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# Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions

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# POST-9/11 OVERREACTION AND FALLACIES REGARDING WAR AND DEFENSE, GUANTANAMO, THE STATUS OF PERSONS, TREATMENT, JUDICIAL REVIEW OF DETENTION, AND DUE PROCESS IN MILITARY COMMISSIONS

*Jordan J. Paust\**

INTRODUCTION .....	1335
I. SOME ERRONEOUS POST-9/11 CLAIMS .....	1336
A. <i>9/11's Supposed Radical Transformation of Legal         Restraints</i> .....	1336
B. <i>Supposed "War" Against al Qaeda and International         "Terrorism"</i> .....	1340
C. <i>Supposed Permissibility of Preemptive Self-Defense</i> .....	1343
D. <i>Supposed "Legal No-Man's Lands"</i> .....	1346
E. <i>Supposed Unprotected Persons</i> .....	1350
1. The Reach of Human Rights Protections .....	1350
2. The Reach of Geneva Law Protections .....	1351
3. The Prohibition of Secret Arrests and Detentions .....	1352
F. <i>Supposed Legality of Torture or Cruel, Inhumane         Treatment</i> .....	1356
II. ADDITIONAL ERRORS AND CONCERNS .....	1359
A. <i>Required Judicial Review of the Propriety of Detention</i> .....	1359
B. <i>Present DOD Rules of Procedure for Military         Commissions</i> .....	1361
CONCLUSION .....	1364

## INTRODUCTION

The September 11, 2001, attacks and several actions of the U.S. Administration have sparked debate and litigation with respect to various matters of great significance under international, constitutional,

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and federal statutory law. Since international law is part of the law of the United States, has constitutional moorings, and can influence the content of constitutional and statutory norms, some of the legal issues are manifestly intertwined. Among them are issues addressed in the following Article that are organized in two Parts, one addressing certain erroneous post-9/11 claims, and the other addressing certain additional errors and matters of great concern. An overarching focus involves attention to relevant international law and some of the consequences that might follow if certain changes in international law occur or if various misconceptions and violations continue. Some of the consequences can bring dishonor and pose significant threats to our democracy and to venerable American values.

## I. SOME ERRONEOUS POST-9/11 CLAIMS

### A. *9/11's Supposed Radical Transformation of Legal Restraints*

Did the dramatic, coordinated attacks on the World Trade Center and the Pentagon on September 11, 2001, require a radical transformation of legal restraints with respect to U.S. responses to terrorism? Film clips of airplanes crashing into the World Trade Center and the subsequent burning and collapse of the towers, fleeing survivors, faces of living victims, and pictures of some of those who perished were repeated on television for weeks. Because film was available and utilized repeatedly by the media, for some it seemed that the attacks were occurring again and again, in our homes, and in ways that unified the country in shock, sympathy, and perhaps anger. The use of passenger airplanes as bombs against skyscrapers seemed new and left many feeling vulnerable. Upon reflection, the media's repetition of the horrific destruction of symbolic skyscrapers in New York City may have been a primary contributing factor to the nation's sense of insecurity—and for some, may have contributed even to an intense anxiety or a sense of terror. It is not unusual that terrorists plan or hope for media contributions to their goals and even overreaction by victim populations and their governments.<sup>1</sup>

Upon reflection, it is most unfortunate, but in human history the dramatic 9/11 attacks were in many respects not unprecedented. Objective analysis also reveals that they were not transforming events requiring radical changes in law. Planned and unlawful human violence involving the loss of several thousand lives, although clearly serious

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<sup>1</sup> See, e.g., LEGAL ASPECTS OF INTERNATIONAL TERRORISM 407, 415–16, 437–40, 459, 532, 590–91, 637 (Alona E. Evans & John F. Murphy eds., 1978); Symposium, *Terrorism and the Media*, 53 IND. L.J. 619 (1978).

and threatening, is not new and, in comparison to many other unacceptable murderous assaults by nonstate actors that have occurred just in the last two decades or in comparison to other crimes against humanity,<sup>2</sup> the loss of even several thousand lives is relatively small.

Terrorism also is not new,<sup>3</sup> nor is the use of terrorist tactics by clandestine state and nonstate perpetrators against the U.S. government and our nationals here<sup>4</sup> and abroad. Even terrorist attacks on the United States and our nationals attributed to al Qaeda were not new. For example, Usama bin Laden and fourteen of his followers had been indicted (some in absentia) for their participation in terrorist attacks on the U.S. embassies and our nationals and foreign nationals in Kenya and Tanzania in August 1998, which resulted in more than 250 deaths and the injury of some 5500 persons.<sup>5</sup> Some of the perpetrators who had been in custody were subsequently convicted.<sup>6</sup> There were also previous al Qaeda attacks in the United States on the World Trade Center in 1993, attacks in Saudi Arabia on the Riyadh training center and the Khobar Towers barracks in 1995 and 1996, and the attack on the *U.S.S. Cole* in 2000, among others.

Attention to terrorism during warfare also is not new. In fact, twentieth century laws of war addressing permissible conduct during actual armed conflicts, the status and rights of various persons, treatment and interrogation, and other rights, duties and competencies were formed partly with reference and in response to terrorism,<sup>7</sup> and in contexts involving threats to "national security" at least as significant and human deaths and injuries at least as numerous and horrific

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2 See generally JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 857-915 (2d ed. 2000) (concerning various contexts in which more extensive crimes against humanity have taken place, and the nature and types of crimes against humanity).

3 See, e.g., *Lake Erie & W. Ry. v. Bailey*, 61 F. 683, 685 (S.D. Ohio 1882); *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 60 (1977) (stating that "terrorist activities . . . of individuals or of groups . . . are in clear disregard of human rights"); 1 Op. Att'y Gen. 52 (1794) (regarding terrorist publications); INTERNATIONAL TERRORISM AND POLITICAL CRIMES (M. Cherif Bassiouni ed., 1975); LEGAL ASPECTS OF INTERNATIONAL TERRORISM, *supra* note 1 *passim*; PAUST ET AL., *supra* note 2, at 995-1017; Symposium, *Terrorism and the Law*, 19 CONN. L. REV. 697 (1987).

4 The 1995 Oklahoma City bombing is one prominent and relatively recent example. See Daniel M. Filler, *Values We Can Afford—Protecting Constitutional Rights in an Age of Terrorism: A Response to Crona and Richardson*, 21 OKLA. CITY U. L. REV. 409 (1996).

5 See *United States v. bin Laden*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000).

6 See, e.g., *United States v. bin Laden*, 156 F. Supp. 2d 359 (S.D.N.Y. 2001); *United States v. bin Laden*, No. S(7)98 Cr. 1023(LBS), 2001 U.S. Dist. LEXIS 15484, at \*1-2 (S.D.N.Y. Oct. 2, 2001).

7 See, e.g., Jordan J. Paust, *Terrorism and the International Law of War*, 64 MIL. L. REV. 1, 11-17, 32, 36 (1974).

as the 9/11 attacks. A few examples of express proscription of terrorism in time of war include the appearance of "systematic terrorism" among the list of customary war crimes adopted by the Responsibilities Commission of the Paris Peace Conference in 1919<sup>8</sup> and the prohibition of terrorism in Article 33 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.<sup>9</sup> Articles 5, 42, and 78 of the Geneva Convention also allow the detention of certain persons who pose security threats during armed conflicts, like those in Afghanistan and Iraq, if detention of particular individuals without trial is necessary and if they benefit from judicial review of the propriety of their detention as required by the Geneva Convention and human rights law.<sup>10</sup> Addressing the 9/11 attacks and relevant laws of war, the Legal Adviser to the U.S. Department of State has written that the terrorist attacks "challenged us to uphold our principles at a time of great fear and anger,"<sup>11</sup> adding: "This is not, however, extraordinary . . . [and] the law of armed conflict . . . has emerged in a strong position, indeed without need for revision or amendment."<sup>12</sup>

Similarly, and more generally, there is no objective and policy-serving reason to conclude that other fundamental legal restraints on governmental responses to nonstate actor violence and terrorism must be abandoned. For example, human rights and other constitutional precepts and restraints<sup>13</sup> were developed and have survived also in times of significant threats to national security, nonstate actor violence, and warfare. Post 9/11 Chicken Little visions of supposed necessity for radical transformations of legal norms are actually out of focus and unacceptable. Recognized dangers of overreaction also are

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8 See PAUST ET AL., *supra* note 2, at 32.

9 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 33, 6 U.S.T. 3516, 3538, 75 U.N.T.S. 287, 308 [hereinafter GC]. Concerning attention to terrorism in connection with the reach of the Geneva Civilian Convention during actual war, see INT'L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 31, 225–26, 594 (Jean S. Pictet ed., 1958) [hereinafter GC COMMENTARY].

10 See, e.g., Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 507–14 (2003); see also *infra* Part I.E.

11 William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 319 (2003).

12 *Id.*

13 Human rights have been viewed since the time of the Founding and Framers as relevant constitutional precepts and as useful aids for clarification of other constitutional norms. See, e.g., JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 193–359 (2d ed. 2003).

not new. As the Supreme Court affirmed in *Ex parte Milligan*,<sup>14</sup> in the context of a major civil war, and in opposition to presidential claims of necessity to detain persons allegedly posing threats to national security:

Time has proven the discernment of our ancestors. . . . Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. . . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence . . . .<sup>15</sup>

The Court also emphasized that precisely at such times “the President . . . is controlled by law, and has his appropriate sphere of duty, which is to execute . . . [and not violate] the laws,”<sup>16</sup> adding: “[b]y the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers.”<sup>17</sup> Clearly, the Executive branch has no powers *ex necessitate*<sup>18</sup> and

14 71 U.S. (4 Wall.) 2 (1866).

15 *Id.* at 120–21; *see also* *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1946) (Murphy, J., concurring) (“‘The Constitution of the United States is law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.’”) (quoting *Milligan*, 71 U.S. (4 Wall.) at 120–21).

16 *Milligan*, 71 U.S. (4 Wall.) at 121; *see also* U.S. CONST. art. II, § 3 (stating “he shall take Care that the Laws be faithfully executed,” thus, there is simply no discretion to violate the law); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 612–13 (1838) (noting that whatever discretion the President may have concerning implementation of the law, the President can never lawfully violate the law); PAUST, *supra* note 13, at 169–73.

17 *Milligan*, 71 U.S. (4 Wall.) at 119.

