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Legitimacy as a target: international law and the 'War on Terror'

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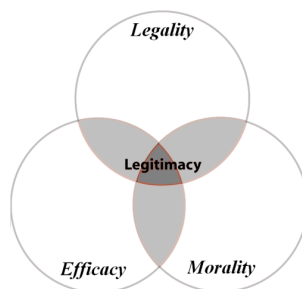
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UNIVERSITÉ DE GENÈVE
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**Legitimacy as a Target:
International Law and the ‘War on Terror’**



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pour l'obtention
du grade de docteur en droit

par
Steven J. Barela

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2011

*To my own giants upon whose shoulders I stand.
That is, to those who taught me about values and principles:
Mary, Phil, Dave, Noni, John,
Margaret, Jackie, Diana, Suzanne and Peter*

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List of Acronyms

ABA	American Bar Association
AP-I	Additional Protocol One to the Geneva Conventions
AP-II	Additional Protocol Two to the Geneva Conventions
AUMF	Authorization to Use Military Force
CAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIA	Central Intelligence Agency
CSRT	Combatant Status Review Tribunals
DTA	Detainee Treatment Act of 2005
ECtHR	European Court of Human Rights
EITs	Enhanced Interrogation Techniques
FBI	Federal Bureau of Investigation
GCs	Geneva Conventions
GSS	Israel's General Security Service
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Convention of Civil and Political Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal to Ex-Yugoslavia
MCA	Military Commissions Act of 2006
NSS	National Security Strategy
OLC	Office of Legal Counsel
OPR	Office of Professional Responsibility
PCIJ	Permanent Court of International Justice
POW	Prisoner of War
SERE	<i>Survival, Evasion, Resistance and Escape</i> Training Program
UCMJ	Uniform Code of Military Justice
UNSC	United Nations Security Council
UNSCOM	UN Special Commission on Iraq (Weapons Inspectors)
VCLT	Vienna Convention of the Law of Treaties

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Introduction: The Genii of the City

If society withdrew its obedience, the commander's rule was at an end. Even Clausewitz, let us recall, was of this opinion, for he understood that military victories were useless unless the population of the vanquished army then obeyed the will of the victor. The resolute society that dislikes its ruler can find another ruler; but where would a ruler who had lost the obedience of his society find another society?

-- Jonathan Schell¹

An international lawyer should no longer write for rulers alone (who may or may not heed his words); he ought to write mainly for ordinary citizens: he should offer them parameters by which to judge international affairs, and analytical mechanisms for examining the intricacies of the world community.

--Antonio Cassese²

On September 11th, 2001 the population of the United States of America began their day with news that four civilian aircraft had been commandeered to become deadly projectile weapons. The crashing of two of these airplanes into the World Trade Center in downtown Manhattan was caught on film and broadcast as the population sat in awe before their television sets watching the destruction of a national symbol. The spectacular terrorist event thus became a vivid image etched into the psyche of a nation. Using terrorism expert Brian Jenkins' assessment that "terrorism is theatre",³ we can unmistakably see that this event was theater *par excellence*.

There is no doubt that this assault of September 11th was a violent attack on innocent civilians in flagrant transgression of the principles of humanitarian and human rights law that should be properly recognized and deplored.⁴ The "violation of established norms" is in fact one of the characteristic features of a terrorist act,⁵ and as such terrorism often provokes a vehement and powerful response. Working with the concept of terrorism as theatre, one can begin to see that of all the tools implemented in orchestrating the tragedy of that day –i.e. box

¹ SCHELL, J., *The Unconquerable World* (New York, Metropolitan Books, 2003) at 221.

² CASSESE, A., *Terrorism, Politics and Law* (Cambridge, Polity Press, 1989) (original emphasis) at viii.

³ JENKINS, B.M. 'International Terrorism: A New Mode of Conflict', in Carlton, D. and Schaerf, C. (eds.), *International Terrorism and World Security* (London, Croom Helm, 1975) at 16.

⁴ For an important reminder that international law violations have been carried out by both parties to this conflict see BENNOUNE, K. 'Remembering the Other's Others: Theorizing the Approach of International Law to Muslim Fundamentalism' (2010) 41 *Columbia Human Rights Law Review* 635.

⁵ LAQUEUR, W., *Terrorism* (London, Weidenfeld and Nicolson, 1977) at 3.

cutters, planes and skyscrapers— it was the television that proved to be the most strategic. The fact that the most destructive portion of the event was caught on film and repeatedly broadcast over the airwaves served al Qaeda’s overarching interests of destabilizing the U.S. government in hopes of jamming its operation, and perhaps even bringing it to a point of immobility. The reason that this shared potent image is so important to those who committed the terrorist act is because it successfully drew the audience, specifically the American public, directly into the conflict as participants. This is not to lay any blame on the media, since the diffusion of the events of that day must be simply recognized as a part of the nature of U.S. media, democracy and society. Yet these violent and destructive images did indeed bring a citizenry full of ire directly into the fold for the creation of counterterrorism policy.

It is the reaction to these terrible events that will primarily concern us in this work. Our contention will be that terrorist groups as non-state actors involved in asymmetrical conflict are trying to shift the field of battle away from a conventional military encounter where they clearly are at an enormous disadvantage, and instead use a “strategy of provocation” to further their goals.⁶ This is always a difficulty that those crafting counterterrorism policy must deal with since the victim state of such attacks inevitably has much more potent hard power to wield if it so chooses. And it is one reason why some specialists have asserted that it was not the attacks of 9/11 that changed the world, but “[r]ather it was our [the United States] reaction to September 11 that changed the world”.⁷ While it is rare that there is a completely coherent idea of what exact response their deeds will prompt, a central motivation of those who employ terrorism is to incite some type of reaction from the adversarial government. In this work, it will be the response of the ‘war on terror’ to the September 11th attacks that will drive our analysis, and serve to provide the evidence supporting our hypothesis of legitimacy as a target of terrorism. By more fully conceptualizing legitimacy and analyzing the ‘war on terror’ through its lenses, the intention is that it will become apparent that this basic societal concept should indeed be placed at the center of the analysis of terrorism.

Democracies tend to be particularly susceptible to provocation since the spectacular nature of violent attacks makes good television coverage for a free press, a fact with which terrorist groups are very familiar. Imagery and coverage of terrorist acts intensify panic and

⁶ This phrase comes from a classic work on terrorism, *idem*, at 81. Although he was using it to specifically describe the approach of the Black Hand and their assassination of the Archduke of Austria Franz Ferdinand by Gavrilo Princip, which was the event generally accepted to have initiated WWI, it is a phrase that captures well the only real influence terrorists have to shape events considering their great lack of weaponry.

⁷ RICHARDSON, L., *What Terrorists Want* (New York, Random House, 2006) at 167.

fear within the targeted society, which generally leads to an insistence upon clear and bold action to ensure security. It is then the short democratic election cycle that helps to foster a rapid and forceful response since politicians wish to be seen as attentive to security concerns. Yet, it has been keenly pointed out that while, “[s]peed and force are both critical elements in a successful military campaign; it is far less clear that they are necessary ingredients of a successful counterterrorism policy”.⁸

Those who are charged with action in a democracy with divided powers, i.e. the executive branch at first instance and then the legislature, are held responsible through the ever moving election cycle. However, the judiciary has a different mandate and is beholden to distinct forces. This branch of government is charged with defending the liberties and protections of individual members in a balance with security. Therefore, one can see how this requirement for a clear response within a democracy can drive a wedge between the separate branches of government because of their differing functions and directives. This wedge begins to explain why terrorism has been described as “destabilizing of legitimately constituted governments” for almost two decades by United Nations bodies,⁹ and why this is particularly the case for constitutional democracies with a separation of powers.¹⁰

It is also necessary to keep in mind that one of the distinctive characteristics of this particular terrorist attack of September 11th is that it was an act of cross-border violence. The reason why this specific feature of the strike is so crucial for our analysis is that both terrorism and counterterrorism are thus inevitably subjected to the rules of international law to assess their legitimacy. This is of central importance to the methodology of this analysis in that we will use international law as the most clear and obvious standards that are available to citizens to judge the legitimate use of physical force by their government, very similar to the manner suggested by Antonio Cassese in our epigraph.

Along with the mass proliferation of media forms making the theater of terrorism much more potent, the 20th century has also seen an exponential growth of international law. An important part of that expansion has been in international rules protecting individuals from abuses by government. In this way a valuable metric has been developing by which citizens have become able to measure their government’s adherence to the legitimate exercising of

⁸ *Idem*, at 101.

⁹ General Assembly resolutions U.N. Doc. A/RES/48/122 (1993). U.N. Doc. A/RES/49/185 (1994), U.N. Doc. A/RES/50/186 (1995), U.N. Doc. A/RES/52/133 (1997), U.N. Doc. A/RES/56/160 (2001), U.N. Doc. A/RES/58/174 (2003); World Conference on Human Rights, Vienna, 1993 A/CONF.157/24 (Part I), chap. III.; Commission on Human Rights resolutions 2001/37 as well as 2004/44; and UNHCHR resolutions 2001/37 and 2003/37.

¹⁰ See generally BIANCHI, A. and KELLER, A. (eds.), *Counterterrorism: Democracy’s Challenge*, (Oxford, Hart Publishing, 2008) 424 pp.

physical force. Indeed, the conventional application of international law has little to do with how citizens, who have no legal personality under its purview, think or feel about the international legal obligations of their own state. State governments are obliged to fulfill their international legal responsibilities regardless of internal politics or municipal law.¹¹ However, when citizens are faced with an exercise of their government's authority against or over foreign nationals, the most obvious, and at times the only, place to find yardsticks by which to measure cross-border counterterrorism policy are within international law. Because international humanitarian law and human rights treaties, along with the UN Charter, have framed the questions of legality for the responses to these terrorist strikes (seen most clearly in internal government documents), international law will also serve as the framework for this work on legitimacy and the 'war on terror'.

Nevertheless, it should be clearly stated that this is not to say that international law is always perfectly clear and consistent for interpretation by common citizens. This is by no means our argument. What will be put forward in this work are three specific circumstances dealing with detention, war-making and interrogation. On these three particular issues, the policies of the 'war on terror' reached beyond the possibility for reasonable argument, no matter how well positioned the authorities were who drafted 'authoritative' interpretation of the state's legal duties. This is crux of what will be found in this work. When aggressive policies were forced into the open and justification demanded by the public, courts or international bodies, we will find that they failed to meet the basic requirements of *legality*, *morality* and *efficacy*. Counterterrorism policies overreached and did not succeed in meeting the codified obligations of domestic, international and constitutional law, the moral standard of reciprocity, and an empirical criterion of effectiveness. It is our hypothesis that these critical failures all came at a cost to the government's legitimacy.

By the end of his second term President George W. Bush, whose signature policy was indeed this global war against terrorism, found himself embattled and beleaguered and in what can be termed a 'legitimacy deficit'. Because the two-term president's mandate has

¹¹ See *Vienna Convention on the Law of Treaties*, Article 27 (Signed 23 May 1969, Entered into force 27 January 1980) 1155 UNTS 331; see also 'Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947' International Court of Justice, Advisory Opinion, 1988, No. 88/12, para. 57: "It was sufficient to recall the fundamental principle of international law that international law prevailed over domestic law, a principle long endorsed by judicial decisions."; 'Greco-Bulgarian Communities' Permanent Court of International Justice (PCIJ), Advisory Opinion, 1930, (ser. B) No. 17, at 32: "the provisions of municipal law cannot prevail over those of the treaty". 'Treatment of Polish Nationals in Danzig' PCIJ, Advisory Opinion, 1933, Ser. A/B., No. 44: "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force".

come to a close, and since his administration was the original architect of the ‘war on terror’, our attention in this work will be on the policies under President Bush.

It must also be acknowledged that even though President Barack Obama was swept into office on a campaign emphasizing “change”, we find that his counterterrorism policies have not departed in a significant way from his predecessor. In a move that was meant to live up to this campaign promise, President Obama did indeed sign executive orders on his second full day in office which indicated a pull back from the previous administration’s counterterrorism policies.¹² Yet, although it is early to engage in serious debate over the actual damage to legitimacy the current administration has suffered via its counterterrorism policies, it is possible to see that some of the same seeds are unfortunately in place.¹³

Nonetheless, our attention will be focused on the administration that launched the massive and forcible reaction to the terrorist attacks of September 11th for two primary reasons. Firstly, information on that policy exists in the public sphere and is quite extensive years after the chosen course of action was implemented. This wide collection of documents has been augmented by numerous leaks from concerned administration officials over the years. (This would also indicate that a legitimacy deficit was suffered since such action certainly represents a lack of pull towards compliance with authority.) Secondly, for purposes of analytical clarity, it is necessary for our attention to remain fixed on the administration which suffered a legitimacy deficit due to its signature policy. For these reasons the scope of this study will remain limited to the seven and a half years of the counterterrorism policies carried out by the Bush administration.

This work represents a conscious integration of two disciplines: political philosophy and international law. Of course, this marriage is certainly not novel since the consummate scholar Martin Wight has described the four hundred years of international theory leading up to the surge of its study in the 20th century as a partition, “between philosophically minded international lawyers and internationally minded political philosophers”.¹⁴ Thus this work simply reaches back to this deep tradition and filiation of thought on international society to present a text that might not at first blush be easily classified into today’s disciplinary categories. Or as it has been recently suggested by the international lawyers George Fletcher

¹² Executive Order No. 13,491, 74 Fed. Reg. 4893, ‘Ensuring Lawful Interrogations’ (22 Jan 2009); and Executive Order No. 13,492, 74 Fed. Reg. 4,897, ‘Review and Disposition of Individuals Detained at the Guantanamo Naval Base and Closure of Detention Facilities’ (22 Jan 2009).

¹³ However, it should be recognized that the killing of Osama bin Laden in a manner that the vast majority of U.S. citizens interpret as legal, moral and effective would certainly bode well for President Obama’s legitimacy.

¹⁴ WIGHT, M., *International Theory: The Three Traditions* (New York, Holmes & Meier, 1992) at 3.

and Jens Ohlin, “any serious book about international law and justice must pay attention to history and philosophy as well as law”.¹⁵

The intention behind utilizing the intersection of these two disciplines is to investigate and formulate one specific impact of today’s changing international environment on the internal political climate of individual states. The dramatic increase in global cooperation throughout the 20th century –between international organizations and their state missions, foreign officers, international civil servants, intelligence officers, military personnel, police investigators, judges, legislators, financial regulators –¹⁶ has surely had an impact on the shape and content of the domestic political order. The rules that are meant to govern all of these interactions fall under the single term of international law, and its mushrooming development following the conclusion of each world war is arguably the most significant change the international system has undergone since the inception of the state based system ushered in with the Peace of Westphalia in 1648. Here we will hypothesis its impact on domestic legitimacy.

To begin this task, it will first be necessary to explain the reasoning for fixing our gaze on international legal obligations by exploring a question that is best illuminated through the discipline of political philosophy. Specifically, we will look to the question of what maintains an authority as legitimate. That is, what actually generates and preserves the *will to obey* she who has the *power to command*? It is this author’s opinion that further exploration into this central question of societal structure, particularly in the circumstances of political conflict, would be welcome and beneficial. Thus this is a primary intention behind our work.

In 1942 an Italian historian wrote an enormously valuable work of political philosophy entitled *The Principles of Power*, in which he explores this subject of legitimacy. Guglielmo Ferrero cogently explains in this work,

¹⁵ FLETCHER, G., and OHLIN, J., *Defending Humanity: When Force is Justified and Why* (Oxford, Oxford University Press, 2008) at 16.

¹⁶ See e.g. SLAUGHTER, A., *A New World Order*, (Princeton, Princeton University Press, 2004) 332 pp. For discussion on how this development has particularly affected domestic law and national courts see BENVENISTI, E., ‘Reclaiming Democracy, The Strategic Uses of Foreign and International Law by National Courts’ (2008) 102 *AJIL* 241; McCRUDDEN, C., ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ (2000) 20, 4 *Oxford Journal of Legal Studies* 499; JACKSON, V., ‘Comparative Constitutional Federalism and Transnational Judicial Discourse’ (2004) 2,1 *Int’l. Journal of Constitutional Law* 91; SLAUGHTER, A., ‘A Global Community of Courts’ (2003) 44, 1 *Harvard Int’l Law Journal* 191; BAHDİ, R., ‘Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts’ (2002) 34 *George Washington Int’l Law Review* 555; SLAUGHTER, A., ‘A Brave New Judicial World’ in IGNATIEFF, M. (ed.), *American Exceptionalism and Human Rights* (Princeton, Princeton University Press, 2005) pp. 277-303; JACKSON, V., ‘Constitutional Comparisons: Convergence, Resistance, Engagement’ (2005) 119 *Harvard Law Review* 109; WATERS, M., ‘Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties’ (2007) 107 *Columbia Law Review* 628.

[a] government is [...] legitimate if power is conferred and exercised according to principles and rules accepted without discussion by those who must obey. There are still peoples who, without knowing the abstract theory of legitimacy, recognize [it] in the respect for these rules and principles [as] the source of the right to govern.¹⁷

Ferrero makes clear in his book that the structure of every society is based on the intersection of command and obedience. Put another way, the authority in command at the top of a community must be bestowed with legitimacy through obedience from below. Without a convergence of these two essential elements any collection of people cannot work together towards shared goals, or ‘act in concert’. No doubt, there has been an enormous amount of attention on the top-down aspect of authority since it is much easier to identify, track, or even target. However, it is the elusive bottom-up component of legitimacy that will concern us here.

Ferrero did an exceptional job of elucidating the centrality of the principle of legitimacy to any society, and thus his work is identified as an essential building block of what we are to put forward in this work. There are two principle points of departure that grow out of Ferrero’s work of political philosophy, and both of these ideas will be pursued and developed in Chapter 1. The first point of Ferrero’s work that will serve us particularly well is that his descriptions of the uncoerced pull towards compliance with authority that exists in every society can be used to generate very helpful imagery for understanding legitimacy as a target. This conceptualization of a target is considered to be one of the distinguishing contributions made by this author to the study of terrorism specifically, and asymmetrical conflict generally. More recent developments in conflicts between non-state actors and governments have been noticed by many commentators as having an increase in occurrence and effectiveness worthy of remark. Conceptualizing legitimacy as a target is hoped to shed a useful light on how such asymmetrical tactics can affect a society.

The conventional military method of engaging in armed conflict has been to focus one’s forces on an adversary’s command structure and military so as to “disarm the enemy”.¹⁸ Yet this approach to and thinking about warfare has been shifting. Throughout the 20th century there has been a particularly curious development in the line of attack concerning political conflict. During this century there was a conspicuous increase in the use of guerrilla warfare,¹⁹ non-violent active resistance,²⁰ and terrorism²¹ to attempt, sometimes successfully,

¹⁷ FERRERO, G., *The Principles of Power* (New York, G.P.Putnam’s Sons, 1942) at 135.

¹⁸ CLAUSEWITZ, K., ‘On War’ in *The Book of War* (New York, The Modern Library, 2000) at 266-7.

¹⁹ For literature that grew out of successful guerrilla movements see e.g. GUEVARA, Ernesto, *Guerrilla Warfare* (Lincoln, University of Nebraska Press, 1961) 175 pp.; MAO, Tse Tung *On Guerrilla Warfare*

to wrest power from an authority.²² One important element that each of these tactics have in common is that they are all means employed by non-state actors, even if the approach to the use of violence in each case differs significantly. It is hypothesized by this author that each of these methods places a target on the legitimacy of a government, even if the scope of our particular investigation here will only encompass terrorism.

Some have suggested that part of this development in warfare and conflict has its roots in the technological progress in weaponry that has run the conventional logic of violence into the ground. Said differently, the logic of nuclear armaments has turned the idea of weaponry on its head by making their use nearly unthinkable for accomplishing political goals. It should not be forgotten that there are a number of instances in which nuclear armed states, and not all of them democracies, have chosen defeat rather than to deploy these most destructive weapons.²³ They have avoided their use by opting for withdrawal or retreat from their political aims rather than attacking their adversaries with nuclear arms: i.e. the Soviets in Afghanistan; the French in Algeria; the British failure (allied with France and Israel) against a nonnuclear Egypt in the Suez crisis; Israel's wars in the West Bank and Lebanon; and both

(Chicago, University of Illinois Press, 1961) 114 pp.; and HỒ, Chi Minh, Fall, B., (ed.) *On Revolution: Selected Writings* (Boulder, CO, Westview Press, 1984) 389 pp.

²⁰ For literature that grew out of successful non-violent movements see GANDHI, Mahatma, Iyer, R., (ed.) *The Essential Writings of Mahatma Gandhi* (Delhi, Oxford University Press, 1991) 438 pp.; KING, M.L.K., Washington, J., (ed.) *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* (San Francisco, Harper Collins, 1986) 688 pp.; HAVEL, V., Vladislav, J., (ed.) *Václav Havel or Living in Truth* (Amsterdam, Meulenhoff Amsterdam, 1986) 315 pp.; or see some of the literature documenting and conceptualizing such movements, ACKERMAN, P., and DUVALL, J., *A Force More Powerful: A Century of Nonviolent Conflict* (New York, Palgrave, 2000) 534 pp.; ZINN, H., and ARNOVE, A., *Voices of a People's History of the United States* (New York, Seven Stories Press, 2004) 647 pp.; SCHELL, *The Unconquerable World: Power, Nonviolence, and the Will of the People*, note 1 above, 416 pp.

²¹ For some discussions of the strategy of terrorism see e.g. RICHARDSON, *What Terrorists Want*, note 7 above, 296 pp.; KILCULLEN, D., *The Accidental Guerilla: Fighting Small Wars in the Midst of a Big One* (Oxford, Oxford University Press, 2009) 340 pp.; and PAPE, R., *Dying to Win: The Strategic Logic of Suicide Terrorism* (New York, Random House, 2005) 316 pp.

²² For an enormously valuable work exploring these contemporary developments in warfare see SCHELL, *The Unconquerable World*, note 1 above, 414 pp. This work from Schell has been extremely influential on this author's contemplation of the subject at hand, and it should be duly noted as such. Schell begins by delving into the work of the well-known Prussian general and military philosopher Karl von Clausewitz to shed light on the ultimate end and objectives of war: i.e. "[w]ar is thus an act to compel our adversary to do our will." (CLAUSEWITZ, 'On War', note 18 above, at 264). Using this as his point of departure, he then takes the reader through the logic and reasoning behind nuclear war (or deterrence), people's war and non-violent resistance movements. Primarily known for his work on nuclear weapons and disarmament, Schell is well positioned to discuss the philosophical questions that lie beneath the use of force between states, guerilla war, terrorism or even non-violent action. Schell makes clear that all of these actions share the same essence in that they are politically motivated and are trying to force a society in another direction (whether one's own government or a foreign nation). The intention of this work is to bring legitimacy to the center of this discussion so as to hopefully further conceptualize what Schell has already valuably initiated. See also, for valuable discussion of this transition in warfare from the perspective of a military officer and scholar, HAMMES, Col. T. (USMC), *The Sling and the Stone: On War in the 21st Century* (St. Paul, MN, Zenith Press, 2006) 310 pp.

²³ *Idem*, SCHELL, *The Unconquerable World*, at 359-60; see also ÁLLAN, P., and KELLER, A., (eds.) *What is a Just Peace?* (Oxford, Oxford University Press, 2006) at 2.

the Chinese and the U.S. in Vietnam. The political theorist Hannah Arendt captured this apparent illogic remarkably well,

The technical development of implements of violence has now reached the point where no political goal could conceivably correspond to their destructive potential or justify their actual use in armed conflict. Hence, warfare—since times immemorial the final merciless arbiter in international disputes—has lost much of its effectiveness and nearly all of its glamour. “The apocalyptic” chess game between the superpowers, that is, between those that move on the highest plane of our civilization, is being played according to the rule: “if either ‘wins’ it is the end of both.” Moreover the game bears no resemblance to whatever war games preceded it. Its “rational” goal is mutual deterrence, not victory.²⁴

While Arendt brought our attention to the technological advancements in weaponry at the highest levels of international military power, her point was rather what this striking development would do more generally to all political conflict. Her conclusion was that, “all these very uncomfortable novelties add up to [...] a reversal in the relationship between power and violence, foreshadowing another reversal in the future relationship between small and great powers”.

This point made by Arendt dovetails nicely with our own idea that non-state actors have been exploring and employing ways to destabilize the legitimacy of governments by provoking an overreach. Nonetheless, the scope of this work is not intended to explore the entire upheaval of political conflict that Arendt posits here, but rather to focus our attention on the phenomenon of modern terrorism and the manifestation of the ‘war on terror’ that al Qaeda was able to provoke with its violent asymmetrical attack of September 11th. Thus while the hypothesis is suggested to apply more generally, the first point taken from Ferrero in Chapter 1 is more precisely the development of legitimacy as a target of terrorism.

Secondly, Ferrero’s work offers an opening that serves as an appropriate title to this introduction: *The Genii of City*. While this Italian historian provides instructive and beneficial discussion on the concept of legitimacy itself, he does leave the intrigued reader wanting more. Ferrero properly identifies an element of society that often goes unnoticed, the uncoerced pull towards command, but he also suggests that what constructs this force or pull is unknowable. In a brief six page chapter he labels the content of legitimacy “the Genii of the City” and proposes that, although this obedience is ever-present in all communities acting in concert, it is, “invisible and bodyless”.²⁵ Ferrero continues, “[b]ecause they are invisible, men are too often apt to be unaware of their presence and even of their existence. And yet these

²⁴ ARENDT, H., ‘Reflections on Violence’ (27 Feb. 1969) *The New York Review of Books*, available at: <<http://www.nybooks.com/articles/archives/1969/feb/27/a-special-supplement-reflections-on-violence/>>.

²⁵ *Idem*, at 17.

invisible Genii rule our entire existence.”²⁶ Despite this coy proposal that the content of legitimacy cannot be known, it is indeed our intention to attempt in this work to expose the Genii of the City. While this author understands that such a project must certainly be undertaken with humility, it is also one that is demanded by the logic we have pursued in naming legitimacy as a target.

Thus in the second half of Chapter 1, we will turn to the legal philosophers François Ost and Michel van de Kerchove who have produced a valuable work on legal validity positing an integrative theory. Since it has been asserted by one scholar of the legitimation of power that legal experts consider that, “legitimacy is equivalent to *legal validity*”,²⁷ it is appropriate that our own work with roots in this discipline looks to legal philosophy for clearer answers. Ost and Kerchove suggest that there are three primary conceptual spheres which intersect, overlap and interact to create the strongest uncoerced pull toward compliance. Lending additional weight to their premise, each of these criterion are borne of significant legal theories that have garnered support at varying levels throughout history: legal positivism, natural law and legal realism. These legal philosophers thus put forward that this unseen pull is constructed by formal validity, axiological validity and empirical validity. As such, we will encapsulate the three concepts constructing legitimacy for our own model in the shorthand of *legality*, *morality* and *efficacy*. None of these spheres dominate or prevail over the others in our model, as this theory is meant to be integrative to capture the interdisciplinary nature of legitimacy.

Chapter 2 will then put forward the major characteristics of terrorism which can be largely summed up as public and politically motivated violence against non-combatants. However, even if most of these traits are often distinguishable, there has long been heated debate over clearly defining an act of terrorism legally, or even academically. It is our contention that much of this controversy indeed stems from the fact that such asymmetrical conflict revolves around the legitimacy of an authority to command or steer a society. With legitimacy at the center of our analysis, we will propose that, even if the more controversial aspects of defining terrorist acts will likely endure as debatable for some time for this very reason, this does not mean that the more blatant acts of terrorism cannot be contextualized, explained or even legally prosecuted.

²⁶ *Ibid.*

²⁷ BEETHAM, D., *The Legitimation of Power* (New York, Palgrave MacMillan, 1991) (original emphasis) at 4.

Moving beyond the description of terrorism as a mere tactic, we will present the three primary strategic goals of terrorism as revenge, renown, and reaction.²⁸ In doing so, it will be possible to explore some of the writings of prominent al Qaeda leaders to demonstrate that these specific aims can certainly be found within their own literature and speeches. Our intention will be to focus most importantly on the strategic goal of provoking a reaction. Author and university professor Michael Ignatieff, chiefly known for his work on human rights, has written about this particular provocative aspect of terrorism explaining,

[t]he French have an excellent phrase—*la politique du pire*, literally the politics of the worst—that encapsulates the logic of terrorism. Its purpose is to make things worse so that they cannot become better. [...] the theoreticians of Al Qaeda have certainly thought deeply about *la politique du pire*. They believe that by provoking the United States and its allies into indiscriminate acts of oppression, they will turn them, as it were, into recruiting sergeants for their cause.²⁹

As such, it is the response to the attacks of September 11th by the United States, and explanations of its overreach within the context of international law, that will be the precise purview of this work.

To conclude this second chapter, we will draw attention to the fact that those who employ terrorist acts as their tactic and strategy have the intention of damaging or destroying an existing legitimacy, but hold little interest in constructing a new one in its place. To illuminate this point most clearly an examination will be carried out of the 2006 Army Field Manual 3-24 *Counterinsurgency*, overseen by General Petraeus who was to step into a very prominent military, and even political, role largely due to the doctrine found in this document. It is clearly understood by the manual's authors that, "[p]olitical power is the central issue in insurgencies and counterinsurgencies: each side aims to get the people to accept its governance or authority as *legitimate*".³⁰ Yet, the attention of this manual is focused on overseas military operations meant to construct legitimacy abroad, rather than on the damage to legitimacy that could be done to the attacked society on September 11th.

Next, in Chapter 3, we will present the international legal framework that the U.S. administration faced when confronting detention, war-making and intelligence gathering policies for its 'war on terror'. No doubt, the dimension and extent of the reaction to the attacks of 9/11 by the United States has taken a form that has been well noticed and felt worldwide. This is at least in part due to the fact that the response has run up directly against

²⁸ RICHARDSON, *What Terrorists Want*, note 7 above, at 71-103.

²⁹ IGNATIEFF, M., *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, Princeton University Press, 2004) (internal citations omitted) at 61-2.

³⁰ Army Field Manual (FM 3-24), *Counterinsurgency*, U.S. Department of Defense (15 December 2006) (my emphasis) at 1-1, §1-3.

international treaties that the state has ratified, customary international law and even *jus cogens* obligations. Clearly, the legal duties that have been undertaken in these international agreements are products of the expanding international system of the 20th century. Thus it is through investigation of the internal legal documents of the administration that it is possible to plainly see the extent to which international law has penetrated into domestic policymaking, even if it was only in an attempt to set these duties aside as inapplicable.

Thus in this third chapter we will lay out the overall international legal framework for three specific policies to be investigated here as the underlying structure of the chapters that are to follow. Since the intention is to apply our model of legitimacy constructed by the intersecting spheres of *legality*, *morality* and *efficacy*, we will apply them sequentially, adding one lens at a time. Our starting point will be to analyze detention policy through the lens of *legality* by looking into the successive Supreme Court decisions on the military facility at Guantánamo Bay, Cuba. Next, we will bring the lens of *morality* to the table and discuss the place of overlap it shares with *legality* by exploring the roots of the UN Charter prohibition on an unprovoked use of force through the just war doctrine. Finally, we will gaze through the lens of *efficacy* for our investigation into the use of torture that occurred as a means for gathering intelligence to find that it also shares a notable place of overlap with *morality* and *legality*. Considering our point of departure, Chapter 3 will rightfully provide the international legal structure for all three instances.

In the second half of this chapter we will also present the thinning political, judicial, military and civil compliance suffered by the administration that had launched this global ‘war’. The ensuing circumstance can be described as a ‘legitimacy deficit’, and our hypothesis is that it was in part a result of this signature counterterrorism policy. Here we will discuss delegitimizing judicial decisions, political dissent, opposition from civil society, and perhaps most importantly, the perceptible dissension from military officers. Of course, there are two important points to keep in mind here. Firstly, there is an enormous difficulty in validating with precision any legitimacy claim, be it diminished or plentiful. Secondly, drawing lines of causality in human relations is always dubious at best. When attempting to do so for millions of people, all with differing levels of information and understanding, the difficulty multiplies exponentially.

These difficulties can be related directly to an important problem that was identified at least as far back as the 18th century. The Scottish philosopher David Hume wrote about the ‘is

vs. ought' problem in *A Treatise of Human Nature*.³¹ This is, of course, an important question for this study: will this be an investigation into what is, or what ought to be? The simple answer to the question of whether this is a descriptive or normative work is that while a great majority of what is presented accurately (and cited as such) describes the reality of what indeed factually occurred in the 'war on terror', the overwhelming hurdle of proving causality in the fluctuation of legitimacy demands that this work is best understood as normative. In other words, this work will investigate the *legality*, *morality* and *efficacy* of specific counterterrorism policies based on the hypothesis that these components indeed have a direct bearing on the legitimacy of the state. To make this link the intention is to rest our argument on logic and reasoning following the tradition of political philosophy, rather than on the use of scientific and statistical tools more fitted to political science.

As an important example, our investigation of the pertinent laws, and how they were interpreted (and thus evaded) by those who launched the 'war on terror', will demonstrate that the particular rules to be investigated represent some of the most fundamental norms of both international and domestic society. Due to their significance, the three specific policies to be examined in this work were played out on the very public stages of the U.S. Supreme Court and the UN Security Council, while the 'Torture Memos' analyzing treaty obligations were debated in the conspicuous and stunning photographic context of detainees being ill-treated by U.S. soldiers in Iraq. The fact that the discussion of international legal obligations took place in exceptionally public forums meant that even laymen who had never contemplated such duties in their lives were suddenly confronted with international law and their state's legal commitments.

Another way in which the basic nature of these rules will be evidenced is by the fact that the principle of applicable law and judicial protection to all those in detention, regardless of citizenship, was found in various categories of both international and domestic law. Confirmation will then be found through an investigation of the moral and legal prohibition of unprovoked violence persistently found in the centuries old just war doctrine (with only one noteworthy exception that became largely dismissed shortly after its suggestion as a legitimate standard). Finally, an investigation into the empirical data on ill-treatment for interrogation purposes in the 'war on terror' will reveal that the innocent and ill-informed were not, and indeed cannot, be excluded from a program instituting abuse. Hence this will expose the inefficacy and immorality of a patently illegal practice. In this way it will be

³¹ HUME, D., *A Treatise of Human Nature*, Book III, Part I, Section I, (Charleston, BiblioBazaar, 2006) at 257.

possible to see how and why such basic norms are easily understood by common citizens, civil servants, politicians and military officers who grant legitimacy to their government to keep it functioning. As such, Chapters 4 through 6 will direct our attention to three specific instances in which certain international laws have penetrated into the domestic sphere and had a hand in influencing the judgments made on foreign policy and the legitimate exercise of physical force.

In Chapter 4, we will look through the lens of *legality* and put forward an analysis of the three landmark decisions handed down by the U.S. Supreme Court on the question of wartime detention at the military facility in Guantánamo Bay, Cuba. It is first necessary to recognize that it has traditionally been the case that courts in the U.S. have demonstrated a great amount of deference to the executive for foreign policy in general, and in times of armed conflict specifically.³² Thus the fact that the Supreme Court stepped into the fray to strike down the detention policy of the executive three consecutive times, the last instance relating to policy created in conjunction with the legislature (a historic first in times of armed conflict),³³ is important to note. In this context, we will posit that the highest court in the land employed an emerging judicial tool conceptualized as a ‘judicial ladder of review’ to push back against overreaching by the other branches of government in a measured, patient and resolute manner so as to eschew the traditional deference exercised by the Court.

Most importantly for our purposes, the Supreme Court unequivocally used international humanitarian law in its *Hamdan* decision of 2006 to bolster its mounting of this judicial ladder, and placed the international laws of war on the front pages of newspapers and as the leading story of nightly news broadcasts. Also in this series of cases that will be explored, each decision persistently recognized that all persons held in detention at the overseas Guantánamo military facility, regardless of citizenship, were protected by law and that the courts indeed had a role to play. Such a protection can also, no doubt, be found in international human rights law. Although the Court made no mention of this coincidence, it is

³² See SCOBIE, I., “‘The Last Refuge of the Tyrant?’: Judicial Deference to the Executive in Time of Terror” in BIANCHI, A. and KELLER, A. (eds.), *Counterterrorism: Democracy’s Challenge*, (Oxford, Hart Publishing, 2008) pp. 277- 312; On wartime jurisprudence, see also BENVENISTI, E., ‘National Courts and the “War on Terrorism,”’ in BIANCHI, A., (ed.) *Enforcing International Law Norms Against Terrorism* (Oxford, Hart Publishing, 2004) at 309-15; Notably, the issue was also treated in Justice Jackson’s opinion in *Korematsu v US*, 65 S. Ct. 193, at 245 (1944): “military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved [...] Hence courts can never have real alternative to accepting the mere declaration of the authorities that issued the order that it was reasonably necessary from a military viewpoint”.

³³ COLE, D., ‘Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay’ (2008) *Cato Supreme Court Review*, Georgetown Public Law Research Paper No. 1272202, available at SSRN:<<http://ssrn.com/abstract=1272202>>.

hypothesized that the growing significance of this body of law actually had a subtle effect on the final outcome of these decisions. Regardless of whether this theory in fact holds true, the series of decisions handed down by the highest court insisting upon an applicable law for these foreign detainees held abroad certainly had a bearing on the citizenry's uncoerced pull towards compliance with the authority claiming that the detainees had no rights at all.

In Chapter 5, another instance which will be explored of international law impacting domestic political views and the legitimacy of the government is the high-profile and well publicized debate in the United Nations Security Council over an invasion of Iraq in 2003. Here we adjoin the lens of *morality* and gaze through it to distinguish a clear overlap with *legality*. Granted, much of the final legal position asserted by the Bush administration was not entirely comprehended by the general public. The decision to base its invasion on arcane and dubious interpretations of previous Security Council resolutions was largely imposed by its inability to acquire an explicit resolution authorizing the use of force. Yet, this debate held in the public domain and widely broadcast served at least two purposes. The first was that the discussion that took place at the United Nations had the effect of clearly demonstrating that the United States had options other than invasion because there was indeed a 'moment for deliberation'. This is precisely what the debate represented, and this moment was amplified by the unprecedented six to ten million people in the streets worldwide on February 15, 2003 protesting a war that had not yet begun.

Secondly, the fact that the United States was legally obliged under Chapter VII of the UN Charter to go before the Security Council in pursuit of an authorization for the military use of force against Iraq compelled an open and explicit reasoning for invasion. The U.S. had to make a public case for invasion that could and would be tested by citizens and the media from that moment forward. The most vociferous reasoning behind the need to invade the sovereign nation of Iraq put forward before the Security Council was based on the possession of weapons of mass destruction and the state's direct connections with the al Qaeda organization. The fact that both of these claims turned out to be patently false underlined the reality that the military incursion was an unprovoked use of force, and thus failed both moral and legal standards emanating from the just war doctrine.

In Chapter 6, we will peer through the lens of *efficacy* to find that it shares a crucial point of overlap with *morality* and *legality* on the question of torture. Thus for the final clear example of how international law has reached across borders to affect the domestic order of the United States we will investigate the United Nations Convention against Torture and

Cruel, Inhuman and Degrading Treatment (CAT).³⁴ Article 4 of this treaty requires that, “[e]ach State Party shall ensure that all acts of torture are offences under its criminal law” and that such legislation “shall make these offences punishable by appropriate penalties which take into account their grave nature”.³⁵ This treaty was signed by President Ronald Reagan in 1988 and then ratified by the Senate in 1990 creating a binding legal duty. As it was explained in the infamous ‘Bybee Memo’, the U.S. legislature passed specific legislation on torture (§2340A)³⁶ to meet this requirement; “Congress criminalized this conduct to fulfill U.S. obligations under the [CAT]” treaty.³⁷ Thus, when speaking of torture, the domestic legal order had been directly altered by international law.

As a result of this change the authors of the ‘Torture Memos’ were forced to directly confront the international legal prohibition of torture. While the ‘Bybee Memo’ explicitly states that it is “obvious” that, “Congress intended Section 2340’s definition of torture to track the definition set forth in CAT”,³⁸ its authors proceeded to put forward a designation that certainly does not match the standard found in that treaty. Lawyers from the Office of Legal Council went well beyond the treaty language of “severe pain or suffering, whether physical or mental,” and explained that for the criminal act of torture to occur a higher threshold must be met. The memo read,

[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.³⁹

The treaty speaks of “severe”, but the memo’s authors upped the ante with “so severe that”. This manufactured standard of ‘death or organ failure’ rippled through the public sphere and caused such a political uproar that this memo was retracted within a week after being leaked, and was later replaced with one meant for public consumption.⁴⁰

The most pertinent point for our purposes is that international law was the standard used to scrutinize the work of this ‘Torture Memo’ because it was the precise yardstick with which the memo was meant to be complying. The infamous ‘Bybee Memo’ was indeed a

³⁴ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT hereinafter) (adopted 10 December 1952, entered into force 26 June 1987) 1465 U.N.T.S. 85.

³⁵ *Idem*, Article 4(1) and (2) respectively.

³⁶ 18 U.S.C. §§ 2340-2340A.

³⁷ Memorandum from Jay Bybee, Assistant (Bybee Memo hereinafter) Attorney General, to Counsel to the President (1 Aug 2002) *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 230-2340A*, reprinted in *The Torture Papers: The Road to Abu Ghraib* 172-217, at 182.

³⁸ *Idem*, at 183.

³⁹ *Ibid.*

⁴⁰ It was replaced with Memorandum from Dan Levin, Acting Assistant Attorney General to James B. Comey, Deputy Attorney General (30 Dec 2004) *Re: Legal Standard Applicable Under 18 U.S.C. §§2340-2340A*.

legal document and thus by definition not meant for laymen. However, pain and suffering is certainly something absolutely everyone can understand, even if very few have actually experienced organ failure and no one can explain how death feels. Additionally, it must be understood that torture and its international ban first bounded into the public square with the shocking leak of abhorrent photographs of naked detainees being abused by U.S. soldiers and contractors at the Abu Ghraib prison in Iraq.⁴¹ As a result, a visual context had already been created and public discussions on the international law banning torture were not taking place in the abstract.

Since that time, information concerning the torture and ill-treatment of detainees in the ‘war on terror’ has continued to flood the public sphere, particularly concerning those who were considered “High-Value Detainees” by the administration. The most significant abuse, and indeed torture by its legal definition, has been documented and released to the public. Through our legal investigation of the ‘Torture Memos’, the effectiveness of the abusive treatment by way of the empirical data on six of these detainees considered of importance, and how this clarifies the moral question on torture, it will become clear that this policy of ill-treatment failed each of our three tests of legitimacy.

By applying our model of legitimacy via the sequential addition of the three lenses of *legality*, *morality* and *efficacy*, our intention is multiple. Firstly, it will be possible to see how these policies of the ‘war on terror’ came into direct contact and conflict with the international legal obligations of the United States. Next, the structure of our work will draw attention to the public forums in which these debates took place as the policies were forced into the open, and this will demonstrate how international law became a part of the discussion about the legitimate exercise of physical force by the government. Thirdly, important details of the ‘war on terror’ will be exposed and documented in our three chapters of application. Finally, by adjoining each lens successively and focusing on the overlap between them we will see the important intersection and interplay between the three conceptual spheres and how this integrative theory sheds light on undermining the legitimacy of a governing power.

Our intention is to posit that the state of a commanding authority is balanced upon how legitimately it exercises the physical force with which it has been bestowed. The pillars of *legality*, *morality* and *efficacy*, which sustain this legitimacy, come under attack when an asymmetrical foe employs terrorist tactics against a government (particularly a constitutional democracy).

⁴¹ CBS *60 Minutes* broadcast the first report on the photos of abuse from Abu Ghraib. See LEUNG, R., ‘Abuse Of Iraqi POWs By GIs Probed : 60 Minutes II Has Exclusive Report On Alleged Mistreatment’ (28 April 2004).

As will be seen throughout this work, the most difficult part of confronting such an enemy lies in distinguishing the combatants from the non-combatants. Of course, making this distinction between the two is the very first rule of customary international humanitarian law.⁴² As it was put forward in the authoritative study directed by the International Committee of the Red Cross in 2005,

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.⁴³

This standard is essential to the conduct of legitimate warfare, and there is no doubt that it becomes an extremely arduous and demanding task in the case of asymmetrical conflict.

By implementing policies that are illegal, immoral and ineffective (often directly stemming from failing to meet the challenging requirement of distinction) a government runs the risk of alienating its citizens and destabilizing the structure of its own society, or worse. Thus this investigation provides indications of where a democratic society would want to fortify its defenses when facing an asymmetrical adversary using terrorism as a tactic.

Observing the approach to be put forward in this work reveals that there are at least three theories of international order implicated in the tack to be followed. Martin Wight suggested in his international theory course offered at the London School of Economics in the 1950s that debates on the international realm generally fit into three broad categories of Realists, Rationalists and Revolutionists –also represented by the terms Machiavellians, Grotians and Kantians.⁴⁴ There is no doubt that what will be found in this text touches on each of these traditional groupings and certain policies, actions and reactions can be cleanly classified within them. However, when all of this is contemplated together what we find is much less clear or tidy, leading us to the conclusion that what is being laid out here, and how it is being described, is best characterized as representing a moment of transition or movement. That is to say, what will be found here can be depicted as a confrontation between these three schools of thought with no clear winner, but with indications of a weakening of a dominant traditional approach.

The first tradition, and the one which appears to have lost ground in this clash, is that of the Realists or Machiavellians. This theory is based on the notion of an international

⁴² HENCKERTS, J., and DOSWALD-BECK, L., *Customary International Humanitarian Law*, International Committee of the Red Cross, Vol. I, (Cambridge, Cambridge University Press, 2005) at 3-8.

⁴³ *Idem*, at 3.

⁴⁴ WIGHT, *International Theory: Three Traditions*, note 14 above, at 7-24.

anarchy in which sovereign states, knowing no political superior, interact in a condition largely governed by warfare. International theorist Hedley Bull suggested that to the principal question of international theory (what is the nature of international society?), the Machiavellians give the answer that there is no such thing as an international society. Bull explains that this school of thought believes, “what purports to be international society – the system of international law, the mechanism of diplomacy or today the United Nations – is fictitious”.⁴⁵ Therefore, since there is no society to speak of, no moral or legal rules truly exist and each state must and will act in its own interest.

It will become evident throughout the chapters analyzing the details of the policy of the ‘war on terror’ that this category of the Machiavellians captures the approach of the Bush administration. Of course, further subtleties can be distinguished in certain policies over the eight years of President Bush’s mandate (e.g. offensive vs. defensive Realism). Nonetheless, it will be seen through internal documents analyzing the obligations of international law that the administration held little regard for these duties and systematically arrived at the conclusion that there were no legal protections for those considered to be ‘unlawful combatants’.⁴⁶ Additionally, the lack of respect for international legal rules will be discerned both through the administration’s dealings with the UN Security Council in the lead up to the invasion of Iraq, and its interpretations found in the ‘Torture Memos’. Yet there is no doubt that these legal policies ruled the day and governed the detention and treatment of those considered to be a terrorist threat, and the ‘war on terror’ generally. Therefore it must be

⁴⁵ BULL, H., ‘Martin Wight and the Theory of International Relations’ (1976) 2 *British Journal of International Studies* 101-106, found in *idem*, at xi-xii.

⁴⁶ This term can first be found in the U.S. Supreme Court decision of *Ex Parte Quirin*, 317 U.S. 1 (1942), and demonstrates the traditional deference that the judicial branch has shown to the executive in times of armed conflict. During World War II, eight German saboteurs landed by submarine on the east coast of the United States in June of 1942. They were arrested almost immediately and charged with various counts of attempted sabotage and espionage. President Roosevelt issued Proclamation 2561 to create military tribunals to try the uniform soldiers without uniforms, and in July the eight were tried and convicted. The Supreme Court heard their petition for habeas corpus, and on the 31st of July it was denied. On the 8th of August six of them were then executed, with two having their sentence commuted for cooperating with the government. It was only months later that the Supreme Court delivered their reasoned opinion in October. This concept and term of “unlawful combatant” lay dormant until the attacks of September 11th when it became deeply embedded in the mentality of the ‘war on terror’ representing a form of nonreciprocal warfare. “*Unlawful combatants* are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals”, (my emphasis) at 31. Of course, relying on this precedent ignores nearly sixty years of intervening law which is marked by a dramatic change to international society through the proliferation of international law and thus a direct altering of the binding legal obligations of the United States.

concluded that this Machiavellian school of thought indeed presided and prevailed during the eight years of the Bush presidency.

At the same time, there is little doubt that the Grotian school was also in play here. This tradition focuses on the, “continuous and organized intercourse between these sovereign states in the pacific intervals: international and institutionalized intercourse”.⁴⁷ Under such an understanding the main actors in the international sphere are still sovereign states, but the attention is rather on the moments and places of cooperation, not conflict. Even though these states answer to no common superior, there is a network of interactions governed by not only explicit consent through treaty, but also through custom and shared norms. This society is no fiction, as its working could be observed and studied in institutions such as international law, diplomacy and the balance of power. Therefore, it is indeed the case that there are both legal and moral constraints on state actors as they are bound by the rules that create this international society, and in whose continuance they have a stake.

As has already been mentioned here in our introduction, specific regulations of international law were repeatedly brought before institutional bodies, both domestic and international, to call into question the administration’s contention that they were unconstrained. In this way the so-called ‘fictitious’ international society actually made itself known to government officials and to the public at large. As just one example, in May of 2006 the United States came before the United Nations Committee against Torture to explain and defend its practices in the face of growing reports of contravention of the treaty. The United States sent an oversized 25 member legal team to submit their report, and the session was held at full capacity in one of the largest UN conference rooms in Geneva.⁴⁸ Additionally, there were numerous journalists covering, and television cameras filming, the event that was casually described by a Senior Official of United Nations Office at Geneva observing the overcrowded room as one of the “highlights of the year at the *Palais des Nations*”.⁴⁹ The legality of ill-treatment and the U.S. defense of its actions in the ‘war on terror’ became an issue of high-profile scrutiny in which a larger community was drawn in to judge the policies. In its response to the U.S. report, the Committee against Torture outlined 24 points of principal concern including that the Guantánamo Bay facility should be closed, and that the “State party should ensure that no one is detained in any secret detention facility under its de

⁴⁷ WIGHT, *International Theory: Three Traditions*, note 14 above, at 7.

⁴⁸ This accounting comes from personal attendance of the session at the *Palais des Nations*. See also CNN.com, ‘UN Grills US on Torture Ban’, World Politics, available at: <<http://www.cnn.com/2006/WORLD/europe/05/05/un.us.torture.ap/index.html>> (last visited May 2006).

⁴⁹ This statement comes from an informal meeting with Ulrich von Blumenthal, Senior Legal Adviser at UNOG, who was on the sidelines of the event.

facto effective control. Detaining persons in such conditions constitutes, *per se*, a violation of the Convention”.⁵⁰ This latter concern was confirmed by the fact that fourteen “High-Value” detainees were transferred to the Guantánamo facility later that year which would offer dispositive proof that they had indeed been ill-treated, and the treaty violated, by holding them in a secret location previously. As will be seen throughout this work, the rules and institutions of international society continually materialized in a similar fashion to frame and raise doubt upon the policies of the ‘war on terror’.

Finally, the Kantian view rejects the idea that the international realm is dominated by states oscillating between conflict and cooperation at all. As Bull explained it, “at a deeper level it was about relations among the human beings of which states were composed”.⁵¹ Like the Grotians, this school of thought also appeals to morality. However, this ethic emanated from the cosmopolitanism of humankind rather than from a system of states that, according to this view, would eventually be swept away because of the imperatives of a human brotherhood. One historical moment pointed out by Wight representing this typology were the Protestant and Catholic Revolutionists of the sixteenth and seventeenth century calling out for a reform and purge of the existing state system. Each group came at the religious issues from opposing positions, yet both posited theories of power based on popular consent and the right to resistance. This line of thought conceptualized society as founded on a contract between the governed and those that govern. The result was that there would be a point at which even a royal government could overstep its power. As one short squib from the English Civil War explained,

A Scot and Jesuit, hand in hand,
First taught the world to say
That subjects ought to have command,
And monarchs to obey⁵²

As such, we return to the question of the *power to command* and the *will to obey* which lies at the heart of our investigation.

Individuals, and not only states, undoubtedly play an enormous role in our account of the ‘war on terror’ and its effect on legitimacy. Firstly, the numerous persons who have been detained and ill-treated in this global campaign serve to display one of the shifting features of international law. That is, while the traditional view of international law did not give

⁵⁰ Conclusions and Recommendations: United States, UN Doc CAT/C/USA/CO/2 (18 May 2006) at para. 17.

⁵¹ BULL, ‘Martin Wight and the Theory of International Relations’, note 45 above, at xii.

⁵² BUCHANAN, G., *De Jure Regni apud Scotus* (1579), and MARIANA, *De Rege et Regis Institutione* (1599), cited in WIGHT, *International Theory: Three Traditions*, note 14 above, at 8.

individuals any legal personality, humanitarian and human rights law in the 20th century are two examples of the evolving legal paradigm that individuals do indeed benefit from the protections of international law at certain times. This shift has surely affected the way in which citizens analyze the legitimate exercise of physical force by their own state.

This brings us to the second manner in which individuals play a direct role in our chronicle of events. It is of course individuals who bestow or remove, either tacitly or expressly, their *will to obey*. Clearly, the relevance of any diminished pull towards compliance pivots on both the quantity of individuals acting on this sentiment, and the placement of dissenting figures within the government. This is one reason why one journalist writing in 2007 about “The Revolt of the Generals” is significant. It was explained, “[i]n op-ed pieces, interviews and TV ads, more than 20 retired U.S. generals have broken ranks with the culture of salute and keep it in the family. Instead, they are criticizing the commander in chief and other top civilian leaders who led the nation into what the generals believe is a misbegotten and tragic war”.⁵³ By the definition we put forward here, this indeed represents a legitimacy deficit.

Thus we will find that all three schools of thought deftly outlined by Martin Wight in his university lectures are engaged here in our work. It is this author’s view that what this most likely represents is a moment of transition and change in the international realm. There is no doubt that over the last six decades there has been a mass proliferation of international institutions and personnel, along with non-governmental organizations engaging them as representatives of an international civil society, all governed by international law. To suggest that this immense growth has not affected the domestic legal order or the mental framework for how citizens judge the obligations of their own government is to deny the obvious. The pertinent question is just how much change has come about as a result, not whether any change has actually occurred.

It is clearly too early to conclude whether one of these schools of thought emerged victorious as all these forces came into collision in the ‘war on terror’. These categories of thinking have been present for as long as the conception of a state based international system has been present, so to propose its dissolution is surely presumptuous. Nevertheless, it will be seen throughout this work that the logic and reasoning put forward from the Machiavellian perspective failed the most basic tests of *legality*, *morality* and *efficacy*. Thus it is believed by this author that the Machiavellian approach suffered the biggest loss in this confrontation, and

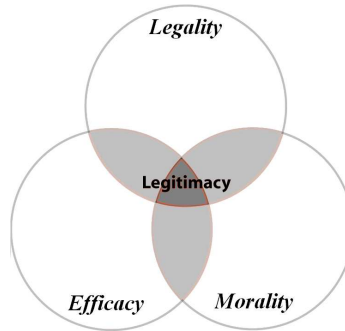
⁵³ SAUER, M., ‘Generals Opposing Iraq War Break With Military Tradition’ *San Diego Union Tribune* (23 Sept 2007).

this speaks to the rising potency of the Grotian and Kantian perspectives, seemingly allied here in this clash.

Yet, the Obama administration continues to pursue many of the very same policies as his predecessor, and has seemingly done so without suffering the same deficit in legitimacy. Considering the diminished pull towards compliance we identify here primarily occurred in President Bush's second term, it is too early to draw conclusions. Nonetheless, this work represents a view on the shifting impact of international law that is worth noting, if only for crafting counterterrorism policy to better defend legitimacy as a target.

Chapter 1

Conceptualizing Legitimacy as a Target of Terrorism



We can no longer have any illusions on the nature of the principles of legitimacy: they are human, that is empirical, limited, conventional, [and] extremely unstable. Any philosophical hack can demonstrate their absurdity; any dictator, at the head of a gang of cutthroats, can suppress them. Nevertheless, they are the condition of the greatest good that mankind, as a collective being, can possess – government without fear.

--Guglielmo Ferrero¹

I. Introduction

An essential dimension of political struggle, whether armed or unarmed, will inevitably revolve around the *power to command* and the *will to obey* since their establishment is what organizes a society. How this is instituted and exercised remains a central and oscillating question for any body politic and it is surely necessary for a government to manage both elements to be defined as functioning. For a community to operate as a unit, decisions and plans must be fixed and then put into action. This clearly requires both command and obedience. Yet, while a commander can be targeted and destroyed with dominant strength, obedience is more elusive and volatile because it is inevitably up to each citizen to exercise through their own individual will. As such, obedience is an element that cannot always be easily explained through the conventional prism of force. There is little doubt that the use of force has been able to command compliance time and again. Nevertheless, today it has become clear that access to more powerful weaponry has faded as the primary deciding factor in every political struggle. It is therefore necessary to move beyond notions of pure force to investigate how some tactics applied by the less powerful in armed conflict are intending to

¹ FERRERO, G., *The Principles of Power* (New York, G.P.Putnam's Sons, 1942) at 314-315.

achieve victory. Thus this work will instead examine how the strategic goals of those who utilize terrorist acts might actually be achieved. That is, they aim to achieve their goals through the provocation of a reaction deemed to be illegitimate since they clearly are not employing overpowering conventional force.

At the beginning of the twentieth century, German sociologist and political economist Max Weber put forward a definition of the state that has become pivotal to Western political thought. Weber described the defining concept of the state as, “a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory”.² The thesis of this work will build on what is considered here to be an essential element of this valuable definition: *legitimacy*. While much attention has focused on the aspect of physical force found in this definition, it is believed by this author that the notion of its legitimate exercise is particularly useful for illuminating the line of attack charted by the asymmetrical tactic and strategy of terrorism.

Moreover, it should not go unnoticed that Weber emphasized the exercise of force by a state as the key function tied to its legitimacy. Likewise, this will serve to construct the thesis of this work as the U.S. wartime authority exercised in the ‘war on terror’ was forceful and at times overreaching, and in turn became damaging to the legitimacy of the U.S. government. Although it is important to recognize that it is extremely difficult to validate a legitimacy claim, one particular moment at which legitimacy comes into sharp focus is when a state’s use of force is challenged. One historical example that has been pointed out is the legitimacy deficit that the United States suffered during the Vietnam War.³ To be sure, many groups that have employed terrorism have raised the legitimacy of the use of force against the people they claim(ed) to represent as central to their grievance against the perceived enemy government.⁴

Following this same line of thought, the 2006 U.S. Army Field Manual 3-24 *Counterinsurgency*, overseen by General Petraeus (who rose to be one of the top commanders for both President Bush and Obama largely due to the military philosophy and doctrine found

² WEBER, M., ‘Politics as a Vocation’ in Gerth, H.H., and Wright Mills, C., (eds. and trans.) *From Max Weber: Essays on Sociology* (New York, Oxford University Press, 1946) (original emphasis) at 78. This speech was delivered at Munich University in January 1919, but not published until October of that year.

³ See COOK, D., ‘Legitimacy and Political Violence: A Habermasian Perspective,’ (2003) 30,3 *Social Justice* 108, available from *Online Questia Library* (last visited 27 Oct. 2010). “As noted, legitimacy may be at issue when a state’s use of force or violence is challenged. (One of the clearer historical examples of this challenge to a legitimacy claim occurred in the United States during the Vietnam War.)”; See also Army Field Manual (FM 3-24), *Counterinsurgency*, U.S. Department of Defense (15 December 2006), “At that time, the North Vietnamese shifted their focus from defeating U.S. forces in Vietnam to weakening U.S. will at home. These actions expedited U.S. withdrawal and laid the groundwork for the North Vietnamese victory in 1975.” at 1-8, §1-36.

⁴ *Idem*, COOK. “Indeed, the legitimacy of a state’s use of force or violence has been a central issue raised by organizations like the PIRA, the PLO, the ANC, and the PKK”.

in this document), highlights the centrality of legitimacy over and over again in discussing modern warfare. While this army manual is focused on the use of the U.S. military in foreign territory, and thus at first glance might not seem applicable in this broad conflict of the ‘war on terror’, one should remember that al Qaeda has indeed engaged the United States in its own asymmetrical conflict. This means that it is certainly appropriate to classify this group as insurgents attempting to undermine the U.S. government, and as such the lessons of counterinsurgency are directly applicable to our discussion. General Petraeus’ manual instructively explains,

[i]llegitimate actions are those involving the use of power without authority—whether committed by government officials, security forces, or counterinsurgents. Such actions include unjustified or excessive use of force, unlawful detention, torture, and punishment without trial. [...] Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term COIN [counterinsurgency] efforts.⁵

As we analyze the policies of the ‘war on terror’ in this work we will find that these exact same examples cited, i.e. the “unjustified [...] use of force, unlawful detention, torture and punishment without trial”, became part and parcel of that very policy. The fact that the current military doctrine guiding U.S. forces in their overseas campaigns claims that “legitimacy is the main objective”⁶ lends enormous credence to our own theory posited here. Therefore both the coincidence and divergence will be further explored in Chapter 2, Section III. Once we understand that the actions of government in response to terrorist acts are often directly related to the legitimate exercise of authority, and consequently central to the conflict, the need for more thoughtful and meticulous counterterrorism policies becomes imperative.

This concept of legitimacy will be central to our analysis because the exercise of the “*legitimate use of physical force*”, most importantly the question of whether it is deemed to be so by the citizenry, ultimately bears upon obedience to command. It will be posited that those who employ terrorist attacks attempt to achieve their strategic goals by driving a wedge between command and obedience within the enemy society. By provoking an overreaching reaction from a government to deal with the terrorist threat, or triggering a response that is considered to be outside of the confines of the government’s authority, the intention is that the citizenry of the rival society will deem the actions carried out to be an illegitimate exercise of physical force. If the determination of illegitimacy pertaining to a policy or government

⁵ FM 3-24, *Counterinsurgency*, note 3 above, at 1-24, §1-132. For more discussion of this document, and its treatment of legitimacy, see Chapter 2, Section III.

⁶ *Idem*, at 1-21, §1-113.

becomes widespread, that is to say, that citizens no longer orient their actions in accordance with the authority, then that society is significantly destabilized and can be caught so inert that it cannot function or move as a unit. Even before such a drastic state of affairs occurs, a government that has a diminishing pull towards compliance with its authority encounters difficulties. That today's predominant purveyors of terror wish to immobilize and disorient their enemy to help reach their strategic goals is hardly controversial. In some measure, this will be a refining and clarification of what has been broadly suggested by other analysts.⁷ Most importantly, however, the objective of this work is first to illuminate the manner in which non-state actors that employ terrorism attempt to reach their overarching goals through a "strategy of provocation"⁸ meant to target legitimacy. Next, which is also suggested to be a unique element that will be brought to the discussion of legitimacy, we will present a way to conceptualize the specific content of legitimacy so that it can be used as a series of lenses for viewing and discussing the issue. In doing so, it will be possible to highlight the critical role that international law has played in evaluating the overreach in the 'war on terror, and how it can play a constructive role in developing an effective counterterrorism policy. Hence with this clarified understanding of the enemy's strategy for reaching its objectives, we can have valuable conversation about how a government attacked by terrorism can best defend itself.

To begin our discussion of legitimacy as a target, it is first necessary to explain the organization of this chapter. Partially because of its interdisciplinary nature, it is felt by this author that the sometimes rigid disciplinary lines of academia have not fostered an ample attention on legitimacy during times of political struggle. Nonetheless, there are still

⁷ For an examination of terrorism intending to destabilize a government through an attack aimed at legitimacy, the presentation most similar to what will be found here, see COOK, 'Legitimacy and Political Violence...', note 3 above. For additional works that speak to the issue of legitimacy involved in armed conflicts involving terrorist acts, even if the issue is not explicit and placed as central, see e.g. IGNATIEFF, M., *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, Princeton University Press, 2004) 204 pp.; FARER, T., *Confronting Global Terrorism and American Neo-Conservatism: The Framework of a Liberal Grand Strategy* (Oxford, Oxford University Press, 2008) 251 pp.; RICHARDSON, L., *What Terrorists Want* (New York, Random House, 2006) 296 pp.; JENKINS, B., 'International Terrorism: A New Mode of Conflict', in Carlton, D. and Schaerf, C. (eds.), *International Terrorism and World Security* (London, Croom Helm, 1975); LAQUEUR, W., *Terrorism*, (London, Weidenfeld and Nicolson, 1977) at 109-112; TUGWELL, M., 'Terrorism and Propaganda: Problem and Response' and CRELINSTEN, R., 'Power and Meaning: Terrorism as a Struggle Over Access to the Communication Structure' in Wilkinson, P., and Stewart, A. (eds.) *Contemporary Research on Terrorism* (Great Britain, Aberdeen University Press, 1987) at 409-418 and 419-450 respectively; see generally BOBBITT, P. *Terror and Consent* (New York, Alfred A. Knopf, 2008); COLE, D., and LOBEL, J. *Less Safe, Less Free* (New York, The New Press, 2007); PAPE, R., *Dying to Win* (New York, Random House, 2005); HAMMES, T., *The Sling and the Stone: on War in the 21st Century* (Minnesota, Zenith Press, 2006).

⁸ This phrase comes from the classic work on this subject, *idem*, LAQUEUR, *Terrorism*, at 81. Although he was using it to specifically describe the approach of the Black Hand and their assassination of the Archduke of Austria Franz Ferdinand, which was the event generally accepted to have initiated WWI, it is a phrase that captures well the only real influence terrorists have to shape events considering their great lack of weaponry.

important works that can be used together as solid building blocks to construct our theory. The question of what makes power legitimate has been of concern for a whole host of professional groups –legal experts, political and moral philosophers, historians and social scientists, to name but a few– who have approached the subject from diverse perspectives using their own professional expertise. Yet offering just one single disciplinary perspective on the concept of legitimacy skews and distorts this topic of deep complexity. It is instead necessary to employ a methodology that sheds light on this multifaceted concept so as to overcome the narrow approach found in some of the work dealing with legitimacy. To do so, in this chapter we will carry out a review of the literature on legitimacy by presenting the pertinent work in a way that recognizes, grapples with and illuminates the interdisciplinary nature of this concept.

To start, it is helpful to discuss some of the different terms used to describe a research project that is meant to bring together and integrate various disciplines to resolve a question that is too complex to solve through only one field of study. In general, there are three primary terms that are used to express this type of approach.⁹ *Multi*-disciplinarity looks at a topic from the perspective of several disciplines at one time, but makes no attempt to join together their insights and thus is often dominated by the home discipline of the researcher.¹⁰ *Inter*-disciplinarity brings together a collection of viewpoints from various disciplines and then draws on the diverse insights by integrating them.¹¹ While the final term of *trans*-disciplinarity is meant to capture, “that which is at once *between* the disciplines, *across* different disciplines, and *beyond* all disciplines”.¹²

One useful way to think about these terms is to use the analogy of a jigsaw puzzle. Multidisciplinarity is about bringing differing point of view to the table as separate pieces of a jigsaw puzzle, but making no attempt to see how they might fit together. Interdisciplinarity is when one tries to assemble these puzzle pieces together by comparing them, looking for the concave and protruding portions, so as to find how they might usefully interact and join together. Whereas transdisciplinarity is meant to describe when the pieces of a puzzle have been fit together in a way that produces a whole new image. While it is important to recognize that this metaphor is imperfect because the outcome of a jigsaw puzzle is predetermined and

⁹ REPKO, A., *Interdisciplinary Research: Process and Theory* (Los Angeles, Sage Publications, 2012) at 20-21.

¹⁰ *Idem*.

¹¹ *Ibid*.

¹² *Ibid.*, at 21 (original emphasis).

the way disciplinary data comes together is much more fluid and supple,¹³ it is still a worthwhile image that communicates well the objective in looking outside of one single discipline for answers to a complex question.

Thus, the first part of this chapter will be organized as a piece by piece construction of differing ideas on legitimacy put forward by the most pertinent intellectuals from different disciplines. In this way, it will be possible to see the logic and reasoning for the conceptualization of legitimacy as a target that is to be found in this chapter and overall work. As well, by arranging the chapter in this manner it will serve as a review of the most relevant literature on legitimacy. While there are certainly various scholars who have discussed the concept of legitimacy, its meaning and application has been quite varied.¹⁴ Therefore there are only some works that are directly germane to our discussion here. As such, we will present the pertinent ideas from the authors of different disciplines and allow them to come together in this chapter as what is meant to be an *interdisciplinary dialogue*. By bringing together the authors and ideas from different fields of study in our review of the literature in a discourse of sorts, the objective is to illuminate both the nature and subject of legitimacy.

However, whether this approach in fact presents a valuable way for understanding terrorism specifically and asymmetrical conflict more generally, will be left up to the reader to decide. This author is still uncertain that this can and will be successfully accomplished with the competencies at hand, and thus it is with modesty that this attempt will be made in addressing a subject matter that demands a method that is both multidisciplinary and integrative. While transdisciplinarity is surely something only achieved through further investigations from other scholars, and by being tested through time.

As such, Sections II through VI will explore the most relevant authors that have treated the concept of legitimacy in our interdisciplinary dialogue. We will start by exploring the limited literature on the joining of political violence with legitimacy to arrive at the classical works of sociologist Max Weber and philosopher Jürgen Habermas on the subject. Then social scientist David Beetham's work on legitimacy will be investigated to expose his valuable discussion on power relations and their deterioration. Next political theorist Hannah

¹³ *Ibid.*, at 25-9. See also, LYALL, C., TAIT, J., MEAGHER, L., and BRUCE, A., *Interdisciplinary Research Journeys: Practical Strategies for Capturing Creativity* (London, Bloomsbury Publishing, 2011) at 40-1.

¹⁴ See e.g., CLARK, I., *Legitimacy in International Society* (Oxford, Oxford University Press, 2007) 288 pp.; ROTH, B., *Governmental Illegitimacy in International Law* (Oxford, Oxford University Press, 2000) 444pp.; WHEATLEY, S., *The Democratic Legitimacy of International Law* (Oxford, Hart Publishing, 2010) 394 pp.; MEYER, L. (ed.), *Legitimacy, Justice and Public International Law* (Cambridge, Cambridge University Press, 2009); DAALDER, I. (ed.), *Beyond Preemption: Force and Legitimacy in a Changing World* (Washington D.C., Brookings Institution Press, 2007); BUCHANAN, A., *Human Rights, Legitimacy, and the Use of Force* (Oxford, Oxford University Press, 2010) 327 pp.

Arendt will provide very beneficial insights on the idea of coerced obedience and its limitations, along with the definition of power as ‘action in concert’. The work of international legal scholar Thomas Franck will then present us with constructive language and vocabulary for better understanding the concept of an uncoerced pull towards compliance. While the historian Guglielmo Ferrero will offer an indispensable discussion of the matter and imagery that will allow us to put forward our own unique conception of legitimacy as a target of terrorism.

Section VII will then present the logical and necessary next step. That is to say, it will expound on the work of legal philosophers François Ost and Michel van de Kerchove to hypothesize a structure and content for understanding legitimacy in our context. That is to say, *legality*, *morality* and *efficacy* will be presented as the interactive components being targeted by those who employ violent attacks on non-combatants. Next, Sections VIII and IX will discuss how the interplay and overlap of these elements can be understood through the work of legal philosopher H.L.A. Hart. By constructing our investigation as a review of the most pertinent literature in the format of an interdisciplinary dialogue the intention is to capture the nature of legitimacy while attempting to integrate the valuable pieces of scholarship that have already been put forward for an added value. It is also hoped to provide a framework for more fruitful discussion over counterterrorism policies that in fact defend against the intention behind terrorist attacks, rather than playing directly into its hands.

II. Political Violence and Legitimacy – Social Science and Philosophy

A review of the literature reveals that there has been very little scholarly attention on legitimacy as a target of terrorism. There has indeed been general recognition by social scientists that legitimacy is an important part of the struggle when there is a clash between governments and groups that use violent actions as their means to engage them politically. In the philosophical literature there have certainly been some attempts to define legitimacy. However, there has very infrequently been an attempt to marry legitimation and terrorism in a way that would greatly illuminate the analysis.

Martha Crenshaw edited the volume *Terrorism, Legitimacy and Power* in 1983, which brought together a variety of political scholars to investigate the consequences of terrorism. Of interest for us is that several of the contributors, including the editor, agreed that,

“legitimacy is the key to a successful response to terrorism”.¹⁵ Crenshaw also put forward, in agreement with her colleague from the volume, Anthony Quinton, that,

[t]he essence of the government’s problem is to maintain and strengthen its authority while diminishing the legitimacy of the terrorists. Thus the government faced with terrorism must be concerned with both the effectiveness and the legitimacy of its policies.¹⁶

Accordingly, we find an approach throughout Crenshaw’s book that certainly dovetails with our own judgment that the legitimacy of the policies instituted to deal with a terrorist threat must be constructed with the understanding that overwhelming force without limits can backfire. This is especially the case when all of the culprits responsible for a violent act of terrorism are difficult, if not impossible, to track down and bring to justice. Yet, even though there is recognition in this edited work that, “[a]ctions against the terrorists must be scrupulously legal”, combating the threat using similar methods in retaliation is “morally abhorrent”, and that, “[e]fficiency and legitimacy [...] are closely related”,¹⁷ there is a disappointing lack of effort aimed at giving any real shape to the concept of legitimacy.

Overall, this work by Crenshaw represents the type of attention that the social science community has made to investigate terrorist attacks in the context of the legitimacy of a regime. One major difficulty for this discipline is that, as recognized by Crenshaw, the legitimacy of a regime is a normative concept and as such lacks any scientific metrics, or statistical data, by which it can be adequately measured. Recognizing this truth also means that it is not possible to simply assume that states under attack by terrorist actions, even democratic ones, are to be automatically deemed clearly and perpetually legitimate. This is not meant to suggest that those who employ terrorism have a just cause. It is only an unsophisticated binary framing of the conflict that would lead toward such a conclusion. Rather, it is to point out that the legitimacy of every regime is always in flux and change, and can indeed be directly affected by terrorism and counterterrorism. Yet beyond this recognition of legitimacy as a normative concept, and pointing to the important connection between political violence and legitimacy, “most social scientists have rarely bothered to discuss the issue at any length”.¹⁸

One article that explicitly links terrorism and legitimacy, with a specific development of the latter concept, is a 2003 piece by the philosophy scholar Deborah Cook entitled,

¹⁵ CRENSHAW, M., *Terrorism, Legitimacy, and Power: The Consequences of Political Violence* (Connecticut, Wesleyan University Press, 1983) at 147.

¹⁶ *Idem*, at 32.

¹⁷ *Ibid.*, at 33-5.

¹⁸ COOK, ‘Legitimacy and Political Violence...’, note 3 above.

‘Legitimacy and Political Violence: A Habermasian Perspective’.¹⁹ The reason she puts forward for writing her article is, “[s]ince political violence today often revolves around the issue of legitimacy, this issue requires much closer scrutiny than it has received in the existing social scientific and philosophical literature”.²⁰ In Cook’s article, one gets a real sense of how much uncultivated territory lies between the phenomenon of terrorism and the concept of legitimacy. She explains,

because legitimacy is a controversial and complex notion, involving not only legal and political matters, but also more strictly moral considerations, it is probably not surprising that social scientists usually avoid dealing with the issue once they have identified legitimacy as pivotal in the conflict between states and terrorist organizations.²¹

This being the case, Cook does a superior job in her short article of outlining the *problématique*. She identified the current lacuna in the literature, and then moved the discussion forward by offering an insightful and pertinent analysis of the work by Max Weber and Jürgen Habermas on legitimacy. In doing so, she places it in the context of terrorism. Therefore, what is necessary for our work here is to highlight the most salient portions of Weber’s and Habermas’ work so as to then attempt to move the conversation another step forward by positing *legality*, *morality* and *efficacy* as the pillars of the complex and interdisciplinary concept of legitimacy. Once this framework has been developed, the intention is to demonstrate its validity via its application to the ‘war on terror’ as the counterterrorist policies spawned in reaction to September 11th and beyond.

An investigation of Weber and Habermas on the issue of legitimacy presents us with two different approaches that have an important impact on its treatment in this work. It will be necessary to begin by explaining the shortcomings of Weber’s approach and at the same time justify the decision to instead follow Habermas on this issue. What we will find is that Weber offers a view of legitimacy that is not amenable to proof, or cannot be tested, because he sees it as based on unspecific subjective beliefs without identifiable content. On the other hand, Habermas adopts the position that the legitimacy of a regime can be accepted or rejected on rational grounds, which actually rest on verifiable content that can indeed be tested. As will be seen throughout this work, it is believed by this author that while legitimacy is multifaceted and ever shifting, there are some broad lines that can help us come closer to understanding its

¹⁹ *Idem.*

²⁰ *Ibid.*

²¹ *Ibid.*

essence, even if we cannot know its precise contour lines at all moments and in all circumstances.

1) Sociologist Max Weber

Max Weber's work on legitimacy has achieved a classical status in the literature of political-science and political sociology, even if it is "tantalizingly incomplete".²² As noted above, the widely diffused definition of the state today comes from Weber when he spoke of "a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory".²³ In the same 'Politics as a Vocation' speech in which he put this classification forward, Weber stated and then asked,

[l]ike the political institutions historically preceding it, the state is a relation of men dominating men, a relation supported by means of legitimate (i.e. considered to be legitimate) violence. If the state is to exist, the dominated must obey the authority claimed by the powers that be. When and why do men obey? Upon what inner justifications and upon what external means does this domination rest?²⁴

Weber goes on to put forward in this speech three broad typologies as the "inner justifications" or "basic legitimations", in an attempt to answer the questions presented here. He presents these as *traditional*, *charismatic* and *legal* authority. The *traditional* authority is based on a belief in the legitimacy of what has always been known to exist and creates a pull towards compliance out of custom. The *charismatic* authority rests upon the personal magnetism, or a pull created by the charisma, of the person giving the order. And *legal* authority is based on the propriety of formally enacted rules and statutes. The motivations for recognizing orders or an authority as legitimate will vary, and sometimes the stimulus to obey will be combined in differing ways in individual cases. Weber also points out elsewhere that "[t]oday the most usual basis of legitimacy is the belief in legality, the readiness to conform with rules which are formally correct and have been imposed by accepted procedure".²⁵ This recognition clearly bolsters our decision to use international law as our underlying framework.

However, the thrust of Weber's argument is that legitimacy is based upon belief. Looking at *traditional* and *charismatic* authority, it is quite easy to understand their basic components as subjective beliefs. At the same time, *legal* authority in Weber's scheme is at first meant to rest on "rational" grounds giving a more stable foundation for the critical aspect

²² SPENCER, M., 'Weber on Legitimate Norms and Authority' (June 1970) 21, 2 *The British Journal of Sociology* 123-134, at 123.

²³ WEBER, 'Politics as a Vocation', note 2 above, at 78.

²⁴ *Idem*.

²⁵ WEBER, M., *The Theory of Social and Economic Organization*, Henderson, A.M., and Parsons, T., (trans.) (New York, The Free Press, 1947) at 131.

of the *will to obey* underpinning a societal structure. Yet, further investigation reveals that these “rational” grounds are themselves based upon belief. In his discussion of the three pure types of legitimate authority in *The Theory of Social and Economic Organization*, similar to what is found in the ‘Politics as a Vocation’ speech, Weber speaks of “[r]ational grounds – resting on a *belief* in the ‘legality’ of patterns of normative rules and the right of those elevated to authority under such rules to issue commands”.²⁶ As such, Weber simply assumes that this belief is rational and gives no evidence or support for his argument. Therefore, whether a rule or command is genuinely legal is not determinative in Weber’s scheme, since it is in fact the “*belief* in the legality” that truly matters.

As further evidence of subjective belief buttressing Weber’s understanding of legitimacy we can look to where he discusses “The Concept of a Legitimate Order” in this same book. Weber launches the entire discussion, with his own emphasis on the specific word in question, by explaining, “[a]ction, especially social action which involves social relationships, may be oriented by the actors to a *belief* in the existence of a ‘legitimate order’”.²⁷ So it is indeed possible to find explicit verification of the basis upon which legitimacy rested for Weber: *belief*.

Also of importance, Weber makes very clear that sheer obedience is not enough to signify that the legitimacy has been bestowed from below. Not only must there be identifiable compliance, but this obedience must be willingly given. As Weber explains, “[t]he merely external fact of the order being obeyed is not sufficient [...]; we cannot overlook the fact that the meaning of the command is accepted as a valid norm”.²⁸ Just as we will see in our discussion of coerced obedience with Arendt’s exploration of how violence can at times undermine political goals,²⁹ Weber too makes the important distinction that to obey out of fear or expediency would not coincide with the concept of legitimacy as discussed here.³⁰

Interestingly, in this book Weber follows his discussion of the legitimacy of an order with a section entitled, “The Concept of Conflict”.³¹ Yet although it makes good sense that the legitimacy of a regime would have a direct bearing on the type, frequency and intensity of social conflict, Weber does not connect the two. He discusses conflict as a battle to impose one’s will that is met with resistance, which can be either peaceful or violent, but he does not

²⁶ *Idem*, (my emphasis) at 328.

²⁷ *Ibid.*, (original emphasis) at 124.

²⁸ WEBER, M., *Law in Economy and Society*, Rheinstein, M., (ed.)(Cambridge, Massachusetts, Harvard University Press, 1954) at 328.

²⁹ See Section IV below.

³⁰ For a useful discussion on this point see PARKIN, F., *Max Weber* (London, Tavistock Publications, 1982) at 74-80.

³¹ WEBER, *The Theory of Social and Economic Organization*, note 25 above, at 132-5.

address the issue of legitimacy in this discussion. Cook expresses the absence of any deliberation as such,

[t]his omission is all the more surprising because there may be a direct connection between conflict and the belief in legitimacy: when the vast majority of citizens believe in a state's legitimacy, they will be unlikely to engage in civil or uncivil disobedience. Conformity to laws will generally prevail. Conversely, the weaker the belief in legitimacy, the greater is the potential for conflict. When individuals do not believe that a state's laws are binding or legitimate, they will be less likely to orient their actions in accordance with these laws, and conflict may ensue.³²

For whatever reason, Weber does not concern himself with linking conflict to legitimacy.

While it is certainly understandable why Weber would interpret the complex notion of legitimacy as supported primarily by belief since it is the sum of many individual's often tacit actions oriented in one general direction, it leaves one wanting for more. What is the content of this belief? Is it really unknowable? Can one count on uncoerced obedience for future order? Perhaps most importantly for this analyst, is there any way to talk about legitimacy with more detail and form? Due to these many important questions left unanswered, Weber's work on fleshing out the details of legitimacy and its shape is not particularly useful when it comes to analyzing it in reference to terrorism.

2) Philosopher Jürgen Habermas

German sociologist and philosopher Jürgen Habermas holds the very pertinent view that since the grounds of 'rational' authority rest on reason, it is indeed possible to test them discursively. That is to say, Habermas believes that not only is it possible to examine the truth claims of a regime's assertions of legitimacy, citizens in democratic states today do in fact engage in such testing proceeding by reasoning or argument rather than intuition and belief. This is of direct importance for our analysis since what is being put forward in this work is that legitimacy does have an empirical shape, or a form that is testable with facts, which can be discussed and investigated. As such, the position of Habermas on this point will be presented here and will then serve as the philosophical basis of moving forward our work on how terrorism targets the legitimacy of a government's actions, i.e. their *legality*, *morality* and *efficacy*.

