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RENDITION LAWFARE

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Rendition refers to the practice of capturing and transferring terrorists suspects from one nation to another for interrogation without extradition or removal proceedings. There is no opportunity for the suspect to challenge the accuracy or legitimacy of the process. It has spurred a maelstrom of criticism across Europe and from human rights groups within the United States.

Almost all of the literature has evaluated the practice under human rights law or a mixed model using both the human rights law and the laws of war. The proper legal standard, however, is the laws of war. Under the laws of war, the legality of rendition hinges on the particular facts. Concerning capture, the Authorization for Use of Military Force (AUMF) permits an aggressive approach, even if it means violating sovereignty and international law. But once capture occurs, the War Crimes Statue, as revised by the Military Commissions Act, requires strict adherence to the laws of war, placing significant restrictions on the transfer and treatment of the suspects. To set a proper example for the world and stay within the rule of law, the U.S. should significantly revise the transfer and treatment aspects of rendition.

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RENDITION LAWFARE

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ABSTRACT

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RENDITION LAWFARE

The United States [is] . . . waging a war against terrorism. . . . . We must track down terrorists . . . . The United States . . . will use every lawful weapon to defeat these terrorists. Protecting citizens is the first and oldest duty of any government. . . . I want to help all of you understand the hard choices involved . . . . We have to adapt. . . . . We must question [terrorists] to gather potentially significant, life-saving, intelligence. . . . For decades, the United States and other countries have used "renditions" to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice. In some situations . . . extradition is not a good option. . . . [R] enditions are permissible under international law. . . . Renditions take terrorists out of action, and save lives. . . . Torture is a term that is defined by law. We rely on our law to govern our operations. The United States does not permit, tolerate, or condone torture under any circumstances. . . . . It is also U.S. policy that authorized interrogation will be consistent with U.S. obligations under the Convention Against Torture, which prohibit cruel, inhuman, or degrading treatment. The intelligence so gathered has stopped terrorist attacks and saved innocent lives. . . The United States has fully respected the sovereignty of other countries that cooperate in these matters. Because this war on terrorism challenges traditional norms and precedents of previous conflicts, our citizens have been discussing and debating the proper legal standards that should apply.[1]

I. Introduction.

The European Union (EU) had expressed concerns about the U.S. practice of rendition. Prior to leaving for Europe on December 5, 2005, Secretary Rice made the comments above at Andrews Air Force Base in an attempt to quell those EU concerns. She used the substance of the speech in a letter to Secretary Straw, in his capacity as the President of the EU.

Following the Secretary of State's lead, on September 6, 2006, President Bush announced the existence of CIA secret prisons ("the program"). President Bush stated: "This program has been and remains one of the most vital tools in our war against the terrorists. It is invaluable to America and to our allies."[2] At the same time he announced the transfer of fourteen high profile Al-Qaeda suspects from the secret prisons to Guantanamo. Three of the fourteen included: Khalid Sheikh Mohammed (KSM),[3] Abu Zubaydah[4] and Ramzi bin al-Shibh.[5] "President Bush stated in the speech: We have a

right *under the laws of war*, and we have an obligation to the American people to detain these enemies and stop them from rejoining the battle."[6]

European Parliament issued a report, on January 26, 2007, condemning the practice of rendition by the United States. On January 31, 2007, German prosecutors issued arrest warrants for thirteen CIA agents;[7] and, on February 16, 2007, an Italian Judge indicted twenty-five individuals suspected to be CIA agents as well as one United States Air Force Officer for the alleged kidnapping of Osama Moustafa Hassan Nasr (Obu Omar).[8]

Back and forth it goes. The media, human rights groups, and European Rapporteurs accuse the United States of torture; Secretary Rice says, unequivocally, we do "not permit, tolerate or condone torture under any circumstances." The human rights groups claim "torture" is being defined too narrowly; Secretary Rice states it is defined by law. Secretary Rice says we obtain diplomatic assurances when appropriate; human rights groups say the assurances cannot be trusted.

Human rights groups[9] and the United Nations (U.N.) Commission on Human Rights insist that the International Covenant on Civil and Political Rights (ICCPR) applies to rendition; United States official policy is that the ICCPR has no extraterritorial effect and no *non-refoulement* clause—rendering it meaningless on this issue. United States applies the laws of war globally to terrorists as the *lex specialis*; the human rights groups and the International Committee of the Red Cross (ICRC) state that it must be directly connected to armed conflict; U.S. claims armed conflict; the others claim armed conflict currently exists only in Afghanistan and Iraq. European Parliament proclaims:

"Maher Arar"; Secretary Rice retorts with "Ramzi Youssef." "Abu Omar!!" "Khalid Sheik Mohammed!!!"

The stakes could be no higher; divisions no greater. Part of the controversy, of course, is the clandestine nature of rendition, the inability to know all of the facts. But as seen from above, the secret nature is not necessarily what ties everyone in a knot. Even if everyone knew and agreed on all of the facts, there would continue to be a brawl over the law. In his book "Of War and Law," Harvard Law Professor David Kennedy explains a phenomenon of Lawfare: "Where the law is open and plural, it will be pulled and pushed in different directions, articulated in conflicting ways by those with different strategic objectives."[10] Few areas have turned out to be more open and plural than the laws addressing the Global War On Terrorism (GWOT), and specifically one of its subcomponents—rendition.

Much of the debate comes from the fact that each side employs different bodies of law—laws of war versus human rights law—while evaluating the issue. For instance, under the laws of war capture, transfer and detention may occur upon identification that an individual belongs to particular class, i.e. the class of "enemy combatant." There is no condition precedent to capture, no conduct that must be attributable to the individual, only that the individual belongs to the category "enemy combatant." Under human rights law, seizure for status as opposed to conduct would be considered "arbitrary" and thus illegal. Similarly, under the laws of war, individuals are entitled to different treatment if they qualify under the category of "Prisoner of War" as opposed to captives that do not. Human rights law makes no such distinctions. Debating rendition with an individual who is applying different legal standards, therefore, inevitably means that little productive

communication will be reached. In such a case, the two sides may talk to each other, but in reality they simply talk past each other.

Before any true evaluation can be made concerning the legitimacy and prudence of rendition, a consensus on the proper body of law, or legal standards, that apply in any given situation must be achieved. This alone would significantly silence much of the Lawfare. It is, however, easier said then done. In his book Law's Empire, Ronald Dworkin explains that "[o]ur most intense disputes about justice . . . are about the right tests for justice, not about whether the facts satisfy some agreed test in some particular case."[11]

Rendition is no different. There is little agreement between the U.S. administration and human rights groups on the proper law to apply. The laws of war and human rights law are two bodies of law that were crafted for separate and distinct states of existence—War and Peace. They do not mix well together, neither the laws nor the states of existence. Unfortunately, a mixed state of *existence* is a *fait accompli*, compliments of al-Qaeda.

In this forced mixed state of existence of quasi-war-quasi-peace, concocting a mixed legal paradigm wherein both bodies of law are applied to a given situation is becoming a popular concept. But as nice and diplomatic as it appears at first blush, this paper will demonstrate the futility of cobbling them together as one. A choice of law was, and continues to be, necessary in every situation—either the laws of war or human rights law, but not both or a mixture thereof. Attempting to apply these disparate bodies of law to a particular situation is untenable.

There is a clear demarcation that divides the two bodies of law; the demarcation is marked by the lines of "armed conflict." Within those lines of "armed conflict," the laws of war rule *exclusively* as *lex specialis*; outside of those lines the laws of human rights is the right choice of law. To say that the proper choice of law in armed conflict is the laws of war does not mean that rendition can be carried out under a red banner[12] of pure policy, however. The laws of war are in fact rules of law. For instance, the laws of war require that while exerting combat power (i.e. capturing) there must be a military necessity for the use of force, and the use of force must be proportional. After capture, all treatment must be, at a minimum, humane. Humane treatment prohibits "cruel treatment and torture,"[13] as well as "outrages upon personal dignity, in particular, humiliating and degrading treatment."[14]

These laws of war derive from custom and treaty, and together form part of the international body of law known as "customary international law." One may wonder how treaty law forms part of the customary the law. It does so under the maxim of *pacta sunt servanda*, that is, the custom that countries will abide by their treaty obligations.[15]

The executive branch, on its own, does not possess the authority under the Constitution of the United States to violate customary international law, i.e. the laws of war.[16] But the executive with congressional authorization does possess that Constitutional authority, albeit violating the laws of war would be an international violation of law.[17]

Under this framework, with the Authorization for Use of Military Force (AUMF),[18] as well as subsequent legislation and case law, the President possesses the authority to take aggressive action to capture terrorists, even if it violates sovereignty.

Once capture occurs, however, the AUMF does not provide specific authority to transgress customary international law concerning detainee treatment, at least not to the extent of overcoming subsequent legislation proscribing grave breaches of Geneva Conventions in this area.

The objective of this paper is threefold. First, to quiet the Rendition Lawfare in the area of choice of law—between human rights law and the laws of war—by definitively establishing that the laws of war are *lex specialis* during armed conflict. Second, by marking the boundaries of the laws of war concerning rendition and discussing whether Congress has authorized any conduct that may transgress those boundaries. Specifically, Congress appears to have empowered the President with wide latitude in the area of capture, including violating sovereignty if need be, but has circumscribed, *via* domestic legislation, the President's authority concerning detainee treatment, requiring compliance with the laws of war. And third, to make recommendations to bring the practice more towards the fold of the laws of war. Specifically, recommendations include foregoing transferring detainees to other countries for interrogation, narrowing the scope of "armed conflict," and implementing due process procedures to not only ensure humane treatment, but to also demonstrate that the nation is not abridging important human rights principles. The *sine qua non* of humane treatment is due process of the law. Procedural safeguards are the only measures that secure humane treatment. In this area, the nation has much room for improvement. By implementing the recommendations, the nation may preserve its ability to seize terrorists, taking them out of business, while at the same time place the practice of rendition under

the rule of law and avoid eviscerating the nation's intent to be a light for the world concerning human rights.

Section I of this paper was the introduction covered above. The remaining agenda for this paper will be as follows: Section II, we will establish a definition for rendition as used in this paper. Section III will explain the history of the laws of war, its characteristics, why the laws of war are *lex specialis* in areas of armed conflict, the global scope of armed conflict against al Qaeda as currently defined by the President, Congress and the Supreme Court. Section IV will address human rights law, covering a brief history, describe its characteristics and explain why it only applies as a policy dictates, and not as binding law. Section V will explain the call for a "mixed model" to resolve the issue of choice of law, and why it is not the answer. Section VI will chalk the legal lines of the laws of war applicable to rendition, explaining the limits and identifying areas of legal impermissibility. This section will also establish that in the area of capture, Congress has authorized broad authority to the President, permitting the President to transgress international law, if need be. Section VII makes the following three recommendations: 1). Cease transferring detainees to third countries for interrogation; 2). Circumscribe the scope of "armed conflict," and, 3). Implement due process, including terminating any practice of "secret" detentions. Section VIII concludes.

II. DEFINING RENDITION.

It is necessary to start off with a definition of rendition to ensure there is common understanding of how it is used in this paper. Secretary Rice defines rendition as follows: *"[R]enditions . . . transport terrorist suspects from the country where they were captured*

to their home country or to other countries where they can be questioned, held, or brought to justice."[19]

For the purposes of this paper keeping the definition to Secretary Rice's definition is all that is needed, except for one point of clarification—rendition is a practice of transfer and detention wherein the individual does not have an opportunity to challenge its accuracy or legitimacy, at least not initially.[20]

III. LAWS OF WAR—*Lex Specialis.*

Introduction To Section

To evaluate rendition, the U.S. administration has decided that the proper choice of law is the laws of war. Given its unique history and character, coupled with the treatment by Congress and the Supreme Court of the current conflict with al Qaeda, the choice to use the laws of war as *lex specialis* is a proper choice of law, at least under the present defined scope of "armed conflict" with al Qaeda.

Brief History—Laws Of War

As Professor David Kennedy has observed, throughout most of written history, the laws of war have typically been a separate area of study possessing its own unique jurisprudence, residing in volumes distinctively marked as laws of war that were placed in separate sections of the library, apart, and many times distant from the nascent body of human rights law.[21]

"The law of war has its roots in Antiquity . . . [It] is one of the oldest areas of public international law . . . ."[22] The law is historically divided into two areas: *jus ad bellum* (concern over whether the war itself is just or not) and *jus in bello* (the concern

over the actions done within war). The focus has shifted back in forth over the years between these two areas, with prolific works addressing each area beginning with the writings of Saint Thomas Acquinas's (1265-1274), Hugo Grotius (1583-1645), Clausewitz (1780-1831), the Lieber Code (1863), Kellog-Briand Pact (1928), Hague Conventions (1899/1907)[23] and Geneva Conventions (1864/1906/1929/1949),[24] United Nations Charter (1945)[25] and the two Protocols of 1977.[26] The Hague, Geneva Conventions, as well as the two Additional Protocols of 1977 have made treaty law the primary law concerning how we treat civilians and combatants when *hors de combat* (out of action); customary law continues to serve as our primary source of authority in how we actually utilize combat power.[27]

Throughout time, the laws of war have served as the *lex specialis* for armed combat. During the U.S. Civil War, President Lincoln promulgated the Lieber Code as the binding and *exclusive* laws of war.[28] In the Lieber Code, Article 40 states: "There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land."[29] Article 41 follows and clarifies this point by stating: "All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field."[30] The Lieber Code, the first codified promulgation of the laws of war for our country, unequivocally made the laws of war the choice of law during armed conflict.

Characteristics—Law Of War.

The purposes and rationales for the laws of war have developed over time. They are perhaps best captured in the St. Petersburg Declaration of 1868 wherein it explains—

"[t]hat the progress of civilization should have the effect of alleviating as much as possible the calamities of war.'"[31] This concept was furthered in the Oxford Manual of 1880, explaining that the laws of war strive "to restrain the destructive force of war, while recognizing the inexorable necessities."[32] The Oxford Manual goes on to elucidate that the laws of war are: "A positive set of rules . . . preventing the unchaining of passion and savage instincts which battle always awakens, as much as it awakens courage and manly virtues, it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity."[33] Two general principles have over time been gleaned from these sources. One is the permissible exertion of combat power, the other concerns itself with humanity, especially concerning the treatment of *hors de combat* and civilians.

Concerning the exertion of combat power, the laws of war in their essence are steeped in balancing the permissibility of killing, with all of its ancillary permutations, against the concept of civility. The foundation upon which this precarious balance rests is comprised of four principles, pillars if you will: military necessity, distinction between combatants and noncombatants, prevention of unnecessary suffering, and proportionality.[34] They are derived from applicable customary[35] and treaty law,[36] and work together to develop unique rules. The manner in which these principles interrelate makes the jurisprudence of warfare *sui generis*, in that the relevance of the law hinges on the legality of the decision to engage in, and then the existence of, armed conflict.

The decision to engage in armed conflict must be done by proper authority, for a proper reason (*jus ad bellum*). And unless the very first shot of every battle is deemed

per se illegal, armed conflict must possess a preparatory element establishing the legal basis for initiating combat power. It may be a previous action by an enemy that permits a response, or it may be an anticipatory action in self-defense. Regardless, in order to justify a collective use of force under the laws of war, some proper command authority must authorize the force. Once authorized, the exertion of force (combat power) must abide by four principles (*jus in bello*).

The first principle in is military necessity. It derives from national security and national policy. That is to say that what is and what is not "military necessity," is defined by the national security and policy to be gained by the armed conflict. In the Lieber Code, Article 14 defines it as: "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."[37]

Military necessity, thus, dictates the use of force in a variety of ways—authorizing, restricting and freeing the use of force. It initially authorizes the use of force whenever and wherever there is a military necessity. It in turn restricts the use of force by necessarily tethering force to military necessity. Force may not be invoked for any reason, but rather must have some nexus to a valid military necessity. Moreover, it frees the use of force from its normal scope and level of severity found in peacetime. Article 15 of the Lieber Code demonstrates this point: "Military necessity, admits of all direct destruction of life or limb of armed enemies, and other persons whose destruction is incidentally unavoidable in the armed contests of the war . . . ."[38] This type of force,

therefore, stands as a unique and separate form of force than that used in peace-time by law enforcement.[39]

Military necessity may justify violating another nation's sovereignty if done in self-defense. The use of preemptive/preventive force "is as old as warfare itself."[40] The Jewish people of the Old Testament used it to protect themselves from King Ahasuerus[41] and the Romans used it against the Gothic youth.[42] The practice continued through more modern times with the advent of sovereignty. The father of modern laws of war, Hugo Grotius, declared preemptive killing to be legal when "waiting would impose too high a price. . . . Kill him who is making ready to kill."[43]

Familiar with the deep history of the use preemptive/preventive force, and its legitimate need, the United Nations, when crafting the Charter, made an exception to Article 2(4)'s general prohibition of force without Security Council approval. Specifically, Article 51 of the Charter states the following: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ."[44]

While the word "occurs" may seem to indicate that a nation must first actually be subject to an attack prior to invoking authority under Article 51, historical practice indicates the Article's breadth encompasses anticipatory use of force.[45] A nation always maintains the right to use force against an imminent threat (preemptive force) or even a threat of grave nature that is more remote in time (preventive force).[46] Oscar Schachter explains that most scholars agree that nations possess a right to self-defense independent from positive law. Some root it into natural law,[47] others in the autonomous nature of the state and the right to secure its own survival.[48]

The second principle on which the laws of war rest is on distinction. In armed combat, force accomplishes a military mission and is employed immediately upon identification of a legal target—i.e. many times[49] individuals (humans)—that meet particular criteria and thus are painted with a label of "combatant."[50] This is the concept known as "distinction." Once distinction occurs, force and death become the *modus operandi*; that is, it becomes the norm used upon those who fall within the category of "combatant." The frequency, breadth and severity of the force reach such levels that destruction of "other persons . . . is incidentally unavoidable. . . ."[51] Again, these aspects are *not* found in peacetime law enforcement.