18 *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–89 (1952); *see also id.* at 597, 604, 610, 614 (Frankfurter, J., concurring); *id.* at 629, 633 (Douglas, J., concurring); *id.* at 646, 649–50 (Jackson, J., concurring); *id.* at 655, 659–60 (Barton, J., concurring); *id.* at 660–62 (Clark, J., concurring); *supra* note 16; *infra* note 19.

no lawful authority to act outside the Constitution either here or abroad.<sup>19</sup>

*B. Supposed "War" Against al Qaeda and International "Terrorism"*

Claims have been made by the Bush Administration that the 9/11 attacks created a state of "war" between the United States and al Qaeda as such,<sup>20</sup> but the number of al Qaeda targetings and resultant losses of life, although substantial in some respects, did not mirror those normally occurring during war. More importantly, as noted in a previous essay, the United States cannot be at "war" with bin Laden and al Qaeda as such.<sup>21</sup> Bin Laden was never the leader or member of a state, nation, belligerent, or insurgent group (as those entities are understood in international law) that was at war with the United States. Armed attacks by nonstate, nonnation, nonbelligerent, noninsurgent actors like bin Laden and members of al Qaeda can trigger the right of selective and proportionate self-defense under the U.N. Charter against those directly involved in processes of armed attack,<sup>22</sup>

19 See, e.g., *Padilla v. Rumsfeld*, 352 F.3d 695, 713 (2d Cir. 2003) (explaining that "emergency powers" exist with Congress, not the President); PAUST, *supra* note 13, at 487–90, 497–503, 510. Justice Black's analysis in *Reid v. Covert*, 354 U.S. 1 (1957), is particularly apt: "[T]he United States is entirely a creature of the Constitution. . . . Its power and authority have no other source. It can only act [at home or abroad] in accordance with all the limitations imposed by the Constitution." *Id.* at 5–6; see also *supra* note 15; *infra* notes 51–52 and accompanying text.

20 See, e.g., Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, § 1(a), 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001) (containing President Bush's claim that the 9/11 attacks created "a state of armed conflict"); Taft, *supra* note 11, at 320 ("initiating an armed conflict").

21 Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345, 347–48 (2002); see also Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 326–28 (2003); Warren Richey, *Tribunals on Trial*, CHRISTIAN SCI. MONITOR, Dec. 14, 2001, at 1 (quoting Professor Leila Sadat explaining that "[t]he actions of Sept. 11 aren't war crimes, they are civilian crimes"). Recently, a Second Circuit panel stated that "whether a state of armed conflict exists against an enemy to which the laws of war apply is a political question." *Padilla*, 352 F.3d at 712. The statement is in error, since numerous cases have addressed legal issues raised with respect to whether, to whom, and how the laws of war and related international laws in time of war apply. See, e.g., Paust, *supra* note 10, at 518–22. *Eisentrager* addressed merely the issue whether sending our armed forces abroad was proper and even recognized that the judiciary will determine that a state of war exists and enemy alien status. *Johnson v. Eisentrager*, 339 U.S. 763 (1950); see also *Ex parte Quirin*, 317 U.S. 1, 27 (1942); *The Prize Cases*, 67 U.S. (2 Black) 635, 667 (1862) (noting that the "Court is bound to notice"); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

22 See, e.g., Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 534–36 (2002).

but even the use of military force by the United States merely against bin Laden and al Qaeda in foreign territory would not create a state of war between the United States and al Qaeda.<sup>23</sup>

The lowest level of warfare or armed conflict to which certain laws of war apply is an insurgency. For an insurgency to occur, the insurgent group would have to have the semblance of a government, an organized military force, control of significant portions of territory as their own, and their own relatively stable population or base of support within a broader population. Al Qaeda never met any of the criteria for insurgent status. Belligerent status under the laws of war is based on the same criteria for insurgent status plus outside recognition by one or more states either as a belligerent or a state.<sup>24</sup> Al Qaeda never met the criteria for insurgent status and certainly lacked any outside recognition as a belligerent, nation, or state. Indeed, al Qaeda is not known to have even purported to be or to have the characteristics of a state, nation, belligerent, or insurgent.

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23 See *War Powers, Libya, and State-Sponsored Terrorism: Hearing Before the House Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs*, 99th Cong. 6–7 (1986) (statement of Abraham D. Sofaer, Legal Advisor, U.S. Dep't of State), *quoted in* JORDAN J. PAUST ET AL., *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 975 (2000) [hereinafter Sofaer]. In a different context, Sofaer noted that

[t]he President may decide to deploy specially trained antiterrorist units in an effort to secure the release of the hostages or to capture the terrorists who perpetrated the act . . . [W]here no confrontation is expected between our units and forces of another state . . . such units can reasonably be distinguished from 'forces equipped for combat.' And their actions against terrorists differ greatly from the 'hostilities' contemplated by the [War Powers] Resolution.

*Id.*

24 Concerning well entrenched criteria regarding an insurgency or belligerency, see, for example, *The Prize Cases*, 67 U.S. (2 Black) 635, 666–67 (1862). Criteria include:

When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents.

*Id.* The Court also noted that, "Foreign nations acknowledge it as a war by a declaration of neutrality . . . recognizing hostilities as existing." *Id.* at 669; *see also* U.S. DEP'T OF THE ARMY, PAMPHLET 27-161-2, *reprinted in* 2 INT'L L. 27 (1962) ("If the rebellious side conducts its war by guerrilla tactics it seldom achieves the status of a belligerent because it does not hold territory and it has no semblance of a government."); U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE ¶ 11(a) (1956) [hereinafter FM 27-10] ("The customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents."); PAUST ET AL., *supra* note 2, at 809, 812–13, 815–16, 819, 831–32.



In view of the above, any conflict between the United States and al Qaeda as such cannot amount to war or trigger application of the laws of war.<sup>25</sup> Thus, outside the context of war to which the laws of war apply (as in Afghanistan and Iraq) members of al Qaeda who were not otherwise attached to the armed forces of a belligerent or state cannot be "combatants," much less "enemy" or so-called "unlawful" combatants, or prisoners of war as those terms and phrases are widely known in both international and U.S. constitutional law. Also, "war" or "armed conflict" and the laws of war could not have applied to the September 11 attacks by al Qaeda operatives, although the attacks undoubtedly triggered other international laws involving criminal responsibility and universal jurisdiction,<sup>26</sup> including crimes against humanity in connection with the targeting of the World Trade Center.

With respect to the September 11 attacks as such, any attempt to expand the concept of war beyond the present minimal levels of belligerency and insurgency would be extremely dangerous, because certain forms of nonstate actor violence and targetings that otherwise remain criminal could become legitimate and create an extended but unwanted form of combatant immunity.<sup>27</sup> Two such targetings would have been the September 11 attack on the Pentagon, a legitimate military target during armed conflict or war (except for the means used—a civil aircraft with passengers and crew), and the previous attack on the *U.S.S. Cole*, another legitimate military target during armed conflict or war. Similarly, a radical extension of the status of war and the laws of war to terrorist attacks by groups like al Qaeda (and there are or predictably will be many such groups engaged in social violence) would legitimize al Qaeda attacks on the President (as Commander in

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25 See also *Pan Am. Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1013–15 (2d Cir. 1974) (holding that the United States could not have been at war with the Popular Front for the Liberation of Palestine (PFLP), which had engaged in terrorist acts as a nonstate, nonbelligerent, noninsurgent actor). But see Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003) (taking a different approach to the question of whether the United States could be at war with al Qaeda). Similarly, common Article 1 of the Geneva Conventions assures that Geneva law is nonderogable, allows no general exception in case of claimed necessity (e.g., where such does not appear in a particular article such as GC Article 27), is not based on reciprocity, and permits no reprisals. See GC, *supra* note 9, arts. 1, 3, 6 U.S.T. at 3518–20, 75 U.N.T.S. at 288–90; GC COMMENTARY, *supra* note 9, at 15–17, 34, 37, 39, 47, 200–02, 204–05, 207, 228.

26 On the nature, history, and reach of universal jurisdiction to prosecute or allow civil sanctions against violations of customary international law, see, for example, PAUST ET AL., *supra* note 2, at 157–76; and PAUST, *supra* note 13, at 420–23, 432–41.

27 See, e.g., Paust, *supra* note 21, at 330–32 (discussing combatant immunity).

Chief) and various U.S. "military personnel and facilities" in the United States and abroad—attacks of special concern to President Bush, as noted in his November 13 Military Order.<sup>28</sup> Applying the status of war and the laws of war to armed violence below the level of an insurgency can have the unwanted consequence of legitimizing various other combatant acts and immunizing them from prosecution. No leader of any country other than the United States is known to have even suggested a need for such a radical change in the status of war, the threshold levels concerning applicability of the laws of war, and actual application of various laws of war (including an array of competencies, rights, immunities, and obligations thereunder) to terrorist targetings by groups like al Qaeda, and selective and proportionate responsive measures against such groups which do not involve the use of military force against the military of some other *de facto* or *de jure* state. It is not clear that even President Bush contemplated the corrupting consequences of such an extension of the status of war or the laws of war. Such consequences would not be in the overall and long-term interests of the United States or the international community.

An additional negative consequence might involve an enhanced status for terrorist perpetrators as they shift from international criminals to an "enemy" able to engage in protracted "war" with certain "victories" against the United States. From the perspective of religious extremists willing to kill for power and cowardly dupes who mistakenly believe they are on their way to heaven, the U.S. government's acceptance of conditions of "war" could become a useful organizing and justifying tool, an unwitting gift turned into a rallying cause.

### C. *Supposed Permissibility of Preemptive Self-Defense*

Does international law permit unilateral preemptive self-defense against perceived threats to a state's national security? I agree with most states and international law scholars that absent an actual armed attack on a state triggering the right of self-defense under Article 51 of the U.N. Charter and absent an authorization to use armed force from the U.N. Security Council or an appropriate regional organization, no state can lawfully engage in what some term preemptive self-defense, and that a change in international law to permit preemptive self-defense is not preferable from a policy oriented standpoint.<sup>29</sup> Im-

28 See sources cited *supra* note 20.

29 See, e.g., Paust, *supra* note 22, at 537–38 & n.15, 557 n.125. Moreover, under the U.N. Charter it is the Security Council that will decide whether a "threat" to peace

portantly, neither the use of armed force by the United States on October 7, 2001, in Afghanistan nor the use of armed force on March 20, 2003 in Iraq were justified as preemptive self-defense. Use of force against al Qaeda in Afghanistan was justified, and justifiable, as self-defense against ongoing nonstate actor armed attacks by members of al Qaeda on the United States and its nationals,<sup>30</sup> although use of force against the Taliban regime was highly problematic under international law.<sup>31</sup> Both the U.N. Security Council and NATO recognized the propriety of "self-defense" against such nonstate actor attacks,<sup>32</sup> but it should be recalled that permissible self-defense actions against nonstate actors within another state that are not directed at the state itself or its military or general population do not create a state of "war."<sup>33</sup> Use of force in Iraq was justified,<sup>34</sup> and justifiable, under U.N. Security Council resolutions authorizing armed force for various

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exists. See U.N. CHARTER art. 39. If one exists, the Council will also decide whether to authorize or mandate economic or other sanctions not involving the use of armed force. *Id.* arts. 41, 42. The Bush Doctrine contained in his National Security Strategy claims a broad unilateral authority unsupportable under international law to use military force against "rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction," "to preempt emerging threats" or an "imminent threat," and "to counter a sufficient threat to our national security." See NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), available at <http://www.whitehouse.gov/nsc/nss/pdf>. Of course, an emerging or imminent threat is not even an actual threat.