Habermas overtly points out that it was Weber who was responsible for igniting the debate at a sociological level over the "truth-dependency of legitimations" because of its

³² COOK, 'Legitimacy and Political Violence...', note 3 above.

ambiguity.³³ As noted, Weber felt that legitimacy was based on an individual's subjective belief in a regime's order or authority, and it was precisely this point that Habermas found to be problematic. For if this belief is conceived to be without any inherent relation to truth, then it is only of psychological significance to an individual and not amenable to the testing of rational justification. In other words, the manner in which Weber presented this belief made the motivation to bestow legitimacy only of importance on an individual level, and not something that could be examined by an entire society on the grounds of logic or reason. There can be, and surely are, individual reasons for granting obedience to a regime and orienting one's behavior in accordance. However this conception of legitimacy leaves a large swath of intellectual territory that cannot be investigated, and Habermas keenly zeroed in on this shortcoming. To resolve this flaw he instead suggested that the grounds upon which legitimacy rests must be linked to their logical status, and thus are criticizable because they either do, or do not, "*motivate rationally*".³⁴ As Habermas explained it (an assertion found throughout his work),³⁵

every effective belief in legitimacy is assumed to have an immanent relation to truth, the grounds on which it is explicitly based contain a rational validity claim that can be tested and criticized independently of the psychological effect of these grounds.³⁶

Most importantly, Habermas feels that not only is the belief in legitimacy correlated directly to truth, in democratic societies today it is increasingly the case that citizens indeed submit the claims of a regime to rational testing. That is, the general public requires more and more that the claims and exercising of authority are meeting the constitutional "catalogue of basic rights, strongly immunized against alteration," in part because the respect of these fundamental rights, "has legitimizing force".³⁷

It is suggested here that there are also times when international law can represent this same type of constraint on a regime because of both international and domestic legal reasoning, and because of the fundamental nature of individual protections that can often be easily understood by a population. If we look at the actions identified to be illegitimate in the Army Field Manual overseen by General Petraeus, "unjustified [...] use of force, unlawful detention, torture and punishment without trial",³⁸ these are extremely important prohibitions

³³ HABERMAS, J., *Legitimation Crisis*, McCarthy, T. (trans.) (London, Heinemann Educational Books, 1976 [German Text: 1973]) at 97.

³⁴ *Idem*, at 98.

³⁵ COOK, 'Legitimacy and Political Violence...', note 3 above.

³⁶ HABERMAS, *Legitimation Crisis*, note 33 above, at 97.

³⁷ HABERMAS J., and LUHMANN, N., *Theorie der Gesellschaft oder Sozialtechnologie?* (Frankfurt, 1971), cited in HABERMAS, *Legitimation Crisis*, note 33 above, at 101.

³⁸ FM 3-24, *Counterinsurgency*, note 3 above, at 1-24, §1-132.

which can be considered overlapping provisions found in both humanitarian and human rights law. While there is no doubt that there are still hurdles to be cleared for international norms to be generally utilized by citizens to discursively test a regime's legitimacy, this basic practice of legitimacy verification through similar means is relatively recent in human history.³⁹ As such, we can understand that the rising use of this tool of holding a government accountable for living up to its constitutional and international obligations surely has ramifications for the policies of counterterrorism. To defend itself against terrorism that is taking aim at legitimacy, a government must take into account the manner in which citizens bestow this uncoerced pull towards compliance.

As such, we find that Habermas takes the salient step beyond Weber to posit that the basis of legitimacy is indeed informed with discernible content. While Weber was satisfied to identify legitimacy as required by every regime to exercise its authority, he did little to conceptualize it as analyzable, and even less so in the context of political violence that challenges the authority of a government. While Habermas has not delved deeply into studying terrorism in relation to legitimacy problems,⁴⁰ it is this author's opinion that he has palpably moved the study of legitimacy and terrorism forward by making their link feasible and reasonable. The two primary forms in which this is accomplished is first with his conclusion that, "every effective belief in legitimacy is assumed to have an immanent relation to truth".⁴¹ Secondly, it is his finding that citizens (particularly in democratic societies),

as participants in a practical discourse test the validity claims of norms and, to the extent that they accept them with reasons, arrive at the conviction that in the given circumstances the proposed norms are 'right'. The validity claim of norms is grounded not in the irrational volitional acts of the contracting parties, but in the rationally motivated recognition of norms, which may be questioned at any time.⁴²

Both of these conclusions are critical for understanding the approach of this work. Like Habermas, we will assume: 1) that the legitimacy upon which a regime rests has specific and knowable content; and 2) that citizens can and will test a government's claims to legitimacy.

There is, nevertheless, one important element put forward by Weber concerning legitimacy that will be central to this study. The particular tack for studying the content of legitimacy claims will be directly related to Weber's contention that a state is defined by its

³⁹ HABERMAS, *Legitimation Crisis*, note 33 above, at 86-88; See also COOK, 'Legitimacy and Political Violence...', note 3 above.

⁴⁰ For a survey of Habermas' treatment of terrorism see *idem*, COOK, 'Legitimacy and Political Violence...'.

⁴¹ HABERMAS, *Legitimation Crisis*, note 33 above, at 97.

⁴² *Idem*, at 105.

“monopoly of the legitimate use of physical force”. That is to say, the manner in which the U.S. government exercised its monopoly on force in the ‘war on terror’ as the response to the terrorist attacks of September 11th will be used as our point of departure. Although it is very difficult to validate any legitimacy claim, Cook was surely correct in suggesting that legitimacy can become a particularly important issue when a state exercises its use of force or violence. As she explained,

[i]n principle, and to paraphrase Habermas, a state's claim that its laws and policies -- in this case, those authorizing the use of force-- are morally justified must be redeemed discursively by citizens. In practice, states have been obliged to demonstrate to their citizens, to other countries, and to the international community at large, that their use of force has been, and continues to be, constrained by just laws, policies, and practices. Where they have failed to do so, their legitimacy has been compromised, sometimes seriously.⁴³

As such, we can begin to see that within this framework it is justifiable and correct to address the detention policies at Guantánamo without a judicial review, the use of preventive war to invade a country that had not launched an armed attack against the United States, and the implementation of torture for intelligence gathering purposes for analyzing the ‘war on terror’ in the context of legitimacy.

III. Erosion of Power Relations – Social Scientist David Beetham

David Beetham wrote on the subject of legitimacy in 1991 in a book entitled *The Legitimation of Power*, and his work offers a perspective that is particularly pertinent to our study.⁴⁴ Beetham explores the manner in which a rule or ruler attains and maintains the *will to obey*, and opens his investigation by explaining, “[w]here power is acquired and exercised according to justifiable rules, and with evidence of consent, we call it rightful or legitimate”. Beetham affirms our central contention, one that we will later see expressed by the historian Guglielmo Ferrero, that understanding legitimacy within a community is about the interdependent relationship between those that govern and those who are governed. Most importantly, he clarifies that study of legitimacy “helps explain the erosion of power relations”.⁴⁵ This includes both striking breaks in political authority, as well as the less dramatic moments of weakness or a diminished degree of cooperation that can be experienced by an authority.

⁴³ COOK, ‘Legitimacy and Political Violence...’, note 3 above.

⁴⁴ BEETHAM, D., *The Legitimation of Power* (New York, Palgrave MacMillan, 1991) 259 pp.

⁴⁵ *Idem*, at 6.

Beetham astutely points out that legitimacy is not an all-or-nothing quantity because it can be “eroded, contested or incomplete” and therefore, “judgements about it are usually judgements of degree”.⁴⁶ Thus when speaking about legitimacy, we are most often discussing the degree of cooperation or the quality of performance. As Beetham explains, “[w]here the powerful have to concentrate most of their efforts on maintaining order they are less able to achieve other goals; their power is to that extent less effective”.⁴⁷ Subtle shifts in power frequently occur and might often be explained in other ways. But this does not mean that the dramatic breaches of political and social order –such as riots, revolts and revolutions– are the only forms of social change related to legitimacy. Put another way, the high level of drama that accompanies such events does not mean that they are the only shifts in power that are worthwhile analyzing and discussing in the context of legitimacy. It is certainly useful to be able to look at and discuss other erosions of legitimacy which occur before there is no longer an intersection between command and obedience. Beetham elucidates the matter by explaining, “[a]s with so much else about society, it is only when legitimacy is absent that we can fully appreciate its significance where it is present, and where it is so often taken for granted”.⁴⁸ However, in agreement with Beetham, this should not mean that legitimacy can only be discussed when it is absent.

Also of importance is the fact that, although Beetham dons the cap of both a social scientist as well as a political philosopher and recognizes that both perspectives are valid and treat the issue of legitimacy, he has chosen in this work to approach the subject from the standpoint of the former. Part of the reasoning for this decision is based on his belief that social science has suffered from great confusion on this topic. Thus he wished to help rescue it from the impact of Max Weber whose “influence has been an almost unqualified disaster”.⁴⁹ As a scholar who has written a treatise on the work of Max Weber,⁵⁰ this statement is by no means meant to malign his work or to diminish his great and worthwhile influence on twentieth century social science. Instead, Beetham takes issue with the definition of legitimacy that Weber provided in an attempt to avoid making a judgment on its existence in the manner of a philosopher, but instead to present a more scientific report on what is. Beetham, in agreement with what has been discussed above, reduces Weber’s approach to

⁴⁶ *Ibid.*, at 20.

⁴⁷ *Ibid.*, at 28.

⁴⁸ *Ibid.*, at 6.

⁴⁹ *Ibid.*, at 8.

⁵⁰ BEETHAM, D., *Max Weber and the Theory of Modern Politics* (Cambridge, Polity Press, 1991) 286 pp.

defining legitimacy as a people's "belief in legitimacy".⁵¹ The reasoning for such an understanding of legitimacy is generally thought to be based on a desire to place the social scientist at an analytical distance from her subject, and not to be standing in judgment of a policy or power. However, the result of basing legitimacy on belief was to make it an individual issue upon which comment was only vague or useless for any broader analysis of a society. Beetham strongly disagrees and dissects the impact that Weber's "belief in legitimacy" starting point has had on social science; it is meant to insulate the analyst from judging or taking a position. His conclusion was that, "the whole Weberian theory of legitimacy has to be left behind as one of the blindest of blind alleys in the history of social science, notable only for the impressiveness of the name that it bears, not for the direction in which it leads".⁵²

To help recover from this impediment that Weber has left as his legacy on the topic of legitimacy Beetham proposes constructing a tripartite structure of legitimacy that attempts to include differing disciplinary approaches. As has been indicated by this author, Beetham is in agreement that the key to comprehending the concept of legitimacy is in recognizing, "that it is multi-dimensional in character".⁵³ As an attempt to address this manifold concept, Beetham posits that it is necessary to manage its analysis with tools from legal experts, moral philosophers and social scientists. In so doing, he posits that his framework will allow one to undertake two different tasks. The first is to carry out a systematic comparison between different forms of legitimacy found to be appropriate in varying historical types of social and political systems. Secondly, the structure hypothesized by Beetham allows the analyst to assess the "degree of legitimacy-in-context of a given power relationship, as a necessary element in explaining the behaviour of those involved in it".⁵⁴ Since this second task can be correlated to the gauging of the validity of counterterrorism policy, and its effect on a government in relation to its citizens, the fundamentals of Beetham's model are surely worth consideration.

The three primary aspects that are deemed to be the essence of legitimacy by Beetham can be classified into the realms of the legal, the moral and the political. Beetham described these categories as operating cumulatively, and on different levels. He explained,

[t]here is the legal validity of the acquisition and exercise of power; there is the justifiability of the rules governing a power relationship in terms of the beliefs and

⁵¹ BEETHAM, *The Legitimation of Power*, note 44 above, at 6 and 8.

⁵² *Idem*, at 25.

⁵³ *Ibid.*, at 15.

⁵⁴ *Ibid.*, at 23.

values current in the given society; there is the evidence of consent derived from actions expressive of it.⁵⁵

The extent to which these factors are present determine the level of general obedience within a society, and the extent to which they are absent will allow us to explain why and how the *will to obey* to a government or regime has eroded. Together these criteria provide the grounds upon which citizens are pulled towards an obligation to comply with what is laid down by those in charge.

One of the most useful consequences of Beetham's contribution is that he moves the analyst's focus of attention away from the consciousness of single individuals. The Weberian approach not only distorted the nature of legitimacy, but it also led to the corrupting of methodological processes of investigation. That is to say, it proposed a flawed research strategy for determining whether a power is legitimate: enquiring whether it is believed to be so. Beetham rightfully insisted that, when it comes to speaking about and analyzing legitimacy, "the evidence is available in the public sphere, not in the private recesses of people's minds".⁵⁶ If we are to ask the right questions about the acquisition and exercise of power, it is possible to give shape to legitimacy-in-context, and we are not left attempting to compile the opinions of citizens who may or may not understand what legitimacy even means. As mentioned above, Habermas has suggested that the content of legitimacy is indeed knowable since it is something that citizens have come to rationally test more and more in contemporary society.

Nonetheless, this author does have one particular criticism of Beetham's factors of legitimacy. The idea that the *power to command* must act within rules and processes that have been formally codified, and tested through adjudication if necessary, is the realm of the legal that is widely accepted by scholars of legitimacy, including Weber.⁵⁷ As well, the view that the rules governing the power relationships within a community and the exercise of power must be found to be justifiable on axiological grounds is philosophically sound and fully accepted by this author. However, the theory that the third leg of legitimacy is to be found in actions of consent by the subordinates in a society seems to suffer from the very same flaw of which Beetham accuses Weber; it misdirects our attention from those who wield power to those who are beholden to it. There is no doubt that the actions of citizens and lower-level administrators and military commanders can demonstrate an acceptance of legitimacy. It is

⁵⁵ *Ibid.*, at 12.

⁵⁶ *Ibid.*, at 13.

⁵⁷ WEBER, *The Theory of Social and Economic Organization*, note 25 above, at 131.

even conceivable that these actions are indicative that the legitimacy of a regime or policy has maintained a certain level that is worthy of note. However, it does not speak to the content of targeted legitimacy for which we are seeking so as to be able provide an assessment of counterterrorism policies. That is to say, the “expressed consent” by subordinates does not offer any substance by which a policy or regime can be tested. Therefore, we will need to continue forward in search of this third piece to the puzzle of legitimacy. Yet for the moment, we will set aside this further search for its contents (to be continued in Section VII below), while we provide additional shape to the concept of legitimacy itself.

IV. Coerced Obedience and Action in Concert – Political Theorist Hannah Arendt

There is indeed a tendency, and a very natural one it would seem, for us to be drawn towards the understanding of obedience in its coerced form as the most prevalent. Many often believe obedience is compelled by the threat of sanction that has been held over someone to get them to orient their action in a desired manner, if not by overt violence being exercised on said person and/or her peers. The reason for this leaning is not exactly clear. Perhaps it is the fact that it is not easy to notice, or even to speak about, an uncoerced orientation of actions because when it is occurring we don’t usually notice or mention it. However, when mass numbers of individuals are drawn to diverge from the demands of law and authority, we cannot help but realize it, remark upon it, and even become frightened by the chaos that ensues. When the legitimacy of an authority is no longer in existence, everyone knows it. Even so, all those who have sought power indeed yearn for such an unspoken, and if possible uncoerced, pull to obey their command.

The pertinent question is then: what is the exact relationship of violence to obedience? To begin to answer this question it is necessary to first recognize that obedience is directly related to power itself because, as we will see below in the section on the historian Guglielmo Ferrero, it indeed is an essential component of its construction. It is also the astute contribution of one particular political theorist that sheds valuable light on violence and its effectiveness as a political tool. Hannah Arendt ventured into well trodden territory to extract an essential insight into power and violence, which implicitly recognizes obedience as crucial for power to exist.⁵⁸ Thus, her work will serve us extremely well in this investigation.

Arendt’s survey of the literature finds that political theorists have generally agreed that violence is the most blatant expression of power. That is to say, violence has been

⁵⁸ ARENDT, H., ‘On Violence’ in *Crises of the Republic* (New York, Harcourt, Brace & World, 1970).

traditionally seen as the most reliable and obvious way to get others to do what we wish of them. She cites Voltaire affirming that, “[p]ower consists in making others act as I choose”, and Weber contending that power exists whenever it is possible “to assert my own will against the resistance” of others.⁵⁹ Clausewitz’s classic definition of war should also be remembered here: “an act of force to compel our adversary to do our will”.⁶⁰ Bertrand de Jouvenel split the concept of power into two vital components (reminiscent of Ferrero) and in so doing employed language already seen in this work. Jouvenel wrote that, “to command and to be obeyed: without that, there is no Power”.⁶¹ The *power to command* and the *will to obey* have been highlighted here as an essential dimension to all political struggle since, “there being in every society a centre of control” and “[a]t all times and in all places we are confronted with the phenomenon of civil obedience”.⁶²

However, in her work *On Violence*, Arendt focused on distinguishing violence from power, because it was something she identified as largely overlooked, or unnoticed, by previous theorists. While most authors saw power and violence as nearly one and the same, Arendt saw the need to explicitly and definitively separate the two concepts from each other. In doing so, Arendt offered a definition of power that greatly helps explain the manner in which this subject will be approached in this work. Arendt asserted that, “[p]ower corresponds to the human ability not just to act but to act in concert.”⁶³

This straightforward framing of a term that is sometimes discussed without enough reflection has enormous implications. Most importantly, it removes the need for the use of weapons or coercion for power to exist. Conventionally understood, this approach is certainly an anomaly. Arendt herself presents Mao Tse-tung’s definition of this term; “power is what grows out of the barrel of a gun”.⁶⁴ For Mao, weapons, violence and power were nearly or completely synonymous. But if we are willing to take the philosophical step with Arendt, we can appreciate the difference between the weapons themselves, and the intent behind their use. From a societal point of view, it is nearly always the case that arms are employed, or violence threatened, to force a specific behavior from a group of people. That is, political violence is meant to produce a desired behavior. However, it is the end, not the means, which matter here. The end is for people to act together in some desired way, while the means are

⁵⁹ *Idem*, at 135.

⁶⁰ CLAUSEWITZ, K., ‘On War’ in *The Book of War* (New York, The Modern Library, 2000) at 264.

⁶¹ JOUVENEL, B., *On Power, Its Nature and the History of Its Growth*, trans. J. F. Huntington (New York, Viking Press, 1949) at 96.

⁶² *Idem*, at 17.

⁶³ ARENDT, ‘On Violence’, note 58 above, at 143.

⁶⁴ *Idem*, at 113.

employed to coerce them to do so. In this way, it is not a leap to arrive at a definition in which the deeds achieved by a group of people working together to the same end are, in fact, the point of employing force. For Arendt, power is expressed when people simply “act in concert”. The critical element that this definition provides is an allowance for traditional understandings to be fully encompassed; yet it simultaneously offers a space in which a sometimes seemingly contradictory idea can be included. In other words, both the force of weaponry and massive non-violent action can both be defined as forms of power, if the desired end is achieved.

However, Arendt also clearly warned against those moments in which force would be applied in a form that becomes considered to be excessive or inappropriate. There is a point at which coercion ceases to function as an effective political tool. This can be the case even if people choose to acquiesce and surrender themselves to it at a given point in time. We must remember that the relations between persons, like all things human, occur on a spectrum of time, ever moving and never stopping. What happens today affects the reactions of tomorrow. Although capitulation might take place, it should not always be understood as a perpetual and permanent handing over of one’s will. Resentment cannot be quantified. It can persist undetected, and it can reach a boiling point. The difficulty of measuring antipathy at any given moment should not, however, hinder our understanding of the definition offered by Arendt. It only forces recognition that power cannot always be measured because it is, at times, latent.

To a certain extent, this analysis of Arendt relocates power in the hands of those that grant their obedience, rather than simply with the officials that command. This is certainly not the case in every circumstance, but we must understand it as a part of the political equation. This is surely why a pull towards compliance with an authority is to be prized. The possession of such legitimacy by a leader is indeed a precious commodity, just as its revocation can be termed a calamity. And this misfortune is not just for she who loses the *power to command*, for it is not always clear how the *will to obey* can be restored if it is lost or nonexistent. The problem of reestablishing a legitimate authority is difficult whether its dissolution came about via conventional power or as a result of an application of overreaching force.⁶⁵

Delving deeper into the distinction between power and violence, Arendt pushed forward. She proposed that, “[t]o substitute violence for power can bring victory, but the price

⁶⁵ This is an extremely important distinction: the destruction vs. the construction of legitimacy. In this work it is be posited that the al Qaeda organization only seeks to reduce or destroy the legitimacy found within the enemy society, and does not have a clear vision of what it will be its replacement if it can indeed provoke a breakdown. For a more complete discussion of this point Chapter 2, Section III.

is very high; for it is not only paid by the vanquished, it is also paid by the victor in terms of his own power”.⁶⁶ Thus we begin to see that Arendt not only saw them as different, but that she went even further and juxtaposed violence and power as opposites saying, “where one rules absolutely, the other is absent”.⁶⁷ This is an important and fascinating point for understanding the functioning of modern societies, yet it is not the essence of what is being fleshed out here. For our purposes, it is vital not to fuse *legitimate* authority with political violence and coercion. Legitimacy can only be clearly understood when the definition of power is separated from violence. As will become more plain in the section on Ferrero, there is an interdependent relationship between command and obedience, and it is this author’s belief that this is the most useful way to comprehend the quintessence of power. Thus, the relevant point here is that while violence can in fact be used to tear down a power structure, it cannot serve as the sole tool used to rebuild a stable one in its place. Nor can violence be exercised outside of the accepted norms of a society without complication, lest it be deemed illegitimate. As Arendt put it,

[v]iolence can always destroy power; out of the barrel of a gun grows the most effective command, resulting in the most instant and perfect obedience. What never can grow out of it is power.⁶⁸

It was this conception of power that allowed Arendt to conceive of the final downfall of the Soviet Union through its exercise of military force in Eastern Europe to quell dissent. This particular part of her work was a specific commentary on the events of 1968, known as the Prague Spring in which the non-violent resistance of the Czech people was met with tanks from the USSR and its Warsaw Pact allies. Arendt saw these events as a direct collision of violence and power, and despite the immediate outcome of a crushed opposition she arrived at the conclusion that this demonstrated a loss of overall power rather than an augmentation of it. It should be pointed out that there were very few analysts, pundits or political scientists that foresaw the fall of the USSR, or even a discernable structural crack in its edifice. It was after the fact that scholars started to point to the Solidarity Movement in Poland and the Charter 77 open association of peoples in Czechoslovakia as organizations that made a major contribution to bringing about the collapse of an empire without the use of arms.⁶⁹ In a more stark demonstration of causality, the Rose Revolution of 2003 in Georgia, the Orange

⁶⁶ ARENDT, ‘On Violence’, note 58 above, at 152.

⁶⁷ *Idem*, at 155.

⁶⁸ *Ibid.*, 152.

⁶⁹ See e.g. ROBERTS, A., ‘Civil Resistance in the East European and Soviet Revolutions’ (1991) Monograph Series, No. 4 *The Albert Einstein Institute*; see also ACKERMAN, P. and DUVALL, J., *A Force More Powerful* (New York, Palgrave, 2000) at 113-174.

Revolution of 2004 in Ukraine, the Tulip (Pink or Lemon) Revolution of 2005 in Kyrgyzstan and the Cedar Revolution of 2005 in Lebanon⁷⁰ brought about political changes without tanks, planes and guns. Additionally, what has been called a “democratic wave” or Arab Spring in the Middle East in 2011 can also be classified into a similar category of people willing to “act in concert” without weapons or being coerced.⁷¹ These real and concrete events defy many common tools of analysis, yet Arendt’s definition of power, and the limits it imposes on effective political violence, begin to shed a new light how we might better conceptualize power or ‘action in concert’.

It is important not to interpret Arendt’s point of view on this pivotal issue too broadly and arrive at the conclusion that hers was an attempt to advocate a kind of political pacifism, or that there is no place for the effective use of force in domestic or international politics. Arendt herself supported the death penalty for the man sometimes referred to as the ‘architect of the Holocaust’, German Nazi Adolf Eichmann.⁷² This would clearly demonstrate a belief in the exercise of political violence in certain circumstances. The intention here, which follows directly from Arendt’s point of view and work, is to clarify that the use of coercion can at times become counterproductive, and there are moments when it will in fact undermine the *will to obey*. What is simply put forward in the above quotes by Arendt is that violence indeed can be used to restore rule, or command immediate and momentary compliance, but an assured enhancement of power it is not. Now that coerced obedience has been explicitly ruled out as a component of legitimacy as discussed here, we will turn to putting forward the most succinct and clear definition of legitimacy as it is understood in our work.

V. An Uncoerced Pull Towards Compliance – International Jurist Thomas Franck

International legal scholar Thomas Franck has also spoken to this concept in his book entitled, *The Power of Legitimacy among Nations*.⁷³ This work investigates the noteworthy

⁷⁰ For a useful analysis of these revolutions generally as meant to fit into a “global narrative”, and the Georgian events specifically, see MANNING, P., ‘Rose-Colored Glasses? Color Revolutions and Cartoon Chaos in Postsocialist Georgia’ (2007) 22, 2 *Cultural Anthropology* 171.

⁷¹ OBAMA, P., “Remarks by the President on the Middle East and North Africa”, State Department, Washington D.C. (19 May 2011), The White House Website, available at: <<http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa>>. It should be recognized that these various events in the Middle East have taken on a very different shape in each country and not all of them can be described as non-violent dissent, e.g. Libya.

⁷² ARENDT, H., *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York, The Viking Press, 1963) 299 pp.

⁷³ FRANCK, T., *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990) 312 pp. For additional studies of this nature see KOSKENNIEMI, M., *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge, Cambridge University Press, 1989) 704 pp.; and KENNEDY, D., *International Legal Structures* (Nomos Verlagsgesellschaft, 1987) 294 pp.

phenomenon of significant obedience to international rules, even though they are not enforced by a unitary system. While this remark may at first seem counter-intuitive since there is so much attention on the violations of international law, this observable fact certainly merits much more attention. Many investigators of international law often ignore this important difference between the domestic and international legal systems and attempt to explain the latter with analogies to the former. However, Franck contends that glossing over this difference misses a fundamental characteristic of the international system that should be recognized and further investigated. As Franck explains it,

[t]hose who see international "law" as just another legal system severely discount one of the most extraordinary things about the international system [...] which is the occurrence of a not inconsequential amount of habitual state obedience to rules and acceptance of obligations *despite* the underdeveloped condition of the system's structures, processes, and, of course, enforcement mechanisms.⁷⁴

Franck has aptly pointed out that the international realm provides an extremely fertile environment for investigations into legitimacy precisely because of this lack of an enforcement mechanism to ensure obedience.⁷⁵ Thus to whatever extent rules are obeyed in the international system, it is the product of a dynamic other than the threat of compulsion that exists in the domestic circumstance.

In this very useful discussion of legitimacy and the international system there are at least two points of particular import. First, there is the strong and clear description of legitimacy being marked by an uncoerced "pull towards compliance".⁷⁶ Second, Franck presents four indicators of a rule's or a rule-making process' legitimacy: determinacy, symbolic validation, coherence, and adherence.⁷⁷ While Franck's phrasing and definition will serve us well in this work, the four indicators will be shown to be ill-suited for our investigation.

Throughout the work, Franck makes it clear that he is speaking to an orientation towards the observance of rules that is not brought about by the use of force or threats. At the same time, he is well aware of the fact that this approach calls into question the dominant idea of legal philosophy that coercion is inherent to all valid law and adherence, which is an idea he attributes to John Austin.⁷⁸ However, Franck's intent is to show that this Austinian idea is

⁷⁴ *Idem*, FRANCK, *The Power of Legitimacy among Nations*, at 33-4.

⁷⁵ *Ibid.*, at 20.

⁷⁶ *Ibid.*, at 24.

⁷⁷ *Ibid.*, at 49.

⁷⁸ *Ibid.*, at 10-33.

of limited use, and that it misses an important part of modern society since a notable part of functioning law is that it does not require constant force. Franck explained,

[t]hose who claim to have identified one or more non-coercive factors in the engendering of obedience generally use the term *legitimacy* and its variant, *legitimation*, to enclose some or all of the additional or alternative (non-coercive) requisites of obedience.⁷⁹

Adding to this basic component of legitimacy, Franck follows up by formulating a definition, “*a property of a rule or rulemaking institution which itself exerts a pull towards compliance on those addressed normatively*”.⁸⁰ This meaning aligns well with what has already been put forward, even if it is particularly crafted so as to meet the task of defining what Franck is investigating. It is our intent to do just the same and highlight the portion of this definition that fits our purposes, without changing its meaning. The particularly valuable pieces are that of a “pull towards compliance”, and such a draw without the aid of coercion. Thus we will combine the two most pertinent portions of Franck’s definition to put forward *an uncoerced pull towards compliance* for our own primary definition. This coincides perfectly with the *will to obey* already suggested, and adds valuable vocabulary for describing the concept under discussion.

Secondly, if we are to look at the taxonomy of legitimacy that Franck puts forward, we find that they are ill-suited for the type of analysis that this particular work requires. There is surely nothing wrong with the four indicators of a rule’s legitimacy, for his purposes. However, this is not what we are addressing here. That is to say, our placement of legitimacy at the center of our analysis of armed conflict with attacks on non-combatants deals with the legitimacy of a government or a policy, not a rule or rule-making institution. And when examining international laws in this work, the focus will not be on the compliance of the state to a legitimate rule (in fact, the U.S. did not comply with certain provisions), but rather that the content of the rule was a standard which citizens accepted as a valid norm for constraining the government. Therefore, we will not be speaking to the pull towards compliance of the rule itself, but rather what the policy that did not comply with certain international norms did to the status of the government in the eyes of a noteworthy portion of the population.

It is also true, that for the very same reasons, Franck’s four indicators are inappropriate for our purposes here. When Franck speaks of determinacy, symbolic validation, coherence, and adherence, this taxonomy does not translate to our own approach to the legitimacy of a government or policy. Franck classifies a rule’s, or a codified text’s, *determinacy* as its

⁷⁹ *Ibid.*, (original emphasis) at 16.

⁸⁰ *Ibid.*, (original emphasis).

linguistic nature “which makes its message clear”,⁸¹ its *symbolic validation* as “the voluntarily acknowledged authenticity [or authority] of a rule or a rule-maker”,⁸² its *coherence* as meaning that it “must emanate from principles of general application”,⁸³ and *adherence* as “the framework of an organized normative hierarchy”.⁸⁴ Even a cursory examination of these categories reveals that they are suited for the investigation into international rules and how they can create a compliance pull on state actors. As well, the fact that Franck has designed this taxonomy to correspond with state compliance can also be evidenced by the fact that he applies these same four indicators when he speaks to legitimacy and fairness in his book, *Fairness in International Law and Institutions*.⁸⁵ For these reasons, Franck’s criteria will not be fitting for us here as we address the content of what creates a pull towards compliance on individuals within a society, rather than on states within the international realm.

Nonetheless, the idea of *an uncoerced pull towards compliance* precisely captures the basic societal ingredient of legitimacy, particularly relevant during political conflict, which we are conceptualizing in this work as a target of terrorism. To further explore the relationship of obedience to command we shall now turn to the historian Guglielmo Ferrero.

VI. Legitimacy as a Target – Historian Guglielmo Ferrero

During the devastating upheaval of World War II an Italian historian attempted to explain what he saw as the tragic dissolution of legitimate regimes in Europe. Guglielmo Ferrero finished the book *The Principles of Power* in Geneva in 1941 as the completion of this work. It is an extremely insightful text which parses out what he considers to be the central components of power, and delves into the idea of legitimacy as a forgotten cornerstone of any organized society. In the beginning pages, Ferrero initiates his inquiry by posing the question, one that reminds us of Weber’s similar query, “why then do some men have the right to command and others the duty to obey?”⁸⁶ His response is that the answer lies in the principles of legitimacy and explains that a government is legitimate, “if the power is conferred and exercised according to principles and rules accepted without discussion by those who must obey”.⁸⁷ Unfortunately, Ferrero did not expand upon what exactly produces this *will to obey* in a citizenry as he instead refers to the specific elements as the invisible “Genii of the City”

⁸¹ *Ibid.*, at 52.

⁸² *Ibid.*, at 91.

⁸³ *Ibid.*, at 152.

⁸⁴ *Ibid.*, at 184.

⁸⁵ FRANCK, T., *Fairness in International Law and Institutions* (Oxford, Clarendon Press, 1995) at 25-41.

⁸⁶ FERRERO, *The Principles of Power*, note 1 above, at 22.

⁸⁷ *Idem*, at 135.

that are not necessarily knowable since most people are not even aware of the existence of this pull towards compliance.⁸⁸ However, once we have explained exactly how legitimacy can be understood as a target of terrorism in this Section, the next objective of this work is to expose these “Genii of the City”.

Nonetheless, Ferrero does provide an enormously useful discussion of the concept of legitimacy itself. He explains that when government is operating smoothly, there is an organized chain of command. It is clear whose orders are to be complied with, and to whom these designated few may direct obligations. Regardless of the structure of the specific arrangements, what is most significant is that there is a shared understanding amongst the people themselves. It should also be noted that there is an inherent absurdity in the social pact if the logic that undergirds the foundation of government is pushed too far. One cause for this intrinsic absurdity at its edges is that most often it is an un contemplated compliance that is the glue that holds the idea of government together. In other words, legitimacy is a mental construct composed of both past experience and our continued social acceptance of it. This is important to recognize because it makes the legitimacy upon which a government rests susceptible to agitation and destabilization.

Ferrero further explains that in a democracy the people are sovereign and elect the leaders who they perceive to be in closest alignment with their own beliefs, and who are conceived to be the most competent due to their training and experience. In a monarchy, the hereditary principle determines who is to rule from one generation to the next and thus a preparation from birth can ensue for the prince who is to take the throne. In an aristocracy, an elite class will inevitably have a number of gifted youth with access to education and hence it will be possible to prepare a cadre of capable civil servants to hold the reins of power. In each case, a certain social understanding has triumphed and provides a logic for the arrangement of government and it is accepted by the population that is to subject itself to such administration. However, Ferrero suggested during the second World War that, “the rational element in principles of legitimacy is purely accidental.”⁸⁹ Inside each of these different societies, no matter its form, there is a reasoning that dominates and produces sufficient obedience within the general population and those at the upper echelons of society so as to allow the community to move as a single unit. Yet it is Ferrero’s contention that this logic is neither etched in stone nor unchangeable.

⁸⁸ *Ibid.*, at 13-19.

⁸⁹ *Ibid.*, at 26.

When legitimacy has been established it appears stable and thus perpetual. It is something we expect to prevail in perpetuity. However, Ferrero warns that we must not be overtaken by the impression that the past experience of legitimacy will always serve to predict what is to follow. As cited in the epigraph to this chapter, one of the conclusions on legitimacy he vividly expressed was,

[w]e can no longer have any illusions on the nature of the principles of legitimacy: they are human, that is empirical, limited, conventional, [and] extremely unstable. Any philosophical hack can demonstrate their absurdity; any dictator, at the head of a gang of cutthroats, can suppress them.⁹⁰

Put forward here we see what should be understood as fundamental to this concept. Legitimacy is best described as amorphous over time, at least partially because it is a subjective human construction, and thus fluid and malleable. Hence, it cannot be presented in what one would recognize as a traditional scientific framework based on falsifiable evidence. As Ferrero explained of this unpredictability, “[c]ollective reactions seem even more capricious and difficult to foresee than individual reactions”.⁹¹ At the core of human relations, free will is an element that cannot be removed from any equation involving human beings, and thus complete objectivity and predictability will be inevitably elusive. It is comforting to believe that what is to come is something we can know with certainty, but this is unfortunately not always the case in human relations because of free will. Thus Ferrero clarified that this precise element is “why no science of the mind and of history analogous to the science of matter and nature has been formulated; one is even forced to consider whether the word ‘science’ can be applied in the same sense to the physical and intellectual life of men, to the chemistry and history of societies”.⁹²

It should be acknowledged that there is a part of this argument that reminds us of what was put forward by Max Weber’s. That is, the notion that the rational component of legitimacy is accidental echoes the idea that it is solely based in subjective beliefs. However, as we have discussed above, it should be remembered that over the second half of the 20th century, after Ferrero first published his work, there has been an exponential growth in standards that can be used to rationally test the legitimacy of a government. And this explains our reasoning for following Habermas’ view that the rational reasons for bestowing legitimacy have been becoming explicit and knowable. Most importantly, it should be clearly

⁹⁰ *Ibid.*, at 314-315

⁹¹ *Ibid.*, at 309.

⁹² *Ibid.*

understood that the idea of legitimacy being is testable by citizens and scholars does not equate with it being scientifically falsifiable. There is indeed a great distance between the two.

This conception of the state based on an unspoken agreement between the governed and those who govern is certainly one that can be traced back for centuries. While coerced obedience must not be discarded out of hand as a form of rule, and has certainly been used to dominate many a society, there is indeed a deep historical filiation in political theory of those who have conceived of government as dependent upon a tacit social contract in which both parties have rights and duties. Those who have conceived of government in this form have been described as ‘contractualists’, and can be traced back at least as far as the Protestant and Catholic *monarchomachi*, or king-killers, in the sixteenth century who contemplated the limits of government power with their resistance theory.⁹³

One of the other important aspects of legitimacy to which Ferrero draws our attention is a manner for visually understanding how its interaction with command is what constructs the basic configuration of power in any society. Indeed, he skillfully articulates the fundamental organization of society that provides very useful imagery for our purposes. By outlining the place from which command and obedience emanate and how they interact with one another we can better comprehend where the gaze of the analyst should be fixed. Thus we can more clearly interpret some of the important effects of a terrorist attack on society. Ferrero cogently posited,

[i]f, in democracies as in monarchies, the authority comes from above, in monarchies as in democracies legitimacy comes from below, since only the consent of those who must obey can create it. In every regime, therefore, the plenitude of the state is realized at the intersection of two lines –one descending, which is authority, and the other ascending which is legitimacy.⁹⁴

One important aspect of this citation is its integration of both a top-down approach with a bottom-up approach. Rather than to promote one element at the expense of the other, there is a clear recognition of the existence of each one and how we can understand their interaction in a simple form. So if we are to sketch what Ferrero is describing when he speaks of the “plenitude of state”, the result would look something like this:

⁹³ KINGDON, R., ‘Calvinism and Resistance Theory, 1550-1580’ and SALMON, J.H.M., ‘Catholic Resistance Theory, Ultramontaniam, and the Royalist Response, 1580-1620’ in Burns, J.H., *The Cambridge History of Political Thought 1450-1700* (Cambridge, Cambridge University Press, 1991) at 193-247; and HOPFL, H., and THOMPSON, M., ‘The History of Contract as Motif in Political Thought’ (Oct 1979) 84, 4 *The American History Review* 919, at 920-4.

⁹⁴ FERRERO, *The Principles of Power*, note 1 above, 171.

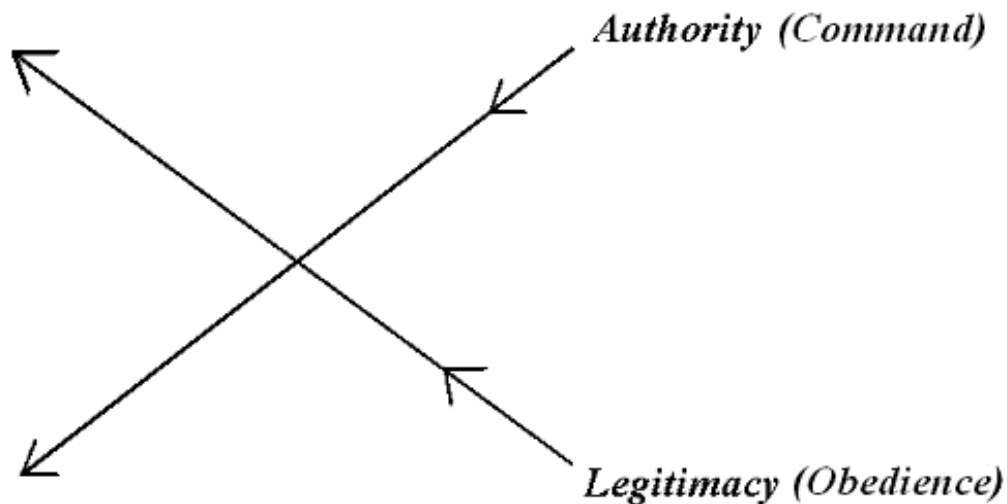


Fig. 1-1

With this schematic we have a visual tool that will help to further explain the theory that is being put forward in this work.⁹⁵ As a starting point, we can identify authority as the general target in conventional warfare in that it is an attempt to destroy the power structure from the top of this edifice. In the modern state, this authority is most clearly expressed and exercised through the military that is authorized to exert force with the approval of the head of state. In this case, the military can be seen as a veritable appendage of the head of the government. The authority or its military arm is targetable in the sense that it is a specific object that can be placed in the crosshairs, literally or figuratively, of a weapon or military unit. In addition, its destruction can be empirically verified.

A clear example of this approach can be evidenced by the fact that first bomb dropped in Baghdad in 2003 to commence the military operation of invading Iraq was programmed with coordinates from a satellite phone intercept for a mobile device that was said to belong to Saddam Hussein.⁹⁶ Although this intelligence proved to be incorrect, the thinking was that to “decapitate” the regime at the outset of hostilities would bring about an immediate, or rapid, collapse of the Iraqi military and thus an end to the fighting before it began. When the capture of Baghdad did not bring this desired end to armed resistance as it then morphed into an

⁹⁵ For alternative imagery of legitimacy, which could be useful in another context, see EASTON, D., *A Systems Analysis of Political Life* (New York, Wiley, 1965) at 273-4. Easton used the metaphor of a “reservoir of good will” to illustrate his idea of diffuse and uncoerced support for authority. In his description of legitimacy, if the backing provided by the people were to fall below a certain level, the legitimacy of the regime or policy would be classified as no longer existent and the community would be left inert. In other words, a collapse of legitimacy occurs when a sufficient amount of uncoerced obedience has been withdrawn. As such, when the validity of a government comes under too much stress because doubts have become widespread, it becomes difficult or impossible for the government to function because authority is not met with sufficient compliance. While this imagery of a reservoir is valuable and captures well the concept of legitimacy, we will see that it is not as useful as Ferrero’s for illustrating how acts of terrorism attempt to goad an illegitimate response.

⁹⁶ Human Rights Watch, “Off Target: The Conduct of the War and Civilian Casualties in Iraq”, (2003) at 17-18, available at: <<http://www.hrw.org/en/node/12207/section/2>>.

insurgency, the U.S. military continued to target what was thought to be the commanding authority. It tried to hunt down Saddam, as well as to pursue his sons, Uday and Qusay, in an attempt to destroy the command structure they thought was leading the resistance. Eventually, Saddam Hussein was captured hiding in a one-man foxhole near Tikrit, looking more like a homeless man than a leader,⁹⁷ and his sons were killed in a safe-house in Mosul.⁹⁸ So the conventional military targeting meant to end the fighting can be clearly discerned, even though neither of these events had the strategic effect on the insurgency that had been hyped and hoped for in advance.⁹⁹

However, the theory being put forward in this work is that terrorism in fact attempts to attack a society not at the top point of authority, but from the other side of this schematic. That is to say, those who employ terrorism are attempting to target the legitimacy of the enemy government so as to knock it off balance and weaken the enemy, if not render it unable to operate as a coherent unit. Those employing terrorist tactics clearly do not have the means to topple a government through the use of weaponry aimed at the authority and its military arm. Hence, it makes more sense to conceive of the individuals who are engaged in battle with a government through the targeting non-combatants as having redirected their efforts towards the *will to obey* of the population. Our premise is: if it is possible to provoke a response that brings about a shared belief within a large enough portion of the population that the regime suffers a legitimacy deficit or has become delegitimized because it has abused its authority, then the enemy government and society will stumble and perhaps even cease to function collectively. When commands are not followed because they are no longer deemed legitimate, then dysfunction becomes a serious problem rendering a society inert. Let us remember that a command, even if properly directed by an official in her appropriate realm of authority, is only words into the wind if the *will to obey* has shifted and compliance can no longer be secured. In this way non-state actors utilizing terrorist tactics are attempting to shift the terrain upon which a battle is waged. By doing so, those who have been traditionally understood to be only spectators are now directly involved in the struggle as actors because it is their *will to obey* that is being targeted.

Another vital piece that emerges in the above quote from Ferrero is that authority cannot stand alone as the only element in the analysis of power. There is little doubt that much attention is directed towards this top-end of the hierarchy because of its effectiveness in

⁹⁷ PACKER, G., *The Assassins Gate : America in Iraq* (New York, Farrar, Straus and Giroux, 2005) at 277.

⁹⁸ *Idem*, at 163-5.

⁹⁹ *Ibid.*, at 298-308.

revealing the structure and operations of a society. However, command cannot be understood as offering a complete description of a functioning society because of its dependent nature. Without sufficient obedience, authority is meaningless. Adding to the difficulty of analyzing this phenomenon is the fact that directing one's attention to legitimacy presents a natural stumbling block because a population's *will to obey* is often tacit, mixed and complex. Therefore it is extremely problematical to track or quantify. Yet despite this impediment, legitimacy cannot be ignored without a cost to the strength of one's analysis. Ferrero properly suggested that, "government only becomes legitimate and is freed from fear by the active or passive, but sincere, consent of the governed".¹⁰⁰

One unique and manifest intention of this work is to highlight this idea of tacit and active endorsement, or legitimacy, as the bull's-eye on the target of attacks conducted by actors employing terrorism. As such, it is necessary and possible to again draw up how this understanding of terrorist attacks would look when applied to the imagery of power provided by Ferrero. A target should be placed on the bottom-up element of legitimacy since this is where terrorist acts are better understood to be directed. At the same time, when such violence is successful in goading a reaction that oversteps the bounds of authority considered valid by the population, then we must also illustrate how that reduced legitimacy would appear in our diagram. The result would appear as follows:

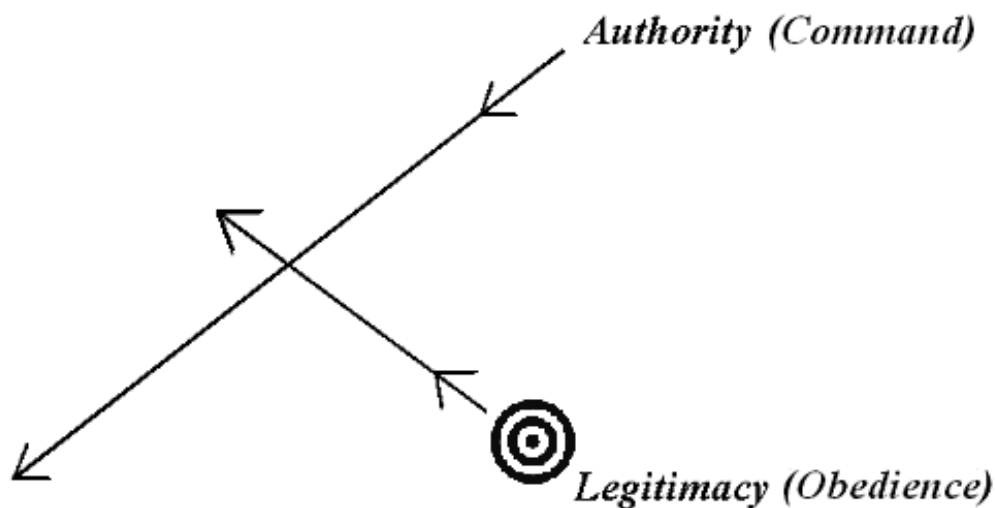


Fig. 1-2

What should also be noticed about this schematic sketching out how a legitimacy deficit, or weakness, might be visualized is that it additionally indicates what a further reduction in legitimacy might portend. In other words, in this drawing we see that there is still

¹⁰⁰ FERRERO, *The Principles of Power*, note 1 above, at 295.

an intersection between command and obedience signifying that while an authority still maintains enough compliance to steer a society, there is a point (and a not too distant one) in which this would cease to be the case. The “plenitude of state” would no longer exist and a community would be caught immobile. Such a circumstance is what has also been described as a ‘power vacuum’ in which no central authority has sufficient authority to command compliance from a large enough portion of the population.

To be clear, such a severe state of ‘delegitimation’ has in no way come about as a result of the response to September 11th. Instead our attention will be focused on what can be properly termed a “legitimacy deficit”, at least partially brought about by the signature policy of the Bush administration and its counterterrorism effort known as the ‘war on terror’.¹⁰¹

What also becomes clear in examining the above schematic is what is additionally necessary for this work. That is, it is crucial to conceptualize the components that construct the interdisciplinary concept of legitimacy itself. Providing a hypothesis of what can be considered to be the pillars required to maintain legitimacy is indeed compulsory to take this work to its logical next step. As such, we will see in the following Section the proposition that the three spheres of *legality*, *morality* and *efficacy* will come together in combination and integration to conceptualize this vital realm of legitimacy. Both of these contributions are intended to be an added value to each of the fields of study of legitimacy and terrorism.

VII. Exposing the Genii of the City – Legal Philosophers Ost and Kerchove

As we have now established that there is valid and logical reasoning for understanding legitimacy as a target, and that following a Habermasian view this target has a content that can be tested rationally, it is now necessary to put forward a manner for investigating the content of legitimacy. In other words, our intent is to attempt to expose Ferrero’s ‘Genii of the City’ that construct legitimacy. To do so, we will present and defend the use of a model of legal validity from contemporary legal philosophers that will serve to give shape to our own understanding of the taxonomy of legitimacy. Because of the inherent interdisciplinary nature of the concept under investigation, we have seen that it has been necessary and warranted to research the work of scholars from various disciplines to get us this far in our understanding of legitimacy. It is again required to continue in this vein, and thus the final model to be put forward here is to help unravel some of this complexity with an interdisciplinary approach so as to best integrate the most valuable features of differing philosophies and methods.

¹⁰¹ For a more in depth discussion of this legitimacy deficit see Chapter 3, section VI.

In our attempt to expose the ‘Genii of the City’, or the content of legitimacy, so that we can have more substantive discussions and investigations of this multifaceted concept that is being targeted by terrorism, we shall look to legal philosophy. As we have seen, legitimacy has surely been investigated from diverse disciplinary perspectives since it touches almost all those that deal with human relations, albeit in slightly different ways. Yet, it is believed by this author that the best idea for the shape of legitimacy comes from the angle of legal validity. Social scientist David Beetham recognized explicitly that legal philosophy indeed had a perspective that corresponded directly to his own study on the legitimation of power when he stated, “legitimacy is equivalent to *legal validity*”.¹⁰² The manner in which we can make out this direct correlation is that both concepts are essentially searching for what creates the elusive *uncoerced pull towards compliance*. While legitimacy deals with the pull towards obeying the commands of an authority, legal validity treats the attraction to an observance of codified rules. Considering that the framework for this study dealing with cross-border terrorism will be that of international law,¹⁰³ it is also fitting that our own model for legitimacy is grounded in law.

The work on legal validity that will provide shape to the model to be used here is that of the Belgian legal philosophers Francois Ost and Michel van de Kerchove in their work entitled, *De la pyramide au réseau?* (From the Pyramid to the Network?).¹⁰⁴ To introduce their work, Ost and Kerchove put forward two images that capture the essence of what they wished to accomplish.¹⁰⁵ Because this imagery is so illustrative of the valuable conceptual thinking behind their move away from the conventional idea that it is necessary to settle on just one philosophy for understanding legal validity, we will also present them here in our discussion.

The first image comes from the original frontispiece of a founding work of both legal positivism and modern political theory. Thomas Hobbes published *Leviathan* in 1651, and the decorative illustration facing the title page included the depiction of an all-powerful allegorical figure that is to symbolize the republic. This figure, whose body is constructed of the compilation of hundreds of other tiny bodies representing the population of the state, is holding the symbol of temporal power in one hand (a sword) and the symbol of spiritual power in the other (a crosier). We can discern that these two representations of authority seen

¹⁰² BEETHAM, *The Legitimation of Power*, note 44 above, (original emphasis) at 4.

¹⁰³ See Chapter 3.

¹⁰⁴ OST, F., and KERCHOVE, M., *De la Pyramide au Réseau ? Pour une Théorie Dialectique du Droit*. (Bruxelles, Publications des Facultés Universitaires Saint-Louis, 2002).

¹⁰⁵ *Idem*, at 7-9.

together begin the outline of a pyramid, a symbol of top-down power. Considering Hobbes' conception of the state and his advocacy for an absolute sovereign, this interpretation of the frontispiece coincides with his superior work of political philosophy found inside the text.



Here we find the sovereign, the title holder of undivided and absolute power. This pyramidal structure is that of a linear and vertical hierarchy, leaving no doubt as to the source of law and authority. This figure of power was once represented and exercised by the divine right of kings, which later transformed into a sovereign crowned by universal suffrage, and can today often be understood as embodied in technocrats. And just to clarify any uncertainties as to the meaning of the image, the Leviathan is found beneath a quote from the book of Job, “*Non est potestas Super Terram quae Comparetur ei*”, or “there is no power on earth to be compared to him”.¹⁰⁷

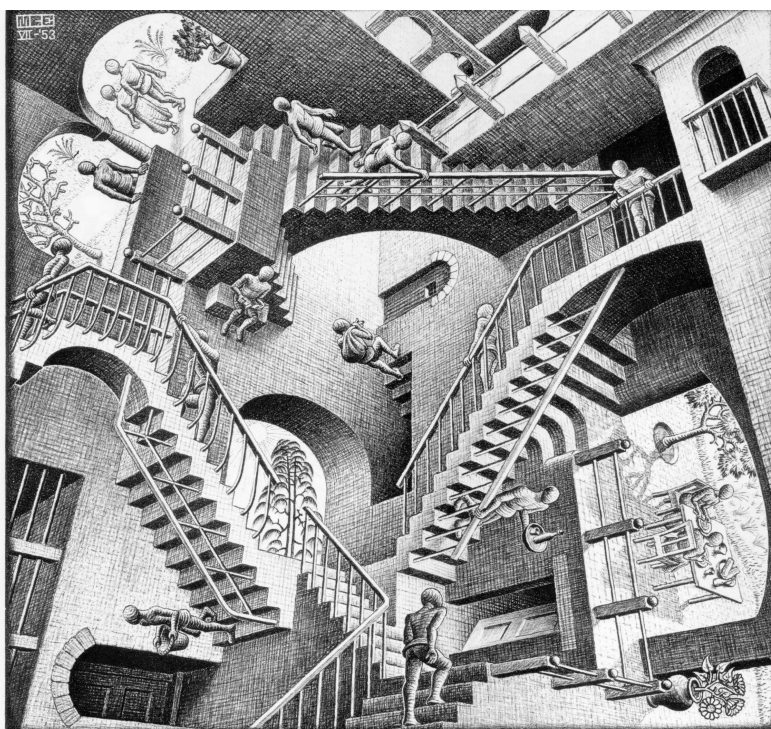
The second illustration that Ost and Kerchove put forward comes from M.C. Escher and is entitled *Relativity*.¹⁰⁸ Although it is at first difficult to orient oneself so as to comprehend what is occurring in the image, the confusion slowly seems to transition into an distorted orderliness. People ascend and descend on stairs and in directions that appear to be incoherent, while doors and windows open from all directions onto the stairwells. Upon reflection, we begin to discern three separate worlds that are each perfectly logical in their own right, but seem to converge into an absurdity when contemplated together. We first find a

¹⁰⁶ HOBBS, T., *Leviathan* Richard Tuck (ed.)(Cambridge, Cambridge University Press, 1991) at xciii.

¹⁰⁷ *Idem*.

¹⁰⁸ OST and KERCHOVE, *De la Pyramide au Réseau ?...*, note 104 above, at 7-9.

figure climbing stairs at the bottom-center of the image with someone peering over the railing at the top-right. If we rotate the picture clockwise, we see a couple strolling in a garden and a person gazing over a low wall. Counter-clockwise rotation reveals people eating on a terrace and a server descending one of the flights of stairs.



Eventually we can conclude that what we are viewing are three coexistent hierarchies with none of them dominating the others. If we insist on imposing one perspective as absolute, we are left with the irrationality of the whole image together as one. However, if we adopt a perspective without a gravitational pull in only one single direction, where one view is not privileged over the others, it is possible for our minds to arrive at something comprehensible.

Ost and Kerchove pose the question of whether our legal world today has indeed shifted away from a monolithic hierarchy suggested by Hobbes, and instead leans towards, “[a] world where political sovereignty would be relative, citizenship shared, multiple rationalities, a plurality of values...a networked world”.¹⁰⁹ It is certainly not within the scope of this work to propose an answer for this multifaceted and complicated philosophical legal

¹⁰⁹ *Idem*. “Des mondes où les souverainetés politiques seraient relatives, les citoyennetés partagées, les rationalités multiples, les valeurs plurielles...un monde en réseau ” (my translation) at 8.

question.¹¹⁰ Nonetheless, the three dimensions of legal validity, and the interaction of these elements, that Ost and Kerchove put forward will certainly serve us well in this study. In part, this is due to the fact that what they propose, as seen here in the discussion of these images, is meant to move beyond the traditional pyramidal legal structure without rejecting its usefulness. Since legitimacy must certainly be treated from multiple perspectives, this thoughtful work on the subject of an uncoerced pull is most welcome.

To begin, for the discussion of legal validity it is first necessary to establish the material existence of a binding law. For some jurists, such as John Austin or Hans Kelsen, simply establishing the material existence of a rule would be sufficient for determining its validity.¹¹¹ However, more recently legal philosophers of high repute, e.g. H.L.A. Hart, have observed that there is not necessarily a direct link between the existence and validity of a legal rule. Hart makes the valuable point that it is important to distinguish the difference between ‘validity’ and ‘existence’, “if only because failure to do this obscures what is meant by the assertion that such a rule *exists*”.¹¹² As such, this work will first establish the material existence of the binding international rules that are indeed applicable to the ‘war on terror’ in Chapter 3 to clear this first hurdle.¹¹³

Most importantly, Ost and Kerchove defend three primary criteria of legal validity. They are composed of three tests that are decisively multiple and interactive: formal validity, empirical validity and axiological validity.¹¹⁴ These criteria are also expressed by Ost and Kerchove as *légalité*, *effectivité* and *légitimité*. Once again, the imagery utilized by these authors is extremely useful to help grasp the intersection of ideas they put forward, and what will provide shape to our own concept of legitimacy. They conceptualize legal validity as the three dimensions of overlapping circles converging as such:

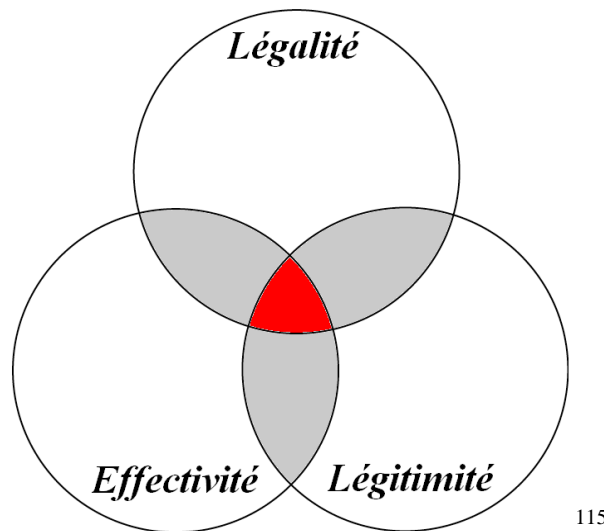
¹¹⁰ This work by Ost and Kerchove certainly makes a valiant effort to tackle some of these questions raised by the emergence, particularly significant in Europe today, of transnational structures that must incorporate various laws, constitutions and treaties.

¹¹¹ OST and KERCHOVE, *De la Pyramide au Réseau ?...*, note 104 above, at 311.

¹¹² HART, H.L.A., *The Concept of Law* (Oxford, Clarendon Press, 1961, 1994) at 109.

¹¹³ The reasoning for the decision to use international law as the framework for this study will be discussed and explained in that chapter. This is not to say that this particular test of ‘material existence’ pertaining to legal validity is always applicable to investigations of legitimacy since some norms by which a community measures the legitimacy of a regime or policy will not always be found in legal form. In this particular study, this is indeed the case and therefore it has been carried out.

¹¹⁴ OST and KERCHOVE, *De la Pyramide au Réseau ?...*, note 104 above, at 309.



Since the third term of *légitimité* can clearly not be repeated since this is the central topic of this work, it is necessary to look for alternative terminology. The philosophical idea that grounds this particular criterion is surely sound and thus it is unnecessary to re-conceptualize the model, but rather to simply replace the chosen language. While the specific discussion of axiological validity is relatively brief in their book,¹¹⁶ there are two clear guide posts that lead us to a substitute term. The first is that Ost and Kerchove tell us that this validity was favored by the proponents of natural law who advocated the use of reason to analyze human nature and deduce binding rules of moral behavior. Secondly, an axiological test is going to indicate the use of values and ethics for determining validity. As such, it is not a substantive modification to simply exchange the word, “*légitimité*” in Ost and Kerchove’s arrangement with the term –morality–, since we will reposition legitimacy to the center of our schematic where there is an overlap of all three circles. Therefore, to transition our diagram to the form in which it will be applied in this work, we will present the tripartite structure of legitimacy, or in other words its content, as *legality*, *morality* and *efficacy*. With these slight and appropriate adjustments we can now conceive of our model of legitimacy as follows:

¹¹⁵ *Idem*, at 352.

¹¹⁶ *Ibid.*, at 337-8.

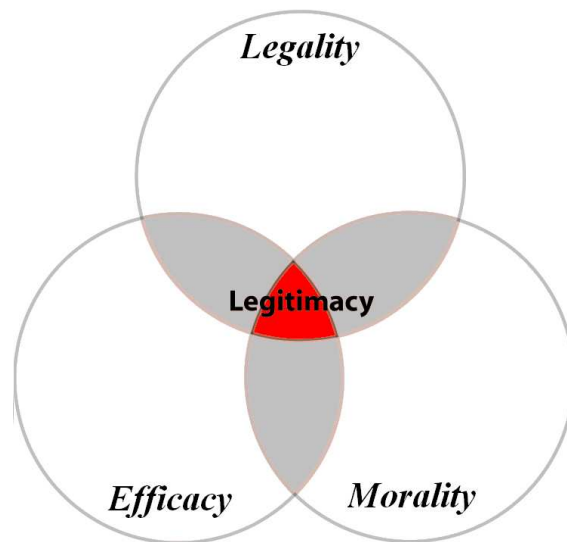


Fig. 1-3

As seen in David Beetham's work, this social scientist has posited that part of the nature of legitimacy could be found in the concepts of legality and morality.¹¹⁷ Therefore, it is not surprising that we find these same two elements present in the conceptualization of legal validity by Ost and Kerchove. As such, this author is quite comfortable with our conclusion that *legality* and *morality* do indeed construct part of legitimacy's content. As noted above, the third element suggested by Beetham of "evidence of consent" does not offer a manner in which a policy or regime can be tested for its fulfillment of the content of legitimacy. As well, the third sphere of *efficacy* presented in the model of Ost and Kerchove does not quite translate directly to our purposes either, although it does point us in a positive direction. Below we will explain the slight shortcomings of how it is presented by Ost and Kerchove, along with the manner in which its concurrent soundness will be extracted and applied in our work. Before this, however, we shall first discuss formal and axiological validity to explain the understandings of legality and morality for our purposes. And because each one of these three spheres rests on a different current of thought in legal philosophy we will also briefly present the currents of positivism, natural law and legal realism respectively.

1) Formal Validity – *Legality*

At the close of eighteenth century a particularly pertinent development took place in legal philosophy. The progression consisted in a deliberate step away from morality as the dispositive factor of legal validity, and towards a theory of legal positivism in which the content of the law is not prescribed by natural or divine authority. At this historical moment,

¹¹⁷ BEETHAM, *The Legitimation of Power*, note 44 above, at 64-89.

prominent legal scholars Jeremy Bentham and John Austin (in part known for their role in founding this legal philosophy) theorized and staunchly defended the premise that for analytical purposes the substance of law must be distinctly separated from any normative requirements. As Austin notably expressed it, “[t]he existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry”.¹¹⁸ Of importance for legal philosophy and the structure of the modern western state, the positivist approach played a central role in conceptualizing legislation as a principal and technical instrument of governance, rather than a marginal one as it had been previously conceived.¹¹⁹ One reason why this laudable feat was achieved must certainly be credited to Austin’s object of identifying “the distinguishing characteristics of positive law and so to free it from the perennial confusion with the precepts of religion and morality which had been encouraged by natural law theorists”.¹²⁰

At what is widely recognized as the inception of this legal theory, one of the primary concerns of Bentham and Austin was to confront and dispute the writings of well-known jurist Sir William Blackstone. Their accusation was that Blackstone continually confused legal and moral analysis in his *Commentaries* by interpreting laws in the way he believed they *ought* to be, by affirming laws to be invalid if they were contrary to the laws of God and by claiming that all laws gain their validity only from God’s superior law.¹²¹ Bentham and Austin found these formulations to be dangerous because they opened the door to resistance to the authority of law and the state, and were based on quite subjective grounds since ethical views will indeed vary. Furthermore, this also created a hazard that some reactionaries would claim that a codified law clearly and automatically carries moral authority simply by its categorization as law. As such, these legal philosophers set out to clearly demarcate the difference between legal and moral authority that was found to be blurred by Blackstone. With this as their aim, Bentham and Austin primarily asserted two very simple principles. First, they affirmed that merely because a law breeches a standard of morality this does not

¹¹⁸ AUSTIN, J., *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence* (London, Weidenfeld and Nicolson, 1954) at 184.

¹¹⁹ COTTERRELL, R., *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (Philadelphia, University of Pennsylvania Press, 1989) at 52.

¹²⁰ HART, H.L.A., Introduction to John Austin’s *The Province of Jurisprudence...*, note 118 above, at X; See also D’AMATO, A., ‘Lon Fuller and Substantive Natural Law’ (1981) 26 *American Journal of Jurisprudence* 202, at 203, “the calling-card of a positivist [is] an insistence that law has no necessary connection with morality”.

¹²¹ COTTERRELL, *The Politics of Jurisprudence...*, note 119 above, at 118-9.

strip it of its status as authoritative law. Secondly, a directive considered to be of moral importance did not automatically render it a legal rule.¹²²

However, these two basic premises upon which Bentham and Austin insisted certainly did not foreclose the inclusion of morality within the framework of a functional legal system. Although legal positivism has been largely based upon this separability thesis that aims to disconnect law from morality, some scholars from the school of legal positivism have worked consciously at clarifying what was *not* meant by their resolve and have concluded that, “they certainly accepted many of the things that might be called ‘the intersection of law and morals’”.¹²³ It was readily accepted by them, as a historical fact, that each sphere had a strong influence on the other and that there was indeed, as Austin put it, “frequent coincidence of positive law and morality”.¹²⁴ While there has been much attention focused on the veracity of this claim of separability in legal positivism, and the case has certainly been made in a terminology that indicates a definite cleavage between law and morality, this unfortunately has “obscured the fact that at other points there is an essential point of contact between the two”.¹²⁵ The fact that this partition has served as useful in unraveling two tangled ideas has sometimes clouded the notion that legal positivism has at no time insisted that morality is completely irrelevant. As such, one important point of coincidence will be discussed at further length below when dealing with the issue of overlap to demonstrate and emphasize that the three spheres constructing legitimacy are indeed interactive.

Nonetheless, our first aim is to describe and explain the formal validity that grounds the sphere of legality. As such it is important to recognize that the structural development of the state in western societies has led to a bolstering of the philosophical logic of positivism. There are two circumstances in particular that can be identified as pertinent to this buttressing: one is the ever increasing technicality and complexity of legal doctrine and its applications; the other is the wide acceptance and deliberate use of law as a steering mechanism for society.¹²⁶ Due to at least these two evident and undeniable developments, there is good reason to endorse much of what legal positivism offers as a philosophy. There is also little doubt that at the end of the eighteenth century there was solid reasoning for this philosophical development and the analytical desire to present a clear demarcation between the two vital and often intertwined concepts of law and morality. The historic entanglement of the law and

¹²² HART, H.L.A., ‘Positivism and the Separation of Law and Morals’ (1958) 71, *Harvard Law Review* 593, at 599.

¹²³ *Idem*, at 597.

¹²⁴ AUSTIN, *The Province of Jurisprudence Determined*..., note 118 above, at 162.

¹²⁵ HART, ‘Positivism and the Separation of Law and Morals’, note 122 above, at 600.

¹²⁶ COTTERRELL, *The Politics of Jurisprudence*..., note 119 above, at 123-4.

religion, particularly in Europe before the enlightenment, certainly demonstrated the need of such extrication so as to have a clearer understanding of each concept in its own right. Such an advantage illuminates the value of this particular element of legal positivism.

The United States government, which will serve as our point of analysis in this study of counterterrorism, is clearly a system that is saturated with rules and laws creating a massive network of regulation and institutions. As such, the issue of formal validity is one that will have significant importance to this study. Since this form of validity signifies a direct affiliation to a judicial system,¹²⁷ the procedures of adjudication are of primary importance here. Ost and Kerchove assert that the classic rule of law is pyramidal in form and those who manage this legal hierarchy are the judicial authorities. As they explained, “[c]ontrol of constitutionality, of legality and of conventionality have long been the only official tests of validity of rules, confirming the impression that validity is reduced only to formal legality”.¹²⁸ It will therefore be necessary to take a deep look into the participation of and rulings by courts of the U.S. as they were related to policies of the ‘war on terror’. To carry out this task in the application of our model, Chapter 4 will look at the Supreme Court and its jurisprudence dealing with detention without judicial review at the military facility in Guantánamo Bay.

2) Axiological Validity – *Morality*

The axiological sphere covered under our heading of *morality* bears a strong relationship to the conception of natural law. This theory has notably stretched over at least two thousand years of western philosophy. Classical theories of natural law emphasized that its principles were of divine origin and could be exposed through human reason. Of great significance for the orthodox application of this legal theory, man-made law must conform to these principles handed down by God in order to be considered valid, or ‘*lex iniusta non est lex*’. As noted, within legal philosophy there has been a long standing dispute over the exact relationship between law and morality, and it was the philosophy of natural law that was built and maintained on the idea of an indivisible bond inevitably linking these two concepts. Whilst the broad lines of these two legal philosophies help provide shape to two of the different validities that compose our model, it should be understood that both natural law and legal

¹²⁷ OST and KERCHOVE, *De la Pyramide au Réseau ?...*, note 104 above, at 326.

¹²⁸ *Idem*. “Contrôles de constitutionnalité, de légalité et de conventionnalité on longtemps représenté les seuls tests officiels de validité de règles, confirmant l’impression que la validité se ramenait à la seule légalité formelle” (my translation) at 327.

positivism have taken on numerous formulations with many subtle differences within each distinct theory.¹²⁹

There is little doubt that, over the many centuries that natural law has been argued to be the proper and clearest lens through which we can view the human relationship with law, it has been put forward in differing forms. A look at some of the initiators of international law who tried to flesh out how exactly a natural law would create rules between states reveals many substantive differences.¹³⁰ As such, to briefly clarify just what is being invoked when the term ‘natural law’ is employed in this text it is proper to look towards its genesis. Given that the moral theorizing of Thomas Aquinas appears in a significant number of introductory materials and encyclopedic entries on natural law,¹³¹ this is a compelling indication that his work has played a central role in its foundation and development. Therefore, his primary tenets of ‘divine providence’ creating the moral framework within which natural law operates, and the fact that these contours are ‘rationally knowable’ to all humans are our two principal elements giving meaning to the term. That is to say, it was conceived that natural law had a celestial meaning and grounding, but could at the same time be discerned through human reason.

However, much of the theological terminology, along with a great deal of metaphysics, that have been infused into this theory over the centuries have made for a problematic resonance within the contemporary intellect. This is certainly one reason that natural law has fallen from favor in comparison to legal positivism. However, what is meant by the invocation of the term of ‘natural law’ today is less lofty. The current meaning is that there are a few rudimentary principles of human conduct that can be reduced to certain elementary truths of importance and that are basic enough to be considered essential in any and all societies. As one legal theorist has put it, “it may best be described in modern times as those systematic rules that have survived through evolution over time as best fitting the mutual needs of a society”.¹³² For example, the concept of *self-preservation* has been

¹²⁹ See e.g. PAULSON, S., ‘The Neo-Kantian Dimension of Kelson’s Pure Theory of Law’ (Autumn 1992) 12, 3, *Oxford Journal of Legal Studies* 311, at 318-319. This article is one demonstration of how someone who was considered to be a renown legal positivist can have had clear-cut differences within his theory that set him apart.

¹³⁰ For further discussion of some of the original theorists of international law see Chapter 5.

¹³¹ Stanford Encyclopedia of Philosophy, ‘The Natural Law Tradition in Ethics’ available at: <<http://plato.stanford.edu/entries/natural-law-ethics/>> (last visited 19 Oct 2009).

¹³² D’AMATO, A., *International Law: Process and Prospect* (New York, Transnational Publishers, Inc., 1987) at 6 note 7.

identified by proponents of natural law, such as Grotius, Hobbes and their followers as “a paramount principle, and the basis for whatever universal morality there was”.¹³³

It is important to remember that none of the original founders of international law who intended to ground it in natural law were speaking only to narrow legal issues, but rather putting forward broad treaties of politics, religion, and philosophy.¹³⁴ The reason why this is of import is because it is useful to understand that this body of law at its origin was not based upon a positivist theory of law at all but instead on a broader notion that indeed nurtured a connection with morality. What this means for our discussion is that there to indeed be something found in the ideas of a universal morality which can be described as pulling towards coherence. It is agreed that, in accordance with one of the most prominent contemporary advocates of natural law, “coherence and goodness have more affinity than coherence and evil”.¹³⁵ Therefore, due to this character of natural law there are indeed critical times when morality tends towards reason and logic. Consequently, this portion of our work will be based on the assumption, and accordingly a search for, such coherence in the policies of the ‘war on terror’. More specifically, the chapter in which we will apply the axiological validity of this sphere will deal with the limits of war-making, and thus we will examine the *jus ad bellum* policies of the United States as they were developed and applied in their counterterrorism project.

Nonetheless, it is necessary to provide further clarification of how exactly this axiological validity will be applied in Chapter 5 of this work, as coherence is certainly only a broad starting point. As such, there will be two primary frameworks that will provide the appropriate the tests here of axiological validity: 1) just war theory; and 2) reciprocity. The former tradition is one that is a complex body of ideas that has grown out of a variety of religious and secular sources and provides a framework by which we can approach the moral constraints that should be applied to the launching of war. The latter is a concept that we can find repeated by some of the most well respected moral philosophers such as Immanuel Kant, and John Rawls. Interestingly, we also find that the idea of reciprocity is one that has deep roots in international law, and even reaches further into ancient texts dealing with warfare.¹³⁶

¹³³ TUCK, R., *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, Oxford University Press, 1999) at 5.

¹³⁴ See e.g. KRATOCHWIL, F., *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge, Cambridge University Press, 1989).

¹³⁵ FULLER, L., ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (Feb., 1958) 71, 4 *Harvard Law Review* 630, at 636.

¹³⁶ For an investigation into the concept of reciprocity in international law, specifically on the question of counterterrorism, and its roots in the laws of war see generally OSIEL, M., *The End of Reciprocity* (Cambridge, Cambridge University Press, 2009) 652 pp.

3) Empirical Validity – *Efficacy*

While at first glance one might consider the realm of efficacy to be rather straight forward, Ost and Kerchove properly point out that this sphere “is extremely complex, and deceptively simple”.¹³⁷ Perhaps most significant, these authors broach the important difficulty that arises out of the fact that there are many different ways to construe how this notion is to be understood and measured. Therefore it is necessary to put forward some of these differing interpretations so that they can be distinguished and clarified. In doing so it will allow us to address how we will treat the question of *efficacy* here in this work.

To begin, the idea that a political policy must perform or function in the best possible manner with the least amount of waste of time and effort can be classified under the label of ‘efficiency’. This particular approach largely addressing the question of cost/benefit (but not reduced simply to it only) is grounded in legal realism. One perspective on this philosophical school suggests, “rules should be viewed teleologically, as but means to the achievement of social ends”,¹³⁸ and as such there is an important connection to sociological jurisprudence. What this means in the end is that the focus turns to analyzing and judging the efficiency and measured outcome of a law on society.

The manner in which Ost and Kerchove speak of this realm of *l’effectivité* is indeed slightly different. They explain, “[i]n the first analysis, we would say that *l’effectivité* relates to the capacity of a rule to produce the behavior desired by the legislator in those to which it is addressed”.¹³⁹ While this is a more useful interpretation for our purposes, and certainly echoes the idea we are trying to capture in our overall discussion of legitimacy, there continues to be an important problem. In this particular case of terrorism and counterterrorism, we are tackling the issue of security. One could say that security laws are addressed to criminals and meant to produce the desired behavior of forbearance through deterrence. While this may indeed be the case in some instances, it is very difficult to argue that international laws are based on the concept of deterrence since there is no uniform enforcement mechanism.

There are at least two important points to keep in mind when contemplating these interpretations of effectiveness. The first is that we are intending here to direct our attention towards how it is that citizens evaluate the policy or regime of a government. The legitimacy

¹³⁷ OST and KERCHOVE, *De la Pyramide au Réseau ?...*, note 104 above, “...est une notion extrêmement complexe, faussement simple” (my translation) at 329.

¹³⁸ RUMBLE., W., ‘Legal Realism, Sociological Jurisprudence and Mr. Justice Holmes’ (Oct. - Dec., 1965) 26, 4 *Journal of the History of Ideas* 547, at 549.

¹³⁹ OST and KERCHOVE, *De la Pyramide au Réseau ?...*, note 104 above, “En toute première analyse, on pourra dire que l’effectivité s’entend de la capacité de la règle à orienter le comportement de ses destinataires dans le sens souhaité par le législateur” (my translation) at 329.

of a government is based upon the reasoning and perceptions of its citizens and therefore our particular question revolves around the effectiveness of the authority in charge. In both of the definitions put forward above there is an implicit understanding that the laws under scrutiny are addressed to those within the society. Therefore each suggest that what is to be tested or analyzed is the impact that law has on the general public. However, as has been pointed out, our investigation is centered on the “*monopoly of the legitimate use of physical force*”, and thus our gaze is fixed in another direction. This is indeed an important reason explaining the chosen framework for this study. Human rights law, humanitarian law and some UN Charter obligations are legal duties undertaken by governments directing the constraints under which they are to treat their own citizens and those who fall under their effective control. At the very same time they can be used (and it is our argument that a growing population does exactly this), as standards of assessment by citizens, not of the society, but rather of whether government is exercising its monopoly on force legitimately. Therefore one could say that in this case the lens of analysis is inverted.

The second point that should not be forgotten is that the goal that is meant to be achieved in counterterrorism is that of increased security. Of course, even if this laudable objective is one that every government undertakes with certainty and assurance, realizing the safety of the members of a society is not nearly as obvious as one normally assumes. Most importantly, the concept of security is based on perception and subjective belief. While empirical studies can be carried out and presented to citizens, very few people base either their sense of wellbeing or danger on these reviews. This is a significant feature of security that has been spotlighted at least as far back as the 18th century. Montesquieu drew attention to this characteristic of safety when discussing the manner in which the disposition of laws in a society has a direct relation with freedom of those subjected to them. He explained, “[p]olitical liberty consists in security, or, at least, in the opinion that we enjoy security”.¹⁴⁰ Therefore it is critical to remember that measuring effectiveness in our case suffers from an inherent difficulty of subjectivity.

As such, the term we will apply in our model of legitimacy is that of *efficacy* and our working definition comes from its direct derivative: efficacious. That is, under our definition a

¹⁴⁰ BARON DE MONTESQUIEU, Charles De Secondat, *The Spirit of Laws*, Book XII, 1, 2 (Chicago, Encyclopaedia Britannica, 1952) at 85. See also, Book XI, 6, 3, where Montesquieu speaks of the Constitution of England and the three separate powers of government (including the judiciary as the third power), “The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety” at 69-70.

policy must be “having or showing desired result or effect”.¹⁴¹ Since this meaning certainly opens the door to many different tools of measurement for arriving at an empirical validity, particularly depending on the specific policy under review, it is not proper to pretend that there is but one applicable instrument that can be put forward. Hence what we will discuss here most pertinently in this section is the manner in which courts in different jurisdictions have broached this important question of *efficacy* in matters concerning counterterrorism policy. In doing so, this will provide an overview of how it has been treated in recent rulings. Then in Chapter 6 we will look into the question of the efficacy when it comes to coercion and abuse in interrogation. In that specific instance, the matter of *efficacy* will rest on the calculability of increased security if ill-treatment is introduced.

Nonetheless, Ost and Kerchove do provide clues on how to invert this lens so that it can offer a view onto the legitimacy of a government. As mentioned, the notion of efficacy can equally apply to the policies of a government, just as the effective achievement of social ends can be evaluated. Therefore this term is surely valid even if it needs to be transposed for our investigative purposes. Ost and Kerchove point out that the legal criteria of efficacy or effectiveness “has experienced a spectacular rise in importance over the last decades”.¹⁴² It is a term that has found currency in current legal terminology even if it was once reserved for sociological analysis. For example, in the International Covenant on Civil and Political Rights, Article 2(a) obliges countries that are a party to the treaty to, “ensure that any person whose rights or freedoms as herein recognized are violated shall have an *effective* remedy”.¹⁴³ The European Court of Human Rights used such language in their rulings as in, “[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and *effective*”.¹⁴⁴ Additionally, Article 57(2)(c) of the First Additional Protocol to the Geneva Conventions requires that an, “*effective* advance warning shall be given of attacks which may affect the civilian population”.¹⁴⁵ So we can find that the terminology has indeed found its way into codified international humanitarian and human rights law.

¹⁴¹ Efficacious in Stein, J., (ed.) *The Random House College Dictionary*, Revised Edition, (New York, Random House, 1982) at 421.

¹⁴² OST and KERCHOVE, *De la Pyramide au Réseau ?...*, note 104 above, “...a connu une spectaculaire montée en puissance au cours de ces dernières décennies” (my translation) at 328.

¹⁴³ *International Convention on Civil and Political Rights*, (signed 16 Dec. 1966, entered into force 23 March 1976) 999 UNTS 171, Article 2 (my emphasis).

¹⁴⁴ *Airey v. Ireland* (9 Oct 1979) Application no. 6289/73 at §24 (my emphasis).

¹⁴⁵ *Protocol Additional to the Geneva Conventions of 12 August 1949* (Additional Protocol I), Relating to the Protection of Victims of International Armed Conflicts (signed 8 June 1977, entered into force 7 Dec. 1978) 1125 UNTS 3, Article 57(2)(c) (my emphasis).

As well, we can find major judgments from high courts in differing jurisdictions, along with extrajudicial writings, that indicate the recent influence that this leaning toward assessing the efficacy of policies has had within the legal world. This is not to say that courts have charged into the field of policymaking and rendered judgment on the work of the political branches. Rather, this is simply an assertion that there are times and places when different high courts have found ways to enter into an evaluation of the efficacy of policies, most often by utilizing judicial tools such as ‘reasonableness’ and ‘proportionality’. As these legal devices for treating *efficacy* are implemented differently in various jurisdictions, even when bearing an important resemblance, it is not within the scope of this work to single one test out as superior or more applicable. This is especially the case considering that our intention in this work is to speak to *efficacy* as a component of legitimacy, meaning that individual citizens are highly unlikely to make such distinctions either.

One judicial scholar, Iain Scobbie, has utilized the “notion of ontology” discussed by Chaïm Perelman to investigate the role of courts in evaluating counterterrorism policies after the attacks of September 11, 2001. One of the results of this study was to shine a light on how efficacy has tiptoed into recent legal evaluation.¹⁴⁶ Since ontology “aims to encapsulate the philosophical basis of a given legal system”, it is not surprising that if evaluations of efficacy are working themselves into judicial opinions, this would turn up in such an analysis. Thus, much of what is to follow comes from the insightful work of Scobbie in which he reveals this current judicial trend in national courts.