Given all of the above, it is important to understand that moments before a combatant is captured *intentionally* killing him with unequivocal lethal force is permissible, not only permissible but justified, expected. Unless the combatant is surrendering, there is no requirement to capture. But if capture is desired, it is clearly permissible.

There is no limitation on scope of capture other than distinction, and in some aspects distinction may even be a broader concept than the distinction that permits killing. This is explicitly demonstrated in Article 15 of the Lieber Code that "allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the capture . . . ."[52] Traditionally, as seen in the Lieber Code, capture has been treated as a fairly broad concept, recognizing the import of taking those who pose a threat out of the fight.

Moreover, once capture occurs, detention is not necessarily maintained with a view to prosecution. In international armed conflict, when an enemy is captured who

qualifies as prisoner of war, no prosecution will occur because of the combatant's privilege, so long as the prisoner was abiding by the rules of war.[53] Detention in these cases is required to keep the individuals off the battlefield.[54] When the conflict is *not* of international character, the purpose of detention is, like international armed conflict, to prevent the detainee from rejoining the enemy. But in addition, it is also to alleviate the command from the burdens of any type of adjudication while necessity requires the command's attention be placed on battle. As the United States Fourth Circuit Court Of Appeals observed, it avoids "saddling military decision-making with the panoply of encumbrances associated with civil litigation" during a period of armed conflict."[55]

The Supreme Court of the United States recently recognized the uniqueness of detention during times of armed conflict in the case of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), by stating "[t**]**he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'"[56] The Court went on to state: "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention . . . ."[57]

Detention, therefore, during times of armed conflict, differs from that of peacetime detention in both its precipitating justification and continued purpose.

The third principle in exerting combat power under the laws of war is the prevention of unnecessary suffering. It is an important concept and perhaps somewhat unique to the laws of war in that the principle has little to do with the level or magnitude of lethality of force used to destroy, but everything to do with prohibiting extended or

particularly heinous suffering. Primarily this principle has focused on the types of weapons that cause widespread and egregious suffering, i.e. poisonous gas, biological agents, projectiles shaped with the intent to cause suffering. The "prohibition of *unnecessary suffering*, however, constitutes acknowledgement that *necessary suffering* to combatants is lawful . . . ."[58]

Lastly, concerning the exertion of combat power, the fourth principle is the concept of proportionality. Proportionality in armed conflict is also unique when compared to other bodies of law. Barring unnecessary suffering,[59] proportionality has little relevance *vis-à-vis* the targeted individual (the combatant); its primary relevance is to balance the military necessity against the possibility of collateral damage (protected persons such as civilians and prohibited structures).

In addition to the four principles, there are other elements that make employing combat power a unique area of the law. In particular is the area of secrecy. National and operational concerns produce a need for secrecy that again resides on a level not typically found in peacetime. What is done or said, what is not done or not said, and what is said was done but was not, all have implications on intelligence, counter-intelligence and overall success. Success may teeter on secrecy. The gravity of the stakes, nature of the enemy, number of lives on the line, all may push what typically is found in a peacetime democracy—that is the values of openness and free access—under a cloak of secrecy.

Besides the exertion of combat power and aspects such as secrecy, there is another general category found in the laws of war, this category concerns the treatment of *hors de combat* (persons who no longer take part in hostilities) and the treatment of civilians. Concerning *hors de combat*, if and when a combatant is captured or surrenders,

the primary law concerning their treatment derives from the four Geneva Conventions of 1949, and to the extent that they reflect customary law, the additional protocols to the Geneva Conventions—Additional Protocol I and Additional Protocol II of 1977.[60]

The primary focus of the four Geneva Conventions of 1949 center around the treatment of *hors de combat* during international armed combat, meaning armed combat that occurs between two High Contracting Parties.[61] When the conflict is one that qualifies as an international armed conflict, detainees to the conflict must be treated with the full protections of prisoners of war if they are a member of the opposing armed forces, a militia or even an armed forces who professes allegiance to an unrecognized authority, so long as they: 1). Act under a command structure; 2). Wear fixed distinctive signs/uniforms; 3). Carry arms openly; and, 4). Conduct their operations under the laws and customs of war.[62]

As prisoners of war, individuals are required to give only general identifying information,[63] and are not only entitled to humane treatment at all times,[64] but also relatively fairly expansive and protective rights.[65] Moreover, prisoners of war can only be transferred to another party to the Geneva Conventions and only after the detaining power is convinced the other party will abide by the convention. Even after transfer, the transferring power does not relinquish all of its responsibilities. It must ensure that the nation in custody follows the terms of the Geneva conventions; when any complaint is forwarded back to the transferring power, that the nation in custody is not fulfilling its requirements under the conventions, the transferring power must either ensure the situation is corrected or request a transfer of the prisoner of war back to its control.[66]

In contrast to the broad protective rights discussed above, the Geneva Conventions provide much less in the way of protection when the armed conflict does not qualify as an "international armed conflict." In fact, the only article in the Geneva Conventions that addresses "armed conflicts not of an international character," is Common Article 3. Common Article 3 requires humane treatment. It is a minimum level of protection when compared to those provided to prisoners of war, nonetheless it establishes and sets-forth ascertainable legal requirements of treatment for those detained in an armed conflict.

The laws of war thus differentiate between the type of armed conflict involved and the conduct of the individuals within the conflict, including whether they are fighting under a chain-of-command, fighting under distinctive uniforms and abiding by the laws of war. These lines that demarcate legal protections are rooted in the history of warfare, such as the Lieber Code. The Lieber Code went out of its way to distinguish between those who abide by the laws of war and those who do not. Article 63 of the Lieber Code, for instance, stated: "Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter."[67] Indeed, in the history of warfare, "unlawful combatants were often summarily executed . . . ."[68]

Regardless of whether the armed conflict is of an international or non-international character, detainees may be held for the duration of hostilities.

There is no counterpart in human rights law to the types of differentiation explained above; providing different types of treatment to different types of detainees are unique aspects of the laws of war; it underlies the necessity of compliance, deterrence in

resorting to armed conflict by rogue elements, and the efficiency quid pro quo to enforce a system of legal protection.

For the United States personnel, violations of the laws of war may be prosecuted under domestic laws that serve as implementing legislation to the laws of war, such as the Uniform Code of Military Justice (UCMJ),[69] the War Crimes Statute,[70] as revised by the Military Commissions Act.[71] Moreover, torture, a violation of the Geneva Conventions, may be prosecuted under the Torture Statue,[72] if committed outside of the United States.

Invoking The Nation's War Powers—Establish Armed Conflict & Laws of War

When President Bush addressed the nation on September 6, 2006, and explained in general terms this nation's current policy concerning rendition within the GWOT by announcing that the fourteen very high level suspected terrorists who had been held under C.I.A. detention were being transferred to Guantanamo Bay for prosecution, including Khalid Sheikh Mohammed, President Bush stated that:

> In some cases we determine that individuals we have captured pose a significant threat or may have intelligence that we and our allies need to . . . have to prevent new attacks. Many are al Qaeda operatives or Taliban fighters trying to conceal their identities, and they withhold information that could save American lives. In these cases, it has been necessary to move these individuals to an environment where they can be held secretly, questioned by experts and, when appropriate, prosecuted for terrorist acts.[73]

President Bush went on to unequivocally state: "We have a right under the *laws of war* . . . to detain these enemies and stop them from rejoining the battle." As seen from President Bush's statement above, and the speech given by Secretary Rice at Andrews Air Force Base, the U.S. administration clearly made its choice of law concerning how it justifies the practice of rendition—laws of war.[74]

There are two messages in the statements made by President Bush and Secretary Rice—explicit and implicit messages. Explicit is the assertion that rendition is legal under the laws of war; implicit is the assertion that the laws of war provide the proper body of law to evaluate the practice of rendition and that the particular practices employed have been legal under the laws of war. The legitimacy of these pronouncements rely on the following factors: duty to defend national security, extent of the threat, whether the situation is one of "armed conflict," and if armed conflict, whether the particular facts of the rendition actually abide by the laws of war, including domestic laws that implement the laws of war, and, lastly, whether the sovereignty of another nation is violated.

First, concerning the duty of national security, the nation has a duty to protect its children, citizens and inhabitants. This duty is as Secretary Rice stated "the first and oldest duty of any government . . . ."[75] A state that fails to protect its citizens will eventually cease to exist as an independent state and will have committed not just a grave breach but the worst act that it can commit, call it what you will—failure of its primary duty, a mortal sin, an unforgivable act, an evil remiss. President Abraham Lincoln addressed this issue by promulgating the Lieber Code in the Civil War, in which it states: "To save the country is paramount to all other consideration."[76] The International Court of Justice (ICJ) recognized this duty of survival of the state by refusing to outlaw the threat of the use of nuclear weapons in stating: "[t]he court cannot lose sight of the fundamental right of every state to survival . . . ." Suffice it to say, the nation's duty to ensure its survival and the safety of its citizens, is one that accepts no failure.

The threat to our citizens from al Qaeda and its affiliates is substantial and "global."[77] If there was any doubt, one need only to read the transcript of the March 10, 2007 Combatant Status Review Tribunal (CSRT) of Khalid Sheikh Mohammed. In a written statement read by his personal representative, Khalid Sheik Mohammed (KSM) admitted responsibility for the following al Qaeda operations: 9/11 in the U.S.; decapitation of Daniel Pearl in Karachi, Pakistan; bombing of a nightclub in Bali, Indonesia; planning the destruction of the Panama Canal; destruction of the New York Stock Exchange post 9/11; planning the destruction of embassies in Indonesia, Australia and Japan; bombing of a hotel in Mombasa; planning of a bombing of nightclubs frequented by American service members in South Korea; planning an attack against NATO Headquarters Europe; surveying U.S. nuclear power plants for attack; assassination attempts against Pope John Paul and President Clinton in Philippines, and much more. He also admitted to being in charge of the production of biological weapons such as anthrax and planning a dirty bomb on U.S. territory. [78]

In a comprehensive work addressing the threat of al Qaeda and its affiliates, Professor Shultz, Director of the International Security Studies Program at the Fletcher School of Law and Diplomacy, describes that our country faces a "global Salafi Jihad insurgency"[79] with al Qaeda as its "vanguard."[80] Professor Shultz explains that one of the precipitating events was the Soviet invasion of Afghanistan which "gave a fledging Salafi Jihad movement a sacred cause to mobilize beyond the national level to Liberate a part of the Ummah from a foreign infidel invader."[81] After the Soviets withdrew from Afghanistan, the "'Afghan Arabs' debated where next to fight for the Islamic cause. Where was the next area of operations and who was the enemy? These questions formed

the basis of a strategic re-assessment."[82] With Iraqi's invasion of Kuwait, Saudi Arabia granted permission for the U.S. to deploy and stage out of its Kingdom. Bin Laden deemed this "treason"[83] and "concluded in late 1994 that the new [area of operations] and target should center on the U.S. If Salafi Jihadists were to realize their global goals, America had to be defeated."[84] During the 1990's, Sudan and Afghanistan gave al Qaeda the opportunity "to build a transnational organization. Tens of thousands of Salafi-oriented Muslim's were trained and indoctrinated. They constituted the second generation of international holy warriors."[85]

Professor Shultz further explains that just prior to 9/11, the Jihad "reached the incipient stage of a global millenarian insurgency," and while U.S. operations post-9/11, including Operation Enduring Freedom, initially set the Jihad back, over the last few years al Qaeda and the Salafi Jihadists have made "four strategic adaptations: 1) employing the Internet to establish a virtual sanctuary; 2) making use of ungoverned territory; 3) exploiting the Iraq conflict; and 4) maintaining national level Jihad activities through the nine regional theatres."[86] The effectiveness of these adaptations is yet to be realized.[87]

The gravity and global aspect of the threat described by Professor Shultz was recognized by the United Nations (U.N.). On 12 September 2001, the U.N. in Resolution 1368 stated it was "calling on *all States* to . . . to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks . . . ."[88] A call to all of the states of the world indicates the pervasive and serious nature of the threat.

While the duties of national security and the global threat against it may provide the impetus and justification for the nation to take heightened or aggressive actions in the

name of defense, the expansive powers of war and the laws of war fully come into existence only upon the actuality of "armed conflict." As stated above, the full force of the Geneva Conventions is explicitly triggered in "all cases of declared war or other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[89] In cases that do not involve two High Contracting Parties, armed conflict can nonetheless exist and trigger the water-downed version of the Geneva Conventions—Common Article 3. The trigger for both international and non-international application of the Geneva Conventions is "armed conflict," either in *de jure* or *de facto* forms.

Identifying the existence of "armed conflict," therefore, is imperative. And as imperative as this task may be, achieving an accurate identification of the precise moment and parameters of "armed conflict," is not easy. In an article criticizing the current administration's approach of global war, Professor Rosa E. Brooks states: "Drawing principled and analytically satisfying lines between war and peace, conflict and non-conflict, crisis and normalcy has always been difficult on the margins."[90] When Professor Brooks speaks of the "margins," she contrasts situations such as WWI and WWII wherein the existence of armed conflict is clear, to marginal areas such as the Irish Republican Army vis-à-vis the British government. The global terrorist threat and the actions of states against the terrorism, clearly falls more towards the margins than at the core of armed conflict, making the identification of armed conflict at the very least a complicated matter when fighting al Qaeda and its affiliates.

While there is no definitive definition of "armed conflict," in deciding the Case Concerning Military and Paramilitary Activities In And Against Nicaragua (*Nicaragua v.*

United States), 1986 ICJ Lexis 4 (27 June 1986), the International Court of Justice (ICJ) provided valuable insight and a useable legal standard. In particular, the ICJ provided a definition of "armed attack." While not exactly on-point, the ICJ defined "armed attack" in fairly broad terms stating that "'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support."[91] Perhaps even more important is the manner in which the ICJ came to its conclusion. Specifically, the ICJ explained that the standard in defining whether an armed attack did or did not occur is the reaction of the victim state. That is, the ICJ explicitly stated that the victim state is the proper entity to define whether force used against it falls within the category of being considered an "armed attack."[92]

Similarly, in his article addressing the "Emerging Category of Transnational Armed Conflict," Professor Geoff Corn explains that "the critical *de facto* criteria for determining the existence of transnational armed conflict is resort by a nation to the use of combat military power to respond to a threat posed by a non-state armed entity."[93] Identifying "armed conflict," therefore, appears to center around both the interpretation of the events by the states involved, and the actual use of, or absence of, armed forces.

In the GWOT, the U.S. has both interpreted the situation against al Qaeda and its affiliates as one of global armed conflict, and has reacted with the use of military force. In response to the attacks of 9/11, on September 18, 2001, Congress passed a joint resolution, the "Authorization for Use of Military Force"[94] (hereinafter AUMF), stating the following:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned,

> authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any further acts of international terrorism against the United States by such nations, organizations or persons.[95]

Congress went on to state in Section 2(b)(1) of the AUMF that the authorization for the use of this force is: "the War Powers Resolution . . . . Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution."[96] From its title to its closing, the AUMF is written in the parlance of armed conflict. It is also sweeping language, specifying no geographical or temporal limitations, specifically authorizing the use of "all necessary and appropriate force . . . to prevent further acts of international terrorism . . . ."

The Supreme Court, in *United States v. Hamdi*, 542 U.S. 547, 520 (2004), seems to accept that the fight against terrorism as "unconventional war" and recognizes its potentially indefinite duration by stating:

> If the Government does not consider this *unconventional war* won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life.

Hamdi, 542 U.S. at 520 (emphasis added).[97]

Two years later, the Supreme Court reiterated this theme in *Hamdan v. Rumsfeld*, 126 S. Ct. 2669, 2775 (2006). In *Hamdan*, the Supreme Court explicitly states: "we assume that the AUMF activated the President's war powers . . . ."[98] Moreover, the Supreme Court held that the military commissions, as then constituted, violated both the Uniform Code of Military Justice (UCMJ) and Common Article 3 of the Geneva Conventions.[99] Common Article 3 begins

with the following words: "In the case of armed conflict. . . ."[100] It is therefore clear that the Supreme Court of the U.S., categorizes the conflict with al Qaeda and its affiliates as an "armed conflict."