30 See, e.g., Paust, *supra* note 22, at 533–36. It is also legitimate to capture the attackers during self-defense actions, and such capture is not "arbitrary" detention or impermissible kidnapping in a foreign state. See, e.g., *id.* at 538–39; see also PAUST ET AL., *supra* note 23, at 479. However, when capture is made by an occupying power in occupied territory, laws of war preclude the transfer of non-prisoners of war out of occupied territory. See *infra* notes 119–20. The capture of Saddam Hussein in Iraq was most likely the capture of a prisoner of war.

31 See, e.g., Karl M. Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 YALE J. INT'L L. 341, 345 (2003); Paust, *supra* note 22, at 540–43.

32 Paust, *supra* note 22, at 535 & nn.4–5.

33 See Sofaer, *supra* note 23 (discussing the supposed "war" against al Qaeda and international "terrorism"); *supra* Part I.B. Yet, on October 7, 2001, the United States used massive military force against the Taliban regime in Afghanistan, thus triggering war and application of the laws of war during that armed conflict.

34 See, e.g., Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland, to the United Nations Addressed to the President of the Security Council (Mar. 21, 2003), U.N. Doc. S/2003/350, quoted in Mary Ellen O'Connell, *Addendum to Armed Force in Iraq: Issues of Legality*, ASIL INSIGHTS, Apr. 2003, at <http://www.asil.org/insights/insigh99a1.htm>; Letter from the Permanent Representative of the United States of America, to the United Nations Addressed to the President of the Security Council (Mar. 21, 2003), U.N. Doc. S/2003/351; Lord Goldsmith, U.K. Attorney-General, *Legal Basis for Use of Force Against Iraq* (Apr. 2003), at <http://www.pm.gov.uk/output/Page3287.asp>.

purposes (including return of Kuwaiti property and foreign persons detained in Iraq since 1990, restoration of peace and security in the region, and termination of the Iraqi regime's oppression of its people—the latter two general purposes providing some support even for regime change),<sup>35</sup> whether or not any weapons of mass destruction would actually be found in Iraq or any direct links with al Qaeda attacks existed (and presumably there were no such weapons or direct links).

Some supporters of preemptive self-defense have misunderstood and misused the early *Caroline* incident of 1837 to claim that, during the *Caroline* incident, the United States and United Kingdom recognized the permissibility of preemptive self-defense. Just the opposite is true. At no time in the debate concerning the incident was there any reference to the phrase “preemptive self-defense.” All discussions of international law focused on claims concerning the proper reach of self-defense, and the context was undeniably one involving a series of nonstate actor armed attacks on Canada by Canadian and U.S. insurgents operating within Canada and the United States.<sup>36</sup> If anything, the U.S. claim sought a far more limiting form of self-defense than is allowed today under Article 51 of the U.N. Charter, which in any event otherwise expressly and unavoidably limits the inherent right of self-defense to a circumstance of “armed attack.”<sup>37</sup> U.S. Secretary of

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35 See, e.g., Paust, *supra* note 22, at 549–50 & nn.77–78, 555–56 & nn. 121, 123 (addressing U.N. Security Council Resolutions 678 (1990), 687 (1991), 688 (1991), 949 (1994), and 1441 (2002)); see also S.C. Res. 686, U.N. SCOR, 48th Sess., 2978th mtg. pmbll., ¶¶ 1, 4, U.N. Doc. S/RES/686 (1991) (addressing the continued viability of S.C. Res. 678); Secretary-General Kofi Annan, Statement of Jan. 14, 1993, *reprinted in* IRAQ AND KUWAIT 741 (M. Weller ed., 1993) (remarking that the January 13, 1993 raids on Iraq by France, the United Kingdom, and the United States “received a mandate from the Security Council, according to Resolution 678 and the cause of the raid was the violation by Iraq of Resolution 687 concerning the cease-fire. So . . . this action was taken and conforms to the Resolutions . . . and conforms to the Charter of the United Nations”). But see Frederic L. Kirgis, *Security Council Resolution 1441 on Iraq's Final Opportunity to Comply with Disarmament Obligations*, ASIL INSIGHTS, Nov. 2002, at <http://www.asil.org/insights/insigh92.htm>; Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. (forthcoming 2004); O'Connell, *supra* note 34; Alain Pellet, *L'agression*, LE MONDE, Mar. 24, 2003, at 1.

36 See, e.g., Paust, *supra* note 23, at 535 & n.6; *infra* note 39 and accompanying text.

37 U.N. CHARTER art. 51 (recognizing the “inherent right of individual or collective self-defense if an armed attack occurs”) (emphasis added); see also Paust, *supra* note 22, at 534–35, 537–38. But see William C. Bradford, “The Duty to Defend Them”: A Natural Law Justification for the Bush Doctrine of Preventive War, 79 NOTRE DAME L. REV. 1365 (2004); Michael D. Ramsey, *Reinventing the Security Council: The U.N. as a Lockean System*, 79 NOTRE DAME L. REV. 1529 (2004).

State Daniel Webster would have limited the right of the United Kingdom (on behalf of Canada), even when it was experiencing ongoing armed attacks by nonstate actors, to a circumstance where the actual use of force in response to attacks presents a case “in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation,” and he had argued that the self-defense measure or “means” actually utilized—an attack by British forces on the ship *Caroline* while it was docked in U.S. waters—failed to meet such a test, presumably because the British forces could have waited until the vessel *Caroline* traveled into Canadian waters.<sup>38</sup> After the incident, but before Webster’s limiting claim, there had been additional armed attacks from U.S. territory,<sup>39</sup> but this did not lessen U.S. hostility to British claims concerning the self-defense measure taken in U.S. territory.

#### D. *Supposed “Legal No-Man’s Lands”*

Another misconception is that there are certain areas on earth that are so-called “legal no-man’s lands”<sup>40</sup> wherein human beings have no protections under relevant international law. Such a misconception might be confused with a notion that there are certain illegal no-legal-protection lands where actions take place in violation of international law. In any event, under international law no locale is immune from the reach of relevant international law. For example, at certain times after October 7, 2001, and perhaps still in certain places, the

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38 See Paust, *supra* note 22, at 535 n.6 (quoting Secretary of State Daniel Webster); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. INT’L L. 3, 45 (1999). Today, the limits that exist are contained in far more malleable general principles of reasonable necessity and proportionality considered in context plus any relevant international law precluding the choice of particular tactics or weapons. See also MYRES S. McDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 217 (1961). McDougal and Feliciano noted that standards of “necessity” and “proportionality” have sometimes been “cast in language so abstractly restrictive as almost, if read literally, to impose paralysis. Such is the clear import of the classical peroration of Secretary of State Webster in the *Caroline* case.” *Id.*

39 See KENNETH R. STEVENS, BORDER DIPLOMACY 12–13, 24–25, 35, 52, 62 (1989), cited in Abraham D. Sofaer, *On the Necessity of Preemption*, 14 EUR. J. INT’L L. 209 (2003).

40 See Jean Eaglesham, *Blair in Pledge on British Terror Suspects*, FIN. TIMES, Oct. 23, 2003, at 7; *Shame of Guantanamo*, S.F. CHRON., Oct. 16, 2003, at A22. Professor Harold Koh has recently used the phrases “extra-legal zones” and “zones and persons outside the law,” although I believe merely for rhetorical purposes and to decry the Administration’s failures to uphold the law. See Harold Hongju Koh, *Rights to Remember*, ECONOMIST, Nov. 1, 2003, at 24.

United States has been an occupying power in Afghanistan.<sup>41</sup> Similarly, the United States is an occupying power in Iraq.<sup>42</sup> Thus, in Afghanistan and Iraq various laws of war concerning rights, duties, and competencies applicable in occupied territory apply.<sup>43</sup> While involved in armed conflicts in Afghanistan and Iraq, various other laws of war also apply during the armed conflicts that have occurred or are occurring against the Taliban and Iraqi military forces under Saddam Hussein (even today within Iraq if former Iraqi military personnel are part of a belligerent or insurgent group engaged in armed hostilities inside Iraq).<sup>44</sup> Various other international laws, including human rights law, also apply in such territories and within the United States. Thus, neither Afghanistan nor Iraq are so-called "legal no-man's lands."

Under international law, which is part of the laws of the United States for several purposes,<sup>45</sup> persons detained or transferred on U.S. warships or military aircraft are within the equivalent of U.S. territory with respect to the application of relevant international and U.S. domestic laws and territorial jurisdiction.<sup>46</sup> Thus, persons on U.S. war-

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41 See, e.g., Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 24 n.67 (2001).

42 See, e.g., S.C. Res. 1438, U.N. SCOR, 58th Sess., 4761st mtg. pmb., U.N. Doc. S/RES/1483 (2003) (noting the letter from the Permanent Representatives of the United States and United Kingdom of May 8, 2003, "recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command"); Press Release, White House Office of the Press Secretary, President's Statement on U.N. Vote Lifting Sanctions on Iraq (May 22, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/iraq/20030522-11.html>; Jordan J. Paust, *The U.S. as Occupying Power Over Portions of Iraq and Special Responsibilities Under the Laws of War* (May 2003), available at [http://www.nimj.com/documents/occupation\(1\).doc](http://www.nimj.com/documents/occupation(1).doc).

43 For an overview of some of the applicable laws, see Paust, *supra* note 42.

44 For an overview of some of the general laws of war, see, for example, PAUST ET AL., *supra* note 2, at 803-54. Saddam Hussein was captured on December 13, 2003, but armed violence has not ended.