One place where we can find evidence of assessments of efficacy in judicial decisions is in the 1999 ruling handed down by the Israeli Supreme Court on the General Security Service’s (GSS) methods of interrogation.¹⁴⁷ In this case, the petitioners claimed that the methods employed by the GSS were torture and thus illegal. In response, the government claimed the physical means used were “moderate physical pressure” and only applied in extreme cases. The case looked at five particular techniques and was heard by an expanded court of nine judges with the majority opinion written by Court President Aharon Barak. In the end, the Court found that none of the five techniques would be lawful under the authority

¹⁴⁶ SCOBIE, I., “‘The Last Refuge of the Tyrant?’: Judicial Deference to the Executive in Time of Terror’ in BIANCHI, A., and KELLER, A. (eds.), *Counterterrorism: Democracy’s Challenge*, (Oxford, Hart Publishing, 2008) 277- 312.

¹⁴⁷ *Public Committee Against Torture in Israel v. The State of Israel*, Israeli High Court of Justice, HCJ5100/94 (6 Sept 1999).

granted, and that the “necessity defense” argued by the government cannot serve as a basis of authority since it is not applicable in advance.¹⁴⁸

The Court did not decide on the exact status of the interrogation techniques in the context of international torture law because the GSS was not acting under a specific provision that offered distinct authority, and thus the Court simply evaluated their activity within the standard of Criminal Procedure Statute generally applying to police officers or other classes of officers.¹⁴⁹ The Court found that it was not necessary to enter into an in-depth inquiry of the “law of interrogation” since they were simply dealing with the power under administrative authority. Therefore, the oft repeated word of what was found to be required of such an interrogation is that it was “reasonable”. When the opinion discussed some of the details of what this was to mean it entered into a light discussion of efficacy and expounded,

a reasonable investigation is likely to cause discomfort. It may result in insufficient sleep. The conditions under which it is conducted risk being unpleasant. Of course, it is possible to conduct an *effective* investigation without resorting to violence. Within the confines of the law, it is permitted to resort to various sophisticated techniques. Such techniques—accepted in the most progressive of societies—can be *effective* in achieving their goals. In the end result, the legality of an investigation is deduced from the propriety of its purpose and from its methods. Thus, for instance, sleep deprivation for a prolonged period, or sleep deprivation at night when this is not necessary to the investigation time-wise, may be deemed disproportionate.¹⁵⁰

As well, when treating the specific techniques the Court found that the “shaking” of an individual during the interrogation process, “surpasses that which is necessary”, and that forcing a detainee to crouch on her tip-toes, “does not serve any purpose inherent to interrogation”.¹⁵¹ Overall, in its decision to rule against the government, the analysis was meant to fit into the standard found by the Court that, “[a]ll these limitations on an interrogation, [...] flow from the requirement that an interrogation be fair and reasonable”.¹⁵² And at one point, the Court even expressed that the ruling against the specific techniques was handed down because, “[i]t does not fall within the scope of the authority to conduct a fair and *effective* interrogation”.¹⁵³

If we look into the extrajudicial writings of the former Israeli Court President, Aharon Barak, we find an explanation of the philosophy that underlay his decision making process when he was President of the Court, or what Scobbie might call the ‘ontology’ he was

¹⁴⁸ *Idem*, at 3.

¹⁴⁹ *Ibid.*, at 19-20.

¹⁵⁰ *Ibid.*, at 23-4 (my emphasis).

¹⁵¹ *Ibid.*, at 24.

¹⁵² *Ibid.*, at 29.

¹⁵³ *Ibid.*, at 27 (my emphasis).

operating under. The primary point that concerns us here is his discussion of the idea of “reasonableness”. As we saw in the opinion Barak authored on methods of interrogation, this judicial tool allowed him to step in to evaluate the efficacy of government policy. Yet it was acknowledged by Barak himself in a law journal article in 2003, “[i]ndeed, the efficiency of the security measures is a matter that is in the proper jurisdiction of the other branches of government”.¹⁵⁴ However, this is not without limit. The political branches of government were required to stay within certain legal parameters, and the manner in which Barak established those parameters was with the tool of “reasonableness”. In the same article he explained, “[a]s long as the other branches are acting within the framework of the ‘zone of reasonableness,’ there is no basis for judicial intervention”.¹⁵⁵ In his book of 2006 Barak recognized that this concept was “notoriously vague”, and further clarified that, “[r]easonableness means that one identifies the relevant considerations and then balances them according to their weight”.¹⁵⁶ The balancing of security concerns under Barak was something that the Israel’s High Court was well-known for, and it was so often employed that Scobbie claimed that it could be classified almost at “the status of a fetish”.¹⁵⁷ Barak claims that this tool of balancing is the particular expertise of the judiciary, while the other branches have their own proficiency and skill in other areas. In explanation of the judicial tool under discussion here Barak wrote in his book,

[t]he key test here is reasonableness. Put simply, the executive must act reasonably, for an unreasonable act is an unlawful act. In many cases the test of reasonableness allows for only one possibility, which the executive *must* choose. Sometime, however, the reasonableness test allows for several possibilities, thereby creating a ‘zone of reasonableness.’ The executive has freedom of choice within this range. The principle of separation of powers requires the executive, rather than the judiciary, to choose one possibility within this zone. But the principle of separation of powers requires the court, rather than the executive, to determine the limits of the zone of reasonableness.¹⁵⁸

So with this judicial tool of ‘reasonableness’, we can discern a manner in which former Court President Barak has managed a way to examine efficacy in limited circumstances.

One of the clearest examples of the use of efficacy for the rendering of a prominent provision of a law passed in the wake of the 9/11 terrorist attacks outside the bounds of legality comes from the *Bundesverfassungsgericht*, or the German Federal Constitutional

¹⁵⁴ BARAK, A., ‘The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism’ (2003) 58 *University of Miami Law Review* 125, at 138.

¹⁵⁵ *Idem*.

¹⁵⁶ BARAK, A., *The Judge in a Democracy* (Princeton, Princeton University Press, 2006) at 249.

¹⁵⁷ SCOBIE, “‘The Last Refuge of the Tyrant?’” ..., note 146 above, at 286.

¹⁵⁸ BARAK, A., *The Judge in a Democracy*, note 156 above, at 248.

Court in 2006.¹⁵⁹ After the attacks in the United States there were a rash of security oriented laws passed that seemed to compromise individual liberty at the service of security. In this environment, the Court examined the high profile Air-transport Security Act (*Luftsicherheitsgesetz*) passed in 2004 which included a provision that empowered the minister of defense to order a passenger airplane to be shot down if it could be determined that the aircraft would be used as a projectile weapon against others, and if this was only means of preventing such a disaster. The German Constitutional Court examined this particular provision, clearly passed with the September 11th terrorist strikes in mind, and struck it down as unconstitutional. The decision handed down in February of 2006 is largely known for employing Kantian moral reasoning through the legal principle of human dignity, and found that the persons inside of the aircraft could not be used as mere means and sacrificed, “for the purpose of the presumptive prevention of a severe danger”.¹⁶⁰ However, the decision also employed a “proportionality test” to examine the facts and determine that the presumed efficacy of such a policy was patently false, and therefore could not be legal.

Because the statute must pursue a legitimate end, it thus must fulfill three requirements and found to be: “suitable (*geeignet*); necessary (*erforderlich*); and appropriate or reasonably fair (*angemessen*)”.¹⁶¹ This test allows the Court to enter into questions of fact to determine if the legislature has chosen appropriate measures for achieving its specific purposes, and can be roughly equated to the requirements of reasonableness in U.S. constitutional law. While the parliament was convinced that the shooting down of a hijacked aircraft was a feasible means to increase security, the Court ruled that, “[t]he statute, simply, could never achieve what it pretended to pursue”. To arrive at this conclusion, the Court explained that the minister of defense could only attain a rough idea of what was actually occurring inside the aircraft. How exactly was she supposed to “know” that terrorists had taken control of the aircraft and intended to use it as a weapon? The intention to do so before the fact will certainly not be announced by any terrorists on board or on the ground. Nor would the pilots onboard do so because they would be signing their own death sentence since the known result would be to be shot down.¹⁶² Therefore the only information available would come from external sources that surely could not achieve anything dispositive. That is to say, radio contact with the

¹⁵⁹ For discussion of the decision in English see, LEPSIUS. O., ‘Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-Transport Security Act’ (2006) 7 *German Law Journal* 761.

¹⁶⁰ *Idem*, at 767.

¹⁶¹ *Ibid.*, at 774.

¹⁶² Of course, this scenario raises questions as to what occurred on United Airlines Flight 93 on September 11th, 2001 where passengers decided to rush the cockpit of their plane under the control of terrorists. Not knowing how to fly the passenger aircraft themselves, it certainly can be said that they were signing onto their own death.

passenger plane would be cut off, which could be due to any number of reasons, and a military jet flying alongside the aircraft would be unable to peer inside the windows to arrive at any definitive conclusions of what was occurring inside. Therefore, the minister of defense would have to make her decision to shoot down the plane with a high level of uncertainty. Knowledge of the actual events would be “speculative”, or based on mere presumption.¹⁶³ The German Parliament assumed a circumstance that could never happen. Considering there was one certain outcome, that everyone onboard the aircraft would be killed, the Court found that these facts, or lack of the *efficacy* of the policy, added significant weight to their findings on human dignity and the use of persons as a means to an end.¹⁶⁴

Thus we can indeed find jurisprudence and extrajudicial writings of significance which demonstrate the use of the judicial tools of ‘reasonableness’ and ‘proportionality’ to enter into the discussion of *efficacy*. This is not to say that for the sake of legitimacy all must be found within the confines of case law. However, it does provide a persuasive argument for the fact that this notion of inverting our lens to judge the policies of government to have found a foothold within legal minds on the highest levels, and also relevant for those who exercise their *will to obey*.

As such, the sphere of *efficacy* will be applied to our investigation of the interrogation policies implemented in response to the terrorist attacks of September 11th. We will use the concept of empirical validity to dig into the results from some of the highest profile detainees to analyze whether the use of severe physical and psychological pain and suffering was an effective intelligence gathering tool. On this particular policy question, it will be the lack of calculability that most clearly renders such a policy of ill-treatment inefficacious. While it must be recognized that international courts usually refuse to enter into discussions of efficacy when it comes to torture, in discussing legitimacy it becomes necessary to do so because it is a question that common citizens will indeed take into consideration. In doing so, we will find that in this particular circumstance there is indeed an overlap between the interactive spheres of *efficacy*, *legality* and *morality*.

¹⁶³ LEPSIUS, ‘Human Dignity and the Downing of Aircraft...’, note 159 above, at 775.

¹⁶⁴ *Ibid.* The Court also found that there were further doubts as to the technical feasibility of ordering the downing of an aircraft. We must assume an alarm period of 15 minutes, plus another 15 minutes for military jets to reach the presumed hijacked airplane. Since it takes only 60 minutes to pass through German airspace, the timing was found not to be sufficient for such a grave decision to be taken.

VIII. An Intersection of Morality and Law – Legal Philosopher H.L.A. Hart

Since the model put forward by Ost and Kerchove for legal validity, transposed here for use in analyzing the content of legitimacy, is based on the interactivity of the three poles of *legality*, *morality* and *efficacy* it is necessary to clarify what is meant by this notion of integration.¹⁶⁵ In other words, what does it mean for these poles to not stand in juxtaposition, but rather in interaction with each other? For our purposes, we will focus on the notion of overlap between the spheres. If different policies are found to be illegal and immoral, that is not enough. It must be found to be illegal and immoral on the very same point of policy for there to be overlap. Although some might disagree, it is strongly believed by this author that there are indeed places at which legality, morality and efficacy coexist. To demonstrate this point, we will flesh out one of the places of overlap here so that it can be understood with more specific detail. To do so, we will explore one particular place of coincidence between legality and morality that will serve as the major point of overlap for Chapter 5 on war-making. More precisely, every legal and moral code prohibits the gratuitous use of violence, and, as such, a policy that advocates materially unprovoked hostilities can be placed in a point of overlap between illegality and immorality. To begin, it is necessary to establish the existence of this overlap.

As has been noted above, there has long been an analytical tension between legality and morality and, although separating the two has often seemed advantageous, it has not been so easily achieved. Just where one ends and the other begins has not been something that has been resolved easily, if at all. For a good example demonstrating the longevity of this struggle over the attempt to separate law from morality one can look to an ancient text by Xenophon. It reads,

Alcibiades. Please, Pericles, can you teach me what a law is?

Pericles. To be sure I can.

Alcibiades. I should be so much obliged if you would do so. One so often hears the epithet "law-abiding" applied in a complimentary sense; yet, it strikes me, one hardly deserves the compliment, if one does not know what a law is.

Pericles. Fortunately there is a ready answer to your difficulty. You wish to know what a law is? Well, those are laws which the majority, being met together in conclave, approve and enact as to what it is right to do, and what it is right to abstain from doing.

Alcibiades. Enact on the hypothesis that it is right to do what is good? or to do what is bad?

Pericles. What is good, to be sure, young sir, not what is bad.

¹⁶⁵ For discussion on such interactivity see OST and KERCHOVE, *De la Pyramide au Réseau ?...*, note 104 above, at 341-51.

Alcibiades. Supposing it is not the majority, but, as in the case of an oligarchy, the minority, who meet and enact the rules of conduct, what are these?

Pericles. Whatever the ruling power of the state after deliberation enacts as our duty to do, goes by the name of laws.

Alcibiades. Then if a tyrant, holding the chief power in the state, enacts rules of conduct for the citizens, are these enactments law?

Pericles. Yes, anything which a tyrant as head of the state enacts, also goes by the name of law.

Alcibiades. But, Pericles, violence and lawlessness--how do we define them? Is it not when a stronger man forces a weaker to do what seems right to him--not by persuasion but by compulsion?

Pericles. I should say so.

Alcibiades. It would seem to follow that if a tyrant, without persuading the citizens, drives them by enactment to do certain things--that is lawlessness?

Pericles. You are right; and I retract the statement that measures passed by a tyrant without persuasion of the citizens are law.

Alcibiades. And what of measures passed by a minority, not by persuasion of the majority, but in the exercise of its power only? Are we, or are we not, to apply the term violence to these?

Pericles. I think that anything which any one forces another to do without persuasion, whether by enactment or not, is violence rather than law.

Alcibiades. It would seem that everything which the majority, in the exercise of its power over the possessors of wealth, and without persuading them, chooses to enact, is of the nature of violence rather than of law?

To be sure (answered Pericles), adding: At your age we were clever hands at such quibbles ourselves. It was just such subtleties which we used to practise our wits upon; as you do now, if I mistake not.

To which Alcibiades replied: Ah, Pericles, I do wish we could have met in those days when you were at your cleverest in such matters.¹⁶⁶

What we find in this dialogue demonstrates that the attempt to separate law and morality are certainly not new to humanity. As well, it is possible to find an implicit reference to an ‘uncoerced pull towards compliance’ in this dialogue as Alcibiades and Pericles try to arrive at a definition of law. Nonetheless, we still cannot characterize this tension between law and morality resolved today after significant efforts of legal positivists since the close of the eighteenth century. However, we have indeed seen above that the initiators of legal positivism in fact did admit to a, “frequent coincidence of positive law and morality”.¹⁶⁷ Since even the originators of legal positivism did not rule out a coincidence of law and morality at certain points, we will therefore accept its existence and demonstrate that one indispensable place of overlap is the exclusion of the use of gratuitous force.

¹⁶⁶ XENOPHON, *Memorabilia*, Book I, Chpt. ii, BONNETTE, A., Ed. and Tr. (Ithaca, Cornell University Press, 1994) at 26-7.

¹⁶⁷ AUSTIN, *The Province of Jurisprudence Determined...*, note 118 above, at 162.

To assist in tackling this issue of coincidence between the two legal philosophies we shall turn to the prominent positivist legal scholar and philosopher H.L.A. Hart. One reason that Hart will be highlighted in this analysis is because his theory of legal positivism has been “seen to depend on an absolute defence of the distinctiveness of a realm of positive law and positive legal analysis separate from moral or political argument”.¹⁶⁸ Additionally, Hart has been grouped together with Bentham, Austin and Kelsen as jurists that are particularly noteworthy for their theories of legal positivism.¹⁶⁹ Hence there is little doubt that Hart can be considered as a veritable adherent of the central pillar of legal positivism that concerns us in this analysis. As such, Hart’s basic claim that, “[i]n all communities there is a partial overlap in content between moral and legal obligation,”¹⁷⁰ and that he has found there to be “a core of indisputable truth in the doctrines of Natural Law”¹⁷¹ is all the more credible and convincing.

Hart’s *The Concept of Law* has been considered one of the most influential in contemporary jurisprudence, and it is here that he lays out and develops his own sophisticated view of legal positivism within the framework of analytical jurisprudence. After disputing Austin’s theory that law can be described as the command of a sovereign backed by the threat of punishment, and contributing his innovative theory on primary and secondary rules, Hart delivers two chapters on the relevant topic of this section: ‘Justice and Morality’ and ‘Laws and Morals’. In these chapters Hart highlights the enormous importance of maintaining *equity* within a legal system. He claims that this can be evidenced by the frequency with which the words like ‘fair’ and ‘unfair’ have been invoked in criticism of law. The standard that is to ‘treat like cases alike’ and ‘different cases differently’ is so deeply embedded in our contemporary thought that it is nearly unanimous that blatant discrimination must be met with at least the lip-service of denunciation.¹⁷² Thus it has become less and less acceptable to overtly defend barefaced distinct treatment based on such natural human characteristics as color or gender.

Most importantly for our discussion, Hart directly correlates this concept of equity with a protection from wanton injury or death. He wrote,

[s]uch a structure of reciprocal rights and obligations proscribing at least the grosser sorts of harm, constitutes the basis, though not the whole, of the morality of every social group. Its effect is to create among individuals a moral and, in a sense, an artificial equality to offset the inequalities of nature. For when the moral code forbids one man to rob or use violence on another even when superior strength or cunning

¹⁶⁸ COTTERRELL, *The Politics of Jurisprudence...*, note 119 above, at 219.

¹⁶⁹ *Idem*, at 120.

¹⁷⁰ HART, *The Concept of Law*, note 112 above, at 171.

¹⁷¹ *Idem*, at 181.

¹⁷² *Ibid.*, at 155-184.

would enable him to do so with impunity, the strong and cunning are put on a level with the weak and simple.¹⁷³

We see in this quote that Hart understands that the basic security for all within a society starts with a reciprocal forbearance, and he puts this forward as an essence of all forms of morality. As proponents of natural law posited before him, Hart saw that the shared interest of survival, or self-preservation, demands an agreement upon such restraint for humans to be able to coexist together. Yet what we will also see is that Hart does not view this as simply a moral standard. Rather it is, for the very same reasons, an indispensable legal norm to boot.

A confusion that is often present in the debate over law and morals is the lack of a precise definition of morality as it would be applied over different circumstances. While codified law can always be directly referenced, and its exact formulation can be ascertained and documented with little quarrel, morals do not share the same quality. Both the fact that the exact contours of morality have changed over time (certainly within western culture), and the fact that there is an unavoidable interface of a vast range of cultures the world over with each possessing their own view on human perfection, have contributed to a difficulty of understanding morality as universal.

However, it is this author's opinion that it is in fact possible to clarify what is intended when the word morality is invoked by drawing a distinction between a "morality of duty" and a "morality of aspiration".¹⁷⁴ These two categories represent opposite ends of the same scale, and where one leaves off for the other to begin has long dominated moral argument. A 'morality of duty' starts at the bottom and, "lays down the basic rules without which an ordered society is impossible".¹⁷⁵ Whereas a 'morality of aspiration' is at the top end of this scale and is about human excellence or, "the fullest realization of human powers".¹⁷⁶ The difficulty in specifying with exactness all the forms of a 'morality of aspiration' as we mount this scale, does not mean that some of the more basic requirements of a baseline 'morality of duty' are unknowable or incomprehensible. In other words, it is indeed possible to "know what is plainly unjust without committing ourselves to declare with finality what perfect justice would be like".¹⁷⁷ This wide scope that morality can cover, from the most obvious demands of social living to the highest reaches of human aspiration, often leads to a confusion over how morals might have any sort of uncomplicated relationship with law. Yet, our

¹⁷³ *Ibid.*, at 164-5.

¹⁷⁴ FULLER, L., *The Morality of Law* (New Haven, Yale University Press, 1964) at 3-32.

¹⁷⁵ *Idem*, at 5.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*, at 12.

discussion of legitimacy, and that which will be affected in Chapter 5, is solely concerned with the more discernible bottom end of this scale.

It is the teleological view of humanity that Hart disputes most forthrightly, and also, that which relates to the top end of this scale.¹⁷⁸ It should be recognized that the teleological conception of the human race, that we are perfectible and (perhaps even more dubiously) that we can know what this perfection looks like, most closely coincides with the ‘morality of aspiration’. As pointed out, this belief that an identifiable purpose for humankind exists, and can even be legislated into being, can quickly lead to irresolvable disputes which badly muddle the waters of a relationship between law and morals. However, Hart properly draws our attention to the fact that even this teleological view can be narrowly enough applied to suit his purposes of legal theory and to account for the overlap we wish to spotlight here. Hart explains,

[i]t will be rightly observed that what makes sense of this mode of thought and expression is something entirely obvious: it is the tacit assumption that the proper end of human activity is survival, and this rests on the simple contingent fact that most men most of the time wish to continue in existence. [...] This simple thought has in fact very much to do with the characteristics of both law and morals, and it can be disentangled from more disputable parts of the general teleological outlook in which the end or good for man appears as a specific way of life about which, in fact, men may profoundly disagree.¹⁷⁹

This disentanglement is crucial to Hart’s conclusions. By making this distinction within the teleological view, and then underscoring the one remaining universal truth of human life (that we wish it to continue), he is able to straddle the two primary legal philosophies under discussion here. While the theories of legal positivism and natural law are often presented as mutually exclusive, Hart made sure to point out there is indeed a place of coincidence between the two legal philosophies, and at the same time between the concepts of law and morals.

Even if we were to dismiss the more metaphysical formulations for why survival is central to human association, there is a vast quantity of our thought and language that reflects this understanding of a nearly universal desire for continued existence. ‘Malady and healing’, ‘threat and security’, along with ‘injury and relief’ are all words whose meaning indicate the extent to which self-preservation has become the underlying structure of our belief systems surrounding human existence. Were our human environment to be radically different (i.e., were our bodies and nourishment impregnable), this might indeed change. For now at least, it would be quite difficult to argue that harm and death have not been invoked consistently as

¹⁷⁸ HART, *The Concept of Law*, note 112 above, at 189-191.

¹⁷⁹ *Idem*, at 191-2.

negative. It is only if a benefit can be directly tied to them are these terms appealed to as a worthwhile cost. Yet harm and death are time and again still portrayed as a *cost*.

It is for this reason that Hart arrives at the conclusion that the legal philosophy which has served as the general starting point via rejection for his own legal theory, in fact has a piece worth salvaging. He called this retrievable piece the ‘minimum content’ of natural law, and describes it as “universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims”.¹⁸⁰ From a renowned legal positivist, the recovery of this idea and its integration into his own theory is certainly worthy of being noted. It is this notion that Hart has used to conclude that there is indeed a moment when the actual content of law is prescribed. As he puts it,

[i]n considering the simple truisms which we set forth here, and their connection with law and morals, it is important to observe that in each case the facts mentioned afford a *reason* why, given survival as an aim, law and morals should include a specific content. The general form of the argument is simply that without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other.¹⁸¹

To help substantiate his conclusions, Hart researched and worked on the genesis of legal positivism by way of Bentham and Austin¹⁸² in his article ‘Positivism and the Separation of Law and Morals’ published in 1958 within the pages of the *Harvard Law Review*.¹⁸³ In it, much of the same reasoning is applied and similar conclusions reached. Hart specifically attempts to correct the point that Bentham and Austin saw no intersection at all between law and morals. Rather they believed that even if there were identifiable coincidences, it was conceptually necessary to make the distinction for analytical purposes. For instance, even if it might only be the nascent form of the same argument that he himself made, Hart calls our attention to Austin’s recognition that there are “resemblances between different systems which are bottomed in the common nature of man”.¹⁸⁴ Thus, such an acknowledgment would indicate that Austin was aware of at least a partial truth to be found in natural law. Additionally, Hart concludes after analyzing the work of Bentham and Austin that even their legal philosophy would also deem that there are indeed certain provisions in a legal system that are “necessary”.¹⁸⁵ By sketching the hypothetical scenario that humans were somehow to

¹⁸⁰ *Ibid.*, at 193.

¹⁸¹ *Ibid.*, (original emphasis).

¹⁸² Additionally, Hart edited a volume of Austin’s work, AUSTIN, *The Province of Jurisprudence Determined...*, note 118 above, at 162.

¹⁸³ HART, ‘Positivism and the Separation of Law and Morals’, note 122 above.

¹⁸⁴ Cited in *idem*, at 620 and found originally in AUSTIN, *The Province of Jurisprudence Determined...*, note 118 above, at 373.

¹⁸⁵ *Ibid.*, at 621.

become invulnerable to attack, and could obtain sufficient nourishment through the breathing of air that could not rot nor spoil, Hart points out that all legal systems would no longer necessarily need minimum rules forbidding the free use of violence nor theft. However, under our human conditions as we know them,

such rules are so fundamental that if a legal system did not have them there would be no point in having any other rules. Such rules overlap with basic moral principles vetoing murder, violence, and theft; and so we can add to the factual statement that all legal systems in fact coincide with morality at such vital points [...]¹⁸⁶

IX. Overlap and Application

An important quality of this model of legitimacy is that it aims to capture not only the tripartite structure of the content of legitimacy, but that it also presents a manner in which we can understand the interactive nature of the three elements of *legality*, *morality* and *efficacy*. In other words, these poles are not in juxtaposition, but rather there is a place of overlap between these three philosophies or validities. This is part of the reason behind the introduction of the Escher image demonstrating three different poles coexisting and functioning together simultaneously. It will therefore be important that the application of our model not simply present just one pole of legitimacy independent of the others by treating one policy per sphere. Nor is it desirable to analyze each of the three policies of detention, war-making and interrogation through all three of the spheres of legitimacy since it would create a redundancy and perhaps at the expense of clarity. Additionally, it is felt that such repetition would serve little purpose in demonstrating and discussing overlap. Thus this work will be organized in a way that tries to capture the utility of the three spheres of legitimacy and their overlap, while attempting to avoid unwarranted duplication.

To accomplish our task, Chapter 4 will begin our analysis by applying solely the lens of *legality* to the issue of detention without judicial review at Guantánamo so as to ascertain the manner in which formal validity was fleshed out before the U.S. Supreme Court. Next in Chapter 5, we will adjoin the lens of *morality* to the already present lens to analyze war-making policies in the ‘war on terror’. Although the primary lens for this chapter will be that of *morality*, the focus of our attention will in fact be on the overlap with *legality* discussed above. Finally, in Chapter 6 we will then affix the lens of *efficacy* to the other two present so as to analyze the use of abusive interrogation techniques for the aim of gathering reliable and credible intelligence. While we will be gazing through the lens of *efficacy* in this chapter, the

¹⁸⁶ *Ibid.*

focus once again will be on the space in which it overlaps with *legality* and *morality*. So by adding the lenses one by one, and concentrating upon the point at which there is overlap between them in the discussion of the three different policies, our intention is to gain substantive analysis of each issue, while highlighting the interactive nature of the three poles of legitimacy.

X. Conclusion

In this chapter, we have attempted to establish that the legitimacy of a government can and should be conceived of as an important target of terrorism. Because the *power to command* and the *will to obey* are a vital part of the structure of any society, it is sensible that if enemies can find a way to disrupt or stress Ferrero's intersection of authority and obedience, then real damage can be done to a society. We have seen through our survey of the literature on legitimacy that very few have attempted to bring together the ideas of political violence and the legitimacy of a government, yet we have demonstrated here through an interdisciplinary dialogue that there is strong reasoning for doing so. Due to its nature, the uncoerced pull towards compliance with an authority of the state has been, and will continue to be throughout this work, explored from different disciplinary perspectives. If there is one point on which all analysts agree, it is that legitimacy cannot be confined to just one disciplinary study.

While Max Weber's work on legitimacy has reached a classical status in the literature, it leaves the analyst wanting more. The fact that his analysis can be reduced to a "belief" in legitimacy leads scholars on the topic into a dead-end since it rests in the deep corners of the mind of numerous individuals who exercise their obedience, if only tacitly. As Beetham aptly pointed out, "the evidence is available in the public sphere, not in the private recesses of people's minds". Most importantly, it leaves the concept of legitimacy empty of content. However, Weber's conception of the state as "the *monopoly of the legitimate use of physical force*" has become pivotal to Western thought, and deservedly so. When fully understood, this linguistic nugget captures the ongoing tension within a society between command and obedience with regard to the exercise of authority to create and maintain order. As well, it properly explains that physical force must be employed legitimately, even if the content of legitimacy has been obscured by Weber himself. This is where Habermas steps in to emphasize that not only is the content of what creates *an uncoerced pull towards compliance* actually knowable, but it is being rationally tested by citizens more and more every day.

Through our interdisciplinary dialogue we have been able to hypothesize a general shape of the content of legitimacy in an attempt to expose the 'Genii of the City'. We have

constructed a philosophically sound model by reasoning through the work of scholars treating legitimacy in the context of conflict. As such, it is put forward that the content of legitimacy consists of three overlapping circles representing *legality*, *morality* and *efficacy*. With these analytical tools, and an emphasis on where they coincide, it will be possible to investigate and evaluate the policies that were instituted in the counterterrorist response to the horrific attacks of September 11th, 2001. Before that analysis is carried out, it is first necessary in the next chapter to explore the phenomenon of terrorism itself in the context that we have now created, and to suggest what that means for counterterrorism. Then in Chapter 3, we will explain how and why the framework of international law serves to hold and secure the lenses of *legality*, *morality* and *efficacy* in our analysis of the legitimacy of the policies of the ‘war on terror’.

Chapter 2

Terrorism and Counterterrorism

Rather, they seek either to cause the enemy to overreact and thereby permit them to recruit large numbers of followers so that they can launch a guerilla campaign, or to have such a psychological or economic impact on the enemy that it will withdraw of its own accord. Bin Laden called this the “bleed-until-bankruptcy plan”.

-- Louise Richardson¹

I. Introduction

In this chapter we will begin by clarifying the major characteristics of modern terrorism in Section II. Although there continues to be a legal and academic debate over the definition of some of the finer points at the edges of this phenomenon, it is generally agreed that actions of public and political violence targeting non-combatants certainly qualify as terrorism. With these features spelled out and discussion over some of the more controversial characteristics in the context of legitimacy, this section will continue with a discussion of the short-term goals of terrorist acts – revenge, renown and reaction. This will include reference to places where these objectives can be found in the al Qaeda literature, providing evidence of how legitimacy is indeed a target in this organization’s strategy. Finally, in Section III, we will make one important point on the nature of the cross-border attacks carried out by al Qaeda on September 11th 2001 as related to the issue of legitimacy. While military attention has recently been placed on the importance of trying to construct a government that is deemed legitimate in overseas operations because it is recognized that insurgents are indeed operating on this battlefield, this recent military doctrine ignores the manner in which al Qaeda wishes to destroy or weaken the legitimacy of the U.S. government at home.

II. Terrorism as Tactic and Strategy

1) A Brief History

Terrorism is not a new phenomenon. The term “terror” begins to appear in dictionaries and is used in writings in reference to the French Revolution, and in this context the term referred to political violence used as a tool by the state. The Jacobins were said to occasionally use the term “terrorism” or “terrorist” in a positive sense when speaking or writing about themselves,

¹ RICHARDSON, L., *What Terrorists Want* (New York, Random House, 2006) at 6.

according to a French dictionary published in 1796.² The idiom contemporaneously migrated across the channel and into the English language where in 1795 we find Edmund Burke referring in a famous passage to, “those hell hounds called terrorists” unleashed onto the people of France.³ It is important that this particular historical phenomenon refers to terror imposed from above by the state, rather than from below by insurgents, since it represents a beginning of the idea of “popular sovereignty as a basis for political legitimacy”.⁴ However, it quickly becomes quite clear that popular sovereignty is something that can be invoked by anyone, whether it is used to defy a government or to wield its coercive power. The end result turns out to be, directly in line with what we highlight here, a conflict over the *power to command* and the *will to obey* centering on the question of who in fact speaks for the people.

Of interest to this discussion, the historian Guglielmo Ferrero provides a plausible theory for understanding the origins of this ‘reign of terror’ that was let loose in 1789.⁵ His hypothesis brings us back to the central issue of legitimacy for all organized societies. Ferrero reminds us that all aspects of the apparatus of state (i.e. laws, police, courts and jailers) rest on the idea of an uncoerced pull towards obedience to their command. Any government would become instantly and completely paralyzed if all subjects came to the simultaneous agreement to withhold their obedience. While Ferrero claims that man’s existence is relatively ordered because this could seemingly never happen, there was in fact one such moment that he found in his historical research. On July 14, 1789 the Bastille, the infamous royal jail in Paris, was stormed by a crowd while a substantial number of nearby Royal Army forces did not come to defend the *ancien régime*.⁶ Ferrero highlights this moment as the complete collapse of legitimacy. A frightening chaos thus spread throughout all of France. He explains,

[i]t is less familiar that this victorious uprising was followed, for the first time in history, by the event which we held, not without reason, to be impossible: All over France, for six weeks, as soon as the news from Paris was heard, all the people – peasants, workers, lower middle classes, officials, upper classes– as at a signal after a secret agreement, refused to obey.⁷

Thus it is Ferrero’s theory that it was the absence of any legitimate authority that spawned this particular state terror epitomized by the thousands of public beheadings with the guillotine. This is certainly not to suggest a justification for the ‘reign of terror’ that followed in an effort

² LAQUEUR, W., *Terrorism*, (London, Weidenfeld and Nicolson, 1977) at 6.

³ BURKE, E., *Selected Works*, vol. 4 (Indianapolis, Liberty Fund, 1999) at 315.

⁴ RICHARDSON, *What Terrorists Want*, note 1 above, at 30.

⁵ FERRERO, G., *The Principles of Power* (New York, G.P.Putnam’s Sons, 1942) at 82-101.

⁶ For a apt discussion of how in the revolutionary moment, specifically discussion the storming of the Bastille, we can often find that hearts and minds have already shifted and give way to less than brutal and violent bloodshed see SCHELL, J., *The Unconquerable World* (New York, Metropolitan Books, 2003) at 164-7.

⁷ FERRERO, *The Principles of Power*, note 5 above, at 82-3.

to impose order on a society without any recognized commanding authority. Nor is it to launch into historical disputes over the events of that time period. The point here is to again underline the manner in which legitimacy rests at the center of struggles to steer any society. In this case, we see that it was the absence of legitimacy that helped unleash the violence that has given a name to the phenomenon we discuss here today.

The concept of terrorism as examined in this work, however, refers to a tactic employed by non-state actors. This, too, is not a new phenomenon. In fact, its occurrence can be observed in much earlier periods of history. There have been movements that can be traced back as far as the 1st century which systematically employed political terrorism, or persons “from below” attacking office holders in public with daggers and/or setting fire to prominent official buildings and public archives in an attempt to bring about the changes they desired from those in control.⁸ Such tactics were employed by the *sicarii* in Palestine to eliminate Roman rule. By performing their political violence in a crowd they “ensured that word of their action would spread”. Writers have thus underscored the widespread terror that ensued.⁹ In Persia and Syria in the 11th century a group known as the Assassins killed prefects, governors and caliphs because it was believed that a, “long-term campaign of terror carried out by a small, disciplined force could be a most effective political weapon”.¹⁰ They too were very conscious of the need for publicity to have their deeds acquire the desired impact, and thus chose prominent victims to be attacked on holy days, preferably with many witnesses. For this reason such a violent political approach has been described as “a public spectacle”.¹¹

Narodnaya Volya (People’s Will) represented a burst of organized terrorist activity carried out by Russian revolutionaries between 1878 and 1881. This group is most well-known for the killing of the governor general of St. Petersburg, and for its targeting, with ultimate success, of Tsar Alexander II.¹² The high profile killings at the end of the 19th century represented the apogee of such terrorist activity in Russia until the Social Revolutionary Party decided to also engage in a similar “spectacular assassination” strategy two decades later with the primary result being a provocation of brutal repression.

The high water mark of terrorism in Western Europe can be said to be the anarchists of the 1890s who promoted the idea of politics through “propaganda by deed”. While successful

⁸ LAQUEUR, *Terrorism*, (London, Weidenfeld and Nicolson, 1977) at 3-20.

⁹ RICHARDSON, *What Terrorists Want*, note 1 above, at 24.

¹⁰ LAQUEUR, *Terrorism*, note 2 above, at 8.

¹¹ RICHARDSON, *What Terrorists Want*, note 1 above, at 26.

¹² LAQUEUR, *Terrorism*, note 2 above, at 11-12.

assassinations in France, Spain, and Italy gained enormous publicity, and bomb throwing by individuals became well-known during a rise in propaganda favoring violence, the widely held impression it created of a large international conspiracy was in fact false.¹³ There was public fascination with the secret and mysterious nature of anarchist groups, and these organizations were often conflated with socialists, nihilists and radicals. The spread of such skewed views of the size and nature of these violent actors, even though empirically incorrect, demonstrates how perception can indeed trump reality itself when it comes to politics.

Unfortunately, the frailty of human memory has meant that more recent events involving attacks by non-state actors meant to influence a government have been regarded by many to be a novel phenomenon in our history. As seen above, today's terrorism shares important similarities with the historical examples of those who wished to contest, or simply to impose, authority. Most importantly, we see the long held belief that such political violence must be at least public, if not spectacular. Therefore, it is not new that such political violence is a spectacle in search of an audience. Consequently, terrorism expert Brian Jenkins spoke very aptly in 1975 when he stated, "terrorism is theatre".¹⁴

2) Terrorism Today

The modern employment of terrorism can be said to have an enhanced political effect and societal impact which can be attributed to more recent changes that have occurred within our societies. There are two significant transformations that will be highlighted here as they indeed directly shape the effectiveness of terrorism as a tactic and strategy. The first is the widespread proliferation of cameras, mass media, and information sharing tools. Hence when Margaret Thatcher spoke in 1985 of publicity being the "oxygen" on which terrorists depend,¹⁵ she was speaking to a historical fact long understood as tied to the phenomenon. At the same time, she was identifying an experience of modern times that has continued to increase exponentially since the statement was first made.

The second important factor that has enhanced the impact of terrorist tactics is that during the 20th century there has been a notable rise in the international acceptance and explicit codification of very detailed laws of war and legal treaties enshrining the idea that each and every individual has inviolable human rights. The development of such laws

¹³ LAQUEUR, *Terrorism*, note 2 above, at 11-15.

¹⁴ JENKINS, B.M. 'International Terrorism: A New Mode of Conflict', in Carlton, D. and Schaerf, C. (eds.), *International Terrorism and World Security* (London, Croom Helm, 1975) at 16.

¹⁵ THATCHER, M., Speech delivered 15 July 1985 at Albert Hall, South Kensington, central London, to the American Bar Association: "And we must try to find ways to starve the terrorist and the hijacker of the oxygen of publicity on which they depend".

protecting individuals has also been accompanied by a significant growth in international criminal law, international military tribunals and human rights monitoring bodies to oversee implementation of these laws. While there is no doubt that these enforcement mechanisms fall far short when compared with domestic law and governing institutions, it must also be recognized that such developments also represent giant steps forward when seen in an historical perspective. Thus international law has undoubtedly become more clear and conspicuous in our human consciousness over the previous decades. That is to say, its development since the end of the Second World War represents a palpable change in the tools that citizens can use to evaluate and scrutinize their own government's protection of individual rights – protection to which the government is obligated by its legal commitments. Thus, counterterrorism policy is under a new type of microscope that intensifies the scrutiny of a state that attempts to confront terrorist groups absent of any constraint. As was presented in the previous chapter, and will become clarified in what follows throughout this work, international law provides metrics for the public to employ to measure and evaluate their own state's exercise of force. We will see that while the increased media sources have provided a drastic increase in credible facts distributed to a citizenry about abuses both against and by the government, international law has offered analytical tools that can and have been applied to evaluate this increased empirical data.

The most obvious impact that this has had on terrorism is in regard to its choice of targets. The brief overview of the historical roots of terrorism found above clearly demonstrates that, in its earlier forms, those from below who wished to directly affect the policy of government attempted to attack as high up the hierarchy as their weapons could reach. In other words, the targets chosen were often office holders of the ruling regime. However, the defining trait of a terrorist act today is that those who have been placed in the crosshairs can be described as non-combatants, uninvolved citizens or innocent civilians. As mentioned in our introduction, this type of targeting is in direct violation of the principles of humanitarian and human rights law, and thus can be described as patently illegal in both domestic and international law. Nonetheless, this illicit and violent tactic does in fact aim at strategic goals, which will be discussed further in Subsection 4 below.

3) Terrorism as Tactic: Modern Characteristics and Definition

Before exploring terrorist groups' primary short-term strategic goals, it is first necessary to present the major characteristics of modern terrorism. As a starting place, this work will take terrorism to mean: public and politically motivated violence against non-combatants.

However, there is no universally accepted definition of terrorism in international law (nor even within some domestic jurisdictions),¹⁶ although there has been much debate and negotiation for decades. It is also true that this discussion over a definition has not been confined to the legal community. It is one that also exists in the academic literature.¹⁷ In laying out the critical characteristics of this phenomenon and some of the primary disputes that have arisen when attempting to formulate a legal definition, we will explain why the most important components for understanding modern terrorism indeed already exist. There are five major characteristics of the phenomenon of terrorism that give it its shape and provide an analytical structure for understanding what is under discussion in this work. We will first briefly lay out the three less controversial features of terrorism. Then through our discussion of the international definition, we will present the characteristics that continue to be more contentious. At the same time, we will provide an explanation as to why these two traits of terrorism have been controversial, and why this will most likely continue to be the case for some time to come.

The first aspect of terrorism that is widely accepted to characterize such acts is the fact that they are politically motivated. If these acts are not so motivated, they can simply be understood to be ordinary criminal activity. Therefore a terrorist act is not only illicit, but is meant to specifically challenge the authority of a regime to steer a society by attempting to bring about a change in policy. Secondly, violence against persons, or the threat thereof, must be employed. Partly because the term terrorism has recently become so prevalent, the word has been used promiscuously and applied to a variety of acts which do not necessarily fall into

¹⁶ See e.g. that there are differing definitions found in United States law and government institutions, with particular disagreement over whether politically motivated violence constitutes terrorism, or that its targets must be non-combatants, and whether acts of mass destruction aimed at property is included (a change included into the U.S. Federal criminal code after 9/11 in the PATRIOT act). *United States Law Code*: U.S.C. Title 22, Ch.38, Para. 2656f(d), “the term ‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”; *US Federal criminal code*: 18 U.S.C. §2331, “(1) the term ‘international terrorism’ means activities that— (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended— (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum”; *US Code of Federal Regulations*: 28 C.F.R. Section 0.85 (l), “Terrorism includes the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”

¹⁷ See e.g. LAQUEUR, *Terrorism*, note 2 above, at 5, in a footnote the author discusses, “the difficulties involved in agreeing on a comprehensive definition of terrorism. Such a definition does not exist nor will it be found in the foreseeable future. To argue that terrorism cannot be studied until such a definition exists is manifestly absurd”.

the same category, e.g. eco-terrorism and cyber-terrorism.¹⁸ Thirdly, the specific chosen target often has symbolic significance because a message is being sent to a larger audience and not to the victims of violence themselves. In the simplest terms, a terrorist act is public. Because the point of terrorism is that the impact is more psychological than the actual physical act itself, the choice of a more symbolic target tends to attract more of the vital ‘oxygen’ of publicity. Looking at these widely accepted characteristics of terrorism, it is not difficult to see how the use of public and political violence is aimed not at the security forces or state representatives of a regime, but instead directed at the legitimacy of its command.

Next, it is necessary to discuss the more divisive features of modern terrorism that have been stumbling blocks impeding the arrival at a commonly accepted international legal definition of this phenomenon that has been deemed by the United Nations Security Council (UNSC) to be a “threat to the peace”.¹⁹ Two major obstructions have been whether terrorism must be committed by a non-state group (can a state commit terrorist crimes?), and whether the “targeting of innocents” includes attacks on the security forces of a democratic regime. This author believes that for analytical clarity, and more importantly due to the understanding of legitimacy as being the primary battleground involved in this type of conflict, it makes most sense to limit the terrorist designation to non-state actors and only when their actions target true civilians without a status within the government, or unaffiliated non-combatants.

An explanation for these choices will follow, but it is first necessary to understand that today there already exist 13 international conventions treating specific assets or persons believed to be current or future targets of terrorism.²⁰ However, although the international

¹⁸ There are indeed some who believe that large-scale destruction of property must be included in the definition of the term. Cf. U.S. Federal criminal code, note 16 above, “the term ‘international terrorism’ means activities that— (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, *or that would be a criminal violation if committed within the jurisdiction of the United States or of any State*” (my emphasis). However, this author does not think that expanding the definition so widely is useful since such acts can be a conscious effort by a group to avoid bodily harm or death (for example the African National Congress specifically chose sabotage as a tactic to avoid violence against individuals, see RICHARDSON, *What Terrorists Want*, note 1 above, at 8-9), and thus such a definition clouds the more critical aspect of attacks directed at the human person.

¹⁹ U.N. Doc. S/RES/1368 (2001), U.N. Doc. S/RES/1373 (2001), U.N. Doc. S/RES/1377 (2001).

²⁰ The 13 UN treaties dealing with terrorist acts are: (1) *Convention on Offences and Certain Other Acts Committed On Board Aircraft* (signed 14 Sept 1963, entered into force 4 Dec 1969) 704 UNTS 219; (2) *Convention for the Suppression of Unlawful Seizure of Aircraft* (signed 16 Dec 1970, entered into force 14 Oct 1971) 860 UNTS 105; (3) *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (signed 23 Sept 1971, entered into force 26 Jan 1973) 974 UNTS 177; (4) *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents* (signed 14 Dec 1973, entered into force 20 Feb 1977) 1035 UNTS 167; (5) *International Convention against the Taking of Hostages* (signed 17 Dec 1979, entered into force 3 June 1983) 1316 UNTS 205; (6) *Convention on the Physical Protection of Nuclear Material* (signed 3 March 1980, entered into force 8 Feb 1978) 1456 UNTS 101; (7) *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,

community has been able to create conventions to deal with the hijacking of aircraft, the taking of hostages, terrorist bombing, illicit acts against the safety of maritime navigation, crimes against persons protected internationally including diplomatic agents, the financing of terrorism and nuclear terrorism, etc., there has not been agreement on a general anti-terrorist convention. Perhaps more widely known, is the fact that this also means that there is not one single, and widely accepted, definition of terrorism. Nevertheless, this fact should not confuse us into believing that there is not sufficient agreement that the most abhorrent public and political violence is an international crime. As the former President of the United Nations International Criminal Tribunal for the former Yugoslavia, Antonio Cassese, expressed it, “[t]o my mind a definition of terrorism does exist, and this phenomenon also amounts to a customary international law crime”.²¹

This eminent jurist has pointed out that the difficulty in drafting an acceptable definition for a comprehensive treaty prohibiting terrorist acts has not actually centered on disagreement over the primary characteristics of what constitutes terrorism as a crime.²² Instead, the decades-long discord has in fact arisen over what should be excluded from this definition. Developing countries have staunchly held that an exclusion must be made for “freedom fighters”, i.e. individuals and groups fighting for the right to self-determination, in any definition of terrorism. Countries that had themselves struggled against colonial rule or foreign domination have vociferously insisted that any legal definition of terrorism must not include acts by those engaged in national liberation movements. Thus a stalemate has endured in international negotiations since the end of WWII over this exemption. In addition, there has been an insistence on the importance of studying the historical, economic, social and political causes of a resort to terrorist acts. However, it should be understood that the lack of consensus

(signed 24 Feb 1988, entered into force 6 Aug 1989) 1589 UNTS 473; (8) *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (signed 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221; (9) *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf* (signed 10 March 1988, entered into force 1 March 1992) 1678 UNTS 304; (10) *Convention on the Marking of Plastic Explosives for the Purpose of Detection* (signed 1 March 1991, entered into force 21 June 1998) 30 ILM 721 (1991); (11) *International Convention for the Suppression of Terrorist Bombings*, (signed 15 Dec 1997, entered into force 23 May 2001) 2149 UNTS 284; (12) *International Convention for the Suppression of the Financing of Terrorism (ICSFT)* (signed 9 Dec 1999, entered into force 10 April 2002) 39 ILM 270 (2000); (13) *International Convention for the Suppression of Acts of Nuclear Terrorism* (signed 13 April 2005, entered into force 7 July 2007) UN Doc. A/RES/59/290 (2005). To view the full text of these treaties, and their current status, visit: <<http://www.un.org/terrorism/instruments.shtml>>.

²¹ CASSESE, A., ‘Terrorism as an International Crime’ in Bianchi, A., (ed.) *Enforcing International Law Norms Against Terrorism* (Oxford, Hart Publishing, 2004) at 214. For further discussion on this issue of a definition for terrorism see e.g. FLETCHER, G., ‘The Indefinable Concept of Terrorism’ (2006) 4 *Journal of International Criminal Justice* 894-911; and BERNARD, F., *L’Etat de droit face au terrorisme* (Genève, Schulthess Éditions Romandes, 2010) 163-174.

²² *Idem*, CASSESE ‘Terrorism as an International Crime’. This chapter provides a very useful overview for understanding the international quarrel over an international definition.

on an exception, does not mean that a general agreement on the definition of terrorism has not emerged.

As one example of the existence of agreement on the primary components of terrorism as a crime it is possible to look to the 1999 International Convention for the Suppression of the Financing of Terrorism.²³ Because this treaty was meant to criminalize an activity that is not in and of itself illicit, i.e. providing funds, it was necessary for this particular treaty to define in more detail under what circumstances such activity would be punishable for supporting “terrorist” acts. It is therefore the primary universally authoritative international instrument currently in force that provides a definition. While the definition put forward is meant to simply apply to the specifics of the crime of terrorist financing, one finds in the treaty a twofold approach that indeed covers the primary components of the phenomenon of terrorism. In Article 2(1)(a), reference is made to the offenses found in nine other treaties listed in the annex (on hijacking, hostage taking, etc.); and then Article 2(1)(b) puts forward a broad formulation. It reads,

[a]ny [...] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.²⁴

Even though this definition includes the primary characteristics of terrorism as an international crime, there will continue to be particular cases on the fringes of terrorist activity that will continue to sow disagreement and so this cannot be said to be all-encompassing. Nonetheless, the existence of this definition, which has indeed been accepted and referred to by the Supreme Court of Canada,²⁵ along with the passage of UNSC Resolution 1566 in 2004 which includes a description of terrorism that largely reflects what is put forward above,²⁶ belies the common belief that the international community has failed to outline the most

²³ *ICSFT*, note 20 above.

²⁴ *Idem*, Art. 2(1)(b).

²⁵ *Suresh v. Canada* (Minister of Citizenship and Immigration) (2002) 1 S.C.R. 3, 2002 SCC 1, at note 96, “[w]e are not persuaded, however, that the term ‘terrorism’ is so unsettled that it cannot set the proper boundaries of legal adjudication”.

²⁶ U.N. Doc. S/RES/1566 (2004). Para. 3 reads, “*Recalls* that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature”.

important aspects of a terrorist act. This is true despite the difficulties captured in the rather crude adage, ‘one man’s terrorist is another man’s freedom fighter’.

The human rights author and professor Michael Ignatieff addresses and makes a very strong distinction on this point. He maintains that,

[t]here are relatively clear ethical rules for the use of violence in support of a struggle against oppression, injustice or occupation: as a last resort, when nonviolent, deliberative means have been exhausted, and when armed force obeys the rules of war. To be sure, this limits the struggle for freedom. You can’t fight dirty, you must take on military targets, not civilian ones, but at least you are not required to turn the other cheek when you are faced with assault and oppression. Those who observe such rules deserve the name of freedom fighters. Those who do not are terrorists.²⁷

Thus, the common parlance should be understood as referring to how one may feel *politically* about a particular violent deed, not whether such violence against non-combatants is, or is not, a crime. Indeed, terrorism can be said to exist as a customary international crime. As Antonio Cassese put it, “international rules do cover in sufficiently clear terms at least the most conspicuous and odious manifestations of terrorism”.²⁸

In response to the significant global anxiety spawned by both the September 11th attacks themselves and the U.S. response of the ‘war on terror’, a major United Nations report was released in December of 2004 entitled, *A More Secure World: Our Shared Responsibility - Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change*.²⁹ The document itself is an incisive work demonstrating that the Panel took its mandate, and the gravity of the times, seriously. In its assessment of terrorism, there is a direct and useful discussion of the lack of a comprehensive treaty and legal definition of terrorism. Importantly, the Panel points out that not only do we have the 13 specific treaties dealing with terrorist acts, the definitions contained in the 1999 International Convention for the Suppression of the Financing of Terrorism and Security Council resolution 1566 (2004), there is also customary law, the Geneva Conventions and the Rome Statutes. Due to this wide array of international documents, members of the Panel also concluded, “[l]egally, virtually all forms of terrorism are prohibited”.³⁰ However, it was believed that these legal provisions primarily represented a well- established prohibition of certain forms of the use of force by states, but that the norms governing non-state actors has not kept pace. Thus, the Panel claimed that it was necessary for

²⁷ IGNATIEFF, M., *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, Princeton University Press, 2004) at 95.

²⁸ CASSESE, ‘Terrorism as an International Crime’, note 21 above, at 225.

²⁹ United Nations, *A More Secure World: Our Shared Responsibility – Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change*, 59th Session , Agenda Item 55, New York, (2 Dec 2004).

³⁰ *Idem*, at 51, para. 159.

the international community to address what it considered to be a lacuna. After pointing to the list of legal documents treating terrorism the Panel stated,

[l]egal scholars know this, but there is a clear difference between this scattered list of conventions and little-known provisions of other treaties, and a compelling normative framework, understood by all, that should surround the question of terrorism. The United Nations must achieve the same degree of normative strength concerning non-State use of force as it has concerning State use of force. Lack of agreement on a clear and well-known definition undermines the normative and *moral* stance against terrorism and has stained the United Nations image. Achieving a comprehensive convention on terrorism, including a clear definition, is a *political* imperative.³¹

What should be noticed about the above quote is the insistence that this issue of a definition of terrorism is not a question of law. As the panel expressed it, “[t]his is not so much a legal question as a political one”. The Panel instead was actually concerned with legitimacy, or creating an uncoerced pull toward compliance, with such an international prohibition. Therefore, we can see that this High Level Panel appointed by UN Secretary-General Kofi Annan understood the centrality of the political questions of command and obedience involved when dealing with terrorism. It is suggested by this author that this is indeed another indication that, when investigating this phenomenon, the concept of legitimacy should be at the center of an analysis.

It is necessary to pause for a moment to point out the significance of the shift that has been proposed here by the UN High Level Panel. Historically, it has only been states that have possessed an international personality, and hence they have been the exclusive subjects of international law.³² Therefore, within the classical framework of public international law, the armed groups that usually carry out terrorist acts against states would not at first glance appear to be subjects of that law. In this framework, individuals who carry out public and political violence against a state other than their own must have their action be attributable to another state under the rules for state responsibility for there to be a traditional international

³¹ *Ibid.*, (my emphasis).

³² See e.g. ARZT, D., LUKASHUK, I., ‘Participants in International Legal Relations,’ in Ku, C., and Diehl, P., *International Law: Classic and Contemporary Readings* (Boulder, Lynne Rienner Publishers, 2003) 155-177; and SLOMANSON, W., *Fundamental Perspectives on International Law* (Belmont, CA., Wadsworth/Thompson Learning, 2003) at 173-212. However, it should also be noted that diplomatic protection, which is almost as old as international law itself, is a classic form offering protection to individuals if the state of which that person was a national decided to exercise such protection. For a superior discussion of diplomatic protection as a human rights instrument in current practice see VERMEER-KÜNZLI, A., *The Protection of Individuals by Means of Diplomatic Protection* University of Leiden, Ph.D. dissertation (2007) 223 pp.

crime.³³ Considering that the UNSC responded almost immediately after the 9/11 attacks with Resolutions 1368 and 1373 stating that “such acts, like any act of international terrorism, constitute a threat to international peace and security,”³⁴ and apparently accepted the U.S. expressed view that Afghanistan should be held responsible under the rules of state responsibility,³⁵ it is understandable that the Panel would express such a view. In addition, a distinct feature of modern international law has been for states to recognize individuals as ‘secondary’ subjects of the law. This trend grew out of the conclusion of the Second World War and a conviction of the victorious group of states that what was perpetrated by the Nazi regime was an utter disregard for humanity.³⁶ However, the Panel’s unequivocal approach of asserting that United Nations “must achieve the same degree of normative strength concerning non-State use of force as it has concerning State use of force”,³⁷ should certainly be recognized as a part of this important paradigm shift, and should not go unnoticed.

As indicated above, it is necessary in this section to discuss two of the stumbling blocks that have impeded an agreement on a definition of terrorism, and how they can be interpreted in the light of a struggle over the *power to command* and the *will to obey*. The two difficulties to be dealt with here are the questions of state terrorism and attacks on the security forces of a democratic regime. On the first question, it is critical to understand that the label of “terrorism” has gained an especially derogatory connotation, and as such it has become a term that each party to an armed conflict would like to hang as an albatross around the neck of their opponent. As one expert on terrorism explained,

[o]n one point, at least, everyone agrees: *terrorism* is a pejorative term. It is a word with intrinsically negative connotations that is generally applied to one's enemies and opponents, or to those with whom one disagrees and would otherwise prefer to ignore. ‘What is called terrorism,’ Brian Jenkins has written, ‘thus seems to depend on one's point of view. Use of the term implies a moral judgment; and if one party can successfully attach the label *terrorist* to its opponent, then it has indirectly persuaded others to adopt its moral viewpoint.’ Hence the decision to call someone or label some organization *terrorist* becomes almost unavoidably subjective, depending largely on whether one sympathizes with or opposes the

³³ For a useful discussion of the attribution of a terrorist crime see DUPUY, P., ‘State Sponsors of Terrorism: International Responsibility’ in Bianchi, A., (ed.) *Enforcing International Law Norms Against Terrorism* (Oxford, Hart Publishing, 2004) at 3-16.

³⁴ U.N. Doc. S/RES/1368 (2001) and U.N. Doc. S/RES/1373 (2001) (citation comes from this second resolution). And only two months after the attacks U.N. Doc. S/RES/1377 (2001) was passed stating, “acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century”.

³⁵ DUPUY, ‘State Sponsors of Terrorism...’, note 33 above, at 9. For attributing state responsibility refer to the International Law Commission’s Articles of Responsibility of States for Internationally Wrongful Acts of 2001.

³⁶ CASSESE, A., ‘Individuals’ in Bedajoui, M., *International Law: Achievements and Prospects* (USA, Kluwer Academic Publishers, 1991) at 113-120.

³⁷ United Nations, *A More Secure World...*, note 29 above, at 51, para. 159.

person/group/cause concerned. If one identifies with the victim of the violence, for example, then the act is terrorism. If, however, one identifies with the perpetrator, the violent act is regarded in a more sympathetic, if not positive (or, at the worst, an ambivalent) light; and it is not terrorism.³⁸

It is thus quite easy to see that the struggles over defining this term can indeed be understood to be an important part of the battleground over legitimacy. If you can convince the rhetorical ‘audience in the theater’ that your enemy is a *terrorist*, then a decisive blow has been delivered in this battle over authority.

Nevertheless, in armed conflict there are undeniably norms and constraints on the use of force, and it is here in the laws of war that one can find the best legal and analytical terms to describe “state terrorism”. Laws going back to the 19th century, embodied in the Geneva Conventions and Hague Regulations, proscribe certain tactics and categories of targets. If a national military commits serious violations of the international humanitarian conventions they have signed, or the customary law they are bound to uphold, such acts can be termed as *war crimes*. Article 33(1) of the Fourth Geneva Convention of 1949 explicitly prohibits “all measures of intimidation or of terrorism” against civilians eligible for the status of “protected persons”.³⁹ As the Commentary on this Article points out, it was believed that such organized violence did not do anything to further military goals and so this provision was intended to forestall acts of defiance since it was understood that, “such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance”.⁴⁰ Additionally, acts of terrorism in a non-international armed conflict by any party to a conflict against civilians or those who cease to take part in hostilities is prohibited in Article 4(2)(d) of the Second Additional Protocol of 1977.⁴¹ Finally, both the First and Second Additional Protocols ban, “acts or threats of violence the primary purpose of which is to spread terror among the civilian population” (Articles 51(2) and 13(2) respectively).⁴² It is clear that state terrorism is proscribed and criminalized in international humanitarian law so long as it is carried out against civilians, since combatants are understood to be actively engaged in the armed conflict and thus targetable. Thus terrorist acts by a state in times of armed conflict are criminal and the applicable term, certainly understood to be pejorative, is a *war crime*.

³⁸ HOFFMAN, B., *Inside Terrorism* (New York, Columbia University Press, 2006) at 23.

³⁹ *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 287.

⁴⁰ International Committee of the Red Cross Commentaries, GC IV, Article 33 ‘Measures of intimidation or of terrorism’ at 225-6.

⁴¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts* (signed 8 June 1977, entered into force 7 Dec 1978) 1125 UNTS 609.

⁴² *Idem*, and *Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts*, (signed 8 June 1977, entered into force 7 Dec. 1978) 1125 UNTS 3.

At the same time, if a state implements a policy breaking such international laws against terrorism, and it is “widespread or systematic”, it may amount to a *crime against humanity*. Importantly, it is necessary for the perpetrators to be cognizant or aware of the fact that their criminal acts are part of a systematic or general pattern of conduct for the crimes to rise to this level. The Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) all state clearly that such crimes are deliberate and organized heinous acts directed against civilians. Therefore, we find that there is indeed another even more derogatory term that can be attributed to a state engaging in ‘terrorist’ acts since, if widespread or systematic, they can be *crimes against humanity*.

There is no doubt that states have engaged in the deliberate targeting of civilians by using psychological warfare to ‘break the will’ of the enemy. The “strategic bombings” that took place during the Second World War were instances of both sides engaging in the indiscriminate targeting of cities. The German *Luftwaffe* bombed Warsaw, Coventry and London, while the Allied forces unleashed the controversial firebombing of Dresden and Hamburg. Ultimately, the United States brought this tactic to a culmination by dropping the first atomic weapons on the civilian populations of Nagasaki and Hiroshima in a deliberate attempt to force the hand of their government. Hence one certainly cannot dismiss the accusation that states can and have committed such heinous acts.

However, one must ask the question of what is to be gained by including states in the designation of “terrorism” *per se*? One major problem is that doing so would create analytical confusion since it would conflate private and state-sanctioned force. This is an analytical difficulty that is not easily overcome because these are very different conceptually. Only the latter implies the endorsement of large portions of, if not the entire, community. Although both are forms of collective punishment, the comingling of the two types of violence from below and from above weakens our diagnostic capabilities and can reduce such conflict to a simple sort of ‘name-calling’ if there is not analytical clarity.

In addition, as flawed and cumbersome as domestic and international legal remedies might be for handing down a verdict of a committed war crime, or war criminal, on a state or a *de jure* organ of that state, it is difficult to imagine that justifying a label of ‘state terror’ would somehow be any easier. In fact, in light of all the difficulties that have plagued the international community for decades in simply doing so in the abstract, it would make sense that this would become all the more difficult for any institution, be it international or domestic. This is particularly a problem when we consider the fact that legitimacy is at the

center of such a conflict. For an official body to render the judgment that a government has deliberately and publicly targeted non-combatants for the political purpose of intimidation would be tantamount to a ruling of an illegal exercise of power directly undercutting the government's legitimacy. Fortunately or unfortunately, depending on your point of view, a body with such a dramatic and absolute power does not exist.

Of course, it is central to the study of terrorism to understand that, "one of the fundamental *raison d'être* of international terrorism is a refusal to be bound by ... rules of warfare and codes of conduct".⁴³ When confronting those who choose to employ such heinous practices of committing violence against persons not directly involved in an armed conflict to send a political message, there is no doubt that they are at a disadvantage in a struggle over legitimacy. Groups that choose the tactic of terrorism are at an enormous disadvantage at the opening of this struggle. However, due to the fact that a state wields weaponry and force vastly superior to such adversaries, a government does need to take extreme caution not to overreach and expose itself to accusations of abusing the authority with which it has been imbued by the population. If a state does react excessively and not stay within the confines of the authority with which it has been vested, it squanders away its claim to legitimacy.

In summary, it is felt by this author that 'state terrorism' does not belong in same analytical category as acts committed by non-state actors for several reasons. First, there are codified crimes in international law for which a state can be held accountable if it attempts to terrorize a population (namely *war crimes* and *crimes against humanity*). Secondly, there are major obstacles to any international or domestic body's ability to deliver a ruling concerning state terrorism. Lastly, the inclusion of state-sponsored violence against civilians creates problems with the analytical clarity needed in this area. While there are indeed strong moral arguments for such an inclusion,⁴⁴ they would not outweigh these concerns.

Finally, there is the issue of whether only attacks directed at civilians can be labeled as terrorism. This feature of the phenomenon has rightfully been pointed out to be the "defining characteristic of terrorism".⁴⁵ While some states, the United States for example, view the killing of police and soldiers of a government it deems democratic, or at least friendly, as a terrorist act,⁴⁶ it is not clear to this author that such an inclusion can be so easily put forward. The rationale for such an extension of the term is that in a democratic society, replete with all

⁴³ HOFFMAN, *Inside Terrorism*, note 38 above, at 28.

⁴⁴ Cf. FARER, T., *Confronting Global Terrorism and American Neo-Conservatism: The Framework of a Liberal Grand Strategy* (Oxford, Oxford University Press, 2008) at 28-29.

⁴⁵ RICHARDSON, *What Terrorists Want*, note 1 above, at 6.

⁴⁶ FARER, *Confronting Global Terrorism...*, note 44 above, at 15-29.

of the minimum protections of the vital interests of every minority group – such as, due process and equal protection under the law, freedom of association, conscience and religion—there are multiple avenues for dealing with a redress of grievances without violence. If a person’s vital interests are indeed protected, there can be no legal or moral excuse for a resort to violence against those representing the government’s authority. However, even progressive democracies do not have a perfect record of protecting the most fundamental interests of minorities. Thus being able to make an objective assessment of whether such safeguards are fully functioning can result in debatable conclusions making the classification of attacks against police and/or soldiers a real problem. Particularly problematic is that any official assessments will almost automatically weigh in favor of the ruling authority.

This is most certainly not to say that attacks on the security forces of a democratic regime, be it nominal or real, are legally or morally excusable. It cannot be forgotten that in all domestic jurisdictions such acts of violence are clearly and indisputably illegal, and generally carry a heavier sanction. We therefore find ourselves once again on the battleground of legitimacy. There is no doubt that the government of the United States would like to believe that its system, and those it considers allies, properly addresses all valid grievances and thus merit a status of full legitimacy. But whether a regime protects the fundamental human interests of all members, and thus merits an uncoerced pull towards compliance even by minority groups, is a question not easily answered by the outside observer. Nor is it even at all times straightforwardly calculated by the insider. So who then is credible enough to make such an assessment so as to determine when additional moral sanction is merited? A government will surely always rule in its favor and consider itself legitimate; hence the tougher sanctions that already exist for those who attack its security forces.⁴⁷

⁴⁷ While one can point to the hard fought gains through (primarily, but not entirely) non-violent struggle in the civil rights movement of the late 1950s through the 1960s, the 13th amendment bringing an official end to legal slavery was passed in 1865 and a nascent civil rights movement during the Reconstruction era that followed was marred with unpunished white supremacist intimidation and violence. Some analysts have even concluded that it was the U.S. Supreme Court decisions that played a critical role in suppressing a burgeoning movement at its inception. As has been suggested, “[w]hite supremacists who vehemently opposed civil rights for blacks could not have found a more favorable legal climate for the violent repression of the civil rights movement of that era”. (BARNES, D., and CONNOLLY, C., ‘Repression, the Judicial System, and Political Opportunities for Civil Rights Advocacy during Reconstruction’ [Spring 1999] 40, 2 *The Sociological Quarterly* 327, at 341.) Does this mean that during the one hundred years that African-Americans were reduced to second-class citizens (already following nearly eighty years of legal chattel slavery in the newly established constitutional United States of America) that they could violently attack security forces without incurring the pejorative label of ‘terrorist’? And at what exact point would this distinction change? Would it be with the passage of the Civil Rights Act of 1964? Does the Black Power movement of the late 1960s, who invoked the Malcolm X maxim ‘by any means necessary’ and sought to rid African-American neighborhoods of police brutality, thus deserve the label of terrorist? When did it become clear (or has it?) that the vital interests of this minority group were in fact fully protected by the constitutional democracy? These are all very difficult questions for an analyst attempting to arrive at legal and moral clarity, and assessments that have surely shifted with our political consciousness.

However, identification of those who are not armed and not engaged in defending a regime in an official position is indeed possible to ascertain, at least to a much more reasonable degree. As just one obvious example, we can surely look to the attacks of September 11th.⁴⁸ There is no doubt that the flight attendants, pilots and passengers onboard all four aircraft that day were incontrovertibly civilians, and were claimed to have been attacked as such by the al Qaeda militant group themselves. One might suggest that the American Airlines Flight 77 airplane flown into the U.S. military headquarters of the Pentagon in Virginia, and the United Airlines Flight 93 airliner reportedly heading for the Capitol Building or the White House but downed in a field in Pennsylvania by the passengers onboard⁴⁹ were aimed at questionably civilian targets. However, the other two projectile weapons filled with non-combatants and enough fuel for a nearly six hour transcontinental flight, were deliberately, publicly and violently pummeled into the symbolic World Trade Center buildings in New York City occupied with civilians by any measure. The death toll from that day was 2,977 people of 55 different nationalities (excluding the 19 hijackers), and all were civilian except for the 55 military personnel out of the 125 deaths at the Pentagon.⁵⁰ As for the international community, it has been pointed out above that the UNSC reacted with astounding speed in passing Resolution 1368 just one day after the attacks affirming that it, “*Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security”.⁵¹ As such, it is indeed possible to discern certain acts as undoubtedly public and political violence by non-state actors directed against civilians, i.e. *terrorism*.

4) Terrorism as Strategy – Revenge, Renown and Reaction

While some are drawn to conclude that terrorism is senseless or irrational violence, it is important to understand that those who employ it do in fact have goals they are trying to achieve. Even though at times those who commit acts of terrorism can get so wrapped up in their violent actions that they sometimes miss the point themselves, this does not mean that strategic objectives do not exist.⁵² To understand why violence might be directed against

⁴⁸ For a comprehensive account of that day's events, see The 9/11 Commission Report (2004). Available at: <<http://govinfo.library.unt.edu/911/report/911Report.pdf>>.

⁴⁹ *Idem*, at 2-14.

⁵⁰ 9-11 Research.com: Attack: Pentagon Victims, (last visited 14 Oct 2010) available at: <<http://911research.wtc7.net/sept11/victims/pentagonkilled.html#ref1>>.

⁵¹ U.N. Doc. S/RES/1368 (2001)(original emphasis).

⁵² JENKINS, 'International Terrorism...', note 14 above, at 15.

bystanders who do not themselves have the capacity to direct any change, it is first necessary to recognize there is nothing conventional about this type of combat. Those who choose such tactics are not trying to capture or hold any territory or destroy the enemy's forces. Neither do they have the level of weaponry needed to even engage the military of a state on a traditional battlefield. Terrorists indeed kill, and in a fashion that may at first seem wanton, but as Brian Jenkins put it, "[t]errorists want a lot of people watching and a lot of people listening, and not a lot of people dead".⁵³ However, it should be acknowledged that the number of people dead can surely have a direct impact upon the number of people watching. With that said, a credible threat can even be preferable to actually carrying out the deed since provoking a reaction is based upon the sentiments, or terror, induced. Having the enemy believe in an existing menace can circumvent the need to act, and can therefore avoid failure or exposing weakness. Inspiring and manipulating fear for political reasons through the purposeful public targeting of non-combatants can be described as the means, or tactic of terrorism.

To get closer to understanding the tactic of terrorism as a means for accomplishing strategic goals this author considers the most persuasive analysis of contemporary terrorism to be that of Louise Richardson in her book *What Terrorists Want*.⁵⁴ Richardson's expertise on the subject is impressive. She possesses the traditional scholar's familiarity with the literature that comes from the greater part of a professional life dedicated to the investigation of this age-old political phenomenon. She has taught undergraduates at Harvard on the subject since the mid-1990s. In addition, she has interviewed insurgents, reviewed accounts of interrogations and interviews, and studied the statements of those who have used the tactic of attacking civilians to better understand their motives, means and ends.

One of the most useful elements that Richardson brings to the discussion of terrorism is what she refers to as the "three Rs: Revenge, Renown, Reaction".⁵⁵ She lays out the issue of the effectiveness of terrorism in a way that leaves no clear cases being proven.⁵⁶ Instead, she presents a much more constructive way to get at the motivations of those who attack non-

⁵³ *Idem*, at 15.

⁵⁴ RICHARDSON, *What Terrorists Want*, note 1 above.

⁵⁵ *Idem*, at 71-103.

⁵⁶ *Ibid.* More than once Richardson points out that the often vigorous debate over whether terrorism works is frequently partial and flawed. To properly assess this matter, she asserts, one must look at the stated goals of a terrorist group, and whether those objectives have been specifically achieved through the public targeting of civilians. It must also be true that other means could not have accomplished the same goal (at 17). While Alan Dershowitz published a book provoking debate over this very question, (DERSHOWITZ, A., *Why Terrorism Works* (New Haven, Yale University Press, 2002) 256 pp.) the fact that his argument is built primarily on the case of Palestinian terrorism against Israel begs the question of what exactly he means by "works". Using this tactic has undoubtedly brought sympathy and attention to the conflict. However, the reality is that an independent state has not been established, and that the state of Israel has not been "obliterated". These facts belie the idea that this tactic has functioned as designed.

combatants, and sometimes do so in a manner that sacrifices their own life. To begin, Richardson explains that, “[a]ll terrorist movements have two kinds of goals: short-term organizational objectives and long-term political objectives requiring significant political change”.⁵⁷ It is imperative to distinguish between the two if we are to get closer to understanding the dramatic and immoderate choice of employing the type of violence under discussion here.

The grand goal of reestablishing the Islamic caliphate has been identified by scholars,⁵⁸ along with prominent leaders of the al Qaeda movement such as Ayman al Zawahiri.⁵⁹ This immense political change would require a redrawing of international borders throughout the Middle East, northern Africa and even a portion of the Iberian Peninsula in Europe. However, to present only this objective as what motivates members of al Qaeda to carry out their violent acts misses the more short-term immediate intentions.

Hannah Arendt also spoke to this idea of needing to consider the more proximate reasons for the decision to engage in violent behavior for political reasons. Arendt explained,

[v]iolence, being instrumental by nature, is rational to the extent that it is effective in reaching the end which must justify it. And since when we act we never know with any amount of certainty the eventual consequences of what we are doing, violence can remain rational only if it pursues short-term goals. Violence does not promote causes, it promotes neither History nor Revolution, but it can indeed serve to dramatize grievances and to bring them to public attention.⁶⁰

What we see in this quote by Arendt is that, while violence may indeed serve as a means to achieve a specific aim, one must remember that the objective cannot be too distant in the future for its sense to be truly understood. Though reestablishing the Islamic caliphate is the long-term goal that primarily appeals to leadership of the movement of al Qaeda, we know that groups who employ terrorism have been singularly unsuccessful in bringing about such grandiose goals. Thus understanding that, as is suggested by Richardson, the near-term strategic goals motivating many followers are revenge, renown and reaction is of importance

⁵⁷ *Ibid.*, at 75.

⁵⁸ *Ibid.*, at 80, 85 and 218; AARON, D., *In Their Own Words: Voices of Jihad* (Santa Monica, CA, RAND Corporation, 2008) at 109-10; and MOZAFFARI, M., ‘Bin Laden, Islamism and Terrorism’ (July/Aug 2005) 42, 5 *Society* 34, at 41.

⁵⁹ Letter from Ayman al-Zawahiri to Abu Musab al-Zarqawi, reportedly retrieved in Iraq through counterterrorism activity. It is dated July 9, 2005 and was released by the U.S. Office of the Director of National Intelligence in October 2005, which claims its authenticity. Retrieved from *Council on Foreign Relations.com* <http://www.cfr.org/publication/9862/letter_from_ayman_alzawahiri_to_abu_musab_alzarqawi.html> (last visited 15 Oct 2010).

⁶⁰ ARENDT, H., ‘Reflections on Violence’ (27 Feb. 1969) *The New York Review of Books*, available at: <<http://www.nybooks.com/articles/archives/1969/feb/27/a-special-supplement-reflections-on-violence/>>.

in analyzing terrorism as a strategy. Of course, both types of objectives can be pursued simultaneously and so the divergence can be kept limited and undamaging to the organization.

Revenge – The ubiquity of the theme of *revenge* is so prevalent in terrorist literature and discourse that it is almost superfluous to point it out.⁶¹ During the worst of the “troubles” in Northern Ireland the opportunities for finding a reason to seek revenge were abundant, and the tit-for-tat attacks by both Catholic and Protestant militant groups were most often couched in unmistakable claims of vengeance. Songs, poetry and posters in Palestine demonstrate the pervasiveness of the calls for retribution in the popular culture, and this sentiment fuels the recruiting for suicide bombers. Left and right wing militant groups in Italy used political violence on these same grounds as a spiral of vengeance swirled in the seventies and eighties. This theme of *revenge* illustrates the predominance of the idea of collective punishment found in many terrorist groups, as guilt is attributed with a very wide brush.

The writings and interviews of Osama bin Laden exude these very same siren calls for vengeance through terrorist action. Bin Laden clearly attempts to tap into this sentiment of a desire for revenge for perceived injustices to recruit followers and soldiers for a jihad against both the United States and its allies. In his 1996 fatwā, or religious opinion meant to be based on Islamic law, he inveighs against a host of assaults he believes the Muslim people have suffered at the hands of these enemies and declares it a duty to fight against them. Outlining some of the specifics acts that necessitated vengeance, bin Laden wrote,

[i]t should not be hidden from you that the people of Islam had suffered from aggression, iniquity and injustice imposed on them by the Zionist-Crusaders alliance and their collaborators; to the extent that the Muslims blood became the cheapest and their wealth as loot in the hands of the enemies. Their blood was spilled in Palestine and Iraq. The horrifying pictures of the massacre of Qana, in Lebanon are still fresh in our memory. Massacres in Tajakestan, Burma, Cashmere, Assam, Philippine, Fatani, Ogadin, Somalia, Erithria, Chechnia and in Bosnia-Herzegovina took place, massacres that send shivers in the body and shake the conscience. All of this and the world watch and hear, and not only didn't respond to these atrocities, but also with a clear conspiracy between the USA and its' allies and under the cover of the iniquitous United Nations, the dispossessed people were even prevented from obtaining arms to defend themselves.

He then goes on to spotlight an aggression upon the most sacred territory of Islam,

The people of Islam awakened and realised that they are the main target for the aggression of the Zionist-Crusaders alliance. All false claims and propaganda about "Human Rights" were hammered down and exposed by the massacres that took place against the Muslims in every part of the world. The latest and the greatest of these

⁶¹ RICHARDSON, *What Terrorists Want*, note 1 above, at 88-94.

aggressions, incurred by the Muslims since the death of the Prophet (ALLAH'S BLESSING AND SALUTATIONS ON HIM) is the occupation of the land of the two Holy Places -the foundation of the house of Islam, the place of the revelation, the source of the message and the place of the noble Ka'ba, the Qiblah of all Muslims- by the armies of the American Crusaders and their allies.⁶²

As we see, a catalog of reasons for vengeance runs deep in bin Laden's rhetoric.

Just as intended, this list of grievances did not remain static. After the al Qaeda attacks of September 11th, the United States responded by invading Afghanistan in less than one month on October 7, 2001, and then Iraq on March 20, 2003. These two wars launched in reaction to the terrorist attacks provided additional reasons for bin Laden to call for revenge against his enemies. Shortly after the invasion of Afghanistan, a challenge to the West and a rallying cry to Muslims to take up arms was broadcast on Al-Jazeera satellite television and attributed to bin Laden. In it, bin Laden speaks of the bombing of the innocent people of Afghanistan, and jumps on the language of a "crusade" used by President Bush (even though this term was quickly repudiated by the administration).⁶³ Bin Laden explained the newly spawned need for revenge as such,

[t]he entire West, with the exception of a few countries, supports this unfair, barbaric campaign, although there is no evidence of the involvement of the people of Afghanistan in what happened in America. The people of Afghanistan had nothing to do with this matter. The campaign, however, continues to unjustly annihilate the villagers and civilians, children, women, and innocent people.

He then continued to hammer at this theme of retribution by emphasizing the grave slip of referencing the crusades,

[a]fter the US politicians spoke and after the US newspapers and television channels became full of clear crusading hatred in this campaign that aims at mobilizing the West against Islam and Muslims, Bush left no room for doubts or the opinions of journalists, but he openly and clearly said that this war is a crusader war. He said this before the whole world to emphasize this fact.

And in an even more explicit call for vengeance, Bin Laden goes on,

But when the victim starts to take *revenge* for those innocent children in Palestine, Iraq, southern Sudan, Somalia, Kashmir and the Philippines, the rulers' ulema

⁶² BIN LADEN, Osama, "Declaration of War against the Americans Occupying the Land of the Two Holy Places." first published in *Al Quds Al Arabi*, a London-based newspaper, in August, 1996. Available on the PBS Online Newshour, at : <http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html> (last accessed 18 Oct 2010).

⁶³ It is indeed true that just days after the attacks of 9/11 President Bush made a public statement saying, "this *crusade*, this war on terrorism, is going to take awhile", but the administration backed away quickly and called the use of this term a mistake. FORD, P., 'Europe Cringes at Bush "Crusade" Against Terrorists' Christian Science Monitor (19 Sept. 2001) available at : <<http://www.csmonitor.com/2001/0919/p12s2-woeu.html>>.

(Islamic leaders) and the hypocrites come to defend the clear blasphemy. It suffices me to seek God's help against them.⁶⁴

The reason why this is directly pertinent here in our discussion of calls for revenge is that images of the atrocities of the war in Iraq, such as would occur in any form of high-tech or low-tech military operation, were indeed widely circulated throughout the Muslim world. Hence, a direct confrontation with U.S. power at its most coercive and violent was faced by the people Iraq and Afghanistan, and spread extensively through images on televisions to the 1.5 billion Muslims across the globe. One example of how bin Laden referred to such activity that most assuredly served his purposes of broadening a sentiment of a desire for vengeance was in his 2004 video known as 'Message to America'. In this video he drew a direct correlation between what he considered atrocities of the past, and how they seamlessly demonstrated themselves in the present. Bin Laden stated,

[t]his means the oppressing and embargoing to death of millions as Bush Sr did in Iraq in the greatest mass slaughter of children mankind has ever known, and it means the throwing of millions of pounds of bombs and explosives at millions of children - also in Iraq - as Bush Jr did, in order to remove an old agent and replace him with a new puppet to assist in the pilfering of Iraq's oil and other outrages.⁶⁵

This call to avenge the damaging actions suffered, and provoked by terrorist acts themselves, is most often grounded in the idea of 'humiliation' as can be seen in Osama bin Laden's 1996 fatwā, "[d]eath is better than life in humiliation!"⁶⁶ Thus any successful counterterrorism program must surely bear in mind this dangerous spiral of humiliation and *revenge*.