Moreover, in direct response to the Supreme Court invalidating the military commissions in *Hamdan*, as constructed at the time, Congress and the President passed into law the Military Commissions Act (MCA). Section 948(a)(1) of the MCA defines "unlawful enemy combatant" as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States . . . including a person who is part of the Taliban, al Qaeda, or associated forces."[101]

All of the above demonstrates that even if one disagrees on the wisdom, prudence or political skill in labeling the struggle against terrorism as a global armed conflict, it is nonetheless *legally* justifiable to do so given the armed attack by al Qaeda, the breath of their presence worldwide, statements by the likes of Khalid Sheikh Mohammed consistently referring to the conflict as "war,"[102] their demonstrated ability to carry-out armed attacks, the nation's duty to secure the nation's safety, as well as the fact that our nation has in fact invoked its war powers in response, with explicitly broad authorization by Congress. In fact, given the above, it would be remiss to analyze actions taken under the name of GWOT using any other paradigm. This is further buttressed by the first category of Justice Jackson's well-known tripartite framework established in his concurring opinion of the Steel Seizure Case:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he

> possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952).[103] Exercising executive powers as the Commander in Chief under the AUMF, combines both the President's and Congress's constitutional authority. These authorities combined with the Supreme Court's language in *Hamdi* and *Hamdan*, place the determination that the conflict with al Qaeda and its affiliates as "armed conflict," in a fairly unassailable position. And with no international supreme authority, the conflict clearly should be legally analyzed using armed conflict as the primary paradigm, at least for now with the current executive administration and the sweeping language of the AUMF still in force.

During armed conflict, the proper laws to apply are the laws of war. The laws of war create ascertainable standards that may be used to evaluate the practice of rendition. As Professor John Yoo summarizes the position that the law of war is the proper choice of law by stating: "[t]hose who imply that a departure from peacetime rules is tantamount to a descent into lawless, *ultra vires* action are simply incorrect. Warfare is characterized by different constraints than those that govern peacetime, but it is nonetheless subject to and bound by the rule of law."[104]

IV: HUMAN RIGHTS LAW—Limited Applicability

Introduction

The history, nature and non-extraterritorial reach of human rights law does not allow it to coalesce with the laws of war during armed conflict. With the exception of Article 3 of the Convention Against Torture, prohibiting *refoulement* (refouler) when it is more likely than not that the individual will be tortured, the body of human rights law is applicable only through domestic implementing legislation and as policy, as this section will demonstrate.

History—Human Rights Law

In contrast to the laws of war, human rights law has a fairly new lineage. In "The International Review of the Red Cross," Robert Kolb discusses this aspect, stating: "It was only after the Second World War, as a reaction against the excesses of the Axis forces, that human rights law became part of the body of public international law."[105] Human rights law concerns, primarily, how a nation treats its own citizens. Prior to WWII, how a nation treated its own citizens was not a typical concern of the international community. Traditionally, sovereignty of a nation included the concept that the nation was the final and only arbiter within its own borders, including, and perhaps most especially, how it treated its citizens.

As with all international law, there are two sources of human rights law, customary and treaty law. Customary law is established when two elements are met: one, "widespread and uniform practice of states," and two, "followed by the states under a sense of legal obligation, '*opinio juris*.'"[106]

While customary human rights law does possess some relevance, the relevance is limited. With 193 nations worldwide,[107] "seven or eight major civilizations,"[108] speaking six-thousand dialects and languages,[109] all under disparate economic conditions, addressing a myriad of situations, only the most general propositions have much of a chance meeting the legal definition of "custom." Moreover, the newness of Human Rights law coupled with the fact that it was primarily created contemporaneously with treaty law means that most, if not all, is found in treaty law.

Treaty based Human Rights law began with the creation of the United Nations (U.N.) Charter. Article 1(3) of the Charter states that one purpose of the U.N. is accomplished by: ". . . encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . . ." The U.N. Charter reinforces this purpose in Articles 55 and 56, basically reiterating and pledging to achieve this standard.[110]

Louis Henkin describes that the Charter was a "radical political-legal change . . . ."[111] Henkin explains that the Charter "did not claim authority for the new human rights commitment it projected other than in the present consent of States." And, it is a "positivist instrument. It does not invoke natural rights or any other philosophical basis for human rights [i.e. natural rights] . . . . The Charter Preamble links human rights with human dignity but treats that value as self-evident, without need for justification."

After adopting its charter, the U.N. continued its theme of Human Rights with the creation of the Universal Declaration of Human Rights (UDHR).[112] The U.N. created the UDHR in 1948 as an overarching document intended to set a foundation for Human Rights law. The UN did not intend the UDHR to be "law," but rather as a mechanism to

spawn law, to serve as a base upon which law could be constructed. With its carefully drawn hortatory and precatory language, the U.N. assumed that law would quickly follow. It was a reasonable assumption as the "law" was in fact being drafted when the UN adopted the UDHR. But the law was slow in forthcoming, taking another eighteen years to be adopted and another ten years for it to come into force.

Finally, in 1976, the International Convention on Civil and Political Rights (ICCPR),[113] and the International Covenant on Economic, Social and Cultural Rights (ICESCR), law came into force. These three documents—UDHR, ICCPR and ICESCR—serve as the basis for all international human rights law. They are often referred to as the "International Bill of Rights."[114] The UDHR serves as an inspirational umbrella, the ICCPR and ICESCR as the documents incorporating that inspiration into baseline human rights law.[115]

From these documents and their subsequent influence, more and more conventions have been held producing more and more human rights law. For instance, the Convention Against Torture (CAT) was ratified by the United States October 1994.[116] Other significant international Human Rights treaties include: The Convention on the Prevention and Punishment of the Crime of Genocide,[117] the International Convention on the Elimination of All Forms of Racial Discrimination,[118] the International Convention on the Suppression and the Punishment of the Crime of Apartheid, the Convention on the Elimination of All Forms of Discrimination Against Women,[119] the Convention on the Rights of the Child and the Protocol Relating to the Status of Refugees.[120] In addition to these major treaties, there are three main regional systems (Europe, Americas and Africa)

that have also adopted Human Rights Charters,[121] Conventions,[122] Declarations[123] and Protocols.[124]

There is no definitive definition of what is considered "human rights" and consequently no objective way to circumscribe its boundaries. The trend certainly appears to be one of continual expansion with an increasing number of particularized areas finding its way under the human rights rubric. But while its role aggrandizes in both breadth and influence, its particular interrelationship with other bodies of law has not been well understood. For instance, notwithstanding its logical connection to the laws of war, there has been little attempt to define its relationship. Robert Kolb points out that "[d]uring the drafting of the Universal Declaration of 1948, the question of the impact of war on human rights was touched on only in exceptional cases."[125]

In discussing the relationship between human rights, laws of war and rendition, this paper will focus its discussion to the following three Human Rights documents: UDHR, ICCPR and CAT.[126]

Characteristics—Human Rights Law.

The UDHR is completely hortatory, setting an aspirational tone from its outset with its Preamble, using universal, all encompassing language which recognizes the "inherent dignity and . . . equal and inalienable rights of all members of the human family . . . ."[127] This theme continues through its articles such as Article 1 stating: "[a]ll human beings are born free and equal in dignity and rights. They . . . act towards one another in a spirit of brotherhood."[128] Moreover, Article 3 states: "[e]veryone has the right to life, Liberty and security of person,"[129] and, Article 9 states: "No one shall be subjected to

arbitrary arrest, detention or exile."[130] The UDHR does not address the uniqueness and realities of armed conflict, however. It does not attempt to balance combat power with humane treatment; it does not differentiate between different types of personalities on the battlefield; and, the concept of detention for detention sake is foreign to the UDHR.

Similarly, the ICCPR provides no substantive binding *law* applicable to the United States concerning the GWOT. As a general rule treaties do not possess extraterritorial effect unless otherwise stated. In the case with the ICCPR, the explicit language within the treaty limits its reach to only areas that are both ". . . within its territory *and* subject to its jurisdiction . . . ."[131] This conjunctive language, particularly debated and pre-meditatively drafted, reiterates that the ICCPR falls within the general rule of not possessing extraterritorial effect.

In addition to its non-extraterritorial effect, upon ratification, the U.S. included the following declaration by the Senate: "That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."[132] These articles, 1 through 27, encompass all of the substantive articles of the ICCPR and no specific domestic implementing legislation has been passed to incorporate the ICCPR. The reason for this is that at the time of ratification, the U.S. held the opinion that the domestic laws of the U.S. fulfilled the requirements of the ICCPR. In any area where there was any doubt, the U.S. made an applicable reservations, understandings and declarations. For instance, concerning Article 7 of the ICCPR, prohibiting torture and cruel, inhumane and degrading treatment, [133] the U.S. made the following reservation: "the United States considers itself bound by Article 7 to the extent that "cruel, inhuman

or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the constitution of the United States."[134] In other words, the U.S. position was that no changes in U.S. laws needed to occur to comply with the ICCPR, and commensurately, the ICCPR offers nothing in the way of binding law that is not already in existence with domestic U.S. law.

Even if the substantive portions of the ICCPR were extra-territorial, they still would provide little in the way of guiding the conduct of armed conflict. The language simply was not crafted with armed conflict in mind; there is no language specifically addressing times of armed conflict and its unique aspects of employing combat power. The language of the ICCPR was crafted to work in law enforcement type of situations, not armed conflict.

For instance, Article 9 of the ICCPR addresses arrest. It states that: "Everyone has the right to Liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his Liberty except on such grounds and in accordance with such procedure as are established by law."[135] Article 9 goes on to require that the individual arrested must be informed of reasons of arrest, charges, taken promptly before a judge and entitled to compensation for unlawful detention.[136] There is no recognition of the concept of distinction in Article 9; rather Article 9 in an armed conflict situation would treat everyone the same, combatant and civilians alike. Moreover, there would be no differentiation between those who qualify as prisoners of war from those who do not, no separation between international and non-international armed conflict. Under the ICCPR, the marked differences and nuances between these

categories would be dissipated by putting everyone and every situation into one standard for arrest.[137] Most significantly, there is no recognition of detention for any other reason than criminal prosecution. Detention in an armed conflict situation, on the other hand, has as part of its utility and purpose keeping the individual from re-entering the fight.

In response to these issues, a human rights advocate might point to Article 4 of the ICCPR which allows for derogation concerning Article 9's standards for arrest during times "of public emergency which threatens the life of the nation . . . ."[138] To derogate, the nation must proclaim its intention to do so, and reasons for the necessity, to the other signatory states and the Secretary-General of the United Nations.[139]

But there is no derogation permitted for Article 6's requirements concerning the respect for life.[140] Article 6 states that: "Every human being has the inherent right to life. This shall be protected by law. No one shall be arbitrarily deprived of his life." In the *travaux preparatoires*, "arbitrarily' appears to have meant both "illegality" and "unjustly."[141] Whether the concept of killing immediately upon distinction under the laws of war would be consider illegal or unjust, is unknown. If it would, then Article 6 of the ICCPR is completely incompatible with the laws of war; if it would not be considered illegal or unjust, then the ICCPR definition of arbitrarily depriving life would be completely defined by the laws of war, subsuming all substance of Article 6 into the laws of war, and possibly diminishing the safeguards the Article was intended to provide when applied outside the parameters of armed conflict.

To apply the ICCPR to armed conflict, therefore, would simply mean providing proper notice of derogation for arrest, but not for killing, while both arrest and killing would thereafter be regulated by the laws of war during the armed conflict. In that case,

notice provides little; it would simply serve a *pro forma* purpose. It makes much more sense to simply accept that during armed conflict, the laws of war apply as *lex specialis*.

Before moving on to Convention Against Torture, it is also important to note that the ICCPR is inapplicable as a source of *law* concerning rendition in the aspect of *refouler*. That is, the ICCPR does not does not possesses a non-refoulement clause that would prohibit rendering individuals to a country when it is more likely than not the individual will be tortured after being rendered. There is no such prohibition in the ICCPR.

The Convention Against Torture (CAT) has as its main purpose to prohibit torture as well as "cruel, inhuman or degrading treatment or punishment."[142] The initial precatory language of the CAT couches itself into the U.N. Charter by stating: "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . ." It goes on to its substantive language at Article 1 to specifically define torture as: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession . . . ." And while the CAT does not explicitly define cruel, inhumane or degrading treatment, it does at Article 16 require: "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1 . . . ."[143]

Like the ICCPR, the CAT is by and large inapplicable because it is generally not extra-territorial. But unlike the ICCPR, there are two explicit exceptions to this general

rule. First, unlike the ICCPR, it explicitly possesses a *non-refoulement* rule. Article 3 of the CAT prohibits the U.S. from rendering or extraditing "a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[144] Upon ratification of the CAT, the U.S. made an understanding that Article 3's language of "substantial grounds for believing that he would be in danger of being subjected to torture,"[145] would mean "more likely than not that he would be tortured."[146]

Second, Article 5 of CAT requires states to prohibit torture extraterritorially. In order to implement this requirement, the U.S. enacted implementing legislation in the form of 18 USC §§ 2340-40A.[147] These provisions enable the U.S. to prosecute any U.S. citizen or anyone located in the U.S. for crime of committing torture *outside* the United States.[148] In all other aspects the CAT, like the ICCPR, is non-extraterritorial. Thus, while the CAT prohibits cruel, inhumane and degrading treatment, there is no extraterritorial aspect to this prohibition. Moreover, the non-refoulement prohibition concerns only *torture*, not cruel, inhumane or degrading treatment.

Thus, the CAT is in fact applicable only in the two aspects of *non-refoulement* and requiring criminal legislation, as stated above. But as a practical matter they have both been implemented in domestic law and therefore do not take away from the proposition that the *lex specialis* for armed conflict is the laws of war and domestic legislation applicable to armed conflict.

V. MIXED MODEL—Not A Panacea.

Many have recently suggested that the best approach is to implement a "mixed model."[149] This approach is rapidly gaining support.[150] This section will first define the

mixed model, and then explain why it is an unworkable approach that simply adds confusion to an area that is already muddled.

In this mixed model, the human rights law is never suspended or completely replaced by the laws of war. Rather, they continue to exist, even in armed conflict. Human rights law and laws of war "must be read in harmony to the degree possible."[151] In other works, the laws of war act as *lex specialis* but only in those particular situations where a traditional battlefield exists and only when there is a direct conflict between the laws of war and the other bodies of law. The human rights organizations argue that this mixed model is required under international law as established by the International Court of Justice in two advisory opinions: "Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (hereinafter "Nuclear Weapons Opinion") and the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (hereinafter "Construction of a Wall Opinion).[152]

In the Nuclear Weapons Opinion, while the ICJ recognized that the law of war is *lex specialis* during armed conflict, it also recognized that "the International Covenant of Civil and Political Rights does not cease in times of war . . . ." The ICJ further developed this concept in the Construction of a Wall Opinion by stating: "[a]s regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."[153]

Commentator Margaret L. Satterthwaite of the Center For Human Rights and Global Justice summarizes the need for a "mixed model by arguing that "[t]he United

States has asserted that in relation to the "War on Terror," the *lex specialis* rule operates effectively as a doctrine of preemption. . . . Only by clearing the decks can the United States find an opening for the practice of extraordinary rendition. The reasoning behind these moves—the use of the *lex specialis* maxim as a doctrine of preemption, and the ousting of one set of rules for a blank slate—is contrary to the international legal order."[154] While she admits that the ICJ could have done a better job at explaining the mixed model, she nonetheless concludes that the rule established by reading the Nuclear Weapons Opinion and Wall Opinion in *pari materia* is this: "Only when an actual conflict arises will the *lex specialis* rule require application of [laws of war] norms."[155]

With all due respect to Satterthwaite, it is not so easy to interrelate these bodies of law. It is one thing to say we must combine the two, quite another to actually coalesce them in symphony fashion. The best way to illustrate the limits of this approach is to actually look at the two opinions that started this course of discussion.

Nuclear Weapons Opinion.

In 1996, when the United Nations General Assembly asked the ICJ: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" One can reasonably assume the ICJ understood the level of scrutiny the opinion would draw, regardless of its conclusion. Some nations, including the United States, objected to the ICJ even considering the issue, further piquing anticipated scrutiny. With a deliberate hand the ICJ penned an explanation of its jurisdiction, analytical processes and holdings. It is with this backdrop that we review the opinion's language concerning the

interrelationship of the *lex specialis* of the laws of war with the body of human rights law.