45 See, e.g., PAUST, *supra* note 13, at 7-12, 56-57 n.68, 60 n.92, 169-73, 415-16.

46 See, e.g., *id.* at 417, 427 n.17; PAUST ET AL., *supra* note 23, at 404 & n.2, 414, 744-51, 758. U.S. warships are also "territory" over which the United States exercises full sovereign power and jurisdiction, including the exercise of military justice and other enforcement competencies. Under international law, persons onboard are present in the "territory" of the United States. There should be no doubt, therefore, about the reach of the U.S. Constitution to restrain Executive actions on board U.S. warships and military aircraft. See PAUST, *supra* note 13, at 488, 494-95, 498 n.8, 510 n.102; *supra* note 21. The United States also exercises jurisdictional competencies over U.S. aircraft. See, e.g., 49 U.S.C. § 1301(38)(b) app. (2000) (discussing special aircraft jurisdiction). Once onboard a U.S. warship or military aircraft, persons transferred elsewhere who remain under the control of the U.S. military should retain relevant constitutional protections.

ships and aircraft are not in areas without legal protection. Especially relevant on such vessels and aircraft would be human rights law, the laws of war applicable while the United States is engaged in armed conflict in Afghanistan or Iraq, and even relevant constitutional protections.<sup>47</sup>

The U.S. military base at Guantanamo Bay, Cuba, is territory under the complete control of the United States and is territory within which various types of international law, including human rights<sup>48</sup> and relevant laws of war, apply. Guantanamo is territory specially occupied by the United States beyond the contemplated purpose of the bilateral treaty with Cuba allowing the United States to use Guantanamo as a naval coal-refueling station. Guantanamo is also territory under the "complete jurisdiction and control" of the United States pursuant to the treaty with Cuba, a treaty that provides Cuba with only "ultimate sovereignty" and, thus, necessarily one that provides the United States certain forms of sovereign power in addition to complete jurisdiction and control.<sup>49</sup> However, Guantanamo is not

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47 See Paust, *supra* note 42, at 24–25 (distinguishing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)); *supra* notes 19, 46.

48 Some human rights and duties, such as those contained and incorporated by reference in Articles 55(c) and 56 of the U.N. Charter, and those under customary international law, are universal. Some apply only in the Americas, such as those set forth in the American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser.L/V/I.4, Rev. (1965), which is an authoritative indicia of at least regional customary rights and duties and is otherwise binding on the United States through the Charter of the Organization of American States. See Charter of the Organization of American States, Apr. 30, 1948, art. 3(k), 2 U.S.T. 2394, 119 U.N.T.S. 3, *amended by* the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324; *see also id.* arts. 44, 111; Advisory Opinion OC-10/89, Inter-Am. C.H.R., Ser. A, No. 10, 45 (1989); *Report on the Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities*, Inter-Am. C.H.R., ch. 7, O.A.S. Doc. OEA/Ser.L/V/II.96, doc. 10, rev. 1 (1997) ("The American Declaration . . . continues to serve as a source of international obligation for all member states."). Some human rights instruments apply within the territory of a signatory and also to all individuals where they are "subject to its jurisdiction." *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2(1), 999 U.N.T.S. 171, 173; FRANCISCO FORREST MARTIN, CHALLENGING HUMAN RIGHTS VIOLATIONS: USING INTERNATIONAL LAW IN U.S. COURTS 101 (2001). The latter circumstance would include individuals detained, for example, on U.S. warships or in territory under the jurisdiction and control of the United States such as Guantanamo, or more generally in occupied territory in Afghanistan or Iraq, since they are clearly "subject to . . . jurisdiction" of the United States in such places. Moreover, customary human rights reflected in the International Covenant, like all customary international laws, are universal in reach and implicate universal jurisdiction. *See supra* note 26.

49 *See, e.g.*, Agreement Between the United States of America and the Republic of Cuba for the Lease to the United States of Lands in Cuba for Coaling and Naval

a war-related occupied territory and, as such, certain laws of war and presidential competencies applicable only in war-related occupied territory do not apply.<sup>50</sup> In any event, persons detained at Guantanamo are not in an area devoid of legal restraints and protections. Moreover, the better view is that the U.S. Constitution also limits executive authority at Guantanamo and anywhere else, since our government and all who are within the Executive branch, including U.S. military personnel, are entirely creatures of the Constitution and simply have

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Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 [hereinafter Lease Agreement]; *Gherbi v. Bush*, 352 F.3d 1278, 1290–91 (9th Cir. 2003); *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1342 (2d Cir. 1992); *United States v. Rogers*, 388 F. Supp. 298, 301 (E.D. Va. 1975); Paust, *supra* note 41, at 24–25; Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677, 692 & n.68 (2002); *cf.* *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995) (stating that Guantanamo is not U.S. territory as such). *But see* *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003) (assuming in error that habeas is only available to persons within the sovereign territory of the United States and deciding in error that the United States does not exercise any sort of sovereign jurisdiction and control at Guantanamo Bay, Cuba), *cert. granted sub nom.* *Rasul v. Bush*, 124 S. Ct. 534 (2003); *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1048–50 (C.D. Cal. 2002) (discussing the same errors concerning the proper reach of the habeas statute). Actually, the habeas statute does not require “sovereignty” or “territory” of the United States but only United States “jurisdiction.” 28 U.S.C. § 2241 (a), (c)(3) (2000); *Gherbi*, 352 F.3d at 1289; Paust, *supra*, at 690–94. Further, in contrast to *Al Odah*, the United States not only exercises “jurisdiction,” but also exercises “complete jurisdiction and control over and within” Guantanamo of a sovereign nature under Article III of the treaty with Cuba and as an occupying power exercising sovereign power inconsistent with the original purposes of the treaty; and, per terms of Article III of the treaty, Cuba only has “ultimate” sovereignty and, thus by necessary implication, under the treaty the United States clearly has some sovereign power at Guantanamo. Additionally, the United States is exercising a form of its sovereign power and jurisdiction wherever it detains persons. Many other cases also recognize the reach of habeas with respect to United States and foreign accused situated outside United States sovereign territory and outside the territory where a particular district court sits. *See, e.g., Gherbi*, 352 F.3d at 1288–89; Paust, *supra*, at 692 n.69. Of course, interpretation and application of the treaty and customary international law are legal matters within the competence and responsibility of the judiciary. *See, e.g.,* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111 cmts. c–e, 113 (1987) [hereinafter RESTATEMENT]; PAUST, *supra* note 13, at 7–11, 16, 67–71, 169–73; PAUST ET AL., *supra* note 23, at 111–35, 171, 179–80. With respect to United States’ use of Guantanamo inconsistent with the U.S.-Cuba treaty, the preamble set forth the purpose of the lease: “To enable the United States to maintain the independence of Cuba, and to protect the people thereof,” and Article II stated that the United States could “generally . . . do any and all things necessary to fit the premises for use as coaling or naval stations only, and for no other purpose.” Lease Agreement, *supra*, pmbl., art. II.

50 *See* Paust, *supra* note 41, at 25 n.70 (explaining that a military commission cannot properly be constituted or exercise lawful jurisdiction at Guantanamo Bay); *see also infra* note 117 and accompanying text.



no authority or lawful power to act here or abroad inconsistently with the Constitution.<sup>51</sup> Importantly, the text and structure of the Constitution contain no territorial limitation and even contemplate a reach to conduct abroad.<sup>52</sup>

### *E. Supposed Unprotected Persons*

#### 1. The Reach of Human Rights Protections

Despite claims that certain persons, including “enemy combatants” or so-called “unlawful combatants,” have no rights,<sup>53</sup> no human being is without protection under international law and the types of protection are many. God’s law is clear enough: love each as thyself.<sup>54</sup> Human law has evolved at least partly to fulfill such a fundamental rule. For example, human rights law, which applies in times of relative peace or war,<sup>55</sup> provides basic rights for every human being and includes the fundamental right to human dignity.<sup>56</sup> Some human rights are derogable under special tests in times of public emergency or other necessity,<sup>57</sup> but many human rights are nonderogable and

51 See *supra* note 19 and accompanying text; see also *Ex parte Quirin*, 317 U.S. 1, 25 (1942); *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922); *United States v. Lee*, 106 U.S. 196, 220 (1882); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–23, 127, 131 (1866); *United States v. Worrall*, 2 U.S. (2 Dall.) 384, 393–94 (C.C. Pa. 1798); *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979); Paust, *supra* note 41, at 18–20.

52 See U.S. CONST. art. I, § 8, cls. 10–11, 13–14; *id.* art. I, § 10, cl. 3; *id.* art. II, § 2; *id.* art. III, § 2, cl. 3; *id.* amend. XIII (explaining that slavery is not permitted within the United States “or any place subject to their jurisdiction”).

53 See, e.g., Ruth Wedgwood, *The Rules of War Can’t Protect Al Qaeda*, N.Y. TIMES, Dec. 31, 2001, at A11 (claiming that members of al Qaeda are unprivileged combatants who do not have a right to “claim protection of the law”). But see Taft, *supra* note 11, at 321–22 (noting that even unprivileged combatants or terrorists have certain legal rights and “are not ‘outside the law’”); sources cited *infra* notes 56, 60–65.

54 See, e.g., *Matthew* 22:39; see also *id.* at 25:35–40, 42–45.

55 See, e.g., Paust, *supra* note 10, at 505–06 n.5.

56 See, e.g., International Covenant on Civil and Political Rights, *supra* note 48, pmbl., 999 U.N.T.S. at 173 (“Recognizing that these rights derive from the inherent dignity of the human person.”); *id.* art. 10(1), 999 U.N.T.S. at 176 (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”); *id.* art. 16, 999 U.N.T.S. at 177 (“Everyone shall have recognition everywhere as a person before the law.”); *id.* art. 26, 999 U.N.T.S. at 179 (“All persons shall be equal before the law and are entitled without any discrimination to the equal protection of the law.”); Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 HOW. L.J. 145 (1983).

57 See, e.g., International Covenant on Civil and Political Rights, *supra* note 48, arts. 4(1), 18(3), 19(3), 22(2), 999 U.N.T.S. at 174, 178.

are therefore absolute.<sup>58</sup> Certain human rights are also peremptory *jus cogens* that cannot be derogated from and that preempt any other laws.<sup>59</sup> Thus, in every circumstance, every human being has some forms of protection under human rights law.