Renown – The second short-term goal motivating groups that employ terrorism is the desire to achieve an elevated status, within one's own community or on the greater international scene at large, for one's deeds. In this case militants attempt to attain *renown* through exposure for their actions. But there is more at play than just the simple publicity that has been discussed. It is the concept of glory for attempting to redress the humiliation that has been perceived to be suffered by those who lash out violently at civilians. Because glory on a "national or, increasingly, global stage" is particularly important to the leaders of such movements,⁶⁷ the recent revolution in information (mainly image) sharing tools has had an

⁶⁴ BIN LADEN, Osama, translation found on BBC News.com (3 Nov. 2001) 'Bin Laden Rails Against Crusaders and UN', available at : < http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1636782.stm> (last visited 20 Oct 2010)(my emphasis).

⁶⁵ BIN LADEN, Osama, translation found on Al-Jazeera.com (1 Nov. 2004) 'Message to America', available at: <<http://english.aljazeera.net/archive/2004/11/200849163336457223.html>>.

⁶⁶ BIN LADEN, Osama, "Declaration of War against the Americans...", note 62 above.

⁶⁷ RICHARDSON, *What Terrorists Want*, note 1 above, at 94.

acute impact on this phenomenon. One analyst has explained that in Iraq this has had a particular impact because, “[f]or propaganda purposes, they create their own videos of virtually every terrorist attack, often at great risk to themselves and their operations”.⁶⁸ However, unlike revenge which terrorists take for themselves, *renown* is something that must be bestowed by others, and this can come from a complicit community or from their enemies.

In looking into the writings and orations of al Qaeda one indeed finds a focus on this issue of media coverage. Most importantly here, there is an attempt to characterize a very small group of dedicated and zealous attackers as engaged in a real confrontation with the most powerful military of the world and its government. By portraying the struggle in these terms it certainly demonstrates an effort to cloak themselves in the ‘glory’ of standing up to the oppressor. One of al Qaeda’s top strategists, Abu Ubeid al-Qurashi portrayed the struggle as such,

[i]n the media, the United States has failed to market its crusade. The US propaganda machine has been unable to defeat feelings of hatred toward the United States. It has not even managed to dispel the doubts within the United States. The immensity of the Western propaganda apparatus did not prevent its defeat at the hands of Shaykh Usama. The cameras of CNN and other Western media dinosaurs undertook the task of filming the raid [9/11] and sowing fear in its aftermath. It didn’t cost al-Qa’ida a cent. Moreover, the ‘terror’ tapes that CNN showed later demonstrated the mujahidin’s increased capabilities and endeared them to the Islamic community.⁶⁹

Speaking of the media outlets which address the Muslim population in the Middle East, al-Qurashi continued,

Al-Jazirah’s exclusive videotape of Shaykh Usama and other leaders brought the network worldwide notoriety and carried the voices of the mujahidin to the Islamic community and the entire world at no cost. By way of contrast, one should note that many revolutionary organizations in the past took hostages merely for the sake of airing their message. Today, the international media is in a race for scoops on the latest statements by the mujahidin. The mujahidin have also put the Internet to work, using it effectively to deliver their voices and points of view to hundreds of thousands of Muslims.”⁷⁰

What we find here is a sophisticated understanding of both the media outlets that cover this interaction between the two parties, as well as how these outlets operate. By expressing that television news programs and newspapers are “in a race for scoops”, one gets a glimpse into this meaningful comprehension of how media outlets are actually functioning. Additionally, we see that a small band of criminals willing to attack non-combatants to

⁶⁸ AARON, *In Their Own Words...*, note 58 above, at 268.

⁶⁹ AL-QURASHI, Abu Ubeid, quoted in Aaron, *In Their Own Words...*, note 58 above, at 270.

⁷⁰ *Idem*.

publicize their grievances views itself as actively engaged with the mammoth entity it considers its enemy. This belief is not completely absurd. Perusing newspapers, magazines, television news coverage and book shelves on the subject of terrorism would certainly bolster this argument. Yet it should be recognized that non-state actors have not often seized the full attention and activity across the institutional spectrum of a state so thoroughly. Thus, these words of one of al Qaeda's leading members do not seem far off the mark. Al-Qurashi also explained the significance of the 9/11 attacks in comparison with killings of Israeli athletes at the 1972 Olympics in Munich by saying, "The September 11 [operation] was an even greater propaganda coup. It may be said that it broke a record in propaganda dissemination. [...] With few exceptions, the entire planet heard about it".⁷¹

Al Qaeda's very top operatives certainly understand that it is through the modern medium of media coverage that they will be able to achieve the high reputations for which they yearn. Ayman al Zawahiri, one of the organization's principle ideologues who is sometimes described as second-in-command,⁷² specifically spoke of this medium being the majority of the battleground upon which they were engaged. In 2005 he stated, "I say to you: that we are in a battle, and that more than half of this battle is taking place in the battlefield of the media. And that we are in a media battle in a race for the hearts and minds of our Umma [Islamic community]".⁷³

Finally, this idea of seeking renown was explicitly connected by al Qaeda to what comes with death when fighting for Allah. Imbuing death with the very highest of glory, were it to come in this jihad, they vehemently advance and claim to lead. Bin Laden himself explained in 1997,

[w]e see that getting killed in the cause of Allah is a great honor wished for by our Prophet. He said in his Hadith: "I swear to Allah, I wish to fight for Allah's cause and be killed, I'll do it again and be killed, and I'll do it again and be killed". Being killed for Allah's cause is a great honor achieved by only those who are the elite of the nation. We love this kind of death for Allah's cause as much as you like to live. We have nothing to fear for. It is something we wish for.⁷⁴

For bin Laden, his followers can reach this exalted renown simply by sacrificing their life for the jihadi cause he promotes.

⁷¹ *Ibid.*, at 271.

⁷² With the death of Osama Bin Laden, al Zawahiri is reported to have taken command of al Qaeda according to a statement released by the organization. *BBC News.com*, Middle East, 'Ayman al-Zawahiri Appointed as al-Qaeda Leader' (16 June 2011) available at: < <http://www.bbc.co.uk/news/world-middle-east-13788594> > (last visited 26 June 2011).

⁷³ Al-ZAWAHIRI, Ayman, quoted in Aaron, *In Their Own Words...*, note 58 above, at 268.

⁷⁴ BIN LADEN, Osama, interview with Peter Arnett (March 1997) found on FindLaw.com, Special Coverage: War on Terrorism, available at: <<http://news.findlaw.com/legalnews/us/terrorism/documents/binladen.html>>.

Reaction –It must be pointed out that what sort of response is developed and carried out by a state confronting a group using terrorist tactics is within its own hands, and not in those of the terrorists. In other words, although there are indeed political forces in play when it comes to setting counterterrorism policy, a state's *reaction* is of its own making and most certainly of the highest importance. As it has been astutely pointed out by one scholar, "governments have choices in how to combat terrorism – choices that can be key determinants of the outcome".⁷⁵

There is little doubt that those who choose to employ terrorism can be described as action-oriented groups since such political violence has been called "propaganda by deed". Yet although this is the *modus operandi* of an adversary, this certainly does not mean that confronting it on the same grounds is advantageous to those who are defending themselves from such attacks. Hence, because the terrorists want to provoke a reaction, one must be extremely contemplative about how exactly to respond to such public and political violence.

To begin, it should be recognized that democracies are especially susceptible to this type of provocation. They are, at the same time, often structured in a way that causes tension between the different branches of government over interpretation of the established constraints on their response.⁷⁶ It is not an option for a state, nor would it be preferable, to refrain entirely from a response as there is a legal and philosophical duty to protect citizens from such violent attacks.⁷⁷ It has long been accepted that the first duty of a government is to provide security for its citizens. As well, it is an international legal human rights obligation for states to protect individuals under their jurisdiction from terrorist attacks. This obligation stems most specifically from the right to life and the right to security.⁷⁸ Thus a response is required. However, one difficulty that arises in a democracy is that the existence of a free press and a short-term election cycle combine to push politics to the fore, and thus into overreaction.

The spectacular nature of terrorist acts is meant to grab the attention of the press, and indeed to attempt to seize as much media attention as possible. Even though it is rarely the case that the press coverage produced is in any way sympathetic to the cause or plight of terrorist groups, the publicity gained relating to the event is indeed what they are seeking. With the collective eyes of a society fixed on the tragedy, the demand for an immediate and

⁷⁵ CRENSHAW, M., *Terrorism, Legitimacy, and Power: The Consequences of Political Violence* (Connecticut, Wesleyan University Press, 1983) at 31.

⁷⁶ See generally BIANCHI, A., and KELLER, A. (eds.), *Counterterrorism: Democracy's Challenge*, (Oxford, Hart Publishing, 2008) 424 pp.

⁷⁷ BERNARD, *L'Etat de droit face au terrorisme*, note 21 above, at 153-162,

⁷⁸ See e.g. Office of the High Commissioner of Human Rights, 'Human Rights, Terrorism, and Counter-Terrorism' Fact Sheet No. 32, Printed at United Nations, Geneva (July 2008), available at: <<http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>>.

conspicuous response flows directly into the political process of a democracy, establishing a competition for who will best provide security. Unfortunately, this competition can skew and distort any cool-headed reasoning since advocating swift and overwhelming force is often politically advantageous. However, even though speed and force might be exactly what are needed in a traditional military encounter, it is not at all clear that these elements are conducive to an effective counterterrorism policy. As was explained with the lone, solitary vote, cast by U.S. Congresswoman Barbara Lee in the House of Representatives, against the Use of Force Act for an invasion of Afghanistan just days after the attacks of 9/11, “[w]e are not dealing with a conventional war. We cannot respond in a conventional manner. I do not want to see this spiral out of control”.⁷⁹

Additionally, many terrorist groups have in fact promoted the use of attacks on civilians to incite a repressive reaction from the government. This is because repressive action helps demonstrate that the ruling regime is unconstrained by limits, and can push sympathizers to the side of the non-state actors in the psychological battle.⁸⁰ It is this provocation of the government to overstep constraints that raise doubts about the legitimacy of a government. For this reason *legality*, *morality* and *efficacy* are critical lines that must be firmly constructed in one’s mind when formulating a counterterrorist response. As Richardson insightfully explains, “[p]art of the genius of terrorism [...] is that it elicits a reaction that furthers the interests of the terrorists more often than their victims”.⁸¹

Michael Ignatieff echoes this essential idea in his book on modern terrorism and its effects on political ethics. He states, “it is the response to terrorism, rather than terrorism itself, that does democracy the most harm”, and he goes on to explain that this damage is “exactly what a certain kind of terrorism intends”.⁸² Ignatieff continues,

[s]uccess depends less on the initial attack than on instigating an escalatory spiral, controlled not by the forces of order but by the terrorists themselves. If terrorists can successfully draw democracies into this spiral and control its upward acceleration, they will begin to dictate the terms of the encounter. [...] Since a state will always be too strong for a cell of individuals to defeat in open battle, it must defeat itself. If

⁷⁹ LEE, B., U.S. Representative California’s 9th Congressional District, Speech on the United States House Floor (14 Sept 2001), available at: <http://www.wagingpeace.org/articles/2001/09/14_lee-speech.htm>.

⁸⁰ RICHARDSON, *What Terrorists Want*, note 1 above, at 99. Richardson’s research shows that the idea of provoking state repression to bring new recruits into the fold has been long advocated by 19th century Russian populist Sergey Nechayev, Brazil’s Carlos Marighella (author of the most prominent terrorist manual before that of al Qaeda), the Basque nationalist group Euskadi ta Askatasuna (ETA) and the Italian social revolutionary movement the Red Brigades.

⁸¹ RICHARDSON, *What Terrorists Want*, note 1 above, at 101.

⁸² IGNATIEFF, *The Lesser Evil*, note 27 above, at 61.

terrorists can provoke the state into atrocity, this will begin to erode the willingness of a democratic public to continue the fight.⁸³

Thus, if this provocation is what non-state actors who employ terrorist tactics intend, it is extremely important to defend against this targeting of legitimacy. Ignatieff concludes that this challenge is indeed the nemesis of liberal democracies, and they must not, “succumb to this provocation, not allow attacks to become the pretext for abandoning law altogether”.⁸⁴

In reading the writings of al Qaeda strategists and leaders one finds that this idea of provocation is indeed prevalent. The objective is to provoke a reaction that is deemed to be excessive. David Aaron, a diplomat and international expert, has put together a compilation and commentary of the writings of a very small group of Muslims, sometimes referred to as extremist jihadis, who have made the enormous moral step of choosing to unabashedly and violently target non-combatants in an effort to promote their cause. This work, *In Their Own Words: Voices of Jihad*, very clearly points out that the writings do not represent Islam, Islamic fundamentalism, nor various Islamic political movements. What sets the group represented in this book apart is its willingness to employ terrorism. Most importantly for our purposes here, we find that not only is reaction a common denominator, but it is truly overreaction that is desired. As Aaron puts it,

Many of the jihadi statements in this book would achieve their desired effect if they exaggerated the threat and provoked an American overreaction. Such overreaction is a principal strategic objective of jihadi “raids.” It makes the jihadis appear more powerful and threatening, which attracts recruits and enhances the message that the success of jihad is inevitable. One of the most useful things the U.S. government could do is tone down its rhetoric and bring the risk the jihadis pose into proportion.⁸⁵

As well, we find that the idea of driving a wedge between the citizens of the United States and their government, and especially through reference to the principles of human rights that the state has long espoused, is considered to be strategically important by these groups. In a well-known essay by one of the organization’s principle ideologues it was explained why it was necessary to strike the U.S. directly. Al-Zawahiri wrote,

If the shrapnel from the battle reaches their homes and bodies, they will trade accusations with their agents about who is responsible for this. In that case, they will face two bitter choices: Either personally wage battle against the Muslims, which means the battle will turn into clear cut jihad against infidels, or they reconsider their plans after acknowledging the failure of the brutal and violent confrontation against

⁸³ *Idem*, at 62.

⁸⁴ *Ibid*.

⁸⁵ AARON, *In Their Own Words*, note 58 above, at 302.

Muslims. Therefore we must move the battle to the enemy's grounds to burn the hands of those who ignite fire in our countries.⁸⁶

If an attack is successful in reaching the enemy's shores, it is thought that they will be faced with one of two choices: react in kind with war, or retreat from Muslim territories. Both responses would serve al Qaeda's interest.

Al-Qurashi, specializing in strategy, has clearly studied the subject of insurrection and understands the nature of the conflict that has been engaged in by al Qaeda. Most interestingly for understanding al Qaeda's strategy, he recognizes the limits inherent in the military dominance that the U.S. possesses and seeks to capitalize on those limitations. As he explains in 2002,

[m]ilitarily, the 11 September raid is a great threat to the United States' current military standing. The asymmetric strategy that al-Qa'ida is pursuing entails the use of means and methods that the defender cannot use, recognize, or avoid. They rendered the United States' tremendous military superiority useless and reduced the effectiveness of US military deterrence internationally. The proliferation of the 'martyrdom bomb' and its expansion beyond Palestine to US targets has thrown off US calculations and caused the United States' sense of security to evaporate.⁸⁷

Al Qurashi is evidently quite pleased with the fact that the U.S. military has become fully engaged in this battle, showing no concerns that al Qaeda faces its awesome hard power in Afghanistan. In fact, we can sense that this is indeed a part of the plan.

In 2002, coalition forces in Afghanistan uncovered at least two letters from Osama bin Laden to Mullah Mohamed Omar, the spiritual leader of the Taliban movement and the de facto head of state of that country from 1996 to 2001. The two men are reported to have had a relationship that goes back as far as the resistance to the Soviet occupation from 1979 to 1989, and in these letters we can find important strategic explanations for the battle that al Qaeda wages against the United States. One of the disclosures we have seen repeatedly in our discussions of the phenomenon of terrorism. That is, the central role of publicity. Since we have recognized that the media is the means by which this publicity occurs today, it is not surprising that bin Laden identifies the combat taking place in the media as the central front. He even goes so far as to say, "it is obvious that the media war in this century is one of the strongest methods; in fact, its ratio may reach 90% of the total preparation for the battles".⁸⁸

⁸⁶ Al-ZAWAHIRI, Ayman, *Knights Under the Prophet's Banner* quoted in RICHARDSON, *What Terrorists Want*, note 1 above, at 100.

⁸⁷ Al-QURASHI, note 69 above, at 201.

⁸⁸ BIN LADEN, Osama, 'Letter to Mullah Mohammed 'Omar from Osama bin Laden' available at Combating Terrorism Center at Westpoint, *Harmony and Disharmony: Exploiting Al-Qa'ida's Organizational*

In another letter of a similar nature, uncovered by coalition forces in 2002 and then cited by President Bush in a speech made in 2006, a key strategic disclosure is found. The President asserted that Bin Laden explained that al Qaeda was intending to launch “a media campaign to create a *wedge* between the American people and their government”.⁸⁹ The idea of a *wedge* being driven between a government and its people coincides directly with our premise that legitimacy is a primary battleground and a target of terrorism.

Another place where we can find some of the clearest confirmations of this strategy is in Osama bin Laden’s famous ‘Message to America’ that was released just days before the 2004 presidential elections in the United States. Notably, bin Laden no longer appeared with a military rifle in rugged mountainous terrain, but instead was sitting behind a desk in what was surely an attempt to appear stately, and worthy of recognition as directly engaged in communication with the highest levels of the U.S. government. Given the timing of this high-profile video, it is understandable that CIA analysts agreed in 2004 that “bin Laden’s message was clearly designed to assist the President’s reelection”.⁹⁰ Hence, it would seem that bin Laden had concluded that his organization’s interests were best served by more of the same ‘war on terror’ policies initiated in the aftermath of the al Qaeda attacks. Hence he hoped for another four years of George W. Bush as the Commander-in-Chief. Regardless of whether this was the primary intention of the al Qaeda leader, the strategic timing of the video surely reveals a calculation to interfere with and affect the internal politics of their enemy.

One place where we begin to see Osama bin Laden present himself as a shrewd and cunning leader of forces (albeit of extremely limited forces), is where he draws a comparison with the conflict undertaken with the Soviet forces in Afghanistan in the 1980s, and the conflict in which the United States now finds itself engaged. Bin Laden clearly believes that it was his forces’ use of guerilla warfare that led to the downfall of the Soviet Union in this south-central Asian country. His description of the event is that they “bled Russia for 10 years, until it went bankrupt and was forced to withdraw in defeat”.⁹¹ He envisions the current conflict with the United States as taking place on this same battleground, and speaks

Vulnerabilities, Doc ID: AFGP-2002-600321, (unknown date of origin, translation date - 5 June 2002): <http://www.ctc.usma.edu/aq/aq_600321.asp>.

⁸⁹ BIN LADEN, Osama, ‘Letter to Mullah Mohamed Omar’ uncovered by coalition forces in 2002, cited by President George W. Bush, ‘Remarks on the War on Terror’ Transcript on *Washington Post* (5 Sept 2006), “In it, bin Laden says that Al Qaida intends to launch, in his words, a media campaign to create a *wedge* between the American people and their government.” (My emphasis), available at: < <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/05/AR2006090500656.html>>.

⁹⁰ SUSKIND, R., *The One Percent Doctrine* (New York, Simon & Schuster, 2006) at 335-336.

⁹¹ BIN LADEN, Osama, ‘Message to America’, note 65 above.

specifically about “bleeding America to the point of bankruptcy”.⁹² While bin Laden appears to be speaking primarily in economic terms, it is equally conceivable that this bankruptcy he speaks of is figurative. An absence of funds would certainly lead to the need for military withdrawal, but at the same time a moral bankruptcy, or insolvency of legitimacy, would lead to the same result. Therefore, al Qaeda’s strategy of provocation into an overreach, or a “bleed until bankruptcy plan”,⁹³ should be understood as both literal and metaphorical.

Furthermore, in the speech delivered in this ‘Message to America’ video, he extols the success al Qaeda has had in inciting the U.S. to twice engage its military in this struggle in two different countries. Bin Laden claims,

[a]ll that we have mentioned has made it easy for us to *provoke and bait* this administration. All that we have to do is to send two mujahidin to the furthest point east to raise a piece of cloth on which is written al-Qaida, in order to make the generals race there to cause America to suffer human, economic, and political losses without their achieving for it anything of note other than some benefits for their private companies.⁹⁴

What can also be found in this citation is the introduction of the *wedge* mentioned above. We see that bin Laden draws an explicit distinction between the people of the United States, and the “private companies” that have profited from the government’s policies. And drawing out a divergence of interests, he suggests that while the former suffers the latter actually benefits.

Shortly thereafter, bin Laden makes a statement that even more explicitly coincides with the “media campaign to create a wedge between the American people and their government”. In this speech directed to U.S. citizens just before their presidential elections, Bin Laden states,

[i]t is true that this shows that al-Qaida has gained, but on the other hand, it shows that the Bush administration has also gained, something of which anyone who looks at the size of the contracts acquired by the shady Bush administration-linked mega-corporations, like Halliburton and its kind, will be convinced. And it all shows that the real loser is ... you.⁹⁵

By unambiguously tying the Bush administration to the private military corporations that had received contracts to assist in the war-making activities related to the ‘war on terror’, we can clearly see this wedge being driven between the people and their government. If we think about Ferrero’s explanation of the basic societal structure presented in Chapter 1, we can

⁹² *Idem.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*, (my emphasis).

⁹⁵ *Ibid.*, (my emphasis).

easily see how the attempt to drive a wedge between command and obedience would put us directly on the battlefield of legitimacy.

As has also been pointed out above, for nearly two decades UN bodies (particularly when considering human rights and counterterrorism) have been consistently highlighting that one of the aims of terrorism is the, “destabilizing [of] legitimately constituted Governments”. Additionally, one of the scholars who has identified legitimacy as a critical issue in the investigation of terrorism has pointed out that, “[b]oth the history of the results of terrorism and the analysis of its relationship to the legitimacy of regimes support the proposition that tolerating a right-wing counterterrorism reaction, [...] is destabilizing”.⁹⁶ As such, a major goal of this work is to flesh out how exactly it is that terrorism is “destabilizing” to a society. Since this is indeed an important consequence of terrorism, it would be most useful to the study of terrorism to conceptualize this destabilization so it is better understood. It is therefore proposed that much of this destabilization occurs as a result of the *reaction* chosen by the government. Accepting Weber’s widely acknowledged definition of the state as ‘a community that claims the *monopoly of the legitimate use of physical force*’, means that every government runs the risk of pushing too far in its efforts to curb political violence, and stepping beyond what is deemed to be legitimate. This brings us to the crux of the question as we have posed it here: how do we determine what is the *legitimate* use of physical force?

As will be discussed in the following chapter, the clearest place to find limits on what might be considered legitimate in responding to cross-border attacks is in international law. Not only are they the codified standards that the U.S. government has explicitly agreed to via the signature of the president and the ratification by two-thirds of the Senate, they are precisely the rules that the executive branch itself applied in assessing its rights and duties in the ‘war on terror’. Unfortunately, as we will see in detail, the administration and its lawyers did a poor job of analyzing their obligations and repeatedly arrived at the conclusion that there was not any constraining law at all that would be applicable to their counterterrorism response reaching well beyond its own borders. In analyzing three particular areas in which the administration’s counterterrorist policies overreached in their use of detention, war-making and interrogation, we will see that issues of *legality*, *morality* and *efficacy* all come directly into play.

There are certainly examples in their writings of the fact that al Qaeda strategists understand the constraints that exist for a government that is trying to combat terrorism or any

⁹⁶ CRENSHAW, *Terrorism, Legitimacy, and Power...*, note 75 above, at 33.

other political violence. Of course, we cannot expect to find in these writings an in-depth legal analysis of U.S. counterterrorism policies. Al Qaeda is not made up of, nor do they hire, international lawyers to construct a legal case. Nonetheless, the approach of utilizing international law as a form of criticism in the propaganda or media war that has become an important part of armed conflict today has been identified as a trend in warfare. It has even been described with the term (meant to be pejorative), *lawfare*.⁹⁷

As one example of the recognition by al Qaeda of these limits on the U.S. government specifically because of its explicitly expressed commitment to certain international standards, one can turn to the strategic thinker al-Qurashi. In 2002 he wrote,

[a]s soon as the first real crisis hit the United States in the form of the September attacks, the United States embraced the opposite of all the principles it espouses: such as respect for freedoms and human rights. The detention camp at Guantanamo, which the United States wanted to use to terrorize Muslims, was a shameful stain on US ‘democracy.’ The unjust arrests that affected thousands of members of the Muslim community in the United States, and which violated the detainees’ most basic civil rights, forever sullied the rosy image that the United States painted of itself. The US model for justice became arrest without a specific charge, a refusal to disclose the names of detainees, pressure and torture, claims without proof, widespread monitoring of telephone conversation and e-mail, the disclosure of individual bank accounts, and secret military courts that try cases by presidential order and do not allow defendants to appeal their sentences (including death sentences).⁹⁸

While this is by no means a sharp legal dissection of the U.S. policies implemented in the ‘war on terror’, nor is there any reference to specific international laws, we can certainly see that the intention is to highlight the contravention of legal commitments made by the state. As it should not be anticipated that the al Qaeda group steeped in its own interpretation of religious doctrine would put forward a legal analysis, this certainly represents a good understanding of the issues at stake for the legitimacy of the US government.

⁹⁷ DUNLAP, Col. C., USAF ‘Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts’ Prepared for the *Humanitarian Challenges in Military Intervention Conference*, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University, Washington, D.C., (29 Nov. 2001), available at : <<http://www.duke.edu/~pfeaver/dunlap.pdf>>. Col. Dunlap is usually credited with the creation of this term *lawfare*, and this essay of 2001 is certainly interesting beyond the innovation of this term. The author defines this term as “the use of law as a weapon of war”, and predicts that the usage of international law as a way to critique military affairs, and even for the military to constrain itself with the institutionalization of JAG lawyers, had already reached a high-water mark. This paper was delivered less than 3 months after the 9/11 attacks and Dunlap predicted that the violent events of that day, “will have a profound effect on the role of law in military interventions”. While the sentiment at that time is surely understandable, we will see throughout this paper that in fact the transgression of the most basic norms of international law indeed had an important impact on the way in which the ‘war on terror’ was viewed.

⁹⁸ AL-QURASHI, note 69 above, at 220.

While the rebuilding of an Islamic caliphate has been presented by al Qaeda as its ultimate strategic goal, this grandiose project does not clearly coincide with the destructive means they employ and thus should be set aside, if only for analytical clarity. However, as we have seen throughout this discussion of strategy, the three short-term goals of revenge, renown and reaction that terrorist groups pursue tend to weave together and explain quite a bit about those who choose to employ such a violent tactic. By understanding these three objectives which transcend the ideological underpinnings of very different groups using political violence (even at times against each other), we can avoid the pitfall of dismissing the tactic of terrorism as senseless violence. *Revenge* is a sentiment that can be easily understood, even if we do not agree with the interpretation of events that lead to its origins. Moreover, one can see how trying to avenge a perceived injustice through violent means can often lead to provoking a spiral of violence, particular if one is not extremely cautious with her reaction, as each party to a conflict only sees their list of grievances swell. *Renown* grows out of the publicity hungrily sought by terrorist groups, and is sometimes inadvertently bestowed by governments exaggerating the size and strength of their attackers. While *reaction* is indeed the nub of the ‘destabilization’ that can occur if a government oversteps what are considered to be legitimate constraints on its exercise of the use of force to combat terrorist groups. Notably, we see quite clearly why publicity has been called the “oxygen” of terrorism since it can serve to feed all three of these short-term aims at the same time. When an overreaction occurs that puts stress on the *legality*, *morality* and *efficacy* that bolster an uncoerced pull towards obedience by the population, a weakening of political cohesion can occur and the strategic goals of terrorist groups can be furthered through this deficit of legitimacy.

III. Destruction, not Construction, of Legitimacy

Attempting to understand the reasoning behind the hijacking of a commercial aircraft filled with civilians to fly them all into symbolic buildings occupied by even more (primarily) non-combatants so as to build an Islamic caliphate, indeed causes an analytical short-circuit. Therefore, it is necessary to make one final point in this chapter concerning the strategy of al Qaeda terrorism. As we will see in the following chapter, the fact that this organization crossed international borders to carry out its attack had a direct impact upon the place in which the U.S. administration, and as a result the citizens themselves, focused its attention for interpreting the constraints it would be required to heed. At the same time, the international character of this conflict also helps to explain that, while al Qaeda attempts to target legitimacy, it appears to have little intention of reconstructing it so as to later take over the

territory. This is significant because if we understand that the aims are primarily related to destruction, and not construction, this further promotes the necessity to fortify defenses around legitimacy, where the attack is primarily focused.

To flesh out this point, we will briefly turn to the work that has been given significant credence recently by the U.S. government itself as a result of promotions within the military. At the end of 2006, nearly four years after the invasion of Iraq, President Bush was under significant pressure to change course in that country. This strain was largely caused by significant losses of members of the Republican Party at the polls in November of 2006, along with the release of a highly anticipated report in December of that year by the Iraq Study Group (a bi-partisan commission appointed and given a mandate by Congress) that began its recommendations by describing the situation as, “grave and deteriorating”.⁹⁹ At this critical juncture, the president chose to appoint General David Petraeus to lead all U.S. troops in Iraq, and to oversee the commonly referred to “surge” strategy primarily based on Army Field Manual 3-24 entitled *Counterinsurgency*,¹⁰⁰ drafted under his oversight. One of General Petraeus’ key advisors was a former officer in the Australian Army named David Kilcullen who wrote the book *The Accidental Guerilla* upon his return from that military theater.¹⁰¹ Both of these texts are quite useful for gaining the military understanding of the overall armed conflict, along with how it does, and does not, coincide with our own. The fact that General Petraeus was later promoted to head the United States Central Command, along with President Obama’s appointment of him as the Commander of U.S. forces in Afghanistan, all speak to the continued relevance of the line of thinking.

Both the Army Field Manual overseen by General Petraeus and the book by Kilcullen were developed and written by military thinkers, and thus it is not surprising are that they are primarily looking at the overseas operations that have been launched by politicians to deal with the threat posed by the phenomenon of terrorism faced today. Clarifying that this is indeed the approach taken, the former explicitly presents itself as a publication which, “establishes doctrine (fundamental principles) for military operations in a counterinsurgency (COIN) environment”.¹⁰² In other words, the document is meant for use overseas and does not contemplate a legitimacy deficit at home, even if there are places where such a discussion

⁹⁹ *The Iraq Study Group Report*, Baker, J., and Hamilton, L., (co-chairs) (6 Dec 2006) available at: <http://www.usip.org/isg/iraq_study_group_report/report/1206/index.html>.

¹⁰⁰ Army Field Manual (FM 3-24), *Counterinsurgency*, U.S. Department of Defense (15 December 2006).

¹⁰¹ KILCULLEN, D., *The Accidental Guerilla: Fighting Small Wars in the Midst of a Big One* (Oxford, Oxford University Press, 2009) 340 pp.

¹⁰² FM 3-24, *Counterinsurgency*, note 100 above, at vii.

would be most welcome.¹⁰³ This strategy of provocation certainly manifests problems for the society and government that has been directly attacked, but the attention in each of these works is on the adversaries found abroad and the foreign theaters of operation.

At the same time, however, there is an explicit recognition throughout the Army Field Manual that legitimacy is indeed the central front of the conflict at hand. In the document overseen by General Petraeus this is first made clear in the very definition put forward of the conflict:

an insurgency is an organized, protracted politico-military struggle designed to weaken the control and *legitimacy* of an established government, occupying power, or other political authority while increasing insurgent control.¹⁰⁴

We see very clearly here that the drafters of the Army Field Manual are keenly aware of the fact that insurgents are attempting to weaken a government by targeting its legitimacy. Moreover, the manual is filled with references like this one, and it can be said that its drafters saw the legitimacy of a government as the primary target of attack in the case of an insurgency just as we have posited here. It is useful to take a brief look at the numerous examples that are to be found in this Army Field Manual 3-24: “Political power is the central issue in insurgencies and counterinsurgencies; each side aims to get the people to accept its governance or authority as *legitimate*”;¹⁰⁵ “Such outside involvement, however, does not change one fact: the long-term objective for all sides remains acceptance of the *legitimacy* of one side’s claim to political power by the people of the state or region”;¹⁰⁶ “Resulting stories often include insurgent fabrications designed to undermine the government’s *legitimacy*”;¹⁰⁷ “Counterinsurgents seeking to preserve *legitimacy* must stick to the truth and make sure that words are backed up by deeds; insurgents, on the other hand, can make exorbitant promises and point out government shortcomings, many caused or aggravated by the insurgency”;¹⁰⁸ “Today, when countering an insurgency growing from state collapse or failure, counterinsurgents often face a more daunting task: helping friendly forces reestablish political

¹⁰³ One place where this would be useful is in the discussion of the Vietnam War. It is posited, “North Vietnamese actions after their military failure in the 1968 Tet offensive demonstrate this approach’s flexibility. At that time, the North Vietnamese shifted their focus from defeating U.S. forces in Vietnam to weakening U.S. will at home. These actions expedited U.S. withdrawal and laid the groundwork for the North Vietnamese victory in 1975”. (*Idem*, at 1-8, §1-36). In this author’s opinion, how exactly insurgents in Vietnam worked to weaken the “will at home” would be most useful for deepening an understanding of this type of conflict and the idea of what can be considered a “legitimate use of physical force”.

¹⁰⁴ *Ibid.*, at 1-1, §1-2, (my emphasis).

¹⁰⁵ *Ibid.*, at 1-1, §1-3, (my emphasis).

¹⁰⁶ *Ibid.*, at 1-2, §1-7, (my emphasis).

¹⁰⁷ *Ibid.*, at 1-3, §1-12, (my emphasis).

¹⁰⁸ *Ibid.*, at 1-3, §1-13, (my emphasis).

order and *legitimacy* where these conditions may no longer exist”;¹⁰⁹ “Subversive activities can take the form of clandestine radio broadcasts, newspapers, and pamphlets that openly challenge the control and *legitimacy* of the established authority”;¹¹⁰ “The primary struggle in an internal war is to mobilize people in a struggle for political control and *legitimacy*”;¹¹¹ “The HN [Host Nation] government must recognize and remove the threat to sovereignty and legitimacy posed by extragovernmental organizations of this type”;¹¹² “Operational objectives are those that insurgents pursue to destroy government *legitimacy* and progressively establish their desired end state”;¹¹³ “Success requires the government to be accepted as *legitimate* by most of that uncommitted middle, which also includes passive supporters of both sides”;¹¹⁴ “Victory is achieved when the populace consents to the government’s *legitimacy* and stops actively and passively supporting the insurgency”.¹¹⁵ No doubt, the controlling military doctrine today also views legitimacy as a target.

Demonstrating this point most clearly is the fact that there is an entire section that discusses this idea as central, falling under the unambiguous heading:

Legitimacy Is the Main Objective

1-113. The primary objective of any COIN operation is to foster development of effective governance by a *legitimate* government. Counterinsurgents achieve this objective by the balanced application of both military and nonmilitary means. All governments rule through a combination of consent and coercion. Governments described as ‘*legitimate*’ rule primarily with the consent of the governed; those described as ‘*illegitimate*’ tend to rely mainly or entirely on coercion. Citizens of the latter obey the state for fear of the consequences of doing otherwise, rather than because they voluntarily accept its rule. A government that derives its powers from the governed tends to be accepted by its citizens as *legitimate*. It still uses coercion – for example, against criminals – but most of its citizens voluntarily accept its governance.¹¹⁶

Of course, it is certainly debatable whether legitimacy can be so easily summarized, then taught to an occupying military force so as to then pass along a legitimate government to an occupied territory. Not to mention the fact that traditional humanitarian law assumes that occupying powers should respect the existing laws and economic arrangement and therefore

¹⁰⁹ *Ibid.*, at 1-4, §1-21, (my emphasis).

¹¹⁰ *Ibid.*, at 1-7, §1-33, (my emphasis).

¹¹¹ *Ibid.*, at 1-8, §1-40, (my emphasis).

¹¹² *Ibid.*, at 1-9, §1-44, (my emphasis).

¹¹³ *Ibid.*, at 1-14, §1-74, (my emphasis).

¹¹⁴ *Ibid.*, at 1-20, §1-108, (my emphasis).

¹¹⁵ *Ibid.*, at 1-3, §1-14, (my emphasis).

¹¹⁶ *Ibid.*, at 1-21, §1-113, (my emphasis).

raises questions about the validity of transformative military occupation.¹¹⁷ Additionally, the notion of what constitutes a legitimate government and how that is to be achieved is something that has been profoundly and hotly debated by political philosophers, from Machiavelli to Hobbes to Locke to Rousseau, for hundreds of years. Therefore, it certainly can come across as hubris to suggest that such a pivotal aspect of society's functioning has been resolved and can be moderated and manufactured by an uninvited outside military force. It should be noted that while the manual suggests that, "commanders and staffs determine what the HN [Host Nation] population defines as effective and legitimate governance",¹¹⁸ it is still recognized that, "[d]ifferences between U.S., local, and international visions of legitimacy further complicate operations. But the most important attitude remains that of the HN population. In the end its members determine the ultimate victor".¹¹⁹ This is surely why this foreign military operation aimed at the construction of legitimacy must be understood as nation building, and perhaps beyond the capabilities of even the most powerful militaries. Consequently, before politicians commit U.S. troops to invasions abroad it must be understood that while 'regime removal' is well within their capacities, 'regime change' is something far more complex and unclear.

Next, we will look into the book written by Kilcullen since it offers useful explanations as to how the international character of this conflict with al Qaeda shapes its nature, and thus some of his conclusions about counterinsurgency. Kilcullen puts forward four different models for thinking about the conflict and suggests that none of them are exhaustive, nor are they mutually exclusive, and thus all can offer constructive insights into the struggle. He posits the encounter as a 1) backlash against globalization, 2) a civil war within Islam, 3) asymmetric warfare and 4) a globalized insurgency. For our purposes, it is not necessary to explore each of these models separately and extensively, but rather it is only necessary to highlight the pertinent points. Most importantly, each of these models quite clearly posits the interactions between state governments as an aggravating factor in the conflict. When looking at globalization, it is the many advantages that Western society enjoys that sparks violent antagonisms with the less privileged and should be expected in this unbalanced arrangement. The civil war within Islam thesis suggests that Western military forces have been provoked into stepping into an internal conflict that doesn't concern them and that they do not

¹¹⁷ See generally ROBERTS, A., 'Transformative Military Occupation: Applying the Laws of War and Human Rights' in Pejic, J., Schmitt, M.N. (eds.) *International Law and Armed Conflict: Exploring the Faultlines* (The Netherlands, Koninklijke Brill BV, 2007) 439-495.

¹¹⁸ FM 3-24, *Counterinsurgency*, note 100 above, at 1-21, §1-118.

¹¹⁹ *Idem*, at 1-22, §1-118.

understand. The goal is to force an eventual full retreat from the region by the Western powers so that an Islamic caliphate can be established in the Middle East, and only then would the Muslim world truly turn against the West to expand its supremacy. Then there is the approach that puts forward a functional hypothesis rather than a political one. That is, the vast disparity in military power in the world today requires that the less powerful find a method of confronting the unprecedented military strength of the United States, and asymmetrical warfare has provided those means.

Finally, the globalized insurgency can also be seen through this international paradigm, but the speculation is that the uprising is meant to overthrow the entire political order, both inside and outside of the Muslim world. In this scenario, Kilcullen points out that an unprecedented international cooperation to deal these terrorist threats is imperative. He continues,

[s]ince 9/11, such cooperation has in fact been excellent (especially in areas such as transportation security and terrorist financing). United States leadership has been central to this effort, but international support for U.S. initiatives has waned substantially since the immediate post-9/11 period, largely as a result of international partners dissatisfaction with U.S. unilateralism, perceived human rights abuses, and the Iraq War. This implies that America's international reputation, moral authority, diplomatic weight, persuasive ability, cultural attractiveness, and strategic credibility –it's "soft power"– is not some optional adjunct to military strength. Rather, it is a critical enabler for a permissive operating environment –that is, it substantially reduces the friction and difficulty involved in international leadership against threats like AQ [al Qaeda]– and it is also the prime political component in countering a globalized insurgency.¹²⁰

While the idea that the U.S. living up to its international legal obligations creates less friction to the conducting of the military and diplomatic operations necessary to address this insurgency that crosses international borders certainly goes hand-in-hand with our own thesis, it is not exactly the same. For this author, and in agreement with Kilcullen, all of these arguments for understanding this struggle against al Qaeda in its global context are certainly important and valid for appreciating the complexity of the matter at hand. Yet our contention is that there is still more to the story.

It is also noteworthy that Kilcullen interprets the overall al Qaeda military strategy in a very similar way to that which it has been discussed above. As he summarizes it,

Al Qa'ida's military strategy [...] appears to be aimed at bleeding the United States to exhaustion and bankruptcy, forcing America to withdraw in disarray from the Muslim world so that its local allies collapse, and simultaneously to use the provoking and alienating effects of U.S. intervention as a form of provocation to

¹²⁰ KILCULLEN, *The Accidental Guerilla*, note 101 above, at 14.

incite a mass uprising within the Islamic world, or at least to generate and sustain popular support for Al Qa'ida.¹²¹

He then breaks the four basic tactics of this al Qaeda strategy down as being the use of provocation, intimidation, protraction and exhaustion to achieve its overarching goals. By provocation, Kilcullen means to goad enemies “to react (or overreact) in ways that harm their interests”.¹²² Intimidation means to “prevent local populations from cooperating with governments or coalition forces by publicly killing those who cooperate”.¹²³ Protraction is suggested to mean, “prolong the conflict in order to exhaust their opponents’ resources, erode the government’s political will, sap public support for the conflict, and avoid losses”.¹²⁴ Finally, exhaustion is to, “impose costs on the opponent government, overstress its support system, tire its troops, and impose costs in terms of lives, resources, and political capital, in order to convince that government that the war is not worth the cost”.¹²⁵ While there is rather obvious coincidence in the way that Kilcullen presents these four tactics that are meant to be separate, one can see that none of this contradicts what we have discussed above. Nonetheless, our intention in this work is to draw attention to the specific manner in which the targeted society suffers from a “sap in public support”, and a loss of political “will” or “capital”. While these symptoms are identified as being the result of attacks by insurgents, there is little attempt to conceptualize how or why this can happen back at home, away from the military theaters of operation.

Kilcullen next moves on to lay out the central thesis of his work, which also explains the title he has chosen of *The Accidental Guerilla*. This military officer and scholar believes that the basic cycle that al Qaeda has set-up and attempts to follow is that of *infection*, *contagion*, *intervention*, and *rejection*. Firstly, it is necessary to understand that al Qaeda believes in a very narrow and extreme brand of *salafi*-ism (already a small minority belief system within the Muslim community), and Kilcullen refers to this even smaller group willing to employ terrorist tactics as *takfiri*. It is explained, “[t]he doctrine of *takfir* disobeys the Qur’anic injunction against compulsion in religion (Sûrah al-Baqarah: 256) and instead holds that Muslims whose beliefs differ from the *takfiri*’s are infidels who must be killed”.¹²⁶ Due to

¹²¹ *Idem*, at 29.

¹²² *Ibid.*, at 30.

¹²³ *Ibid.*, at 30-1.

¹²⁴ *Ibid.*, at 31.

¹²⁵ *Ibid.*, at 32.

¹²⁶ *Ibid.*, at xviii-xix. To further explain this theory and the immensely limited number of targets for killing in this conflict see also PACKER, G., ‘Knowing the Enemy’ (18 Dec 2006) *New Yorker* 61, “Kilcullen has plotted out a ‘ladder of extremism’ that shows the progress of a jihadist. At the bottom is the vast Population of mainstream Muslims, who are potential allies against radical Islamism as well as potential targets of subversion,

the fact that this narrow minority belief is quite unpopular, the strategy of the “*takfiri* terrorist” is to embed itself into a conflict-ridden area that is subjected to little governing, and to then provoke intervention from outside due to the violence sown. In doing so, the local population then stands up against and resists the outside intervention and becomes what he calls, “the accidental guerilla”. In this way, the violent conflict is expanded and these *takfiri* terrorists manifest allies who are willing to fight and die, albeit in defense of their own hometown, local hills or traditional identity. Kilcullen sketches out this part of his theory as follows:

- 1) *Infection* - Al Qaeda establishes a presence in a remote, ungoverned or conflict-affected area.
- 2) *Contagion* - Al Qaeda uses the safe haven to spread violence and *takfiri* ideology to other regions.
- 3) *Intervention* - Outside forces intervene to deal with the al Qaeda threat and disrupt the safe haven.
- 4) *Rejection* - Local population reacts negatively, rejecting outside intervention and allying with al Qaeda¹²⁷

While this is certainly an elegant theory that explains much of the conflict with al Qaeda, it is again only externally focused.

Nonetheless, from the perspective of this work, what is most important is that all of the attention from these two military officers of high repute is on constructing legitimacy outside of the United States, not on the attempts to destroy or weaken the legitimacy at home. Therefore, it is extremely valuable to recognize the idea of focusing on destruction, rather than construction of legitimacy, is a far less complex and daunting task. That is not to say that undermining and weakening the legitimacy of a government is easy and obvious. Rather, as with nearly all things known in this world, destruction is easier than construction.

and whose grievances can be addressed by political reform. The next tier up is a smaller number of “alienated Muslims,” who have given up on reform. Some of these join radical groups, like the young Muslims in North London who spend afternoons at the local community center watching jihadist videos. They require “ideological conversion”- that is, counter-subversion, which Kilcullen compares to helping young men leave gangs. [...] A smaller number of these individuals, already steeped in the atmosphere of radical mosques and extremist discussions, end up joining local and regional insurgent cells, usually as the result of a ‘biographical trigger-they will lose a friend in Iraq, or see something that shocks them on television.’ With these insurgents, the full range of counterinsurgency tools has to be used, including violence and persuasion. The very small number of fighters who are recruited to the top tier of Al Qaeda and its affiliated terrorist groups are beyond persuasion or conversion. ‘They’re so committed you’ve got to destroy them,’ Kilcullen said. ‘But you’ve got to do it in such a way that you don’t create new terrorists.’”, at 68.

¹²⁷ *Ibid.*, KILCULLEN, *The Accidental Guerilla*, at 35.

Of course, this is not entirely surprising when looking overall at terrorist movements. In general, there have been only vague outlines put forward of the future world which they wish to create. As discussed above, al Qaeda does speak about the establishment of a caliphate ruled by Sharia law, but they tend to fall very short on any detail. Even after all of its carefully managed publicity campaigns, al Qaeda and its leaders have, “completely failed to articulate a positive political alternative”.¹²⁸ Terrorist expert Louise Richardson continued, “[t]errorist leaders today [...] appear altogether more interested in the process by which the present system will be destroyed than in the functioning of the new system”.¹²⁹ One notable result that follows from not possessing a coherent vision of the future that you wish to build is that there are far less constraints on means. If one is concentrated only on the destruction of the enemy because this is believed to be the sole obstacle to deliverance, then the methods chosen are irrelevant and public attacks on non-combatants become a viable option.

As for more specifics from al Qaeda, when Osama bin Laden was interviewed in 1997 and asked about what kind of society would be created if they were to be victorious in retaking the Saudi Arabian peninsula, his response was vague and rambling. He simply said, “We are confident, with the permission of God, Praise and Glory be to Him, that Muslims will be victorious in the Arabian peninsula and that God's religion, praise and glory be to Him, will prevail in this peninsula. It is a great pride and a big hope that the revelation unto Muhammad, Peace be upon him, will be resorted to for ruling. When we used to follow Muhammad's revelation, Peace be upon him, we were in great happiness and in great dignity, to God belong credit and praise”.¹³⁰ This first ever television interview offered a moment for him to expand on the grand plans for the future that al Qaeda hoped to see, and all he came up with was repeated thanks to God. This is not uncommon for leaders of the organization. David Aaron, the diplomat who compiled a manuscript of the writings of extremists who were willing to target civilians in what they conceived to be jihadi, commented,

[o]ne of the curious things about jihadism is the notable lack of articulated political or social goals beyond implementing shari'a law. The election slogan of the Muslim Brotherhood in Egypt, “Islam Is the Answer,” seems to suffice for jihadis. Even such jihad writers as Sayyid Qutb focus their analyses on the shortcomings of other ideologies rather than explicating how their philosophy would translate into government structures and economic and social policy. As one jihadi notes, referring to Abu Bakr Naji's “The Management of Savagery,” it is as if they are not really interested in governing, but only in waging jihad. Bin Laden's only evident policy impact on the Taliban was in persuading them to blow up the historically priceless

¹²⁸ RICHARDSON, *What Terrorists Want*, note 1 above, at 85.

¹²⁹ *Idem.*

¹³⁰ BIN LADEN, Osama, interview with Peter Arnett, note 74 above.

Bamiyan Buddhas. (These were the largest bas relief statues in the world, created in the third century and on the UNESCO list of world historic treasures. There was a world outcry when the Taliban destroyed them in March 2001 at the urging of Osama bin Laden.)¹³¹

As a policy prescription, destroying historic religious artifacts is undoubtedly limited and patently intolerant. Yet our work is meant to focus attention at the point of attack, the United States political authority. In other words, we will posit how exactly al Qaeda meant to destroy or weaken the legitimacy of their enemy's government through its strategy of provocation.

IV. Conclusion

We have seen that the fundamental characteristics of the phenomenon of terrorism are that it is public and political violence by non-state actors directed at civilians. While suggesting that terrorism can be defined as politically motivated violence carried out in a manner to attract publicity is not controversial, the other two features of this action are more contentious. That is to say, there have long been stumbling blocks in the legal and academic community over whether terrorist acts can be carried out by states and if security forces working for democratic a government should also be considered as civilians. The position taken here is that our understanding of legitimacy as central to the conflict pushes us towards limiting the definition to non-state actors who target persons not associated with providing security to the state, regardless of its claimed democratic credentials. And finally, from a legal perspective, the decades old dispute over an exclusion for groups claiming to be "freedom fighters" struggling for self-determination does not bear on the definition provided, and does not weaken the legal norm prohibiting the targeting of non-combatants.

However, these characteristics that define terrorism as a tactic provide little guidance for understanding terrorism as a strategy. The three short-term goals put forward by Louise Richardson of revenge, renown and reaction are prevalent in the writings of al Qaeda members, including Osama bin Laden, and thus provide an insight into their strategy. In looking into the strategic goals of this organization, we can find that the targeting of legitimacy is indeed a useful way of understanding this conflict and the intentions behind how it is being carried out by the enemy aggressor. By grasping the armed struggle in this fashion we can begin to posit solutions for best constructing a defensive counterterrorism strategy.

Finally, we have seen that leading military doctrine today has also posited legitimacy as the central front in the insurgencies it faces, which should clearly include the organization

¹³¹ AARON, *In Their Own Words...*, note 58 above, (internal citations omitted) at 109.

that launched its bellicose attacks on September 11th, 2001. Unfortunately, the military principles that are guiding the United States at present are largely centered on how legitimacy can be constructed in the theaters where invasions have been launched, and do not discuss the protection of the legitimacy of the government at home. However, considering the military is subordinate to the political branches in the U.S., and that this conflict is in essence a political struggle, it is not surprising that the officers of the armed services do not in fact provide answers for defending the legitimacy of U.S. authority in the eyes of its citizens. Nonetheless, the Army Field Manual 3-24 of 2006, did provide an historical example at one particular point of how *legality* and *morality* (and as we will see in Chapter 6, *efficacy*) can strike at the heart of legitimacy. The manual provided a vignette on the Battle of Algiers which dovetails perfectly with our own theory,

Lose Moral Legitimacy, Lose the War

During the Algerian war of independence between 1954 and 1962, French leaders decided to permit torture against suspected insurgents. Though they were aware that it was against the law and morality of war, they argued that—

- This was a new form of war and these rules did not apply.
- The threat the enemy represented, communism, was a great evil that justified extraordinary means.
- The application of torture against insurgents was measured and nongratuitous.

This official condoning of torture on the part of French Army leadership had several negative consequences. It empowered the moral legitimacy of the opposition, undermined the French moral legitimacy, and caused internal fragmentation among serving officers that led to an unsuccessful coup attempt in 1962. In the end, failure to comply with moral and legal restrictions against torture severely undermined French efforts and contributed to their loss despite several significant military victories. Illegal and immoral activities made the counterinsurgents extremely vulnerable to enemy propaganda inside Algeria among the Muslim population, as well as in the United Nations and the French media. These actions also degraded the ethical climate throughout the French Army. France eventually recognized Algerian independence in July 1963.¹³²

Next, we will turn to explaining how cross-border terrorist attacks prompted the use of a framework of duties and rights from international law, most clearly laid out in internal executive administration documents. Additionally, before applying the lenses of *legality*, *morality* and *efficacy* to the ‘war on terror’ we will outline the discernable legitimacy deficit suffered by the administration leading the provoked overreaction.

¹³² FM 3-24, *Counterinsurgency*, note 100 above, at 7-9.

Chapter 3

International Law

and a

Legitimacy Deficit

The government must function in accordance with law. There is a very strong temptation in dealing both with terrorism and with guerrilla actions for government forces to act outside the law, the excuses being that the processes of law are too cumbersome, that the normal safeguards in the law for the individual are not designed for an insurgency and that a terrorist deserves to be treated as an outlaw anyway. Not only is this morally wrong, but, over a period, it will create more practical difficulties for a government than it solves.

-- Sir Robert Thompson¹

I. Introduction

The cross-border nature of the conflict in which the U.S. administration found itself had the direct effect of compelling the government to frame its own rights and duties through the framework of international law. At every turn, we will find that the administration in charge of directing this global campaign of the ‘war on terror’ against those who carried out the attacks of September 11th was confronted with constraints of international humanitarian and UN Charter law, along with human rights laws that had been growing in quantity and specificity throughout the 20th century. After explaining the reasoning behind this methodological choice in Section II, the framework of these international laws will be presented here in Sections III through V. However, as will be seen in the interpretations put forward of that law, the Bush administration held an enormously restrictive view of the obligations that could be imposed on the world’s most militarily and economically powerful country. In the end, the administration’s legal analysis of the applicable treaty law provided that there was in fact very little constraint on the administration’s action in the ‘war on terror’.

Nonetheless, it can be said that there were indeed consequences for doing so. However, they were of a very different nature than normally supposed. As it has been explained in the previous two chapters, terrorism is a phenomenon that targets the legitimacy of a government through a strategy of provocation. By goading its adversary to overreact and

¹ THOMPSON, R., *Defeating Communist Insurgency: Experiences from Malaya and Vietnam* (London, Chatto & Windus, 1966) at 52, cited in Roberts, A., ‘Countering Terrorism: A Historical Perspective’ in BIANCHI, A. and KELLER, A. (eds.), *Counterterrorism: Democracy’s Challenge*, (Oxford, Hart Publishing, 2008) at 20.

to step outside the bounds of its legitimate authority, those who employ terrorism hope to inflict injury by bringing about a discernible legitimacy deficit, delegitimation, or if possible full illegitimacy. In this particular case of the ‘war on terror’, a president whose signature policy had significant problems with *legality*, *morality* and *efficacy* (and their overlap) ended up whittling away at his own authority and legitimacy. Thus Section VI will explore the indications of this legitimacy deficit that ensued. Because absolute causality in such a case can be next to impossible to establish definitely, this connection will rest upon the strength of argument and analysis hoped to be found throughout this work.

II. International Law as the Framework

We will begin by explaining why international law is the best framework for analyzing how a thinning of the government’s legitimacy took place as a result of the counterterrorism exercise known as the ‘war on terror’. There is no doubt that international law does not hold the same status as domestic law, and the absence of a unified sanctioning mechanism certainly can raise doubts in the common citizen’s mind about its validity. Columbia Law School Professor Louis Henkin has even pointed out that international lawyers, “have often had to defend the very existence of International Law”.² Thus, at first glance, it might seem odd to put international law forward as a measuring stick by which citizens judge the legitimacy of their government. However, there is one distinctive element of the September 11th attacks that gave them a character that must shape the way we think about and analyze this terrorism and the response to these attacks. These were cross-border terrorist attacks. Non-state actors stepped across international boundaries to conduct public and politically motivated violence against non-combatants within the foreign territory of the United States. As such, when citizens of the victim country, and even more critically the official members of the state itself, attempted to understand the rights and duties related to its response that was to inevitably reach outside of its domestic borders, international law was the most logical and concise, not to mention the most legally fitting, framework.

It should also be remembered that the response of the ‘war on terror’ to the shocking attacks of September 11th was indeed the signature policy of the administration that was to lead the nation for the more than seven years that followed. Not only were the terrorist strikes and their aftermath caught on film and stamped into the memory of the nation’s people, there were two wars launched against Afghanistan and Iraq with the U.S. military and coalition

² Cited in SLOMANSON., W., *Fundamental Perspectives on International Law* (Belmont, CA., Wadsworth/Thompson Learning, 2003) at 1.

forces in reaction, complete with embedded journalists traveling with selected military troops. These conventional wars striking at entire nation-states in retaliation were just one part of the global war initiated. As was said of the overall confrontation that was commenced, “[t]he United States responded in the strongest way possible, with a declaration of war”.³ A rhetorical and real military campaign was introduced under the umbrella term the “war on terror” which seized the attention of the people who were meant to be protected by its initiation.

Just following the attacks, the very evening of September 11th, 2001, President Bush addressed a grieving nation and made a commitment that the government’s response would indeed be international when he stated, “[w]e will make no distinction between the terrorists who committed these acts and those who harbor them”.⁴ While this statement raised early concerns that the reaction would be too broad and not narrowly aimed at the individuals responsible, it clearly indicated that foreign regimes that assisted the culprits would also be targeted. Within days, the Congress also responded by passing the Authorization to Use Military Force (AUMF) stating that,

the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁵

Not only did the legislation explicitly state that the president could use military force against “nations” determined to be responsible, it also repeated the claim from days earlier that those who “harbored” the individuals or groups responsible for the attacks. This again demonstrated the internationality of the conflict at hand.

Even further clarifying the internationality of this conflict, the UN Security Council reacted with remarkable speed passing Resolutions 1368 and 1373 referencing the “inherent right of individual or collective self-defence in accordance with the Charter”.⁶

Then, October 7, 2001 the President announced that on his orders the U.S. military had, “begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan”.⁷

³ RICHARDSON, L., *What Terrorists Want* (New York, Random House, 2006) at 147.

⁴ BUSH, P., The White House, Office of the Press Secretary, ‘Statement by the President September 11, 2001’, available at: <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html#> (last visited 15 Jan 2008).

⁵ Authorization for Use of Military Force, (18 Sept 2001) Public Law 107-40, 115 Stat. 224.

⁶ U.N. Doc. S/RES/1368 (2001), U.N. Doc. S/RES/1373 (2001).

⁷ BUSH, P., ‘Presidential Address to the Nation’, The White House, Office of the Press Secretary (7 Oct 2001) available at : <<http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011007-8.html>>.

There were both important political and legal implications of labeling this response a “war”. One political consequence was that the operation was given the high-profile status of a monumental clash of peoples, a grand engagement of historical importance in which the survival of the political community was at stake. This certainly serves a domestic political goal by elevating the ruling government and making it more difficult for the opposition party to challenge it at the polls. But at the same time it provides the tiny group of enemy terrorists that had no status to act on the global stage the glory and ‘renown’ they desperately seek. As well, it empowers them psychologically and likely aids in its efforts to recruit new members. This bellicose framing of the conflict also opens the door to the large financial outlays and institutional concentration on the military instruments needed for conventional warfare.

However, “a central principle of counter-insurgent doctrine, and insurgency is the closest analogy to the present threat, is the primacy of political and economic measures and information operations designed to isolate the violent.”⁸ Finally, calling it ‘war’ stirs up some of the most basic and passionate human emotions. It invites calls for extermination of the “enemy”, hostile xenophobia and blind hatred which can all be misdirected at a larger community when the perpetrators of the crime are a narrow group of individuals that hide within this population and can be extremely difficult to distinguish, target and attack.

When an effective counterterrorism policy depends on differentiating between the guilty and the innocent so as to avoid exacerbating the conflict, feeding these emotions at home can be counterproductive as it can be extremely difficult to quarantine your soldiers, who are tasked with making these critical distinctions, from this impassioned emotion. As well, it should be remembered that making this distinction between combatants and non-combatants is the very first rule of customary international humanitarian law.⁹

The principle of distinction between civilians and combatants is one that goes as far back as 1868 where in the St. Petersburg Declaration it was declared, “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.¹⁰ It is an accepted rule of both international and non-international armed

⁸ FARER, T., *Confronting Global Terrorism and American Neo-Conservatism* (Oxford, OUP, 2008) at 237.

⁹ HENCKERTS, J., and DOSWALD-BECK, L., *Customary International Humanitarian Law*, International Committee of the Red Cross, Vol. I, (Cambridge, Cambridge University Press, 2005) at 3-8.

¹⁰ St. Petersburg Declaration, preamble (11 December 1868), Saint Petersburg, cited in *ibid.*, Vol. II, at 15. This principle can also be found in other instruments of international humanitarian documents, e.g. Article 1 of the 1880 Oxford Manual provides: “The state of war does not admit of acts of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts.”; Paragraph 39 of the 1994 San Remo Manual states: “Parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants.”; Section 5.1 of the 1999 UN Secretary-General’s Bulletin states: “The United Nations force shall make a clear distinction at all times between civilians and combatants ...”. For a additional documentation of treaties, military manuals, national legislation, national

conflict,¹¹ and establishes the meaning behind war as a distinct concept separate from civilian violence.

The United States has certainly been one of the abundance of countries affirming this principle over many decades.¹² It first appeared in the Lieber Code of 1863, a directive signed by President Abraham Lincoln during the American Civil War that dictated to Union forces how to conduct themselves in the armed conflict. Here it was pronounced, “[A]s civilization has advanced during the last centuries, so has likewise steadily advanced [...] the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms”.¹³ More recently, the Department of Defense asserted after the first Gulf

practice, United Nations affirmations and other international bodies, and international conferences all confirming this principle visit *ICRC.com*, Customary IHL, Practice Relating to Rule 1. The Principle of Distinction between Civilians and Combatants, Section A, The Principle of Distinction, available at: <http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule1#top>.

¹¹ *Protocol Additional to the Geneva Conventions of 12 August 1949* (Additional Protocol I), Relating to the Protection of Victims of International Armed Conflicts (signed 8 June 1977, entered into force 7 Dec. 1978) 1125 UNTS 3, Article 48: “The Parties to the conflict shall at all times distinguish between the civilian population and combatants.” This article was adopted by consensus; See also *Protocol Additional to the Geneva Conventions of 12 August 1949* (Additional Protocol II), Relating to the Protection of Victims of International Armed Conflicts (signed 8 June 1977, entered into force 7 Dec. 1978) 1125 UNTS 609, Article 13(2): “The civilian population as such, as well as individual civilians, shall not be the object of attack”. No doubt, how this distinction is made is up to much interpretation particularly when it comes to questions of targeting (i.e. membership status v. carrying arms openly). As well, the fact that President Obama has supported the ratification of Additional Protocol II of the Geneva Conventions as an “important component of the legal framework that covers armed conflict”, further demonstrates the acknowledgement that the principle of distinction has not been a sticking point.

¹² In explaining the US government’s position on the basic principles applicable in armed conflicts before the Third Committee of the UN General Assembly in 1968, the US representative stated that the principle of distinction, as set out in draft General Assembly Resolution 2444 (XXIII), constituted a reaffirmation of existing international law. (United States, Statement before the Third Committee of the UN General Assembly, UN Doc A/C.3/SR.1634, 10 Dec 1968); Subsequently, US officials have referred to General Assembly Resolution 2444 (XXIII) as an accurate statement of the customary rule that a distinction must be made at all times between persons taking part in hostilities and the civilian population. (United States, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 Sept 1972, *AJIL* Vol. 67, pp. 122-126; Statement of the Acting Legal Advisor for Politico-Military Affairs during the symposium at Brooklyn Law School, 25 Sept 1982, reprinted in Marina Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1881-1988*, Department of State Publication, 10120, Washington D.C., 1993-1995, pp. 3421-3422); The US Department of Defense also stated: “The law of war with respect to targeting, collateral damage and collateral civilian casualties is derived from the principle of discrimination; that is, the necessity for distinguishing between combatants, who may be attacked, and noncombatants, against whom an intentional attack may not be directed, and between legitimate military targets and civilian objects. (United States, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 621); According to the Report on US Practice: “It is the *opinio juris* of the United States that ... a distinction must be made between persons taking part in the hostilities and the civilian population to the effect that the civilians be spared as much as possible.” (Report on US Practice, 1997, Chapter 1.4); In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army pointed out that “the obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such”. (United States, Letter from the Department of the Army to the legal advisor of the U.S. Army forces deployed in the Gulf region, 11 Jan 1991, §8E, Report on U.S. practice, Chapter 1.4).

¹³ General Orders No. 100 : The Lieber Code, Instructions for the Government of Armies of the United States in the Field (24 April 1863), prepared by Francis Lieber, LL.D., Originally Issued as General Orders No. 100, Adjutant General’s Office, 1863, Washington 1898: Government Printing Office, Article 22. The Avalon Project:

War that distinguishing between combatants and civilians as codified in Article 48 of the First Additional Protocol of the Geneva Conventions, “is generally regarded as a codification of the customary practice of nations, and therefore binding on all”.¹⁴

At the same time, there were very important legal implications that arose from calling the campaign against terrorism a ‘war’. This legal framing of the circumstance meant that certain norms of international law would need to come to the center of the administration’s counterterrorism policy. To understand the extent to which this legal framing impacted the ‘war on terror’ policies one only needs to look at the legal advice coming out of the Office of Legal Counsel (OLC) to the President of the United States. A young prominent academic named John Yoo, with an expanded view of executive power, found himself in a position at the Justice Department to draft legal opinions for what is “effectively an advance pardon for actions taken at the edges of vague criminal laws”.¹⁵

Just two weeks after the terrorist attacks of September 11th, in an opinion that was to set the tone for the counterterrorism actions by the Bush White House to come, Yoo asserted that statutes passed by Congress cannot “place *any* limits on the President’s determinations as to *any* terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make”.¹⁶ In other words, it was asserted by the Office of Legal Counsel that the President was not legally bound by the laws enacted by Congress when it comes to war. Overall, it was asserted that the president has “broad constitutional power” in matters of military force, military pre-emption and retaliatory measures against terrorist persons, organizations or states. This also included those who the president determined to harbor them. This unrestrained view of the presidency certainly helps explain why John Yoo has been called a “godsend” for an executive that was deeply concerned by any legal impediments to its action.¹⁷ At the same time, while this first memo primarily dealt with the Congressional and Constitutional limits the president needed to respect (i.e., none, in the case of war), this

Documents in Law, History and Diplomacy, Yale Law School, available at: <http://avalon.law.yale.edu/19th_century/lieber.asp#art22>.

¹⁴ In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Article 48 of the 1977 Additional Protocol I (United States, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 625), available at: <http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule1#top>.

¹⁵ GOLDSMITH, J., *The Terror Presidency* (New York, W.W. Norton & Co., 2007) at 96-7.

¹⁶ Memorandum from John Yoo, Deputy Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel, to Timothy Flanigan, Deputy Counsel to the President, ‘*The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*’ (25 Sept 2001)(my emphasis), reprinted in *The Torture Papers: The Road to Abu Ghraib* (Cambridge, Cambridge University Press, 2005) at 24.

¹⁷ GOLDSMITH, J., *The Terror Presidency* (New York, W.W. Norton & Co., 2007) at 98.

would also have a direct and profound effect on how international legal obligations were viewed by the administration and its lawyers.

It is not uncommon for practitioners and scholars to specifically highlight the respect for a legal framework as a critical element of an effective counterterrorism campaign.¹⁸ In the context of the ‘war on terror’, that legal framework would be international law. Otherwise there are indeed no limitations to the exercise of force across borders. If we consider again Weber’s contention that the modern state is defined by the “*monopoly of legitimate use of physical force*,” to posit no limits whatsoever would raise a significant problem even if we are speaking of force that is applied outside of a given territory. Sir Robert Thompson, one of the key figures involved in the British military and police operation against ‘Communist Terrorists’ in Malaya after 1948, spoke specifically of this principle when distilling the basic tenets for similar cases saying, “[t]he government must function in accordance with law”.¹⁹ As seen in the epigraph, he went on to explain,

[t]here is a very strong temptation in dealing both with terrorism and with guerrilla actions for government forces to act outside the law, the excuses being that the processes of law are too cumbersome, that the normal safeguards in the law for the individual are not designed for an insurgency and that a terrorist deserves to be treated as an outlaw anyway. Not only is this morally wrong, but, over a period, it will create more practical difficulties for a government than it solves.”²⁰

In this context, that law emanates from international treaties and customs, which certainly does not change the need for the governed to feel as though the government exercises force legitimately. As it has been explained, “[u]nderstandable doubt over the formal applicability of some provisions of existing law should not be turned into a license to flout basic norms”.²¹

To best understand the international legal framework that was put forward by the administration that launched the ‘war on terror’, it is most useful to discuss it in the manner in which it will be organized in this work. In other words, a brief sketch will be drawn of the administration’s interpretation of the international legal obligations it faced by breaking these down into the three major categories of detention, war-making and interrogation.

Over the last half century, international law has grown remarkably. The number of actors on the international stage expanded from the original 51 founding members of the United Nations in 1945 to 192 Member States as of 2010. The number of codified legal instruments has also increased dramatically. In addition, there has been a significant increase

¹⁸ See e.g. ROBERTS, A., ‘The War on Terror in Historical Perspective’ (2005) 47, 2 *Survival* 101, at 110; see generally BERNARD, F., *L’Etat de droit face au terrorisme* (Genève, Schulthess Éditions Romandes, 2010).

¹⁹ THOMPSON, *Defeating Communist Insurgency...*, note 1 above.

²⁰ *Idem*.

²¹ ROBERTS, A., ‘Countering Terrorism: A Historical Perspective’, note 1 above, at 21.

in the number of international organizational bodies built by legal agreement which are often mandated to collect and analyze information relating to the fulfillment of the accords. At the same time international law has also greatly developed as a valid global structure in the minds of diplomats, civil servants and common citizens. Therefore it is not surprising that the administration tasked with responding to the widely televised international terrorist attacks would indeed feel obligated to legally justify its policies within this body of law. As the 'war' proceeded some legal requirements became imposed by the interpretation of applicable law by the U.S. Supreme Court, and the UN Charter obligation that the Security Council authorizes any use of force between states. As well as the fact that before the inception of this 'war on terror' there was an application of the domestic law on torture which grew out of a duty found in the UN Torture convention. Thus, this work will specifically address the international legal policies on the three contentious issues of detention without judicial review, the limits on international war-making, and the constraints on coercion in interrogation.

III. Detention through the Lens of Legality

As the war in Afghanistan began in earnest in October of 2001, it quickly became necessary for the commander-in-chief of the U.S. forces to address the issue of where and under what legal authority to detain the persons being captured in that armed conflict. On November 13th Vice President Dick Cheney brought a four-page text to a private lunch with the President which had been drafted by the vice president's lawyer in strict secrecy. This document meant to strip foreign terrorism suspects of access to any court. By the end of the lunch the document had the president's authorizing signature, and at the end of the day became an official military order.²² The order was designed to remove any role whatsoever from the courts (civilian, military or international), allow for indefinite confinement and to restrict proceedings, if there were to be any at all, solely to closed "military commissions" created by the president.²³ The document which was to lay out some of the most important groundwork for the detention, treatment and trial of suspects in the 'war on terror' was so tightly controlled, and passed through such few hands on the way to gaining the President's signature that Secretary of State Colin Powell and National Security Advisor Condoleezza Rice were

²² GELLMAN, B., *Angler: The Cheney Vice Presidency* (New York, The Penguin Press, 2008) at 162-8.

²³ Military Order, '*Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism*', 66 Fed. Reg. 57,833, sec. 7(b)(2) (13 Nov 2001) reprinted in *The Torture Papers*, note 16 above, at 25-28.

said to be astonished to learn from the television news about the presidential order that evening.²⁴

This critical legal document was drafted by Cheney's lawyer, David Addington, who modelled it on the military commissions created by President Franklin D. Roosevelt's to deal with Nazi saboteurs in World War II. In doing so, an issue would arise that plagued the whole legal framework for the 'war on terror'. As this problem was aptly described,

[b]y relying on Roosevelt's model, and on the 1942 Supreme Court case upholding it, Addington discarded six decades of intervening law and treaties. Since then the United States had led the world in creating international institutions and international law, some of it enacted into U.S. statutes. The United Nations, headquartered in New York, passed the Universal Declaration of Human Rights in 1948. More than 190 countries signed the Geneva Conventions, negotiated under U.S. sponsorship beginning in 1949. The armed services built a whole new legal system, the Uniform Code of Military Justice. Congress enacted a torture statute and the War Crimes Act.²⁵

Thus we can see clearly the problem of structuring a central restrictive component of the 'war on terror' around a sixty year old document, and the concept of complete judicial deference to the executive in times of armed conflict. Radical changes had occurred in both the international and domestic legal obligations of the United States, and the expectations of citizens for their government to respect them.

The next step in constructing what has been called a "legal black hole" by a prominent judge in another jurisdiction,²⁶ was the December 28, 2001 memorandum drafted by John Yoo and Patrick Philbin of the OLC finding that if the administration should choose to open a detention center at its military facility in Cuba, "the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantánamo Bay, Cuba]".²⁷ Also in this memorandum, there is a discussion of the potential legal exposure if a detainee were to convince a federal district court to entertain an application for a writ of habeas corpus. It is here that we begin to see the first direct recognition of the manner in which such a policy course would create legal exposure to the law of nations since it would indeed be these laws upon which the authority is based to hold

²⁴ GELLMAN, *Angler*, note 22 above, at 168.

²⁵ *Idem*, at 163.

²⁶ See e.g. STEYN, L. (House of Lords) 'Guantanamo Bay: The Legal Black Hole' (2004) 53,1 *International and Comparative Law Quarterly* 1.

²⁷ See Memorandum from: Patrick PHILBIN, Deputy Assistant Attorney General and John YOO, Deputy Assistant Attorney General, to: William Haynes II, General Counsel, Department of Defense, 'Re: Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay' (28 Dec 2001), reprinted in *The Torture Papers*, note 16 above, at 29.

them in detention. As was acknowledged, if a court did decide to hear a habeas petition, it would,

allow a detainee to challenge the legality of his status and treatment under international treaties, such as the Geneva Conventions and the International Covenant on Civil and Political Rights. *See* 28 U.S.C. §2241 (c)(4) [Domestic Habeas Corpus Statute]. Thus, a court could review, in part, the question whether and what international law norms may or may not apply to the conduct of the war in Afghanistan, both by the United States and its enemies.²⁸

Thus, as we can clearly begin to see, the administration and its lawyers were explicitly aware of the fact that the ‘war on terror’ would be running smack into the state’s international legal obligations. Thus, the administration’s lawyers subsequently drafted memos in the following days constructing the legal framework upon which it would rely for detention of members of the Taliban and al Qaeda.

What needs to be understood here is that those combatants being captured by the United States and coalition forces were of at least two categories. Firstly, involved in the armed conflict of Afghanistan were members of the Taliban who were fighting on behalf of the ruling government of the state. Secondly, there were members of the non-state group al Qaeda found in the country and fighting since they had previously installed military training camps inside of the territory of Afghanistan. The reason that this is significant is because it means that we are in fact talking about two different types of armed conflict (international v. non-international), which each have their own legal regime. The first armed conflict was regarded as necessary by the fact that the Taliban as the effective government of Afghanistan refused to expel the al Qaeda elements found within its borders, and thus the conflict can be defined as a traditional international armed conflict falling under the legal regime of the Hague Regulations and the Geneva Conventions, as well as customary international humanitarian law.²⁹ The second armed conflict against al Qaeda is not limited to the territory of Afghanistan, and as non-state actors they are not a Party to the Geneva Conventions, nor do they have any international legal personality.³⁰ However, this does not mean that there is no law applicable to the captured members of al Qaeda. Under a traditional interpretation, members of the Taliban would merit the status of Prisoners of War (POW) under Geneva Convention III, and members of al Qaeda would be protected by Common Article 3 found in

²⁸ *Idem*, at 36.

²⁹ ALDRICH, G., ‘The Taliban, al Qaeda, and the Determination of Illegal Combatants’ (31Oct 2002), extract from *Humanitäres Völkerrecht*, No 4/2002, a review published by the German Red Cross and the "Institute For International Law of Peace and Armed Conflict" in *Bochum*, at 203. Available at: <<http://www.icrc.org/eng/resources/documents/misc/5myj5e.htm>>.

³⁰ *Idem*.

all four of the Geneva Conventions and, in more detail, by Article 75 of Geneva Protocol I of 1977, both as customary law.³¹

However, in what would eventually cause an extended public uproar that would rise all the way to the U.S. Supreme Court in three landmark decisions from 2004 to 2008, this was not the legal approach taken by the Bush administration. On January 9, 2002 John Yoo co-authored another OLC memo in which the explicit engagement with international law began entitled, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*.³² Anyone who has studied international humanitarian law can immediately recognize the form of legal analysis, the questions addressed and the references cited, demonstrating the extent to which the administration went to justify its policies within this body of law. Nonetheless, the conclusions arrived at truly test the limits of honest and professional legal analysis. The determination that there was no applicable law whatsoever to the detainees comes across as a predetermined assumption meant only for expediency.

In this OLC document, it is advised that not only is al Qaeda uncovered by Geneva Convention III as POWs (a reasonable conclusion), but neither are they covered by Common Article 3, which has been called the “minimum yardstick” in armed conflict by the International Court of Justice (ICJ).³³ What this means is that international humanitarian law has become understood to offer minimum protections (i.e. freedom from torture and ill-treatment and an arbitrary loss of life or punishment) to absolutely everyone held in detention in an armed conflict, regardless of that person’s nationality or combatant status. Although the authors do explicitly recognize that there has been a discernable development in the laws of war since the adoption of the Geneva Conventions in 1949 (explicitly citing the *Nicaragua v. United States* by the ICJ,³⁴ and the well-known *Tadić* case of the International Criminal Tribunal of Ex-Yugoslavia [ICTY]³⁵), Yoo and Delabunty dismiss this “recent trend” that would confirm Common Article 3 as “a catch-all that establishes standards for any and all

³¹ *Ibid.*

³² Memorandum from: John YOO, Deputy Assistant Attorney General and Robert J. DELABUNTY, Special Counsel, to: William Haynes II, General Counsel, Department of Defense, ‘*Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees*’ (9 Jan 2002), reprinted in *The Torture Papers*, note 16 above, at 38-79.

³³ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) ICJ Reports of Judgments, Advisory Opinions, Merits, Judgement of 27 June 1986, para. 218: “Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’” (internal citations omitted).

³⁴ *Idem.*

³⁵ International Criminal Tribunal of Ex-Yugoslavia, Appeals Chamber, *Tadić*, 15 July 1999 (Case no. IT-94-1-A).

armed conflicts not included in common Article 2 [international armed conflict]”.³⁶ Remarkably, the authors chose to set aside the jurisprudence of the highest courts created by the United Nations Charter and Security Council Resolution on the exact question at stake because, “the result was merely stated as a conclusion, without taking account either of the precise language of Article 3 or the background to its adoption”.³⁷ According to their argument, two lawyers in the OLC are meant to have a more authoritative interpretation of the law, its history and its scope, than either of these high courts of the ICJ or the ICTY.

Legally speaking, this assertion holds no water. Although we often think of lawyers as zealous advocates for one side of an argument, this does not describe the status or role of lawyers in the Office of Legal Counsel. This understanding of a lawyer’s role is based upon the courtroom setting where a judge(s) has or have the mandate to determine the validity of each opposing argument (which is exactly what the ICJ and the ICTY carried out in this circumstance). The lawyers of OLC, however, are called upon to prepare legal briefs which present the requirements of the law as authoritatively understood at that time.³⁸ To set aside court rulings on the specific law in question is to ethically overstep into the realm of advocacy,³⁹ and carries absolutely no legal weight.

As we will see in the fourth chapter of this work, the Supreme Court dealt directly with this question of Common Article 3 of the Geneva Conventions as it would be applied to members of al Qaeda in the *Hamdan v. Rumsfeld* decision of 2006.⁴⁰ Interestingly, the Supreme Court indeed focused on the precise language of the provision and determined that it is meant to be applied “in contradistinction to a conflict between nations”.⁴¹ What we will see in that chapter is that the Court methodically pushed back against this specific contention of the White House lawyers, and used international law in its mounting of a ‘judicial ladder of review’ to take the historic step of eschewing the traditional and seemingly routine deference to the political branches in times of armed conflict. Specifically, in the series of *Rasul*, *Hamdan* and *Boumediene* cases that came before the Supreme Court, it was repeatedly found

³⁶ See YOO and DELABUNTY Memo, *Re: Application of Treaties and Laws*, note 32 above, at 46.

³⁷ *Idem*, at note 19. This quotation refers to the *Nicaragua v. United States* decision, while for the *Tadić* case it was similarly stated, “we think that such an interpretation of common Article 3 fails to take into account, not only the language of the provision, but also its historical context”.

³⁸ CLARK, K., and MERTUS, J., ‘Torturing the Law: The Justice Department’s Legal Contortions on Interrogation’ *The Washington Post* (20 June 2004) at B03, available at : <<http://www.washingtonpost.com/wp-dyn/articles/A54025-2004Jun19.html>>.

³⁹ CLARK, K., ‘Ethical Issues Raised by OLC Torture Memorandum’ (Winter 2005) 1, 2 *Journal of National Security Law and Policy* 455, at 463-9.

⁴⁰ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁴¹ *Idem*, at 630.

that there was indeed applicable law, judicial protections and a role for the judiciary in the ‘war on terror’.

One of the other important and questionable conclusions that the OLC came to using international law was that the fighting force representing the *de facto* government of Afghanistan, the Taliban, did not qualify for POW status even though the Geneva Conventions were applicable to the armed conflict. In the same January 9th document it was argued that Afghanistan was not in fact ruled by a government at all in the lead up to the invasion, and thus it was better understood as a “failed state” whose territory had been overrun.⁴² It was argued that Afghanistan did not possess, “the attributes of statehood necessary to continue as a party to the Geneva Conventions”, and therefore the armed forces fighting for it did not warrant its protections.⁴³ Additionally, the authors claimed that the Taliban and al Qaeda had become “functionally indistinguishable” and so members of the Taliban “would be on the same legal footing as al Qaeda”.⁴⁴

Moving beyond arguments on the statehood status of the government, the OLC also produced a memo on February 7, 2002 detailing their legal assessment of the *Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*.⁴⁵ In this document we see administration lawyers digging into the nitty-gritty of international humanitarian law to justify the exclusion of any legal protections pertaining to anyone captured in Afghanistan. As we have seen, the OLC lawyers had argued that al Qaeda and the Taliban were excluded from POW status and the basic protections of Common Article 3. The specifics of this particular text argue the same, although through a different legal provision, for the members of the armed forces defending the state of Afghanistan. Article 4 of the Third Geneva Convention lays out the criteria for determining whether a member of a militia who has fallen into the hands of the enemy is entitled to Prisoner of War status. Article 4 provides the scope for determining who is to benefit from the entire Third Geneva Convention designed to protect prisoners of war. Most importantly, the OLC concludes that “the President possesses the power to interpret treaties on behalf of the Nation”, and thus that his reading of the facts would effectively remove any “doubt” that would give rise to a tribunal hearing required by Article 5 to determine the status of a detained individual.⁴⁶ Therefore, this memo found that

⁴² YOO and DELABUNTY Memo, *Re: Application of Treaties and Laws*, note 32 above, at 50.

⁴³ *Idem*.