Beyond its discussion of jurisdiction, the ICJ begins the opinion with an explicit section titled “Applicable Law.” In this section, it lists the “International Covenant on Civil and Political Rights - Arbitrary deprivation of life,” Genocide Convention, norms and considerations safeguarding the environment in armed conflict and the following: “Application of most directly relevant law: law of the Charter and law applicable in armed conflict.”[156] Then at paragraph 24, the ICJ substantively takes on the issue of applicable law by explaining that some of the nations that object to the possession of nuclear weapons in general, do so because the weapons are in violation of Article 6 of the ICCPR: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The Court goes on to explain that, on the other hand, nations who generally defend the possession of nuclear weapons assert that the ICCPR is applicable *only* in peacetime, these nations believe that the laws of war are the only laws that apply during hostilities. To these pro-nuclear nations, whether life is or is not arbitrarily forfeited must be evaluated using a law of war analysis. Faced with these polar views, the ICJ’s attempted to resolve the issue with the language set-forth below:

> . . . the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the

> conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, *can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself*.[157]

The language above does in fact explicitly state, as Satterthwaite points out, that the ICCPR continues to exist even during war. It cannot be said in a technical sense, therefore, at least not according to the ICJ, that the laws of war, *ipso facto*, are the *exclusive* body of law in armed conflict. From the Court's language it seems fair to metaphorically state that as the ICCPR crosses the concertina from peace into armed conflict it survives at least "[i]n principle," but its condition after passing thru the Rubicon of armed conflict, seems as a whole to be in critical condition. And Article 6, in particular, appears to be dead on arrival.

According to this opinion, whatever fashion one would normally define "arbitrary deprivation of life" in Article 6 during peacetime, during armed conflict it means whatever armed conflict would define it as. In other words, Article 6's words and meanings are subsumed by the laws of war in armed combat; they add nothing.

Thus, other than the fact that the ICCPR "does not cease in times of war, there is little in the way of independent contribution for the ICCPR in armed conflict. Commentator Satterthwaite fully concedes the limits of the opinion's language. At this point she points to the second opinion on which she relies, the ICJ's Construction of Wall Opinion.[158] Before we move on to the Construction of Wall Opinion, however, it behooves us to take look at the rest of the Nuclear

Weapons Opinion. While there was no more discussion by the Court concerning the right "rule of recognition"[159] between the laws of war and human rights law, the manner in which the Court used the laws of war to analyze the Nuclear Weapons question is elucidating.

At the legal crucible of human existence and military force, the Nuclear Weapons Opinion reads like a primer on the laws of war, not human rights law. The following is a paragraph made by cutting and pasting from the opinion:

> *Warfare is inherently destructive . . . .*[160] *The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization . . . .*[161] *State practice shows that the illegality . . . does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.*[162] *The "laws and customs of war" . . . were the subject of efforts at codification undertaken in The Hague . . . . . One should add to this the "Geneva Law" . . . . These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.*[163] *The cardinal principles . . . are the following. The first is aimed at the protection of the civilian population and . . . the distinction between combatants and non-combatants; . . . the second principle, it is prohibited to cause unnecessary suffering. . . .*[164] *[T]he intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and <u>applies to all forms of warfare</u> (emphasis added). . . .*[165] *International humanitarian law has evolved to meet contemporary circumstances . . . . The fundamental principles of this law endure: to mitigate and circumscribe the cruelty of war for humanitarian reasons . . . .*[166] *[T]he Court cannot lose sight of the fundamental right of every State to survival . . . .*[167] *[E]minently difficult issues . . . arise in applying the law on the use of force. . . .*[168]

If the rule to be gleaned from this opinion is a "mixed model," it is a peculiar way to express it. The appearance of the ICCPR is perfunctory at best. The *pro forma* mention that the ICCPR "does not cease in times of war . . ." is the

sum total of the human rights contribution to the opinion. The rest of the opinion is written *exclusively* using traditional, time-honored customary and treaty based laws of war language and analysis.

Construction Of Wall Opinion.

The background of this second opinion is that on 8 December 2003, the General Assembly sent a letter to the ICJ stating that the General Assembly was gravely concerned over Israel's continued insistence in building a wall that departed from the Armistice Line of 1949 (Green Line) into Occupied Palestinian Territory including into East Jerusalem.[169] Israel claimed that the wall was simply an act of self-defense under Article 51 of the U.N. Charter in response to Palestinian terrorist attacks.[170] The General Assembly found otherwise and asked the Court to render an advisory decision on the "legal consequences arising from the construction of the wall being built by Israel [under] rules and principles of international law, including the Fourth Geneva Convention of 1949 (addressing the treatment of civilians), and relevant Security Council and General Assembly resolutions?"[171]

The ICJ did in fact explain that the relationship between international humanitarian law and human rights law falls into one of three categories: exclusively humanitarian, exclusively human rights law or both.[172] But there was little subsequent effort to untangle these categories and mark their boundaries, and there was no guidance on how to discern the right category.

At the time of the opinion, Israel had been an occupying power of the territory for 37 years. This fact was salient to the ICJ's analysis. Because Israel had occupied the

area for almost four decades, the ICJ determined that the Hague Regulations of 1907 applied but only Article III dealing with occupied territories as well as the Fourth Geneva Convention (1949) applicable to occupied territories.[173] Also, because it was an occupied territory, the ICJ decided that Article 51 of the U.N. Charter concerning self-defense was inapplicable.[174] The ICJ also noted ICCPR's derogation rule in Article 4 and noted Israel's notice that it was derogating rights under ICCPR Article 9 concerning "arbitrary arrest or detention." [175] In all other cases, the ICJ stated the ICCPR would apply.

However, no standards were articulated, no explanation as to whether there are transitory periods, no differentiation between international and non-international armed conflict, no attempt to differentiate or couch the standard of giving weight to a state's reaction to armed attack as established the 1986 ICJ case of *Nicaragua v. United States,*[176] nor was there any effort to explain the interrelationships between the human rights law and laws of war within the mixed category.[177] There was also little in the way of adequately deciphering why Israel gives up its right of self-defense just because the territory is occupied.[178]

Overall, the opinion provides no guidance from which a rule of recognition may be framed. Other than the naked pronouncements that human rights law apply, it adds little guidance more than that provided by the Nuclear Weapons Opinion.

In a "mixed model," there is just no legal rule or discernable system to determine when it is more appropriate to apply human rights law as opposed to the laws of war. There is also no discernable standard to determine if the two laws are in conflict on any given issue and no method to resolve conflicts when they exist, including no final arbiter to make these decisions. A mixed-model, in other words, is a call for an *ad hoc* system.

The issue of identifying exactly what law to apply is referred to as the "doctrine of sources."[179] Restatement of the Law, Third, Foreign Relations Law of the United States § 102, lists the laws that are recognized as international law and also attempts to provide a method of resolving conflicts between the laws. [180] For instance, when there is a conflict between custom and a treaty, a subsequent treaty prevails over a contrary custom unless the custom is *jus cogens*.[181] Nonetheless, even the Restatement does not provide a system to resolve how human rights law and the laws of war should interrelate. Human rights law and the laws of war both contain elements of custom and treaty law. Moreover, these laws were initially forged independently, without forethought of how they would interrelate. As Robert Kolb eloquently explained: "At the time of the adoption of the Geneva Conventions and the Universal Declaration of Human Rights, literature relating to the law of war sometimes made reference to human rights. However, it never failed to stress the continuing cleavage between the two branches, although the similarity of their aims gives the impression of being closely related."[182]

Even if there were a systematic way to mix these two bodies of law, doing so would come at an untenable cost. In his article titled "*Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*,"[183] Kenneth Watkins explores the necessity of bringing these two bodies of law together in contemporary warfare. While the article overall is a call for the two laws to work together—a call for a mixed approach—he also recognizes inherent incompatibilities of the human rights law in times of armed conflict, specifically he notes incompatibilities with the high levels of demand for accountability by human rights law that would often be impractical in times of armed conflict, as well as impracticalities of human rights law during times of actual

or threatened levels of high violence. Concerning the latter, Watkins states: "A threatened use of weapons of mass destruction by a transnational terrorist group may not be amenable to a human-rights-based review process."[184] The bottom-line is that the mixed approach is no panacea. It simply attempts to heap one body of law upon another, operating under the assumption that more law fixes the issue. It does not.

VI. LAWS OF WAR—The Legal Boundaries Of Rendition.

General

Rendition is not *per se* illegal. The legality of rendition depends on the facts of the situation and whether those facts comply with, or violate, the laws of war. Violations of the laws of war, for the U.S., fall under U.S. domestic laws which specifically implement the laws of war and provide a method of domestic enforcement of those laws.[185]

The Military Commissions Act of 2006 (MCA),[186] has circumscribed the domestic laws that are relevant when assessing and prosecuting actions concerning the violations of the laws of war. In the MCA, each of the following laws were either specifically amended to address violations of the laws of war or were referenced to define those violations: War Crimes Statute,[187] Torture Statute, [188] DTA,[189] UCMJ,[190] and the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States in defining "cruel, inhumane, or degrading treatment."

The laws referenced above, serve as the relevant legal standards for U.S. personnel concerning the treatment of terrorist suspects after capture. In this regard, the MCA states: "No foreign or international source of law shall supply a basis for a rule of

decision in the courts of the United States in interpreting the prohibitions enumerated in [the War Crimes Statute]."[191] The laws of war and the domestic U.S. laws implementing the laws of war, therefore, are the *lex specialis* and serve as the exclusive standard in U.S. courts. The application of these laws and the constraints they place over the practice of rendition during both international and non-international armed conflict is discussed below.

International Armed Conflict[192]

When analyzing rendition, the first step is to evaluate the exertion of combat power, i.e. capture. The proper standards to apply to capture are the four principles of military necessity, distinction between combatants and noncombatants, prevention of unnecessary suffering, and proportionality.[193] In addition, part of military necessity may mean using anticipatory or preventive force in the face of another nation's sovereignty. In these cases, the standard is whether the force would fit under Article 51 of the U.N. Charter. As a general rule, concerning rendition, the United States asserts that it respects the sovereignty of other nations.[194]

Some nations, because of their domestic political environment, may covertly acquiesce in an abduction of one of their citizens, but overtly deny cooperation. Because of this reality, the proper method for a nation to truly communicate a complaint concerning a violation of its sovereignty, is for the nation to formally make a demand for repatriation.[195]

As a general rule under the laws of war, Nations possess the sovereign authority to hand over terrorists to the United States or grant permission to the United States to capture terrorists within their territories using military necessity as the authority.

If nations do not take appropriate and timely actions to capture or kill terrorists that threaten the U.S., the U.S. has a right to exercise self-defense under Article 51 of the United Nations Charter, when needed. Self-defense includes capturing terrorists that possess valuable intelligence concerning grave threats against the U.S.

Even in cases that may not fulfill the elements of Article 51, the President *may* possess authority to violate sovereignty and capture terrorists who pose a threat to the U.S. While actions that do not fulfill Article 51 requirements would in fact be international law violations, to the extent that the President's actions fall within the Vesting Clause[196] and Commander in Chief Clause[197] of the U.S. Constitution, as well as the language of the AUMF stating the he may use "necessary and appropriate force," requisite authority would exist under Justice Jackson's first category in his tripartite analysis, making the violation of international law legal under the U.S. Constitution.[198]

Indeed, in *Hamdi*, the Supreme Court recognized the deference the political branches possess in this area, especially the Executive. In particular, the Supreme Court stated: "Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." (Citing to *Dep't of the Navy* v. *Egan*, 484 U.S. 518, 530, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988) (noting the reluctance of the courts "to intrude upon the authority of the Executive in military and national security affairs")).[199] Complementing the Executive's power in this area is the fact that the courts in the U.S. have consistently ruled that

forcible abductions abroad, in the course of bringing a defendant before the court, does not impair prosecution.[200]

Given the above, as soon as the U.S. identifies an al Qaeda or affiliate member (distinction), capturing the individual is a proper use of combat force.[201]

Military necessity may require transfer after capture for various reasons—security of the individual, secrecy of the capture, witness location, proximity to or distance from other detainees, etc... Transfer may not occur, however, to obtain information with knowledge that torture or cruel, inhumane or degrading treatment will occur. In fact, prisoners of war can only be transferred to another party to the Geneva Conventions and only after the detaining power is convinced the other party will abide by the convention.

Article 12, of the Third Geneva Convention,[202] requires that prior to transfer, a good faith assessment must be made that the receiving state is willing and able to treat the prisoner humanely. This is a lower threshold of concern than the Article 3 of the CAT that only prohibits *refoulement* when there is a danger of "torture."[203] Moreover, given that the test is that the receiving state must be both willing *and* able, assurances from the receiving state that it will provide proper treatment will not suffice on its own accord. An element of ability must be assessed and demonstrated. Over the past few years, the human rights groups have vehemently criticized U.S. reliance on assurances.[204] Especially in cases of transfer to countries that the U.S. State Department lists as having recently practiced torture (i.e. Egypt, Jordan, Morocco, Syria, Saudi Arabia and Yemen).[205] Under a standard of "willing and able," the War Crimes Statute, in

combination with Article 12 of the Third Geneva Convention, would prohibit accepting *pro forma* assurance in the face of demonstrated practice to the contrary.[206]

After transfer, the transferring power does not relinquish its responsibilities. Article 12 states that "the Power by whom the prisoners of war were transferred shall, upon being notified by the Protection Power, take effective measures to correct the situation or shall request the return of the prisoners of war."[207] Not only does this language require continuing vigilance after transfer, but the language referencing access by the "Protecting Power," i.e. the International Committee of the Red Cross (ICRC), appears to categorically prohibit secret prisons in times of international armed conflict concerning prisoners of war.

If an occupied territory is involved, even more concerns arise. When a suspected terrorist is captured and then transferred from an *occupied* area, extreme care must be taken to ensure that proper distinction has occurred. A mistake of taking a civilian for a combatant followed by forcible transfer would violate Article 49 of the Fourth Geneva Convention,[208] qualifying as a "grave breach" under Article 147 of the Fourth Geneva Convention,[209] and therefore constituting a violation of the War Crimes Statute, which proscribes all grave breaches under the Geneva Conventions.[210]

A "draft" memorandum from the U.S. Department of Justice dated 3/19/04 addressed the issue of transfers from occupied Iraq.[211] Jack I. Goldsmith III,[212] authored the opinion and concluded that the prohibition only applied to individuals who were *legally* present in Iraq. Any illegal alien present in Iraq was, according to the draft opinion, authorized to be transferred from Iraq without violating the Fourth Geneva Convention. The opinion equated "forcible transfers" and "deportations" as synonyms

and pointed to Roman law, the Lieber Code and various law review articles to support the conclusion that the prohibition of transfer only applied to those legally present. This draft opinion was recently the subject of a critical article written by Professor Leila Sadat, attacking the opinion as unsupported by the plain text of the Fourth Geneva Convention, unsupported by custom in international law, and unsupported by common sense in that it is directly in conflict with the experiences of WWII, of which the prohibitions were directly intended to prevent.[213]

Regardless of who is right in this debate, mistakes in distinction of combatant versus civilian, as well as mistakes in the distinction of legal versus illegal presence, would place U.S. personnel in danger of committing violations of the War Crimes Statute. This is particularly true because Articles 49 and 147 of the Fourth Geneva Convention do not explicitly contain a scienter requirement. Rather, Article 49 makes no qualifications in its prohibition of "forcible transfers," and Article 147 prohibits all "unlawful" transfers. Similarly, the War Crimes Statute simply requires an individual to "commit" a war crime.

Moving from transfer to captivity, prisoners of war during captivity are entitled to humane treatment. Inhumane treatment of a prisoner of war is a grave breach under Article 130 of the Third Geneva Convention. During international armed conflict, prisoners of war are "bound to give only surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information."[214] Prisoners of war are not only entitled to humane treatment at all times,[215] but also fairly expansive and protective rights, including "respect for their persons and their honour,"[216] with 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."[217] Treatment of prisoners of war, given the above, is a restrictive field of practice. Rendering prisoners of war, therefore, takes on a significant risk of committing a grave breach under Article 130 of the Third Geneva Convention.

Violations of Article 130, equate to violations of the War Crimes Statute, *ipso facto*. The War Crimes Statute proscribes all grave breaches of the Geneva Convention. Maximum punishment of the War Crimes Statute is life imprisonment and even death if the victim dies as a result. In addition, the Torture Statute proscribes torture as well as cruel, inhumane and degrading treatment. Under these parameters, while rendition is not necessarily illegal, when prisoners of war are involved, the constraints are many and the criminal liabilities potentially unforgiving.