## 2. The Reach of Geneva Law Protections

Under the Geneva Conventions, there is no gap in the reach of at least some forms of protection and rights of persons.<sup>60</sup> Any person detained, whether a prisoner of war, unprivileged belligerent, terrorist, or noncombatant, has at least minimum guarantees "in all circumstances" "at any time and in any place whatsoever" under common Article 3.<sup>61</sup> Such rights include the right to be "treated humanely," freedom from "cruel treatment and torture,"<sup>62</sup> and freedom from "outrages upon personal dignity, in particular, humiliating and degrading treatment,"<sup>63</sup> and minimum human rights to due process in case of trial.<sup>64</sup> Protocol I to the 1949 Geneva Conventions assures the same minimum guarantees to every person detained, regardless of status.<sup>65</sup>

58 See, e.g., *id.* art. 4(2), 999 U.N.T.S. at 174; *General Comment No. 24*, U.N. GAOR, Hum. Rts. Comm., 1382d mtg. ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), reprinted in PAUST, *supra* note 13, at 376–77. The right to judicial review of the propriety of detention is also recognized today as a nonderogable human right. See, e.g., Paust, *supra* note 10, at 509–10.

59 See, e.g., *General Comment No. 24*, *supra* note 58, ¶ 8; RESTATEMENT, *supra* note 49, § 702 cmts. a, n; PAUST ET AL., *supra* note 23, at 49–53. Among *jus cogens* prohibitions listed in the *Restatement* are: murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and a consistent pattern of gross violations of human rights. RESTATEMENT, *supra* note 49, § 702 (c)–(g).

60 See, e.g., *Prosecutor v. Delalić*, Case No. IT-96-21-T, Trial Judgment, ¶ 271 (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber Nov. 16, 1996); GC COMMENTARY, *supra* note 9, at 51, 595; INT'L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 51 n.1, 76, 423 (Jean S. Pictet ed., 1960); FM 27-10, *supra* note 24, ¶ 73; Paust, *supra* note 10, at 511–12 & n.27.

61 See GC, *supra* note 9, art. 3, 6 U.S.T. at 3518, 75 U.N.T.S. at 288; Derek Jinks, *Protective Parity and the Law of War*, 79 NOTRE DAME L. REV. 1493 (2004).

62 See GC, *supra* note 9, art. 3(1)(a), 6 U.S.T. at 3520, 75 U.N.T.S. at 290.

63 See *id.* art. 3(1)(c), 6 U.S.T. at 3520, 75 U.N.T.S. at 290.

64 See *id.* art. 3(1)(d), 6 U.S.T. at 3520, 75 U.N.T.S. at 290 (incorporating customary human rights to due process by reference); see also, Paust, *supra* note 10, at 511–12 & n.27.

65 See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 75, 1125 U.N.T.S. 3, 37–38 [hereinafter Protocol I]; see also Taft, *supra* note 11, at 321–22 (stating that the customary "safety-net" of fundamental guarantees for all persons found "expression in Article 75 of Protocol I," which the United States re-

The test for prisoner of war status with respect to members of the armed forces of a party to an international armed conflict is membership in the armed forces.<sup>66</sup> Persons who are “enemy combatants” would be prisoners of war under the laws of war with membership in the armed forces of a party to an international armed conflict as the determining criterion for both combatant<sup>67</sup> and prisoner of war status.<sup>68</sup> Unprivileged fighters are those who are not entitled to engage in combat and to receive combatant immunity for lawful acts of war.<sup>69</sup> Some of these phrases have been misused, as has the phrase “unlawful combatant” since it confuses two separate issues concerning (1) a person’s status (e.g., as a combatant or a noncombatant who is not privileged to engage in combat), and (2) a lack of immunity for personal acts committed in violation of the laws of war.<sup>70</sup> In any event, dangerous consequences can arise for U.S. and foreign military personnel if the legal test for prisoner of war status is changed from membership to some other test applicable, for example, only to certain militia or volunteer corps.<sup>71</sup>

### 3. The Prohibition of Secret Arrests and Detentions

Since September 11, the Bush Administration has refused to release the names and whereabouts of hundreds of persons detained as “special interest” immigration detainees,<sup>72</sup> various persons detained as

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gards “as an articulation of safeguards to which all persons in the hands of an enemy are entitled”).

66 See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4(A)(1), 6 U.S.T., 3316, 3321, 75 U.N.T.S. 135, 138 [hereinafter GPW]; Paust, *supra* note 10, at 510–11 & n.23; Paust, *supra* note 21, at 332–33.

67 See, e.g., Paust, *supra* note 21, at 328–30.

68 *Id.*

69 *Id.* at 328–32.

70 See, e.g., *id.* at 332. Additionally, no one has immunity for war crimes or other international crimes. See, e.g., PAUST, *supra* note 13, at 422–23, 435–39 nn.69–72; FM 27-10, *supra* note 24, ¶ 498–99; *id.* ¶ 510 (“The fact that a person who committed an act which constitutes a war crime acted as the head of a State or as a responsible government official does not relieve him from responsibility for his act.”).

71 See, e.g., PAUST, *supra* note 13, at 333–34.

72 See, e.g., HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES 7, 17 (2002), available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf> [hereinafter PRESUMPTION OF GUILT]; LAWYERS’ COMM. FOR HUMAN RIGHTS, A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11, at 19–21 (2002), available at [http://www.lchr.org/US\\_law/loss/loss\\_report.pdf](http://www.lchr.org/US_law/loss/loss_report.pdf); Press Release, Human Rights Watch, U.S. Supreme Court Should Review and Reject Secret Detentions (Sept. 30, 2003), available at <http://www.hrw.org/press/2003/09/us093003.htm>; see also David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953

material witnesses,<sup>73</sup> and thousands of persons detained without trial as alleged security threats here, at Guantanamo Bay, Cuba, and elsewhere.<sup>74</sup> Yet, refusal to disclose the names or whereabouts of such detainees fits within the definition of forced disappearance of persons that is proscribed by international law in all circumstances.<sup>75</sup> As the *Restatement (Third) of the Foreign Relations Law of the United States* recognizes, "causing the disappearance of individuals" is absolutely prohibited under international law,<sup>76</sup> constitutes a violation of the customary human rights of the persons who disappear,<sup>77</sup> and constitutes a violation of a peremptory prohibition *jus cogens*.<sup>78</sup> Thus, forced disappearance is a prohibition that preempts more ordinary international law

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(2002) (discussing the United States' treatment of citizens and noncitizens post-September 11).

73 See, e.g., PRESUMPTION OF GUILT, *supra* note 72, at 17; Michael J. Kelly, *Executive Excess v. Judicial Process: American Judicial Responses to the Government's War on Terror*, 13 IND. INT'L & COMP. L. REV. 787, 808–11 (2003); Edward Walsh, *Court Upholds a Post-9/11 Detention Tactic*, WASH. POST, Nov. 8, 2003, at A11.

74 See, e.g., LAWYERS COMM. FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 52–53 (2003), available at <http://www.lchr.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf> [hereinafter ASSESSING THE NEW NORMAL]; Paustr, *supra* note 10, at 529–30; Dan Chapman, *Al-Qaida Cases Blur Rules on Interrogations*, ATLANTA J.-CONST., Mar. 4, 2003, at 1A (stating that "U.S. officials say more than 3000 al-Qaida members and supporters have been detained worldwide since Sept. 11," some in Afghanistan, some on Diego Garcia in the Indian Ocean, some 650 at Guantanamo Bay, some "in Jordan, Egypt and Saudi Arabia, whose governments are known to allow torture," and others in places unknown); Daphne Eviatar, *Foreigners' Rights In the Post-9/11 Era: A Matter of Justice*, N.Y. TIMES, Oct. 4, 2003, at B7 (reporting that "[m]ore than 5000 citizens of foreign countries have been detained"); Amnesty Int'l, Memorandum to the U.S. Government on the Rights of People in U.S. Custody in Afghanistan and Guantanamo Bay 23–27 (Apr. 15, 2002), available at [http://web.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/AMR510532002ENGLISH/\\$File/AMR5105302.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR510532002ENGLISH/$File/AMR5105302.pdf); Katharine Q. Seelye, *Moscow, Seeking Extradition, Says 3 Detainees Are Russian*, N.Y. TIMES, Apr. 3, 2002, at A13.

75 See, e.g., Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, art. II, reprinted in 33 I.L.M. 1529, 1530 (1994); *Declaration on the Protection of All Persons from Enforced Disappearance*, G.A. Res. 47/133, U.N. GAOR, 47th Sess., pmbll., U.N. Doc. A/RES/47/133 (1992), reprinted in 32 I.L.M. 903 (1993); Forti v. Suarez-Mason, 694 F. Supp. 707, 710–12 (N.D. Cal. 1988); see also *infra* notes 76–83.

76 RESTATEMENT, *supra* note 49, § 702(c); see also THOMAS BUERGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS 277–79 (3d ed. 2002) (addressing several cases before the Inter-American Court of Human Rights); Maureen R. Berman & Roger S. Clark, *State Terrorism: Disappearances*, 13 RUTGERS L.J. 531 *passim* (1982) (discussing disappearances as a form of government sponsored terrorism); Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System*, 18 AM. U. INT'L L. REV. 651 *passim* (2003) (reviewing cases from the Inter-American Court of Human Rights).

77 RESTATEMENT, *supra* note 49, § 702, cmts. a, c, n, rprr. notes 1, 11.

78 *Id.* cmt. n, rprr. note 12.

and allows for no derogation under any circumstances.<sup>79</sup> Similarly, the Human Rights Committee under the International Covenant on Civil and Political Rights has declared that “unacknowledged detention” of persons is a violation of human rights law and is “not subject to derogation.”<sup>80</sup> U.S. cases also recognize that forced disappearance violates customary and treaty-based international law,<sup>81</sup> and both Congress<sup>82</sup> and the Executive<sup>83</sup> have made the same recognitions with respect to foreign violations.

Within the Americas, the preamble to the Inter-American Convention on the Forced Disappearance of Persons also affirms “that the forced disappearance of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights.”<sup>84</sup> Addi-

79 *Id.* rptr. note 11; PAUST ET AL., *supra* note 23, at 49–51.

80 *General Comment No. 29*, U.N. GAOR, Hum. Rts. Comm., 1905th mtg. ¶ 13(b), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).

81 *See, e.g., In re Marcos*, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 416, 426 (S.D.N.Y. 2002); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184–85 (D. Mass. 1995); *Forti v. Suarez-Mason*, 694 F. Supp. at 710–712 (N.D. Cal. 1988); *see also Abebe-Jira v. Negewo*, 72 F.3d 844, 845–46 (11th Cir. 1996) (discussing campaign of arbitrary imprisonments, torture, and other forms of terror); *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980) (explaining that arbitrary detention violates customary international law), *aff’d on other grounds*, 654 F.2d 1382 (10th Cir. 1981) (using international law as an aid in interpreting a federal statute, while holding that arbitrary detention violates the statute); Alfonso Chardy, *Fernandez Larros Found Liable for Chilean Official’s Death*, MIAMI HERALD, Oct. 16, 2003 (addressing \$4 million jury verdict regarding crimes against humanity and various human rights violations as well as the disappearance of some 3200 persons during the Pinochet regime in Chile).