⁴⁴ *Ibid.*, at 39

⁴⁵ BYBEE, J., Assistant Attorney General, ‘*Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*’ (7 Feb 2002) reprinted in *The Torture Papers*, note 16 above, at 136-43.

⁴⁶ *Idem*, at 137.

the president's own conclusions on the facts obviate the need for any courts to become involved to check this determination of status, i.e. protections by the Third Convention.

The document categorizes members of the Taliban as a "militia", thus holding them responsible for fulfilling the four conditions found in Article 4(A)(2).⁴⁷ Those conditions are: 1) falling under a command structure; 2) having a distinctive sign recognizable at a distance; 3) carrying arms openly; and 4) conducts operations within the laws of war. What is found here by the OLC is that the Taliban "militia" only meet the third condition, but this "is of little significance because many people in Afghanistan carry arms openly".⁴⁸ It is denied that there was a command structure organizing the Taliban (and when this did occur it was al Qaeda who was often in charge);⁴⁹ that they wore any uniforms or clothing that would distinguish them from civilians; and that they were aware of and followed the Geneva Conventions or any other body of law. Additionally, the OLC concluded that these four conditions, at a minimum, must be met by all members of armed forces to be legally entitled to POW status.⁵⁰

It should not go unnoticed that there were some within the administration who explicitly argued against the adoption of this legal policy. Secretary of State Colin Powell indeed wrote a noteworthy memo opposing this course of action.⁵¹ In presenting the "Cons" to following the advice from these lawyers, the retired four-star general of the U.S. Army pointed out that such a decision would not fall in line with the long standing precedent that had been set. He wrote, "[i]t will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, at 138.

⁴⁹ *Ibid.*, at 137.

⁵⁰ Cf. ALDRICH, G., 'The Taliban, al Qaeda, and the Determination of Illegal Combatants', note 29 above; AZUBUIKE, L., 'Status of Taliban and Al Qaeda Soldiers: Another viewpoint' (2003) 19,1 *Connecticut Journal of International Law* 127; ROTH, K., 'US Officials misstate Geneva Convention requirements' Human Rights Watch, New York (28 Jan 2002), cited in SASSOLLI, M., and BOUVIER A., *How does law protect in war?* Volume II, (Geneva, International Committee of the Red Cross, 2006) at 2312-5; and PAUST, J., 'War and Enemy Status after 9/11: Attacks on the Laws of War' (2003) 28 *Yale Journal of International Law*, 325. It should also be recognized that the Commentary to the Geneva Conventions is not completely clear as to whether the four criteria apply only to militia, or if regular armed forces must also abide by the criteria to keep from losing their status as combatants if captured. PICTET, J., *Geneva Convention relative to the Treatment of Prisoners of War* (GC III) (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 135, *Commentary*, (Geneva, International Committee of the Red Cross, 1960) at 49, "[i]t is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians. The Convention does not provide for any reciprocal notification of uniforms or insignia, but merely assumes that such items will be well known and that there can be no room for doubt".

⁵¹ POWELL, C., Secretary of State, to: Counsel to the President, 'Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan' (26 Jan 2002) reprinted in *The Torture Papers*, note 16 above, at 122-5.

troops, both in this specific conflict and in general”.⁵² As well, Secretary Powell warned that, “[i]t has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy”.⁵³ On both counts, he was correct.

Nevertheless, President Bush signed an official determination on this very same 7th of February that can be considered one of the most critical documents tracing the framework for the detention and treatment of those captured in the first military action of the ‘war on terror’. The document entitled *Humane Treatment of al Qaeda and Taliban Detainees* accepts the reasoning he received from his lawyers in the OLC regarding their interpretation of the international treaty obligations of the United States and instituted their conclusions as policy. The most important conclusions of the document signed by the President read,

- a. I accept the legal conclusion of the Department of Justice and determine that *none of the provisions of Geneva apply to our conflict with al Qaeda* in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.
- b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to exercise that authority at this time. Accordingly I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.
- c. I also accept the legal conclusion of the Department of Justice and determine that common *Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees*, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to “armed conflict not of an international character.”
- d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the *Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva*. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.⁵⁴

What is the most remarkable result of this decision is that the captured detainees were to be protected by *absolutely no laws*. The administration’s lawyers had indeed confronted and directly engaged with international law, yet their conclusion in doing so was that there was no applicable law. As indicated above, Chapter 4 will discuss in detail the manner in which the U.S. Supreme Court dealt with this denial of any applicable law, courts and legal protection for those held in detention at Guantánamo in the ‘war on terror’. However, it is worth mentioning here that this eventuality has indeed been addressed by some of the most

⁵² *Ibid.*, at 123.

⁵³ *Ibid.*

⁵⁴ BUSH, P., ‘*Humane Treatment of al Qaeda and Taliban Detainees*’ (7 Feb 2002) (my emphasis) reprinted in *The Torture Papers*, note 16 above, at 134-5.

authoritative sources on international humanitarian law.⁵⁵ As it was put most succinctly in the Commentary to the Geneva Conventions, “nobody in enemy hands can be outside the law”.⁵⁶ There is no gap through which a person may slip entirely unprotected. As such, through the investigation of the *Rasul*, *Hamdan* and *Boumediene* cases that came before the Supreme Court dealing with this very question, it will be possible to more fully grasp how this particular point of international law indeed had an impact on the legitimacy of the government.

IV. War-making through the Lens of Morality

Jus ad bellum, or the use of force in international law, underwent a significant transformation in the twentieth century when there became a shared understanding among states that military action was not an unrestricted prerogative of each and every sovereign nation. While theologians, philosophers and jurists have expounded upon the contours of the ‘legitimate’ use of force in the international arena for centuries, it was only the Kellogg-Briand pact of 1928, signed by more than 60 nations, that was the first explicit “renunciation of war as an instrument of national policy”.⁵⁷ Also at this time, an attempt to modify the right to wage war can be found in the treaty of the League of Nations and the Permanent Court of International Justice. Article 10 of the Covenant declared that all signatories would guard against “external aggression” and respect “territorial integrity and existing political independence”.⁵⁸ Because this was an abstract provision it was necessary to also look at Article 11 which pronounced that war or its threat was a concern to the entire league. In addition, it required looking at Article 12 which enunciated that in the case of an intense dispute between states which could likely escalate beyond restraint, members undertook to submit the quarrel to arbitration, adjudication or to enquiry by the Council.⁵⁹ It is certainly well known that neither of these treaties stopped states from plunging into a second devastating world war. However, there is no doubt that these treaties represent a palpable legal shift in the understanding among nations about the justifiable use of force between states.

When the drafters of the United Nations Charter met in San Francisco in 1945 the intention was to build upon the prohibition of war that had begun with the Kellogg-Briand

⁵⁵ For further, more in depth, discussion on this point see Chapter 4, Section V(2) dealing with the application of Common Article 3 in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁵⁶ International Committee of the Red Cross Commentaries, GC IV, Article 4 ‘Definition of Protected Persons’ at 51.

⁵⁷ General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact of Paris), 1928, 94 L. N. T. S. 57.

⁵⁸ *Covenant of the League of Nations*, 1919, Art. 10, 1 Int. Leg. 1, 7.

⁵⁹ *Idem*, Articles 11 and 12.

pact, and to address some of its shortcomings. The starting point for this work pivots on Article 2(4) of the Charter which reads,

[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.⁶⁰

While much of the international legal literature criticized the Kellogg-Briand treaty because it referred only to “war” specifically, and thus it was thought to leave all other uses of force short of war unregulated, this provision in the new charter was meant to transcend this narrow and ambiguous term.⁶¹ This provision again must be read in conjunction with the preceding Article 2(3) which articulates that all members “shall settle their international disputes by peaceful means”, clearly laying out the first step along the path envisioned to meet the goal expressed in the Charter’s Preamble of saving “succeeding generations from the scourge of war”.⁶²

However, the Charter provides for two exceptions under which the use of force can be legally exercised in the international realm. The first exclusion is when force is exercised because it has been authorized by the UN Security Council under Chapter VII to address a threat to the peace, a breach of the peace or an act of aggression, a power granted to it by Article 39 of the Charter.⁶³ The second exception is derived from Article 51 which deals with the “inherent right of self-defense” in the case of armed attack. It reads,

[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁶⁴

To be sure, there are various points of debate and discussion on the proper interpretation of these two exceptions found in the Charter, and the use of force generally, in international

⁶⁰ *Charter of the United Nations* (signed 26 June 1945, entered into force 24 Oct 1945) 9 *Int. Leg.* 327, at 332.

⁶¹ DINSTEIN, Y., *War, Aggression, and Self-Defense*, 3rd ed. (Cambridge, England, Cambridge University Press, 2001) at 80.

⁶² *Charter of the United Nations*, note 60 above, at 332 and 330 respectively.

⁶³ *Idem*, at 343. Article 39 reads, “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”.

⁶⁴ *Ibid.*, at 346.

law.⁶⁵ However, what is critical here is to understand that the prohibition of the threat or the use of force between states found in the UN Charter, moving forward from the Kellogg-Briand pact, “has a deep impact on the legitimate character of the activities and the role of states”.⁶⁶ At the same time it should be recognized that some scholars suggest that, “there is solid ground supporting the claim that with respect to the use of force, the detailed limits contained in the Charter never became legally operative or that albeit operative initially, they gradually lost their legal authority through a widespread practice of non-compliance”.⁶⁷ Yet even this acknowledgement of differing legal opinions on the firmness of the legal norm does not mean that states are left with an absolute and unfettered discretion, and “one would seem obligated to at least consider the question of whether [...] noble goals are best advanced through the unqualified attribution to states of legitimate authority to make war”.⁶⁸

Regardless of this unsettled controversy, it would be disingenuous to assert that this legal transformation did not somehow have an effect upon, if not in fact emanate directly from, the devastated and threatened grassroots communities of the globe after WWII. No matter where one pinpoints its genesis, the twentieth century witnessed a distinct development in the metric tools available to peoples to measure the justifiability of military actions taken by their own government. International law has greatly proliferated and progressed throughout the 20th century, and indeed provides just such a measuring stick that can be used to analyze the exercise of governmental authority. However, one should not lose sight of the fact that the shared beliefs of a community concerning the difference between right and wrong, or morality, play an important role in both law and legitimacy. While the moral filiations of the use of force in the international arena can be traced back over many centuries, it has only been in more recent times that states have taken the steps to codify them as legal restraints. The relationship between morality and law has been a major piece of this age old discussion on the use of force. Chapter 5 aims to illuminate how this interplay continues to be

⁶⁵ For authoritative discussion of the use of force in international law and the UN Charter see DINSTEIN, Y., *War, Aggression, and Self-Defense*, 3rd ed. (Cambridge, England, Cambridge University Press, 2001) 300 pp. and BROWNLIE, I., *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963) 532pp.; For an excellent discussion of the use of force in international law at the beginning of the 21st century, and a most interesting integration of moral philosophy, see FLETCHER, G. and OHLIN, J., *Defending Humanity: When Force is Justified and Why* (Oxford and New York, OUP, 2008) 257 pp.; And for a discussion of the most pertinent questions raised by the threat of terrorism in the context of the use of force in international law see FARER, T., *Confronting Global Terrorism and American Neo-Conservatism* (Oxford, OUP, 2008) at 43-78.

⁶⁶ LUTZ-BACHMANN, M., ‘The Threat of Violence and of New Military Force as a Challenge to International Public Law’ in Meyer, L., (ed.) *Legitimacy, Justice and Public International Law* (Cambridge, Cambridge University Press, 2009) 252, at 252.

⁶⁷ FARER, T., ‘Un-just War Against Terrorism and the Struggle to Appropriate Human Rights’ (2008) 30 *Human Rights Quarterly* 356, at 376.

⁶⁸ *Idem*.

present in an assessment of the invasion of Iraq as a reaction to the terrorist attacks of September 11th. In the end, this military action resulted in a collapse of support by U.S. citizens which is best explained by the action's legal and moral failings. The thesis of the fifth chapter is that codified international law on the use of force helped to shed light on this lack of moral underpinnings in the government's policy.

The presentation of our argument in this manner should not be misunderstood to be a blunt assertion that international law is simply the formulation of some kind of universal morality. Such confusion might be expected since there was indeed a long tradition of conceiving of law as the extension of a moral code within the theory of natural law. In addition, the international legal regime has been often described as basic, nascent or merely incomplete. However, what is posited here is that the specific normative nature of the arguments put forward for the invasion of Iraq opened the door to a moral criticism of the action, and that this intersection is certainly not inherent to all international legal disputes. Both the final legal position taken by the United States and United Kingdom concerning UN Security Council Resolutions on Iraq, along with the arguments over a 'humanitarian intervention', are open to moral criticisms for their myopic and unilateral formulations, ascribing to themselves the 'right authority' to make war in the name of the United Nations.

Above all, however, the central argument for the invasion of Iraq was based on an extension of the traditional understandings of international legal limits so that an anticipatory war could be waged against a *perceived* future threat.⁶⁹ It was this theory of a war mislabeled as "pre-emptive" that patently failed a moral analysis. Moreover, this doctrine became further exposed as morally vacuous when the presumption, or knowingly false assertion, that Iraq possessed weapons of mass destruction was found to be manifestly inaccurate.⁷⁰ Indeed, the intelligence for such an allegation was misrepresented to U.S. citizens during the brusque national debate over the need for an invasion.⁷¹ As a result of this moral and legal deficit for the invasion of Iraq, further damage was done to the legitimacy of President Bush's signature policy of the 'war on terror'.

Chapter 5 will hence focus on the overlapping legal and moral questions raised by the United States' decision to invade the sovereign country of Iraq as a part of its 'war on terror'.

⁶⁹ DAALDER, I., *Beyond Preemption: Force and Legitimacy in a Changing World* (ed.)(Washington D.C., Brookings Institution Press, 2007) at 1-18.

⁷⁰ Duelfer Report, Iraq Survey Group, Posted on the CIA website 6 Oct 2004, Key Findings available at <https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004/Comp_Report_Key_Findings.pdf>.

⁷¹ Senate Intelligence Committee Report on Whether Public Statements Regarding Iraq by U.S. Government Officials Were Substantiated by Intelligence Information, Second Part of Phase II Inquiry, June 2008, available at <<http://intelligence.senate.gov/080605/phase2a.pdf>>.

This chapter will place the moral lens from our model of legitimacy on the international legal frame to look at the issues raised by this invasion. However, this is by no means to say that such an approach displaces the legal lens found in the UN Charter. Rather the two are indeed complimentary since, as we have seen in Chapter 1 and will continue to see throughout Chapter 5, there is a vital overlap between all legal and moral codes. That overlap is the prohibition of the wanton use of violence within a community, and the use of force to be analyzed here certainly deals with such a proscription. Consequently, the most pertinent elements of the Just War Doctrine will be applied and investigated as the proper axiological examination since it has been with humanity for centuries and offers moral understandings of decisions to make war. Through this analysis and investigation we will find that the interpretations used by the U.S. government of the legal and moral standards for war-making would surely leave no restraints in place. Without any legal and moral limitation on violence, the result is absurd to both the UN Charter system and the Just War doctrine.

Some would suggest that the overlap that has been identified here between law and morals is irrelevant because there is no logical correlation to the international system of states, and thus any comparison is inappropriate. Indeed, the approximate equality between persons bears little resemblance to any sort of inherent parity among states. The physical size or population, the available resources or the organization of a society within a territory are all indeterminate in the international system thus leaving the door open to entities of disproportionate conventional strength. Yet this indefinite characteristic of the states that make up the international realm does not inevitably portend a state of nature in which there is “warre of all against all”. As Michael Walzer reminds us, “[t]he comparison of international to civil order is crucial to the theory of aggression”.⁷² The intent of this work is certainly not to confront all the realist arguments for why this should be our understanding, and so it will suffice to spotlight the enormously relevant fact for this analysis that war or aggression between states is a very public affair. Although there is no international police force, the possibility of violence being carried out by one state upon another in some kind of private action allowing the aggressor to escape away unnoticed by others is simply not a possibility. Not only does the proliferation of cameras, both of the mainstream media and otherwise, make this impossible, but also the international forum of the United Nations where 192 states sit with an open panoramic view on such action. This is in no way to suggest that wars will no

⁷² WALZER, M., *Just and Unjust Wars*, 3rd ed. (New York, Basic Books, 1977) at 58.

longer be fought as a result of this publicity. It is rather to clarify the point that in today's international community war must be justified, launched and waged in plain sight.

As one particularly glaring example of the incongruent interpretation of international law put forward by the U.S. administration we can look to the preventive war doctrine that was advanced in the National Security Strategy of September 2002 (NSS).⁷³ In it, there was what has become a now infamous discussion of anticipatory military action. The government claimed, “[t]he struggle against global terrorism is different from any other war in our history”, and thus required that the U.S. “adapt the concept of imminent threat”.⁷⁴ By attempting to redefine “imminent threat” as a danger that is no longer on the brink of causing violent injury, but instead pushed temporally further out to mean a menace in the undefined future, the U.S. administration wished to infuse the expression *preemptive attack* with the recognized meaning of *preventive war*.

In other words, we end up with a distorted mixing of offense and defense. As it was oddly put in the NSS, “we recognize that our best defense is a good offense”.⁷⁵ Considering the language of an, “inherent right of self-defense” found in Article 51 of the UN Charter, this is a real problem.

When we investigate the concept of anticipatory military action we find that a crucial bifurcation in the Christian just war doctrine occurred in the late 16th and early 17th century relating to this very issue. While there were some who believed that the violent and furious times of the Protestant Reformation, dividing the communities and countries of Europe, demanded a temporal expansion of what could be construed as a threat, there were others who argued that it was objective and material factors that needed to limit the use of force. Interestingly, it is this decisive split that can explain part of the beginnings of a secularized just war doctrine, or what has developed over the last four hundred years into contemporary international law.

Representing what has been called a “holy war rationale” was Francis Bacon, an advisor to Queen Elizabeth who believed that Spain had a design for a universal monarchy with the Spanish King at its head and the Catholic religion as its faith.⁷⁶ Bacon believed that this threat required an anticipatory attack against Spain based on a “just feare”. In 1624 he wrote,

⁷³ The White House, The National Security Strategy of the United States of America (September 2002) available at : <<http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>>.

⁷⁴ *Idem*, at 5 and 19 respectively.

⁷⁵ *Ibid.*, at 6.

⁷⁶ JOHNSON, J., *Ideology, Reason and the Limitation of War : Religious and Secular Concepts 1200-1740* (Princeton, Princeton University Press, 1975) at 81-95.

[...] wherein two things are to be proved, the one that a just feare (without an actual invasion or offence) is a sufficient ground of Warre, and in the nature of a true defensive; the other that we have towards Spaine cause of just feare, [...] not out of umbrages, light jealousy, apprehensions a farre off, but out of a clear foresight of imminent danger.⁷⁷

Tellingly, this logic and reasoning was of relatively limited duration and had no direct progeny. It was a school of thought that extinguished itself shortly after Catholics and Protestants ceased fighting each other over religious beliefs.

However, in direct contrast, the other side of the bifurcation of the just war doctrine that took place spawned the inauguration of a tradition that has only grown in force over time. Hugo Grotius, the man who has at times been called the father of modern international law, spoke directly to this very same idea just one year later in 1625. In his magnum opus *De Jure Belli ac Pacis*, he wrote,

War in defence of life is permissible only when the danger is immediate and certain, not when it is merely assumed. I admit, to be sure, that if the assailant seizes weapons in such a way that his intent to kill is manifest the crime can be forestalled; [...] But those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived, and deceive others.⁷⁸

We will thus find an extremely revealing division during in the late 1500s and early 1600s over the limits of anticipatory attack within the tradition of just war, the historical development of which provides useful moral instruction on the idea of launching war based on the predictions of future threats and dangers.

As to the other exception for the use of force, that of a UNSC approved exercise of military force to address a threat to the peace, the United States indeed brought its case before the Council to seek such a Chapter VII authorization. In late 2002 and early 2003 there was a high stakes and high profile debate which was closely followed in the U.S. television and print press. One thing that that this Security Council discussion certainly made clear was the fact that the launching of military action against Iraq was not a last resort, and this dialogue among the major powers explicitly demonstrated a there was undeniably a *moment for deliberation*. Additionally, the U.S. and United Kingdom's final argument for proceeding to invade Iraq without explicit authorization from the Security Council turned on attributing to themselves the power to unilaterally bypass the 'right authority' of that body. Considering

⁷⁷ BACON, F., *Considerations Touching a Warre with Spaine*, VVritten by the Right Honourable Francis Lo. Verulam, Vi. St. Alban, available at: <http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:image:434>.

⁷⁸ Hugo Grotius, *De Jure Belli ac Pacis*, Book II, chpt. 1, sec. V. found in *The Classics of International Law*, ed. James Brown Scott (Oxford: Clarendon Press, 1925), at p. 173.

that a strong majority of the population of the United States initially believed that the country, "should only invade Iraq with UN approval and the support of its allies",⁷⁹ the decision to invade regardless of such a UNSC resolution could not have had a negligible effect on legitimacy.

V. Interrogation through the Lens of Efficacy

To begin to talk about the stark international illegality of ill-treatment in interrogation one can first look to the Geneva Conventions in which we find the laws that govern armed conflict. A detainee who qualifies for prisoner of war status is required under Article 17 of the Third Convention, "to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information".⁸⁰ In other words, such detainees are to give their name, rank and serial number, but not obligated to provide any intelligence information whatsoever. The Article continues, and states even more clearly that even "unpleasant or disadvantageous treatment" cannot be used for interrogation. It reads,

[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.⁸¹

However, it must be clearly understood that this Article applies only to those who qualify for POW status. This is exactly why the discussion found above in Section III dealing with the status of detainees is also critical to the issue of interrogation. As was pointed out, the presidential determination of February 7, 2002 found that neither the Taliban nor al Qaeda members were to qualify for prisoner of war status.

Equally important, it was determined in this same document that neither group of detainees were covered by Common Article 3 of the Conventions. This Article, which has been pointed out to have been upheld by the highest international courts as "the 'quintessence' of the humanitarian rules found in the Geneva Conventions as a whole",⁸² also

⁷⁹ KULL, S., RAMSEY, C. and LEWIS, E., 'Misperceptions, the Media, and the Iraq War' (Winter, 2003/2004) 118, 4 *Political Science Quarterly*, 569. "Asked in a Chicago Council on Foreign Relations poll in June 2002 about their position on invading Iraq, 65 percent said the United States 'should only invade Iraq with UN approval and the support of its allies'; 20 percent said 'the US should invade Iraq even if we have to go it alone'; and 13 percent said 'the US should not invade Iraq.'" at 569 note 1.

⁸⁰ *Geneva Convention relative to the Treatment of Prisoners of War* (GC III) (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 135, Article 17.

⁸¹ *Idem*.

⁸² ICTY, Appeals Chamber, Case No: IT-96-21-A, Prosecutor v. Zejnil Delali] Zdravko Muci] also known as "Pavo" Hazim Deli] Ead Lando@o also known as "Zenga", Celebici Judgment, 20 Feb 2001, at para. 143.

contains an explicit prohibition on the ill-treatment of detainees. Not only is “cruel treatment and torture” banned, but so are “outrages upon personal dignity, in particular, humiliating and degrading treatment”.⁸³ As such, the determination that there was no applicable law from the Geneva Conventions to members of neither the Taliban nor al Qaeda meant that none of these rules would govern their interrogation.

One high ranking official inside of the Bush administration who has taken credit for formulating this legal analysis that would put all detainees from Afghanistan outside of the law, Douglas Feith, has spoken to the calculation that was occurring behind the scenes.⁸⁴ According to Feith, the reasoning was based on his work going as far back as 1985. He argued that those who did not follow the Geneva Conventions should not be allowed to take refuge in those rules. When it was pointed out to him that such interpretation meant that there would be no law controlling interrogation, he boldly responded, “that’s the point”.⁸⁵ So not only did this determination of the laws of war not covering captured detainees in the ‘war on terror’ have a direct impact on their detention at Guantánamo to be discussed in Chapter 4, it also begins to explain the manner in which international law was employed for the questions of interrogation treated in Chapter 6.

Beyond international humanitarian law, human rights law has ponderously and methodically placed a tightly woven web of illegality over torture as a means for gathering information or punishing anyone detained in custody. Torture is a form of treatment that has been excluded in both customary and treaty based international law in all social contexts, and no exceptions have been made for emergency, geography or circumstance. The laws of war, the Universal Declaration of Human Rights,⁸⁶ the International Covenant on Civil and Political Rights⁸⁷ and regional human rights treaties⁸⁸ all provide for an absolute prohibition

⁸³ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (GC I) (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (GC II) (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 85; *Geneva Convention relative to the Treatment of Prisoners of War* (GC III) (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 135; *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (GC IV) (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 287, Common Article 3, “the following acts are and shall remain prohibited at any time and in every place whatsoever [...] (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture”.

⁸⁴ SANDS, P., *Torture Team: Rumsfeld’s Memo and the Betrayal of American Values* (New York, Palgrave Macmillan, 2008) at 29-36.

⁸⁵ *Idem*, at 35.

⁸⁶ UN General Assembly Resolution 172A (III) (10 Dec 1948).

⁸⁷ *International Convention on Civil and Political Rights* (adopted 16 Dec. 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 7.

⁸⁸ *American Convention on Human Rights* (adopted 22 November 1969, entered into force 18 July 1978) O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, Art. 5. *European Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted 20 March 1952, entered into force 18 May 1954) European Treaty Series No.

of the use of torture and other cruel, inhuman or degrading treatment in even the most difficult of circumstances. This particular ban has been frequently found by Human Rights courts to enshrine “one of the fundamental values of democratic societies”.⁸⁹

In addition, it has become well understood that there are no exceptions to this basic prohibition since there can be no derogation from this protection “even having regard to the imperatives of a public emergency threatening the life of the nation or to any suspicion, however well-founded, that a person may be involved in terrorist or other criminal activities”.⁹⁰ What this means in lay terms is that there is no emergency situation that is considered to be so dire that this prohibition on torture can be set aside, even momentarily, to protect the nation.

At the same time, this proscription is also not subject to limitation. The Grand Chamber of the European Court of Human Rights ruled on this point in *Saadi v. Italy* in 2008 in the treatment of its own regional human rights treaty.⁹¹ While this ruling is not binding on the United States, it no doubt provides persuasive argument for interpreting the U.S.’ own international obligations concerning torture. The Italian government wanted to deport a person suspected of terrorist activity back to Tunisia, but there were real concerns that he would be tortured upon his return. In a unanimous *en banc* decision taken by all seventeen judges of the Court it was found that there was no balancing to be made between security and torture. It was ruled that protection against torture is absolute, and cannot be limited in any circumstances. Additionally, the Grand Chamber went out of its way to state that even if it would have been the case that Tunisia had provided assurances that it would not torture, this would still have been insufficient.⁹²

Thus, as will be seen with the issue of detention without judicial review in Chapter 4 (but to a greater extent on the issue of torture), there is a very important coincidence between humanitarian and human rights law on the issue of torture and ill treatment. This is significant because when assessing the issue of legitimacy we need to be addressing an exercise of power, and prohibitions thereof, that are uncomplicated and easily grasped by citizens. So the

5, 213 U.N.T.S. 221, Art. 3. *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, entered into force 21 Oct 1986) OAU Doc. CAB/LEG/67/3 rev. 5; 1520 U.N.T.S. 217, Art. 5. *Revised Arab Charter on Human Rights* (adopted 22 May 2004, entered into force 15 March 2008) reprinted in 12 Int'l Hum Rts Rep 893 (2005), Art. 8.

⁸⁹ See *Aydin v. Turkey* (25 Sept 1997) 57/1996/676/866 at §81.

⁹⁰ *Idem*.

⁹¹ *Saadi v. Italy* (28 Feb 2008) Application no. 37201/06.

⁹² For further discussion on this case see BERNARD, *L'Etat de droit face au terrorisme*, note 18 above, at 153-4 and 218-9. See also BERNARD, F., ‘The European Convention on Human Rights and the Fight Against Terrorism’ (forthcoming).

fact that the prohibitions are common to the different bodies of law demonstrates their fundamental nature. Finally, the fact that such abusive treatment is absolutely excluded in both peaceful times and war once more demonstrates the degree to which torture has been rejected as a means of government policy. As the former UN Special Rapporteur on Torture, Nigel Rodley, summarizes the international legal status,

the prohibition of torture and other cruel, inhuman or degrading treatment is: absolute (i.e. no treaty or customary rule permits any exceptions to the prohibition whether under human rights law or the law of armed conflict); it is non-derogable (as a matter of treaty law, in terms of both torture and other ill-treatment, and in terms of general international law, at least as regards torture, as a peremptory norm). In other words, international law prohibits every act of torture or other cruel, inhuman or degrading treatment or punishment, no matter where, when, or against whom it is perpetrated, including when it is perpetrated or tolerated in the name of protecting civilian populations from the threat, however grave or imminent, of terrorist attack.⁹³

In the simplest and most categorical terms, the prohibition of torture can be described as an absolute norm of *jus cogens*.⁹⁴ This simply means that the ban on torture is one of the most basic norms, and it can never be disregarded. As stated in a U.S. circuit court decision of 1993, “the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*. [...] Under international law, any state that engages in official torture violates *jus cogens*”.⁹⁵ As further evidence that this view has been fully accepted by U.S. courts, the more recent decision of *Cornejo-Barreto v. Seifert* in 2000, the same Circuit court ruled that this understanding is also found in the authoritative *Restatement (Third) of the Foreign Relations Law of the United States*. As such, it was ruled that courts should use the *Charming Betsey* cannon to interpret domestic law in a way that does not conflict with international obligations.⁹⁶ The ruling read,

The individual's right to be free from torture is an international standard of the highest order. Indeed, it is a *jus cogens* norm: the prohibition against torture may never be abrogated or derogated. We must therefore construe Congressional enactments consistent with this prohibition. In the extradition context, the approach

⁹³ RODLEY, N. with POLLARD, M., *The Treatment of Prisoners under International Law*, 3rd ed. (Oxford, Oxford University Press, 2009) at 81.

⁹⁴ See PAUST, J., ‘The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions’ (2009) 43 *Valparaiso University Law Review* 1535, at 1535; U of Houston Law Center No. 2009-A-7. Available at SSRN: <<http://ssrn.com/abstract=1331159>>; see also *Idem* at 81. There is a noteworthy difference between these two scholars in that Rodley finds there to be a *jus cogens* prohibition of only torture, while Paust believes there to be this same status for both torture and ill-treatment. It should also be noted that these conclusions concerning the *jus cogens* nature of the prohibition torture were reached even after the release of the ‘torture memos’ into the public sphere.

⁹⁵ *Siderman de Blake v Republic of Argentina*, 965 F. 2d 699, 717 (9th Cir.), cert denied, 507 U.S. 1017 (1993).

⁹⁶ For discussion of the *Charming Betsy* cannon see Chapter 4, Section II (3).

we describe here allows us to give full effect to Congressional legislation without creating a conflict between domestic and international law.⁹⁷

In addition to the above cited humanitarian and human rights treaties, the UN General Assembly adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in December of 1984 which then entered into force in 1987.⁹⁸ As a result of there being a specific treaty dealing with the issue, the ban on torture can be placed into a particular category of legal exclusion beyond the status of other human rights. From 1979 until 1984 a working group of the Commission on Human Rights developed the draft of the convention, and one of its most significant features is to provide a legal definition of the term ‘torture’.⁹⁹ The treaty lays out the definition out in Article 1 as such,

[f]or the purposes of this Convention, torture means 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, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

From this definition, which is now considered to be customary, we can extract four main points necessary for the liability of torture: 1) treatment must rise to the level of *severe* physical or mental suffering, 2) it must be intentionally inflicted, 3) there must be a purpose for the inflicted pain, and 4) it must occur with the consent or acquiescence of a public official.¹⁰⁰ It should be noted that there are two slight differences between humanitarian and

⁹⁷ *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir.) (2000) at 1016. Also see footnote 15 which lays out the most relevant case law on the issue, “The Restatement of Foreign Relations Law explains that freedom from torture is a *jus cogens* norm. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW S 702 (1986). Federal courts, including our court, have long recognized the binding nature of the right to be free from torture. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (right to be free from torture is a ‘fundamental right’); *Trajano v. Marcos*, 978 F.2d 493, 499 (9th Cir. 1992) (death from torture contrary to law of nations), cert. denied by *Marcos-Manotoc v. Traj*, 508 U.S. 972 (1993), and on appeal after remand sub nom., *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) (prohibition of torture is *jus cogens* norm); and *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1996) (official torture prohibited by international human rights and humanitarian norms). See also John Dugard & Christine Van Den Wyngaert, *Reconciling Extradition with Human Rights*, 92 Am. J. Int’l L. 187, 198 (1998) (‘If any human rights norm enjoys the status of *jus cogens*, it is the prohibition on torture. Consequently, no requested state should have difficulty in justifying a refusal to extradite a person to a state in which he is likely to be subjected to torture - a course approved by the 1984 Convention against Torture . . .’).”

⁹⁸ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT Treaty)* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

⁹⁹ RODLEY and POLLARD, *The Treatment of Prisoners...*, note 93 above, at 48.

¹⁰⁰ NOWAK, M., and McARTHUR, E., *The United Nations Convention Against Torture: A Commentary* (Oxford, Oxford University Press, 2008) at 28.

human rights law on this question. The first is that, naturally, humanitarian law requires the existence of an armed conflict. Secondly, through the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, it has been established that in the context of war it is not a necessary requirement to have the presence or consent of a public official.¹⁰¹

Additionally, there are at least two more significant elements clarified by this treaty. The first is that the Committee Against Torture established by the treaty has interpreted Article 2(1) which affirms that there is an obligation to take, “effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”, to mean that the scope of application is not to be limited by simple territorial control. The Committee has stated that the treaty, “refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control”.¹⁰² In fact, the Committee reiterated this point directly to the United States when the state came to Geneva in 2006 to submit its scheduled report. In its conclusions and recommendations the Committee stated that the United States should recognize that the provisions of the treaty, “apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world”.¹⁰³

We also find that the treaty explicitly spells out the absolute nature of the prohibition in this same Article 2, section (2), where it provides that torture cannot be justified by invoking any exceptional circumstances “whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency”. Nor is it possible to legally

¹⁰¹ The Trial Chamber in the 1998 Furundžija decision outlined five elements necessary for torture related to armed conflict in the circumstance of individual criminal responsibility. The Court applied the basic elements present in the CAT, and as such determined that the presence of a public official was one of the requirements. “[A]t least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity”, *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgement, 10 Dec 1998, at §162. However, three years later in the Kunarac case, the Trial Chamber of the ICTY found that there was indeed an important difference between human rights law and humanitarian law on the question of torture. The Court stated that it was “of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offense to be regarded as torture under international humanitarian law”, *Prosecutor v Kunarac, Kovac and Vukovic*, Case IT-96-23-T & IT-96-23/1-T, Judgement, 22 Feb 2001, at §496.

¹⁰² General Comment no. 2 : Implementation of article 2 by States parties, UN Doc CAT/7C/GC/2/CRP.1/Rev.4 (23 November 2007) at para. 16.

¹⁰³ Conclusions and Recommendations: United States, UN Doc CAT/C/USA/CO/2 (18 May 2006) at para. 15. Commentary on the CAT treaty (NOWAK, and McARTHUR, *The UN CAT: A Commentary*, note 100 above) makes an important point on this interpretation, “the Government of the United States recently took the position that Article 2 was geographically limited to the US territory in the strict sense. It is evident that this position is a purely ideological one aimed at exempting the US detention centres established in the so-called ‘war against terror’ to hold indefinitely alleged terrorist suspects, such as the detention facility at Guantánamo Bay, from international scrutiny”, (internal citations omitted) at 117.

excuse torture because it came in the form of “an order from a superior officer or a public authority”, as found in Article 2(3), which firmly establishes in treaty form Principle IV of the Nuremberg Principles for the act of torture.¹⁰⁴

Additionally, Article 4 of the CAT treaty requires that, “[e]ach State Party shall ensure that all acts of torture are offences under its criminal law” and that such legislation “shall make these offences punishable by appropriate penalties which take into account their grave nature”.¹⁰⁵ As a result, the U.S. was under a binding legal duty to codify in its own domestic law the illegality of torture as a crime carrying grave sanction. The infamous ‘Bybee Memo’ in fact made this point that the U.S. legislature passed specific legislation on torture (§2340A)¹⁰⁶ to meet its legal responsibility. The memo read, “Congress criminalized this conduct to fulfill U.S. obligations under the [CAT]”.¹⁰⁷ Therefore, the national legal order of the United States had been directly altered by international law in the case of torture.

Another important element for understanding this treaty specifically, and the general international law on ill-treatment, is that there has come to be a legal difference between two categories: 1) torture and 2) other ill-treatment. That is to say, torture has come to be interpreted as being a *severe* form cruel, inhuman or degrading treatment. While it was not the intention of the drafters of the Universal Declaration of Human Rights to draw this distinction,¹⁰⁸ this difference was first recognized in the decision of the European Commission of Human Rights in the *Greek* case of 1969.¹⁰⁹ The separation of the terms continued to grow out of distinction over obligations and consequences to be incurred by the two different branches of ill-treatment. This approach was included into the widely ratified CAT treaty in which we find the definition of torture at the beginning of the treaty as presented above. Later, we find Article 16 which deems as also illegal the other forms of ill-treatment (cruel, inhuman and degrading) that does “not amount to torture as defined”.¹¹⁰ One reason for this is that the treaty focuses on creating individual criminal responsibility for torture along with state responsibility thereunto. The other measures do not so uniformly concentrate on

¹⁰⁴ Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950, Principle IV, “[t]he fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him”. Available at : <<http://www.icrc.org/ihl.nsf/full/390>>.

¹⁰⁵ *Idem*, Article 4(1) and (2) respectively.

¹⁰⁶ 18 U.S.C. §§ 2340-2340A.

¹⁰⁷ Memorandum from Jay Bybee, Assistant (Bybee Memo hereinafter) Attorney General, to Counsel to the President (1 Aug 2002) *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 230-2340A*, reprinted in *The Torture Papers: The Road to Abu Ghraib* 172-217, at 182.

¹⁰⁸ RODLEY and POLLARD, *The Treatment of Prisoners*..., note 93 above, at 82.

¹⁰⁹ *Greek Case* (5 Nov 1969) Application no. 3321/67-Denmark v. Greece; Application no. 3322/67-Norway v. Greece; Application no. 3323/67-Sweden v. Greece; Application no. 3344/67-Netherlands v. Greece.

¹¹⁰ CAT Treaty, note 98 above, Art. 16.

criminalisation and have thus been left to develop on an ad hoc basis through decisions in individual cases.

Additionally, it should be pointed out that even though the prohibition of torture is found in both the CAT and the ICCPR, our focus will primarily be on the former. One reason for this is that the CAT treaty was dealt with explicitly and directly in the ‘torture memos’ and therefore provides more fertile ground for exploration. Additionally, and a primary reason explaining the treatment of only the CAT treaty in those memos, the United States has maintained an unfortunate interpretation of the ICCPR that it has no extraterritorial applicability. The state has interpreted Article 2(1) relating to its scope of application as meaning that an individual must be both “within its territory and subject to its jurisdiction”.¹¹¹ Although this interpretation directly contradicts the interpretation of the Human Rights Committee created to oversee the implementation of the treaty establishing *effective control* to be the proper understanding of obligation,¹¹² the U.S. continues to maintain its position. For these reasons, this work will not look as deeply into ICCPR legal duties, and primarily focus on the obligations found in the CAT treaty.

One final point that should be clearly reiterated is the absolute nature of the ban on torture. The former United Nations Special Rapporteur on Torture explains this point lucidly in his commentary on the treaty. Manfred Nowak explains,

[t]he *absolute prohibition of torture*, therefore, means that, under normal circumstances torture must not be balanced against any other interest, including national security or the protection of human rights of others. All attempts to justify the practice of torture in the ‘war against global terrorism’ in order to extract information from a suspected terrorist for the purpose of, for example, saving the life of innocent civilians who are in danger of being subjected to an imminent terrorist attack (the so-called ‘*ticking bomb*’ scenario), clearly violate the absolute prohibition of torture as laid down in Article 7 CCPR and Article 2(2) CAT.¹¹³

Considering this stark nature of the valuable and respected observations put forward here, it might at first blush seem odd that our approach is to treat the issue of torture through the lens

¹¹¹ See ‘Opening Statement to the U.N. HRC’, M. Waxman, Head of U.S. Delegation, (17 July 2006) Geneva, Switzerland, available at <<http://www.state.gov/g/drl/rls/70392.htm>> : “[i]n addition, it is the long-standing view of the United States that the Covenant by its very terms does not apply outside of the territory of a State Party. [...] It is the long-standing view of my government that applying the basic rules for the interpretation of treaties described in the Vienna Convention on the Law of Treaties leads to the conclusion that the language in Article 2, Paragraph 1, establishes that States Parties are required to respect and ensure the rights in the Covenant only to individuals who are BOTH *within* the territory of a State Party *and* subject to its jurisdiction”.

¹¹² Human Rights Committee General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), clarifies the HRC’s view that, “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or *effective control* of that State Party, even if not situated within the territory of the State Party”, (my emphasis), at para. 10.

¹¹³ NOWAK, and McARTHUR, *The UN CAT: A Commentary*, note 100 above, at 119.

of efficacy. However, it must be remembered that our intention is to first and foremost investigate the issue of legitimacy as a target of terrorism. Therefore such an approach is in fact useful and merited.

Regardless of this tightly woven web of illegality found in international treaty obligations, all of which have been signed and ratified by the United States, the administration pried through this netting with legal tools in what have become known as the ill-famed ‘torture memos’. And it was through this distinction between the two levels of ill-treatment (torture v. cruel, inhuman and degrading) that John Yoo of the Office of Legal Counsel wrenched to offer legal cover to the administration in the first of these memos of August 1, 2002. Despite the fact that this first document was leaked to the press and brought veritable political scandal to the Bush administration directly in the wake of the photos of detainee abuse in the Abu Ghraib prison facility of Iraq, there would be additional memos drafted by the OLC offering legal justification for abuse of detainees during interrogation. One of the most characteristic elements of this series of memos legally authorizing highly coercive techniques in interrogation was once again their direct engagement with international law. We find that, for the administration’s lawyers to attempt to twist open a legal avenue for mistreatment of detainees, it was evidently necessary for them to do so through the international obligations that the state had taken on by treaty. So when these memos became public, international law was once again directly before the U.S. population.

As such, a legal analysis of the ‘torture memos’ will be carried out in Chapter 6, along with the primary attention on the very problematic results from the abusive interrogations authorized at the highest levels on some of the central individual cases in the ‘war on terror’. In doing so, it will be possible to spotlight the overlap of legality and efficacy on the issue of interrogation. At the very same time, we will also see that by illuminating the insurmountable hurdle of a torture program being performed on the arbitrary basis of unverifiable suspicion, and thus being inefficacious in an interrogation program, this will simultaneously remove the possibility of the moral argument since all contention for the use of torture being for the greater good is based upon its efficacy. Therefore what we will find in the last chapter looking through the lens of efficacy, and focusing on the part of that lens that overlaps with legality and morality, is that we have indeed ended up in the overlapping zone where all three spheres coincide.

VI. Legitimacy Deficit

In a democratic country with a free press searching for the justifications of harsh policies reaching across borders one can surely expect that a discussion of international legal obligations would come directly into the mainstream conversation. And this is indeed what happened. As the administration's policies of detention, war and interrogation moved into the newspapers and television news programs as a result of Supreme Court decisions, United Nations Security Council resolutions (and debates over a second resolution that was never passed),¹¹⁴ photographs of detainee abuse in Iraq, and the leaked 'torture memos', U.S. citizens were repeatedly and consistently confronted with the international agreements that their country had signed and ratified. Being a constitutional democracy based on the consent of the governed means that these international accords were agreed to in the name of the citizens of that nation. Therefore, suggesting that the limitations on the exercise of power found in the international treaties to be discussed in this work are indeed a metric by which some U.S. citizens have measured the policies of their government is not farfetched. Given the fact that the United States was a central player in the construction of the global system that includes these limitations on the exercise of government power,¹¹⁵ it is all the more feasible that the citizens of that country would feel these obligations as binding on their own government. As one international lawyer keenly pointed out in his treatment of international law and the 'war on terror',

[c]ollision between the executors of a self-proclaimed counter-terror 'war' and the norms embodied in human rights treaties and the humanitarian laws of war (and in most modern constitutions) is inevitable, since the norms are, above all, restraints on the exercise of power.¹¹⁶

So not only did international law come before the U.S. citizenry in a steady stream in relation to their counterterrorism 'war', they were also implicitly asked to evaluate the logic and validity of such constraints on their government.

However, it must be acknowledged that there are few, if any, reliable tools for 'scientifically' measuring the legitimacy of a government. Calculating the quantity of pull towards compliance, or tacit obedience, of millions of citizens to their government is certainly

¹¹⁴ This is a reference to the second resolution authorizing an invasion of Iraq that was never passed by the UNSC because there were not enough votes for a majority, along with threats of a veto by France and Russia (BBCNews.com, 'Russia Raises Iraq Veto Threat' [28 Feb 2003] available at : <<http://news.bbc.co.uk/2/hi/europe/2807433.stm>>) which would have legally authorized the military invasion by the United States and coalition forces.

¹¹⁵ See generally SANDS, P., *Lawless World: America and the Making and Breaking of Global Rules from FDR's Atlantic Charter to George W. Bush's Illegal War* (New York, Viking, 2005) 314 pp.

¹¹⁶ FARER, T., *Confronting Global Terrorism and American Neo-Conservatism* (Oxford, OUP, 2008) at 5.

beyond our scientific capacities. As we have seen Guglielmo Ferrero say of the nature of the principles of legitimacy, they are, “extremely unstable. Any philosophical hack can demonstrate their absurdity; any dictator, at the head of a gang of cutthroats, can suppress them”.¹¹⁷ Hence, most frequently, the *will to obey* is something that is easiest to talk about when it actually does not exist. When it is accepted without question, a government functions smoothly and the existence of a legitimate authority is obvious. It is when it is gone that we cannot help but notice.

Nevertheless, there is undoubtedly a spectrum of legitimacy that exists between a completely valid political authority and a comprehensive state of illegitimacy in which consent sufficient to run a government is no longer present from those who grant their obedience because there has been a decisive break in the societal order. It is within this range of legitimacy that we can find the state of affairs that come to exist in the United States in the years after the attacks of September 11th as there clearly was no type of political or governmental collapse of which to speak.

What will be described in this section was a less than optimal, or strained, pull towards compliance with authority which we can identify as leaning towards the lower end of this spectrum. In line with what has been put forward by political theorist David Beetham,¹¹⁸ we shall use the terms “legitimacy deficit” and “delegitimation” to describe what can be identified following the attacks of 9/11 and the implementation of the policies of the ‘war on terror. Beetham defines the first of these terms as follows:

[a] *legitimacy deficit* or weakness, then, is a condition of inappropriateness or inadequacy in the constitutional rules, which limits the degree of support that they, and those deriving power from them, can command [...].¹¹⁹

In this case, we will be looking at the interpretation of those rules that are found in international law since this is where the tension can be most obviously found. Also of significance, we find that Beetham correlates this weakness directly to “constitutional rules” that must be followed by a person wielding authority derived from them. This is important because there is indeed an explicit connection between the U.S. Constitution and international law since the latter is directly referred to in the former. Most specifically, international law is placed in the category of “supreme Law of the Land”¹²⁰ in Article VI of the U.S. Constitution,

¹¹⁷ FERRERO, G., *The Principles of Power* (New York, G.P.Putnam’s Sons, 1942) at 314-315.

¹¹⁸ BEETHAM, D., *The Legitimation of Power* (New York, Palgrave Macmillan, 1991) at 205-242.

¹¹⁹ *Idem*, at 209 (my emphasis).

¹²⁰ U.S. Constitution. Art. VI, para. 2.

although there has long been debate over the exact meaning of this phraseology.¹²¹ All the same, what is certain is that international law does have a constitutional legal significance within the United States system of government.

The second term of “delegitimation” coming from Beetham’s work is described as:

a process whereby those whose consent is necessary to the legitimation of government act in a manner that indicates their withdrawal of consent. Mass demonstrations, strikes, acts of civil disobedience: such actions can have damaging consequences for the moral standing of a government and also its capacity to rule; the more so, the larger the numbers involved or the more crucial their cooperation is to the attainment of the government’s purposes.¹²²

We will find that these types of events or occurrences are more extreme than most of what has occurred in the United States in relation to the ‘war on terror’. However, it will be shown below that there certainly have been some instances in which certain actions of open dissent could be described in similar terms.

One stumbling block for clearly viewing a legitimacy deficit is the fact that knowing exactly where to focus one’s attention for judging a pull towards acceptance of authority can be extremely difficult. The U.S. federal government has three separate branches, law enforcement officers, state department and justice department officials, numerous additional agency workers and the vast military forces that include the Army, Navy, Marine Corps, Air Force, and Coast Guard. At the same time each of the fifty states has its own parallel and integrated bureaucracies of state government. Confidence in and within these many different institutions is something that surely fluctuates from day to day for millions of different people. This work does not posit any sort of metric for measurement of this fluid, yet imperative, phenomenon. Rather, the intention here is to put forward tools for examining and analyzing what is believed to be a central portion of the target at which terrorism aims. In doing so it is necessary to point out evidence of some of the results, even if they are not meant to be systematically presented as a metric tool.

Consciously recognizing this difficulty, this section describing the *legitimacy deficit* that built up over a several year period will focus primarily on the executive who set and directed the policies of the ‘war on terror’, along with some of the legal counselors’ work in advising him. More specifically, this means that the indications of this deficit of authority will be related to Former President George W. Bush who has completed his two terms in office.

¹²¹ For a discussion of international law in the context of the U.S. Constitution, and how this body of law has been treated judicially in the United States, see Chapter 4, Section II.

¹²² BEETHAM, *The Legitimation of Power*, note 118 above, at 209.

Although his successor, President Obama, has largely followed the same counterterrorism policies during his presidency, it is believed to be early to judge the impact that this has had on his own, and the government's, legitimacy. One important reason for this is that, as we will see, the most obvious effects of a legitimacy deficit were borne out in President Bush's second term in office. Additionally, President Obama was elected on a platform of change, and in his second full day in office signed executive orders indicating a pull back from the previous administration's national security policies concerning terrorism.¹²³ Therefore it is quite natural that citizens would begin with the belief that a veritable and significant change had taken place.

As a starting place, it is possible to track the polls of President Bush over his eight year presidency. He had job approval ratings that soared to unprecedented levels in the ninetieth percentile following the attacks of 9/11.¹²⁴ He then left office with numbers, again unprecedented, that reached into the twentieth percentile. What this represents is a clear and nearly uninterrupted downward spiral for President Bush's time in office after his poll numbers rocketed in the wake of the September 11th attacks. Most starkly, the CBS-New York Times poll scored him with a "final approval rating of 22%" which was "the lowest final rating for an outgoing president since Gallup began asking about presidential approval more than 70 years ago".¹²⁵

Of course, it must be acknowledged that there are multiple factors that contribute to the legitimacy of an executive and her policies, and the exercise of physical force is but one of them. It is a critical element to be sure, but it is certainly not unique in its impact. Therefore analysts will, and should, point to the inadequate response to Hurricane Katrina which devastated the gulf coast, including the storied city of New Orleans. As well, President Bush presided over an economic collapse and a \$700 billion bailout with taxpayers' money to save banking institutions that were 'too big to fail'. There is no doubt that these events, and the

¹²³ Executive Order No. 13,491, 74 Fed. Reg. 4893, 'Ensuring Lawful Interrogations' (22 Jan 2009); and Executive Order No. 13,492, 74 Fed. Reg. 4,897, 'Review and Disposition of Individuals Detained at the Guantanamo Naval Base and Closure of Detention Facilities' (22 Jan 2009).

¹²⁴ Presidential Approval Ratings, George W. Bush's Job Approval Ratings, *Gallup.com*, available at: <<http://www.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx>> (last visited 1 June 2011); for comparisons of various polling data see PRESIDENT BUSH – Overall Job Rating, *PollingReport.com*, available at: <<http://www.pollingreport.com/BushJob.htm>> (last visited 1 June 2011); and President Bush Job Approval, *RealClearPolitics.com*, available: <http://www.realclearpolitics.com/polls/archive/?poll_id=19#polls> (last visited 1 June 2011).

¹²⁵ The Bush Legacy, 'Bush's Final Approval Rating: 22 Percent – CBS News/N.Y. Times Poll Finds President Will Leave Office with Lowest Final Approval Rating Ever', *CBSNews.com*, (16 Jan 2009) available at: <http://www.cbsnews.com/stories/2009/01/16/opinion/polls/main4728399.shtml?source=related_story> (last visited 1 June 2011).

perceived contribution and response to them, had an important impact on the historically low poll numbers President Bush suffered.

However, what is posited here is that the exercise of force in the ‘war on terror’, the president’s signature policy, made a significant contribution to a thinning pull towards authority among the citizens of the United States. Just how much of an impact cannot be measured with precision. Nonetheless, it was surely a significant enough difference for analysts to direct their attention in this direction so as to help explain the effects of terrorism on a society. As well, this conception helps to construct a future counterterrorism policy that does minimum damage to this target of terrorism.

It should also be noted that this legitimacy deficit came about in the second term of President Bush’s mandate. While the policies which placed the greatest stress on the realms of *legality*, *morality* and *efficacy* primarily took place during the first Bush term, it was during his second tenure in office that we can most clearly discern a weakness in the pull towards compliance with his and his administration’s authority.

To most clearly view this legitimacy deficit, the evidence of it will be organized into four different categories: 1) pertinent judgments by the judicial branch, 2) significant political shifts and statements, 3) notable declarations and actions by civil society, and 4) striking deeds and public affirmations made by high ranking military officers and retirees.

1) Pertinent Judicial Decisions

As we will see in detail in Chapter 4, there were a series of relevant rulings by the U.S. Supreme Court over a four year period starting in 2004 which can be understood as both a delegitimizing force on the executive branch of the government and its policies of the ‘war on terror’, as well as a reflection of a sentiment emanating from the general public. This series of decisions dealt directly with the legality of the president’s authority, and methodically and repeatedly struck down assertions of broad powers outside of U.S. territory in times of armed conflict. Most significantly, this was proposed to be possible without any interference from the judiciary. Just as some commentators have suggested that rulings of the highest courts of a nation can be seen as a legitimizing force for an executive and its policies,¹²⁶ it is suggested here that the inverse is also true. When the Supreme Court explicitly rules against the executive and its assertion of powers in high profile cases, the result can be that it is a

¹²⁶ See SCOBIE, I., “‘The Last Refuge of the Tyrant?’: Judicial Deference to the Executive in Time of Terror’ in BIANCHI, A. and KELLER, A. (eds.), *Counterterrorism: Democracy’s Challenge*, (Oxford, Hart Publishing, 2008) pp. 277- 312.

delegitimizing force on the policies, and perhaps even the government as a whole.¹²⁷ As an important contributing force to legitimacy, citizens who are asking the question of whether a government is exercising its power legally, there is little that can be more dispositive than a judgment from the highest court in the land. When this happens in succession, and on the same primary question of an overreach of executive power, the result is all the more impactful on the pull towards compliance.

In 2004, the U.S. Supreme Court took its first step into the fray of ‘war on terror’ by handing down two significant rulings dealing with the president’s authority to detain combatants captured in the war in Afghanistan. In *Hamdi v. Rumsfeld*,¹²⁸ eight out of nine justices held that the executive branch did not have the authority to hold a U.S. citizen on national territory indefinitely without affording the rights of due process enforceable through habeas corpus, though no single opinion commanded a majority. With reasonings from the Justices that were quite diverse, the Court refused to accept the administration’s contention that it had a broad authority to detain such persons under its constitutional commander-in-chief powers. In the same term, the Court pushed back against the Bush administration by asserting its institutional competence in the *Rasul v. Bush*¹²⁹ decision. On domestic statutory grounds, the Court asserted its authority to hear habeas corpus’ challenges to the detention of foreign nationals captured abroad and held in the detention facility of Guantánamo Bay in connection with hostilities. Although the two decisions dealt with detainees of different nationalities in different locations, both rulings struck down assertions of executive power to act on its own without any judicial review, even in times of armed conflict.

In 2006, the Supreme Court once again took up issues of the president’s authority for detention and trial at the Naval Guantánamo facility in *Hamdan v. Rumsfeld*.¹³⁰ In this case Salim Hamdan was held as a combatant in the ‘war on terror’, and the executive argued to the Court that as a member of al Qaeda he was not afforded the protections of the Third Geneva Convention as a prisoner of war, nor was he entitled to the protections of Common Article 3. This time the Court used international law (ruled to be a part of domestic law through the Uniform Code of Military Justice), to find that Common Article 3 indeed applied and thus the executive did not have a free reign in armed conflict because there was applicable law that offered protection to a foreign citizen outside of national territory. Thus, once again, the Court

¹²⁷ Cf. BARAK, A., ‘The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism’ (2003) 58 *University of Miami Law Review* 125, at 140-1. Former Israeli Supreme Court Justice Ehud Barak insists here in this extrajudicial writing that the Court does not grant legitimacy, but rather simply rules on questions of law.

¹²⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹²⁹ *Rasul v. Bush*, 542 U.S. 466 (2004).

¹³⁰ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

struck down the claims of wide authority implemented until then by the executive and ruled that the government was again not exercising its power legally.

Finally, in 2008, the Supreme Court rendered its decision on the *Boumediene v. Bush*¹³¹ case again dealing with issues of detention without judicial review in Guantánamo. The petitioners in this case were nationals of foreign states, with not all of them being captured on the battlefield in Afghanistan. In addition, none of them were citizens of a nation at war with the United States. More pertinently, each individual claimed that they were neither a member of the al Qaeda terrorist network nor of the Taliban regime that offered the group sanctuary. For a third straight time in four years, the Court found that the government did not possess the authority it claimed. In this case, that was the authority to perpetually detain foreigners in Guantánamo without the judicial protection of habeas corpus. This time, though, the decision was based upon an interpretation of constitutional law, thus raising an even more critical question of the legitimate exercise of force since the authority being exercised by the government emanates directly from this fundamental document. Importantly, the *Boumediene* decision pivoted on the Separation of Powers principle, which was explained in the majority decision to directly address the authority of the executive to detain persons without the constraint of judicial review.¹³²

It should be noted that the Supreme Court was extremely cautious and measured in this series of decisions that would question the authority of the president during a time of armed conflict. Since there has been a traditional deference to the political branches in times of conflict,¹³³ the methodical approach of the Court is all the more noteworthy. In fact, it was the first time in the Court's history that it ruled against the President and Congress acting together in a time of armed conflict.¹³⁴ Considering this detail it would certainly be outlandish to suggest that the Court purposefully aimed to undermine the legitimacy of the government.

¹³¹ *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

¹³² For discussion on the use of this Separation of Powers principle in the *Boumediene* decision see Chapter 4, Section II.

¹³³ See SCOBIE, I., "'The Last Refuge of the Tyrant?': Judicial Deference to the Executive in Time of Terror' in BIANCHI, A. and KELLER, A. (eds.), *Counterterrorism: Democracy's Challenge*, (Oxford, Hart Publishing, 2008) pp. 277- 312; On wartime jurisprudence, see also BENVENISTI, E., 'National Courts and the "War on Terrorism,"' in BIANCHI, A., (ed.) *Enforcing International Law Norms Against Terrorism* (Oxford, Hart Publishing, 2004) at 309-15; Notably, the issue was also treated in Justice Jackson's opinion in *Korematsu v US*, 65 S. Ct. 193, at 245 (1944): "military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved [...] Hence courts can never have real alternative to accepting the mere declaration of the authorities that issued the order that it was reasonably necessary from a military viewpoint".

¹³⁴ COLE, D., 'Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay' (2008) *Cato Supreme Court Review*; Georgetown Public Law Research Paper No. 1272202. Available at SSRN: <<http://ssrn.com/abstract=1272202>>.

Nonetheless, it would be difficult to argue that this series of decisions did not have an important impact upon citizens judging legitimacy.

2) Political Dissent

Since the nature of party politics in a constitutional democracy is at least partially based upon the promotion of your own party leader's authority to rule, and at the same time the invalid status of your opponent, it is difficult to identify political dissent that represents a legitimacy deficit or weakness. Even so, it is important to discuss the political atmosphere to be able to have a general understanding of the environment in which these claims of weakened authority is taking place. It is believed by this author that polls are blunt instruments for testing the legitimacy of an authority since they are simply snapshots in time of an ever moving sentiment. However, they do serve the purpose of offering an overall impression of what is occurring. While it has already been mentioned that Bush finished his second term with polling in the twentieth percentile, it is valuable to trace the consistent downward trajectory of this measurement a little more closely.

Official results of the election of November 2004 show President Bush being reelected with 50.7% of the popular vote over challenger John Kerry with 48.2%.¹³⁵ If we track the trend of his overall job performance polls from that time forward we see that there was a brief moment at the beginning of his second term in January 2005 that he polled in the low 50's.¹³⁶ Then in October of 2005 Bush dropped below 40% in the polls and while it was signaled at that time as "a terrible set of numbers" and widely reported, there was never any recovery from that low approval which only portended even lower ratings.¹³⁷ On the whole, Bush spent his entire second term below the midway mark in job approval polls and, as noted, finished his mandate with historically dismal numbers. While these poll numbers tend to reflect the concept of legitimacy as described by Weber (i.e. a belief found deep in the recesses of the minds of numerous individuals), this will not be the only indicator used in this work to illustrate the legitimacy deficit suffered by the administration.

¹³⁵ *Rasmussen Reports*, 'Presidential Tracking Poll: Bush-Kerry', (1 Jan 2005) available at: <http://www.rasmussenreports.com/public_content/politics/presidential_tracking_poll_bush_kerry> (last visited 15 June 2007).

¹³⁶ *Polling Report.com*, 'Bush: Job Rating' and 'PRESIDENT BUSH: Overall Job Rating', available at: <<http://www.pollingreport.com/BushJob1.htm>> (last visited 1 June 2011); and President Bush Job Approval, *RealClearPolitics.com*, available at: <http://www.realclearpolitics.com/polls/archive/?poll_id=19#polls> (last visited 1 June 2011).

¹³⁷ See e.g. MURRAY, M., 'Bush Approval Dips Below 40 Percent', *NBC News*, (12 Oct 2005) available at: <<http://www.msnbc.msn.com/id/9672058/>> (last visited 20 Nov 2010).

Also worthy of note is the moment at which Republicans began to clearly create a political distance between themselves and the president. This started when both Houses of Congress voted overwhelmingly for the “McCain Amendment” to be incorporated into the Detainee Treatment Act of 2005. The vote was 90-9 in the Senate and 308-122 in a nonbinding vote in the House.¹³⁸ The bill legislated an end to “cruel, inhuman and degrading treatment” by the Department of Defense, which was a language clearly taken from international legal treaties meant to eliminate less severe forms of ill-treatment. Once again, this demonstrates a direct impact of international law on domestic law-making.

During this same period, Republicans continued to create political space between themselves and the president as there were “revolts” caused by the Harriet Miers’ appointment to the Supreme Court (which was later withdrawn),¹³⁹ and the uproar from Republicans over the perception that the administration was compromising security by authorizing the sale of national ports to a Dubai-owned company.¹⁴⁰ Regardless of the available explanations, these events marked the beginning of a political gap opening within the Republican Party over issues of legality and security.

From the other side of the political party system, there were also noteworthy public expressions from former statesmen that typified the expanding uneasiness with the administration and its ‘war on terror’. In May of 2007, the book *The Assault on Reason* was released by the former Democratic Vice-President Al Gore. In it, he blasts the sitting president for numerous transgressions of legality boldly accusing, “President Bush has repeatedly violated the law for six years”.¹⁴¹ On top of this, Gore repeatedly warns against the accumulation and abuse of power, speaking specifically to the manner in which the administration dismissed the Geneva Conventions,¹⁴² the launching of a war against Iraq stating, “the current White House has engaged in an unprecedented and sustained campaign of mass deception”,¹⁴³ and noting the “profound shocks to our nation’s conscience regarding torture”.¹⁴⁴ The same month, Former Democratic President Jimmy Carter was widely quoted

¹³⁸ BABINGTON, C., and MURRAY, S., ‘Senate Supports Interrogation Limits: 90-9 Vote on the Treatment of Detainees Is a Bipartisan Rebuff of the White House’ *The Washington Post* (6 Oct 2005) Page A01; and SCHMITT, E., ‘House Backs McCain on Detainees, Defying Bush’ *The New York Times* (15 Dec 2005).

¹³⁹ FLETCHER, M., and BABINGTON, C., ‘Miers, Under Fire From Right, Withdrawn as Court Nominee’ *The Washington Post* (28 Oct 2005) Page A01.

¹⁴⁰ BUNCOMBE, A., ‘Bush Faces Rebellion in Own Party Over Ports’ *Independent, The (London)* (9 March 2006) available at: <http://findarticles.com/p/articles/mi_qn4158/is_20060309/ai_n16161923> (last visited 15 June 2007).

¹⁴¹ GORE, A., *The Assault on Reason* (New York, The Penguin Press, 2007) at 221.

¹⁴² *Idem*, at 59-65, 157-9 and 174-177.

¹⁴³ *Ibid.*, at 103, and generally at 103-24.

¹⁴⁴ *Ibid.*, at 150, and generally at 150-8.

as saying, “I think as far as the adverse impact on the nation around the world, this administration has been the worst in history.”¹⁴⁵ There is no doubt that one could dismiss these extremely harsh public assessments as nothing other than partisan attacks. However, it should be remembered that these two former politicians are acutely aware of the sentiments of the community after spending so much time in the public sphere at the highest level. Thus it is more likely that they took serious precaution to be sure they were not stepping out on a limb by themselves.

Finally, we can turn to the elections of November 2006 to acquire evidence of a visible diminution of faith in authority as opposition seeped from the political left and began to include the center and the political right. In these mid-term elections Democrats won a total of thirty House seats and six Senate seats to take control of both chambers. It was reported in various media outlets that the decisive factor in this obvious shift was the president and the issue of Iraq that produced the defeat for the Republicans.¹⁴⁶ This detail is perhaps most interesting because President Bush himself was not on the ballot, yet 40% of voters polled said they were casting a ballot against him.¹⁴⁷ Also of interest is the fact that while the Democrats reaped the benefits that had at least partially grown out of the executive’s ‘war on terror’, the Congress controlled by the Democrats held only a 23% approval rating in mid-2007.¹⁴⁸ Thus it would seem as though Democrats joined the president in this poll crater since both of the political branches of government suffered from dismal job approval ratings. The party system in a democratic government certainly makes the reading of legitimacy all the more difficult to decipher. Nonetheless, what can be discerned is that, from a political perspective, the government as a whole was taking a hit as counterterrorism policies became more fully understood and discussed in the public sphere.

3) Dissent from Civil Society

There were indeed a number of occurrences emanating from civil society that demonstrated a palpable discontent and restlessness. For example, there were debates in the mainstream press

¹⁴⁵ See e.g. NICHOLS, J., ‘Who’s Afraid of Jimmy Carter? George Bush’ *The Nation* (20 May 2007); and FoxNews.com, Associated Press ‘Former President Carter Blasts Bush’s Administration as ‘Worst in History’ (19 May 2007) available at: <<http://www.foxnews.com/story/0,2933,273937,00.html>> (last visited 22 Nov 2010).

¹⁴⁶ CNN.com, ‘Exit Polls: Bush, Iraq Key to Outcome’ (8 Nov 2006) available at: <http://www.cnn.com/2006/POLITICS/11/08/election.why/index.html> (last visited 22 Nov 2010).

¹⁴⁷ NAGOURNEY, A., ‘Democrats Seize Control of House; Senate Hangs on Virginia and Montana,’ *The New York Times* (8 Nov 2006) Page A01.

¹⁴⁸ “Bush job rating hits record low in NBC/WSJ poll”, *Swissinfo.com*, June 14, 2007, http://www.swissinfo.org/eng/international/ticker/detail/Bush_job_rating_hits_record_low_in_NBC_WSJ_poll.html?siteSect=143&sid=7924210&cKey=1181785940000 (last visited 15 June 2007).

over whether President Bush was the worst president in U.S. history.¹⁴⁹ The highest grossing political documentary of all time, bringing in an unprecedented \$119 million inside the United States (outperforming the second place film by more than four times), was the Michael Moore film *Fahrenheit 9/11*.¹⁵⁰ In addition there were raucous public protests¹⁵¹ and calls for resignations¹⁵² when officials from the administration appeared at public events. In addition, there were open calls for impeachment beginning as early as February 2006, as one article took notice of a largely ignored resolution introduced in the 'People's House' of Congress. Representative John Conyers at the end of the previous year appealed for the setting up of, "a select committee to investigate the Administration's intent to go to war before congressional authorization, manipulation of pre-war intelligence, encouraging and countenancing torture, retaliating against critics, and to make recommendations regarding grounds for possible impeachment".¹⁵³ This call for impeachment endured and grew and in early 2008 human rights lawyer Scott Horton wrote,

[p]olling now shows that a large majority of Americans believe that President Bush and Vice President Cheney have committed serious transgressions against the Constitution which would merit consideration of the impeachment process.

¹⁴⁹ NEUHARTH, A., (founder of USA Today newspaper) 'Mea Culpa to Bush on President's Day : Bush Is Worst President of All-Time' USA Today (16 Feb 2007), Page 15A, "A year ago I criticized Hillary Clinton for saying 'this (Bush) administration will go down in history as one of the worst.' 'She's wrong,' I wrote. Then I rated these five presidents, in this order, as the worst: Andrew Jackson, James Buchanan, Ulysses Grant, Hoover and Richard Nixon. 'It's very unlikely Bush can crack that list,' I added. I was wrong. This is my mea culpa. Not only has Bush cracked that list, but he is planted firmly at the top."; WILENTZ, S., 'The Worst President in History?: One of America's leading historians assesses George W. Bush' *Rolling Stone Magazine* (19 April 2006), "Many historians are now wondering whether Bush, in fact, will be remembered as the very worst president in all of American history".

¹⁵⁰ Box Office Mojo, 'Documentary – Political, Total Grosses, 1982-Present', available at: <<http://www.boxofficemojo.com/genres/chart/?id=politicaldoc.htm>>.

¹⁵¹ DWYER, M., 'Former Bush Aide Card Is Booed at UMass' *The Boston Globe* (26 May 2007), "Hundreds of students and faculty erupted in a chorus of boos yesterday when Andrew Card, President Bush's former chief of staff, rose to accept an honorary doctorate in public service at the University of Massachusetts. The protesters blamed Card in part for the Iraq war. The boos and catcalls, including those from faculty who stood on stage with Card, drowned out provost Charlena Seymour's remarks as she awarded the degree. Protesters say Card lied to the American people in the early days of the Iraq war and should not have been honored at the graduate student commencement." Video of the loud and raucous protest in the middle of the ceremony is available at: <<http://www.sott.net/articles/show/133153-Former+Bush+Aide+Card+Is+Booed+at+UMass,+Media+Spins>>; HUMMEL, D., 'BYU Campus Protests Dick Cheney Speech' The Associated Press (2 April 2007); ZHOU, K., "Former Classmates Criticize Gonzales : '82 School alums publish open letter in Washington Post." *The Harvard Crimson* (16 May 2007).

¹⁵² ALMOND, S., 'Condoleezza Rice at Boston College? I Quit' *The Boston Globe* (12 May 2006) available at: <http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/05/12/condoleezza_rice_at_boston_college_i_quit/>; and see Fox News, 'Boston College Protest' *Hannity and Colmes* (23 May 2006), "PROF. STEVE ALMOND, RESIGNED TO PROTEST RICE: I think actually morality plays a role. I just feel public officials shouldn't lie to us, especially about matters that are as important as war." Available at: <<http://www.foxnews.com/story/0,2933,196645,00.html>>.

¹⁵³ H. Res. 635 cited in LAPHAM, L., 'The Case for Impeachment: Why We Can No Longer Afford George W. Bush' (March 2006) *Harper's Magazine*. Other news outlets took notice of this article as talk of the idea seeped into the mainstream, see e.g. CARLSON, P., 'Lewis Lapham Lights Up' *The Washington Post* (21 March 2006).

Impeaching President Bush and Vice President Cheney for their attempts to hijack the Constitution would make a clear statement about abuse of power.¹⁵⁴

The most significant action pursuing this course was the introduction of 35 articles of impeachment in the House of Representatives by Dennis Kucinich and co-sponsor Robert Wexler and was eventually signed on to by 10 other Representatives.¹⁵⁵ These are surely paltry numbers demonstrating an uphill political battle for following through on impeachment, but nonetheless demonstrate a weakening of legitimacy. At the same time, it is important to recognize that there have been a total of 12 presidents who have had articles of impeachment introduced against them.¹⁵⁶

Further demonstrating a mounting national sentiment of discontent and frustration with the exercise of power by the administration were the actions by the American Bar Association President (ABA), the largest voluntary professional association in the world. The president of the ABA appointed a “Task Force on Presidential Signing Statements and the Separation of Powers Doctrine to examine the constitutional and legal issues raised by the practice of presidents of the United States of attaching legal interpretations to federal legislation they sign”.¹⁵⁷ As will be discussed in more detail in Chapter 6,¹⁵⁸ the matter of ‘signing statements’ first became most acutely identified as an issue of presidential power overreach in relation to the statement attached by President Bush to the “McCain Amendment” outlawing the less severe forms ill-treatment.¹⁵⁹ Most importantly, the president’s statement could be understood as an interpretation of the new law as leaving his commander-in-chief powers unfettered since this administration saw its wartime authority as unassailable in times of armed conflict.¹⁶⁰ In attaching this statement the intention was to direct his administration on how the new legislation was to be interpreted for implementation,

¹⁵⁴ HORTON, S., ‘The Case for Impeachment’ (Feb 2008) *Harper’s Magazine*.

¹⁵⁵ H. Res. 1258, 110th Cong.

¹⁵⁶ Only the 17th and 42nd presidents of the United States, Andrew Johnson and Bill Clinton, have actually been impeached by the House of Representatives, although neither one was removed from office since the Senate did not convict them on the charges. See TURLEY, J., ‘Senate Trials and Factional Disputes: Impeachment as a Madisonian Device’ (Oct 1999) 49,1 *Duke Law Journal* 1, at 84-91 and 96-108.

¹⁵⁷ American Bar Association, *Report: Task Force on Presidential Signing Statements and the Separation of Powers Doctrine*, (7-8 Aug 2006), at 7-14, available at: <<http://www.abanet.org/op/signingstatements/>>.

¹⁵⁸ See Chapter 6, Section II(4).

¹⁵⁹ SAVAGE, C., ‘Bush Could Bypass New Torture Ban’, *The Boston Globe*, (4 Jan 2006) available at : <http://www.boston.com/news/nation/articles/2006/01/04/bush_could_bypass_new_torture_ban/?page=2>; and SAVAGE, C., ‘Bush Challenges Hundreds of Laws’ *The Boston Globe*, (20 April 2006) available at : <http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/>.

¹⁶⁰ See Memorandum from John Yoo, Deputy Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel, to Timothy Flanigan, Deputy Counsel to the President, (25 Sept 2001), reprinted in *The Torture Papers*, at 24.

as well as to attempt to influence any future court that might take up this law for review in a judicial process.

As a clear indication of the gravity with which the distinguished authors of this report assessed this issue, the first recommendation asserted that the Task Force opposes,

as contrary to the rule of law and our constitutional system of separation of powers, the issuance of presidential signing statements that claim the authority or state the intention to disregard or decline to enforce all or part of a law the President has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress.¹⁶¹

The primary focus of this report, and then the legislation recommended by the ABA, was to highlight the very troublesome disturbance in the separation of powers between the three branches of government when the executive ascribed the power of interpretation of law to itself through the use of signing statements. If the president has serious constitutional concerns with a law passed by Congress and placed on her desk, she does indeed have the option of a veto. It was also advocated that Congress pass further legislation¹⁶² to create a less cumbersome path to bring a case before the courts so that disputes over the constitutionality of laws can be resolved by the third branch through its traditional role of interpretation that has been established since *Marbury v. Madison*.¹⁶³ Both of these options were strongly and publicly advocated for by this professional association.

Due to the fact that President Bush was the leader of the Republican Party it is significant that he also lost support from this side of the political spectrum.¹⁶⁴ In March 2007, a cooperative effort of prominent conservative thinkers launched a campaign to restore checks and balances and civil liberties protections under assault by the Executive Branch, arguing that since 9/11, the President had acquired too much power.¹⁶⁵ The conservative group gave a

¹⁶¹ American Bar Association, *Report: Task Force on Presidential Signing Statements...*, note 157 above, at 1.

¹⁶² MATHIS, K., American Bar Association President, 'Potential Misuse of Presidential Signing Statements Poses Threat to Checks and Balances' (Jan. 31, 2007) Press Release, the ABA "urged Congress to adopt legislation creating procedures for judicial review of presidential signing statements that claim authority or indicate intent to disregard or decline to enforce the law being signed", available at : http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=69.

¹⁶³ 5 U.S. (1 Cranch) 137 (1803).

¹⁶⁴ CONNELLY, 'Poll Shows Bush Losing Support of Republicans' *The New York Times* (2 March 2007).

¹⁶⁵ See 'Conservatives Launch Effort to Rollback Presidential Abuse of Power', *Liberty Coalition*, (21 March 2007), available at: <<http://www.libertycoalition.net/conservatives-launch-effort-to-rollback-presidential-abuse-of-power>> (last visited 15 June 2007); or <<http://www.libertycoalition.net/node/596>> (last visited 24 Nov 2010). As the Liberty Coalition removed this content from their own website, one can now find substantive details of this effort in an article written from an interview with conservative scholar Bruce Fein, FISHER, W., 'The Right Seeks to Reign in Presidential Power' *Truthout* (4 April 2007) available at: <<http://www.truth-out.org/article/the-right-seeks-rein-in-presidential-power>> (last visited 24 Nov 2010); and HENNEBERGER, M., 'Prominent Conservatives Launch Effort to Restore "Civil Liberties Under Assault by Executive Branch"' *The Huffington Post* (20 March 2007) available at: <http://www.huffingtonpost.com/melinda-henneberger/prominent-conservatives-l_b_43859.html> (last visited 24 March 2010).

press conference at the National Press Club and was led by former Georgia Congressman Bob Barr, David Keene of the American Conservative Union, writer and conservative direct mail pioneer Richard Viguerie, and constitutional scholar Bruce Fein who served in the Reagan administration as associate deputy attorney general. These well respected Republicans introduced a campaign under the heading, “Conservatives Launch Effort to Rollback Presidential Abuse of Power”. The specific agenda was compiled in a ten point list of needed legislation, all of which directly or indirectly addressed policies dealing with the “war on terror”, in an attempt to affect the balance in the government that they believed to have gone awry. It was felt by these conservatives that it is necessary to restore the Constitution’s checks and balances because the reaction to 9/11 had led to an accumulation of power in the executive that was felt to be unhealthy for the democracy. In a statement outlining the legislative package proposed by the group, it said that Congress should act to,

restore congressional oversight and habeas corpus, end torture and extraordinary rendition, narrow the President's authority to designate 'enemy combatants,' prevent unconstitutional wiretaps, email and mail openings, protect journalists from prosecution under the Espionage Act, and more.¹⁶⁶

Finally, it has been largely recognized that a critical base of support for President Bush came from the evangelical community. This can at least be partially evidenced by the fact in the run up to the war in Iraq it was reported that Bush received strong support from evangelical Christians who felt the war was justified.¹⁶⁷ Yet, in March of 2007, the board of directors of the National Association of Evangelicals, representing some 30 million U.S. citizens in about 45,000 churches, endorsed a landmark document, “An Evangelical Declaration Against Torture: Protecting Human Rights in an Age of Terror”.¹⁶⁸ This is a very interesting mélange of ideas with discussions of both the Christian commitment to the sanctity of human life through specific references to the Bible along with detailed citations of pertinent international law on torture. Cited in the flow of news reports that emerged after its release, the declaration boldly states that, “[t]he boundaries of what is legally and morally permissible in war have been crossed in the current ‘war on terror’”.¹⁶⁹ While the document

¹⁶⁶ *Idem.*, HENNEBERGER, ‘Prominent Conservatives Launch Effort...’.

¹⁶⁷ See EDWARDS, B., ‘Evangelicals for War - Silent Evangelical Support Of Bush's Proposed War Against Iraq’ *National Public Radio, Morning Edition* (26 Feb 2003) <<http://www.npr.org/programs/morning/transcripts/2003/feb/030226.hagerty.html>> (last visited 24 Nov 2010).

¹⁶⁸ ‘An Evangelical Declaration Against Torture: Protecting Human Rights in an Age of Terror’ (Summer 2007) 5,2,01 *The Review of Faith & International Affairs* 1931-7743, at 41-58.

¹⁶⁹ See e.g. PULLIAM, S., ‘NAE [National Association of Evangelicals] Endorses Statement Against Torture: Declaration calls for churches and individuals to act on "non-negotiable" issue.’ *Christianity Today: A Magazine of Evangelical Conviction* (16 March 2007) available at: <<http://www.christianitytoday.com/ct/2007/marchweb-only/111-54.0.html>> (last visited 24 Nov 2010); ‘NAE Leaders Advance Broad Agenda with Landmark

was said to be a moral and theological statement, the fact that the scholars also chose to reach for international law in addition to the Bible to bolster their arguments, is certainly noteworthy in the context of this work.

4) Military Dissent

There was also dissent and resistance that can be discerned within the military,¹⁷⁰ as those entrusted with the security of the nation found good reason to oppose different elements of the ‘war on terror’. At certain times, there were even actions that could fall into the category of disobedience, which would point beyond a legitimacy deficit and towards delegitimation. However, due to the top-down nature and structure of the military, dissent is often quite difficult for someone outside of the institution, and even at times within it, to recognize. Therefore it was often retired military officers who began to voice to the public wider institutional concerns about the missions the military was carrying out. One expression of this military opposition can be found in a public radio addresses by retired General William Odom calling the president absent without leave, or “AWOL”, and condemning his handling of the war in Iraq because it is “squandering its [U.S.] influence, money, and blood, and facilitating the gains of our enemies”.¹⁷¹

Additionally, there was a television ad campaign launched at the cost of a half million dollars by VoteVets.org, an act that has been called “an act of defiance perhaps not seen since President Truman fired Gen. Douglas MacArthur”.¹⁷² One of the most pointed commercials featured retired Major General John Batiste, a former commanding general of the first infantry division in Iraq. In the publicly made announcement the military officer bluntly stated, in response to a clip of President Bush claiming that he will always listen to his generals on the ground,

Document on Human Rights and Torture’, *National Association of Evangelicals*, (11 March 2007), <<http://www.nae.net/idex.cfm?FUSEACTION=nae.benefits>> (last visited 15 June 2007); ‘An Evangelical Declaration Against Torture’, *Evangelicals for Human Rights*, (11 March 2007) available at: <http://www.evangelicalsforhumanrights.org/pb/wp_abaf1d69/wp_abaf1d69.html?0.060027795951972496> (last visited 15 June 2007).

¹⁷⁰ See e.g. RICKS, T., ‘Army Officer Accuses Generals of “Intellectual and Moral Failures”’ *The Washington Post* (27 April 2007); HODIERNE, R., ‘Poll: More Troops Unhappy with Bush’s Course in Iraq’ *Army Times* (Jan 2007) available at: <<http://www.armytimes.com/news/2006/12/tns.troopspol0611229/>>; and ‘GIs Petition Congress to End Iraq War’ *CBS News* (25 February 2007) <http://cbs11tv.com/topstories/topstories_story_056230805.html>.