Non-International Armed Conflict

During non-international armed conflict the standards for capture are the same as for international armed conflict, discussed above. But for transfer and treatment of the detainee in captivity, Common Article 3 is the applicable article under the Geneva Conventions. In *Hamdan*,[218] the Supreme Court established that Common Article 3 is the minimum standard to apply in the GWOT for all situations that do not fall under international armed combat. Specifically, in course of deciding the legality of the proposed military commissions, the Supreme Court explicitly found that Common Article 3 governs the treatment of al Qaeda and its affiliates when *hors de combat*, whenever the situation is not an international armed conflict. The general standard under Common Article 3 is that *hors de combat* "shall in all circumstances be treated humanely . . . ."[219]

Common Article 3 does not specifically define humane treatment, but does explicitly prohibit "cruel treatment and torture . . . [as well as] outrages upon personal dignity, in particular, humiliating and degrading treatment . . . ."[220]

In 2005, Congress and the President established the Detainee Treatment Act (DTA) as law. The DTA explicitly states that: "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."[221] It goes on to define "cruel, inhuman, or degrading treatment or punishment," as that which is "prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984."[222]

One year after passing the DTA, Congress and the President passed the MCA in response to the *Hamdan* decision. Applicable portions of the MCA were explicitly intended to "fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in context of an armed conflict not of an international character."[223]

The MCA amends the War Crimes Statute, Section 2441 of title 18, United States Code, by explicitly adding to the War Crimes Statute violations of Common Article 3. Specifically, through the MCA, the War Crimes Statute now proscribes not only grave breaches in international armed conflict but also violations of Common Article 3. The

violations under Common Article 3 include not only committing "torture" and "cruel or inhuman treatment," but also *conspiring* or *attempting* to commit torture, as well as cruel or inhumane treatment.[224] The MCA defines the terms of "torture" and "cruel, inhumane and degrading treatment," and like the DTA also further references to the Reservations, Declarations and Understandings to the Convention Against Torture (CAT),[225] to clarify the meaning of "cruel, inhuman, or degrading treatment or punishment."[226]

The reservation in the CAT, referenced to by the DTA and MCA, defines "cruel, inhuman or degrading treatment or punishment", to mean "or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."[227] In a Congressional Research Report to Congress on the subject of "Interrogation of Detainees: Overview of the McCain Amendment,"[228] Legislative Attorney Michael Garcia explains that currently there is a fair amount of uncertainty in how courts will interpret this language, as well as uncertainty in whether the courts will apply a lower standard for detainees in armed conflict than what courts have applied to domestic criminal suspects. Whether the courts follow or depart from its standard in criminal cases, the courts will undoubtedly look to those previous criminal cases for guidance. In this vein, Garcia provides the following examples of cases wherein courts have deemed that the government's conduct violated the Fifth, Eighth and Fourteenth Amendments:

- "handcuffing an individual to a hitching post in a standing position for an extended period of time that "surpasses the need to quell a threat or restore order;
- maintaining temperatures and ventilation systems in detention facilities that fail to meet reasonable levels of comfort; and

- prolonged interrogation over an unreasonably extended period of time, including interrogation of duration that might not seem unreasonable in a vacuum, but becomes such when evaluated in the totality of the circumstances."[229]

If these cases are any indication of how courts may define "cruel, inhuman, or degrading treatment," each rendition needs to carefully structure and scrutinize its transfer and treatment of detainees. The penalties under the War Crimes Statute are no kinder when the violation originates under Common Article 3. And the addition of conspiracy, *via* the MCA, to the War Crimes Statute when a violation of Common Article 3 is involved, expands the breadth of coverage.

In addition to the above, a plurality of the Supreme Court in *Hamdan* referred to Protocol I, Article 75, as reflecting minimum "safeguards" to which "all persons in the hands of an enemy are entitled."[230] Protocol I, Article 75(3) addresses detention, stating that "[a]ny person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken." At Article 75(6), Protocol I goes on to state that "[p]ersons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict."

The theme within Article 75 of Protocol I is due process; that is, the provisions attempt to ensure a minimum level of due process for detainees. The U.S. has not ratified Protocol I, and out of the two Protocols of 1977, Protocol II is actually more relevant to non-international armed conflicts.[231] The relevance of Protocol I to the U.S. practice of rendition is thus uncertain. But with a plurality of the Supreme Court applying it in

Hamdan, Protocol I's due process requirements demand at least weighty consideration in any analysis of rendition.

As with international armed conflict, the legality of rendition in non-international armed conflict must be assessed on case by case. As seen from above, transfer in a non-international armed conflict has more latitude than transfer in an international armed conflict with prisoners of war, or transfer from an occupied territory. In captivity, torture and cruel, inhumane and degrading is prohibited. The definition of torture is well established, but the opposite is true for cruel, inhumane and degrading treatment. For cruel, inhumane and degrading treatment, the definition relies upon that which the U.S. interprets it to mean in the Fifth, Eighth and Fourteenth Amendments. It is an uncertain standard in the respect that it may possess more breadth, and its threshold may be lower, than expected. This possibility coupled with the plurality in *Hamdan* pointing to Protocol I and its due process focus, brings rendition perilously close to the line of illegality; whether it crosses over or not, depends on the particular facts of the situation.

Unlike the latitude that aggressive capture enjoys given its fit within the explicit language of the AUMF—"all necessary and appropriate force . . . to prevent any further acts of international terrorism against the United States . . . ,"—deviations from the transfer and treatment constraints do not enjoy the same leeway. First, once capture occurs, the language of the AUMF does not provide specific authority to violate customary international law in the area of detainee treatment. Capturing terrorists nests within the AUMF language, but subsequent transfer and detention for interrogation possess a much more attenuated relationship. Second, and even more on point, with the passage of the MCA after the AUMF, explicitly revising the War Crimes Statute to

prohibit violating grave breaches of the Geneva Convention concerning detainee treatment, Congress expressly indicated its will to abide by those laws.

If the President invokes his executive powers to authorize practices that violate the laws of war in contradiction to the War Crimes Statutes, those practices would fall under the third category of Justice Jackson's tripartite analysis in the Steel Seizure Case, in that it would be "incompatible with the expressed . . . will of Congress, [and the President's powers would be] at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[232]

The constitutional powers that the President would need to rely upon would be those bestowed by the Vesting Clause[233] and the Commander in Chief Clause.[234] And while these clauses do in fact contain significant powers and have received deferential treatment in the realm of conducting combat operations, i.e. capture, they are nonetheless general powers and thus do not contain the exactitude and weight to survive, under a Jacksonian *Steel Seizure* analysis, the subtraction of Congress's explicit and specific powers in the area of authorizing the deviation from transfer and treatment standards of detainees.

Professor Glennon addresses this very issue as he explains that "the President is possessed on no plenary power to violate international law." Professor Glennon goes on to explain that this power resides in the Constitution under Article 1, § 8, clause 10, giving Congress the power to "define and punish . . . Offences against the Law of Nations."[235] Indeed, reading this explicit Constitutional authority granted to Congress in conjunction with the cases of *Little v. Barreme*,[236] *The Charming Betsy*,[237] and *Brown v.*

U.S.,[238] leaves no independent power for the President to violate customary international law in the areas of transfer and treatment of detainees.

The case of *Barreme* concerned the capture, for prize, of a Danish ship named the "Flying Fish." The capture occurred during the undeclared war against France. Congress had passed the Non-Intercourse Act, prohibiting American ships from sailing *to* French ports. While the Non-Intercourse Act prohibited only ships sailing to French ports, the order issued by the Secretary of the Navy to carry-out the Act authorized seizure of ships to prevent "all intercourse . . . between the ports of the United States and those of France . . . ."[239] The Flying Fish, when seized, was in fact sailing *from* a French port. Chief Justice Marshall held that the seizure was illegal and that the Captain of the Navy ship that seized the Flying Fish was liable for damages, as the seizure was not authorized under the Congressional Act. Chief Justice Marshall clearly could have focused on the fact that the Captain was simply following orders or allowed for executive discretion to the extent that the seizure occurred during an undeclared war, and this was simply seizing from, as opposed to, a French port. But instead, Chief Justice Marshall focused on the fact that Congress had explicitly expressed its will only to seize ships bound to, not from, and therefore the seizure was in fact in contravention of that will. [240]

The Charming Betsy is another opinion by Chief Justice Marshall concerning the Non-Intercourse Act during the undeclared war with France. The holding was also that the seizure was illegal, as the ship was owned by an American citizen who had obtained Dutch commercial privileges based on his domicile, and thus was not subject to the law. In the opinion, Chief Justice Marshall stated that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ."[241]

Nonetheless, he went on to recognize a duty of the courts to give authority to Acts that do not comply with international law, if "plainly expressed."[242]

Lastly, the *Brown* case involved seizure of cargo in the U.S. delivered by a British ship upon declaration of war during the War of 1812. Once again, Chief Justice Marshall wrote the opinion, and once again he held that the seizure was improper. In *Brown*, the analysis focused on the fact that the seizure could not be based solely on the proclamation of war, which would violate customary international law. Rather, the President needed separate Congressional legislation to do so. In dicta, Chief Justice Marshall stated that the President could, however, violate customary international law with Congressional authorization.[243]

The *Barreme* and *The Charming Betsy* cases reiterate that executive action incompatible with Congress's expressed will, fall within the third category of Jackson's tripartite framework, making it unlikely to be receive much deference from the courts. This is especially true if Congress's will is one provided to it under the Constitution, such as Article I, § 8, clause 10, giving Congress the power to "define and punish . . . Offences against the Law of Nations."

Recently, the Supreme Court in the *Hamdan* case reiterated this very point. While assessing the President's authority to convene military commissions, the Supreme Court stated: "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." Concerning transfer and treatment, Congress explicitly and unambiguously

stated its will in the MCA and War Crimes Statute. Those statutes prohibit violations of the laws of war, addressing areas such as transfer and treatment *after* capture.

They do not, however, address capture. Moreover, no legislation after the AUMF has placed limitations on capture similar to those Congress placed on the treatment of terrorists. Concerning capture, the *The Charming Betsy* and *Brown* cases reiterate that when the President acts pursuant to Congress's will, expressed or implied, customary international law standards are not necessarily beyond transgression. This provides justification for the executive to take aggressive action concerning capture, even if a violation of Article 51 may occur. While the cases indicate that Congress must express its will with particularity for the President to possess authority to violate international law, depending on the facts of the circumstances, the "necessary and appropriate" language of the AUMF may in fact fulfill that requisite level of specificity.

The *Hamdi* court recognized this difference between capture and post capture standards identified above. Specifically, after holding that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker,"[244] the Supreme Court went on to state: "initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized."[245]

The next section will discuss recommendations intended to keep rendition within permissible parameters while maintaining its ability to neutralize terrorist suspects.

VII. RECOMMENDATIONS.

Recommendation #1: Do Not Transfer Detainees To Other Nations For Interrogation.

Transferring detainees after capture to a third nation, that is a nation other than where capture occurred, unquestionably places the practice of rendition at risk of transgressing legality. This is especially true when the receiving nation is one that has a history of torture or maltreatment.

Simply transferring the detainee, as seen from above, inherently contains significant concerns. In international armed conflict, POW's can only be transferred when the receiving state demonstrates the willingness and ability to abide by the Geneva Conventions, and the duty for the U.S. to ensure that proper care does not end at transfer. If the transfer is from an occupied territory, improper distinction could equate to a grave breach, violating the prohibition of transferring civilians out of the territory. In non-international armed conflict, transferring the detainee has fewer constraints, but the transfer must still be deemed humane. If there is a history of torture or mistreatment, the question of humane treatment ineluctably becomes a concern.

To evaluate compliance of humane treatment, one must review the actual facts of the practice. The U.S. practice is to seek assurances when there is a question whether it is more likely than not that the detainee will be tortured. The U.S. does so to fulfill its obligation under Article 3, CAT. But Article 3(2) of the CAT, mandates that when nations are assessing the danger of *refoulement*, the nation "shall take into account all relevant considerations including . . . consistent pattern of gross . . . violations of human rights."[246] The language does not explicitly discuss assurances as a substitute for

engaging in this analysis and the scope of the analysis that Article 3(2) mandates is anything but narrow. In particular, Article 3(2) requires an evaluative process of the receiving state's history that goes beyond simply analyzing the possibility of torture. Specifically, it requires an inquiry into all patterns of gross violations of "human rights."[247] If a consistent pattern of gross violations of "human rights" suffices as a requisite consideration, how much weight should recent torture, cruel, inhumane and degrading treatment carry? A sincere and reasonable answer should be—enough to place little weight in assurances in those cases where the country providing the assurance has recently engaged in torture or cruel, inhumane and degrading treatment.[248]

In addition, the policy statement in the Foreign Affairs Reform and Restructuring Act of 1998, ("FARRA"),[249] states that "[t]he United States [shall] not . . . 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."[250] Commentator Satterthwaite uses this FARRA policy statement to attack the validity of the administration's policy of substituting "more likely than not" for "substantial grounds" language found in the CAT.

The fact that the U.S. policy is based on an understanding made at the time of ratification, seems to undercut Satterthwaite's attack on that issue. Similarly, the policy language of the FARRA is precatory in nature.[251] But while it may not be used in the Justice Jackson Steel Seizure sense to indicate the "will of Congress,"[252] nonetheless, the FARRA language is language was in fact used by Congress, and thus when the executive

is considering an assurance, the FARRA language should further indicate a need for caution.

Perhaps the most serious issue with transfer is the substantive concern over potential criminal liability if torture or cruel, inhumane or degrading treatment does in fact occur in the receiving nation after transfer. If torture or cruel, inhumane or degrading treatment does occur, inevitably the U.S. will be, and has been, brought under scrutiny.[253] Questions such as the following will undoubtedly be asked every time this situation arises: What was the actual U.S. motive in transferring? Why did the U.S. select that particular state? Was the U.S. intending to have the detainee tortured? What knowledge did the U.S. possess prior transfer? Was the U.S. a co-conspirator or principle in the act?

With our role as a world leader and our historical place as an ardent protector of human rights, is transfer under naked assurances worth the gain? That is a question the administration should ask and answer prior to *every* transfer. Eliminating these types of transfers all together and keeping the detainee either in the custody of the nation where seizure occurred, or in U.S. custody, will alleviate many of these concerns.

Recommendation #2: Circumscribe Armed Conflict, Generally Respect & Support Sovereignty, But Violate If Necessary.

To say, as above, that the current situation with the AUMF, the passage of the DTA, MCA and the decisions in *Hamdi* and *Hamdan* legally justifies applying an armed conflict paradigm globally to al Qaeda and its affiliates, thus triggering the laws of war, is not the same thing as asserting that this nation should exercise that authority, globally,

forever. While the threat from al Qaeda and its affiliates is global, as time passes it becomes more and more apparent that the nation needs to narrow its scope concerning the application of the armed conflict paradigm. The best way to do that is to change the scope of the AUMF to include only those locations where active hostilities exists, to failed states, and to states that are uncooperative in securing dangerous terrorists. And while waiting for that change, policy should make this change immediately.

The GWOT is not ending anytime soon. The nation and the world community now possess a fairly accurate and sophisticated understanding that the threat of terrorism is here to stay for the foreseeable future. This realization requires that our laws and policies maintain congruency not only with the dangerousness of the threat, but also to its potentially perpetual nature. The element of perpetual nature necessarily affects the degree of acceptance that a world-wide application of armed conflict will receive. As Professor Brooks explains, people and courts are generally willing to put up with extra-ordinary measures that cut into personal freedoms in the name of safety, public and national security, but "the willingness of citizens to tolerate such actions . . . is predicated to a great extent on the notion that such actions are the exception, not the norm; that they are allowed only during emergencies, not forever."[254]

Exercising combat power with the military and CIA globally under an armed conflict paradigm, necessarily brings unintended and undesired consequences. Take the case of Abu Omar as an example. On June 24, 2005, Abu Omar was reportedly abducted by CIA agents in Milan, driven to the U.S. Air Force Base in Aviano, flown via U.S. Air Force Base in Ramstein, Germany, and eventually flown to Egypt where he was allegedly tortured.[255] He is free today and has not been charged. As a result, an Italian judge

issued arrest warrants for twenty-five CIA agents and one Air Force officer concerning his rendition.[256]

If the facts are as alleged, it provides a vivid example of the perils of overextending the use of combat power into inappropriate venues, i.e. the streets of Milan. The Abu Omar case can be contrasted with Abu Zubaydah who was captured in Afghanistan shortly after 9/11, questioned by CIA and eventually sent to Guantanamo Bay, Cuba.[257] No similar out-roar has followed Abu Zubaydah, even though the President has plainly stated that "tough" interrogation methods were used on him.[258] While one obvious difference between the two cases is that Omar is free and able to make allegations, the difference in the locales of their seizure is also undeniably relevant. In Afghanistan, armed conflict was palpably present, applying the laws of war were needed and made sense; moreover, the application did not create an affront to the sovereignty or, at a minimum, the pride of one of our allies. Italy differs to Afghanistan in each of those respects.

The nation's laws and policies must be cognizant that each state, similar to the U.S., has responsibilities to its own citizens to ensure that apprehension is carried out within its jurisdiction under domestic law. When the laws of war are not implemented and instead a law enforcement paradigm is in existence, the standard is reflected in Restatement Third of the Foreign Relations Law of the U.S., Section 433. It states that "[l]aw enforcement officers of the United States may exercise their function in the territory of another state only . . . with the consent of the other state . . . and . . . in compliance with the laws both of the United States and of the other state." [259] Abductions that occur outside these parameters, create potential violations of domestic law, i.e.

kidnapping, assault, illegal seizure, etc.[260] Tensions such as those exhibited in Italy when the Milan judge issued warrants for the arrests of CIA agents and one Air Force Officer, occur when an ally is employing a law enforcement model and the U.S. is operating under a laws of war paradigm.