82 *See, e.g.,* 22 U.S.C. § 2151n(a) (2000); S. REP. NO. 102-249, at 9 (1991), *quoted in Xuncax*, 886 F. Supp. at 172.

83 *See, e.g.,* U.S. DEP’T OF STATE, *Argentina*, in 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, at 3–5 (2000); *id. Burundi*, at 4; *id. Columbia*, at 15–17; *id. Guatemala*, at 15; *id. Peru*, at 6; *id. Sudan*, at 5. The 1999 Country Reports are available at [http://www.state.gov/www/global/human\\_rights/1999\\_hrp\\_report/99hrp\\_toc.html](http://www.state.gov/www/global/human_rights/1999_hrp_report/99hrp_toc.html). Country Reports for 2002 are available at <http://www.state.gov/g/drl/rls/hrrpt/2002>. For example, disappearances in Iraq during Saddam Hussein’s regime are addressed in U.S. DEP’T OF STATE, *Iraq*, in 2002 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, at 3–5 (2003), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2002/18277.htm>.

84 Inter-American Convention on the Forced Disappearance of Persons, *supra* note 75, pmbi., 33 I.L.M. at 1530. Technically, the Convention does “not apply to the international armed conflicts governed by the 1949 Geneva Convention[s],” but this certainly does not eliminate applicability of relevant customary international and treaty-based human rights and other proscriptions, especially those identified in the Convention. *Id.* art. XV, 33 I.L.M. at 1532; *see also supra* note 48 and accompanying

tionally, the Convention on Forced Disappearance recognizes that forced disappearance is a crime that is "a grave and abominable offense against the inherent dignity of the human being, and one that contradicts the principles and purposes enshrined in the Charter of the Organization of American States,"<sup>85</sup> and affirms "that the systematic practice of the forced disappearance of persons constitutes a crime against humanity."<sup>86</sup> Such shameful practices of a criminal nature can in no way be justified under international law and they must stop.

Secret arrests and detentions also violate other international laws requiring, without exception, that foreign persons who are "arrested . . . or detained in any . . . manner" shall be free to communicate with consular officers of their state and to have access to them, and recognizing that the consulate officers from their state shall have concomitant freedoms<sup>87</sup> as well as "the right to visit" their nationals who are

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text. Moreover, in case of an international armed conflict, the rights and duties under the Geneva Conventions apply. *See, e.g.*, GC, *supra* note 9, arts. 5, 25, 71, 106-07, 6 U.S.T. at 3520-22, 3534-36, 3562, 3588-90, 75 U.N.T.S. at 290-92, 304-306, 332, 358-60. Yet, in occupied territory, only "where absolute military security so requires," a non-prisoner of war rightly detained without trial under Geneva law standards can "be regarded as having forfeited rights of [private] communication." *See* GC, *supra* note 9, arts. 5, 42, 6 U.S.T. at 3520-22, 3544, 75 U.N.T.S. at 290-92, 314. However, even such persons who are detained in occupied territory cannot simply disappear or have their names kept secret. As the authoritative Commentary to the GC prepared by the International Committee of the Red Cross explains, "[t]he Detaining Power is, however, in no way released from its obligation to notify the arrest to its official Information Bureau for transmission to the official Information Bureau of the country of which the person concerned is a national." GC COMMENTARY, *supra* note 9, at 57-58; *see also id.* at 56 ("[T]he Detaining Power . . . remains fully bound by the obligation, imposed on it by Article 136, to transmit to the official Information Bureau particulars of any protected person who is kept in custody for more than two weeks.").

85 Inter-American Convention on the Forced Disappearance of Persons, *supra* note 75, pmbl. The O.A.S. Charter is treaty law of the United States. *See supra* note 48.

86 Inter-American Convention on the Forced Disappearance of Persons, *supra* note 75, pmbl.; *see also* Forti v. Suarez-Mason, 694 F. Supp. 707, 711 (N.D. Cal. 1988) (citing O.A.S. General Assembly Res. 666 (Nov. 18, 1983)) (stating that disappearance is a crime against humanity). Concerning the nature of crimes against humanity more generally, *see*, for example, PAUST ET AL., *supra* note 2, at 857-915. Such crimes also implicate universal jurisdiction for criminal or civil sanctions in any state that has an offender within its territory, occupied territory, or the equivalent of its territory under international law. *See supra* note 26.

87 *See, e.g.*, Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(a), 21 U.S.T. 77, 101, 596 U.N.T.S. 261, 292; *see also The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 (Oct. 1, 1999), Inter-Am. Ct. H.R., Ser. A, No. 16, ¶¶ 77-84

"in prison, custody or detention, to converse and correspond with . . . [them] and to arrange for . . . [their] legal representation."<sup>88</sup> Such nonderogable rights of communication and visitation have generally been of great significance to the United States and our nationals with respect to protections for U.S. citizens arrested abroad, and they should not be placed in further jeopardy.

### F. *Supposed Legality of Torture or Cruel, Inhumane Treatment*

Since September 11, we have seen claims to interrogate human beings with moderate coercion and "stress and duress" tactics that might or might not constitute torture, but in any event can constitute cruel and inhuman treatment in violation of nonderogable human rights and Geneva law.<sup>89</sup> As noted in another writing, customary and

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(1999), available at <http://www1.umn.edu/humanrts/iachr/A/OC-16ingles-sinfirmas.html>; Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law*, 95 AM. J. INT'L L. 341 (2001).

88 Vienna Convention, *supra* note 87, art. 36(1)(c), 21 U.S.T. at 101, 596 U.N.T.S. at 292.

89 See, e.g., Karima Bennouna, "*To Respect and To Ensure*": *Reconciling International Human Rights Obligations in a Time of Terror*, 97 PROC. AM. SOC'Y INT'L L. 23, 24 (2003); John T. Parry, *What is Torture, Are We Doing It, and What If We Are?*, 64 U. PITT. L. REV. 237, 249-54 (2003); Paust, *supra* note 10, at 530-31; Gary Younge, *US Soldiers Sent Home for Beating Prisoners of War*, GUARDIAN (London), Jan. 6, 2004, at 17; see also Steven W. Becker, "*Mirror, Mirror on the Wall . . .*": *Assessing the Aftermath of September 11th*, 37 VAL. U. L. REV. 563, 612 (2003); John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be An Option?*, 63 U. PITT. L. REV. 743 *passim* (2002); Raymond Bonner et al., *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at 1; Chapman, *supra* note 74 (addressing sleep deprivation, forced standing for hours, and "stress-and-duress" techniques); Andrew Gumbel, *America Admits Suspects Died in Interrogation*, INDEPENDENT (London), Mar. 7, 2003; *Iraqi General Dies in American Custody*, N.Y. TIMES, Nov. 28, 2003, at A26; Vernon Loeb, *Army Fines Officer for Firing Pistol Near Iraqi Detainee*, WASH. POST, Dec. 13, 2003, at A18; Eric Schmitt, *Three Soldiers Are Charged With Assault on Prisoners*, N.Y. TIMES, Nov. 19, 2003, at A10; Jonathan Turley, *U.S. "Interrogations" Border on Torture*, TIMES UNION (Albany), Mar. 11, 2003, at A7; *Terror Pair Tortured, Says Lawyer*, HERALD SUN (Melbourne), Oct. 9, 2003, at 28; Lord Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, Twenty-Seventh FA Mann Lecture, British Inst. of Int'l & Comp. Law (Nov. 25, 2003), available at <http://www.nimj.com/documents/Guantanamo.pdf>.

In *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 5 (1978), the European Court of Human Rights held that prior U.K. interrogation techniques of "wall-standing," hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink constituted "inhuman" and "degrading" treatment in violation of human rights law. *Id.* at 41, 66. The court noted that the "techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation," and, "accordingly," were forms of inhuman treatment. *Id.* at 66. The court concluded that the "tech-

treaty-based human rights law requires, without exception, that no person shall be subjected to torture or to cruel, inhumane, or degrading treatment.<sup>90</sup> The same absolute prohibition exists under customary and treaty-based laws of war.<sup>91</sup> For example, common Article 3 of the Geneva Conventions, which is also customary international law and applies today both during insurgencies and armed conflicts of an international character,<sup>92</sup> requires that every person detained "shall in all circumstances be treated humanely," and that "[t]o this end . . . at any time and in any place . . . cruel treatment and torture" are pro-

niques were also degrading, since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance." *Id.* The court found, however, that they did not constitute "torture" because they did not produce an intensity of suffering "causing very serious and cruel suffering." *Id.*

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85, defines torture, for purposes of the Convention, as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.

*Id.* art. 1(1), S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. at 113. U.S. legislation implements the treaty for criminal sanctions. 18 U.S.C. § 2340A (2000 & Supp. 2003). Other legislation allows civil sanctions. *See, e.g.*, Alien Tort Claims Act, 28 U.S.C. § 1350 (2000); Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

Professor Alan Dershowitz has even suggested that laws should be violated by use of torture. *See* Alan Dershowitz, *Commentary: Painful Moral Questions*, L.A. TIMES, Apr. 17, 2003, at 15; *see also* Mark Bowden, *The Persuaders: When Does Coercion Become Torture*, OBSERVER MAG., Oct. 19, 2003, at 28; David Cole, *Lawyers Keep Out*, NATION, Apr. 21, 2003, at 4. He has co-conspirators among academic ranks. *See, e.g.*, Paul B. Stephan III, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 CONN. L. REV. 831, 831-32, 851 (1987). *But see* Jordan J. Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 CONN. L. REV. 697, 721-35 (1987); *supra* notes 19, 51-52 (recognizing that the Constitution restrains executive authority to act here or abroad).

90 Paust, *supra* note 10, at 530 & n.132. *See also* RESTATEMENT, *supra* note 49, § 702(d) cmts. a, n, rptr. note 11 (forms of "torture or other cruel, inhuman, or degrading treatment or punishment" are proscribed under customary human rights law and are prohibitions *jus cogens* that preempt any other law).