¹⁷¹ Lt. Gen. William Odom (Ret.), ‘Bush Has Gone AWOL’, Democratic Radio Address, (28 April 2007).

¹⁷² TAPPER, J., ‘Political Punch: General Discontent’, *ABC News* (9 May 2007) available at: <http://blogs.abcnews.com/politicalpunch/2007/05/general_discont.html>.

Mr. President, you did not listen. You continue to pursue a failed strategy that is breaking our great Army and Marine Corps. I left the Army in protest in order to speak out. Mr. President, you have placed our nation in peril.¹⁷³

A military officer openly and publicly expressing his view that the Commander in Chief has placed “our nation in peril” is extremely strong language from a convincing source that is surely worthy of note.

In the same vein, Major General Paul Eaton, who also served in Iraq, released a statement after the president’s veto of a military funding bill in May of 2007 saying, “[t]his administration and the previously Republican controlled legislature have been the most caustic agents against America’s Armed Forces in memory.”¹⁷⁴

In that same spring of 2007, the Washington Post published an opinion piece in its editorial pages by Charles C. Krulak, a commandant of the Marine Corps from 1995 to 1999, and Joseph P. Hoar, a commander in chief of U.S. Central Command from 1991 to 1994.¹⁷⁵ This op-ed entitled *It’s Our Cage Too: Torture Betrays Us and Breeds New Enemies*, spoke to the real dangers for U.S. armed forces when the civilian commanders authorize the use of ill-treatment for interrogation purposes. The authors of the piece clearly acknowledged that their experience in combat has taught them that fear can indeed wreak havoc if left unchecked, and they insisted that the politicians of the nation had an obligation to “to lead the country away from the grip of fear, not into its grasp”.¹⁷⁶ Also, they made specific reference to a policy that was slowly seeping into the consciousness of U.S. citizens that there was a “secret CIA interrogation program in which torture techniques euphemistically called ‘waterboarding,’ ‘sensory deprivation,’ ‘sleep deprivation’ and ‘stress positions’ - conduct we used to call war crimes - were used”.¹⁷⁷ Coming from retired military, this certainly gave credibility to the spreading accusations of a practice that citizens were hesitant to accept as having been carried out on behalf of their own security. This is not to mention the fact that these former military officers explicitly argued against the efficacy of employing ill-treatment for intelligence gathering under any circumstances.¹⁷⁸

¹⁷³ Ibid.

¹⁷⁴ ‘Iraq Generals to President: You’ve Failed Us’, *The National Security Network*, (1 May 2007) available at: <<http://nsnetwork.org/node/143>> (last visited 15 June 2007).

¹⁷⁵ KRULAK, C., and HOAR, J., ‘It’s Our Cage Too: Torture Betrays Us and Breeds New Enemies’, *The Washington Post* (17 May 2007) available at: <<http://www.washingtonpost.com/wp-dyn/content/article/2007/05/16/AR2007051602395.html?hpid=opinionsbox1>>.

¹⁷⁶ *Idem*.

¹⁷⁷ Ibid.

¹⁷⁸ While the authors of this article argue that torture is ineffective because it helps build the will and resistance of the enemy, not to mention their numbers, our tack in this work will be slightly different. While this approach rightly addresses the undermining of the strategic goals of nation building abroad, our approach here is that

One published newspaper article traces a bit of the history of military dissent in the United States during wartime, and what he tracked happening in 2007, and called it “The Revolt of the Generals”.¹⁷⁹ The journalist writes,

[i]n op-ed pieces, interviews and TV ads, more than 20 retired U.S. generals have broken ranks with the culture of salute and keep it in the family. Instead, they are criticizing the commander in chief and other top civilian leaders who led the nation into what the generals believe is a misbegotten and tragic war.¹⁸⁰

The piece goes on to explain that it is rare for members of the military to speak out at all, and that retired military officer Andrew Bacevich, now a professor of history and international relations at Boston University, has said that some of the officers during the Vietnam war regret not having spoken up at that time. Bacevich also suggested that this was perhaps part of the reason that there were more U.S. military officers willing to step up when they believed grave mistakes were being made. Nevertheless, regardless of the historical precedents and contemporary reasoning, it was surely significant to the legitimacy of the authority in the United States that members of the armed forces stood up and publicly criticized the administration.

In 2008, there was an official report released by the non-governmental organization Physicians for Human Rights entitled, *Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact*. Of direct consequence here is the fact that the preface for the report was written by the retired Major General Antonio Taguba, who had particularly intimate knowledge of the U.S. interrogation policies and their impact because he led the U.S. Army’s official investigation into the Abu Ghraib prisoner abuse scandal and testified before Congress with his findings in May of 2004. This military officer introduces the report saying that it is to detail the largely untold human story of what happens, “when the Commander-in-Chief and those under him authorized a systematic regime of torture”.¹⁸¹ He goes on to explain,

[i]n order for these individuals to suffer the wanton cruelty to which they were subjected, a government policy was promulgated to the field whereby the Geneva Conventions and the Uniform Code of Military Justice were disregarded. The UN Convention Against Torture was indiscriminately ignored. And the healing

torture is tactically ineffective in the long run because it must always be carried out on *suspicion* and therefore will lead to torture of the innocent and ill-informed. In essence, torturing those who do not have the intelligence you seek can never be efficacious. For a full discussion see Chapter 6.

¹⁷⁹ SAUER, M., ‘Generals Opposing Iraq War Break With Military Tradition’ *San Diego Union Tribune* (23 Sept 2007) available at: <<http://legacy.signonsandiego.com/news/world/iraq/20070923-9999-In23generals.html>> (last visited 24 Nov 2010).

¹⁸⁰ *Idem*.

¹⁸¹ TAGUBA, Maj. Gen. A. (Ret.), ‘Preface to Broken Laws, Broken Lives’, *Report by Physicians for Human Rights* (June 2008) available at: <http://brokenlives.info/?page_id=69>.

professions, including physicians and psychologists, became complicit in the willful infliction of harm against those the Hippocratic Oath demands they protect.

After years of disclosures by government investigations, media accounts, and reports from human rights organizations, there is no longer any doubt as to whether the current administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account.¹⁸²

Such a bold and unwavering accusation, with direct links to the international laws that were defied, reflected Major General Taguba's own loss of confidence in his former Commander in Chief. Importantly, he had become willing to express his stark dissent openly and publicly. This harsh accusation of criminal conduct from a man who had been called on to personally investigate the evidence of such war crimes also surely caused those who read the one page statement or heard reports on it to reflect on and/or question the legitimacy of the authority in the 'war on terror'.

Although it is enormously difficult to definitively prove an act of disobedience taking place within the military chain of command since direct orders are not usually public knowledge, perhaps one of the most intriguing examples of such conduct are the statements by Major General Peter Pace, the Joint Chiefs of Staff in early 2007. On February 11th of that year a briefing was given by anonymous U.S. military officials in Baghdad alleging that the highest level of the Iranian government had directed the use of weapons that had killed U.S. troops in Iraq. Shortly afterwards, it was asked directly if the White House was confident that the weaponry was coming on the approval of the Iranian government, and spokesman Tony Snow confirmed this to be the administration's accusation.¹⁸³ The following day in press conferences in Australia and Indonesia, on the other side of the world from Washington D.C., General Pace "demurred" and said that he had no information indicating Iran's government was directing the supply of lethal weapons to Shiite insurgent groups in Iraq.¹⁸⁴ It would seem highly unlikely that these statements directly contradicting an earlier military briefing to the press, which had already been delayed at least once so that officials would not "overstate"

¹⁸² *Idem.*

¹⁸³ Associated Press, 'U.S. general: No evidence Iran is arming Iraqis: Pace contradicts claims by other U.S. military, administration officials', *MSNBC* (13 February 2007) available at: <http://www.msnbc.msn.com/id/17129144/ns/world_news-mideast_n_africa> (last visited 24 Nov 2010).

¹⁸⁴ DEYOUNG, K., 'Pace Demurs on Accusation of Iran: General Says He Knows Nothing Tying Leaders to Arms in Iraq', *The Washington Post* (13 February 2007) available at: <<http://www.washingtonpost.com/wp-dyn/content/article/2007/02/12/AR2007021201537.html>> (last visited 24 Nov 2010).

what they knew,¹⁸⁵ were authorized by civilian leadership above him. Interestingly enough, it was only months later that General Pace was replaced in a “surprise decision”.¹⁸⁶

After this ostensible act of disobedience, it was reported by the Sunday Times of London that inside the Pentagon there was an internal struggle over whether orders would actually be followed if the military was directed to attack Iran.¹⁸⁷ Later the Inter Press Service reported that efforts by the highest levels in the White House to cast Iran as responsible for attacks on U.S. troops in Afghanistan seemed to have backfired “when Defense Secretary Robert Gates and the commander of NATO forces in Afghanistan, [...] issued unusually strong denials”.¹⁸⁸ While all of the exact details of what went on behind closed doors cannot be confirmed, there is no doubt that General Pace’s original denial of what was coming out of the White House and other military briefings was palpably incongruent. In the context of the other military, civilian, judicial and political dissent, this certainly leads one to believe that this apparent lack of obedience to command was neither accidental nor inconsequential.

5) Causality

Throughout the next three chapters, it will be shown that not only did the U.S. government cross lines of international law, but that the portions of these legal lines that were transgressed also held significance in the realms of morality and efficacy. Consequently, our thesis is that there was indeed a cost at the domestic level, even if there was no clear sanction by the international community. The violated norms were so fundamental that a portion of the U.S. population worthy of note had real doubts about their own tacit compliance with the government carrying out such policies, and thus a legitimacy deficit was suffered. As a result, this weakness made it more difficult for the governing system to operate smoothly. Although the norms of international law that were violated in the ‘war on terror’ did not carry an overt and clear price on the global level, it is our hypothesis that the legitimacy of the domestic regime was diminished by these policy decisions.

At one point in his book on legitimacy in the international system Thomas Franck discussed the possible costs paid by a regime that violates its domestic law. He explained that,

¹⁸⁵ *Ibid.*

¹⁸⁶ “Outgoing Joint Chiefs of Staff Chairman Pace Refused to Voluntarily Retire”, *FoxNews.com*, 15 June 2007, <<http://www.foxnews.com/story/0,2933,282995,00.html>> (last visited 24 Nov 2010).

¹⁸⁷ Michael Smith and Sarah Baxter, ‘US Generals “Will Quit” If Bush Orders Iran Attack’, *Sunday Times Online* (London), (25 Feb 2007) <<http://www.timesonline.co.uk/tol/news/world/iraq/article1434540.ece>> (last visited 24 Nov 2010).

¹⁸⁸ PORTER, G., ‘Cheney’s Iran-Arms-to-Taliban Gambit Rebuffed’, *Inter Press Service* (11 June 2007) available at: <<http://ipsnews.net/news.asp?idnews=38123>> (last visited 24 Nov 2010).

[a] government which refuses to obey its own domestic law is subject to a broad range of remedies: impeachment, writs of mandamus, Congressional hearings, remedial legislation, defeat at the polls, or revolt in the streets. Nothing comparable comes into play at the level of the global system when a state disobeys international 'law'.¹⁸⁹

What Franck explains here can be understood as the legitimacy deficit of a regime that can come about by not abiding by one's own domestic law. It is hypothesized here that the legitimacy deficit described above is one that is, at least partially, rooted in violations of international law. It would be absurd to assert that at this point in history all transgressions of international treaties lead to such a result. Yet what is being described in this work is that, when we look at the circumstance of the 'war on terror', and specifically laws dealing with detention, war-making and interrogation, we see that certain norms found in international law have begun to, if only incrementally, have comparable domestic consequences. Thus it is posited that the failure to adhere to some of the most basic of norms found in international law can carry similar penalties to the government's legitimacy at home.

This would appear to be one of the more interesting consequences of the grand proliferation of international law that has occurred since the end of World War II. The explicit commitment by a government to adhere to certain constraints, and the wide dissemination of them to the common citizens of states who are a party to the pertinent treaties, has meant that Weber's "*legitimate use of physical force*" has been extending beyond borders. There are times and instances in which this idea of what is 'legitimate' has been given more definite shape and created further constraint because a portion of society (certainly enough to be considered relevant) judge their governments by such standards.

This author realizes that the presentation of our work in this manner raises, and perhaps even dodges, questions that lead to some of the most difficult problems of causality. Even if this author were competent enough to resolve such complex questions, this work is not the place to do so. As such, it should be recognized that this is not a work of teleology, if only partially because it is not believed that final causes always exist or are provable in human relations. Rather, the intention here is not to provide dispositive proof of how international law has penetrated the minds of sufficient numbers of U.S. citizens for it to have had an effect upon its judgments of legitimacy. This is a work of political philosophy and international law that will instead focus on two other primary goals. The first has been to

¹⁸⁹ FRANCK, T., *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990) at 31.

present the concept of legitimacy and its three primary components of *legality*, *morality* and *efficacy* as a target of terrorism.

Next, the intention is to present how the three issues of detention, war-making and interrogation, as carried out in the ‘war on terror’, flesh out in international law using these three lenses. There is no doubt that the detail in which this will be done is well beyond the understanding of the common citizens’ comprehension of international law. However, in doing so, we will see that there was indeed overlap on these particular issues seen through the lenses of *legality*, *morality* and *efficacy*. This is particularly because at each turn it was argued by the U.S. administration that there was no applicable law, no constraint on their action. Therefore, the intention is to rest our analysis on what is hoped to be strength of reasoning. Our hypothesis is that this overlap, and the fact that these issues were amplified by the U.S. Supreme Court dealing with detention without judicial review, the U.N. Security Council dealing with war-making powers and graphic photos of detainee abuse and the disclosure of the ‘torture memos’ raising issues of interrogation and torture, led to the legitimacy deficit seen during the final years of the Bush mandate.

Another issue that arises when speaking to the question of causality is whether this work is meant to address the way things actually are, or the way things should be. This is of course an important question that can be traced back at least as far back as the 18th century through the work of David Hume. This Scottish philosopher wrote about the significant and often overlooked ‘is vs. ought’ problem in *A Treatise of Human Nature*.¹⁹⁰ In 1739 he wrote, “[i]n every system of morality, [...] all of a sudden I am surprised to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*”. Although our work is not solely dealing with the issue of morality, it is necessary to treat the question of whether this text is meant to be descriptive or normative.

There is no doubt that a great portion of this work is based on rigorous research and presented as accurately as possible. Of course, this is something that can be attested to by the citations of and referencing to all measure of documents ranging from U.S. Supreme Court and lower court decisions, to U.S. Congressional Reports, to international treaties, to UN Security Council and General Assembly Resolutions, to a variety of United Nations documents, to Non-Governmental Reports to newspaper, television, radio and online reports,

¹⁹⁰ HUME, D., *A Treatise of Human Nature*, Book III, Part I, Section I, (Charleston, BiblioBazaar, 2006) at 257.

to an abundance of academic articles and books. Therefore the starting point of this work is undoubtedly descriptive.

At the very same time, this next to irresolvable question of definitive causality in human relations certainly makes it problematic to assert that this work is only of a descriptive nature. In other words, the hypothesis that it is the overlapping spheres of *legality*, *morality* and *efficacy* that construct the legitimacy of an authority, and that it is in fact being targeted by terrorists, runs into the inevitable problem that no scientific testing has ever been created to examine this question. The problem produced by the complexity of human relations is very well delineated by Guglielmo Ferrero in his own work on legitimacy. He explained,

[i]n a universe which is governed by the law of causality, the human mind is alone distinguished by its freedom, a word used somewhat equivocally by certain philosophical schools. Every piece of iron exposed to heat reacts in the same way. It expands, turns red, then white, softens, and finally liquefies. The forecast is unmistakable, and all human labor is based on the security afforded by countless similar forecasts. The reactions of the human mind to physical or mental forces acting upon it, are on the contrary variable and far more unpredictable. One man will react quite differently from another to the same circumstances; the same man will not necessarily react tomorrow as he reacts today.¹⁹¹

Of all the more consequence is that in this particular case we are speaking of a great abundance of individuals interacting with each other, and each one with their own free will. It is then surely apparent that collective reactions will seem all the more capricious and difficult to anticipate with absolute certainty. As Ferrero has keenly explained,

This is why no science of the mind and of history analogous to the science of matter and nature has been formulated; one is even forced to consider whether the word 'science' can be applied in the same sense to the physical and intellectual life of men, to the chemistry and history of societies.¹⁹²

Due to the inherent and insurmountable hurdle of confirming causality in the ebb and flow of legitimacy requires that this work is best understood as normative. Simply stated, we will investigate the *legality*, *morality* and *efficacy* of the most controversial counterterrorism policies instituted in the 'war on terror' using the hypothesis that these three components indeed have a direct impact on the legitimacy of the government. To establish their relationship to legitimacy, we ground our argument in reasoning and logic following the tradition of political and legal philosophy, rather than to turn to the less suitable scientific and statistical tools of political science.

¹⁹¹ FERRERO, *The Principles of Power*, note 117 above, at 309.

¹⁹² *Idem*.

While the link between legitimacy and the components we hypothesize may indeed be understood as more normative than descriptive, this linkage surely appears to be one that has been growing over the last half century. Again, determining precise figures for the number of members of a society that judge legitimacy through the lenses of *legality*, *morality* and *efficacy* is outside of our scientific capacities. Yet we can indeed discern signs of an increase.

There are at least two indications of this trend. It is hard to deny that there has been a palpable and empirical growth in the number of international institutions, hard law and soft law instruments, and educational offerings meant to investigate and explain this augmentation over the past decades. As was mentioned in our introduction, it has been suggested that there are three main schools of thought in international relations: Machiavellians, Grotians and Kantians.¹⁹³ As such, one can empirically track the rise of the Grotian school of thought over this time period through this growth in these tangible bodies and codified agreements, and its impact on civil society is precisely what is being suggested here.

Additionally, during this previous century there has been a conspicuous rise in the use of terrorism,¹⁹⁴ non-violent active resistance,¹⁹⁵ and guerrilla warfare¹⁹⁶ to try, and at times successfully, to topple a government. All asymmetrical forms of confronting a regime have been on the rise during this same period of time,¹⁹⁷ and this theory is means to give explanation to this escalation. Thus, it is our suggestion that what is under discussion in this work points towards a trend that is recognizable and worthy of our attention.

¹⁹³ WIGHT, M., *International Theory: The Three Traditions* (New York, Holmes & Meier, 1992) at 7-24.

¹⁹⁴ For some discussions of the strategy of terrorism see e.g. RICHARDSON, *What Terrorists Want*, note 3 above, 296 pp.; KILCULLEN, D., *The Accidental Guerilla: Fighting Small Wars in the Midst of a Big One* (Oxford, Oxford University Press, 2009) 340 pp.; and PAPE, R., *Dying to Win: The Strategic Logic of Suicide Terrorism* (New York, Random House, 2005) 316 pp.

¹⁹⁵ For literature that grew out of successful non-violent movements see GANDHI, Mahatma, Iyer, R., (ed.) *The Essential Writings of Mahatma Gandhi* (Delhi, Oxford University Press, 1991) 438 pp.; KING, M.L.K., Washington, J., (ed.) *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* (San Francisco, Harper Collins, 1986) 688 pp.; HAVEL, V., Vladislav, J., (ed.) *Václav Havel or Living in Truth* (Amsterdam, Meulenhoff Amsterdam, 1986) 315 pp.; or see some of the literature documenting and conceptualizing such movements, ACKERMAN, P., and DUVALL, J., *A Force More Powerful: A Century of Nonviolent Conflict* (New York, Palgrave, 2000) 534 pp.; ZINN, H., and ARNOVE, A., *Voices of a People's History of the United States* (New York, Seven Stories Press, 2004) 647 pp.; SCHELL, J., *The Unconquerable World: Power, Nonviolence, and the Will of the People* (New York, Metropolitan Books, 2003) 416 pp.

¹⁹⁶ For literature that grew out of successful guerrilla movements see e.g. GUEVARA, E., *Guerrilla Warfare* (Lincoln, University of Nebraska Press, 1961) 175 pp.; MAO, Tse Tung *On Guerrilla Warfare* (Chicago, University of Illinois Press, 1961) 114 pp.; and HÔ, Chi Minh, Fall, B., (ed.) *On Revolution: Selected Writings* (Boulder, CO, Westview Press, 1984) 389 pp.

¹⁹⁷ For a significant work exploring these contemporary developments in warfare see SCHELL, *The Unconquerable World*, note 195 above, 414 pp. Schell begins by delving into the work of the well-known Prussian general and military philosopher Karl von Clausewitz to shed light on the ultimate end and objectives of war: i.e. "[w]ar is thus an act to compel our adversary to do our will." (CLAUSEWITZ, 'On War' in *The Book of War* [New York, The Modern Library, 2000] at 264). See also, for valuable discussion of this transition in warfare from the perspective of a military officer and scholar, HAMMES, Col. T. (USMC), *The Sling and the Stone: On War in the 21st Century* (St. Paul, MN, Zenith Press, 2006) 310 pp.

Even if it is not possible to measure with precision the number of people using *legality*, *morality* and *efficacy* as measurement tools of legitimacy, there is strong evidence that a good amount of citizens, ever increasing, indeed do. Therefore, it is our contention that while there certainly can be justified squabble over how great of an impact this has on a society at a given moment, the existence of the rational testing of legitimacy by members of society is surely not in question. Which of course brings us back to the question of descriptive vs. normative. In this work we can understand that the treatment of the existence of a rational testing of legitimacy is descriptive, while its quantitative importance is normative.

Nonetheless, it is indeed critical to be attentive to the targeted legitimacy of one's government, and how it has become intertwined with international norms when we exercise force across borders. This is because it is directly related to constructing an effective and successful counterterrorism policy focusing on defense. When crafting a counterterrorism policy it is clearly important to think defensively, and not just offensively. If we understand legitimacy as being targeted by our enemies, policies must be created that take care not to leave this essential battleground unguarded, or create further damage to it by our own choices. Giving shape to the concept and content of legitimacy makes it possible to do just that.

VII. Conclusion

We have seen that the U.S. administration constructed their signature policy of the 'war on terror', as its response to the cross-border terrorist attacks of 9/11, using international law. Considering the international nature of these strikes and the planned reaction, it was surely very natural and appropriate for the executive and its lawyers to do so. Yet there were two very important results that came of this decision. The first is that obligations found in humanitarian law, United Nations Charter law and human rights law all came directly before the people of the United States as the policies of the 'war on terror' became known and challenged. The second consequence of international law framing the debates over U.S. counterterrorism policy is that this body of law became the baseline for discussion and critique. The most high-profile stages upon which these discussions over international obligations took place were in the U.S. Supreme Court and the U.N. Security Council. Much of it spilled into people's living rooms and onto their kitchen tables through television programs and newspaper reports. Although a single stage cannot be identified, the photographs of prisoner abuse at Abu Ghraib prison in Iraq, and the 'torture memos' interpreting international legal obligations leaked out during that the same period, had a very

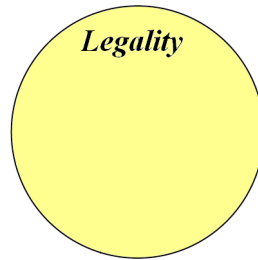
similar effect in that the obligations of human rights law and the laws of war concerning torture entered into the society's conversations.

What followed was what can be described as a 'legitimacy deficit' identifiable in judicial, political, civilian and military dissent. As such, we can posit that since terrorism is meant to be a public action, and the response to it naturally takes on a public shape (particularly in democratic societies), the questions of a "*legitimate use of physical force*" will inevitably arise for the citizens of a nation. Hence, in order to guard against weaknesses in the authority of government, a successful defensive strategy for confronting cross-border terrorism should include policies that are clearly and consciously in line with the most basic international legal duties.

In the following three chapters we will successively apply the lenses of *legality*, *morality* and *efficacy* to the central and most egregious policies of the 'war on terror'. Through this investigation it will be seen that formulating our argument of legitimacy as a target has an added value for analyzing counterterrorism policies. This will demonstrate that there are indeed international laws, ones which often come into play when there is consideration of policies to reduce terrorist acts, that represent such basic norms that their transgression only serves to undermine the legitimacy of the government and plays directly into the hands of terrorist strategy.

Chapter 4

Through the Lens of Legality: Detention without Judicial Review



Those legally associated must believe in its legality, that is, in the formally correct procedure for the creation and application of laws. The belief in legitimacy thus shrinks to a belief in legality; the appeal to the legal manner in which a decision comes about suffices.

– Jürgen Habermas¹

I. Introduction

To initiate the application of our model of legitimacy we will begin with the lens of legality. To be sure, it is difficult arrive at definitive conclusions about the illegality of a policy, even if the highest court in the land has ruled it so. It is extremely likely that there will be dissenting opinions, and thus fully extinguishing the argument for the legality of a policy is nearly impossible. Therefore we will speak to, as will be the case throughout this work, degrees of legality and not all-or-nothing conclusions. With that said, what we will find in this chapter treating the issue of detention without judicial review is that the U.S. Supreme Court ruled in three different cases, using different bodies of law each time, that the administration and the Congress had overstepped the bounds of legality thus directly affecting the legitimacy of the policy and the regime employing it.

Much of the analysis that has been put forward on the ‘war on terror’ –whether they be on the use of abusive interrogation methods,² a broadening of the rules governing the use of

¹ HABERMAS, J., *Legitimation Crisis*, McCarthy, T. (trans.) (London, Heinemann Educational Books, 1976 [German Text: 1973]) at 98.

² See Memorandum from Jay Bybee, Assistant Attorney General, to Counsel to the President (1 Aug 2002) Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 230-2340A, and Memorandum from John Yoo, Deputy Assistant Attorney General, to Counsel to the President (1 Aug 2002) Re: Letter regarding “the views of our Office concerning the legality, under international law, of interrogation methods to be used on captured al Qaeda operatives, reprinted in GREENBERG, K., and DRATEL, J., (eds.) *The Torture Papers: The Road to Abu*

force,³ or the conditions of detention⁴— has concluded that this behemoth in global affairs abandoned their international legal obligations by analyzing domestic and international laws as inapplicable to their circumstances. However, it is suggested here that this characterization of the United States can be understood as an oversimplification which obscures the more subtle, yet methodical and significant, role of the judiciary. There is no doubt that the executive branch of the United States is responsible for conducting military operations and executing the laws of the nation.⁵ As well, we know that international legal obligations are not contingent on the inner workings of a government or internal law.⁶ Yet, an analysis overlooking the interplay of all three branches of government would be incomplete. For a fuller discussion of the legitimacy of a policy it is necessary to widen our purview to delve into the work of the highest national court and how it managed the interaction with the executive and the legislature on the issue of wartime detention.

As explained in the previous chapter, the administration leaned heavily on international law for framing its policies. Therefore a broader view is particularly important in the United States where the internal assessments over international obligations are often seen, rightly or wrongly, through its constitutional structure.⁷ This founding document divides the powers of government into three branches, and the result has at times been a passing along of

Ghraib (Cambridge, Cambridge University Press, 2005) at pp. 172-217 and pp. 218-222 respectively. See also SANDS, P., *Torture Team*, (New York, Palgrave Macmillan, 2008) 232 pp.; MAYER, J., *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (United States, Doubleday, 2008) 392 pp.

³ FLETCHER, G. and OHLIN, J. *Defending Humanity: When Force is Justified and Why* (Oxford and New York, OUP, 2008) at 155-176; BARELA, S., 'Preemptive or Preventive War: A Discussion of Legal and Moral Standards', (Winter 2004) 33, 1 *Denver Journal of International Law and Policy* 31; KOLB, R., 'Self-Defence and Preventive War at the Beginning of the Millenium' (Wien, Springer-Verlag 2004) 59 *Zeitschrift für öffentliches Recht*; SANDS, P., *Lawless World* (New York, Viking, 2005) at 174-204.

⁴ PAUST, J., 'Judicial Power To Determine the Status and Rights of Persons Detained Without Trial' (Spring 2003) 44, 2 *Harvard. Int'l Law Journal* 503; COLE, D., *Enemy Aliens* (New York, The New Press, 2005) 297 pp.; DE LONDRAS, F. 'The Right to Challenge the Lawfulness of Detention: An International Perspective on US Detention of Suspected Terrorists' (2007) 12 *Journal Conflict Security Law* 223; and generally SEKHON, V., 'Understanding the Executive Branch's Use of International Law in the War on Terrorism' (Winter 2006) 7,1 *Stanford Journal of International Relations* available at: <http://www.stanford.edu/group/sjir/7.1.04_sekhon.html>.

⁵ *U.S. Constitution*, Art.II, §2 and §3.

⁶ See *Vienna Convention on the Law of Treaties*, Article 27 (Signed 23 May 1969, Entered into force 27 January 1980) 1155 UNTS 331; see also 'Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947' International Court of Justice, Advisory Opinion, 1988, No. 88/12, para. 57: "It was sufficient to recall the fundamental principle of international law that international law prevailed over domestic law, a principle long endorsed by judicial decisions."; 'Greco-Bulgarian Communities' Permanent Court of International Justice (PCIJ), Advisory Opinion, 1930, (ser. B) No. 17, at 32: "the provisions of municipal law cannot prevail over those of the treaty". 'Treatment of Polish Nationals in Danzig' PCIJ, Advisory Opinion, 1933, Ser. A/B., No. 44: "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force".

⁷ See e.g. BIANCHI, A., 'International Law and US Courts: The Myth of Lohengrin Revisited' (2004) 15, 4 *EJIL* 751.

the state's international legal duties with each branch maintaining a plausible lack of responsibility. More recently, a manner in which national courts have dealt with this similar difficulty is by employing a 'judicial ladder of review' meant to prompt an inter-branch dialogue with the court playing the role of moderator. This chapter will analyze a series of cases that have come before the Supreme Court of the United States (*Rasul*, *Hamdan* and *Boumediene*) relating to pertinent international norms in the 'war on terror', and that can simultaneously be found in domestic and constitutional law. Because certain fundamental rules are codified across different types of law, courts of late have found a novel way to provide protections for individuals across borders and regardless of citizenship by moderating such an institutional dialogue.

Through this investigation, we will see that the U.S. Supreme Court indeed prompted such an inter-branch colloquy with the executive and legislature in an attempt to affect the final legal policies of the nation. While the other branches of government implemented policies and passed legislation that poorly interpreted the applicable law, the highest national court methodically employed this novel judicial tool and took the historic step of eschewing the traditional deference shown by courts in times of armed conflict. In so doing, the Supreme Court was measured, patient and resolute in its push back against the effective removal of judicial review for those held in detention at Guantánamo in the 'war on terror'.⁸ Ultimately, this series of formal legal rulings from the highest court in the land reflected a diminished legitimacy, and even assisted in delegitimizing the policy and the authority that employed it.

This chapter will analyze a series of Supreme Court decisions between 2004 and 2008 so as to illustrate the manner in which the judicial branch has wrestled with the other two branches of government over executive detention in the 'war on terror'. By exploring these cases together, rather than individually, a much fuller picture will be provided of how rights found in various categories of law, including international norms, played a role in the dialogue between the various branches of government. It was not too long ago that legal analysts pointed to a reticence of national courts to apply international law in the domestic setting so as to avoid any clash with the executive and thus afford latitude in foreign affairs.⁹ However, more recently national courts have shown a growing propensity for a cross-

⁸ For a substantive argument against the measured approach we will see employed by the U.S. Supreme Court cf. FISS, O. 'The Perils of Minimalism' (2008) 9, 2, Art. 13 *Theoretical Inquiries in Law*, available at: <<http://www.bepress.com/til/default/vol9/iss2/art13>>.

⁹ See BENVENISTI, E., 'Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts' (1993) 4 *EJIL* 159.

fertilization of sources and jurisprudence, face to face meetings of judges in seminars and increased citation of international law in their judgments.¹⁰ Of course, this judicial globalization of sorts has not been a strongly identifiable vein in the U.S. Supreme Court's work.¹¹ Nevertheless, one can see its influence in a passionate debate on the subject of the recourse to foreign and international law in the 2005 *Roper v. Simmons* decision.¹² Through an analysis of a series of more recent Supreme Court decisions dealing with the 'war on terror' it will become clear that there has been a discernable tack in the direction of this global judicial trend. This is certainly not to say that the Court has warmly embraced a global judicial community and has taken up a place at its table. Rather it is to demonstrate that a fundamental international norm in play during counterterrorism efforts has indeed been consistently interpreted to be applicable through the use of various judicial tools, thus shining a light on the U.S. Supreme Court's current views of, and struggles over, international law.

Traditionally, there has been great deference granted to the executive branch by national courts in times of conflict.¹³ Yet in the current conflict, something different has occurred when cases relating to the administration's legal reasoning over detention and judicial review have come before the U.S. Supreme Court. Starting in 2004, the Court began to push back against the Bush administration by asserting its own institutional competence in the *Rasul v. Bush*¹⁴ decision, on domestic statutory grounds, to hear habeas corpus' challenges to the detention of foreign nationals captured abroad in connection with hostilities. In this

¹⁰ See e.g. SLAUGHTER, A., *A New World Order*, (Princeton, Princeton University Press, 2004) at 65-103; BENVENISTI, E., 'Reclaiming Democracy, The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *AJIL* 241; McCRUDDEN, C., 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20, 4 *Oxford Journal of Legal Studies* 499; JACKSON, V., 'Comparative Constitutional Federalism and Transnational Judicial Discourse' (2004) 2,1 *Int'l. Journal of Constitutional Law* 91; SLAUGHTER, A., 'A Global Community of Courts' (2003) 44, 1 *Harvard Int'l Law Journal* 191; BAHDI, R., 'Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts' (2002) 34 *George Washington Int'l Law Review* 555; SLAUGHTER, A., 'A Brave New Judicial World' in IGNATIEFF, M. (ed.), *American Exceptionalism and Human Rights* (Princeton, Princeton University Press, 2005) pp. 277-303; JACKSON, V., 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 *Harvard Law Review* 109; cf. WATERS, M., 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 628.

¹¹ *Idem*, BENVENISTI, 'Reclaiming Democracy...', at 244.

¹² *Roper v. Simmons*, 543 U.S. 551 (2005).

¹³ See SCOBIE, I., "'The Last Refuge of the Tyrant?': Judicial Deference to the Executive in Time of Terror' in BIANCHI, A. and KELLER, A. (eds.), *Counterterrorism: Democracy's Challenge*, (Oxford, Hart Publishing, 2008) pp. 277- 312; On wartime jurisprudence, see also BENVENISTI, E., 'National Courts and the "War on Terrorism,"' in BIANCHI, A., (ed.) *Enforcing International Law Norms Against Terrorism* (Oxford, Hart Publishing, 2004) at 309-15; Notably, the issue was also treated in Justice Jackson's opinion in *Korematsu v US*, 65 S. Ct. 193, at 245 (1944): "military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved [...] Hence courts can never have real alternative to accepting the mere declaration of the authorities that issued the order that it was reasonably necessary from a military viewpoint".

¹⁴ *Rasul v. Bush*, 542 U.S. 466 (2004).

same term, eight out of nine justices held in *Hamdi v. Rumsfeld*¹⁵ that the executive branch did not have the authority to indefinitely hold a U.S. citizen on national territory without affording the rights of due process enforceable through habeas corpus, though no single opinion commanded a majority. Under quite different reasoning by the Justices, the Court roundly rejected the administration's contention that it possessed a wide authority to detain persons under its constitutional commander-in-chief powers. As has been oft quoted from Justice O'Connor's plurality opinion, "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens".¹⁶

Looking at the positioning of the Supreme Court after the term ended in 2004, it would certainly be difficult to conclude that it was acting as any type of protectorate of human rights or international humanitarian law. While the decisions indeed treated norms that exist in international law, but explicitly using domestic statutory law, they were limited and left a wide margin of flexibility to the other two branches of government to alter its course without insuring an adherence to international obligations by the state. The Court had simply examined and ruled on whether the executive had been given, either through the Constitution or through statute, the institutional competence to act as it had in the specific circumstances.

However, if we take into account the continued trajectory of case law before the Supreme Court dealing with detention in the 'war on terror', it is possible to discern what has been called an "emerging judicial theory" in a conceivably globally coordinated move. International jurist Eyal Benvenisti has theorized a "judicial ladder of review" which can be distinguished and charted in the recent rulings of national courts in various jurisdictions.¹⁷ This framework of a five-step ladder, implemented in different jurisdictions so as to affect the outcomes of policies by engaging in dialogue with the other branches of government over the restriction of rights, is enormously useful for explaining the progression of cases dealing with counterterrorism that have come before the U.S. Supreme Court. As we will see, the cases are best understood by discussing them together as a series of jurisprudence, rather than as isolated cases. Therefore, this theoretical structure will frame our analysis so as to delve deeper into the ascension of review that the judiciary has climbed in its moderating of a dialogue with the other branches of government.

¹⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁶ *Idem*, at 536.

¹⁷ BENVENISTI, E., 'United We Stand: National Courts Reviewing Counterterrorism Measures' in BIANCHI and KELLER, (eds.), *Counterterrorism: Democracy's Challenge*, note 13 above, pp. 251-276. The author briefly sketches initial steps of the Guantánamo decisions in the U.S. concerning detention and judicial review, and put forward his theory before the *Boumediene* case (discussed below) was decided in June 2008.

At this point it is useful to provide an outline of Benvenisti's 'judicial ladder of review',¹⁸ and exhibit how it allows the court the ability to moderate an inter-branch dialogue. This framework is based on the proposition that the judiciary prefers to affect final policy with a low profile, and with as minor amount of intrusion as possible. To do so, it aims to engage the legislature as a potential ally in the task of containing the exercise of authority by the executive. Yet if it is unable to manifest a partner to share the burden, the Court holds the option of ascending the ladder alone. The intent is for the judicial branch to encroach as little as possible onto the executive's authority during a time of conflict, and thus it tailors its responses to the political circumstances and opts for a more deliberative process involving all three branches. However, it should not be overlooked that it is the judiciary that holds the tools to manage this process and thus chooses how and when to ratchet up or down the ladder according to its own assessment.

The five rungs of the 'judicial ladder of review',¹⁹ are constructed as such: 1) the least controversial technique is for the judiciary to refer an action back to the executive for reconsideration; 2) the next rung of the ladder is to address domestic statutes so as to call for legislative clarification of the executive's authority to act; 3) subsequently, the judiciary may refer to substantive limitations found in international treaty obligations (one of the more interesting facets of this ladder because it was not that long ago that courts shied away from its reference) thus constraining executive and legislative discretion; 4) if the bench is still not satisfied with the outcome, it may invoke constitutional restrictions on specific parts of a legislation, but allow for re-legislation; 5) finally and ultimately, the court may well ascend to the height of this ladder and rule a measure utterly infringing upon constitutional safeguards and thus beyond the scope of authority of either branch.

As this chapter is to be a view of legitimacy through the lens of legality, we will analyze the progression of engagement by the U.S. Supreme Court with the other branches of government over executive detention without judicial review. Section II of this chapter will cover a short historical overview of how international law has been viewed by Justices of the Supreme Court to provide a context for understanding how this particular issue is regarded today by the Court. Section III briefly lays out the many different questions of international legality, from the perspective of both humanitarian and human rights law, raised by holding persons without access to any sort of judicial review. Section IV investigates the *Rasul* and *Hamdi* decisions and looks at the manner in which a unique familiarity with previous case law

¹⁸ *Idem*, at 255-263.

¹⁹ *Ibid.*, at 256-7.

gave one Supreme Court Justice an intimate knowledge of the controlling jurisprudence that ultimately had an important impact on the judgment. Next, Section V will investigate the Court's direct use of humanitarian law in the *Hamdan* decision, and its distinctive interpretation of Common Article 3 to rule on the applicability of a portion of the Geneva Conventions to the 'war on terror'. Section VI will assess the *Boumediene* decision and discuss it as a human rights' advancement in substance, even if the decision was based on constitutional law. At the same time, it will address the missed opportunity for creating a more harmonious concert between constitutional and human rights law that should be lamented. Lastly, Section VII will conclude the analysis and point out current adjudication over confinement in Afghanistan that treats this same question of detention without judicial review. As a result, we will arrive at a sharpened and clear view of the issues of legality with an undeniable conclusion that the policy of detention in this conflict was repeatedly declared outside of the law, and thus having a direct impact on legitimacy.

II. The United States and International Law

To best understand the series of cases to be treated in this chapter, some context will be provided of how the U.S. national court system has traditionally dealt with international law. To do so, we will have a brief look at the at the last-in-time rule, self-executing treaties, the *Charming Betsy* canon and the competing judicial philosophies within the Supreme Court on the status of international and foreign law in the United States. In the presentation of this section what will become clear is that U.S. courts have long taken the view that their interpretation of international obligations found in treaties must be seen through the Constitution. What this has often meant is that it has been possible to pass the responsibility for upholding international obligations between the branches of government because of their divided functions, or in this case out of the hands of the judiciary. Nevertheless, the three cases in the judicially moderated dialogue followed in this chapter will demonstrate a way in which the Supreme Court has found to deal with this traditional deference to the political branches in light of divided constitutional responsibilities.

1) The Last-in-Time Rule

While Article VI of the U.S. Constitution bestows the status of "supreme Law of the Land" on treaties,²⁰ there has long been debate on the proper interpretation of this phraseology. There

²⁰ U.S. Constitution, Art. VI, para. 2.

are three primary arguments as to why international treaties do not always sit atop a hierarchy of law within the United States.²¹ The first contention is that all legislation is subject to the last-in-time rule so that the legislature may retain the authority to change or update all the laws, and thus treaties may be overridden by a more recent act of Congress. The second is that the act of concluding a treaty is only carried out by two parties, the President and the Senate, and thus cannot have the power to overrule a legislative one that also includes the House of Representatives. The third argument holds that it is an absurd result to conclude that the judiciary may interfere with the foreign policy prerogative that is rightly attributed to the political branches.

The first application of the last-in-time rule to treaty interpretation by the Supreme Court was found in *The Cherokee Tobacco* case of 1870.²² This was a case that dealt with a dispute over a treaty signed with the Cherokee nation in 1866 releasing the tribe from paying any tax on the sale of farm products, and legislation passed by the U.S. Congress in 1868 imposing a tax on distilled spirits, fermented liquors, tobacco, snuff and cigars produced outside of the United States. The Court found that like other domestic legislation, Congress does have the authority to step in and change the parameters of the law, albeit in this case negotiated with an outside party. The Court ruled,

A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty...In the case under consideration, the act of Congress must prevail as if the treaty were not an element to be considered. If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.²³

Notably, Justice Bradley dissented from this decision because he found a distinct peculiarity in the formulation that a treaty would be held in the same regard as domestic law. His dissenting opinion pointed out that the jurisdiction of the case, “depends on a solemn treaty entered into by the United States government and the Cherokee nation, in which good faith of the government is involved, and not on a mere municipal law”.²⁴

One might suggest that this particular decision’s precedential effect was limited because a treaty with a Native-American tribe was not of the exact same nature as other treaties since it was negotiated by special commissioners of the War Department rather than

²¹ VAGTS, D., ‘The United States and Its Treaties: Observance and Breach’ (April 2001) 95, 2 *AJIL* 313 at 314.

²² *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, at 621 (1870).

²³ *Idem*, at 621-2. The Supreme Court here cited *Taylor v. Morton* (23 F. Cas. 785 (C.C.D. Mass. 1855) (No. 13,749)) in which Justice Robbins Curtis first enunciated this peculiar principle in a circuit court decision.

²⁴ *Ibid.*, at 623.

the Secretary of State.²⁵ In light of later decisions by the Supreme Court dealing with such treaties this question is certainly valid. In *United States v. Kagama* of 1886 the Court held that the U.S. government, “has the right and authority, instead of controlling them [Native American tribes] by treaties, to govern them by acts of Congress”,²⁶ and in 1903 the Supreme Court ruling of *Lone Wolf v. Hitchcock* held that, “[t]he power exists to abrogate the provisions of an Indian treaty”.²⁷

However, the next time the Supreme Court took up a case dealing with the clash of a treaty with domestic legislation the accord was of a traditional international nature, and it followed the same line of reasoning as the *Cherokee Tobacco* case. In the *Head Money Cases*²⁸ decision of 1884 the Court was confronted with congressional legislation and a treaty waiving immigration tax between the U.S., Belgium, Denmark, France, Great Britain, the Netherlands, Norway, Prussia and Sweden. The Court used the same formulation and held that treaties must be subject to a review of Congressional action on the matter in order for a treaty to be the subject of judicial cognizance.²⁹ As well, it was held that the participation of a third party of government gave legislation a higher status than a treaty.³⁰

While there has been some judicial activity in this sphere since these early decisions of the Supreme Court, there has been no real upsurge in reference to or upending of this domestic understanding. Most recently, in the *Breard v. Greene*³¹ case of 1998 a reassertion of the later-in-time rule was again made. The case involved a Paraguayan citizen who was convicted and sentenced to death for rape and murder in the state of Virginia, and the questions were surrounding his rights arising from the 1963 Vienna Convention on Consular Relations. Paraguay filed action before the International Court of Justice (ICJ) to seek redress for the state of Virginia’s violations by failing to notify Breard of his right to consular access under the Vienna Convention.³² The ICJ ordered the United States to take steps to make certain that the prisoner was not executed before the World Court had rendered a decision, but

²⁵ FOULKE, R., ‘Treaties’ (May 1918) 18, 5 *Columbia Law Review* 422, at 433.

²⁶ *United States v. Kagama*, 118 U.S. 375, at 375 (1886).

²⁷ *Lone Wolf v. Hitchcock*, 187 U.S. 553, at 566 (1903).

²⁸ *Head Money Cases*, 112 U.S. 580 (1884).

²⁹ *Idem*, at 581.

³⁰ *Ibid.*, at 599: “A treaty is made by the President and the Senate. Statutes are made by the President, the Senate, and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress and which, when made, usually suspends or destroys existing treaties between the nations thus at war.”

³¹ *Breard v. Greene*, 523 U.S. 371 (1998).

³² ACEVES, W., ‘Application of the Vienna Convention on Consular Relations (Paraguay v. United States.) Provisional Measures Order / Breard v. Greene. 118 S.Ct. 1352’ (July 1998) 92, 3 *AJIL* 517, at 518.

the Supreme Court refused to grant certiorari and Breard was executed that same evening. In the *per curiam* opinion to deny appeal, the Supreme Court made reference to the 1996 Antiterrorism and Effective Death Penalty Act and stated, “Breard’s ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently-enacted rule, just as any claim arising under the United States Constitution would be”.³³

Of course, this minutia of internal law interpretation is at direct odds with the Vienna Convention on the Law of Treaties.³⁴ The basic premise of *pacta sunt servanda* is clarified in Article 26 of the Vienna Convention of the Law of Treaties and states that, “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” The following Article 27 affirms even more precisely that municipal law may not be invoked as a justification for not fulfilling a treaty obligation. Additionally, both the Permanent Court of International Justice in an advisory opinion³⁵ of 1930 and the International Court of Justice 1988 ruling on the United Nations Headquarters Agreement³⁶ declared that international law is to prevail over municipal law. As such, the arguments of constitutional interpretation put forward above can be construed as expedient to national interests, but in direct conflict with international norms dealing with treaties.

Expounding this very concern at the time of the drafting of the Constitution was Secretary of Foreign Affairs, and later the very first Chief Justice, John Jay in the *Federalist Papers*. Specifically discussing the last-in-time rule, Jay insisted upon the reasoning that any treaty is the product of two parties and thus cannot be subject to unilateral abrogation. Jay wrote,

treaty is only another name for a bargain, and that it would be impossible to find a nation who would make a bargain with us, which should be binding on them ABSOLUTELY, but on us only so long as we may think it proper to be bound by it....let us not forget that treaties are made, not by only one of the contracting parties, but by both; and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them.³⁷

³³ *Breard*, note 31 above, at 376.

³⁴ *Vienna Convention on the Law of Treaties*, note 6 above.

³⁵ ‘Greco-Bulgarian Communities’, PCIJ, note 6 above: “the provisions of municipal law cannot prevail over those of the treaty”.

³⁶ ‘Applicability of the Obligation to Arbitrate’, ICJ, note 6 above: “It was sufficient to recall the fundamental principle of international law that international law prevailed over domestic law, a principle long endorsed by judicial decisions”. To no avail, the attorney general of the United States indeed tried to invoke the later-in-time rule of internal congressional action as a justification in the international sphere.

³⁷ JAY, J., ‘Federalist No. 64: The Powers of the Senate’ from the New York Packet, Friday 7 March 1788, Reprinted in *Federalist & Anti-Federalist Papers*, (USA, BN Publishing, 2006) (original emphasis) at 242.

Additionally, Alexander Hamilton spoke to the judicial cognizance of international agreements saying, “[t]he treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other all laws, be ascertained by judicial determinations”.³⁸ The point here is not to enter into historical debate over the Founder’s intent or original understanding of the Constitution,³⁹ but rather to put forward that there have long been strong arguments presented as to why a less narrow conception of national interest should prevail within the United States when it comes to international treaties.

2) Self-Executing Treaties

At the most general level, self-executing treaties are those that can be enforced by courts without further legislation, while non-self-executing treaties require a legislative act to give judicial force to an international agreement. It is a particular understanding and implementation of this doctrine that exists in the United States. In 1887 the first Supreme Court opinion used the phrase “self-executing”⁴⁰ indicating a solidifying domestic interpretation of treaty obligations. However, it was well before this in the *Foster & Elam v. Neilson* decision⁴¹ of 1829 that the Marshall Court first expounded this principle and delineated the activities of the separate branches of government regarding treaties and in what way the courts of the United States should handle international agreements. Chief Justice John Marshall wrote,

Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the Legislature whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the Judicial, Department, and the Legislature must execute the contract before it can become a rule for the Court.⁴²

³⁸ HAMILTON, A., ‘Federalist No. 22: The Same Subject Continued: Other Defects of the Present Confederation’ from the New York Packet, Friday 14 December 1787, Reprinted in *idem*, at 92.

³⁹ For such a debate see YOO, J., ‘Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding’ (Dec., 1999) 99, 8 *Columbia Law Review* 1955; and VÁZQUEZ, C. ‘Laughing at Treaties’ (Dec., 1999) 99, 8 *Columbia Law Review* 2154; and FLAHERTY, M., ‘History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land”’ (1999) 99 *Columbia Law Review* 2095.

⁴⁰ PAUST, J., ‘Self-Executing Treaties’ (1988) 82 *AJIL* 760, at 766. It was first used in *Bartram v. Robertson*, 122 U.S. 116, at 120 (1887). The phrase was again used a year later by the same Justice Field in an opinion that has also been cited as its origin, perhaps because of its repeated usage: *Whitney v. Robertson*, 124 U.S. 190, at 192 and 194 (1888).

⁴¹ *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

⁴² *Idem*, at 314. It should be pointed out that the same treaty, and provisions, came under review by the Supreme Court only a few years later in *Percheman v. United States*, 32 U.S. (7 Pet.) 51 (1833), and this time it was

While this interpretation seems to have become the constitutionally preferable view in the United States –that international treaties are not inherently self-executing–⁴³ there continues to be at least one major difficulty with this formulation, not to mention notable doctrinal disorder. The primary stumbling block found here is within the wording, “either of the parties”. It is unclear where exactly one should look inside the separated powers of the United States to ascertain the intent of this party.⁴⁴

Courts are the organs that are called upon to determine whether a treaty is in fact self-executing or not, yet a coherent judicial doctrine is still wanting.⁴⁵ Domestic jurisprudence is unclear as to whether this intent emanates from the provisions themselves, the President, treaty negotiators or Congress.⁴⁶ The *Restatement of the Law (Third)* (*Restatement* hereinafter) by the American Law Institute, which puts forward its opinion of how U.S. rules might be applied by an impartial tribunal if charged with deciding a controversy in accordance with international law,⁴⁷ asserts that whether a treaty is self-executing “is an issue that a court must decide when a party seeks to invoke the agreement as law”.⁴⁸ The statements by the President and the Congress as to the particular meaning are relevant to the interpretation of a treaty by the courts, similar to the way that the legislative history of a statute is pertinent.⁴⁹ As such, the buck does not stop with any particular branch of government, and can be continually passed along.

What we begin to see here is that the interaction between the different branches of government is inevitably in play in this doctrine, and thus domestic politics can end up distorting international legal commitments. That is not to say that the country automatically fails to meet its legal obligations because of this formulation, as one must certainly recognize that there are also political reasons to fulfill international duties. It is rather to put forward an explanation as to why a difficulty arises when scholars attempt to elucidate the doctrine of self-execution purely through positivist legal reasoning. As well, some researchers have even

interpreted (albeit now using a translation from Spanish that was made available to the court) to contain legal obligations that did not in fact require legislation to make them enforceable by the court.

⁴³ PAUST, ‘Self-Executing...’, note 40 above, “except those which[...]declare war on behalf of the US” at 782.

⁴⁴ BIANCHI, A., ‘International Law and US Courts: The Myth of Lohengrin Revisited’ (2004) 15, 4 *EJIL* 751, at 759-60.

⁴⁵ VÁSQUEZ, C., ‘The Four Doctrines of Self-Executing Treaties’ (Oct. 1995) 89, 4 *AJIL* 695, at 695.

⁴⁶ For a Congressional example of shaping how the courts will interpret a treaty see ‘U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights’, where it is declared that “Articles 1 through 27 of the Covenant are not self-executing”. Available at <<http://www.iilj.org/courses/documents/U.S.SenateResolutionontheRatificationoftheICCPR.pdf>>.

⁴⁷ American Law Institute, *Restatement of the Law (Third), The Foreign Relations Law of the United States* (St. Paul, Minnesota, American Law Institute Publishers 1987).

⁴⁸ *Idem*, at §111 (h).

⁴⁹ *Ibid.*, at §314 (d).

asserted that it is a “judicially invented notion that is patently inconsistent with express language in the Constitution”.⁵⁰ If it is indeed “inconsistent” with the Constitution, the founding legal document of the nation, then it is clear that there is more than legality at play. Further buttressing this conclusion we will see below in the analysis of the *Hamdan* decision that the application of this doctrine led to directly contradictory conclusions in lower courts, while the Supreme Court found a way to deftly avoid the question altogether.

Finally, it should not be overlooked that the *Restatement* also points out that regardless of the interior federal machinery of the country’s government, its international legal obligations continue.⁵¹ Or as it is phrased in one section of the publication, “[a] federal state may leave implementation to its constituent units but the state remains responsible for failures of compliance”.⁵² Therefore, we can conclude that this doctrine of self-execution inside the United States offers only an explanation of *how* the country attempts to meet, or even at times to avoid, its international obligations.

3) The *Charming Betsy* Canon

One method for integrating international obligations into the domestic legal sphere is through the interpretation of municipal statutes. It is not uncommon for national jurisdictions to take international standards into consideration when interpreting local laws, regardless of their formal ranking within the domestic system.⁵³ It is a practice that crosses legal tradition, although what circumstances would activate its use and its exact scope of application certainly varies between nations. In the United States this procedure of statutory construction falls under the canon that is commonly known as the *Charming Betsy*.

In 1804 it was again the Marshall Court that (re)formulated a canon that has now been cited by many an international lawyer; “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”.⁵⁴ However, the Court was in large measure speaking for a nation that owed much of its prosperity to trade, and thus critically sought to buttress and shore up the international rule of law in this regard. The case dealt with a neutral sailing vessel, specifically the schooner the *Charming Betsy*, and what

⁵⁰ PAUST, ‘Self-Executing...’, note 40 above, at 760.

⁵¹ *Restatement*, note 47 above, at §115 (b).

⁵² *Idem*, at §321 (b).

⁵³ BIANCHI, ‘International Law and US Courts...’, note 44 above, at 771.

⁵⁴ *Murray v. The Charming Betsey*, 6 U.S. (2 Cranch) 64 at 118 (1804). It should be noted that this case was not in fact the first time that the Supreme Court had specifically spoke to this rule. In a very similar earlier case, *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 at 43 (1801), the court wrote, “the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations or the general doctrines of national law”.

procedures were to govern a forfeiture as prize or salvage in the ‘Quasi War’ between France and the newly independent United States.⁵⁵ It has been said that Chief Justice Marshall “twisted interpretations and principles to reach a desired result”,⁵⁶ namely the denial of claim of the schooner as prize. Yet the Congress passed, and President Jefferson signed, a bill to compensate the naval officer who had followed orders to stop and seize the schooner.⁵⁷ Despite the fact that a full investigation of the history of this case might lead in the direction of an odd application of international law, this canon of statutory interpretation now finds a section of the *Restatement* dedicated to this principle indicating its solidified place in the national law.⁵⁸

For this work, the significance of the *Charming Betsy* canon is twofold: statutory and constitutional. As multilateral human rights treaties have evolved and expanded, one emergent method for incorporating these obligations into a domestic legal context has been through a statutory, rights-conscious *Charming Betsy* principle.⁵⁹ Under this formulation, courts interpret ambiguous municipal statutes in such a manner so as to avoid transgressing U.S. treaty obligations or customary international law. This usage of the canon is certainly more expansive than its traditional use, as evidenced in its national jurisprudential inception, because it at times allows courts to look beyond jurisdictional questions and to inform the ‘substantive’ content of domestic law. There is no doubt that the canon as traditionally understood applies to legislative statutes. However, it has also been suggested that the Supreme Court could and should apply the *Charming Betsy* canon in its interpretation of the Constitution.⁶⁰ This canon, as applied constitutionally, might seem to be of relevance in our discussion of the *Boumediene* decision as the U.S. Supreme Court interpreted the Constitution, although upon extremely narrow grounds, to be in line with certain human rights obligations. However, it cannot be overlooked that this was done with minimal human rights law argument put forward by the petitioners’ counsel or any reference to human rights law by the Court.

⁵⁵ LEINER, F., ‘The Charming Betsy and the Marshall Court’ (Jan. 2001) 45,1 *The American Journal of Legal History* 1.

⁵⁶ *Idem*, at 1.

⁵⁷ *Ibid.*, at 18-19.

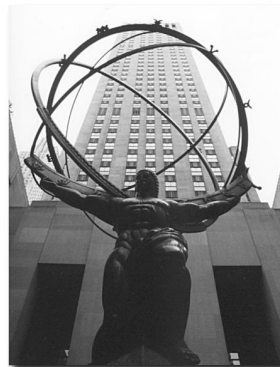
⁵⁸ *Restatement*, note 47 above, at §114.

⁵⁹ For an investigation into this phenomenon in common law jurisdictions see WATERS, M., ‘Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties’ (2007) 107 *Columbia Law Review* 628.

⁶⁰ For a discussion of the constitutional use of this canon, see ALFORD, R., ‘Foreign Relations as a Matter of Interpretation: The Use and Abuse of *Charming Betsy*’, (2006) 67 *Ohio State Law Journal* 1339, at 1341-2 : “[o]nce benignly embedded in the narrow confines of statutory discretion, it [a constitutional *Charming Betsy*] has now metastasized to such a degree that its proponents harbor hope that it soon will be deeply embedded throughout our corpus juris”; See also *idem*, at 679-685.

4) Transnational Judicial Dialogue and the U.S. Supreme Court

Recently, there has been increased scholarship and attention to the growing phenomenon of national courts engaging in what has been likened to a judicial globalization.⁶¹ That is to say, judges from different national jurisdictions are speaking with one another and exchanging judicial views, participating in seminars and judicial organizations together, and citing each others' work in their own opinions. This trend can be uncovered in several different areas of jurisprudence, particularly constitutional, including issues of privacy rights, freedom of expression, gender equality, the death penalty, and even counterterrorism.⁶² This growing tendency is not limited to transnational discourse, but also includes deepening interactions with regional and international counterparts. Constitutional courts the world over have also taken to citing European Court of Human Rights decisions, regardless of whether they are themselves a part of its jurisdiction. As another example, the International Criminal Court and the NAFTA treaty are built on the premise that there will be a direct relation between national and international tribunals. A very interesting and useful way of conceptualizing this transnational judicial dialogue has been put forward by Anne-Marie Slaughter. She suggests that we can best understand these connections spanning national borders and oceans as a section of "the globe hoisted by Atlas at Rockefeller Center, criss-crossed by an increasingly dense web of networks".⁶³



*Atlas, by Lee Lawrie in Rockefeller Center, New York*⁶⁴

⁶¹ See e.g. SLAUGHTER, *A New World Order*, note 10 above, at 65-103; BENVENISTI, 'Reclaiming Democracy...', note 10 above; MCCRUDDEN, C., 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20, 4 *Oxford Journal of Legal Studies* 499; JACKSON, V., 'Comparative Constitutional Federalism and Transnational Judicial Discourse' (2004) 2,1 *Int'l. Journal of Constitutional Law* 91; SLAUGHTER, A., 'A Global Community of Courts' (2003) 44, 1 *Harvard Int'l Law Journal* 191; BAHDI, R., 'Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts' (2002) 34 *George Washington Int'l Law Review* 555; SLAUGHTER, A., 'A Brave New Judicial World' in IGNATIEFF, M. (ed.), *American Exceptionalism and Human Rights* (Princeton, Princeton University Press, 2005) pp. 277-303; JACKSON, V., 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 *Harvard Law Review* 109; cf. WATERS, 'Creeping Monism...', note 59 above.

⁶² BENVENISTI, "United We Stand...", note 17 above.

⁶³ SLAUGHTER, *A New World Order*, note 10, at 5-7.

⁶⁴ *Idem*, Image available at <<http://ergosum.files.wordpress.com/2007/04/atlas.jpg>>.

This image provides an effective visual for grasping nascent international, and in this case judicial, connections that demonstrate some current attempts at solving problems which have not been, and cannot be, resolved by a concept of individual and autonomous nations.

Former Justice of the Supreme Court of Canada, Claire L'Heureux-Dubé, wrote about her view of the “globalization of the judicial world” over a decade ago, and addressed the manner in which the highest court in the U.S. fit into this mushrooming phenomenon.⁶⁵ The observation from her advantaged perspective was that, “[m]ore and more courts [...] are looking to the judgments of other jurisdictions, particularly when making decisions on human rights issues”.⁶⁶ While there have historically been particular courts that served as hubs, particularly during the colonial era, this hierarchy has now shifted into a different form. Justice Heureux-Dubé wrote, “as courts look *all* over the world for sources of authority, the process of international influence has changed from *reception* to *dialogue*”.⁶⁷ While acknowledging the difficulty of a scientific assessment, her only marginally limited perspective was that the U.S. Supreme Court was having a declining impact on this dialogue, and even though a part was structural, other reasons can be attributed to the Court itself.⁶⁸

The possible benefits of comparing constitutional and statutory protection, along with how international legal obligations play a role in individual jurisdictions, through such judicial dialogue are numerous.⁶⁹ It offers forthright discussion of the hurdles to safeguarding shared concepts that exist in many constitutions of the world, in somewhat varied circumstances, such as dignity, freedom and equality. Through such evaluation with foreign counterparts judges can gain a sharpened insight into their own systems or provisions as to why they might already work reasonably well in certain areas, or need improvement in others. Comparative study can also make up for long experience in constitutionalism that only some countries possess. On the matter of potential benefits, we can also look to the words of former Chief Justice Rehnquist of the U.S. Supreme Court, “the real value of [these] reciprocal visits is in establishing face-to-face contact with judges in another country who, despite the

⁶⁵ HEUREUX-DUBÉ, C., ‘The Importance of Dialogue : Globalization and the International Impact of the Rehnquist Court’, (1998) 34 *Tulsa Law Journal* 15, at 16.

⁶⁶ *Idem*.

⁶⁷ *Ibid*, (original emphasis) at 17.

⁶⁸ *Ibid*, at 29-37; For more evidence of this decline see LIPTAK, A ‘US Supreme Court’s Influence is Waning’, *International Herald Tribune* (17 Sept. 2008) <<http://www.ihf.com/articles/2008/09/17/america/18legal.php>>.

⁶⁹ JACKSON, ‘Comparative Constitutional Federalism’, note 61 above, at 92-3.

differences between our judicial systems, face many of the same problems faced by federal judges in the United States.”⁷⁰

Additionally, it should be pointed out that such dialogue does not portend a homogenous result. Thus, another benefit from such structured and unstructured interaction is also that of “informed divergence,”⁷¹ in which judges consciously choose a different route than their colleagues. This can be due to the particular circumstances of their jurisdiction or to the case directly before them. As a result of such dialogue, they may choose to put forward their reasoned choice of departure.

While the U.S. Supreme Court has been identified as one court that in some ways operates outside this burgeoning network,⁷² perhaps due to a sense of obligation to democratic autonomy, it cannot be said that the entire court persists upon such a path. Some commentators have described the opinion of the court on this issue as split between two philosophical branches of thought.⁷³ The appointments to the court of Chief Justice Roberts and Justice Alito have been characterized as solidifying an inward looking alliance on constitutional interpretation with Justice Thomas and Justice Scalia.⁷⁴ Meanwhile Justice Kennedy now finds himself to be a swing vote on certain issues, and according to some has shown a strong “cosmopolitan” bent.⁷⁵ Typifying the inclination of those opposed to

⁷⁰ REHNQUIST, Chief Justice W., ‘Remarks to Court of Appeals for the Federal Circuit, 20th Anniversary Judicial Conference’, 8 April 2002, Available at <http://www.supremecourtus.gov/publicinfo/speeches/sp_04-08-02a.html>.

⁷¹ SLAUGHTER, *A New World Order*, note 10 above, at 181-3.

⁷² BENVENISTI, ‘Reclaiming Democracy...’, note 10 above, at 241-3; also see generally HEUREUX-DUBÉ, ‘The Importance of Dialogue...’, note 65 above, and LIPTAK, ‘Supreme Court’s...’, note 68 above.

⁷³ See e.g. BIANCHI, ‘International Law and US Courts...’, note 44 above, at 773-776; POSNER, E., ‘*Boumediene* and the Uncertain March of Judicial Cosmopolitanism’, University of Chicago Public Law and Legal Theory Working Paper No. 228 (Aug. 2008) available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1211426 (last visited 15 Jan 2009) The Law School, University of Chicago; and FELDMAN, N., ‘When Judges Make Foreign Policy’, *The New York Times Magazine*, (25 Sept 2008) available at: <<http://www.nytimes.com/2008/09/28/magazine/28law-t.html?partner=rssnyt>> (last visited 15 Jan. 2009).

⁷⁴ For an indication of this philosophical bent one can look to each of their votes in the *Hamdan* and *Boumediene* decisions. To be sure, Chief Justice Roberts did not take part in the *Hamdan* decision on the Supreme Court since he recused himself for having already heard the case. He voted against *Hamdan* while he was sitting on the Court of Appeals in the District of Columbia Circuit.

⁷⁵ See generally POSNER, ‘The Uncertain March...’, note 73 above: “[t]he cosmopolitan elements of *Boumediene* recall the debate about the use of foreign law to interpret provisions of the U.S. Constitution, of which Justice Kennedy is a major proponent”. For further context of the new appointments to the court *cf.* statements by the two most recently departed justices from the Supreme Court: REHNQUIST, Chief Justice, note 70 above: “[i]t is important for judges and legal communities of different nations to exchange views, share information and learn to better understand one another and our legal systems.”; and O’CONNER, J. ‘Keynote Address to the American Society of International Law’, Annual Proceedings, 1 Jan 2002: “[n]o institution of government can afford now to ignore the rest of the world [...] Harnessing the good that can come from our increasingly global world while avoiding these pitfalls involves—indeed, requires—those with power and influence in our country to develop a greater knowledge and understanding of what is happening outside our nation’s borders. This is true of courts as much as it is of any other governmental body.” Available at: <<http://www.highbeam.com/doc/1P3-242672731.html>>.

consultation with outside sources for interpretation of the U.S. Constitution are the words of Justice Thomas in a concurrence denying certiorari in 2002 of the *Foster v. Florida* case; “this court’s [...] jurisprudence should not impose foreign moods, fads or fashions on Americans”.⁷⁶

However, the court does indeed participate in formal exchanges with its counterpart across the Atlantic, the European Court of Justice, and has visited its equivalents in Mexico, Germany, France, England and India.⁷⁷ Additionally, there are statements that can be pointed out by members of the Court, from the other side of the philosophical divide, which indicate a conviction that examining foreign sources of law, along with international law, will serve to benefit the depth of their own decision making and opinions. In 2003, Justice Breyer addressed the American Society of International Law and spoke to the historical views of justices of the Supreme Court. He said that many on the Court hold, “a view that now extends beyond public international law to embrace foreign law and legal institutions as well.”⁷⁸ While Justice Ginsburg even more recently expounded her view that, “if U.S. experience and decisions can be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so we can learn from others including Canada, South Africa, and most recently the U.K. - now engaged in measuring ordinary laws and executive actions against charters securing basic rights.”⁷⁹

One case in which we can see very clearly these separate factions in direct duel is in the 2005 opinions of *Roper v. Simmons*.⁸⁰ The case dealt with a defendant who had committed murder when he was seventeen years old, and was then sentenced to death after he had turned eighteen. The Court held, on various grounds, that the Eighth and Fourteenth Amendments forbid the imposition of death on offenders who were under the age of eighteen at the time the crime was committed. After laying out a broad reasoning, Justice Kennedy in his majority opinion states that this decision, “finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth

⁷⁶ *Foster v. Florida*, 537 U.S. 990 (2002).

⁷⁷ SLAUGHTER, *A New World Order*, note 10 above, at 65-6.

⁷⁸ BREYER, J., ‘Keynote Address at American Society of International Law’, Proceedings of the Annual Meeting, 1 Jan 2003. Available at: <<http://www.highbeam.com/doc/1P3-500642341.html>>.

⁷⁹ GINSBURG, J. ‘A decent Respect to the Opinions of [Human]kind’, Address on the Value of a Comparative Perspective in Constitutional Adjudication to the Constitutional Court of South Africa (7 Feb 2006), available at <http://supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html>.

⁸⁰ *Roper v. Simmons*, 543 U.S. 551 (2005).

Amendment remains our responsibility.”⁸¹ In what has been called the, “most ambitious use of international sources to date,”⁸² Justice Kennedy went on to cite the International Convention on Civil and Political Rights (ICCPR) along with other regional human rights treaties to lend persuasive authority to his opinion.

In dissent, Justice Scalia disparaged the majority opinion with his well-known sharp pen and directed some of his most caustic criticism at the use of international sources. To raise doubts over the said international consensus he writes, “the Court is quite willing to believe that every foreign nation — of whatever tyrannical political makeup and with however subservient or incompetent a court system — in fact *adheres* to a rule of no death penalty for offenders under 18”.⁸³ Finally, Justice Scalia’s attack on the use of what he calls “foreign sources”, concludes on a familiar questioning of what reasoning or authority is to be regarded as the most true to the U.S. Constitution. To do so, he starts off by reproducing a portion of Justice Kennedy’s majority opinion justifying the use of human rights treaties,

The Court responds that “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.” *Ante*, at 578 [reference to the majority opinion]. ...the Court’s statement flatly misdescribes what is going on here. Foreign sources are cited today, *not* to underscore our “fidelity” to the Constitution, our “pride in its origins,” and “our own [American] heritage.” To the contrary, they are cited *to set aside* the centuries-old American practice...of letting a jury of 12 citizens decide whether...youth should be the basis for withholding the death penalty.⁸⁴

In this last citation demonstrating some of the current internal debate, we find what has become central to the framework in the United States for viewing international law: the U.S. Constitution.⁸⁵ Indeed, if there is one filiation that can be followed through this section of our work, it is that of a constitutional structure composed for the interpretation of international legal obligations in U.S. courts. Whether it is the separation of powers doctrine, federalism or deference to the democratically elected political branches, the manner in which treaty responsibilities are interpreted by U.S. courts is largely shaped by the Constitution. This holds true for the last-in-time rule, self-execution, certain applications of the *Charming Betsy*

⁸¹ *Idem*, at 575. While Justice O’Conner wrote a dissenting opinion in this case, she did affirm, “the existence of an international consensus [. . .] can serve to confirm the reasonableness of a consonant and genuine American consensus” at 605. As well, it should be noted that some authors, not to mention Justice Scalia (evidenced in his dissent), believe Justice Kennedy’s use of international sources to “confirm” the decision is disingenuous, see e.g. WATERS, ‘Creeping Monism...’, note 59 above, at 658-660.

⁸² *Idem*, WATERS, ‘Creeping Monism...’, at 633.

⁸³ *Roper v. Simmons*, note 80 above, at 623.

⁸⁴ *Idem*, (original emphasis) at 628.

⁸⁵ See generally, BIANCHI, ‘International Law and US Courts...’, note 44 above.

canon, and the current debates over what role international and the law from other jurisdictions should play in constitutional interpretation.

This is the context in which the U.S. Supreme Court found itself as the series of counterterrorism cases came before it between 2004 and 2008 relating to detention and judicial review in the ‘war on terror’. Next, it will be necessary to lay out some of the specific humanitarian and human rights laws relating to detention.

III. International Norms: a Framework for Dialogue

On January 16, 2002 detainees captured in Afghanistan began to arrive at the U.S. military facility in Guantánamo Bay on the island of Cuba.⁸⁶ The executive branch had decided to use this naval base on the south-eastern tip of the country (acquired through the Platt Amendment in 1903 while U.S. forces were still occupying the island)⁸⁷ as a holding space for captives in its counterterrorism effort. This particular facility certainly appears to have been chosen because neither U.S. domestic jurisdiction, nor pertinent international laws, was thought by administration lawyers to fully apply to non-citizens detained on foreign land. Indeed, this stance was in fact taken by government lawyers before the Supreme Court,⁸⁸ and internal documents have been published asserting this legal position even previous to the decision to open the detention facility.⁸⁹

The stark and extreme legal position on the U.S. Constitution and international law of the Deputy Assistant Attorney General John Yoo has been outlined in third chapter of this work.⁹⁰ It was only two weeks after the terrorist attacks that Yoo wrote his first legal memo relating to the ‘war on terror’ stating that the Congress cannot pass legislation to limit the president’s power in wartime. What is more noteworthy in our discussion here, however, was

⁸⁶ GREENBERG, K. and DRATEL, J., *The Torture Papers*, note 2 above, at XXV.

⁸⁷ MARIS, G., ‘International Law and Guantánamo’ (1967) 29, 2 *The Journal of Politics* 261, at 261-3.

⁸⁸ *Rasul*, note 14 above, Oral Arguments (20 April 2004) STEVENS, J.: “Supposing the war had ended, could you continue to detain these people on Guantánamo? Would there then be jurisdiction?” GENERAL OLSON: “We believe that there would not be jurisdiction.” Transcript available at <http://www.oyez.org/cases/2000-2009/2003/2003_03_334/argument/>; Also during *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), Oral Arguments (28 March 2006) GENERAL CLEMENT: “I don’t think, consistent with the position of the executive, that the Geneva Convention applies in this particular conflict,” Transcript available at <http://www.oyez.org/cases/2000-2009/2005/2005_05_184/argument/>.

⁸⁹ See Memorandum from: Patrick Philbin, Deputy Assistant Attorney General and John Yoo, Deputy Assistant Attorney General, to: William Haynes II, General Counsel, Department of Defense, Re: Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay (*Possible Habeas Jurisdiction* hereinafter), (28 Dec 2001), reprinted in *The Torture Papers*, note 2 above: “[w]e conclude that a district court cannot properly entertain an application for a writ of habeas corpus by an enemy alien detained at Guantanamo Bay Naval Base, Cuba.” at 37.

⁹⁰ See Chapter 3, Section II-III. For further evidence of this extreme legal position see the discussion Yoo’s article on the use of force in international law in Chapter 5, Section III, or for an even more extreme position that became the basis of policy see Chapter 6, Section II concerning Yoo’s authorship of the ‘Torture Memos’.

the executive's vision of the role of the judiciary in this war. The administration, or at least a small cadre from the Vice President's office,⁹¹ did not envision the judicial branch playing any role whatsoever and moved to exclude the national courts early on in the conflict. Just two months after the attacks on New York and Washington (and a downed plane in Pennsylvania), the President signed a military order dealing with, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism".⁹² In it, the bold assertions of the executive's unitary control over its conduct of the 'war on terror' were plain, and in particular when it came to any type of judicial review. The document read,

the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.⁹³

This exclusion of the Judiciary is certainly one of the reasons that two years after the opening of the Guantánamo detention center, some notable jurists from other national jurisdictions began to publicly refer to this facility as a "legal black hole".⁹⁴

It was with this legal stance that the Bush administration launched its 'war on terror' and began detaining prisoners at Guantánamo in 2002. Yet there are a host of legal questions that need to be answered in order to assess the administration's compliance with the applicable humanitarian law here: is the armed conflict international, or non-international?⁹⁵; are the detainees in Guantánamo entitled to 'prisoner of war' status under the Geneva

⁹¹ GELLMAN, B. and BECKER, J., 'A Different Understanding with the President' *Washington Post* (24 June 2007) A01. In this newspaper article the circumscribed and truncated process is detailed in which this particular military order was drafted in the Vice President's office, presented by Vice President to the President in a closed luncheon meeting, and signed within hours. This episode was also described in the book by the former author (GELLMAN, B., *Angler: The Cheney Vice Presidency* [New York, The Penguin Press, 2008] 470 pp.), but the article certainly represents much more readership.

⁹² Military Order, 'Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism', 66 Fed. Reg. 57,833, sec. 7(b)(2) (13 Nov 2001) reprinted in *The Torture Papers*, note 2 above, at 25.

⁹³ *Idem*, at 28.

⁹⁴ See e.g. STEYN, L. (House of Lords) 'Guantanamo Bay: The Legal Black Hole' (2004) 53, 1 *International and Comparative Law Quarterly* 1.

⁹⁵ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (GC-I) (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (GC-II) (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 85; *Geneva Convention relative to the Treatment of Prisoners of War* (GC-III) (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 135; *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (GC-IV) (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 287; Clearly, to resolve this question one must begin with Common Article 2 and determine if the conflict is "between two or more of the High Contracting Parties". It was as a result of the interpretation of this provision that *al Qaeda* detainees were found to have no legal protection. This determination can be evidenced by the memorandum signed by the President: "I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with *al Qaeda* in Afghanistan or elsewhere throughout the world because, among other reasons, *al Qaeda* is not a High Contracting Party to Geneva". BUSH, P., 'Humane Treatment of *al Qaeda* and Taliban Detainees' (7 Feb 2002) reprinted in *The Torture Papers*, note 2 above, at 134-5.

Conventions?⁹⁶; were there any legal protections to be found at all in the Geneva Conventions that applied to members of the Taliban and al Qaeda?⁹⁷; does there exist an ‘unlawful combatant’ status that puts a prisoner outside of the framework of Third and Fourth Geneva Conventions?⁹⁸; what happens if doubt should arise as to the status of a detainee?⁹⁹ Each of these questions is critical for resolving the issue of whether the Bush administration was exercising its power legally under the laws of war.

However, neither can it be overlooked that there are also human rights laws that remain applicable in armed conflict.¹⁰⁰ The clauses for derogation give human rights

⁹⁶ *Idem*, *GC-III*, to determine ‘prisoner of war’ status one must turn to Article 4(A) and ascertain if an individual who has fallen into the power of the coalition forces in Afghanistan fit into one of the categories fleshed out in the Article. It is through the interpretation of this provision (specifically 4(A)(2)) that the *Taliban* detainees were found not to fit into any of these categories, and thus afforded no legal protection. The President’s memorandum, *ibid.*, reads: “I determine that the provisions of Geneva will apply to our present conflict with the Taliban.” Yet, “I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva”. For the reasons outlined *idem*, there was also no prisoner of war protection for *al Qaeda*: “I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war”.

⁹⁷ *Ibid.*, Common Article 3. For discussion of the application of this Article as a baseline for all detainees in any conflict, see section IV(2) below. For the administration’s assessment of this legal question, see the presidential memorandum *ibid.*: “I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to ‘armed conflict not of an international character’”.

⁹⁸ As evidenced in previous three notes above, the U.S. administration interpreted there to indeed be a gap in the Conventions through which detainees could, and did, slip without any legal protection. This possibility has certainly been considered elsewhere, only the conclusions have largely been the reverse. For more discussion of this issue see Section V (2) below.

⁹⁹ *GC-III*, note 95 above, Article 5 provides that “[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal”. As such, there is indeed a process foreseen by the Geneva Conventions, and further discussion can be found below at notes 89-93 and accompanying text. As well, see Chapter 3, Section III. This requirement could indeed create a heavy case load, however, a leading case will be able to largely determine a group’s status, and only some individual cases will merit a full tribunal hearing.

¹⁰⁰ See, e.g. ‘Legality of the Threat or Use of Nuclear Weapons’ ICJ, Advisory Opinion, 8 July 1996, I.C.J. Reports 1996-I, 226, para. 25: “[t]he Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war,”; ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’ ICJ, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, General List No. 131 para. 106: “the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict,”; *Protocol Additional to the Geneva Conventions of 12 August 1949 (AP-I)*, Relating to the Protection of Victims of International Armed Conflicts, (signed 8 June 1977, entered into force 7 Dec. 1978) 1125 UNTS 3, Article 72: “the protection of fundamental human rights during international armed conflict,”; *Protocol Additional to the Geneva Conventions of 12 August 1949, (AP-II)*, Relating to the Protection of Victims of International Armed Conflicts, (signed 8 June 1977, entered into force 7 Dec. 1978) 1125 UNTS 609, Preamble: “Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person,”; *American Convention on Human Rights (American Convention hereinafter)*, (signed 22 November 1969, entered into force 18 July 1978) O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, Article 27(1): “[i]n time of war,”; *European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention hereinafter)*, (signed 20 March 1952, entered into force 18 May 1954) European Treaty Series No. 5, 213 U.N.T.S. 221, Article 15(1): “[i]n time of war,”; See also *Ex Parte Milligan*, 71 U.S. 2 (4 Wall.) (1866), U.S. Supreme Court held that trials of civilians by presidentially created military commissions are unconstitutional, clearly indicating a continued existence of rights in wartime.; *The Julia*, 12 U.S. (8 Cranch) 181, 193 (1814): “in war, all intercourse between the subjects and citizens of the belligerent

conventions the ability, not to mention the authority, to flex and bend with circumstances. This includes threats even as grave as those to the life of a nation. This is an important reason why these two branches of law have been persistently and explicitly depicted as complementary and mutually reinforcing.¹⁰¹ As well, this explains the various efforts that have been made to establish the manner in which the rules from both branches converge on a minimum common standard that is applicable at all times.¹⁰²

Of direct pertinence here is the human rights standard prohibiting “arbitrary” arrest or detention, which can be found in nearly all the major human rights conventions.¹⁰³ Yet, this is a relative right. This means that whether the detention of a suspected terrorist is ‘arbitrary’ must be assessed in context. That is, the detainee’s right to liberty is weighed against the security of society, and the interests of a government in preserving law and order.¹⁰⁴ To perform this balancing, human rights law requires that a person who has been deprived of her liberty has the possibility of judicial review. As Article 9(4) of the ICCPR affirms, “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order release if the detention is not lawful”.¹⁰⁵ A very similar, but more general, right can also be found in Article 14(1), “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.¹⁰⁶ Principle 9 of the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* also outlines that anyone kept under detention must be held by an authority who “exercise[s] only the powers granted to him under the law and the exercise of these

countries is illegal unless sanctioned by the authority of the government or in the exercise of the rights of humanity” (my emphasis).

¹⁰¹ See e.g. Human Rights Committee’s General Comments No. 29 on Art. 4 (CCPR/C/21/Rev.1/Add.11), and No. 31 (CCPR/C/21/Rev.1/Add.13) where it is specifically stated in para 11: “both spheres of law are complementary, not mutually exclusive”; BIANCHI, A., ‘Dismantling the Wall : The ICJ’s Advisory Opinion and Its Likely Impact on International Law’ (2004) 47 *German Yearbook of Int’l Law* 343, at 371; See generally HEINTZE, H., ‘On the Relationship Between Human Rights Law Protection and International Humanitarian Law’ (2004) 86 (856) *International Review of the Red Cross* 792. In this particular instance, it should be noted that the United States at no time explicitly derogated from its treaty obligations.