It is therefore imperative that the U.S. consider the viability of its laws, making them relevant, effective and responsive to the environment. The laws, or at least the policies, need to treat places such as Afghanistan different from the Italy's and Germany's of the world. Lumping all nations, and places, together in one policy, inevitably requires shoe-horning some situations into paradigms that are completely inappropriate.

This of course may bring into question not just rendition but the entire GWOT strategy, which is beyond the scope of this paper. Suffice it to say that at least in relation to rendition, more distinctiveness and precision would be prudent.

Recommendation #3: Transparency & Due Process.

The U.S. and its forefathers have always stood against tyranny. Ranging in import from the Boston Tea Party protesting unjust taxes to defeating Hitler Germany, Americans have always fought injustice. The U.S. holds itself out to the world as the example of a nation based on the rule of law, guaranteeing at least a minimum level of due process, for *everyone*. At times, it has fallen short of its standards (i.e. slavery and the internment of Japanese Americans during WWII), but the U.S. has always corrected course. When other nations have exhibited less than optimal human rights standards, the U.S. has ardently protested and insisted on a change of ways.

For instance, on March 6, 2007, the U.S. State Department issued its country reports on human rights practices. In the China report, the U.S. cited as a human rights concern the fact that China "used incommunicado detention,"[261] wherein families were not notified of the detention, and also that Chinese "police can unilaterally detain persons for up to 37 days before releasing them or formally placing them under arrest. After a suspect is arrested, the law allows police and prosecutors to detain a person for up to seven months while public security organs further investigate the case. Another one and one-half months of detention are allowed where public security organs refer a case to the procuratorate to decide whether to file charges."[262]

China responded to these allegations on March 9, 2007, with indignation. The Washingtonpost.com reported that China's response "has sharpened to reflect increasing reports of U.S. abuses against foreigners suspected of connections to terrorism. These include accusations of kidnapping, torture and imprisonment without legal recourse -- the same abuses often raised by the United States with Chinese authorities."[263]

With the U.S. practices during GWOT, such as rendition, the U.S. has become susceptible to allegations of human rights abuse and is commensurately losing credibility that has taken years and years to build as a human rights leader. Moreover, the U.S. is unintentionally emboldening other countries in their defense of abusive approaches; those countries are able to now to persuasively point the finger back at the U.S., as China has recently demonstrated.

In his book Rights from Wrongs, Harvard Law Professor Alan M. Dershowitz poignantly explains that morality more than anything else is a concept of right and wrong that a society develops over time through experience. Specifically, he explains morality

in the following terms: "Deciding what is moral--what is right--rarely involves the simply discovery of eternal truths. It is an ongoing process of trial and error, evaluation and reevaluation, based on changing experiences."[264] What has history taught the world about secret prisons and practices such as sending individuals to countries that practice torture for interrogation? One may think back to the Latin and South American military Junta's of the 1970's and 1980's;[265] or the more recent horrors of disappearances in Bosnia, Algeria and Zimbabwe.[266] But the dangers found when transparency is covered, are not unique to foreign nations. In the "Report on the Treatment by the Coalition Forces of Prisoners of War and other protected person in Iraq,"[267] dated February 2004, the International Committee of the Red Cross (ICRC) documented substantial allegations of maltreatment and found that:

> [i]n most cases, the allegations of ill-treatment referred to acts that occurred prior to the internment of persons deprived of their Liberty in regular internment facilities, while they were in the custody of arresting authorities or military and civilian intelligence personnel. When persons deprived of their Liberty were transferred to regular internment facilities, such as those administered by military police, where the behavior of the guards was strictly supervised, ill-treatment of the type described in this report usually ceased.[268]

This observation in the ICRC report that an increase in transparency alone dramatically reduces if not completely eliminates complaints, makes a persuasive case for questioning the legality, long-term utility and prudence of secret and inaccessible detention procedures. Whether transparency eliminates actual abuse or simply the opportunity to make a complaint, the result is desirable in either case. That is, openness and due process ensure, establish and convey fairness, humane treatment.

The speech made by the President on September 6, 2006, announcing the transfer of the fourteen high value detainees to Guantanamo Bay, further exemplifies this point. Specifically, the President attempted to establish the utility of rendition by pointing to the capture of KSM. In the course of doing so, the President explained that it began with the capture of Abu Zubaydah who "was a senior terrorist leader and a trusted associate of Osama bin Laden."[269] Zubaydah was captured in Afghanistan shortly after 9/11 and questioned by CIA. Zubaydah was initially uncooperative. "We knew that Zubaydah had more information that could save innocent lives, but he stopped talking. As his questioning proceeded, it became clear that he had received training on how to resist interrogation. And so the CIA used an alternative set of procedures. . . . But I can say the procedures were tough, and they were safe, and lawful, and necessary."[270]

As good as the result was in this situation, i.e. the capture of KSM, the fact that a hardened terrorist (Abu Zubaydah), who was trained to resist, eventually capitulated and provided extremely valuable intelligence, necessarily begs the question: just how "tough" were the procedures?

History, including the ICRC Report, indicates that as a general proposition, when "tough" procedures occur behind closed doors, in secret locations meted out on individuals who have received little to no due process, there are significant dangers of abuse. And because of that general pattern, the world rarely accepts the legitimacy of speeches proclaiming fairness, humane treatment, without evidence. Instead of acceptance, government proclamations concerning secretive detention and interrogation typically cause world skepticism to entrench.

Openness and due process procedures would, on the other hand, *establish* that individuals are being treated humanely; even when the nation uses "tough" procedures. This is to say that the *sine qua non* of humane treatment *is* due process.[271] Humane treatment can rarely be demonstrated without it.

The 9/11 Commission report addressed the importance of these very issues in a recommendation using the following words: "The U.S. government must define what the message is, what it stands for. We should offer an example of moral leadership in the world, committed to treat people humanely, abide by the rule of law."[272]

While rendering individuals is not inherently incompatible with the laws of war, it clearly is a practice susceptible to violations. Implementing due process and transparency would not only reduce the opportunities for actual abuse, it would also send the right message to the world; it would offer a stark alternative to the Bin Laden option.[273]

VIII. CONCLUSION.

The laws of war and human rights laws are two separate and distinct bodies of law that were not drafted, and did not evolve into, legal paradigms that work concurrently with one another in a given situation. The laws of war are meant for war, armed conflict, and the human rights laws are meant for times of peace. Attempts to develop a mixed model have gained popularity over the years, but in the end the mixed model provides few answers. In today's contemporary post-9/11 environment, the lines between war and peace are blurred. Nonetheless, the fact that it is more difficult to properly ascertain when and where the laws of war should be applied, does not diminish the importance of allowing the laws of war to rule exclusively when properly invoked.

The current AUMF, with the subsequent case law and related legislation, establish the legal preconditions for the laws of war to serve as *lex specialis* concerning al Qaeda and its affiliates. This is not to say that the current situation of deeming armed conflict as being in existence globally is a prudent and an enduring approach. It is not. It is to say, however, that when legally analyzing rendition, one must identify the proper law to apply. At this time, the proper law is the laws of war, given decisions already made by the current administration and previous Congress, as well as key Supreme Court decisions interpreting those laws.

Under the laws of war, rendition is not *per se* illegal. Each and every exercise of the practice of rendition must be analyzed on its particular facts. Capturing terrorists is part and parcel with invoking combat power. Under the AUMF, Congress has specifically authorized the President wide-latitude in invoking that power. When Congress and the President act together, they possess the authority under the U.S. Constitution to violate international law, if they so choose. Violations of international law remain as violations within the international community, but within the courts of the U.S. they are treated as authorized measures if approved by Congress. The capture element of rendition, therefore, possesses the latitude to be carried out with aggressive action to serve our nation's security interests.

Once capture occurs and terrorist suspects become *hors de combat*, different and much more stringent standards apply. These standards make secret prisons, transferring individuals to third nations for interrogation, especially when prisoners of war or when individuals from occupied territories are involved, causes special concern. Humane treatment of detainees is the minimal standard. Under the MCA and War Crimes Statute,

that standard is linked to the Geneva Conventions and the Fifth, Eighth and Fourteenth Amendments of the U.S. Constitution. Concerning detainees, examples of these standards has not been well established in U.S. Courts and thus it is possible that the scope of the prohibitions and legal thresholds may be different than anticipated. Mistakes may equate to criminal legal liability under our domestic laws. The international laws that serve as the basis for these laws cannot be violated under the Constitution of the United States, as Congress has expressed its will through domestic legislation proscribing transgression.

The practice of rendition has received a storm of international disapproval. To bring the practice further towards the fold of the laws of war, and to set an international example in human rights, the U.S. should cease transferring individuals to third countries for interrogation, cease the practice of using assurances to send individuals to countries that have a history in practicing torture, revise the AUMF to limit armed conflict, and increase the due process and openness of detention as well as the interrogation process. In the end, these measures will continue to allow an aggressive approach to combating terrorism while at the same time will keep this nation true to its most cherished principles, producing the best results and sending the correct message to the world.

Endnotes

[1] Condoleezza Rice, U.S. Sec'y of State, Remarks Upon Her Departure for Europe (December 5, 2005), [hereinafter Secretary Rice, Andrews AFB Speech] HYPERLINK "http://www.stat.gov/secretary/rm/2005/57602.htm

[2] President George W. Bush, President Bush's Sept. 6, 2006 REMARKS FROM THE EAST ROOM OF THE WHITE HOUSE, as transcribed by Federal News Service, *available at* *http://www.npr.org/templates/story/story.php?storyId=5777480*.

[3] Khalid Sheikh Mohammad is suspected to be the mastermind behind 9/11 attacks. He uses the nickname Moqtar. *See* President George W. Bush speech, *id*.

[4] Abu Zubaydah is suspected to be a senior Al-Qaeda member who ran a terrorist training camp in Afghanistan. *See* President George W. Bush speech, *supra* note 2.

[5] Ramzi bin al-Shibh is suspected to be an accomplice of KSM in the 9/11 plot. *See* President George W. Bush speech, *supra* note 2.

[6] President George W. Bush speech, *supra* note 2.

[7] Washington Post Foreign Service, January 31, 2007, page AO1, *available at*: http://www.washingtonpost.com/wp-dyn/content/article/2007/01/31/AR2007013100356.html

[8] Obu Omar is reportedly an Egyptian citizen who resided in Italy was allegedly abducted on June 17, 2003.

[9] Human Rights Groups refers to groups such as Amnesty International, Center For Human Rights and Global Justice, Human Rights Watch, etc.

[10] DAVID KENNEDY, OF LAW OF WAR, 127 (2006). Professor Kennedy defines "Lawfare" as "managing law and war together—requires a strategic assessment of these various claims, and active strategy by military and humanitarian actors to frame the situation to their advantage." *Id*. at 125.

[11] RONALD DWORKIN, LAW'S EMPIRE, 73 (1986).

[12] Signifying no quarter. *See* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, THE LAW OF WAR DESKBOOK, (2000) [hereinafter LAW OF WAR DESKBOOK].

[13] Third Geneva Convention (GPW), Article 3(1)(a), *infra* note 36.

[14] *Id.* at Art. 3(1)(c).

[15] MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY, 230 (1990). The principle of Pacta sunt servanda is found in Art. 26 of the Vienna Convention on the Law of Treaties. It states: "[e]very treaty in force is binding upon the parties to it and must be performed by them in good fait." GLENNON, note 10 at 230, citing the Convention.

[16] *See Brown v. U.S.* (8 Cranch) 110 (1814). *See also* GLENNON, CONSTITUTIONAL DIPLOMACY *supra* note 15.

[17] GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 15 at 243.

[18] *See infra*, note 94.

[19] Condoleezza Rice, *supra* note 1.

[20] For an in depth definition of rendition, differences between all the different forms of rendition, *see* Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 3 *available at:* http://test.extrajudicialexecutions.org/docs/wp/WPS_NYU_CHRGJ_Satterthwaite_Rendition_Final.pdf; [hereinafter Satterthwaite, *Rendered Meaningless*].

[21] KENNEDY, *supra* note 10.

[22] Robert Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva*

Conventions, The International Review of the Red Cross, September 30, 1998, at: http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57jpg2?opendocument

[23] The 1899 Hague conference adopted a "Convention on land warfare to which *Regulations* were annexed. The Convention and Regulations were revised at the Second International Peace Conference in 1907." *See* DIETRICH SCHINDLER AND JIRI TOMAN, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS, 57 (1981) [hereinafter SCHINDLER/TOMAN].

[24] The 1949 convention most often referred to Geneva Convention, *reprinted in* SCHINDLER/TOMAN, *supra* note 23, at 305.

[25] Charter of the United Nations, adopted 26 June 1945, entered into force 24 Oct. 1945, as amended by G.A. Res. 1991 (XVIII) 17 Dec. 1963, entered into force 31 Aug. 1965 (557 UNTs 143); 2101 of 20 Dec. 1965, entered into force 12 June 1968 (638 UNTS 308); and 2847 (XXVI) of 20 Dec. 1971, entered into fore 24 Sept. 1973 (892 UNTS 119). 188 Member States. [hereinafter U.N. Charter]. Citations obtained from HENRY J. STEINER, PHILIP ALSTON, LAW POLITICS MORALS, 1467 (2nd Ed., 2000) [hereinafter STEINER].

[26] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] and Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

[27] *See Case Concerning Military and Paramilitary Activities In And Against Nicaragua* (*Nicaragua v. United States*), 1986 ICJ Lexis 4 (27 June 1986) at paragraph 174. In response to the U.S. claim that Nicaragua could only base its claim under the U.N. Charter, the ICJ stated: "The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, nonintervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated." *Id.* Combat power and its principles of military necessity, distinction, proportionality, prevention of unnecessary suffering, come from customary law as reflected in documents such as the Lieber Code.

[28] Instructions for the Government of Armies of the United States in the Field (prepared by Dr. Francis Lieber and promulgated as General Orders No. 100 by President Lincoln, Apr. 24 1863), [hereinafter Lieber Code] *reprinted* in SCHINDLER/TOMAN, *supra* note 23 at 3. Citation obtained from EDWARD KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION, 11 n. 12 (1992).

[29] *Id*. at 9.

[30] Lieber Code, Article 41, *reprinted in* SCHINDLER/TOMAN, *supra* note 23.

[31] Declaration Of St. Petersburg 1868, No. 8, Renouncing The Use, In Time of War, Of Explosive Projectiles Under 400 grams Weight, Signed at St. Petersburg, 29 November/11 December 1868, *reprinted in*: SCHINDLER/TOMAN *supra* note 23. *See also* STEINER, *supra* note 25, at 67.

[32] Oxford Manual Preface (1880). Found in SCHINDLER/TOMAN, *supra* note 23 at 36.

[33] *Id.* at 37.

[34] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, JA 422, OPERATIONAL LAW HANDBOOK, Chapter 2 (Aug. 2006), [hereinafter OPERATIONAL LAW HANDBOOK].

[35] *The Paquete Habana*, 175 U.S. 677 (1900), establishes the legitimate role of customary law as part of the laws of war. In this decision, the Supreme Court upheld as customary law what the Court deemed "usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law . . . ." *Id.* at 686. "The intricate body of international law considered by the Supreme Court grew out of centuries of primarily customary law, although custom was supplemented and informed centuries ago by selective bilateral treaties. Custom remains essential to argument about the laws of war to this day, indeed to the subject matter jurisdiction of the International Criminal Tribunal for the Former Yugoslavia . . . . But this field is increasingly dominated by multilateral treaties that have both codified customary standards and rules and developed new ones in numerous international conferences. . . . The treaties now include the Hague Conventions concluded around the turn of the century, the four Geneva Conventions of 1949 (as well as two significant protocols of 1977 to those conventions). . . ." STEINER, *supra* note 25 at 67. The 1977 Geneva Protocols as mentioned in STEINER, are in fact considered by many to reflect customary Law of War notwithstanding the fact that the U.S. has not ratified them. Up until 2003, the OPERATIONAL LAW HANDBOOK stated: "the U.S. considers many of the provisions of the Protocols to be applicable as customary international law." This sentence was deleted in the 2004 manual. *See* Geoff Corn, *Hamdan, Fundamental Fairness, and the Significance of Additional Protocol II*, Army Lawyer, 5-6 (August 2006) [hereinafter Geoff Corn, Significance of Additional Protocol II].