91 *See* Paust, *supra* note 10, at 530-31; GC, *supra* note 9, art. 3, 6 U.S.T. at 3518-20, 75 U.N.T.S. at 288-90; *id.* art. 5, 6 U.S.T. at 3520-22, 75 U.N.T.S. at 290-92; *id.* art. 16, 6 U.S.T. at 3528, 75 U.N.T.S. at 298; *id.* art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306; *id.* art. 31, 6 U.S.T. at 3538, 75 U.N.T.S. at 308; *id.* art. 33, 6 U.S.T. at 3538-40, 75 U.N.T.S. at 308-10; *id.* art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

92 *See, e.g.*, Paust, *supra* note 10, at 512 n.27.



scribed in addition to "outrages upon personal dignity, in particular, humiliating and degrading treatment."<sup>93</sup> Despite claims by some to relax the prohibitions, the prohibitions are absolute, and violations of any relevant laws of war would be prosecutable as war crimes.<sup>94</sup> Additionally, "torture or inhuman treatment" or "wilfully causing great suffering or serious injury to body or health" are among the more serious war crimes listed as "grave breaches" of the Geneva Conventions.<sup>95</sup> As the Legal Adviser to the U.S. Department of State wrote recently, terrorists have the "right to humane treatment—a right that belongs to all humankind, in war and in peace. . . . [I]nhumane treatment is cruel and unacceptable under any circumstances."<sup>96</sup> Indeed, torture and cruelty offend the human soul, our basic sense of fairness, and our common dignity and humanity.

Finally, the United States and its nationals cannot avoid responsibility under international law by merely transferring persons to other states for torture or cruel and inhumane interrogation. The United States cannot lawfully transfer persons to another country where they face a "real risk" of human rights violations,<sup>97</sup> and law of war obligations of the United States and its nationals cannot be avoided where the United States or a national is complicit in violations,<sup>98</sup> much less a co-conspirator.

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93 GC, *supra* note 9, art. 3, 6 U.S.T. at 3518–20, 75 U.N.T.S. at 288–90.

94 See, e.g., FM 27-10, *supra* note 24, ¶ 499 ("Every violation of the law of war is a war crime."); PAUST ET AL., *supra* note 2, at 821–23, 829, 831–33.

95 See, e.g., GPW, *supra* note 66, art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238; GC, *supra* note 9, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

96 See Taft, *supra* note 11, at 321.

97 See, e.g., Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831, 1832; The Soering Case, 161 Eur. Ct. H.R. (ser. A) at 34–36, 44 (1989). Further, the United States must not extradite or otherwise transfer persons to a foreign country where there will be a "real risk" of violations of human rights or rights or duties under the laws of war. See, e.g., PAUST ET AL., *supra* note 2, at 349, 352–53, 396 (quoting Jefferson in *Ex parte Kaine*, 14 F. Cas. 78, 81 (C.C.S.D.N.Y. 1853) (No. 7,597): "[T]o deliver fugitives from them would be to become their accomplices."); RESTATEMENT, *supra* note 49, §§ 475, cmt. g, 476, cmt. h, 711, rptr. note 7.

98 Concerning complicity, see, e.g., PAUST ET AL., *supra* note 2, at 39–43; PAUST, *supra* note 13, at 210, 286–87, 291. Additionally, the Geneva Conventions create a duty to respect "and to ensure respect for" the Conventions "in all circumstances." See, e.g., GC, *supra* note 9, art. 1, 6 U.S.T. at 3518, 75 U.N.T.S. at 288; GC COMMENTARY, *supra* note 9, at 15–17. Geneva law duties are *obligatio erga omnes*, owed by and to all humankind. See, e.g., PAUST ET AL., *supra* note 23, at 48. Further, the state to which an individual can otherwise be transferred must be willing and able to comply with Geneva law. See, e.g., GPW, *supra* note 66, art. 12, 6 U.S.T. at 3328, 75 U.N.T.S. at 146; see also Paust, *supra* note 41, at 16 n.36 (citing examples of extraditions refused on such grounds). Transfer of non-prisoners of war out of occupied territory is a war

## II. ADDITIONAL ERRORS AND CONCERNS

### A. *Required Judicial Review of the Propriety of Detention*

In another article, I outlined human rights and law of war standards concerning the permissibility of detention of persons without trial who pose significant security threats. Human rights law requires that such forms of detention not be "arbitrary," though detention can be permissible if it is reasonably needed under the circumstances.<sup>99</sup> The Geneva Civilian Convention also allows detention of such persons without trial during an international war, but certain persons can only be detained in the United States or in occupied territory if their detention is necessary under the circumstances.<sup>100</sup> In every case, there

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crime. See GC, *supra* note 9, art. 49, 6 U.S.T. at 3548, 75 U.N.T.S. at 318; *id.* art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388; *infra* notes 118–19.

99 See, e.g., Paust, *supra* note 10, at 505–07.

100 *Id.* at 512–14. Recently, a Second Circuit panel ruled that the Non-Detention Act of 1971, 18 U.S.C. § 4001(a) (2000), precluded Executive detention of U.S. citizens because the Act requires that U.S. citizens shall not be "detained by the United States except pursuant to an Act of Congress," and no such legislation exists. *Padilla v. Rumsfeld*, 352 F.3d 695, 718–24 (2d. Cir. 2003). However, the issue is more complex given the authority under treaty law of the United States to detain certain persons under certain circumstances. First, the 1971 congressional limitation of authority to detain should be interpreted consistently with 1949 treaty-based authority to detain outlined in the GC. When a clash between the two is unavoidable, there must be a clear, unequivocal intent of Congress to override prior treaty law for the legislation to prevail under the last-in-time rule (which is not evident from the face of the 1971 legislation or legislative history addressed by the Second Circuit panel, *cf. id.* at 718–19 (meant to limit power during war)). Even when such an intent can be demonstrated, there are Supreme Court based exceptions to the last-in-time rule that assure the primacy of treaty law and one such exception requires that the law of war (at least duties and rights thereunder) prevail. See PAUST, *supra* note 13, at 99–107, 120. More generally, presidential power can be enhanced by international law since the President must faithfully execute law, including international law, and the duty creates a competence to do so. See, e.g., *id.* at 9, 16, 44–47, 79, 82, 88, 180, 185, 457, 468–69, 480–81. Following this approach, it might be argued that the President's authority to detain under Geneva law prevails over the 1971 Act.

Nonetheless, the competence of the United States to detain certain persons under Articles 5, 42, and 78 of the GC would be exercisable merely by Congress if cases such as *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), are followed by analogy. In *Brown*, the majority recognized that the laws of war created a competence for the United States to seize enemy property located within the United States but held that such a competence must be exercised by Congress. *Id.* at 128–29. In dissent, Justice Story suggested that the President could execute that competence, since all were in agreement that the President was bound to execute the law of war during a war declared by Congress, and that Congress had set no legislative limits on the President's power to execute such laws or to carry on the war. *Id.* at 145, 149, 153 (Story, J., dissenting). If one follows Story's approach in this case, however, Congress has set

must be available independent, fair, effective, and meaningful judicial review of the propriety of detention,<sup>101</sup> a requirement that the present Administration has failed adequately to permit.<sup>102</sup> Numerous cases throughout our history also make clear the power and responsibility of U.S. courts ultimately to determine the status and rights of detainees under human rights law and the laws of war.<sup>103</sup> More generally,

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a limit on the power to detain U.S. persons and the congressional limit would prevail. Congress does have power to place certain limits on the exercise of presidential powers during war and occupation. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (noting that "restrictions on" executive use of "armed force" can be imposed by "treaty, or legislation"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 602, 609–10 (1952) (Frankfurter, J., concurring); *id.* at 635–36 n.2, 654–55 (Jackson, J., concurring); *id.* at 659–60 (Burton, J., concurring); *id.* at 662 (Clark, J., concurring); *Santiago v. Noguerras*, 214 U.S. 260, 266 (1909) (discussing limits during occupation); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (noting that Congress has the power to "conduct a war"); *The Thomas Gibbons*, 12 U.S. (8 Cranch) 421, 427–28 (1814) (regarding seizure of ships abroad); *Brown*, 12 U.S. (8 Cranch) at 110 (regarding seizure of property in the United States); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804) (regarding seizure of ships abroad); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (same); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40–42 (1800) (same); *United States v. Smith*, 27 F. Cas. 1192, 1228–31 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J., on circuit) (regarding use of force abroad); 9 Op. Att'y Gen. 516, 518–19 (1860) (noting that Congress can limit use of "land and naval forces" that are otherwise "under his orders as their commander-in-chief"); see also U.S. CONST. art. I, § 8, cl. 11 (stating that Congress has power to "make Rules concerning Captures on Land and Water"); *id.* art. I, § 8, cl. 14 (granting Congress power to "make Rules for the Government and Regulation of the land and naval forces"); *id.* art. I, § 8, cl. 18 (granting Congress power to "make all Laws which shall be necessary and proper for carrying into Execution the foreign powers"). Recognition that the Geneva Conventions prevail over the 1971 legislation would not answer the question whether it is Congress or the Executive that has the power to exercise a treaty-based competence on behalf of the United States to detain certain persons even though the Executive is bound to comply with duties and rights based in Geneva law (and, similarly, Congress cannot abrogate duties or rights or authorize their infraction). See, e.g., PAUST, *supra* note 13, at 106–07, 109. Nor would it answer the question whether congressional power exists to set limits and, thus, has primacy in case the power to detain is generally shared. The *Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862), are no help because in earlier legislation Congress had specifically authorized the use of force in response to invasions or insurrections and had placed no other limits in the legislation.

101 Paust, *supra* note 10, at 507–10, 514, 518–26, 528–29; see also *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003) (discussing jurisdictional issues and judicial power regarding Guantanamo Bay detainees).

102 See, e.g., *Gherebi*, 352 F.3d at 1280–81; Paust, *supra* note 10, at 503–04, 527–29.

103 See, e.g., Paust, *supra* note 10, at 518–25, 529; see also *Gherebi*, 352 F.3d at 1282–84. Such power exists in international law, which is part of the laws of the United States, and is constitutionally based. See, e.g., RESTATEMENT, *supra* note 49, § 111 cmts. d–e, rptr. note 4; Paust, *supra* note 10, at 507–10, 514–18.

Chief Justice Marshall recognized early in our history that our judicial tribunals "are established . . . to decide on human rights."<sup>104</sup> In a democracy adhering to law and the proper balance and separation of powers, it could not be otherwise.

### B. *Present DOD Rules of Procedure for Military Commissions*

Since 9/11, we have witnessed the deliberate creation of rules of procedure for U.S. military commissions that would violate human rights and Geneva Convention guarantees<sup>105</sup> and create war crime civil and criminal responsibility for those directly participating in their creation and application if the military commission rules are not changed and are utilized.<sup>106</sup> We have seen a refusal to even disclose the names of persons detained, and executive claims are made before our courts and media that human beings have no human rights or Geneva law protections, no right of access to an attorney or to their consulate, and no right of access to a court of law to address the propriety of their detention without trial.<sup>107</sup> Present Department of Defense rules for military commissions would assure denial of the human rights to trial before a regularly constituted, competent, independent, and impartial court;<sup>108</sup> to counsel of one's choice and to effective rep-

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104 *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810); *see also supra* note 14 and accompanying text.