¹⁰² *Turku Declaration of Minimum Humanitarian Standards* (E/CN.4/Sub.2/1991/55); *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, reprinted in (Oct. 1985) 79, 4 *AJIL* 1072; and the UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4.

¹⁰³ See e.g. *International Covenant of Civil and Political Rights*, (ICCPR hereinafter)(signed 16 Dec. 1966, entered into force 23 March 1976) 999 UNTS 171, Article 9(1); *American Convention*, note 100 above, Article 7(1)-(3); *European Convention*, note 100 above, Article 5(1); *African Charter on Human and People’s Rights*, (signed 27 June 1981, entered into force 21 Oct. 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 1520 UNTS 217, Article 6; *Universal Declaration of Human Rights*, (concluded 10 Dec. 1948), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), Articles 3 and 9.

¹⁰⁴ PAUST, ‘Judicial Power ...’, note 4 above, at 507.

¹⁰⁵ *Ibid.*, Article 9(4).

¹⁰⁶ *Ibid.*, Article 14(1).

powers shall be subject to recourse to a judicial or other authority”.¹⁰⁷ Additionally, the prohibition of “prolonged arbitrary detention”¹⁰⁸ is recognized by the United States as a customary international law in the authoritative *Restatement (Third) of the Foreign Relations Law of the United States*, and that a state is responsible for the “denial of justice” for the loss of liberty to foreign nationals.¹⁰⁹

It should also be noted that the right to judicial review is implied to be a derogable right within the text of the ICCPR. In other words, a state is allowed to adjust their obligations temporarily under the treaty in exceptional circumstances. However, there are stringent constraints upon the conditions under which derogation may take place. Not only must it be a public emergency that “threatens the life of the nation” which has been “officially proclaimed”, but the denial of a judicial review must be “strictly required by the exigencies of the situation”.¹¹⁰ Nonetheless, the Human Rights Committee, created by the Covenant itself, has spoken expressly on the specific issue before us and stated that freedom from arbitrary detention is a peremptory norm. Thus, “the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant”.¹¹¹

This is just a glimpse of the mountain of international legal constraints that faced the executive branch as it plowed forward with its interpretations of the applicable law in this cross-border conflict. However, as we will see, the Supreme Court did not primarily deal with these questions through the prism of international law, other than in the *Hamdan* decision of 2006 that read the incorporation of the laws of war into domestic law. Instead, the Court found that the fundamental principle of applicable law affording basic judicial protection, or a judicial review of detention, to be present on both domestic and constitutional grounds allowing it to chart its own route based on the responses of the other branches of government. As the Court navigated its way through the thorny queries posed by the armed conflict and the resulting detainees, it was forced to decide how to avoid direct confrontation while still

¹⁰⁷ *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Resolution of the General Assembly 43/173 (concluded 9 December 1988), Principle 9, reprinted in BROWNLIE, I. and GOODWIN-GIL, G. (eds.) *Basic Documents of Human Rights*, Fourth Edition (Oxford, Oxford University Press, 2002) at 41-49.

¹⁰⁸ American Law Institute, *Restatement of the Law (Third), The Foreign Relations Law of the United States*. (St. Paul, Minnesota, American Law Institute Publishers 1987) at §702(e) and comments.

¹⁰⁹ *Idem*, at §711 and comments.

¹¹⁰ *ICCPR*, note 103 above, Article 4(1).

¹¹¹ General Comment 29, note 101 above, at para. 16. See also para. 11 and note 9 within the document that cites the Committee’s concluding observations on Israel (1998) (CCPR/C/79/Add.93), para. 21: “[t]he Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention”.

addressing the legal obligations. As such, the Court attempted to foster engagement with the political branches while reserving its capacity to moderate a dialogue, and chose its moments to ascend the ‘judicial ladder’ to affect the final outcome.

IV. The *Rasul* Decision: Stimulating the Dialogue

Shortly after the opening of the Guantánamo facility, The Center for Constitutional Rights filed cases within the U.S. national court system in an attempt to provide a judicial review to the detained foreigners in Cuba through habeas corpus petitions. The detainees held there were not informed of the reason for detention, had no right to trial, nor were they provided with any legal counsel. In the Supreme Court term of 2003–2004, two cases had worked their way up through the system to come before the highest court and were consolidated under the name *Rasul v. Bush*.¹¹² In these cases, the petitioners claimed that they had never been combatants against the United States, nor had they engaged in any terrorist acts. The lower courts found that they did not possess jurisdiction to hear the habeas petitions, and dismissed the cases holding that *Johnson v. Eisentrager*¹¹³ was controlling. Thus as aliens outside of U.S. sovereign territory, they could not invoke the right to habeas corpus. Additionally, handed down on the very same day, there was a ruling on a case concerning a U.S. citizen accused of fighting against the coalition forces in Afghanistan. *Hamdi v. Rumsfeld*¹¹⁴ was also an assertion of the Court’s jurisdiction to review executive action regarding detention, and thus both cases represented its initial ascension of the ‘judicial ladder of review’.

This was the first chance that the U.S. Supreme Court had to consider any of the counterterrorism policies instituted in the wake of the devastating attacks of September 11th. The Congress passed the omnibus legislation known as the USA PATRIOT Act¹¹⁵ within six

¹¹² *Rasul v. Bush*, note 14 above, The opinion is in fact a decision for two cases that were argued together, *Rasul v. Bush* (No. 03-334) and *Al Odah v. United States* (No. 03-343). To simplify the discussion in the text the consolidated opinion shall be referred to as *Rasul v. Bush*, or simply *Rasul*. As well, use of the term ‘petitioners’ in the text will also refer to the detainees in both cases.

¹¹³ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

¹¹⁴ *Hamdi*, note 15 above. Yaser Esam Hamdi was seized on the battlefield in Afghanistan by members of the Northern Alliance, and after being transferred to the Guantánamo Bay facility it was discovered that he was a U.S. citizen and again relocated to a naval brig in South Carolina. Hamdi’s father filed a habeas petition on his behalf, claiming that the government held him in violation of the Constitution. While this case did not deal with foreign petitioners, it did treat how exactly the judicial branch would attempt to solve the issue of judicial review obligations for U.S. citizens accused of being an enemy combatant in the ‘war on terror’. This case was indeed of import to this ‘judicially moderated dialogue’ because of how it related to the establishment of CSRT hearings (discussed below at notes 88-93 and accompanying text). However, it is certainly not possible, nor worthwhile, to treat every utterance spoken in this dialogue in such an edited volume.

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

weeks of the attacks, and the President launched wars into Afghanistan¹¹⁶ and Iraq¹¹⁷ well before the Supreme Court was asked to weigh in on whether judicial review is legally afforded to those detained in this ‘global war’. So if we think about the differing controlling mandates of the powers in a modern democracy, we begin to perceive a wedge fashioned here between the separate branches of government. Yet, how exactly the Supreme Court chose to manage its mandate of balancing liberty and security is most interesting. As we will see, the Court’s approach was measured, patient, and resolute in its intent to provide a judicial review of detention without compromising security.

1) A Realignment of Precedent

The majority opinion in *Rasul v. Bush* was written by Justice John Paul Stevens, and he opens his judgment by presenting a brief account of the terrorist attacks on the U.S. which led to the congressional authorization to use force in Afghanistan.¹¹⁸ These hostilities against the Taliban and al Qaeda generated detainees, including the petitioners, who were then moved to the Guantánamo facility. Pertinent to the decision was the legal circumstance of the naval base on the island. The Court observed that the lease that was signed in the aftermath of the Spanish-American war left ultimate sovereignty with Cuba, but granted that, “the United States shall exercise complete jurisdiction and control over and within said areas”.¹¹⁹ As such, the question before the Court was to determine whether there was legal reason to extend habeas protection to non-citizens confined in an area where the country exercised plenary and exclusive jurisdiction, but not ultimate sovereignty.¹²⁰

The lower courts had relied entirely upon the *Johnson v. Eisentrager* decision, and even the briefs put forward by the petitioners and respondent primarily focused upon this particular case law in an assumption that it was the controlling case.¹²¹ The *Eisentrager* case concerned twenty-one Germans who were captured in China at the end of WWII, convicted of war crimes by the U.S. military for continuing to fight after the surrender of their country, and

¹¹⁶ Authorization for Use of Military Force, Public Law 107-40, 115 Stat. 224, 18 September 2001.

¹¹⁷ Authorization for Use of Military Force Against Iraq Resolution of 2002, Public Law 107-243, 116 STAT. 1499, 16 Oct 2002.

¹¹⁸ *Rasul*, note 14 above, at 470.

¹¹⁹ Lease of Lands for Coaling and Naval Stations, 23 Feb 1903, U.S.-Cuba, Art. III, T.S. No. 418, cited in *idem*, at 471.

¹²⁰ *Rasul*, note 14 above, at 475.

¹²¹ While there was a recognition of a portion of the realignment of precedent that was to be put forward in the majority opinion for *Rasul* in one of the Petitioners’ Brief on the Merits (No. 03-334, 1/14/2004, at 12 note 8, available at: <http://www.jenner.com/news/news_item.asp?id=12520724>), the argument was certainly not complete and comprehensive in the way it was finally ruled upon. For further evidence of the government’s conviction that that *Eisentrager* would be the controlling case for any courts treating detention in Guantánamo, see Philbin and Yoo Memo, ‘Possible Habeas Jurisdiction’, note 89 above, at 29-34.

then repatriated to serve out their sentences under American authority on a U.S. military facility.¹²² They then petitioned for habeas corpus before the United States courts claiming that the circumstance of their detention had violated the U.S. Constitution. The Supreme Court held that the District Court for the District of Columbia lacked jurisdiction to hear the petition because, among other things, “[n]othing in the text of the Constitution extends such a right”.¹²³ The Court also pointed out that, “[w]e are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction”.¹²⁴ Plainly, there was good reason to believe that this would be the controlling jurisprudence. Like the cases before the court, *Eisentrager* dealt with foreign citizens held on a U.S. military base seeking judicial review. This certainly seemed a high hurdle to clear for the petitioners.

In a notable twist, the position taken by the Court in this significant decision was, at least in part, due to the fact that one of its members had an intimate knowledge of, and noteworthy role in, a judgment that was handed down over a half century earlier.¹²⁵ The conventional understanding of the relevant precedents was that for the Court to rule in favor of the petitioners, it would need to overrule or somehow distinguish the *Eisentrager* decision from the cases upon which the court was now deciding. A similar case of wartime jurisprudence had certainly not come before the Court in the previous half century. However, the majority opinion held in *Rasul* that, in fact, the statutory understanding implied in *Eisentrager* had already been overruled.¹²⁶ To do so, the decision relied upon a relatively obscure dissent in a 1948 case that had been classified as dealing with venue, rather than jurisdiction.¹²⁷ The case upon which the *Rasul* decision would pivot was *Ahrens v. Clark*,¹²⁸ for which critical parts of the dissenting opinion had been drafted by a young law clerk named John Paul Stevens.¹²⁹

The *Ahrens* case arrived at the high court in 1947, and dealt with the detention of over 100 Germans at Ellis Island who were determined to be a danger to the United States due to

¹²² *Eisentrager*, note 113 above, at 763.

¹²³ *Idem*, at 768.

¹²⁴ *Ibid.*

¹²⁵ THAI, J., ‘The Law Clerk Who Wrote *Rasul v. Bush*: John Paul Stevens’s Influence from World War II to the War on Terror’ (May 2006) 92,3 *Virginia Law Review* 501.

¹²⁶ *Rasul*, note 14 above, at 478-9.

¹²⁷ *Idem*, at 476-8.

¹²⁸ *Ahrens v. Clark*, 335 U.S. 188 (1948).

¹²⁹ When referring to Justice Stevens in his capacity as law clerk, ‘Stevens’ will be used for clarity.

the war in progress with their country.¹³⁰ They were scheduled to be deported, yet the petitioners claim on the merits of their case was principally based on the fact that this order was actually made after the conclusion of hostilities had occurred.¹³¹ However, the portion of the case that concerns us here relates to the fact that the petitioners had brought the case before the District Court for the District of Columbia (that of the Attorney General), rather than the court found in the jurisdiction of their confinement (the Southern District of New York). Ultimately, the majority opinion ruled that the District Court did not have jurisdiction and affirmed the lower courts dismissal because “[i]t is not sufficient, in our view, that the jailer or custodian alone be found in the jurisdiction”.¹³² In a footnote, it also set aside the human rights question of “what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights”.¹³³

It was Stevens, as a law clerk, who was asked by Justice Rutledge to prepare a first draft for the dissent in the *Ahrens* case, and as such he came to have an intimate knowledge of the issues at stake in the case. In his draft dissent, Stevens looked at the two issues of proper respondent and territorial jurisdiction of the prisoner to explain that the Congress did not seem to have in mind the irregular circumstance in which the two were not found in the same jurisdiction.¹³⁴ Also in this text by the law clerk, was a reading that the majority’s opinion ended up deciding future cases in which a detainee was not in the specific territorial jurisdiction of any court. This reading also made it into the final dissenting opinion written by Justice Rutledge, and disagreement within the court over this question (directly relating to the human right of a judicial review available for any detainee regardless of the imprisonment location) was addressed as, “[j]urisdictionally speaking, it is, or should be, enough that the respondent named has the power or ability to produce the body when so directed by the court”.¹³⁵ Yet this was, indeed, only the dissenting opinion without the force of law.

Jumping forward a half-century to the *Rasul* decision, it is possible to quickly discern the impact that a familiarity with this particular jurisprudence allowed Justice Stevens. In the majority opinion penned by Justice Stevens himself, it was pointed out that the petitioners in

¹³⁰ *Ahrens*, note 128 above, at 189.

¹³¹ *Idem*

¹³² *Ibid.*, at 190.

¹³³ *Ibid.*, at 193.

¹³⁴ THAI, ‘The Law Clerk...’, note 125 above, at 507-510. Stevens had a hand in tilting the reasoning for the dissent in this particular direction, and hence left his own distinctive mark on a case that he would pick up over a half-century later in *Rasul*.

¹³⁵ *Ahrens*, note 128 above, at 199.

Eisentrager filed their suit only two months after the *Ahrens* decision was handed down.¹³⁶ Thus, the reasoning put forward was that *Eisentrager* was decided in a legal context in which *Ahrens* was well understood to be in place. Due to this legal environment, Justice Steven's argued that *Eisentrager* was in fact based on the question of a detainee's constitutional right to habeas corpus, rather than a statutory right to habeas review, so as to distinguish it from *Ahrens*.¹³⁷ By reading *Eisentrager* in this way, it no longer became the controlling jurisprudence since the *Rasul* case was looking only at the statutory right to habeas corpus. Therefore, the Supreme Court's decision in *Eisentrager* was found to be an overruling of the constitutional right (previously found in the Court of Appeals), and not related to the statutory interpretation under discussion in this case.

To link this novel interpretation of *Eisentrager* with the case before the Court the majority opinion turned to the case of *Braden v. 30th Judicial Circuit Court of Kentucky* (which in fact made specific mention of the dissent in *Ahrens* by Justice Rutledge).¹³⁸ By relying on this particular case, it allowed Justice Stevens to demonstrate that in 1973 the statutory understanding of habeas had already been reformulated so that, "[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody".¹³⁹ The *Rasul* opinion was careful to point out the reasoning with which *Braden* arrived at its conclusion of overruling the *Ahrens* decision. That is to say, the proceeding developments in the congressional and judicial treatment of the habeas statute, after *Ahrens*, were of central importance to the Court in *Braden*. This led to the finding that the Court, on statutory grounds, could "no longer view that decision [*Ahrens*] as establishing an inflexible jurisdictional rule".¹⁴⁰ As such, Justice Stevens was able to deftly realign the precedents so that *Eisentrager* was no longer the controlling jurisprudence because *Braden* became understood as the precedent that had already overruled the majority opinion

¹³⁶ *Rasul*, note 14 above, at 476. In the *Eisentrager* decision there was only passing mention of a review of legislation, the Court ruled the Constitution does not afford such a review, "nor does anything in our statutes". (This is the most direct mention of the habeas statute in the decision.) *Eisentrager*, note 113 above, at 763.

¹³⁷ *Idem*, at 476-9.

¹³⁸ *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 at 495 (1973).

¹³⁹ *Idem*, at 494-5.

¹⁴⁰ *Ibid.*, at 499-500. Also of interest is just how Justice Stevens chose to cite the *Braden* decision when speaking of the developments which transpired after *Ahrens*. In the *Rasul* opinion we find, "[t]hese developments included, notably, decisions of this Court in cases involving habeas petitioners confined overseas (and thus outside the territory of any district court), in which the Court held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim", (*Rasul*, note 14 above, at 479). Yet, in the original *Braden* decision, the phrase "American citizens," opens this sentence and has been omitted in *Rasul*, (*Braden*, note 138 above, at 498). One must wonder if it was purposeful to leave out a reference that might underline the fact that the detainees in *Rasul* were not U.S. citizens, and thus undermine the reasoning of the decision. This was a point not missed by Justice Scalia and thus highlighted in his dissenting opinion (*Rasul*, at 496-7).

referring to the domestic statute. Instead, largely due to what could be categorized as an intimate familiarity with the Court's jurisprudence on this particular point, the dissenting opinion in *Ahrens* became the controlling precedent.

Having prepared an initial draft for this dissent, Justice Stevens was well placed to comprehend its direct significance in the *Rasul* decision. Reading the series of cases together (*Ahrens*, *Eisentrager*, and *Braden*), it is certainly possible to reconstruct the reasoning used to arrive at the conclusion put forward in *Rasul*: the habeas statute in fact gave the non-citizens detained outside of any court's jurisdiction the right to a judicial review by U.S. courts. However, the fact that no one had previously advanced such a formulation of the relevant case law in the lower courts, nor seemed to follow Justice Stevens in his prompting during oral arguments,¹⁴¹ indicates just, "how unlikely Justice Stevens' reading of the cases was".¹⁴²

2) Human Rights Norms and the *Ahrens* Dissent

Most relevant from a human rights perspective is the fact that the only specific portion of this dissent in *Ahrens* that Justice Stevens chose to cite in his *Rasul* opinion was the questioning of what the absence of habeas jurisdiction would mean for petitioners not confined within the territory of any district court. When Justice Stevens was a law clerk, he had honed in on the fact that the majority opinion in *Ahrens* would leave a wide gap of jurisdiction through which persons in need of protection could vanish. In a footnote in *Rasul*, attention was drawn to the significance of this precarious breach to be found in the majority opinion in *Ahrens*. Justice Stevens cited,

Justice Rutledge wrote: "[I]f absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court's capacity to act, [. . .] then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had [. . .]".¹⁴³

¹⁴¹ THAI, 'The Law Clerk...', note 125 above, at 515-522. It should be noted that one of the Petitioners' Brief on the Merits, note 121 above (at 12 note 8), did indeed make reference to the jurisprudence of *Ahrens* and *Braden*, but the argumentation was incomplete in that it did not present an understanding of *Eisentrager* as referring only to a constitutional right to habeas corpus and therefore not controlling. Also pointing to the unique reading of the precedents by J. Stevens is the fact that during the oral arguments he attempted to prompt the counsel for the petitioners into the interpretation that would finally be found in the majority opinion. Yet J. Stevens was only met with a flustered and argumentative response by the Petitioners' Counsel, Mr. Gibbons. And in a statement that can be heard in the audio recording, but that did not make it into the official transcript, J. Stevens closes his line of questioning to the Petitioners' Counsel with, "I'm trying to help you". To read and listen to the oral arguments go to, The Oyez Project, *Rasul v. Bush*, 542 U.S. 466 (2004), available at: <http://www.oyez.org/cases/2000-2009/2003/2003_03_334/> (last visited 20 Aug 2010).

¹⁴² *Idem*, THAI, 'The Law Clerk...', at 528.

¹⁴³ *Rasul*, note 14 above, (internal citations omitted) at 477, note 7.

Additionally, Justice Stevens might well have chosen to cite the section of the dissent that discussed what some would specifically accuse the administration of having done in these particular circumstances, and as we have seen actually discussed in internal memos.¹⁴⁴ That is, deciding on a location of detention specifically for its placement outside the territorial jurisdiction of the courts. The Rutledge dissent asks, “may the jailers stand in defiance of federal judicial power, and plead either the accident of the locus of detention outside the court's territorial limitations, or their own astuteness in so selecting the place, to nullify judicial competence?”¹⁴⁵ The dissent in *Ahrens* answered in the negative to this human rights question, and in turn the majority a half-century later in *Rasul*, by shifting the controlling question away from the petitioner because instead, “[t]he whole force of the writ is spent upon the respondent”.¹⁴⁶

What is also interesting to note is the timing of the *Ahrens* decision in relation to the development of human rights law. When the case was handed down by the Supreme Court in June of 1948, there were no legally binding human rights instruments in existence. It was not until December of that year that the non-binding Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations.¹⁴⁷ Therefore an assertion of some form of the rights found in Articles 9 & 14 of the ICCPR (which only entered into force in 1976)¹⁴⁸ by a minority of judges in the U.S. Supreme Court decades earlier perhaps demonstrates a rising consciousness of the issue as it is now understood by human rights lawyers. Regardless of whether this filiation of legal philosophy can in fact be drawn, the reality is that Justice Stevens, as a law clerk in 1948 and then as a Justice on the Supreme Court in 2004, asserted and then reasserted that, “federal courts have jurisdiction to determine the legality of the executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing”.¹⁴⁹

¹⁴⁴ See Memo of Philbin and Yoo, *Possible Habeas Jurisdiction*, note 89 above.

¹⁴⁵ *Ahrens*, note 128 above, at 195. For a contemporary discussion of extraterritorial jurisdiction see e.g. SNELL, W. ‘Habeas Corpus: Jurisdiction of Federal Courts to Review Jurisdiction of Military Tribunals When the Prisoner Is Physically Confined outside the United States’ (April 1951) 49,6 *Michigan Law Review* 870.

¹⁴⁶ Cited in *idem*, *Ahrens*, at 197 note 2/5. Judge Cooley originally wrote these persuasive words in *Matter of Jackson*, 15 Mich. 417 at 439-40 (1867), as well as being cited in *Ex parte Endo*, 323 U.S. 283 at 306 (1944).

¹⁴⁷ *Universal Declaration of Human Rights*, note 103 above, relevant Articles being 3, 6, 7, 9 and 10.

¹⁴⁸ *ICCPR*, note 103 above.

¹⁴⁹ *Rasul*, note 14 above, at 485. It should also be noted that the sixth vote cast for granting the detainees access to judicial review in U.S. courts was made by Justice Kennedy, but followed a different line of analysis. In his concurring opinion he writes that he does not agree with the majority’s reading of the *Ahrens* and *Braden* cases that would grant a statutory right to habeas corpus for foreigners. Instead Justice Kennedy thought that *Eisentrager* was still the controlling precedent, but concluded that “[t]he facts here are distinguishable from those in *Eisentrager* in two critical ways,” (at 487). He found that the circumstance of the lease to Guantánamo made it very much like a territory of the U.S., and that their indefinite detention without any legal proceeding to determine their status would lead to concluding that federal courts have the jurisdiction to consider challenges to

This conclusion in *Rasul* indeed only dealt with the court's jurisdiction, and did not venture into what rights might be asserted in the habeas reviews the decision affords. For example, it did not explore whether the Geneva Conventions or any human rights treaties are in fact self-executing or contain any judicially enforceable rights. Even if they were, how they would be applicable in these precise circumstances was also entirely avoided, or set aside for later adjudication. However, there is a human rights victory to be found in this narrow jurisdictional and statutory decision. By reading precedent to align with the *Ahrens* dissent, jurisdiction of the court for the habeas statute would now depend on a prisoner's guardian. Justice Stevens concluded, "[n]o party questions the District Court's jurisdiction over petitioners' custodians [...] Section 2241, by its terms, requires nothing more. We therefore hold that §2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base."¹⁵⁰

Consequently, what we find in the first decisions dealing with the 'war on terror' was that the Court did not choose an abrupt or brusque pushback against the executive's conduct in the war, but only to assert its own institutional competence. The Court investigated the authority under which the executive was acting, and ruled on statutory grounds that would allow for legislative participation in the dialogue. As seen in the *Rasul* opinion, comprehensive familiarity with the pertinent interpretation by the Court of the habeas statute over a half-century period permitted a creative realignment of the precedents. In turn, this allowed a reading of the statute which would grant jurisdiction to those detained outside of the traditional territorial jurisdiction of the national courts. The decision stayed within the confines of a statutory reading which afforded the courts jurisdiction to act. As such, the *Rasul* decision can be understood as an ascent of a jurisdictional rung of the 'judicial ladder of review' (in this instance, the Court chose to initiate the dialogue on the second rung outlined in the introduction). However, this first engagement by the judiciary was much less of a directive, than it was an attempt at discussion with the executive and legislative branches. Clearly, the plain assertion of statutory jurisdiction left a wide margin of operation for the political branches. Yet courts prefer to affect outcomes in the least intrusive manner available, and in fact show a stark wariness of doing so at all in certain jurisdictions. Benvenisti

the legality of detention of a foreign national at the Guantánamo facility in Cuba. Thus Justice Kennedy saw that "*Eisentrager* considered the scope of the right to petition for a writ of habeas corpus against the backdrop of the constitutional command of the separation of powers" (at 486). This attention on the separation of powers is particularly important to note in the light of the reasoning found in the *Boumediene* decision (discussed below).

¹⁵⁰ *Ibid.*, at 483-4.

describes the constraint that some courts face (which certainly applies to the U.S. circumstance) as such:

[c]ourts that operate in a legal and political environment that views judicial intervention with suspicion will tend to avoid as much as possible making a determination of illegal executive action based on second-tier [substantive] considerations. They will, rather, rule on the question of institutional authority to act, a question that is no doubt the domain of the courts and, in so doing, will prefer to leave room for the legislature to weigh-in on the matter. Their hope would be that the legislature will cooperate by imposing effective constraints on the executive.¹⁵¹

V. The Onset of Dialogue and the *Hamdan* Decision

There is no doubt that this first venture by the judiciary into the policies of the ‘war on terror’ motivated a reply from both the executive and the legislature. Each responded in their own way, but neither response could be characterized as entirely cordial to the judiciary on this matter of institutional dialogue. Within ten days of the release of the Supreme Court decisions of *Rasul* and *Hamdi*, the administration ordered the establishment of Combatant Status Review Tribunals (CSRT).¹⁵² The order issued was said to be meant to fulfill the requirements set out by the Court, and was not to preclude them from seeking additional review in federal court. In the *Hamdi* plurality opinion, the Supreme Court had made specific mention of Army Regulation 190-8 when suggesting, “[t]here remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal”.¹⁵³ Thus, the executive seized on this remark to justify the process developed in the order. Under the CSRT, each detainee would be notified of certain limited aspects of her detention, and would be assigned a personal representative (but not a lawyer) to assist before the tribunal of three commissioned military officers.

In November of 2006, Professor Mark P. Denbeaux of Seton Hall Law School released a report on the CSRT developed by the administration and found, “the results of this review are startling”.¹⁵⁴ The report examines the records released for the CSRT hearings of 393 of the then 558 detainees at Guantánamo and found problems with representation for the detainees, evidence withheld from the detainee or denied from being introduced, and the

¹⁵¹ BENVENISTI, ‘United We Stand...’, note 17 above, at 256.

¹⁵² Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy (7 July 2004) Re: Order Establishing Combat Status Review Tribunal, available at <<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>> (last visited 16 Jan 2009).

¹⁵³ *Hamdi*, note 15 above, at 538.

¹⁵⁴ DENBEAUX, M., ‘No-Hearing Hearings - CSRT: The Modern Habeas Corpus?’, An Analysis of the Proceedings of the Government’s Combatant Status Review Tribunals at Guantánamo, (17 Nov 2006) available at: <http://law.shu.edu/publications/guantanamoReports/final_no_hearing_hearings_report.pdf>, (last visited 17 Nov 2009) at 4.

brevity of the process. Perhaps most disturbing, there were three instances reviewed in which the detainee was found to be not/no longer an enemy combatant, and in each case the Defense Department ordered a new tribunal convened in which the detainee was then found to be an enemy combatant.¹⁵⁵ In one case, it even took a third tribunal being convened to finally arrive at declaring the detainee an enemy combatant. Finally, it should also be pointed out that the CSRT are not fulfilling the obligations under Article 5 of Geneva Convention III for determining status because they, “do not have the discretion to determine that a detainee should be classified as a prisoner of war - only whether the detainee satisfies the definition of ‘enemy combatant’”.¹⁵⁶

As for the reaction of the legislature to the attempt at engagement from the judiciary, the Congress responded by trying to strip the courts of jurisdiction to hear the habeas corpus petitions of detainees held at Guantánamo. This provision was tied to a statute aimed at prohibiting the cruel, inhumane and degrading treatment of prisoners known as the Detainee Treatment Act of 2005 (DTA).¹⁵⁷ In one sense, the Graham-Levin amendment (as the jurisdiction stripping portion was initially known) finally brought the legislature into the fray on the issue of judicial review for the detainees at the Guantánamo facility. For example, this amendment created a mechanism for Congress to at long last become involved by mandating that reports be given to specific congressional committees and to adopt certain safeguards in the CSRT procedure.¹⁵⁸ Yet a primary provision of this legislation aimed to ensure that, “no court, justice, or judge shall have jurisdiction to hear or consider...an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba”.¹⁵⁹ Additionally, it provided that the United States Court of Appeals for the District of Columbia Circuit would have the “exclusive” jurisdiction to hear appeals on the CSRT determinations or decisions of military commissions, with a remarkable limitation upon the scope of review only to judgments already handed down, and the rules that had created them.¹⁶⁰

However, there was an important question as to whether this exclusive jurisdiction and limited scope of review applied to pending cases, or only to those filed from that date forward. The Court had postponed a judgment on the motion by the government to dismiss

¹⁵⁵ *Ibid.*, at 6.

¹⁵⁶ Declaration of Commander James R. Crisfield Jr., Judge Advocate General Corps, in the case of *Mozzambeg v. Bush*, District Court for the District of Columbia, Civil Action No. 04-CV-1137 (RMC), available at: <<http://wid.ap.org/documents/detainees/moazzambegg.pdf>> (last visited 17 Nov 2009).

¹⁵⁷ Detainee Treatment Act of 2005 (DTA hereinafter), Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739.

¹⁵⁸ *Idem*, at §1005(a)-(d).

¹⁵⁹ *Ibid.*, at §1005(e)(1).

¹⁶⁰ *Ibid.*, at §§1005 (e)(2) and (3).

the case until it had been argued on the merits, and as such this was the first question with which the landmark judgment of *Hamdan v. Rumsfeld* dealt.¹⁶¹

On June 29, 2006 the decision was rendered with Justice Stevens again writing the plurality opinion, while there were additionally two concurrences and three dissents. Indeed, as this was an involved and contentious case dealing with delicate issues related to the nation's security, not to mention that every branch of government had now become involved to differing levels, it is not surprising that the opinion tallied nearly two hundred pages.

When it came to the question of the applicable scope of the DTA legislation, of specific significance for the Court was the fact that Congress considered the temporal reaches of a different construction of the statute, and rejected one particular form because it would have circumscribed the temporal scope of the statute too far.¹⁶² That is to say, there was a noteworthy episode that is found within the legislative history which indicates that Congress made an overt elimination of one construction of the text *specifically because* it would throw pending cases out of court. As the Court put it, "Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation".¹⁶³

1) The Geneva Conventions as 'Self-Executing' or 'Judicially Enforceable'

One of the central questions that the Court was forced to confront at the outset of this case was that of self-execution or judicial enforceability of an international treaty. The reason that these particular questions are of such importance to this judgment is because in its next move up the 'judicial ladder of review', the Supreme Court indeed reached for international law to help bolster its further ascension. As mentioned before, this is a particularly intriguing development due to the historical resistance of national courts to applying international norms especially when doing so is thought to be an "attempt to constrain the activities of the national court's executive".¹⁶⁴ Additionally, national courts "who uphold the human rights of the individual members of those targeted groups [in the war] often find themselves without widespread support due to limited popular demand for governmental accountability in situations of high security [...] and must confront criticism for exposing the population to

¹⁶¹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁶² *Idem*, at 579-80.

¹⁶³ *Ibid.*, and note 10 where one finds specific discussion of the legislative history reinforcing the majority's understanding, and reference to the insertion of language into the Congressional Record *after* the Senate debate in what would appear to be an attempt to rewrite or falsify the record.

¹⁶⁴ BENVENISTI, 'Judicial Misgivings...', note 9 above, at 159.

excessive risks”.¹⁶⁵ In the context of such history, along with the circumstance of national anxiety manifest in the ‘war on terror’, the decision of the Supreme Court to look towards, and apply a portion of, the Geneva Conventions was certainly a bold one.

As well, these questions of self-execution and judicial enforceability are of significance in the *Hamdan* case because they had been answered in alternating ways by courts along the case’s trajectory to its conclusion in the U.S. Supreme Court. As to whether these two terms in fact have the same meaning, at least in this particular instance, the answer is largely affirmative. In the United States, the judicial nature of a treaty is something that largely becomes resolved as the rights outlined within it are claimed in a case before a court, and *Hamdan* was indeed asserting rights found within the Geneva Conventions.¹⁶⁶ While the initial District Court opinion made reference to the term ‘self-executing’ numerous times¹⁶⁷ in arriving at its conclusion that the Court did indeed have the authority to apply the Geneva Conventions because the treaty was of this nature, the phrase was not again used in the Court of Appeals nor the Supreme Court decisions.¹⁶⁸ In a reverse decision by the Court of Appeals, a volte-face of terminology also applied in that the phrase ‘judicially enforceable’ (rather than ‘self-executing’) was used in the determination that the Geneva Conventions were not of such character.¹⁶⁹ In the end, the Supreme Court avoided invoking either term, which we may well interpret as an agile avoidance of speaking to the nature of the treaty within U.S. law.¹⁷⁰

Initially, Judge Robertson of the District Court ruled that the Geneva Conventions were indeed self-executing by determining that the controlling law came from a case that relied upon the *Head Money Cases*. This case, “established the proposition that a ‘treaty is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined’”.¹⁷¹ In turn, it was held that, “[t]he Geneva Conventions, of course, are all about prescribing rules by which the rights of individuals may be determined”.¹⁷²

The Court of Appeals then concluded that the U.S. has “traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual

¹⁶⁵ BENVENISTI, ‘National Courts...’, note 13 above, at 308.

¹⁶⁶ *Hamdan v. Rumsfeld*, U.S. District Court, 344 F. Supp. 2d 152; U.S. Court of Appeals, 415 F. 3d 33; U.S. Supreme Court, 548 U. S. 557 (2006).

¹⁶⁷ *Idem*, U.S. District Court.

¹⁶⁸ *Ibid.*, U.S. Court of Appeals, and U.S. Supreme Court.

¹⁶⁹ *Ibid.*, U.S. Court of Appeals.

¹⁷⁰ *Ibid.*, U.S. Supreme Court. The term ‘judicially enforceable’ was used only twice (once within quotes) in the majority opinion to make direct reference to the lower court judgment, while Justice Thomas used it four times in his dissention claiming that the Geneva Conventions were not in fact ‘judicially enforceable’.

¹⁷¹ *Ibid.*, U.S. District Court at 164, citing *Head Money Cases*, 112 U.S. 580 at 598 (1884).

¹⁷² *Ibid.*

rights”,¹⁷³ and that a footnote found in the *Eisentrager* decision determines that the “1949 Geneva Conventions does not confer upon Hamdan a right to enforce its provisions in court”.¹⁷⁴ Even if it were applicable, Hamdan was participating in a conflict that fell outside of the scope of the treaty. The Court of Appeals came to this conclusion because al-Qaeda was not a “High Contracting Party” (referring to Common Article 2 of the GCs), and that the phrase “not of an international character” (referring to Common Article 3 of the GCs) was equally inapplicable because clashes did indeed take place outside of the United States.¹⁷⁵

To deal with these divergent holdings, the Supreme Court began by concluding that the *Eisentrager* decision and its accompanying footnote, referring to the enforcement of treaty rights only through political and military authorities, did not control the case before the Court.¹⁷⁶ Instead, the Court ruled that Hamdan’s rights were a part of the laws of war, and the Government did not dispute this. In what might be called a sleight of hand, Justice Stevens put forward for the majority, “compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted”.¹⁷⁷ It is this phrase that encapsulates the manner in which the Supreme Court avoided treating the whole question of whether the Geneva Conventions are ‘self executing’ or ‘judicially enforceable’. The Court instead concluded that because the Uniform Code of Military Justice (UCMJ) requires compliance with the laws of war, of which the Geneva Conventions are clearly a part, the Court can apply its provisions.

As a result of this nimble maneuver to avoid deciding on the exact status of these international laws, the Supreme Court discussed its interpretation of the application of the Geneva Conventions to the *Hamdan* case without dealing with the applicability of general treaty law. It should be noted that such a reading falls short of the general interpretation under international law that treaties indeed have judicial force. While this is lamentable from the perspective of international law, it is at the same time a bold step forward for U.S. courts. Internally, this means that precedent was set for the Geneva Conventions being judicially applicable to cases dealing with military justice within the U.S. national court system, as long as there is not a relevant change within the articles of the UCMJ.

¹⁷³ *Ibid.*, U.S. Court of Appeals, at 38.

¹⁷⁴ *Ibid.*, at 40.

¹⁷⁵ *Ibid.*, at 41.

¹⁷⁶ *Hamdan*, U.S. Supreme Court, note 161 above, at 627.

¹⁷⁷ *Ibid.*, at 628.

2) The Application of Common Article 3

As pointed out, one of the most significant and contentious issues at stake in the controversy over detainees and judicial review was whether there was indeed any law applicable to those held in Guantánamo. While the Bush administration had determined that Taliban fighters were covered by the Geneva Conventions, and the al Qaeda detainees were not, in an internal document of February 2002 it was clarified that the executive considered that neither category of prisoner were entitled to prisoner of war status nor the protections of Common Article 3.¹⁷⁸ The determination made by the administration was that the detainees at Guantánamo were “unlawful enemy combatants” who could be held indefinitely without trial, even if they were to be acquitted by a military tribunal.¹⁷⁹ Therefore, the executive held that their own interpretation of international law led to the conclusion that there was no applicable binding law at all for the detainees at Guantánamo.

This judgment was particularly worrisome in light of the commentary on Article 4 of the Fourth Geneva Convention which elaborates specifically on this point. It reads,

all the particular cases we have just been considering confirm a general principle which is embodied in all four Geneva Conventions of 1949. Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. ‘There is no’ intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution -- not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.¹⁸⁰

Additionally, jurisprudence from the International Criminal Tribunal for the Former Yugoslavia (ICTY) also speaks directly to this point of whether there exists any fissure between the Geneva Conventions through which a detainee in the hands of the enemy may slip unprotected. It was held, “there is no gap between the Third and the Fourth Geneva Conventions. If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV”.¹⁸¹ As such, the question of applicable law was once again directly

¹⁷⁸ White House Memorandum, “Humane Treatment of al Qaeda and Taliban Detainees”, note 95 above. For further analysis of this document, see notes 95-99 above and accompanying text, and Chapter 3, Section III.

¹⁷⁹ Congressional Research Service Report for Congress, ‘Detainees at Guantanamo Bay’, Order Code RS22173, Updated 20 July 2005, available at <<http://www.fas.org/sgp/crs/natsec/RS22173.pdf>>, at 2.

¹⁸⁰ International Committee of the Red Cross Commentaries (ICRC Commentaries hereinafter), GC IV, Article 4 ‘Definition of Protected Persons’ at 51.

¹⁸¹ International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No: IT-96-21-T, Prosecutor v. Zejnir Delali] Zdravko Muci] also known as “Pavo” Hazim Deli] Ead Lando@o also known as “Zenga”, Celebici Judgment, 16 Nov 1998, at para. 271.

before the U.S. Supreme Court, and in the *Hamdan* decision it chose to ascend the ‘ladder of review’ to address this substantive issue through an unequivocal engagement with international law.

To be sure, the Supreme Court faced the difficult question of qualifying the conflict in Afghanistan where there appeared to be two different armed conflicts underway that would be determinative in assessing the applicable law:¹⁸² one with the Taliban regime that controlled the territorial state; and another outside the territory of the United States with the non-state group al Qaeda (of which Hamdan was allegedly a part). While the government argued that the character of the latter conflict would place Hamdan outside the protection of the Geneva Conventions, the Supreme Court resolved that it, “need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories”.¹⁸³

With a noteworthy interpretation, the Court found that Common Article 3 of the Geneva Conventions did indeed apply to the conflict with al Qaeda because the phrase “not of an international character”¹⁸⁴ found there within is applied, “in *contradistinction* to a conflict between nations”.¹⁸⁵ The use of the term “contradistinction” by the Supreme Court is quite intriguing because with this one simple expression the conservative U.S. court made a move beyond the surface language of this common article of the conventions that was originally meant to apply to “victims of civil wars and internal conflicts”.¹⁸⁶ The commentary to the Geneva Conventions on this article certainly speaks to the high aspirations for its applicability since the Red Cross has always been, “concerned with people as human beings, without regard to their uniform, their allegiance, their race or their beliefs, without regard even to any obligations which the authority on which they depended might have assumed in their name or in their behalf”.¹⁸⁷ Nevertheless, the plurality opinion in *Hamdan* pointed out that “the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of ‘conflict not of an international character,’ i.e., a civil war”.¹⁸⁸ So with this tension explicitly laid out between the traditional understanding of the surface language of the article, and the humanitarian hopes for its application, the Supreme Court took a bold domestic stance on this issue.

¹⁸² For further discussion see also Chapter 3, Section III.

¹⁸³ *Hamdan*, note 161 above, at 629.

¹⁸⁴ *Geneva Conventions*, Common Article 3, note 95 above.

¹⁸⁵ *Hamdan*, note 161 above, (my emphasis) at 630.

¹⁸⁶ ICRC Commentaries, GC III, Common Article 3, at 28.

¹⁸⁷ *Idem*.

¹⁸⁸ *Hamdan*, note 161 above, at 631.

However, it cannot be said that this particular approach by the Supreme Court was out of line with the international understanding of treaty obligations. For example, in the judgment of the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, the International Court of Justice discussed Common Article 3 as universally applicable customary international law because it is a baseline of the least amount of protection, or “minimum yardstick”, afforded to those found *hors de combat* in an international conflict.¹⁸⁹ It is also notable that in the discussion on this point of Common Article 3 in the *Nicaragua* decision was also a treatment of the Martens Clause, and its repeated appearance as a common article to the four Geneva Conventions.¹⁹⁰ As well, it has been pointed out that Common Article 3 does, “no more than spell out the ‘hard core’ of international human rights law applicable at all times,”¹⁹¹ and can therefore be understood as sketching an outline of the overlap between human rights and humanitarian law. The ICTY also held that Common Article 3 provisions “are so fundamental that they are regarded as governing both internal and international conflicts” and rules which, “may thus be considered as the ‘quintessence’ of the humanitarian rules found in the Geneva Conventions as a whole”.¹⁹² Finally, in the case of *Kadic v. Karadzic* before a U.S. Court of Appeals under the Alien Tort Act¹⁹³ (which creates federal court jurisdiction for suits alleging torts committed abroad against aliens in violation of the law of nations) it was held that, “the most fundamental norms of the law of war [are] embodied in common article 3”.¹⁹⁴ Thus for the Supreme Court to have singled out Common Article 3 as applicable to the conflict with al Qaeda is certainly not eccentric. Perhaps the only surprising element is the fact that the Court

¹⁸⁹ ‘Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*)’ ICJ Reports of Judgments, Advisory Opinions, Merits, Judgement of 27 June 1986, para. 218: “Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’” (internal citations omitted).

¹⁹⁰ GC I, Article 63; GC II, Article 62; GC III, Article 142; GC IV, Art. 158, note 95 above: “[p]arties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience”. These common articles are known as the ‘Martens Clause’ that has been a part of the laws of war since its introduction into the preamble of the 1899 Hague Convention, although due to its broad formulation, it has long resulted in differing interpretations of its scope.

¹⁹¹ --, ‘International Humanitarian Law: From Law to Action: Report on the Follow-up to the International Conference for the Protection of War Victims’ Presented by the ICRC in consultation with the International Federation of the Red Cross and Red Crescent Societies at the 26th International Conference of the Red Cross and Red Crescent, Geneva 3-7 December 1995, Commission I, Question 2 of the Agenda; reproduced in IRRC, No. 311, March-April 1996, section 2.4.

¹⁹² ICTY, Appeals Chamber, Case No: IT-96-21-A, Prosecutor v. Zejnil Delali] Zdravko Muci] also known as “Pavo” Hazim Deli] Ead Lando@o also known as “Zenga”, Celebici Judgment, 20 Feb 2001, at para. 143.

¹⁹³ 28 U.S.C. § 1350 (1988), enacted in 1789 but rarely invoked until more recently.

¹⁹⁴ *Kadic v. Karadzic*, U.S. Court of Appeals, Second Circuit, 70 F.3d 232, 64 USLW 2231.

chose not to discuss its applicability as customary international law, but instead to interpret its surface language as granting application through ‘contradistinction’.¹⁹⁵

3) Common Article 3 and the Military Commissions

Having established that the applicable law to the U.S. armed conflict with al Qaeda was found in Common Article 3, the Supreme Court next moved on to determine whether the judicial rights afforded to Hamdan (as an alleged combatant in this conflict) were indeed protected by his trial before a military commission created by the President. As the language in this article is somewhat imprecise due to its basic nature, ascertaining the exact meaning required further investigation by the court. The specific language of the provision that was pertinent to Hamdan in this case was Common Article 3(I)(d) stating,

[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.¹⁹⁶

To begin to assess whether Hamdan’s rights under this provision were protected, the plurality looked again to the commentary of the Geneva Conventions to find a meaning for the phrase “regularly constituted court.” While nothing giving further shape to its meaning is found in the article itself nor its accompanying commentary, Article 66 of Geneva Convention IV deals with the type of competent courts that are to be used to try civilians in breach of penal provisions in occupied territories. Although this was certainly not the circumstance before the Court, the commentary reveals the same phraseology of ‘regularly constituted’ court and that, “[t]his wording definitely excludes all special tribunals”.¹⁹⁷ Additionally, the Court turned to the Red Cross publication *Customary International Humanitarian Law* where they found this phrase in Common Article 3 to mean, “established and organized in accordance with the laws and procedures already in force in a country”.¹⁹⁸ This specific reference was taken from the petitioner’s brief submitted to the Court, where it is also found, and thus taken to be persuasive.¹⁹⁹ Additionally, the brief cites this same text on the way in which a ‘regularly constituted court’ should be able to operate in relation to other branches of

¹⁹⁵ One can posit that a reason for this particular formulation of the argument was due to ensuring a majority vote on the judgment. As an indication that the interpretations of customary international law might have played a role look concurring opinion by J. Kennedy to *Hamdan*, note 161 above, at 654-55, where other doubts were raised about customary international law.

¹⁹⁶ *Geneva Conventions*, Common Article 3, note 95 above.

¹⁹⁷ *Hamdan*, note 161 above, at 632, citing the ICRC Commentaries, GC IV, Article 66, at 340.

¹⁹⁸ *Idem*, at 355 citing HENCKERTS, J., and DOSWALD-BECK, L., *Customary International Humanitarian Law*, International Committee of the Red Cross, Vol. I, (Cambridge, Cambridge University Press, 2005) 621 pp.

¹⁹⁹ Brief for the Petitioner, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184), at 48.

government in that it, “must be able to perform its functions independently of any other branch of the government, especially the executive”.²⁰⁰ On this point the petitioner’s brief elaborates,

the commission is an *ad hoc* tribunal fatally compromised by command influence, lack of independence and impartiality, and lack of competence to adjudicate the complex issues of domestic and international law. The rules for trial change arbitrarily—and even changed after the Petition for Certiorari was filed. It is not regularly constituted; its defects cannot be cured without a complete structural overhaul and fixed rules.²⁰¹

The majority certainly does not go as far in its opinion, and instead relies on the reasoning put forward by Justice Kennedy in his concurring opinion that, “[a]t a minimum a military commission like the one at issue—a commission specially convened by the President to try specific persons without express congressional authorization—can be ‘regularly constituted’ by the standards of our military justice system only if some practical need explains deviations from court-martial practice”.²⁰² A practical need for the commissions was not found to be demonstrated by the government. We also see that the Court indeed indicated a manner in which the political branches may resolve one of the deficiencies of the military commissions: congressional authorization. However, this was not without a caveat.

What we have seen here in the *Hamdan* case is that the U.S. Supreme Court did not show traditional wartime deference, and again chose to moderate the dialogue over the conduct of the administration, and now the legislative branch, in the ‘war on terror’. This time, the Court reached for the provisions of international humanitarian law to find applicable law and judicial guarantees available to non-citizens detained in Guantánamo. In so doing, the Court gave further credence to international law as a valid set of norms that could indeed constrain the government even in times of armed conflict. To be sure, there were both creative and questionable interpretations of humanitarian law and its applicability. This was apparent in the Court’s reading of the laws of war into the UMCJ statutes and then the application of Common Article 3 as ‘contradistinctive’ to international armed conflict. Yet it cannot be denied that these interpretations of applicability are now stamped as precedent into the domestic law of the United States. Perhaps most importantly, the finding that Common

²⁰⁰ *Idem*, citing HENCKERTS and DOSWALD-BECK, *Customary International Humanitarian Law*, note 198 above, at 356.

²⁰¹ Brief for the Petitioner, note 199 above, at 48 (internal citations omitted).

²⁰² *Hamdan*, note 161 above, at 645.

Article 3 is indeed applicable law to the ‘war on terror’ became legally established with far reaching implications.

By utilizing international law to buttress its decision, the Court also further ascended the ‘judicial ladder of review’ and in turn set a higher hurdle for legislative authorization should the legislature choose to further engage in this institutional colloquy. However, it must not be overlooked that Justice Kennedy in his concurring opinion, joined by Justices Souter, Ginsburg and Breyer, put forward a cautionary caveat indicating how further moderation of the dialogue might take place: “[s]ubject to constitutional limitations, Congress has the power and responsibility to determine the necessity for military courts, and to provide the jurisdiction and procedures applicable to them”.²⁰³

VI. The Continuation of Dialogue and the *Boumediene* Decision

After the *Hamdan* decision the executive branch found itself in a precarious position regarding the status of detainees at the Guantánamo facility since the Supreme Court had found the military commissions it had established to be illegal under the applicable law, in particular without congressional approval. In reaction, on September 6, 2006 the administration announced the transfer of fourteen high-value detainees in the ‘war on terror,’ including the alleged mastermind of the September 11th attacks, from undisclosed ‘black sites’ to the Guantánamo Bay Naval Base.²⁰⁴ This public statement and transfer was made in an effort to urge Congress to authorize new military commissions so that these and other terror suspects could be put on trial under new rules since the previous commissions had been struck down in *Hamdan*. President Bush stated, “[a]s soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September 11, 2001, can face justice”.²⁰⁵ Thus the President seemed to be daring Congress to deny him the tools he claimed to need for dealing with the worst of the al Qaeda leaders now brought into open detention at Guantánamo. From a political point of view, this announcement was a part of a series of speeches the President gave in the lead up to the fifth anniversary of the September 11th attacks, and “carried potential political benefits for a White House that [was] intent on maintaining Republican

²⁰³ *Idem*, (internal citations omitted) (my emphasis).

²⁰⁴ STOLBERG, S., ‘President Moves 14 Held in Secret to Guantanamo’ New York Times (7 Sept 2006) available at <<http://www.nytimes.com/2006/09/07/us/07detain.html?pagewanted=1&sq=transfer%20high%20value%20detainees%20to%20guantanamo&st=cse&scp=3>>, (last visited 19 Dec 2008).

²⁰⁵ *Idem*.

control of Congress”.²⁰⁶ This suspected political advantage was due to the fact that the mid-term congressional elections were to be held just two months later.

1) The Military Commissions Act of 2006

In less than one month, at a truly remarkable speed, the Military Commissions Act of 2006 (MCA)²⁰⁷ was drafted and passed by the Congress bringing the legislative branch fully into the fray on detention without judicial review in the ‘war on terror’. Two days after this bill was signed into law, John Yoo, who had now returned to academia after serving in the Bush Justice Department, published a sharp editorial article for the Wall Street Journal providing his assessment of the new law and how it should be understood concerning the broad dialogue that had been opened between the three branches of government. He wrote,

The new law is, above all, a stinging rebuke to the Supreme Court. It strips the courts of jurisdiction to hear any habeas corpus claim filed by any alien enemy combatant anywhere in the world. It was passed in response to the effort by a five-justice majority in *Hamdan v. Rumsfeld* to take control over terrorism policy.²⁰⁸

While a remand to the legislature in the *Hamdan* decision hoped for a deliberative and careful look at the matter of military commissions and detention now that the Supreme Court had clarified some of the law and issues at stake, the result was less than optimal. The speed with which the legislature acted due to the political and electoral urgency forced by the executive’s transfer of high-value detainees has already been pointed out. As a likely result of this haste, along with overt intention, a series of criticisms have been leveled against specific provisions of the MCA.²⁰⁹ One part of the MCA that meant to circumvent dialogue, and which directly raises serious concerns over international legal obligations, was that §3 and §5 stipulating, “[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding” as a “source of rights”.²¹⁰ Yet it is not

²⁰⁶ *Ibid.*

²⁰⁷ Public Law No. 109-366, 120 Stat. 2600, Oct. 17, 2006. Passed by the Senate on 28 Sept. 2006, by the House of Representative on 29 Sept. 2006, and signed into law by the President on 17 Oct. 2006.

²⁰⁸ YOO, J., ‘Sending a Message - Congress to Courts: Get out of the war on terror’ The Wall Street Journal, (19 Oct. 2006) available at <<http://www.opinionjournal.com/editorial/feature.html?id=110009113>>.

²⁰⁹ See e.g. FARER, T., ‘The Two Faces of Terror’ (April 2007) 101, 2 *AJIL*; VASQUEZ, C. ‘The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide’ (Jan. 2007) 100, 2 *AJIL*; BRADLEY, C., ‘The Military Commissions Act, habeas corpus, and the Geneva Conventions’ (April 2007) 101, 2; MARTINEZ, J., ‘The Military Commissions Act and “Torture Lite”: Something for a Great Nation to Be Proud Of?’ (2007) 48 *Harvard International Law Journal* 58.

²¹⁰ For a useful analysis on this provision see e.g. MARTIN, D., ‘Judicial Review and the Military Commissions Act: on striking the right balance’ (April 2007) 101, 2 *AJIL*. It should be noted that this particular provision has been improved in the MCA of 2009. Section 948b states, “(e) Geneva Conventions Not Establishing Private Right of Action—No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action.” Thus while the original

within the scope of this study to flesh out all of the critiques relating to this statute. Instead, attention will only be drawn to the provision that dealt directly with the inter-branch colloquy charted in this chapter since it attempted to strip jurisdiction from the federal courts.

It was §7 of the MCA that concerned access to judicial review in the national courts. In what can be described as a direct retort to *Hamdan*, the provision read,

[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus [...] or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination..²¹¹

Under this language, even a claim that a detainee was being subjected to continued torture and ill-treatment while in detention could not be heard before a federal court of the United States.²¹² Thus this provision raises serious doubts as to its conformity with the numerous obligations under human rights and humanitarian law since it would effectively neuter the court system from dealing with any claims against the government in its ‘war on terror’. Further action was also taken in this bill to clarify, and remove all doubt, as to its temporal effect on the federal courts’ jurisdiction. Section 7(b) read that the legislation,

shall take effect on the date of the enactment of this Act, and shall apply to all cases, *without exception*, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.²¹³

This rejoinder from the legislature, at the behest of the executive, was plainly a boisterous statement in the ongoing dialogue. As such, the Supreme Court first needed to place its attention here to determine if the Congress had properly exercised its legal authority in stripping the courts of jurisdiction in such circumstances.

Although the case was initially denied certiorari six months after passage of the MCA, with decisive votes against it by Justices Stevens and Kennedy,²¹⁴ the very next term brought about a reversal of position by these two key Justices. A hearing was granted for *Boumediene v. Bush* and the Court rendered its decision on June 12, 2008 with the majority opinion

provision professed to bar any invocation of the Geneva Conventions, under the new terms they can be used offensively in habeas proceedings or defensively in penal proceedings. But they still do not give rise to any independent action.

²¹¹ 28 U.S.C. [section] 2241(e), as added by MCA, note 207 above, § 7.

²¹² See MARTIN ‘Judicial Review...’, note 210 above, at 10.

²¹³ 28 U.S.C. [section] 2241, as added by MCA, note 207 above, § 7(b), (my emphasis).

²¹⁴ *Boumediene v. Bush*, 127 S.Ct. 1478 (2007).

delivered by Justice Kennedy.²¹⁵ The petitioners in this case were all foreign nationals, with only some of them captured on the battlefield in Afghanistan, but none of them were citizens of a nation at war with the United States. More importantly, each individual denied that they were a member of the al Qaeda terrorist network or the Taliban regime that offered the group sanctuary.²¹⁶ With these facts established, Justice Kennedy began his analysis for the majority by clarifying that the phraseology of the MCA statute was clear. Section 7 of the law did indeed deny jurisdiction to federal courts and thus the cases must be dismissed, *if* the provision was determined to be constitutionally valid.²¹⁷ Additionally, Justice Kennedy explicitly acknowledged that the language found in the MCA must be understood as a part of ongoing inter-branch colloquy over judicial review for the detainees at Guantánamo. As he explained it, “[i]f this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to *Hamdan*’s holding that the DTA’s jurisdiction-stripping provision had no application to pending cases”.²¹⁸ The Court thus turned to analyze the constitutionality of §7 of the MCA.

2) The Constitutional Right to Habeas Corpus

As indicated at the close of Section V, if unsatisfied with the direction of the inter-branch dialogue the next rung in the ‘judicial ladder of review’ would be for the Court to examine actions taken by the political branches to determine whether they were in line with all constitutional constraints. Justice Kennedy had indeed suggested in his concurring opinion in *Hamdan* that the requirement of constitutionality would be how any further legislation by the Congress would be assessed by the Supreme Court should further litigation come before it. Therefore it is not a surprise that the Court reached for, grasped, and boldly ascended to the next rung of the ‘judicial ladder of review’ –that of constitutionality– to buttress its opinion of the illegality of the government action in the ‘war on terror’. In this manner, and for the first time in the Court’s history, it ruled against the President and Congress acting together in a time of armed conflict.²¹⁹

²¹⁵ *Boumediene v. Bush*, 128 S.Ct. 2229 (2008). The opinion is again a decision for two cases that were argued together, *Boumediene v. Bush* (No. 06-1195) and *Al Odah, Next Friend of Al Odah, et al. v. United States et al.* (No. 06-1196). To simplify the discussion in the text the consolidated opinion shall be referred to as *Boumediene v. Bush*, or simply *Boumediene*. As well, when the term ‘petitioners’ is employed in the text, it will also refer to the detainees in both cases.

²¹⁶ *Idem*, at 2241.

²¹⁷ *Ibid.*, at 2242-43.

²¹⁸ *Ibid.*

²¹⁹ COLE, D., ‘Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay’ (2008) *Cato Supreme Court Review*; Georgetown Public Law Research Paper No. 1272202. Available at SSRN: <<http://ssrn.com/abstract=1272202>>.

To establish whether the congressional stripping of habeas corpus rights from the detainees at Guantánamo was constitutional, the Supreme Court briefly examined the history and origins of the ‘Great Writ’ of habeas corpus as particularly understood by the Framers of the U.S. Constitution. Through this investigation, the Court found that the Suspension Clause in the Constitution²²⁰ was one that should be understood as central to its construction and must inform a proper interpretation of a document that initially lacked a Bill of Rights. This fundamental writ was included directly into the Constitution’s original text to guard against abuse by the other two branches so as to maintain the delicate balance of governance that the Framers intended. Justice Kennedy’s majority opinion reveals a deep concern for the separation of powers in reference to the importance of habeas corpus and explains,

“[t]he Framers’ inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty.”²²¹

For this reason, he contended that this structure of government also affords that it is not only citizens who are granted substantive guarantees found in the Constitution and Bill of Rights. He deduced this from the fact that the Court had previously found, “foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles”.²²² This is particularly significant because the separation of branches of government in the U.S. has often allowed for a certain amount of buck passing, or responsibility avoidance, when it comes to international law.²²³ Thus, in this case it is important that the Supreme Court explicitly indicated that it is this very same constitutional principle that in fact allows for non-citizens to have a voice in the national courts. Of course, this privilege ultimately turns on standing and the ability to litigate “in our courts”. Therefore, the challenge continued to be centred on the geographic reach of constitutional protections to these foreign nationals.

The most powerful citation put forward in the opinion supporting the majority’s holding of the centrality of the writ of habeas corpus in the constitutional structure would certainly be that of Alexander Hamilton in the *Federalist Papers*. It should also be remembered that this series of essays published in a New York newspaper with the intent of

²²⁰ U.S. Constitution, Art. I, §9, cl. 2. “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it”.

²²¹ *Boumediene*, note 215 above, at 2246.

²²² *Idem*. To evidence this point J. Kennedy cites *INS v. Chadha*, 462 U. S. 919, at 958–959 (1983).

²²³ See e.g. BIANCHI, A., ‘International Law and US Courts...’, note 44 above.

informing voters and advocating for the Constitution's ratification, serves as a primary source for its interpretation. In *Federalist No. 84* Hamilton wrote, and the Court cited,

[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone. . .are well worthy of recital: 'To bereave a man of life. . .or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.' And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls 'the BULWARK of the British Constitution.'²²⁴

With these incisive words and perspective on the historical moment, one quickly grasps the reasoning for including a means for a judicial review of detention directly into the text of the Constitution. Additionally, we clearly glean its direct relevance to legitimacy.

In large measure, what can be found in Justice Kennedy's majority opinion is the intent to lay out the contours of a constitutional principle, rather than a formal rule based on a reading of the common law in the essentially arbitrary year of 1789. However, Justice Scalia took great issue in his dissenting opinion with what he interpreted as an usurpation of power by the Court and maintained that, "[i]t is nonsensical to interpret those provisions themselves in light of some general 'separation-of-powers principles' dreamed up by the Court".²²⁵ Instead, he asserted the originalist interpretation for which he is widely known²²⁶ to insist that, "[t]he writ as preserved in the Constitution could not possibly extend farther than the common law provided when that Clause was written".²²⁷ Thus, one place in which a line can be drawn between the two camps of the Court on the *Boumediene* decision is over a formal historical test for the reach of the writ, and the majority who preferred a more flexible functional test.²²⁸

There were two primary ways in which the majority overcame the argument of a strictly formal test for the right to habeas corpus: 1) by breaking down the *Eisentrager* decision as one not based on this formalism, and 2) by looking at the Court's finding in the so-called 'Insular Cases' in which the application of the Constitution to incorporated and

²²⁴ *Boumediene*, note 215 above, at 2247.

²²⁵ *Idem*, at 2297.

²²⁶ See e.g. BARNETT, R., 'Scalia's Infidelity: A Critique of Faint-Hearted Originalism', (2006) 75, 7 *University of Cincinnati Law Review*.

²²⁷ *Boumediene*, note 215 above, at 2297.

²²⁸ See DWORKIN, R., 'Why It Was a Great Victory' (2008) 55, 13 *The New York Review of Books*, available at <<http://www.nybooks.com/articles/21711>>, (last visited 5 Jan 2008). It should also be noted that the other primary argument put forward by the dissent was made by Chief Justice Roberts, who claimed that the decision would be of little use to the detainees as it will most likely have only a "modest" impact on their opportunity for freedom. While Justice Scalia asserted that "[i]t will almost certainly cause more Americans to be killed", all four dissenting judges signed on to each opinion seemingly undisturbed by the contradiction.

unincorporated territories was based upon practical constraints. On the first point, Justice Kennedy indicated that in the government's principle brief in 1949 for the *Eisentrager* case it indeed advocated a "bright-line" test, much like the government did in this case, for determining the scope of habeas corpus application. However, "the Court mentioned the concept of territorial sovereignty only twice in its opinion", and instead "devoted a significant portion [...] to a discussion of practical barriers to the running of the writ".²²⁹ For the majority, this suggested that the Court was not only focused upon the formal legal status of the prison where the detainees in *Eisentrager* were being held, but also the practical degree of control that the U.S. exercised over the facility. Ultimately Justice Kennedy concluded, "[n]othing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus".²³⁰

At the beginning of the twentieth century, the Supreme Court decided a series of legal actions over newly acquired lands, known as the 'Insular Cases', in which it addressed whether the Constitution was applicable in territory that is not a state in the union. Justice Kennedy found the Court's reasoning in these cases instructive to the issue at hand, and pointed out that, "the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace".²³¹ This being the case, a doctrine was devised by the Court for determining the reach of the Constitution based on practicable necessities, and in particular whether judicial enforcement would be "impracticable and anomalous".²³²

With these readings of pertinent jurisprudence the Court discerned a common thread between them and found that, "questions of extraterritoriality turn on objective factors and practical concerns, not formalism".²³³ A real concern was expressed by the majority over the idea of strict adherence to such formalism in an issue concerning the application of the Constitution because it would allow the political branches the possibility of constructing circumstances to fit a desired legal outcome. The terms of the lease with Cuba concerning "ultimate sovereignty" and "exclusive jurisdiction" were negotiated, drafted and signed by the political branches, but this certainly did not afford them the "power to switch the Constitution on or off"²³⁴ by its own stipulations. To do so, as affirmed in Justice Kennedy's opinion, would grant the Congress and the President the principal authority exercised by the Supreme Court, and delineated in the landmark judgement of *Marbury v. Madison*, to determine "what

²²⁹ *Boumediene*, note 215 above, at 2258.

²³⁰ *Idem*.

²³¹ *Ibid.*, at 2254.

²³² *Ibid.*, at 2255.

²³³ *Ibid.*, at 2258.

²³⁴ *Ibid.*, at 2259.

the law is”.²³⁵ Therefore reliance on such formalism must be eschewed because of the opening it allows for grave distortions to the U.S. system of government. As was warned,

[t]hese concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.²³⁶

Upon the strength of this reasoning, so as to avoid devolution of the tripartite system, a majority on the Supreme Court thus again found that the detainees in the ‘war on terror’, this time constitutionally, had a right to a judicial review. In the majority’s words,

[w]e hold that Art. I, §9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. [...] The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.²³⁷

While the reasoning in this *Boumediene* decision is clearly based upon constitutional interpretations, there is good reason to trumpet this finding as a partial human rights victory. Holding that constitutional protections extend to non-citizens outside of United States territory indeed belies the standard U.S. contention that the protections of the ICCPR are extended only to individuals who are both “within its territory *and* subject to its jurisdiction”.²³⁸ As such, this advancement in the U.S. legal position should be recognized. Yet there is no doubt that the practical constraints placed on this extension of rights by the Court in the *Boumediene* decision are difficult to reconcile with the concept of ‘effective control’ held by the Human Rights Committee to be the proper mechanism for determining applicability. It is indeed lamentable that an opportunity was missed to present a full throated human rights law argument to the Court in *Boumediene*, so as to help inform the content of constitutional norms, and help develop a more harmonious concert between constitutional

²³⁵ *Marbury v. Madison*, 1 Cranch 137 at 177 (1803).

²³⁶ *Boumediene*, note 215 above, at 2259.

²³⁷ *Idem*, at 2262.

²³⁸ *ICCPR*, note 103 above, Article 2(1) (my emphasis). The United States has long held the position that the text of Article 2(1) relating to the scope applicability of the ICCPR, to which the U.S. is a party, requires that an individual must be both “within its territory and subject to its jurisdiction”. (For an example of this interpretation see ‘Opening Statement to the U.N. HRC’, M. Waxman, Head of U.S. Delegation, (17 July 2006) Geneva, Switzerland, available at: <<http://www.state.gov/g/drl/rls/70392.htm>>).

standards and human rights law.²³⁹ This is an important point which will be discussed further in Section VI (4) below.

Additionally, it should be noted that the Court's constitutionally based decision was modest in two important regards. The first is that the Suspension Clause expressly permits the Congress to suspend habeas rights in "cases of rebellion or invasion", and therefore this step could be taken without surmounting the enormous hurdle of a constitutional amendment. While this is surely not an action to be taken without due consideration, it does speak to the modesty of the decision. Secondly, the decision was very fact-specific and not a broad categorical rule, which should therefore be understood as quite narrow. Nevertheless, using the 'judicial ladder of review' as our guide for understanding this inter-branch colloquy, we can also appreciate the calculation of using such a reading of the habeas rights found in the Constitution, rather than human rights law, as a constraint on the other branches of government in times of armed conflict.

3) Deficiencies of the DTA and the Unconstitutionality of MCA §7

Even though under ordinary circumstances the Supreme Court would remand the issue to the Court of Appeals of whether an adequate substitute has been made available to the detainees at Guantánamo since that court did not rule on this issue, it instead determined that, "[t]he gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional".²⁴⁰ To begin its analysis of the procedures afforded by the Congress, the Court highlighted that both the DTA and MCA must be understood as legislation meant to "circumscribe" and "dilute" the ordinary habeas protections.²⁴¹ As Justice Kennedy cited from the Congressional Record, in discussion over the bill Senator Kyl had emphasized that "the limited judicial review authorized [by the DTA] [is] not habeas-corpus review. It is a limited judicial review of its own nature".²⁴² The Supreme Court did not attempt to put forward at this point the requisites for an adequate substitution of habeas corpus. It did, however, stress that there is no controversy over the fact that the privilege of habeas corpus must offer a prisoner a meaningful opportunity to make evident that she is not being detained within the requirements of the relevant law. Additionally, the Court points out that habeas proceedings

²³⁹ For detailed treatment of how the relevant human rights jurisprudence might have been presented see DE LONDRAS, F., 'What Human Rights Law Could Do: Lamenting the Absence of an Int'l Human Rights Law Approach in *Boumediene & Al Odah*' (2008) 41 *Israel Law Review* 562.

²⁴⁰ *Boumediene*, note 215 above, at 2263.

²⁴¹ *Idem*, at 2263-8.

²⁴² *Ibid.*, at 2266.

have traditionally been most critical and extensive at the initial phase of detention, and most pressing when the confinement has been carried out by executive order.²⁴³

As such, the Court assessed the CSRT process and the appeal afforded by the DTA to find four primary shortcomings: 1) the lack of the ability to contest the CSRT's finding of fact; 2) the need for a legal avenue for supplementing the CSRT findings with exculpatory evidence; 3) the absence of provisions allowing detainees to challenge the President's authority under the AUMF to hold them indefinitely; 4) and denial of judicial power to order release. The first failing found by the Court was that the circumscribed procedure did not allow a detainee to properly rebut the factual basis for the government's claim that this individual was an enemy combatant. This inadequacy included, but was not limited to, the fact that the detainee did not have the assistance of legal counsel, that the means to gather and present evidence was extremely limited, that the most critical allegations might not be presented to the detainee, and the limitless admission of hearsay evidence.²⁴⁴ Thus the majority determined that there was "considerable risk of error" in the CSRT's findings of fact,²⁴⁵ and that the writ, or its substitute, must encompass the means to correct such possible prior errors. The DTA, however, granted exclusive jurisdiction to a Court of Appeals only to review whether the CSRT complied with the "standards and procedures specified by the Secretary of Defense",²⁴⁶ and not to inquire into the legality of detention. While the government advocated at oral argument a reading of the DTA that would remedy these infirmities, if it would allow the jurisdictional-stripping provision (§7) of the MCA to remain intact, the Court saw no way to construe the statute so as to provide the constitutionally required opportunity for such a detainee to present newly discovered exculpatory evidence.²⁴⁷ There was additionally no forum in which these individuals would have the opportunity to have their primary claim adjudicated: "that the President has no authority under the AUMF to detain them indefinitely".²⁴⁸ And finally, it was held that an essential element of judicial power in habeas, or habeas-like, proceedings must also include the authority to issue an order directing the prisoner's release if necessary. The majority thus held that the process of judicial review under the DTA could not serve as a replacement for the constitutionally derived right of habeas corpus because its cumulative deficiencies were too great.

²⁴³ *Ibid.*, at 2266-71.

²⁴⁴ *Ibid.*, at 2271-4.

²⁴⁵ *Ibid.*, at 2270.

²⁴⁶ DTA, note 157 above, §1005(e)(2)(C), 119 Stat. 2742.

²⁴⁷ *Boumediene*, note 215 above, at 2271-2.

²⁴⁸ *Idem*, at 2271.

Because of these failings found in the DTA legislation that followed *Rasul* and *Hamdi*, the Supreme Court held that the provision of the MCA which stripped the federal courts of jurisdiction in habeas proceedings, passed in response to *Hamdan*, left detainees in the ‘war on terror’ an inadequate substitution for the Great Writ. To buttress this push back in the inter-branch colloquy followed in this chapter, the Supreme Court grasped the constitutional rung on the ‘judicial ladder of review’ and once again ascended. Or as Justice Kennedy explained,

[o]ur decision today holds only that the petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that the petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court. The only law we identify as unconstitutional is MCA §7, 28 U. S. C. A. §2241(e) (Supp. 2007).²⁴⁹

4) Limited Human Rights Law Argument

One might be tempted to assert that the Supreme Court applied a constitutional *Charming Betsy* interpretation²⁵⁰ in the *Boumediene* decision because of the way that much of the holding in the decision falls in line with international human rights obligations. However, the fact that the petitioners’ counsel put forward extremely limited human rights law standards as applicable, or contextually appropriate, jurisprudence would seem to belie such an assertion. More importantly, the Supreme Court made absolutely no reference to this body of law in its decision. It should be noted that this case indeed provided an opportunity to further examine the applicability of human rights law, which offers an extensive jurisprudence on the very issues at stake. As well, it offers further opportunity to integrate constitutional rights with international human rights law. However, during oral arguments, reference was made only once to humanitarian law and the Geneva conventions by the petitioner’s counsel, and international law was also confined to this area in the limited inquiries by the Justices concerning such law.²⁵¹ A look into the documentary briefs provided by the petitioners’ counsel reveals some attention on humanitarian law, and a minimal advancement of international human rights law argument.²⁵² The most elaborate explanation as to the

²⁴⁹ *Ibid.*, at 2275.

²⁵⁰ For a discussion of the constitutional use of this canon, see ALFORD, ‘Foreign Relations...’, note 60 above; See also WATERS, ‘Creeping Monism’, note 59 above, at 679-86.

²⁵¹ Access to the oral arguments, both the transcript and audio, can be found at The Oyez Project, *Boumediene v. Bush*, 553 U.S. ____ (2008) available at: <http://www.oyez.org/cases/2000-2009/2007/2007_06_1195/> (last visited 16 January 2009).

²⁵² Brief for Petitioners al Odah, et al., No. 06-1195; Brief for the *Boumediene* Petitioners, No. 06-1195; Brief for Petitioners El-Banna, et al., No. 06-1195; Reply Brief for Petitioners al Odah et al., No. 06-1195; Reply Brief for el-Banna et al., No. 06-1195; Reply Brief for the *Boumediene* Petitioners, No. 06-1195; All briefs are available at: <<http://www.mayerbrown.com/probono/news/article.asp?id=3706&nid=291>> (last visited 13 Jan 2009).

reasoning for the use of foreign law related to human rights that was put forward by counsel appears in the reply brief for the *Boumediene* petitioners:

The experience of other allied democracies is relevant here, not only in ascertaining the extent to which the laws of war authorize detention of combatants, but also in determining what process this “particular situation demands.” Courts in Europe and Israel—where the risk of terrorist attack has been substantial for many years— have unflinchingly held that lengthy executive detention without charge or trial offends the rule of law.²⁵³

This statement is made by the petitioners’ counsel to refer to its original brief in which attention is drawn to three particular foreign and international law sources; Israel’s statutes and its Supreme Court, the European Court of Human Rights (ECtHR), and the United Kingdom’s House of Lords. Notably, these three references are to some of United States’ closest allies. Counsel pointed out that although there has been a decades-long struggle by Israel against terrorist acts, there has been a guarantee of judicial review for executive detention within 48 hours in Israel, within eight days in the occupied territories, and within fourteen days even for individuals held as “unlawful combatants”.²⁵⁴ Additionally, citation is made (in the very last footnote) to the ECtHR decision *Aksoy v. Turkey* in which it was held that there were insufficient safeguards, and the exigencies of the situation did not necessitate, the detention of an individual under suspicion of terrorism for fourteen days even though it was found that there was a public emergency threatening the life of the nation.²⁵⁵ The one last reference to foreign human rights case law was to *A & Others v. Secretary of State for the Home Dep’t*, in which it was held by the British House of Lords that a terrorism threat does not justify a derogation of United Kingdom’s obligations to the extent of holding foreign nationals under extended circumstances without any charge under the European Human Rights Convention.²⁵⁶ While this jurisprudence is certainly directly relevant, this is the entire extent of reference made by the petitioners’ counsel.

This cursory treatment is unfortunate because human rights law would provide a much richer soil to till than was made available, and allow for what might have been a “persuasive role”²⁵⁷ in answering the precise questions before the Supreme Court in *Boumediene*; i.e.

²⁵³ *Idem*, Reply Brief for the *Boumediene* Petitioners (internal citations omitted), at 25.

²⁵⁴ Brief for the *Boumediene* Petitioners, note 252 above, at 49.

²⁵⁵ Cited in *idem*, at 50, note 52.

²⁵⁶ *Idem*.

²⁵⁷ For detailed treatment of how the relevant human rights jurisprudence might have been presented see DE LONDRAS, F., ‘What Human Rights Law Could Do: Lamenting the Absence of an Int’l Human Rights Law Approach in *Boumediene* & *Al Odah*’ (2008) *Israel Law Review* (forthcoming) available at:

determining the ‘reach’ of U.S. constitutional protections, and the content of such protections. Yet, there are distinct hurdles presented by such a course. The first being that the United States has long held the position that the text of Article 2(1) relating to the scope applicability of the ICCPR, to which the U.S. is a party, requires that an individual must be both “within its territory and subject to its jurisdiction”.²⁵⁸ Of course, this is not in line with the HRC’s own interpretation, which has consistently held that the treaty can have extraterritorial application. As one example, the Committee held in *Burgos/Lopez v. Uruguay* that Article 5(1) providing that “nothing in the present Covenant may be interpreted as implying [...] any right to engage in any activity [...] aimed at the destruction of any of the rights and freedoms recognized herein”,²⁵⁹ led to the conclusion that “it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory”.²⁶⁰ General Comment 31 also clarifies the HRC’s view that, “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or *effective control* of that State Party, even if not situated within the territory of the State Party”.²⁶¹ The U.S. interpretation of the ICCPR, and these contradictory stances on the applicability of one of the central human rights treaties relating to the availability of judicial review by the HRC, would certainly offer some explanation of the limited human rights law argument put forward by counsel.

Additionally, the fact that U.S. national courts have traditionally upheld the peculiar last-in-time rule,²⁶² would raise serious questions as to whether the DTA of 2005 and the MCA of 2006 might actually trump the validity in U.S. courts of the ICCPR signed in 1992. Not to mention that when the Senate ratified the ICCPR, a declaration clause was included indicating that the treaty would not be self-executing, and thus could not be invoked in the

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1123465&download=yes> (last visited 4 Jan 2009) at 10; and DE LONDRAS, F. ‘The Right to Challenge the Lawfulness of Detention: An International Perspective on US Detention of Suspected Terrorists’ (2007) 12 Journal Conflict Security Law 223.

²⁵⁸ For evidence of this interpretation see ‘Opening Statement to the U.N. HRC’, M. Waxman, Head of U.S. Delegation, (17 July 2006) Geneva, Switzerland, available at: <<http://www.state.gov/g/drl/rls/70392.htm>> : “In addition, it is the long-standing view of the United States that the Covenant by its very terms does not apply outside of the territory of a State Party. [...] It is the long-standing view of my government that applying the basic rules for the interpretation of treaties described in the Vienna Convention on the Law of Treaties leads to the conclusion that the language in Article 2, Paragraph 1, establishes that States Parties are required to respect and ensure the rights in the Covenant only to individuals who are BOTH *within* the territory of a State Party *and* subject to its jurisdiction”.

²⁵⁹ ICCPR, note 103 above, Article 5(1).

²⁶⁰ *Burgos/Lopez v. Uruguay*, Communication No. 52/1979, at para. 12.3.

²⁶¹ General Comment No. 31, note 101 above, (my emphasis), at para. 10.

²⁶² See Section II (1) above.

national courts.²⁶³ And finally, questions as to the applicability of human rights law in armed conflict might have dissuaded the petitioners' counsel. However, by putting forward minimal human rights law arguments, counsel seems to have ceded territory by implicitly allowing the understanding maintained by the government to go unchallenged of *lex specialis* meaning a stark distinction absent of overlapping between humanitarian law and human rights law.²⁶⁴ Notwithstanding these seemingly steep obstacles to presenting a full throated human rights law argument in the *Boumediene* case, it is this author's opinion that an opportunity was indeed missed. These difficulties certainly did not preclude a reliance on human rights standards to help inform the content of constitutional norms, and could have helped develop a more harmonious concert between constitutional standards and human rights law. Ultimately, the approach taken by the petitioners' counsel conceded a view that domestic law must remain untouched by international understandings of individual rights and contemporary developments, and this is to be lamented.

VII. Conclusion

The Supreme Court laid out some specific legal constraints during its moderating of the dialogue and ascension of the 'judicial ladder' that would have a direct effect upon any subsequent administration. To begin, the legal interpretations put forward while on the first rung in *Rasul* have little further bearing on this particular conflict because Congress reacted with the DTA and MCA legislation that have readjusted the statutory requirements of habeas corpus to those detained in Guantánamo, Afghanistan and Iraq. As well, the Court's decision that statutory habeas rights extended to the detainees in Guantánamo was at least partially based on the finer points of the lease with Cuba creating a distinctive division of sovereignty and jurisdiction. However, what is certainly worthy of note from a human rights perspective is that this decision explicitly realigned precedent of jurisdictional questions to focus on a prisoner's guardian, rather than on the detainee herself.

More importantly, there are undeniable implications to come out of the Supreme Court's next statement in the inter-branch colloquy concerning international law in *Hamdan*. The first is that, barring any radical changes in the UCMJ, the Geneva Conventions do not

²⁶³ 'U.S. Senate Resolution of Advice and Consent to Ratification of [ICCPR]', note 46 above.

²⁶⁴ See e.g. 'Comments by the Government of the United States of America to the conclusions and recommendations of the Committee against Torture', CAT/C/USA/CO/2/Add. 1: "[t]he law of war, and not the Convention, is the applicable legal framework governing these detentions", at para. 11; See also 'Opening Statement to the U.N. HRC', M. Waxman, note 238 above, : "As we have explained before, the United States believes that the law of armed conflict – international humanitarian law – provides the proper legal framework regarding some of the questions raised by the Committee".

now need to be determined by a court to be self-executing in cases involving the military justice system. To be sure, this advancement (albeit limited and open to congressional revision) is one worthy of acknowledgement, and certainly has repercussions beyond the current conflict. Secondly, and directly related to the constraints future administrations will face, the finding in *Hamdan* that Common Article 3 is applicable to the ‘war on terror’ will surely help shape their policies. Despite the irregular formulation used to arrive at this conclusion, this ruling will additionally help to further ingrain Common Article 3 as a baseline of protections afforded to all individuals in any type of armed conflict, as well as to offer further form to the interpretation of the provision which reads, “judicial guarantees [...] recognized as indispensable by civilized peoples”.²⁶⁵ Moreover, it was the specific use of international law in this decision that offered the Supreme Court a palpable buttress to push back against the political branches and to mount the ladder further. Considering the judiciary’s infrequent use of international law as legitimate norms to constrain the domestic political process, particularly in times of armed conflict, this is undoubtedly noteworthy.