[36] The two primary treaties are the Hague and Geneva Conventions. Various other treaties specifically addressing warfare can be found in the OPERATIONAL LAW HANDBOOK, chapter 2 references. The following two cites for the Hague and Geneva Conventions were also obtained there: Hague Convention No. IV, 18 October 1907, Respecting the Laws and Customs of War on Land, T.S. 539, including the regulations thereto [hereinafter H. IV]; Hague Convention No. IX, 18 October 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2314 [hereinafter H. IX]; Geneva Convention, for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.S.T.S. 85; Geneva Convention, for the Amelioration of the Condition of Wounded and Sick and Shipwrecked Members, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 31; Geneva Convention, Relative to Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S 3364, 75 U.N.T.S. 135 [hereinafter GPW]; Geneva Convention, Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S 3365, 75 U.N.T.S. 287 [hereinafter GC]; As well as objects that are legal to engage.

[37] Lieber Code, Article 14, *reprinted in* SCHINDLER/TOMAN, *supra* note 23 at 6.

[38] Lieber Code, Article 15, *reprinted in* SCHINDLER/TOMAN, *id.* at 6 (emphasis added).

[39] A difference in kind because it may legally be invoked after distinction.

[40] ALAN DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS, 59 (2006) [hereinafter DERSHOWITZ, PREEMPTION].

[41] *Id.* at 61-62.

[42] *Id.* at 62-63.

[43] *Id.* at 64.

[44] U.N. Charter, *supra* note 25 at Article 51.

[45] *See* Ryan C. Hendrickson, *Article 51 and the Clinton Presidency: Military Strikes and the U.N. Charter*, 19 B.U. Int'l L.J. 207, 211-12 (Fall 2001). For Nicaragua's cross border raids of Costa Rica

and Honduras and support of rebels in El Salvador. *Id.* For instance Israel used anticipatory force in 1967 (The Six-Day War); 1973 (Yom Kippur), 1981 (Osirak, Iraqi nuclear reactor); 1982 (Lebanon); *See* DERSHOWITZ, PREEMPTION, *supra* note 40 at 76-104. The United States invoked Article 51 to mine Nicaragua's harbor, in its invasion into Iraq (1993), Kosovo (1998), Afghanistan and Sudan (1998).

[46] ALAN DERSHOWITZ, PREEMPTION, *supra* note 40 at 105.

[47] Oscar Schachter, Self-Defense and the Rule of Law, *83 A.J.I.L. 259* (April 1989). Schachter quotes Grotius's words: "[t]he right of self-defense . . . has its origin directly, and chiefly, in the fact that nature commits to each his own protection . . . each his own protection . . . . " *Id.*

[48] *Id. quoting* Dean Acheson's famous quote of: law "simply does not deal with such questions of ultimate power. . . . The survival of states is not a matter of law." *Citing* to Acheson, Remarks, 57 ASIL PROC. 13, 14 (1963).

[49] Some times things or places as opposed to individuals.

[50] OPERATIONAL LAW HANDBOOK, *supra* note 34 at Chapter 2.

[51] Lieber Code Article 15, *reprinted in* SCHINDLER/TOMAN, *supra* note 23 at 6.

[52] Lieber Code Article 15, *reprinted in* SCHINDLER/TOMAN, *supra* note 23 at 6.

[53] The combatant's privilege is the concept that combatants who are legally engaging in war are privileged to kill, so long as they abide by the rules of war.

[54] *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), *stating* "[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Id.*

[55] *Hamdi v. Rumsfeld*, 316 F.3d 450, 465 (2003) (citation omitted) (*vacated* on other grounds by, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

[56] *Id.* at 518, *quoting Ex parte Quirin*, 317 U.S. 1, 28 (1942).

[57] *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

[58] *Id.*

[59] Unnecessary suffering primarily applies to illegal weapons, such as gas, poisoned

[60] The U.S. has not ratified either protocol, but in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 (2006), a plurality of the Supreme Court found that Protocol I, Article 75 applied as customary law.

[61] *See id.*, at 2796.

[62] This is a summary of the applicable requirements of Article 4, GPW, *supra* note 36. Article 4 actually breaks the categories down into six subparagraphs, additionally listing persons accompanying the armed forces, crew members and inhabitants of non-occupied territory who pick up arms in resistance upon the approach of the invading force. The four requirements of being under a command, wearing fixed distinctive signs/uniforms, carrying arms openly and abiding by the laws of war are only listed as requirements under Article 4(A)(2) that addresses "militias and members of other volunteer corps . . . ." *Id.* The U.S. position is, however, that these requirements must be read into all of the other categories, including Article 4(A)(1) that addresses members of the opposing armed force and Article 4(A)(3) that

addresses members of an armed force that professes allegiance to another authority not recognized by the detaining power. *See* Memorandum From Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice, Office of the Legal Counsel, for Alberto R. Gonzales, Counsel to the President, dated February 7, 2002, *reprinted in* KAREN J. GREENBERG AND JOSHUA L. DRATEL, THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB, 139 (2005) [hereinafter GREENBERG/DRATEL].

[63] GPW, *supra* note 36 at Art. 17.

[64] Relative to detainees that do not qualify as POW's. *See id.* at Art. 13.

[65] *Id.* at Art. 12-20.

[66] *See id.* at Art. 12.

[67] Lieber Code, Article 63, *reprinted in* SCHINDLER/TOMAN, *supra* note 23, at 12. Similarly, Lieber Code Article 65 stated: "The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war." *Id.*

[68] *Padilla v. Bush*, 233 F. Supp. 2d 564, 592 (S.D.N.Y. 2002).

[69] Uniform Code Of Military Justice, codified at 10 U.S.C. §§ 801-950 (2000) (hereinafter UCMJ).

[70] 18 U.S.C. § 2441.

[71] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) [hereinafter MCA].

[72] 18 U.S.C. § 2340A.

[73] President Bush Speech, *supra* note 2.

[74] Some may understandably question whether the administration approved the practice of rendition using the Laws of War as its analytical paradigm given the memorandum from Alberto R. Gonzales, Counsel to the President to George W. Bush, President, Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with al-Qaeda and the Taliban (Jan. 25, 2002) [hereinafter Gonzales, Geneva Memo], *reprinted in* GREENBERG/DRATEL, *supra* note 62 at 134. *See also* Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, ILSA Quarterly, Vol. 15: Issue 3, (March 2007).

[75] Secretary Rice Statement, *supra* note 1.

[76] Lieber Code, Article 5, *reprinted in* SCHINDLER/TOMAN, *supra* note 23 at 4.

[77] ROHAN GUNARATNA, INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR, 125 (2003) (stating: "Al Qaeda can draw on the support of 6-7 million radical Muslims worldwide, of which 120,000 are willing to take up arms"). *Id.* at 125. *See also id.* at 15 stating that Al Qaeda is global.

[78] Khalid Sheikh Mohammed, Combatant Status Review Tribunal transcript [hereinafter KSM transcript], available at: http://www.foxnews.com/projects/pdf/transcript_ISN10024.pdf.

[79] Richard Shultz, *Global Insurgency Strategy and the Salafi jihad Movement*, Unpublished Material, available from Professor Shultz, Fletcher School of Law and Diplomacy, Tufts University, Medford, MA, 02155. Professor Shultz defines insurgency as: "Insurgency is a strategy of unconventional

and asymmetric warfare executed by one of four different types of non-state armed groups that today pose complicated analytic and significant operational challenges to those states that are confronted by them." *Id.* at 6. "Armed groups can be divided into four-part typology—insurgents, terrorists, militias, and organized crime." *Id.* at 7.

[80] *Id.*

[81] *Id.* at 50.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 51.

[85] *Id*.

[86] *Id.*

[87] *Id.*

[88] U.N. Resolution 1368, para. 3.

[89] GPW, *supra* note 36, at Article 2.

[90] Rosa Brooks, *War Everywhere: Human Rights, National Security, and the Law of Armed Conflict in the Age of Terrorism*, 21, University of Pennsylvania Law Review, Vol. 153, 2004 Available at: SSRN: http://ssrn.com/abstract=573321 or DOI: 10.2139/ssrn.573321.

[91] Case Concerning Military and Paramilitary Activities In And Against Nicaragua (*Nicaragua v. United States*), 1986 ICJ Lexis 4 (27 June 1986) at paragraph 195. A more limited interpretation could be taken from the ICJ by requiring that the armed attack be supported by a state. Earlier, in this same paragraph, the ICJ states: "There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" *(inter alia)* an actual armed attack conducted by regular forces, "or its substantial involvement therein". *Id.*

[92] *Id.*

[93] Geoff Corn, *Hamdan, Lebanon, and the Emerging Category of Transnational Armed Conflict: Maybe, just Maybe, the Department of Defense Had it Right All Along*, at 57. Professor Corn readily admits that defining the proper threshold of when the armed conflict paradigm comes into existence is an extremely difficult issue to mark and certainly not a settled issue. Moreover, Professor Corn would now add to this requirement an analysis of the Rules Of Use of force, to distinguish armed conflict from humanitarian missions. According to Professor Corn, when ROE changes from a conduct based standard (i.e. force is only authorized in response to a conduct of a threatening nature) to a status based standard (i.e. force is authorized against groups upon distinction, i.e. designated as "combatants"), the threshold into armed conflict is met. This is based on personal conversations with Assistant Professor Corn.

[94] Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (September 18, 2001) (enacted).

[95] *Id.* at Section 2(a).

[96] *Id.* at Section 2(b)(1).

[97] The opinion is a plurality opinion written by Justice O'Connor.

[98] *Hamdan, supra* note 60 at 2775.

[99] *Id.* at 2759.

[100] GPW, art. 3, *supra* note 36.

[101] MCA, *supra* note 71.

[102] *See* KSM transcript, *supra* note 78.

[103] Justice Jackson, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (concurring opinion) [hereinafter Steel Seizure Case]. *See also infra,* text accompanying notes 232-245.

[104] John Yoo, *The Changing Laws Of War: Do We Need A New Legal Regime After September 11?: Transferring Terrorists*, 79 Notre Dame L. Rev. 1183, 1185 (2004).

[105] Kolb, *supra* note 22.

[106] JACK L. GOLDSMITH AND ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW , 23 (2005).

[107] U.S. Department Of State, Fact Sheet, Bureau of Intelligence and Research, Washington, DC, February 15, 2007.

[108] SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER, 21 (1996).

[109] Steven Pinker, statement made by him on March 5, 2007, while teaching Thinking About Taboo Subjects at Harvard University. Notes on files with author.

[110] THOMAS BUERGENTHAL, DINAH SHELTON, DAVID STEWART, INTERNATIONAL HUMAN RIGHTS, IN A NUTSHELL, (3rd Ed., 2002).

[111] STEINER, *supra* note 25 at 141, *quoting* Louis Henkin, *International Law: Politics, Values and Functions*, 216 Collected Courses of The Hague Law Academy of International Droit (Vol. IV, 1989), at 215.

[112] Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), UN Doc. A/810, at 71 (1948). (hereinafter Universal Declaration of Human Rights). Citation found in STEINER, *supra* note 25 at 1470.

[113] International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, entered into force 23 March 1976, G.A. Res. 2200A (XXI), UN Doc. A/6316 (1966), 999 UNTS 171, *reprinted in* 6 ILM 368 (1967). 144 states parties. Citation found in STEINER, *supra* note 25 at 1468. [Hereinafter ICCPR].

[114] STEINER, *supra* note 25 at 136.

[115] To keep the paper in proper focus, the ICESCR will not be discussed in substance.

[116] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment
or Punishment, *opened for signature* December 10, 1984, G.A. Res. 39/46, 39 UN GAOR Supp.

No. 51, at 197, UN Doc. A/RES/39/708 (1984), *entered into force* June 26, 1987, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture or CAT].

[117] Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 Dec. 1948, entered into force 12 Jan. 1951, 78 UNTS 277. 130 states parties. Citation obtained from STEINER, *supra* note 25 at 1468.

[118] International Convention for the Elimination of All Forms of Racial Discrimination, adopted 21 Dec. 1965, entered into force 4 Jan. 1969, 660 UNTS 195, reprinted in 5 ILM 352 (1966). 155 states parties. Citation obtained from STEINER, *supra* note 25 at 1468.

[119] Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 Dec. 1979, entered into force 3 Sept. 1981, G.A. Res. 34/180, 34 UNGAOR, Supp. (No. 46), UN Doc. A/34/46, at 193 (1979), reprinted in 19 ILM 33 (1980). 165 states parties. STEINER, *supra* note 25 at 1468.

[120] Protocol Relating to the Status of Refugees, opened for signature 31 Jan. 1967, entered into force 4 Oct. 1967, 606 UNS 267, reprinted in 6 ILM 78 (1967). 134 states are parties. Citation obtained from STEINER, *supra* note 25 at 1468.

[121] *See* European Social Charter, signed 18 Oct. 1961 (Revised), adopted 3 May 1996, entered into force 3 July 1999, ETS 163. 5 states parties; Charter of the Organization of American States, signed 1948, entered into force 13 De. 1951, amended 1967, 1985, 14 Dec. 1992, 10 June 1993; Charter on Human and Peoples' Rights [African], adopted 27 June 1981, entered into force 21 Oct. 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 ILM 58 (1982), 7 HRLJ 403 (1986). 53 states parties; Charter of the Organization of African Unity, adopted 25 May 1963, 47 UNTS 39, reprinted in 2 ILM 766 (1963). 53 states parties. Citations obtained from STEINER, *supra* note 25 at 1470-72.

[122] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, signed 26 Nov. 1987, entered into force 1 Feb. 1989, Doc. No. H(87)4 1987, ETS 126, reprinted in 27 ILM 1152 (1988); 9 HRLJ 359 (1988). 40 states parties; European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 4 Nov. 1950, entered into force 3 Sept. 1953, 213 UNTS 221, ETS 5. 41 states parties; American Convention on Human Rights (Pact of San Jose´), signed 22 Nov. 1969, entered into force 18 July 1978, OASTS 36, O.A.S. Off. Rec. OEA/Ser.L/V/11.23, doc.21, rev.6 (1979), reprinted in 9 ILM 673 (1970). 25 states parties; Inter-American Convention to Prevent and Punish Torture, signed 9 Dec. 1985, entered into force 28 Feb. 1987, OASTS 67, GA Doc. OEA/Ser.P,AG/doc.2023/85 rev. I (1986) pp. 46-54, reprinted in 25 ILM 519 (1986). 15 states parties; Convention Governing the Specific Aspects of the Refugee Problems in Africa, adopted 10 Sept. 1969, entered into force 20 June 1974, 1001 UNTS 45, reprinted in 8 11-M 1288 (1969). 44 states parties. Citations obtained from Steiner, *supra* note 25 at 1470-72.

[123] American Declaration of the Rights and Duties of Man, signed 2 May 1948, OEA/Ser.L./V/11.71, at 17 (1988). Citation obtained from STEINER, *supra* note 25 at 1470-72.

[124] Too many to cite, *see* STEINER, *supra* note 25.

[125] *Id.*

[126] Regional agreements and other more attenuated areas of the law will be excluded to keep the focus of this paper at its intended narrow focus.

[127] Universal Declaration of Human Rights.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] ICCPR *supra* note 113, at Article 2, paragraph 1 (emphasis added).

[132] Declaration to the ICCPR, available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/da936c49ed8a9a8f8025655c005281cf?Opendocument (accessed on April 10, 2007).

[133] Article 7, ICCPR states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." *Id.*

[134] Ratification, ICCPR, Paragraph I (3).

[135] ICCPR, *supra* note 113, at Article 9(1).

[136] *Id.* at Article 9(2)-9(5).

[137] *See* Melysa H. Sperber, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces*, 40 Am. Crim. L. Rev. 159, 186 (2003) (admitting to the poor fit of the human rights law in this area but arguing that human rights law is nonetheless appropriate law to apply in situations when the individual is a citizen of the U.S. fighting overseas for the enemy).

[138] ICCPR *supra* note 113, Article 4.

[139] *See id.*

[140] *Id.*

[141] MARC J. BOSSUTY, GUIDE TO THE "TRAVAUX PREPARATORIES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 122 (Martinus Nijhoff Publishers, 1987)

[142] CAT *supra* note 116, Article 16.

[143] *Id.*

[144] *Id.*, Article 3. Specifically, Article 3 states: "1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." *Id.*

[145] *Id.*

[146] U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment, para. II(2), Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990) [hereinafter US CAT RUD's]. This definition was already in place and was being used by the United States to enforce its obligations under the 1951 Convention relating to the Status of Refugees (Refugee Convention). The U.S. enforces Article 33 of the Refugee Convention through section 241(b)(3)

of the INA. *See* United States, *Initial Report of the United States of America to the Committee Against Torture*, submitted to the U.N. Comm. Against Torture, U.N. Doc. CAT/C/28/Add.5, paragraph 6 (Feb. 9, 2000) [hereinafter *U.S. Initial Report to CAT Committee*]. Available at:
HYPERLINK "http://www.state.gov/www/global/human_rights/torture_articles.html"

[147] Added Pub. L. 103-236, title V, Sec. 506(a), Apr. 30, 1994, 108 Stat. 463; amended Pub. L. 103-415, Sec. 1(k), Oct. 25, 1994, 108 Stat. 4301; Pub. L. 103-429, Sec. 2(2), Oct. 31, 1994, 108 Stat. 4377.