105 *See, e.g.,* Becker, *supra* note 89, at 563, 580–86; Paust, *supra* note 49, at 677–90; Paust, *supra* note 41, at 10–18; Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, *ARMY LAW.*, Nov. 2003, at 40, 43–45; Joshua Rozenberg, *Law Chief Calls on US to Give Terror Suspects Fair Trial*, *DAILY TELEGRAPH* (LONDON), Sept. 19, 2003, at 1 (identifying, through U.K. Attorney-General Goldsmith, some of the British complaints about lack of a jury, secret hearings, restrictions on counsel for the accused, and the lack of judicial review); *see also* ASSESSING THE NEW NORMAL, *supra* note 74, at 57–58, 60–61; Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 *CAL. W. L. REV.* 433 *passim* (2002) (relating recent military tribunals to others through history in the light of international law); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 *GEO. WASH. L. REV.* 649 (2002); *Blair Wants Britons' Legal Status Resolved*, *HOUS. CHRON.*, Oct. 23, 2003, at A23 (noting that Prime Minister Tony Blair reiterated concerns "about the form of trial that they [U.K. nationals] will have under a military commission"); Lord Johan Steyn, *supra* note 89, at 11–12, 18.

106 *See, e.g.,* Paust, *supra* note 41, at 4 n.12, 10 n.18, 28 n.81; Paust, *supra* note 49, at 694; Wallach, *supra* note 105, at 45–46.

107 *See generally* Paust, *supra* note 10 *passim*; sources cited *supra* notes 72–74.

108 *See, e.g.,* A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 *WIS. L. REV.* 309, 360–61; Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 *N.C. L. REV.* 1, 9–12, 58–59 (2002); Harold Hongju Koh, *The Case Against Military Commissions*, 96 *AM. J.*

resentation;<sup>109</sup> to fair procedure and fair rules of evidence;<sup>110</sup> to review by a competent, independent, and impartial court of law;<sup>111</sup> and to various other human rights.<sup>112</sup> Clearly, the rules should be changed.

Moreover, a serious violation of the separation of powers exists with respect to the total lack of judicial review of military commission decisions concerning offenses against the laws of war (which have been incorporated by Congress as offenses against the laws of the United States<sup>113</sup>) and other international crimes over which there is concurrent jurisdictional competence in federal district courts.<sup>114</sup> Under Article I, Section 8, Clause 9 of the Constitution, Congress merely has power "[t]o constitute Tribunals inferior to the supreme Court" and, thus, tribunals subject to ultimate control by the Supreme Court.<sup>115</sup> For this reason, the congressional authorization for creation

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INT'L L. 337, 338-39 (2002); Paust, *supra* note 49, at 687-88; Detlev F. Vagts, *Which Courts Should Try Persons Accused of Terrorism?*, 14 EUR. J. INT'L L. 313, 322 (2003); *see also* NORMAN ABRAMS, *ANTI-TERRORISM AND CRIMINAL ENFORCEMENT* 330-31 (2003); Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 CHINESE J. INT'L L. 1, 3-4 (2003) (quoting the Declaration of Rights of the Massachusetts Constitution, art. 29, which "framed by John Adams, boldly declares, 'It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit,'" and adding that, "[i]ndividual judicial independence is necessary if each case is to be resolved on its own merits, according to the facts and the law").

109 *See, e.g.*, Paust, *supra* note 49, at 690.

110 *See, e.g., id.* at 688-89.

111 *See, e.g., id.* at 685-86; *see also* Reid v. Covert, 354 U.S. 1, 36 n.66 (1957) ("[L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.") (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

112 *See, e.g.*, Paust, *supra* note 49, at 678-85 (including impermissible discrimination on the basis of national origin, denial of equal access to courts and to equality of treatment and equal protection of the law, "denials of justice" in violation of customary international law, and denial of the human right to fair, meaningful, and effective judicial review of the propriety of detention).

113 *See, e.g.*, 10 U.S.C. §§ 818, 821 (2000) ("concurrent jurisdiction"); *In re Yamashita*, 327 U.S. 1, 7-8 (1946); *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942); *United States v. Schultz*, 4 C.M.R. 104, 111 (C.M.A. 1952); Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6, 10-12 (1971).

114 Concerning concurrent competence in federal district courts, *see, for example*, 28 U.S.C. § 3231 (2000); Paust, *supra* note 113, at 17-28; and sources cited *supra* note 113.

115 *See also* James E. Pfander, *Federal Courts: Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1454-56 (2000) ("Like other provisions of Article I that operate as restrictions on legislative power, the Inferior Tribunals Clause underscores the inability of Congress to fashion new courts to displace the constitutional supremacy of the one supreme court.").

of ad hoc military commissions in 10 U.S.C. § 821 is subject to the constitutional restraint contained in Article I, Section 8, Clause 9.

Limitations of presidential power to set up a military commission pose an additional problem. The President's power to set up a military commission and the jurisdictional competence of a military commission are limited in terms of time to a circumstance of actual war until peace is finalized<sup>116</sup> and are limited in terms of the place for its direct functioning to a theater of war or a war related occupied territory.<sup>117</sup> The U.S. military base at Guantanamo is neither in a theater of actual war nor in a war related occupied territory,<sup>118</sup> and, thus, a military commission at Guantanamo would not be properly constituted and would be without lawful jurisdiction.

Another problem with respect to prosecution of certain persons in a military commission at Guantanamo involves an absolute prohibition under the laws of war. Any person who is not a prisoner of war and who is captured in occupied territory in Afghanistan or Iraq must not be transferred out of occupied territory. Article 49 of the GC expressly mandates that "[i]ndividual or mass forcible transfers . . . of protected persons from occupied territory . . . are prohibited, regardless of their motive."<sup>119</sup> Further, "unlawful deportation or transfer" is

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116 See, e.g., *Madsen v. Kinsella*, 343 U.S. 341, 346–48 (1952) (discussing power "related to war" and "common-law war courts"); *Yamashita*, 327 U.S. at 11–13; *Quirin*, 317 U.S. at 28; *The Grapeshot*, 76 U.S. (9 Wall.) 129, 132–33 (1869) (permitting jurisdiction "so long as the war continued," and "during war"); *Cross v. Harrison*, 57 U.S. (16 How.) 164, 190 (1853) (permitting jurisdiction until "treaty of peace"); 24 Op. Att'y Gen. 570, 571 (1903); Paust, *supra* note 41, at 5 & n.14, 9, 25 n.70.

117 See *The Grapeshot*, 76 U.S. (9 Wall.) at 132–33 (identifying war related occupied territory as "wherever the insurgent power was overthrown"); WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 836 (2d ed. 1920):

A military commission . . . can legally assume jurisdiction only of offences committed within the field of command of the convening commander. . . . [Regarding military occupation, a commission] "cannot take cognizance of an offence committed without such territory. . . . The place must be the theatre of war or a place where military government or martial law may be legally exercised; otherwise a military commission . . . will have no jurisdiction.

*Id.*; Paust, *supra* note 41, at 5 & n.14, 25 n.70, 26–27; see also *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (discussing tribunals in "occupied enemy territory"); *id.* at 326 (Murphy, J., concurring) (noting that martial law is limited to cases where "a foreign invasion or civil war actually closes the courts"); *Coleman v. Tennessee*, 97 U.S. 509, 515 (1878) ("when . . . in the enemy's country"); *id.* at 517 (when in occupation of enemy territory).

118 See Paust, *supra* note 41, at 25 n.70.

119 GC, *supra* note 9, art. 49, 6 U.S.T. at 3548, 75 U.N.T.S. at 318; see also *id.* art. 76 6 U.S.T. at 3566, 75 U.N.T.S. at 336 (noting that "persons accused of offences shall be detained in the occupied country"); Protocol I, *supra* note 65, art. 85(4)(a), 1125

not merely a war crime; it is also a "grave breach" of the Geneva Conventions.<sup>120</sup> To correct such violations of the laws of war, persons who are not prisoners of war and who were captured in occupied territory and eventually found at Guantanamo or other areas under U.S. control outside of occupied territory should be returned to the territory where they were captured.

### CONCLUSION

What has especially marked this Administration and some of its most ardent supporters with respect to responses after 9/11 are attempts at radical destruction of civil liberties, human rights, and rights under the Geneva Conventions, as well as a quest for unreviewable and unchecked executive powers. Serious short and long-term consequences can ensue for the United States, other countries, U.S. and other military personnel, and other U.S. nationals if violations of such rights do not stop. As noted elsewhere, what resonates more than the details of deprivation is the grating, mean-spirited, and ultimately anti-American tone of the entire effort.<sup>121</sup> The violations are unnecessary. They degrade this country, its values, and its influence. They can fulfill terrorist ambitions<sup>122</sup> and pose long-term threats greater than the September 11 attacks.

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U.N.T.S. at 42; GC COMMENTARY, *supra* note 9, at 278–80, 363; Paust, *supra* note 41, at 24 n.68 (discussing further unlawful transfers). Additionally, rights and duties under the Geneva Conventions must be applied "in all circumstances." GC, *supra* note 9, art. 1, 6 U.S.T. at 3518, 75 U.N.T.S. at 288; *see also supra* note 98.

120 GC, *supra* note 9, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388; Protocol I, *supra* note 65, art. 85(4)(a), 1125 U.N.T.S. at 42; GC COMMENTARY, *supra* note 9, at 280, 599; *see also* Rome Statute of the International Criminal Court, art. 8(2)(a)(vii), (b)(viii), July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), *reprinted in* 37 I.L.M. 999, 1006–07 (1998).

121 Paust, *supra* note 49, at 694.

122 *See* Bennouné, *supra* note 89, at 25 (arguing that if illegal means are used in response to terrorism, the impermissibility of terrorist means might blur and the illegal methods of governmental response might deconstruct the impermissibility of strategies of the terrorists as well). Bennouné warns that "counterterrorism is pregnant with future terrorists" and, hence, doomed to failure. *Id.*; *see also* Sir Adam Roberts, *Role of Law in the "War on Terror": A Tragic Clash*, 97 PROC. AM. SOC'Y INT'L L. 18, 19–20 (2003) (detailing pitfalls of governments acting outside the law in dealing with terrorists); Lord Johan Steyn, *supra* note 89 (expressing concern that "unchecked abuse of power begets ever greater abuse of power").