[148] *Id.*

[149] Satterthwaite, *Render Meaningless*, *supra* note 20 at 63, *quoting* David Krtzmer, *Targeted Killing of Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?* 16 EUR.J.INTL L. 171 (2005).

[150] *See* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 A.J.I.J. 1 (January, 2004).

[151] *Id.* at 65.

[152] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 130 [hereinafter *Construction of Wall Opinion*].

[153] *Id.* at ¶ 160.

[154] *Id.* at 65-66.

[155] Satterthwaite, *Render Meaningless*, *supra* note 20 at 65.

[156] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. Rep. 226 [hereinafter, *Threat of Nuclear Weapons Advisory Opinion*].

[157] *Id.* at ¶ 25 (emphasis added).

[158] *Construction of Wall Opinion , supra* note 152.

[159] H.L.A. Hart, The Concept of Law, 100-110 (1961).

[160] *Threat of Nuclear Weapons Advisory Opinion*, *supra* note 156 at ¶ 30.

[161] *Id.* at ¶ 35.

[162] *Id.* at ¶ 52.

[163] *Id.* at ¶ 75.

[164] *Id.* at ¶ 78.

[165] *Id.* at ¶ 86.

[166] *Id.*

[167] *Id.* at ¶ 96.

[168] *Id.* at ¶98

[169] *Construction of Wall Opinion*, *supra* note 152 p. 6-7.

[170] *See id.* at ¶ 138.

[171] *Id. at* p. 7.

[172] *Id.* at ¶ 106.

[173] *Id.* at ¶ 124.

[174] *Id.* at ¶ 139.

[175] ICCPR, Article 9, *see supra* note 113.

[176] The court did discuss the *Nicaragua v. United States* case in two aspects, however. One for the proposition that the U.N. Charter establishes the customary international law of when force may be used, referring to Article 2(4) of the U.N. Charter; and two, that there is an international obligation for a state to end a wrongful act. *See Construction of Wall Opinion*, *supra* note 152, ¶¶ 87, 150.

[177] *See* Ariel Zemach, *Taking War Seriously: Applying The Law Of War To Hostilities Within An Occupied Territory*, 38 Geo. Wash. Int'l Rev. 645, 688 (2006).

[178] *See id*. at 668-69.

[179] GLENNON, ONSTITUTIONAL DIPLOMACY, *supra* note 15 at 33 (1990).

[180] *See id.*

[181] *See* Restatement of the Law, Third, Foreign Relations Law of the United States § 102, Comment j.

[182] Kolb, *supra* note 22.

[183] Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 A.J.I.L. 1 (January, 2004).

[184] *Id.* at 22.

[185] One exception to the domestic laws being ones that implement the laws of war is 18 U.S.C. §§ 2340A, 2340, which prohibits torture outside of the United States and was intended to implement not the laws of war but the requirement of Article 5 of the Convention Against Torture, which requires the signatories to pass criminal laws prohibiting torture and establishing jurisdiction over the crime of torture. *See* CAT, Article 5. *See also* John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, Harvard Journal on Legislation, Vol. 43 at 496-501, explaining that the statute, referred to as the "torture statute," was passed with the opinion that torture was not an issue within the United States and thus the purpose of the statute was simply to strengthen the prohibition of torture within other countries.

[186] *See* MCA, *supra* note 71.

[187] 18 U.S.C. § 2441.

[188] 18 U.S.C. § 2340A. *See also* 18 U.S.C. § 2340 for definitions.

[189] *See* The Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and pandemic Influenza Act 2006 (P.L. 109-148); *see also* National Defense Authorization Act for FY2006 (P.L. 109-163) [hereinafter Detainee Treatment Act or DTA].

[190] *See* UCMJ, *supra* note 69.

[191] MCA *supra* note 71 at § 6(a)(2).

[192] During the GWOT, only the initial invasions into Afghanistan and Iraq qualified as an international armed conflict between two High Contracting Parties. Initially there was much legal debate within the U.S. administration concerning whether the invasion of Afghanistan qualified as an international armed conflict given that the Taliban exhibited many attributes of a failed state. The U.S. administration ended up categorically denying prisoner of war status to the Taliban under the Third Geneva Convention, based on evidence that the Taliban did not fulfill the requirements under Article 4 of the Third Geneva Convention to qualify as prisoners of war because they were not properly commanded, did not have fixed uniforms and did not abide by the laws of war. *See* John Yoo, Deputy Assistant Attorney General, Memorandum For William J. Haynes II, General Counsel, Department of Defense, Jan. 9, 2002, *reprinted in* GREENBERG/DRATEL , *supra* note 62 at 39; *See also* Memorandum For Chairman Of The Joint Chiefs Of Staff, Re: Status of Taliban and al Qaeda, Jan. 19, 2002, *reprinted in* GREENBERG/DRATEL, *supra* note 62 at 80; *See also* Jay S. Bybee, Asst. Attny Gen., Memo For Alberto R. Gonzales, Counsel to the President, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees, *reprinted in* GREENBERG/DRATEL, *supra* note 62 at 81; *See also* Alberto R. Gonzales, Decision RE Application Of The Geneva Convention On Prisoners Of War To The Conflict With Al Qaeda And The Taliban, Jan. 25, 2002, *reprinted in* GREENBERG/DRATEL, *supra* note 62 at 118; *See also* President George Bush, Memo For The V.P., Re: Humane Treatment of al Qaeda and Taliban Detainees, Feb. 7, 2002, *reprinted in* GREENBERG/DRATEL, *supra* note 62 at 134. Regardless of what theory Afghanistan fell under, international armed conflict ended, if it ever existed, after only a few months at least when the Provisional government was established December 2001, under the Bonn Agreement. *See* Tanya Domenica Bosi, *U.N. Report: Post-Conflict Reconstruction: The United Nations' Involvement In Afghanistan*, 19 N.Y.L. Sch. J. Hum. Rts. 819 (2003). Similarly, international armed conflict in Iraq was also relatively short period of time, ending upon the United Nations Resolution proclaiming the U.S. and the United Kingdom as occupying powers. *See* Ariel Zemach, *Taking War Seriously: Applying The Law Of War To Hostilities Within An Occupied Territory*, 38 Geo. Wash. Int'l L. Rev. 645, 654 (2006).

[193] This is the standard during armed conflict. The law enforcement standard is discussed *infra* note 259 and accompanying text.

[194] *See* Condoleezza Rice statement, *supra* note 1.

[195] *See* THOMAS M. FRANCK AND MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW, 340 (2nd ed., 1993).

[196] U.S. CONST. art. II, § 1, cl. 1.

[197] U.S. CONST. art. II, § 2, cl. 1.

[198] *See supra* text and cite accompanying note 103. *See also infra* text accompanying notes 232-245, discussing the need for Congressional approval to violate international law.

[199] *Hamdi v. Rumsfeld*, *supra* note 54 at 531.

[200] *See Ker v. Illinois*, 119 U.S. 436 (1886); *see also Frisbie v. Collins*, 342 U.S. 519 (1952). The two cases together are known as the *Ker-Frisbie* rule. *See* FRANCK AND GLENNON, *supra* note 195 at 341. *See also U.S. v. Alvarez-Machain*, 504 U.S. 655 (1992). *But see* U.S. v. Toscanio, 500 F.2d 267 (2d. Cir.

1974), creating a due process exception to the *Ker-Frisbee* rule when the government conduct shocks the conscience of the court.

[201] *See Hamdi v. Rumsfeld, supra* note 54 at 592.

[202] *See* GPW, *supra* note 36.

[203] Although the CAT applies in both non-international as well as international armed conflicts.

[204] *See also* Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Rendition*," 85 (Oct. 2004), [hereinafter *Torture by Proxy*], *available at* http://www.nyuhr.org/docs/TortureByProxy.pdf., calling it "a circumvention of the absolute prohibition against torture and *refoulement* to torture . . . ." *Id. See also* Satterthwaite, *Rendered Meaningless, supra* note 20 at 36, stating in reference to assurances: "the U.S. is again seeking to exploit an area of human rights law that has been less than fully developed." *Id.*

[205] *Torture by Proxy, supra* note 20, at 38-40 (quoting from 2003 & 2004 country reports by Department of State describing credible and alleged abuse including in many cases torture) (citations omitted).

[206] In reference to POW's, this appears to be a higher standard than the CAT.

[207] GPW, Article 12, *supra* note 36.

[208] GC, Article 49. The Fourth Convention "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." *Id*. at Article 2. *See also* Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, ILSA Quarterly, Vol. 15: Issue 3, 14-16 (March 2007).

[209] *See* Fourth Geneva Convention, Article 147 that defines grave breaches and includes in its definition the "deportation or transfer or unlawful confinement of a protected person . . . ." *Id.*

[210] 18 U.S.C. § 2441(a) – (c).

[211] *See* Draft Memorandum For Alberto R. Gonzales, RE: *Permissibility of Relocating Certain "Protected Persons" from Occupied Iraq*, DRAFT 3/19/04, by Jack I. Goldsmith III, Assistant Attorney General, *reprinted in* GREENBERG & DRATEL, TORTURE PAPERS, *supra* note 62, at 367-380.

[212] At the time, Jack Goldsmith III was an Assistant Attorney General, Office of the Legal Counsel. He is now a Professor at Harvard Law School and co-author with Eric A. Posner of the book "The limits of international law," Oxford University Press (2005).

[213] *See* Leila Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, ILSA Quarterly, Vol. 15: Issue 3, at 9 (March 2007).

[214] GPW, *supra* note 36 at Art. 17.

[215] *Id.* at Art. 13.

[216] *Id.* at Art. 14.

[217] *Id.* at Art. 17.

[218] *Hamdan*, 126 S. Ct. *supra* note 60, at 2796-97.

[219] Common Article 3, GPW, *supra* note 36.

[220] *Id.* .

[221] DTA, *supra* note 189, at § 1003(a).

[222] *Id.* at § 1003(c).

[223] MCA *supra* note 71, at § 6(a)(2). The term "grave breach" as used in conjunction with Common Article 3 is a misnomer. There are no "grave breaches" of Common Article 3 in the sense that to have a grave breach under Article 130 of the Third Geneva Convention, there must be international armed conflict under Article 2. The term "grave" in reference to Common Article 3 as used in the MCA is more accurately thought of as "serious." The insight for this information was provided by Professor Geoff Corn, South Texas School of Law.

[224] MCA *supra* note 71, at § 6(d)(1)(A-B).

[225] United States Reservations, Understandings, and Declarations Upon Ratification, *included in U.S. Initial Report to CAT Committee*, submitted to the U.N. Comm. Against Torture, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) [hereinafter *U.S. Initial Report to CAT Committee*].

[226] *See* MCA, *supra* note 71 at § 6(c)(2).

[227] Second Periodic Report of the United States of America to the Committee Against Torture, Submitted by the United States of America to the Committee Against Torture, May 6, 2005, Annex 4(I)(1), available at http://www.state.gov/g/drl/rls/45738.htm.

[228] Michael John Garcia, *Interrogation of Detainees: Overview of the McCain Amendment*, CRS Report for Congress, Jan. 24, 2006.

[229] *Id.* (citations omitted).

[230] *Hamdan*, *supra* note 60 at 2797, *quoting* from Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (2003).

[231] *See* Geoff Corn, *Significance of Additional Protocol II*, *supra* note 35.

[232] *Steel Seizure Case*, *supra* note 103.

[233] *See supra* note 196.

[234] *See supra* note 197.

[235] GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 15.

[236] *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

[237] *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) [hereinafter *The Charming Betsy]*.

[238] *Brown v. U.S.*, *supra* note 16. *See also* GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 15.

[239] *Little v. Barreme*, *supra* note 236, at Prior History, 3-4. *See also* THOMAS M. FRANCK AND MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW, *supra* note 195 at 2.

[240] *See* GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 15 at 3-8.

[241] *The Charming Betsy*, *supra* note 237, at 118. *See also* GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 15 at 232.

[242] *See* GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 15 at 232, n. 27 and accompanying text.

[243] *Id.* at 232.

[244] *Hamdi*, *supra* note 54 at 533.

[245] *Id.* at 534.

[246] CAT, *supra* note 116, at Article 3(2).

[247] *See id.*

[248] *See* Satterthwaite, *Rendered Meaningless*, *supra* note 20 at 42-48.
See also Torture by Proxy, *supra* note 204 at 37-40.

[249] Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (Oct. 21, 1998) [hereinafter FARRA].

[250] Satterthwaite, *Rendered Meaningless*, *supra* note 20 at footnote 268, quoting the FARRA, *supra* note 249 at § 1242(a).

[251] Yoo, *supra* note 104, at 1231.

[252] *Steel Seizure Case*, *supra* note 103.

[253] Satterthwaite, *Rendered Meaningless*, *supra* note 20; *see also Torture by Proxy*, *supra* note 204; *See also* Amnesty International, Torture and secret detention: *Testimony of the 'disappeared' in the 'war on terror'*, AI Index: AMR 51/108/2005 (August 2005), *available at* *http://web.amnesty.org/library/index/engamr511082005*; *See also* Trevor Paglen and A.C. Thompson, TORTURE TAXI (Melville House Publishing, 2006). *See also* Council of Europe's Parliamentary Assembly Committee on Legal Affairs and Human Rights, Rapporteur Dick Marty, *Alleged Secret Detentions in Council of Europe Member States, Information Memorandum II*,, (Jan. 2006), *available at* http://assembly.coe.int/Main.asp?link=/CommitteeDocs/2006/20060124_Jdoc032006_E.htm; *See also* Council Of Europe Parliament Assembly, Rapporteur Mr. Dick Marty, *Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States, Draft Report- Part II*, Comm. On Legal Aff. & Hum. Rts., (June 7, 2006), [hereinafter *Council of Europe June 2006 Report*], *available at* http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf

[254] Brooks, *supra* note 90 at 21.

[255] *See* Council of Europe June 2006 Report, *supra* note 8 at 38; *See also* Boston Globe, Wednesday, January 31, 2007, p. 38-39; *See also* CBS News, Rome June 24, 2005, *available at* http://www.cbsnews.com/stories/2005/06/24/world/main703982.shtml.

[256] *See* Collen Barry, *Alleged agents of CIA charged, Judge Enables Trial In Italy*, ASSOCIATED PRESS, printed in BOSTON GLOBE, Feb. 17, 2007.

[257] President George Speech, *supra* note 2.

[258] *Id.*.

[259] *Restatement (Third) of the Foreign Relations Law of the United States* § 433 (1987).

[260] *See* John Sifton, Human Rights Staff Attorney, interview of John Sifton by author on January 16, 2007, notes on file with author.

[261] U.S. State Department Country Reports On Human Rights Practices 2006 (China), found at: http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm.

[262] *Id.*

[263] Washingtonpost.com, by Edward Cody, p. A16 found at: http://www.washingtonpost.com/wp-dyn/content/article/2007/03/08/AR2007030800747.html?nav=rss_print/asection

[264] ALAN M. DERSHOWITZ, RIGHTS FROM WRONGS, A SECULAR THEORY OF THE ORIGINS OF RIGHTS, 123 (2004).

[265] Lisa Butler and Reuben Granich, *The Search For Argentina's Disappeared*, Human Rights Center, DNA & Human Rights Report, available at http://www.hrcberkeley.org/dna/printreport_argentina.html.

[266] *See* Human Rights News, February 27, 2003, available at http://hrw.org/english/docs/2003/02/27/algeri5335.htm. *See also* Amnesty International Report, *Zimbabwe: Fear for safety /Abduction/ 'Disappearances' / Torture/Ill-treatment*, available at http://web.amnesty.org/library/Index/ENGAFR460282002?open&of=ENG-ZWE.

[267] 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, reprinted in GREENBERG/DRATEL, *supra* note 62 at 383 – 404.

[268] *Id.* at paragraph 4 of the report, *reprinted in* GREENBERG/DRATEL, *supra* note 62 at 387.

[269] President George W. Bush, President Bush's Sept. 6, 2006 REMARKS FROM THE EAST ROOM OF THE WHITE HOUSE, as transcribed by Federal News Service, *available at http://www.npr.org/templates/story/story.php?storyId=5777480*.

[270] *Id.*

[271] Geoff Corn, *Hamdan, Fundamental Fairness, and the Significance of Additional Protocol II*, Army Lawyer, 8 (August 2006) (Stating that procedural legitimacy remains the *sine qua non* of compliance with the principle of humane treatment).

[272] THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 376 (First Ed.) (Making the recommendation after stating: "In short, the United States has to help defeat an ideology, not just a group of people, and we must do so under difficult circumstances. How can the United States and its friends help moderate Muslims combat the extremist ideas?"). *Id.*

[273] The quote above from the 9/11 Commission went on to state: "To Muslim parents, terrorists like Bin Laden have nothing to offer their children but visions of violence and death. America and its friends have crucial advantage—we can offer these parents a vision that might give their children a better future." *Id.*