Finally, the most recent remark in this institutional discussion found in *Boumediene* is perhaps the most unclear when viewed in light of international law. On the one hand, there is little doubt that the finding of a constitutionally afforded right of habeas corpus to non-citizens held outside the territory of United States is an extension of human rights by the Supreme Court. On the other, it is an open question as to whether this ruling will serve to better protect prisoners held at Bagram prison in Afghanistan, in an Abu Ghraib-type prison in Iraq or even in undisclosed ‘black sites’. This is one key reason that a decision including, or plainly based upon, human rights jurisprudence would have been preferable so as to protect all detainees held under the effective control of the United States, regardless of geography or land-lease agreements with other governments.

Nonetheless, a reading of the conclusion of *Boumediene* indicates that the majority of the Court saw such constraint as at times necessary. The majority declared,

[w]e hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.²⁶⁶

²⁶⁵ *Geneva Conventions*, Common Article 3, note 95 above.

²⁶⁶ *Boumediene*, note 215 above, at 2277.

In this citation it is once again possible to discern a word of caution, perhaps similar to that given by Justice Kennedy in his *Hamdan* concurrence when he warned of a constitutional review of a law that might be passed by the legislature in response to that decision. In *Boumediene*, the Court found one particular provision (§7) relating to the availability of habeas corpus in the MCA to be unconstitutional. Yet there is one final rung left to ascend in the ‘judicial ladder of review’: that of striking down a law in its entirety.

One particular case has been working its way through the judicial system which has brought this same question back to the fore as it has been asked whether these constitutional habeas rights are applicable to non-citizens held in detention in Afghanistan. In April of 2009 a U.S. District Court granted habeas corpus to petitioners held in a military facility in that country stating, “[a]lthough the site of detention at Bagram is not identical to that at Guantanamo Bay, the ‘objective degree of control’ asserted by the United States there is not appreciably different than at Guantanamo”.²⁶⁷ This case of *al Maqaleh, et al. v. Gates* has continued through the court system where the D.C. Court of Appeals reversed the lower court’s ruling in May of 2010.²⁶⁸ If the Supreme Court were to grant certiorari to an appeal of the *al Maqaleh* decision, it could choose to moderate this dialogue further by moving either up or down the ‘judicial ladder’. It is conceivable, though perhaps not likely at this point, that the Court would choose to ascend to the final rung, mediating the dialogue to a form of conclusion. It could strike down a law in its entirety on constitutional grounds and thus find the removal of all habeas rights wholly outside the scope of legislative authority, regardless of geography and citizenship. From a human rights perspective, it is valuable to recognize the tack that the Court has followed so as to best appeal to its sensitivities and attempt to shape future precedent. Of most interest for this author, the fact that the U.S. Supreme Court has found a way to take the historic step of eschewing the traditional and seemingly routine deference to the political branches in times of armed conflict, and in so doing extending rights across borders and nationalities, should not go unnoticed.

The use of the lens of legality in this chapter has indeed sharpened our picture of the detention policy of the United States in the ‘war on terror’. This is not to say the issue of applicable law and judicial protections for those held in this conflict has been fully settled. However, the philosophical principles behind all of the laws applied grounded the majority opinions in the three cases analyzed here, and it is logical that this translates into

²⁶⁷ *Al Maqaleh, et al. v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), at 4.

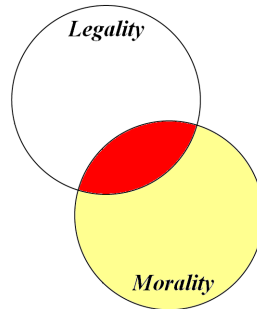
²⁶⁸ *Al Maqaleh, et al. v. Gates*, No. 09-5265 (D.C. Cir.) (May 21, 2010).

understanding by those who exercise their *will to obey*. That is to say, grasping that detainees have the right to challenge the grounds for their perpetual detention, regardless of location and nationality, is not arcane or overly complicated. More importantly, there is no denying that the Supreme Court ruled three times in four years that the detention policy of the administration was operating outside the law. Therefore, it is this author's contention that this crystallizing effect of the legality lens on this issue of detention without judicial review also makes the questions of legitimacy more lucid.

In the next chapter, we shall enlarge our view by adjoining the lens of morality as we look at war-making policy and thus it will be possible to discern the place of overlap that it shares with the lens of legality.

Chapter 5

Through the Lens of Morality: Unjust War



...wherein two things are to be proved, the one that a just feare (without an actuall invasion or offence) is a sufficient ground of Warre, and in the nature of a true defensive; the other that we have towards Spaine cause of just feare, [...] not out of umbrages, light jealousy, apprehensions a farre off, but out of a clear foresight of imminent danger.
-- Francis Bacon (1624)¹

War in defence of life is permissible only when the danger is immediate and certain, not when it is merely assumed. I admit, to be sure, that if the assailant seizes weapons in such a way that his intent to kill is manifest the crime can be forestalled; [...] But those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived, and deceive others.
-- Hugo Grotius (1625)²

I. Introduction

Moral debate over war has been with us for centuries and its historical filiations in the Western world are best traced through the familiar just war doctrine. Its protracted existence and constantly developing recurrence in Western thought speaks to the depth to which the moral dimensions of war run within the populations from which it sprung. Even though there has been a history of formulating a reasoning for casting aside any ethical and legal considerations in war making,³ classical, modern and contemporary forms of moral (at times

¹ BACON, F., 'Considerations Touching a Warre with Spaine' [1624], in *Certaine miscellany works of the right honourable Francis Lord Verulam, Viscount St Alban* (London, 1629) at 8.

² GROTIUS, H., *De Jure Belli ac Pacis*, Book II, chpt. 1, sec. V in *The Classics of International Law*, James Brown Scott (ed.) (Oxford, Clarendon Press, 1925), at 173.

³ See e.g. the well-known *Pro Milone* speech, CICERO, *The speeches / Cicero. Pro Milone; In Pisonem; Pro Scauro; Pro Fonteio; Pro Rabirio postumo; Pro Marcello; Pro Ligario; Pro rege Deiotaro* (Trans. N.H. Watts)(Cambridge and London, Harvard University Press, 1931) Cicero argued, "that should our lives have

mixing clearly with legal) analysis are a testament to the durability and relevance of such an approach.⁴ However, it should be remembered that limits on warfare have come together over scores of years from an amalgamation of sources. These include Christian theologians as a moral doctrine that came into being inside the church, international lawyers as principles that guided and set in motion the first texts of this discipline, and military professionals as considerations of fair play rooted in chivalry.⁵ Therefore as the ‘just war theory’ will serve as the overarching vehicle that will drive this axiological analysis, it should be understood as a relatively imprecise term that rightfully reflects the intersection of the vital concepts of law, morals and prudence. As such, it is certainly a fitting tradition to be used in this work treating the equally interdisciplinary subject of legitimacy.

In Chapter 1, we discussed the concept of overlap and shone a light on a coincidence that exists between legality and morality. In particular, we spoke to the prohibition of gratuitous violence that must exist in any and all legal or moral codes. This exclusion directly relates to the work of this chapter as we will be exploring the rules that have been laid down over the centuries for reducing or eliminating unprovoked military attacks. As this will not be an exhaustive study of just war theory, we will focus on the primary aspects of the tradition that are directly pertinent to the justifications put forward for the invasion of Iraq. The classic doctrine of just war had three basic requirements –right authority, just cause and right intention– and these conditions provided the fundamental shape for how the theory would further develop over time.⁶ Nevertheless, these basic criteria also held within them concepts that have become more explicit, including that war must only be defensive in nature, that it is to be used only as a last resort, that there be a reasonable chance of success and that armed

fallen into any snare, into the violence and the weapons of robbers or foes, every method of winning a way to safety would be morally justifiable. When arms speak, the laws are silent; they bid none to await their word.” at 17; and YOO, J., ‘Using Force’ (Summer 2004) 71, *University of Chicago Law Review* 729, “[r]ather than pursuing these doctrinal or moral approaches, this Article addresses the rules governing the use of force from an instrumental perspective,” at 731; and GLENNON, M., ‘The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter,’ (2002) 25,2 *Harvard Journal of Law & Public Policy*, “I suggest that Article 51, as authoritatively interpreted by the International Court of Justice, cannot guide responsible U.S. policy-makers in the U.S. war against terrorism in Afghanistan or elsewhere. [...] an examination of Article 51 reveals a measure of inconsistency, illogic, and, indeed, incoherence that provides independent grounds for questioning its importuned restraints in decisions concerning use of force. The received interpretation of Article 51 consists in hopelessly unrealistic prescriptions as to how states should behave”.

⁴ See e.g. TUCK, R., *The Rights of War and Peace* (Oxford, Oxford University Press, 1999) 234 pp.; WALZER, M., *Just and Unjust Wars*, 3rd ed. (New York, Basic Books, 1977) 353 pp.; JOHNSON, J., *Ideology, Reason and the Limitation of War: Religious and Secular Concepts 1200-1740* (Princeton, Princeton University Press, 1975) 285 pp.; JOHNSON, J., *Just War Tradition and the Restraint of War* (Princeton, Princeton University Press, 1981) 380 pp.; HAGGENMACHER, P. *Grotius et la doctrine de la guerre juste* (Paris, Presses Universitaire de France, 1983) 672 pp.

⁵ *Idem*, JOHNSON, *Just War Tradition...*, at xxi.

⁶ JOHNSON, *Ideology, Reason and the Limitation of War*, note 4 above, at 38-48.

hostilities are proportional to the evil that was suffered.⁷ In this chapter we will explore the three particular concepts of ‘anticipatory attacks’ for self-defense, ‘last resort’ and ‘right authority’ since they are most directly relevant to the invasion of Iraq.

While all of these criteria from the just war theory correlate to the attempt to exclude wanton bloodshed from international society, our attention will be particularly focused on the distinction between ‘preemptive’ and ‘preventive’ war. The divergence found between these two terms and concepts helps explain the disquiet that grew over what has become known as the “Bush Doctrine”. As will be seen, there was an important bifurcation in the just war tradition during the late sixteenth and early seventeenth centuries, and a part of the cleavage was based on this very issue of anticipatory attack. While some advocated that a “just feare” was a reasonable standard for triggering war (an argument that resulted in no progeny), others insisted that the criteria for launching an attack must be more objective and verifiable (argumentation that helped found international law).

To once again clarify the overlap that exists between legality and morality we return to *The Concept of Law* where H.L.A. Hart put forward a list of five essential causal connections between natural conditions and systems of rules. There are two which primarily concern us in the discussion of a restriction on unprovoked violence: *human vulnerability* and *approximate equality*.⁸ The first of these connections deals with the exposure that every human confronts when interacting with others. Each of us is vulnerable to bodily attack which could shorten or end our existence, and as such we enter into a societal contract (either implicitly or explicitly) requiring mutual forbearances by all members. Hart described the basic starting point for all rule-governing interaction by stating, “[o]f these the most important for social life are those [prohibitions] that restrict the use of violence in killing or inflicting bodily harm”.⁹ So vital is this protection to our human vulnerability that without it there would be no reason to have rules of any other kind.

The second causal connection dealing with equity in treatment springs from only slight differences in strength, dexterity, speed and intellectual capacity that exist between all persons. Yet, no one is so superior that they possess the capacity to single-handedly subdue or dominate others for more than a short time. Even the strongest or shrewdest among us must drop their guard for repose and sleep at some point. As such, this natural condition of negligible inequality, because it is only transitory by nature, leads to the need for a system of

⁷ JOHNSON, *Just War Tradition...*, note 4 above, at 123.

⁸ HART, H.L.A., *The Concept of Law* (Oxford, Oxford University Press, 1961, 1994) at 194-5.

⁹ *Idem*, at 194.

rules that balances out these slight inherent differences, and places all persons on a level playing field. As Hart explains,

[t]his fact of approximate equality, more than any other, makes obvious the necessity for a system of mutual forbearances and compromise which is the base of both legal and moral obligation. Social life with its rules requiring such forbearances is irksome at times; but it is at any rate less nasty, less brutish, and less short than unrestrained aggression for beings thus approximately equal.¹⁰

We will proceed on the assumption that there is indeed a very important overlap between morality and law at the precise point which concerns us in this chapter. Survival, or self-preservation, is a shared value among all humans, and this mutual interest stretches across borders, cultures, or tribes. This is certainly not to say that this common preservation instinct never comes into conflict. Of course, this is exactly the point of codifying a restriction upon the use of force between individuals, and the logic follows to the same result between nations in this context. In any conflict or stand-off both sides often believe they are protecting the survival of their own people. Sometimes this belief of insecurity might become exaggerated or even fabricated, and thus the intent of codified “mutual forbearance” is surely to minimize, or remove, hyperbolic claims from becoming *casus belli*. Thus, interpretations of international law which create no constraint or limit must therefore be rejected as serving only the self-interested and transitory claims of those who attempt to justify a specific action and are incompatible with the idea of any system of rules, be it moral or legal, governing action.

Of course, this *jus ad bellum* discussion of the invasion of Iraq that is to follow raises at least two other questions: how does the question of legality relate to Operation Enduring Freedom which committed a coalition of armed forces into Afghanistan?; and what *jus in bello* questions are relevant for evaluating legitimacy and the ‘war on terror’?

To begin answering the first of these questions, it should be recognized that the overall legal footing for the hostilities in Afghanistan is of a very different nature than that of Iraq. This can be demonstrated through a brief glance at the legal character of this armed conflict. If we assume as correct the premise and evidence that al Qaeda was responsible for the terrorist attacks of September 11th and that this organization had established itself within the sovereign territory of the Afghan state, then we can find legal reasoning for the wrongdoing of that state which would constitute a violation of international law. The International Law Commission’s 1954 Draft Code of Offences against the Peace and Security of Mankind defines crimes under international law, and Article 2(4) specifically speaks of the “toleration”

¹⁰ *Ibid.*, at 195.

of armed bands within one's territory as an offense.¹¹ The UN General Assembly resolution 2625 (XXV) on Friendly Relations and Cooperation Among States affirms that every country has a duty to refrain from supporting the organization of terrorist groups within their territory.¹² While this does not point to an explicit trigger for self-defense under article 51 of the UN Charter, it does certainly cause direct concern for the Security Council for its dealings with 'threats to the peace' under Chapter VII.

We can turn to the unanimously approved UN Security Council resolutions 1368 and 1373 for an authoritative interpretation of the character and legal meaning of the 9/11 attacks.¹³ The use of the specific language in both resolutions "recognizing" on the 12th of September 2001, and then "reaffirming" on the 28th of September, "the inherent right of individual or collective self-defence" has been largely taken by international lawyers to mean that the Security Council determined that the terrorists attacks of September 11th had indeed triggered a right to respond with force.¹⁴ Additionally, in letters submitted to the UN Security

¹¹ United Nations International Law Commission, 'Draft Code of Offences against the Peace and Security of Mankind' (1954) reprinted in *Yearbook of the International Law Commission*, Vol. II. (1954), Article 2(4) "[t]he organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the *toleration* of the organization of such bands in its own territory, or the *toleration* of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions," (my emphasis). It should be remembered that the title of this document surely reflects the language employed at the International Military Trials of Nuremberg one decade earlier where aggression was referred to as 'crimes against the peace'.

¹² A/RES/2625 (XXV) 'Declaration on Principles of International Law Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations', Adopted by the General Assembly at its 25th session, 1883rd plenary meeting, New York, (24 Oct 1970). While clear evidence of the nature of the relationship between al Qaeda and the Taliban government would need put forward to meet the standard of "[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force," the lower standard that, "no State shall organize, assist, foment, finance, incite or *tolerate* subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State," (my emphasis) would certainly indicate that the Afghan state was not living up to its sovereign responsibilities. Ultimately, a court would need to examine the proper applicable standard of "effective control". This standard can be found in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), International Court of Justice (Merits) (27 June 1986), "[f]or this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed." (my emphasis) at 65, §115; and *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) International Court of Justice (Judgment) (26 Feb 2007), "[i]t must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations" at 143, §400. The "overall control" standard used in the Tadić case of the Appeals Chamber of the International Criminal Tribunal of Ex-Yugoslavia would not be relevant here because this criterion was used to classify the type of armed conflict being waged, and was not an attempt by the court to attach state responsibility for the actions of an armed band.

¹³ U.N. Doc. S/RES/1368 (2001) and U.N. Doc. S/RES/1373 (2001).

¹⁴ See e.g. YOO, J., 'Using Force', note 3 above, "[w]hile the war in Afghanistan did not receive explicit UN authorization, most seem to agree that it fell within the bounds of self-defense in response to the September 11

Council, both the United States and the United Kingdom justified the military operation in Afghanistan as individual and collective self-defense.¹⁵ On top of this, although not directly tied to legality, the Taliban regime was already under sanction and censure by the United Nations General Assembly having been denied the seat of Afghanistan within the body, and only two countries in the world had recognized it diplomatically.¹⁶

Due in large part to these pivotal resolutions passed unanimously, the invasion of Afghanistan in 2001 in reaction to the attacks on US soil rested on very different legal grounds than that of the mobilization of troops into Iraq. Owing to the distinct difference which will be fully fleshed out throughout this chapter, and to the fact that this work uses international law as the framework (demonstrating its current relevance to the issue of legitimacy), it is reasonable and warranted to set aside the invasion of Afghanistan for this analysis. While the legality, morality and efficacy of the Afghan operation are certainly pertinent questions related to legitimacy and the ‘war on terror’, their relevance is secondary to that of the Iraq invasion.

As to the second question raised, specific examinations of *jus in bello* regarding the ‘war on terror’ will be primarily limited to the issues of detention without judicial review and torture and ill-treatment during interrogations that are to be found in the previous and following chapters. There is no doubt that the means by which war is waged factors directly into the calculations of its moral character, which can be plainly surmised through its later inclusion into the doctrine of just war. For this reason two complete chapters of this text are dedicated to analyzing particular aspects of humanitarian and human rights law in war, although through somewhat different lenses of analysis. To be sure, the war in Iraq raised other *jus in bello* questions such as the use of white phosphorous against insurgents and civilians during the assaults on Falluja,¹⁷ the use of cluster bombs,¹⁸ and whether feasible

attacks,” at 734; See also FARER, T., ‘Un-just War Against Terrorism and the Struggle to Appropriate Human Rights’ (2008) 30 *Human Rights Quarterly* 356, “the United States did have legitimate authority to undertake the invasion of Afghanistan both because it had been attacked from territory controlled by the Taliban regime and further attacks were expected, and also because a post 9/11 resolution of the Security Council could fairly be construed as authorizing it albeit in general terms” at 376.

¹⁵ Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, Letter (7 Oct 2001), U.N. SCOR, 56th Sess., U.N. Doc. S/2001/946; Letter dated 7 October 2001 from the Chargé d’affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/947.

¹⁶ JENTLESON, B., ‘Military Force against Terrorism: Questions of Legitimacy, Dilemmas of Efficacy’ in Daalder, I., (ed.) *Beyond Preemption: Force and Legitimacy in a Changing World* (Washington, D.C., Brookings Institute Press, 2007) at 42.

¹⁷ The U.S. is a party to both the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 44 LNTS 65 and the Convention for the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and

precautionary methods in targeting were properly implemented.¹⁹ However, the scope of this work will not include the armed conflict operations in Iraq after invasion, and instead concentrate on the *jus ad bellum* question of law and morality.

Also of importance here will be to note the application of the individual and domestic analogy in our analysis. There certainly are some who argue that such analogies are inappropriately applied because international relations should be understood as *realpolitik*, and every state preserves its own *raison d'Etat* thus invalidating moral and legal perspectives.²⁰ In other words, politics between nations must be understood through a nation's material considerations and national interest rather than through abstract ideals. However, in the circumstance before us we are analyzing the legitimacy of a regime or policy and therefore the perception of individuals, and public opinion at large, are directly consequential. Even though there was indeed an historical moment in which states unblushingly argued that recourse to war was their own prerogative to exercise at will and that any appeals to

on Their Destruction, Jan. 13, 1993, 32 ILM 800 (1993), known as CWC. White phosphorous munitions used for the illumination of targets, smoke screens to cover military maneuvers and incendiary purposes are allowed by the treaties as long as they are of the permissible types and quantities. Therefore the accusations are based upon the proposition that the white phosphorous used was a toxic chemical or precursor chemical prohibited by the CWC, and that the "shake and bake" operations employed by U.S. forces in Falluja were actually purposes prohibited by the CWC. For a legal analysis on this issue see Fidler, D., 'The Use of White Phosphorus Munitions by U.S. Military Forces in Iraq' (2005) *ASIL* available at: <<http://www.asil.org/insights051206.cfm>>.

¹⁸ Some argue that cluster munitions are inherently indiscriminate because of the large quantity of bomblets left scattered after deployment, even if well targeted at first instance, and therefore pose problems concerning the protection of civilians when used in residential neighborhoods because they are a means that do not continually target a specific military objective ("are of a nature to strike military objectives or civilian objects without distinction", *Protocol Additional to the Geneva Conventions of 12 August 1949* (AP- I), Relating to the Protection of Victims of International Armed Conflicts, (signed 8 June 1977, entered into force 7 Dec. 1978) 1125 UNTS 3, Article 51(1), or perpetually provide a concrete and direct military advantage (AP-I, Article 51(5)(b)). And while the U.S. is not a party to the Additional Protocols to the Geneva Conventions, maintaining the distinction between combatants and civilians has been identified as Rule 1 in the widely considered authoritative work of the Red Cross, HENCKERTS, J. and DOSWALD-BECK, L., *Customary International Humanitarian Law* Vol. I (ICRC, 2005). Yet while this certainly does not resolve the legal question of the use of cluster bombs by the U.S., the fact that in 2008 the Convention on Cluster Munitions was opened for signature and 94 countries signed on at the opening ceremony, would point towards an emerging agreement on the illegality of these means.

¹⁹ One such instance flagged by Human Rights Watch was the use of 'Flawed Targeting Technology' by depending upon satellite phone intercepts to program U.S. targeting munitions on the Iraqi leadership. "Off Target: The Conduct of the War and Civilian Casualties in Iraq", (2003), available at: <<http://www.hrw.org/en/node/12207/section/5>>. "Targeting based on satellite phone-derived geo-coordinates turned a precision weapon into a potentially indiscriminate weapon. According to the manufacturer, Thuraya's [Satellite Phone Company] GPS system is accurate only within a one-hundred-meter (328-foot) radius. Thus the United States could not determine from where a call was originating to a degree of accuracy greater than one-hundred meters radius; a caller could have been anywhere within a 31,400-square-meter area. This begs the question, how did CENTCOM know where to direct the strike if the target area was so large? In essence, imprecise target coordinates were used to program precision-guided munitions."

²⁰ For one historical example of such an approach see FEUCHTWANGER, E., *Bismarck* (London, Routledge, 2002) 287 pp.

international laws were meaningless,²¹ this was an idea that “never seized the public imagination”.²² It was in this same historical context that Otto von Bismarck wrote dismissively of the public’s ability to grasp political matters because they are “only too ready to consider political relations and events in the light of those of civil law and private persons generally”.²³ Thus, since legitimacy most certainly turns on the perceptions of the people and their individual *will to obey* the government, the domestic analogy loaded with concepts of right and wrong, good and bad, along with morality and immorality, is surely pertinent here for our analysis of the use of force in the ‘war on terror’. It would seem absurd to assume that a public is readily and easily going to extract itself from calculations of war, particularly when all are asked to support it, and it is largely members of the society who are the ones asked to kill and be killed. As Michael Walzer points out, “[u]ntil wars are really fought with pawns, inanimate objects and not human beings, warfare cannot be isolated from moral life”.²⁴

This chapter is organized around an application of the most pertinent portions of the tradition that has served as the baseline of moral analysis in Western civilization for at least some fifteen hundred years when it comes to armed conflict: just war theory. We will begin by tracing the historical filiations of the just war tradition on the question of anticipatory military action in Section II. It will be demonstrated that the distinction between preemptive and preventive war is one that has long existed and forms a critical understanding within the tradition that armed hostilities must be launched in response to an injury received. Importantly, this division provided a basis for the secular turn of the just war tradition in the 17th century into what has become international law today. This discussion will conclude with Immanuel Kant, his ‘categorical impetrative’, and the notion of explicit agreements demonstrating consent for creating a condition that would be thinner than domestic legal communities, but is nonetheless thicker than a state of nature. Next, we will deal with what has become known as the “Bush Doctrine” in Section III. It was presented to the public as a ‘preemptive’ policy, although it is more properly termed ‘preventive war’. Yet in the end this rhetorical sleight of hand could not hide the war in Iraq’s moral failings as the claims of future dangers showed themselves to be nothing more than erroneous suspicions. In the following Section IV, there will be the treatment of whether military confrontation was employed as the

²¹ DINSTEIN, Y., *War, Aggression, and Self-Defense*, 3rd ed. (Cambridge, England, Cambridge University Press, 2001), “[i]n the nineteenth (and early part of the twentieth) century, the attempt to differentiate between just and unjust wars in positive international law was discredited and abandoned” at 62-3. See also POMPE, C.A., *Aggressive War: An International Crime* (The Hague, Martinus Nijhoff, 1953) at 138-152.

²² WALZER, *Just and Unjust Wars*, note 4 above, at 63.

²³ POMPE, *Aggressive War*, note 21 above, at 152.

²⁴ WALZER, *Just and Unjust Wars*, note 4 above, at 64.

‘last resort’, and a discussion of the manner in which morality inevitably enters into such debate when there is clear evidence of a *choice*. It will also be established here how the presence of a ‘moment for deliberation’ (underlining that choice) became unmistakable in the buildup to a war against Iraq. Finally, in Section V there will be a discussion of ‘right authority’ in the context of United Nations Charter provisions, human rights abuses and UN Security Council resolutions. Here it will be argued that the ‘right authority’ of the UNSC was bypassed through expedient interpretations which transferred a questionable authority into the hands of governments to unilaterally sanction the opening of hostilities themselves. Section VI will then provide conclusions on this identified moral and legal overlap in war-making.

II. ‘Anticipatory Attacks’ and the Just War Doctrine

In this section, we will provide an historical analysis of one specific aspect of the just war doctrine to analyze an important part of the argument put forward by the Bush administration for a war against Iraq, often popularly termed the “Bush Doctrine”.²⁵ Although this did not become the official reasoning for the invasion, which will instead be discussed in Section IV below, this doctrine did enter directly into the popular debate over war policy. The intention here is to trace some of the history of debate over the difference between preemptive and preventive war to show that there is indeed a vitally significant chasm that exists between these two standards of anticipatory self-defense. This gulf will be shown to be one that has long existed within the just war tradition, and thus it can be understood as an identifiable stark moral and legal line. One primary reason for a self-imposed prohibition of this nature would simply be for exercising the use of force only in a manner that is likely to be deemed legitimate by citizens. When this line is crossed, one leaves the solid ground of what is knowable or known, for the shaky and unverifiable position of war based upon conjecture of our enemy’s future intentions. Additionally, this conspicuous boundary directly correlates to the intersection of morality and law discussed in the opening chapter, and that intersection must be present in each system for it to have any meaning. That is to say, violence carried out against those who have not perpetrated any injury upon us, nor our friends, is a ban that can

²⁵ One moment at which the popular usage of this term became very clear was during the 2008 Presidential election when the Republican vice presidential candidate Sarah Palin was asked about the “Bush Doctrine” in an interview with ABC anchor Charlie Gibson. See e.g. FROOMKIN, D., ‘What is the Bush Doctrine, Anyway?’ *The Washington Post* (12 Sept 2008) available at: <http://www.washingtonpost.com/wp-dyn/content/blog/2008/09/12/BL2008091201471_pf.html>. As was pointed out, “what Palin said in her response did not actually address what was so radical about Bush’s contribution to American foreign policy. Preemption has in fact been a staple of our foreign policy for ages -- and other countries’ as well. The twist Bush put on it was embracing ‘preventive’ war: Taking action well before an attack was imminent -- invading a country that was simply perceived as threatening”.

be found in every moral and legal code. With the case for war against Iraq, we will see that it is exactly this boundary that was violated with the administration's argument, and that the destructive and empty result of the action based on it eventually demonstrated precisely the reasoning for why the borderline between preemptive and preventive war should exist as a rigid and unmoving standard.

Before entering into our examination of the moral and legal formulations that have progressed over centuries concerning when recourse to war is justifiable, it is useful to sketch out the different types of defense that will come under consideration here in our contemporary conceptualization. In the United Nations Charter, Article 51 accounts for the "inherent right of individual or collective self-defence if an armed attack occurs".²⁶ When this wording is read in conjunction with the restriction placed on all signatories to the Charter found in Article 2(4), requiring that all states, "refrain in their international relations from the threat or use of force"²⁷ a noticeable discrepancy jumps out. That is to say, there is a difference between what is prohibited in Article 2(4) (threat or use of force) and what actions actually trigger the right to self-defense in Article 51 (armed attack). This means that there is in fact a legal gap in the Charter in which one state might be illegally threatening or using force, while the other state does not possess a right to self-defense. This gap can become especially important when a comparison is made with the "threat" of force since, as we will see, it is not uncommon for threats to be suggested as a trigger for the use of force. While there has been academic discussion on the issue of what type of action rises to the level of an "armed attack",²⁸ the jurisprudence on when this phrasing excludes the right to use force before a state has actually suffered a first strike has been explicitly set aside by the International Court of Justice in both its 1986 judgment in the *Nicaragua v. United States of America*,²⁹ and *Democratic Republic of the Congo v. Uganda*.³⁰ Therefore, we will explore this question that has been sidestepped

²⁶ *Charter of the United Nations* (signed 26 June 1945, entered into force 24 Oct 1945) 9 Int. Leg. 327, at 346.

²⁷ *Idem*, at 332.

²⁸ See e.g. DINSTEIN, *War, Aggression, and Self-Defense*, note 21 above, at 165-83; see also FRANCK, T., *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge, England, Cambridge University Press, 2002) at 97-108; and BROWNIE, I., *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963) at 361-8.

²⁹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), International Court of Justice (Merits) (27 June 1986) "In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue" at §194. At the same time it should be recognized that the dissenting opinion from Judge Schwebel in this case argued for a very restrictive reading of Article 51 insisting that it should not be read as, "if, and only if, an armed attack occurs" Dissenting Opinion at §173.

³⁰ *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), International Court of Justice (Judgment) (19 Dec 2005). Even though it did, "observe that the wording

by the ICJ which revolves around the contours of the customary international legal right to engage in the use of force before a state has been struck, i.e. anticipatory self-defense.

Of course, self-defense as a legal doctrine did not emerge until after there was an explicit codified prohibition of the use of force in the UN Charter,³¹ because the two concepts clearly go hand in hand since you must have a prohibition of the use of force before there is an exception. As we will see in our investigation of the just war doctrine, there has long been discussion over the justness of different types of defensive anticipatory action. It was only during the nineteenth and early twentieth centuries that it was argued that every state had an uninhibited right to wage war completely at its own discretion. In other words, during that period states could generally, “resort to war for a good reason, a bad reason or no reason at all”.³² Regardless of this historical gap, it is useful to plot out the different forms of defense that have been contemplated and to place them on a timeline. In this way we will provide a coherent shape to our discussion of the moral and legal delineations of anticipatory war in the just war doctrine and contemporary international law. The most useful breakdown of the different modes of anticipatory action for our purposes is in terms of four temporal moments: *reactive self-defense*, *interceptive self-defense*, *preemptive attack* and *preventive war*.³³

Reactive Self-Defense – This action is the one most obviously contemplated within the text of Article 51. The language of the provision clearly allows for the use of force “if an armed attack occurs”, but there is also the explicit requirement that the state exercising self-defense bring the situation immediately before the Security Council so that it can take steps to restore peace and security. This is surely the most uncontroversial type of action, even if some doubt remains about what intensity of assault rises to the level of an “armed attack”.

of the Ugandan High Command document on the position regarding the presence of the UPDF in the DRC makes no reference whatever to armed attacks that have already occurred against Uganda at the hands of the DRC (or indeed by persons for whose action the DRC is claimed to be responsible)”, it referenced its position in *Nicaragua v. United States of America* and arrived at the same conclusion, “[t]he Court there found that ‘[a]ccordingly [it] expresses no view on that issue’. So it is in the present case” at §143.

³¹ As discussed in Chapter 3, Section IV, there were previous unsuccessful attempts at this codification in the Kellogg-Briand pact of 1928 and the League of Nations Covenant.

³² BRIGGS, H.W., *The Law of Nations* (2nd ed., 1952) at 976, cited in DINSTEIN, *War, Aggression, and Self-Defense*, note 21 above, at 71.

³³ While some terms have been slightly adjusted for a better coherence with discussions and references in this chapter, the basic outline has been kept from the work of KOLB, R., ‘Self-Defence and Preventive War at the Beginning of the Millenium’, (2004) 59 *Zeitschrift für öffentliches Recht* 111, at 122-25.

Interceptive Self-Defense – This action can be described as that undertaken by a state who is acting to interrupt an attack that has already been launched, but has not yet struck the targeted territory. Examples would include the disruption of a launched missile, aircraft or sailing naval fleet. Some have likened this action to a hypothetical attack by the United States on the Japanese naval fleet before they had reached Pearl Harbor.³⁴ Of course, the validity of such an action depends upon the accuracy of intelligence information analyzing threats and coming assaults. However, few would question the justifiability of intercepting an onslaught already underway.

Preemptive Attack – This act raises the eyebrows of some jurists who believe that it crosses the line of legality,³⁵ because verifiability in retrospect is extremely difficult, if not impossible. This is in addition to the fact that, once again, one becomes wholly reliant upon excellent or perfect security intelligence. However, the critical element that solidifies this particular action in our time axis is that of immediacy. In international law, the term that the majority of jurists focus on as paramount for defining this type of deed is that it is triggered by a strike that is *imminent* in time.³⁶ Troop movements to an international border, visible military preparations for an attack or even a declaration that an act of violence will soon be underway are some of the observable circumstances that would demonstrate this imminence. The example that is often put forward for this form of self-defense is the case of Israel's attack on Egypt in 1967 in response to a troop build-up in the Sinai Peninsula and escalating belligerent rhetoric between the states.³⁷

Preventive War – This final variety of action is purported to be a defensive use of force against an adversary that is not now preparing for immediate military confrontation, but the risks involved in waiting for a timing of the enemy's choosing are too great to warrant restraint. This act is surely the most questionable when it comes to international law because of the palpable lack of immediacy. This is not to mention the fact that it is impossible to apply proportionality and necessity, which are also a part of the customary law relating to self-defense. Most significant from a moral perspective, is that any effort launched on the basis of

³⁴ *Idem.*, at 123.

³⁵ See e.g. BROWNLIE, *International Law and the Use of Force by States*, note 28 above, at 275-80.

³⁶ See e.g. FARER, T., *Confronting Global Terrorism and American Neo-Conservatism* (Oxford, Oxford University Press, 2008), "[m]ost scholars have regarded *imminence* as the key criterion" at 48. See also FLETCHER, G. and OHLIN, J., *Defending Humanity: When Force is Justified and Why* (Oxford, Oxford University Press, 2008), "The Attack Must Be Imminent", at 90-1.

³⁷ WALZER, *Just and Unjust Wars*, note 4 above, at 80-5. Cf. POPP, R., 'Stumbling Decidedly into the Six-Day War' (Spring 2006) 60, 2 *Middle East Journal* 281.

such an idea or doctrine, while regularly justified through a loud rhetoric of fear and security, is based solely upon speculation and conjecture. In the just war doctrine, this particular type of action can be most often found under the descriptions of offensive war and that of attacking the growing power of a neighbor.

The intention of this section of our work is to focus a spotlight on the great moral and legal difference between a *preemptive attack* and that of a *preventive war*. A disparity glossed over in the presentation of the Bush Doctrine by the administration. It will be argued and demonstrated that there has long been an identified disparity between these two modes of military action. Throughout the development of the just war doctrine, this moral and legal distinction has been essential and its filiation can be clearly traced. This is not to say that no one has ever attempted to argue that preventive war based on fear and speculation of the unpredictable future should be deemed justifiable. The point is rather that when this case has been made it falls in a distinctly different category not founded on moral and legal arguments. As we will see below, there is one particularly obvious exception to this formula that existed in the late sixteenth and early seventeenth centuries in the doctrine of ‘holy war’ that gave birth to no progeny. Instead, when the rationale for preventive war has most often been put forward, it is based on the concept that the principle that force is beholden to its own rules: those of war strategy and the ‘necessities of nature’. It is argued that for this reason what has become known as the ‘Bush Doctrine’ failed in the eyes of the nation’s citizens from a moral perspective (if only in retrospect as the moral deficit became clearer with the absence of any verifiable threat). Thus the immense space separating *preemptive attack* and *preventive war* is best described as a chasm, or even a precipice.

1) The Classic Doctrine

The fact that nearly all groups who resort to mass violence seem virtually incapable of doing so without formulating a logic for its need certainly points to the fact that such reasoning is inherently human. This is regardless of whether the employment of war is used as tool for self-defense, punishment, ‘peacemaking’, politics or otherwise. However, the filiations of the first recognized formulations of the justifiability of war making, or as it has best become known, the just war doctrine, are traced back to St. Augustine of Hippo, if not further.³⁸ Yet rather than pretending to trace the entire thread of thought on this vast subject, this survey will

³⁸ The fact that Augustine labored to find a basis for his own position within the text of the Bible certainly gives reason to believe that the foundations for the tradition can be followed back to these Christian holy books.

focus on some of the better known figures that have weighed in on limits in war, particularly on the subject of the difference between offensive and defensive wars in *jus ad bellum*. In doing so, it will be seen that there has long been debate over where exactly a line should be drawn between legitimate self-defense and aggression. Nevertheless, the constraints of law and morals expose a sheer drop if one pushes temporally too far in anticipation of an injury suffered.

As a starting point, it should be recognized that Augustine of Hippo left an ambiguous legacy to his successors. Part of this, no doubt, is due to the fact that in attempting to formulate a doctrine on the justness of the participation in war by Christians, Augustine had few ‘shoulders of giants’ to stand upon so as to construct his own intellectual edifice. That is to say, Augustine was largely trying to cobble together political and legal thought that was not initially suited to or meant for an application to a kind of rules or guidelines in international affairs. For example, Roman law did not contain much useful discussion of the structure of how relations with other independent political bodies should take place, other than to distinguish the immortal *civitas* from the mortal citizen. Cicero’s defense of the just empire “seems to have turned principally on a denial of the parallel between an individual and the *respublica*”.³⁹ This distinction was found to be morally unsatisfactory because of how it led to an unleashing of those in power from restraint, but more importantly for what it meant for Christians asked to participate in unconstrained war making. As a result, one essential characteristic of this moral doctrine at its nascent stage (particularly important because of how directly it relates to our own discussion) was that of creating a very tight connection between human law and the conduct of warfare.⁴⁰ In contrast to Roman law, Augustine made a direct correlation between the individual analogy in law to the interaction of political bodies. It should be recognized that it is this same moral parallel that common citizens are likely to employ when judging the legitimacy of the use of force. This fusion of justifiable legal rules and equitable treatment among humans to the international sphere typifies the classic just war doctrine. This is surely why we see it develop and dovetail almost seamlessly into the beginnings of international law. One eminent scholar has pointed to the very existence of ‘canon law’ as evidence of this connection and asserted that this, “linkage between the theologians and the lawyers, in this area, persisted throughout the Middle Ages, and is the most distinctive feature of the theology of war throughout the period”.⁴¹

³⁹ TUCK, *The Rights of War and Peace*, note 4 above, at 22.

⁴⁰ *Idem*, at 57.

⁴¹ *Ibid.*

The underlying assumption of the just war doctrine today is that there are indeed times at which it is morally acceptable to engage in war, along with the supposition that once begun there continue to be ethical constraints on those conducting its waging. However, the earliest theorists did not necessarily begin their work with such assumptions, and instead reasoned through the different possibilities to arrive at these now assumed conclusions. Augustine's writings on justice and war are the clear underlying source for the following two texts that have been classified as a "benchmark" in the development of just war: the *Decretals* of Gratian and Thomas Aquinas' *Summa Theologica*.⁴² Much of the treatment of the questions of war by Gratian in his work of the twelfth century also dealt directly with whether any participation in war at all is allowable by Christians. It was again the affirmative answer to this central query that laid the ground for the participation in warfare by Christians, but the central caveat was put forward that involvement is only acceptable in the cases of a war that is "just". It was the firm establishment that there were indeed circumstances in which Christians could participate in war, by the likes of Augustine and then Gratian, that paved the way for what is now known as the just war doctrine.

One can find only a nascent and rudimentary form of *jus in bello* in the writings of Thomas Aquinas in the thirteenth century through his treatment of the 'right intention' standard drawn directly from Augustine.⁴³ Thus we find that these two presumptions of war being at times morally justified and restrictions on how conflict could be conducted were actually developed over time to give rise to the doctrine, and not simple assumptions found at its inauguration. While it is quite common to find a literature presenting a complete and sophisticated doctrine arising from the earliest theorists, it is only through a piecing together of historical thought that we are able to present something so coherent. In general, however, the classic just war doctrine is a reversal of what is found today. That is to say, that although the *jus ad bellum* principle dominated the classic doctrine, it is much less prevalent and less developed in international law today. While when we compare the *jus in bello* constraints found in the Geneva Conventions and Hague Regulations, they are far more extensive and elaborate than anything found in the classic doctrine of just war.

Of particular importance for our discussion here, is that in the classic doctrine of just war we find the powerful moral principle devised by Thomas Aquinas of 'double effect'. This idea conceptualized by one of the most important theologians of the tradition is central for understanding whether there could ever be a moral justification for killing. Thomas shrewdly

⁴² JOHNSON, *Ideology, Reason and the Limitation of War*, note 4 above, at 33-6.

⁴³ *Idem.*, at 40-3.

drew an important distinction between carrying out a violent action with the intent to kill, and that of killing while using violence to defend one's own life. Not only was there an important moral distinction between the two acts, but this conceptualization of 'double effect' also provided, and should continue to provide, an extremely useful guideline for determining under what circumstances self-defense can be plausibly invoked. In other words, "[t]he use of force had to be directed against the attack, not the attacker".⁴⁴ Therefore, we must also arrive at the important conclusion that there must certainly be an attack (perhaps imminent), otherwise there is indeed nothing to repel. Thomas eloquently explained this significant concept, and it is well worth reproducing his words here:

[n]othing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental. [...] Accordingly the act of self-defense may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in "being," as far as possible.⁴⁵

We see that in the thirteenth century Thomas formulated a fundamental distinction that sheds light on our understanding of the use of force or violence directed onto another even today. One way that this transposition into contemporary usage can be evidenced is by the inclusion of this principle into several provisions of the Rome Statute of the International Criminal Court.⁴⁶ Killing or harm must come only as a side-effect of our own needed and proportional self-preservation. Once again, this means that force must be used only to repel an attack and not to punish the attacker. If an attack has not been launched and is only a future plot, there is nothing to repel.

The other important concepts that Thomas Aquinas also illuminates in this very same discussion of "double effect" are that of *necessity* and *proportionality*. These two concepts are today a part of the customary international law on the use of force,⁴⁷ and we find that they were introduced early on in the just war theory. Thomas follows the above citation,

[a]nd yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of *proportion* to the end. Wherefore if a man, in self-defense, uses more than *necessary* violence, it will be unlawful: whereas if he repel force with moderation his defense will be lawful, because according to the jurists 'it is lawful to

⁴⁴ For a good discussion of the use of force in international law at the beginning of the 21st century, and a most interesting integration of moral philosophy, see FLETCHER, and OHLIN, *Defending Humanity: When Force is Justified and Why*, note 36 above, at 27.

⁴⁵ THOMAS AQUINAS, *Summa Theologica*, II-II, (1265-1274) Question 64, Art. 7 (internal citations omitted).

⁴⁶ For examples see FLETCHER and OHLIN, *Defending Humanity*, note 36 above, at 14-5.

⁴⁷ DINSTEIN, *War, Aggression, and Self-Defense*, note 21 above, at 207-212.

repel force by force, provided one does not exceed the limits of a blameless defense.’⁴⁸

We thus see that both of these elements were indeed central characteristics of the Thomistic tradition of thinking about defensive force.

Hence, on the question pertinent to our analysis on immediacy, one can indeed find that the first documented thinkers on *jus ad bellum* did discernibly sketch out a basic requirement concerning an anticipatory attack. That is, just war must be in response to a specific wrongful act that has taken place. While there were three primary requirements for a just war in the classic doctrine –right authority, just cause and right intention–, implied all the way through the classic tradition is the stipulation that, “just war be of a defensive or retributive nature only; offensive wars and wars of preemptive retribution are not permitted”.⁴⁹ This is certainly not to say that the first use of force was entirely ruled out by these early theologians. Thomas for example certainly did not do so, either implicitly or explicitly.⁵⁰ But there was the fundamental requirement that some fault must have been committed, and thus there was an injustice that needed to be corrected. In other words, the idea of dealing with a sinful act that has not yet occurred through war was implicitly excluded throughout the classical writings. As one scholar of the tradition put it,

[a]ctual wrong must have been done, moreover; it is not enough for evil *intentions* to have existed. Preemptive redress of wrongs or punishment of sin (which to the medieval mind was an instance of redress of wrongs) is ruled out.⁵¹

Therefore, we find that within the just war doctrine, those who first contemplated the moral limits that should constrain even those who were charged with the defense of large populations must still base the launching of war on completed actions and not on assumed future intentions. This surely means that the space between preemptive and preventive war was a gap that has been thought to be critical for centuries.

2) Transition to the Modern Era

Sixteenth century Europe was awash in blood spilled in the religious wars of the Protestant Reformation that lasted until the Peace of Westphalia in 1648 over a hundred and thirty years later. At the very same time, Europeans were confronting the moral and legal ramifications of the 1492 ‘discovery’ of a New World inhabited by a people previously unknown to them in

⁴⁸ THOMAS, *Summa Theologica*, note 45 above, Question 64, Art. 7 (internal citations omitted) (my emphasis).

⁴⁹ JOHNSON, *Ideology, Reason and the Limitation of War*, note 4 above, at 46.

⁵⁰ *Ibid*, at 40.

⁵¹ *Ibid*, (original emphasis) at 38.

lands formerly untouched by the peoples of their continent. Of course, the carnage and bloodshed that this confrontation of peoples unleashed in a struggle for dominance and riches has been well documented.⁵² In the crucible of these violent clashes there was a proliferation of serious thought on the justness of war and conflict, some of it novel and progressive and some of it a self-absorbed and expedient hardening of old ideas. This no doubt spawned a pivotal development in the just war doctrine.⁵³ It was during this time period in Europe that the classic doctrine of just war was secularized and became what is now recognized as the discernible roots of contemporary international law with direct implications for when anticipatory war could be legally employed. Moreover, we will see that during this era of violent conflict some devout religious thinkers morphed the traditional just war doctrine into a justification of war on spiritual grounds with contrary conclusions on anticipatory defense. As such, thought surrounding armed conflict during this time period has been presented and classified as a division between humanist and scholastic traditions, and simultaneously described as a bifurcation of the just war doctrine. Regardless of which school of thought one adheres to, there was an illuminating division over what constitutes a justifiable trigger for the launching of war during this time period.

A) The Humanist Tradition and Holy War

Some political philosophers have suggested that the most useful way to understand how the original strands of thought progressed on issues of war and peace through the sixteenth century is with the designations of ‘humanist’ and ‘scholastic’ traditions.⁵⁴ The distinction between the two might be best described as the rhetorical versus the philosophical. The humanist tradition largely reflected a perspective taken by rhetoricians defending their population’s interests before its own political bodies entrusted with the welfare of those very people. Thus it can be understood as representing a relatively narrow self-interest. While the scholastics took a wider philosophical view beyond just one community to formulate a precept that could be acceptable to all populations and governments concerned with the

⁵² For a firsthand account of the initial encounter from one of the conquistadors see del CASTILLO, Bernal Díaz, *The Discovery and Conquest of Mexico* (New York, De Capro Press, 1996) 512 pp.; for an account that includes the voices of the indigenous peoples see LEÓN-PORTILLA, M., *The Broken Spears: The Aztec Account of the Conquest of Mexico* (Boston, Beacon Press, 1962) 204 pp.; or a criticism of the subjugation of the indigenous peoples see de las CASAS, Fray Bartolomé, *Obras Completas*, Ramón Hernández, O.P. and Lorenzo Galmés, O.P. (ed.) (Madrid, Alianza Editorial, 1992).

⁵³ JOHNSON, *Just War Tradition...*, note 4 above, at 172-189.

⁵⁴ For a valuable discussion of these traditions see TUCK, *The Rights of War and Peace*, note 4 above, at 16-77; See also PIIRMÄE, P., ‘Just War in Theory and Practice: The Legitimation of Swedish Intervention in the Thirty Years War’, Vol. 45, No. 3 (Sep., 2002) *The Historical Journal*, 499-523.

justifications of war.⁵⁵ The first drew extensively on the texts and rhetorical writings of the Romans who were openly skeptical of philosophy, and the second tradition was constructed from earlier Christian literature, along with the writings of the Greek philosophers.⁵⁶

Alberico Gentili (1552-1608), an Italian jurist who made his way to eventually settle at Oxford as a Professor of Civil Law, could be said to exemplify particularly well the humanist tradition. In his major work of 1588, *De Jure Belli*, Gentili treated many of the issues that were in debate concerning hostilities between states, and among them was that of anticipatory attack and preventive war. Gentili had few scruples about the idea of launching an assault before an injury was received. According to Gentili, the ill intentions and fear of the power of another certainly justified striking first in order to protect oneself. As he expressed it,

no one ought to expose himself to danger. No one ought to wait to be struck, unless he is a fool. One ought to provide not only against an offence which is being committed, but also against one which may possibly be committed. Force must be repelled and kept aloof by force. Therefore one should not wait for it to come.⁵⁷

Of note here is the clever rhetorical transition made from what we have seen plainly expressed by Thomas Aquinas in his own citation of Roman jurists, “it is lawful to repel force by force”.⁵⁸ It is the addition of the simple phrase “and kept aloof by force” that might at first blush seem logical and a minor alteration. In effect, however, this allowance drastically changes the entire meaning of the phrase and irretrievably widens the possibilities of employing force.

Gentili also thought one of the most crucial circumstances that warranted military action in anticipation was that of the growing power of a neighbor. He believed that Lorenzo de’ Medici counseled well when advocating that a balance of power should be maintained amongst the princes of Italy so as to avert attempts at domination, and translated this idea into a righteous preventive war. Gentili wrote, “it is better to provide that men should not acquire too great power, than to be obliged to seek a remedy later, when they have already become too powerful”.⁵⁹

Scholars of the humanist tradition often looked to the Roman orator and jurist, Cicero, to help formulate their own stance on issues of war and peace.⁶⁰ One primary reason being

⁵⁵ *Idem*, TUCK, at 226-234.

⁵⁶ *Ibid.*, at 16.

⁵⁷ Alberico Gentili, *De Jure Belli*, Book II, ed. C. Phillipson, trans. J.C. Rolfe (Oxford: Oxford University Press, 1933), p. 62, cited in TUCK, *The Rights of War and Peace*, note 4 above, at 18.

⁵⁸ THOMAS, *Summa Theologica*, note 45 above.

⁵⁹ TUCK, *The Rights of War and Peace*, note 4 above, at 18.

⁶⁰ *Idem*, at 19.

that the idea of warfare fought in the interests of one's own *respublica*, as often eloquently argued by one of the most versatile minds of Ancient Rome, resonated strongly within the humanist tradition. Although Cicero did indeed also argue for anticipatory action against internal enemies such as Marcus Antonius, he also thought that there was a dramatic moral difference between the peoples of Christian civilization and all others.⁶¹ Thus, Cicero maintained that all strikes executed in advance of any proper harm were justifiable if the republic was threatened in some way. This significant Roman orator for the humanist point of view "repeatedly implied that the violence of enemies did not actually have to be manifested in order to be legitimately opposed by violence".⁶²

In the well-known speech, *Pro Milone*, Cicero defended this idea on behalf of a friend on trial for the killing of a fellow Roman standing for the office of praetor. The argument was that self-defense extended to fear of a future hostility as a justification for its implementation. In recognizable terms that reflect a filiation that can be traced back to Thucydides and forward to Hobbes' translated phrase 'necessity of nature',⁶³ Cicero spoke of conflict under arms as being governed by "law not of the statute-book, but of nature".⁶⁴ Further emphasizing the inherent nature of what he considered to be defensive measures, Cicero went on to explain that it was, "a law which we possess not by instruction, tradition, or reading, but which we have caught, imbibed, and sucked in at Nature's own breast".⁶⁵ Also in this speech, we find Cicero articulating what has largely become a conventional wisdom expressed in the proverb, *silent enim leges inter arma*. As he explained,

that should our lives have fallen into any snare, into the violence and the weapons of robbers or foes, every method of winning a way to safety would be morally justifiable. *When arms speak, the laws are silent*; they bid none to await their word.⁶⁶

In the end, the defense of Milo was unsuccessful. Such a claim was found to be at the very periphery of decency, if not well beyond it, in the domestic law. Overall, even in Roman law, one finds that, "the only 'fear' which could be pleaded in extenuation of an individual's act was an immediate and obvious one".⁶⁷

What is most noteworthy about these citations from one of the humanists' favorite sources, is the explicit evacuation of both laws and morals from any reasoning concerning an

⁶¹ *Ibid.*, at 78.

⁶² *Ibid.*, at 19.

⁶³ For more discussion of Hobbes' translation, "necessity of nature", see Section IV below.

⁶⁴ CICERO, *The speeches / Cicero...*, note 3 above, at 17.

⁶⁵ *Idem*.

⁶⁶ *Ibid.*, (my emphasis).

⁶⁷ TUCK, *The Rights of War and Peace*, note 4 above, at 21.

application of the use of force. This was particularly the contention for a circumstance that can be construed as self-defense only if the future were already written and a known entity. Offering final clarification that he indeed thought permissible defense reached out beyond what is described in this chapter as a breach, by allowing for attack on those assumed or thought to be preparing a future ambush, Cicero explicitly argued, “the slaying of a *conspirator* may be a justifiable act.”⁶⁸ In other words, the belief that there is the planning of future injury is enough to unleash deadly punishment.

Another variety of the humanist tradition in this era, or of those who applauded warfare in the interests of their own community, can be found in the works of some Protestant thinkers who advocated the launching of hostilities against those who were not of the same religious persuasion because brutal conflict was ever-present and constituted an implacable threat during that era. As mentioned earlier, this time period was marked by bloodshed over a deep and severe division between Catholics and Protestants within the Christian church. As a result, there were some who picked up the banner of the just war doctrine and used its terminology and framework to advocate the cause of ‘holy war’ against religious enemies.⁶⁹ This sixteenth and seventeenth century trend of employing religious grounds to justify war-making has also been identified as one branch of a bifurcation of the just war doctrine leading to holy war in this case, and the beginnings of a secularized international law in the other. It is of importance to recognize that argument in favor of warfare grounded in justifications based on difference in religious ideology was relatively limited in duration, and has no direct progeny of which to speak. Therefore, we can understand there to be a disconnect between this form of moral argument that found its heyday in the seventeenth century and our contemporary age, or a “discontinuity between early modern holy war theory and the way we in the twentieth century generally think about justice in war”.⁷⁰ In other words, the philosophy that professed that it was indeed *moral* to attack a perceived enemy before any injury had

⁶⁸ CICERO, *The speeches / Cicero...*, note 3 above, (my emphasis) at 19.

⁶⁹ JOHNSON, *Ideology, Reason and the Limitation of War*, note 4 above, at 81-149. For an explicit invocation of this very terminology justifying our use of the phrase to describe this branch of the bifurcation see BACON, F., *An Advertisement Touching an Holy Warre* Laurence Lampert (ed.) (Illinois, Waveland Press Inc., 2000). It is important to clearly state here that although we are pointing out a similarity between the Bush administration and of those advocated holy war at the end of the Middle Ages, this is not to imply that each shared the same religious motivations. It is indeed true that just days after the attacks of 9/11 President Bush made a public statement saying, “this *crusade*, this war on terrorism, is going to take awhile”. (FORD, P., ‘Europe Cringes at Bush “Crusade” Against Terrorists’ *Christian Science Monitor* [19 Sept. 2001] available at : <<http://www.csmonitor.com/2001/0919/p12s2-woeu.html>>). However, it is not the intention of this work to analyze any underlying religious impetus that might or might not have existed within the administration.

⁷⁰ *Idem*, at 83.

been suffered has been a relatively short-lived and limited historical phenomenon.⁷¹ Thus, there is reason to believe that it would have been an unlikely venture to plant the idea that there was a moral necessity to launch an unprovoked attack, and presume it would take root within the twenty-first century US population. Then again, in the wake of the attacks of 9/11 the prevailing security mood certainly could have changed the fertility of the public soil for such a moral argument. Nevertheless, the overriding point here is that the advocacy of a preventive war on moral grounds has historically been a fleeting notion.

The country in which the translating of the just war doctrine into an advocacy for holy war was most identifiable was England. However, this is not to say that this position did not exist in other parts of the continent.⁷² Rather, our attention is drawn to the English affair with the idea of holy war because it was brought into particularly sharp relief in the light of a palpable rivalry with the staunch Catholicism and maritime dominance of Spain during this time period. One specific characteristic of this doctrine of holy war found at the time was a shift in emphasis away from the traditional just war concept of a *limitation* on the Christian's right to make war, but instead a focus on the *permission* to go to war. This attention certainly made a difference in anticipatory war since, its limitation can become wholly subjective when pushed to its temporal edge.

One of the commonalities found in these figures who advocated for the use of religion as a *casus belli* and conceptualized a reformulation in the classic doctrine of just war was indeed specifically on the point anticipatory war. That is to say, those who promoted the idea of holy war also found it justifiable to forestall the evil *intentions* of another by initiating war, rather than waiting for a first strike. One of the earliest calls for just such hostilities against Catholic Spain came from Stephen Gosson in his 1598 sermon at Paul's Cross Church in a parish where many high ranking government officials worshipped.⁷³ *The Trumpet of Warre* oration gained a popularity that led to its later publishing. Because there was no ongoing armed conflict with Spain at that time, "this sermon must be understood as a call to

⁷¹ *Ibid.*, at 81-85. The position taken by Johnson in this work that holy war in the sixteenth century is a form of the just war tradition is certainly recognized to be somewhat at odds with the position of other scholars of the doctrine such as R. Bainton in *Christian Attitudes Toward War & Peace* (Nashville, Abingdon Press, 1960). However, this particular debate is not wholly pertinent to the discussion here because our focus is rather on moral deliberations over the exercise of preventive war. As such, whether the advocacy for this type of military action should be qualified as holy war or crusade or "holy revolution", and whether it should be classified as a part of the just war doctrine, is not directly relevant here. The Puritan argument was indeed a moral one, and did not take root, neither inside nor outside the tradition. As such, for coherence sake, the discussion will be presented here as a part of the just war doctrine as employed by J. Johnson.

⁷² *Ibid.*

⁷³ *Ibid.*, at 96-105.

preemptive [or preventive by our terms] defensive war”.⁷⁴ What this means specifically is that Gosson endorsed and encouraged the protecting of his religious sect and country by launching war on the Spanish whom he identified as propagating offensive religious wars on the continent. Most importantly, his contention was that such a campaign would simply be an exercise in self-defense because Spain’s assumed malevolent future intentions were considered enough to be a trigger to action.

This sermon anticipated the position of a more well-known English dignitary in the early seventeenth century, Sir Francis Bacon. While not a religious zealot, one of Bacon’s writings in particular dealt directly with the subject at hand; *Considerations Touching a Warre with Spaine*.⁷⁵ In this piece we see that Bacon certainly wrote judiciously and his position at the court of Queen Elizabeth and then that of King James gave him the experience necessary to craft his argument prudently. However, he was still unmistakably favorable to holy war in this study document prepared for the King while he was serving as a special royal advisor in 1624. We see here that holding the position that religious causes could indeed give rise to justifiable hostilities once again led to the result that armed struggle could be waged in anticipation of a wrong, and could be based solely on perceived malicious intentions.

To Bacon’s mind, the defense of his religion was certainly grounds enough to initiate a battle against the nation that had professed itself generally to be the protectors of the Catholic world. Most importantly, he saw this as self-defense. The memorable expression upon which he based this reasoning, and the leading thrust of the article under discussion here, was that of a “just feare”. If it could be discerned that another country, which proclaimed a different faith, was prepared for battle (regardless of whether this preparation was intended for its own defense or aimed specifically at one’s own country), then the initiation of armed conflict was in fact a response based upon justifiable reasoning. As Bacon explained it for the specific circumstance facing England,

[t]o proceed therefore to the second ground of a warre with Spaine; we have set it downe to be a just feare of subversion of our civill estate: [...] wherein two things are to be proved, the one that a just feare (without an actuall invasion or offence) is a sufficient ground of Warre, and in the nature of a true defensive; the other that we have towards Spaine cause of just feare, [...] not out of umbrages, light jealousy, apprehensions a farre off, but out of clear foresight of imminent danger.⁷⁶

We see in this citation that Bacon certainly believed there to be a justifiable reason to fear Spain, and that this was certainly enough to trigger a war to be initiated (defensively) by England. It

⁷⁴ *Ibid.*, at 102.

⁷⁵ BACON, ‘Considerations Touching a Warre with Spaine’, note 1 above.

⁷⁶ *Idem*, at 8.

is also interesting to note the cunning rhetorical flourish employed at the citation's closing. By invoking the language of an "imminent danger", there certainly would be an understandable and perhaps unsuspecting draw to the logic applied by Bacon. However, it should not go unstated that the word "foresight", no matter how clear, directly contradicts the imminence of which he speaks. For it is unreasonable for something to be just about to happen at any moment, yet at some unspecific point in the future. Hence the phrase "clear foresight of imminent danger" should be understood as a contradiction in and of itself. In other words, such clear foresight into the future has never been shown to be within our human capabilities, and therefore is a rhetorical flourish rather than a reasonable argument.

To be sure, there were (and continue to be) very practical reasons for the exercise of military power to be seen as just, and Francis Bacon also spoke to this necessity. In other words, a war deemed just would have a direct effect on its efficacy. He identified both funding and troop morale to be vital to a military exercise and at once based upon the perception of the justice of the war-making. As such, we must take Bacon's arguments and reasoning seriously since he recognized that the justness of war would be an important element in rallying the necessary support at home and abroad. As he put it,

"[t]here must bee a care had that the motives of Warre bee just and honorable: for that begets an alacrity, as wel in the Souldiers that fight, as in the people that affoord pay: it draws on and procures aids, and brings manie other comodities besides".⁷⁷

However, venturing into the unstable moral grounds that lie beyond our human capabilities must certainly shake the grounds of "the motives of Warre bee just and honorable", giving rise to real doubt about Bacon's reasoning for a successful anticipatory war.

Finally, we will make brief mention here of one other advocate of holy war in seventeenth century England. Some scholars have classified the proponents of this type of holy war as being, or directly emanating from, Puritans crusading for revolution since some of this group were among the most fervent propagandists.⁷⁸ Indeed, some of those who supported the type of war discussed in this section do fall into such a category, as is also the case with William Gouge. His work is perhaps the most complete in representing all of the recognizable characteristics of the holy war doctrine, including that of pushing the envelope

⁷⁷ BACON, F., 'Perseus, sive bellum', in *De sapientia veterum* [1609], Sir Arthur Gorges (trans.) [1619] (New York and London, 1976), cited in PIIRMÄE, 'Just War in Theory and Practice', note 54 above, at 500.

⁷⁸ See e.g. BAINTON, R., *Christian Attitudes Toward War & Peace*, note 71 above, at 136-151. Bainton has argued, and his influence on this point can be discerned in other scholars' work, that the Puritans were the primary advocates of holy war during this era in England. The inclusion of other backers of this point of view in this chapter would certainly undercut this point. However, it is certainly not within the scope of this text to enter into this debate.

of anticipatory war to its furthest boundaries.⁷⁹ In 1631 Gouge published *Gods Three Arrows*, which has been called a “climax in English attempts to rewrite the Christian doctrine of war”.⁸⁰ In it, he does not portray war as a lesser of two evils, but rather that there are indeed times in which God actually urges his people into battle. Additionally, he attempts to reformulate the concept of a just reaction to a wrong committed when writing, “[d]efensive warre is that which is undertaken to defend ourselves or friends from such wrongs as enemies *intend*, or attempt against us”.⁸¹ Just as we have seen in Gosson and Bacon, Gouge also believed that future intentions could be predicted, and thus this could act as a trigger for “defensive warre”.

B) The Scholastic Tradition and a Secular Doctrine

There was indeed another side to this philosophical bifurcation that characterized the transition into the modern era: the scholastic tradition. During this same critical time period when the Christian church was splintering into warring factions and Europeans were trying discern their obligations to other humans they were confronting in the New World, there was a particularly significant historical development. That is, at this fateful moment of violent confrontation on multiple continents, there was the secularized advancement of the just war doctrine into what is now recognized today as the origins of international law.⁸² Since one of the most pressing and relevant concerns of the time was to expand the law of discovery and occupation to a breadth never before contemplated, it is perhaps not surprising that the most prominent scholars that first advanced a secular just war doctrine were found in the Iberian peninsula. Among some of the most well-known were the Spanish religious philosophers of the sixteenth century, Francisco de Vitoria and Luis de Molina, whose work will be briefly treated here and who generally wrote out their thoughts on war in the characteristic scholastic repertory of commentary on Thomas Aquinas and other Christian and medieval philosophers.⁸³ In distinction to the humanists, the scholastics’ primary concern was not simply the preservation of the commonwealth. The attempt was rather to determine the universal rights of states relating to what could be termed a just war from differing

⁷⁹ JOHNSON, *Ideology, Reason and the Limitation of War*, note 4 above, at 117-125.

⁸⁰ *Idem*, at 118.

⁸¹ Cited in *ibid.*, at 120 (my emphasis).

⁸² SCOTT, J.B., *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Oxford, The Clarendon Press, 1934), and HAMILTON, B., *Political Thought in Sixteenth-century Spain* (Oxford, The Clarendon Press, 1963).

⁸³ PIIRMÄE, ‘Just War in Theory and Practice...’, note 54 above, at 508.

perspectives.⁸⁴ We will also see that, at this earliest stage of international law, the branch of the bifurcation in the direction of more secularized thought on armed conflict contained ideas on anticipatory war quite similar to their predecessors, with one important advancement.

This is certainly not to say that Spain was the only location in which such ideas were to become developed and propagated. While the geographical juxtaposition presented here might give the impression that the English busied themselves with justifications for religious war and the Spanish were contemplating foundations for an international order, this was certainly not the case and such a conclusion must not be taken from this section. Just as England simply provided an unique crucible in which to find some of the most fervent and clear citations of supporters of preventive holy war, Spain will serve similarly to highlight the moral and legal philosophers who secularized the just war doctrine and took it in the direction of an international law. As perhaps the most definitive proof that such simplified geographical conclusions would be erroneous is the simple fact that these Spanish origins were a mode of thought that produced an eminent progeny in other countries as well. This legal philosophy was ripe and continued to mature within the whole of the European continent over the following centuries.

Perhaps the clearest statement from the Spanish Dominicans on the question of the justness of military action came from the first of these major figures, Francisco de Vitoria. With a terminology and reasoning that sharply reflected the just war tradition he inherited, Vitoria wrote that there is but “a single and only just cause for commencing a war, namely, a wrong received”.⁸⁵ For authorities to support this claim to justice he relies on Augustine, Thomas Aquinas and “the opinion of all the doctors”.⁸⁶ While demonstrating an adherence to their heritage on the limitations of war by focusing justness on a wrong received, there was also a vital distinction made by this group of Spanish philosophers that explains a great deal of the subject at hand.

In complete contrast to the branch of holy war, Vitoria explicitly ruled out faith as grounds for hostilities saying, “[d]ifference of religion is not a cause of just war”.⁸⁷ The reason that this element of the bifurcation is particularly significant here is that there was a realization that such an allowance could result in both sides in war owning a valid claim to a justness of defensive war, and thus the imperative distinction between offensive and defensive war would be lost. Molina explained that a circumstance in which both the attacker and the

⁸⁴ *Idem*, at 509.

⁸⁵ Cited in SCOTT, *The Spanish Origin of International Law*, note 82 above, at 208-209.

⁸⁶ *Idem*.

⁸⁷ *Ibid.*, at 208.

attacked were fighting justly, “would be a contradiction in terms: each party to the war would be blameless and so from the nature of the situation they could not kill each other. This goes against any conception of justice”.⁸⁸ As such, in the secularizing of the just war doctrine the interpretation of the traditional claim of harm became more wholly focused on *material* injury.⁸⁹ Very importantly, this clarification also sets in motion the movement towards a *legal* concept of defense in international law, which can be said to have culminated in the twentieth century with the codification of illegal aggression, since the standard for self-protection has moved towards verifiable evidence, i.e. “armed attack” in Article 51 of the UN Charter, rather than a subjective injury.

In illumination of this point on anticipatory action Vitoria espoused a position that falls in line with the standard of imminence that largely characterizes the view of most international lawyers today. He asserted that, “defense can only be resorted to at the very moment of the danger, or, as the jurists say, *in continenti*, and so when the necessity of defense has passed there is an end to the lawfulness of war”.⁹⁰ While Molina’s stance has been described as saying that “[w]ars in pursuit of glory, or pre-emptive strikes, were utterly forbidden”.⁹¹ However, Vitoria’s position should not be taken as unwavering since he also believed that “one who has been contumeliously assaulted can immediately strike back, even if the assaulter was not proposing to make a further attack”,⁹² and that one’s own self-respect can justify her from refusing to flee if by flight she might avoid the danger but compromise reputation.⁹³ Thus we see a more clarified moral and legal position starting to emerge on anticipatory action, even if there was an attention to honor and esteem that can be said to have held a higher value in the sixteenth century than it does today.

3) The Dawn of International Law

While the case has certainly been made that the origin of international law can be traced to the Spanish philosophers just discussed in the last section, the analysis of this study does not turn on such a clear classification designating a particular parentage to this legal tradition. The development of the just war doctrine into a secular form becoming what is now recognized

⁸⁸ De MOLINA, L., *De Justitia et Jure*, vol. i, treatise ii, disputation 105, section 7, cited in HAMILTON, *Political Thought in Sixteenth-century Spain*, note 82 above, at 142.

⁸⁹ JOHNSON, *Ideology, Reason and the Limitation of War*, note 4 above, at 168-171.

⁹⁰ Cited in SCOTT, *The Spanish Origin of International Law*, note 82 above, at 203-4.

⁹¹ TUCK, *The Rights of War and Peace*, note 4 above, at 52.

⁹² Cited in SCOTT, *The Spanish Origin of International Law*, note 82 above, at 204.

⁹³ *Idem*, at 202.

and labeled with Jeremy Bentham's term of 'international law'⁹⁴ concerns us here for its moral analysis of anticipatory strikes. Although the just war thought is clearly present in the works of Hugo Grotius, Samuel Pufendorf and Emmerich de Vattel, it is developed without the theological base that we have seen in their predecessors. However, it should not be presumed that this difference somehow meant that these legal philosophers had a dearth of moral intensity or adulterated the tradition of just war.⁹⁵

As a starting point, we will look to Dutch legal philosopher Hugo Grotius and his celebrated work *De Jure Belli ac Pacis* which attempts to flesh out the natural law that he believed governed nations going to and engaging in war due to its divine origin exposed through human reason. The methodology that he employs reveals an important element of his work that concerns us here because there is a palpable attention on what can be measured with verifiable externals. The just war tradition inherited by Grotius was composed of three primary elements: right authority, just cause and right intention. Yet this purveyor of international law shifted the tradition by replacing 'right authority' with sovereignty. He only scantily treated the most subjective criteria of 'right intention' in connection with other topics, and 'just causes' were regulated by those that can be discerned by an objective observer.⁹⁶ As discussed, the line between preemptive and preventive war pivots on this very distinction of objectivity/subjectivity and thus his stance on the issue can be partially foretold by his tack.

Grotius is certainly an ambiguous figure whose work has properly provoked much scholarly investigation. There continues to be a lack of consensus on exactly how to classify his contribution to law, theory and thought.⁹⁷ He has been classified within the humanist tradition since he was brought up within it, and did put forward some of the most far-reaching set of rights at that time for a state to make war.⁹⁸ In particular, he offered a robust form of the international right of a state to punish, which certainly opened a wide passageway to justifications for war. As well, he put forward a legal validation for occupying territory uncultivated by its inhabitants, which was in fact a rationalization of the prevalent European incursions into the New World for colonization during this era. Yet when we look at the

⁹⁴ See e.g. JANIS, M. W., and MEREDITH, P., 'Jeremy Bentham and the Fashioning of "International Law"' (1984) 78, 2 *American Journal of International Law* 405.

⁹⁵ JOHNSON, *Ideology, Reason and the Limitation of War*, note 4 above, at 209.

⁹⁶ *Idem*, at 213-214.

⁹⁷ See e.g. BULL, H., KINGSBURY, B., and ROBERTS, A., (eds.) *Hugo Grotius and International Relations* (Oxford, Oxford University Press, 1992); HAGGENMACHER, *Grotius et la doctrine de la guerre juste*, note 4 above; BULL, H., *The Anarchical Society* (New York: Columbia University Press, 1977); JEFFERY, R., *Hugo Grotius in International Thought* (New York, Palgrave MacMillan, 2006); KEENE, E., *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge, Cambridge University Press, 2002).

⁹⁸ See TUCK, *The Rights of War and Peace*, note 4 above, at 78-108.

question of preventive war, Grotius certainly did not fit into the conventional conception of the humanists.

Firstly, Grotius believed that there were only very limited conditions in which a state might strike an adversary before a harm had been done. Most importantly, in his work on the rights of war and peace he outlined the necessity of an impending peril being both “immediate” and “certain” for a nation to take up its arms. He wrote,

V. War in defence of life is permissible only when the danger is immediate and certain, not when it is merely assumed.

The danger, again, must be immediate and imminent in point of time. I admit, to be sure, that if the assailant seizes weapons in such a way that his intent to kill is manifest the crime can be forestalled; for in morals as in material things a point is not to be found which does not have a certain breadth. But those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived, and deceive others.⁹⁹

This explicit formulation surely coincides quite well with a contemporary understanding of the limits of anticipatory military action in that it focuses attention on the certitude that a coming attack is just about to befall a nation.

Grotius then entered into a discourse over the concept of ‘fear’, offering numerous citations in support of his view that this emotionally charged concept should be understood as an insufficient trigger for action. This point is perhaps most interesting because it appears as an almost direct rebuttal of the ideas put forward by Francis Bacon using a ‘just feare’ to give reason for an English attack against Spain just one year earlier in 1624. Of course, the advocacy for such a standard was discussed above in the section covering the humanists who were in favor of a holy war because it was not believed that war could be avoided with the most powerful Catholic country on the continent during those volatile times. Thus, one can clearly discern the bifurcation under discussion within the just war tradition when Grotius and Bacon are viewed side by side on this issue of anticipatory attack.

In his own discussion of fear as a just cause, Grotius cited both Greek and Roman authors who can be found supporting his formulations excluding preventive strikes from a legal framework of the laws of war and peace, except in the most extreme circumstances. Grotius first framed this discussion on fear and anticipation by using a citation from the Roman Consul Gellius, which explained that the normal human circumstance must not be

⁹⁹ GROTIUS, *De Jure Belli ac Pacis*, note 2 above, Book II, chpt. 1, sec. V, at 173. It should be pointed out that there are indeed other translations of Grotius’ work that do not completely coincide with this one, and debate can be had over which is the most true to the original text. That debate, however, is not within the scope of this work.

understood as equal to those who find themselves in violent armed combat before an audience. Gellius was cited,

When a gladiator is equipped for fighting, the alternatives offered by combat are these, either to kill, if he shall have made the first decisive stroke, or to fall, if he shall have failed. But the life of men generally is not hedged about by a necessity so unfair and so relentless that you are obliged to strike the first blow, and may suffer if you shall have failed to be first to strike.¹⁰⁰

As well, Cicero was put forward querying, “[w]ho has ever established this principle, or to whom without the gravest danger to all men can it be granted, that he shall have the right to kill a man by whom he says he fears that he himself later may be killed?”¹⁰¹ Finally, Grotius went on to cite Thucydides declaring, “[t]he future is still uncertain, and no one, influenced by that thought, should arouse enmities which are not future, but certain”.¹⁰² There is no doubt that these quotations used by Grotius indeed support his conclusion that anticipatory defense must only be used when a threat is immediate and not supposed. Yet, we can perhaps deduce that Grotius, as versed as he was in the humanist tradition, was engaging in somewhat selective citation since Cicero has been identified as a central author constructing the intellectual roots of the humanist tradition.¹⁰³ At the same time, Thucydides was one of the Greek historians preferred by this same group of Roman thinkers, at least in part owing to the form of arguments that he presented in *The Peloponnesian War*. As one example, when discussing the case of the Mytilenaeans in the face of growing Athenian power, Thucydides gave further validity to the line of argument supporting preventive war by putting forward, “seeing it is in their hands to invade at pleasure, it ought to be in ours to anticipate.”¹⁰⁴

Taking a more scholastic position in his seminal legal work, Grotius closed this part of his discussion on anticipatory self-defense by drawing attention to the fact that if an attack has not yet been launched, there are indeed other means of protecting oneself. That is to say, if a state is not dealing with an “imminent” and “certain” strike upon the nation, then it must look to other methods of defense since it can not be deemed moral and lawful to resort to war when the future remains unwritten and will surely offer other unforeseen means for resolution. Grotius proclaimed,

Further, if a man is not planning an immediate attack, but it has been ascertained that he has formed a plot, or is preparing an ambushade, or that he is putting poison in our

¹⁰⁰ *Idem*, Book II, chpt. 1, sec. V, par. 1, at 174.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ PIIRMÄE, note 54 above, at 509.

¹⁰⁴ THUCYDIDES, *The Peloponnesian War: The Complete Hobbes Translation*, Book III, chpt. 12 (Chicago, The University of Chicago Press, 1989) at 163.

way, or that he is making ready a false accusation and false evidence, and is corrupting the judicial procedure, I maintain that he cannot lawfully be killed, either if the danger can in any other way be avoided, or if it is not altogether certain that the danger cannot be otherwise avoided. Generally, in fact, the delay that will intervene affords opportunity to apply many remedies, to take advantage of many accidental occurrences; as the proverb runs, 'There's many a slip 'twixt cup and lip'.¹⁰⁵

Additionally, Grotius treats a second element of the preventive strike when he speaks of the rising military power of another country that has been classified as an enemy. This situation deals with a threat that is all the more distant than those discussed above since it is not based on even a plan or preparation that is underway, but rather a danger that seems to be in the process of growing. Here again, Grotius breaks with the humanist tradition and proclaims that a country may not lawfully engage in such warfare simply because it risks being in a disadvantageous position in the future. Grotius proclaimed,

XVII. A public war is not admitted to be defensive which has as its only purpose to weaken the power of a neighbour

Quite untenable is the position, which has been maintained by some, that according to the law of nations it is right to take up arms in order to weaken a growing power which, if it become too great, may be a source of danger.

That this consideration does enter into deliberations regarding war, I admit, but only on grounds of expediency, not of justice.¹⁰⁶

We see that on this point of discussion, where subjectivity fully reigns, Grotius is all the more strident in his position. In part, this is surely because Grotius is expounding on one of the bases upon which much liberal thought lies. That is, there are in fact important trade offs for entering into a liberal society and the security it is supposed to offer. When one chooses to step out of a lawless freedom where force can be wielded at the sole discretion of each and every member, there will indeed be uncertain fears. Thus trust and faith must step to the fore in exchange for the promise of further security. However, to complete this transaction there is one essential element that must be present, the equality of all members must prevail. As Grotius puts it,

that the possibility of being attacked confers the right to attack is abhorrent to every principle of equity. Human life exists under such conditions that complete security is never guaranteed to us. For protection against uncertain fears we must rely on Divine Providence, and on a wariness free from reproach, not on force.¹⁰⁷

While Grotius does indeed make a distinction between the interception of an attack about to strike its target, and the attempt to prevent a future risk from becoming too great

¹⁰⁵ GROTIUS, *De Jure Belli ac Pacis*, note 2 above, Book II, chpt. 1, sec. V, par. 2, at 174-5.

¹⁰⁶ *Idem*, Book II, chpt. 1, sec. XVII, at 184.

¹⁰⁷ *Ibid.*

through war, his conclusion is similar. Lawfulness is granted only in the most ‘certain’ and ‘immediate’ circumstances. While these adjectives used to qualify an attack are meant to circumscribe a lawful reaction, a final determination is left in the hands of the state. Clearly, there was no organ available at that time to which a state could adjudicate a claim of transgression and see the application of these temporal restrictions.¹⁰⁸ Of the *ius gentium* to which Grotius was trying to give shape, it should not be forgotten that the international environment of 1625 was not one of obligations based on consent. Rather it was to natural law, which was understood to be universal and objective standards of right and wrong by which laws, as well as human conduct, were to be judged.¹⁰⁹ As such, the standard that Grotius was articulating needed to be crafted in a way that would offer a force based on its strength of reasoning, as well as its universal application.

We see that, in this work by Grotius giving shape to the beginnings of international law, there was an explicit and relatively thorough treatment of the questions of anticipatory defense. One of the specific lines he delineated in regards to a preemptive defense was based on the very same standard spoken of today by a majority of international lawyers: imminence.

We will also find that two other jurists who followed Grotius drew lines of distinction that were quite similar. That is, a division is placed between defense against imminent attack, and the intention to reduce the power of a growing adversary. Their pronouncements, like those of Grotius, attempted to put a constraint upon the moment in time at which a state would be lawfully reacting to the harm or threat of another. For the 17th century German philosopher Samuel von Pufendorf the language he chose for such an action to be deemed acceptable in *Of the Law of Nature and Nations* was that of “moral certainty”. In Book II, Pufendorf takes up this issue in a section entitled “The time allowed for Defence in Natural Liberty”. It is here that Pufendorf speaks of temporal constraint, explicitly excluding suspicion or fear as a just cause, that must exist for a legal and moral military action. However, it should also be noted that Pufendorf indeed saw a difference in the temporal limits for defense between what can be carried out in an established civil nation and that of a state of nature with more latitude allowed in the latter. As a general percept he asserted,

To render the Defence of our selves entirely Innocent, it is commonly thought a necessary Condition, that as to the time, the Danger be just upon us, or as it were in

¹⁰⁸ Today, the UN Security Council is meant to have such an authority to find a state culpable of acting as an aggressor. For a fuller discussion see Section V below on ‘right authority’.

¹⁰⁹ BROWN, C., NARDIN, T., and RENEGGER, N., *International Relations in Political Thought* (Cambridge: Cambridge University Press, 2002) at 312.

the very point of seizing us: And that no Suspicion or Fear, whilst yet uncertain is sufficient to justifie our assaulting another [...] yet before I can actually assault another under colour of my own Defence, I must have tokens and Arguments amounting to a Moral Certainty, that he entertains a Grudge against me, and hath a full design of doing me a Mischief, so that unless I prevent him, I shall immediately feel his Stroke.¹¹⁰

It is this author's opinion that there is a particular potency in the language employed here by Pufendorf to close this excerpt. So much so that one might equate it to that of the powerful phrasing utilized by 19th century US Secretary of State, Daniel Webster, from the oft cited Caroline incident to which many turn to when discussing preemptive military action. While the circumstances of the Caroline affair are not very useful as legal precedent,¹¹¹ Webster acutely expressed a standard of self-defense as being when a threat is, "instant, overwhelming leaving no choice of means and no moment for deliberation".¹¹² Pufendorf's phrase, "unless I prevent him, I shall immediately feel his Stroke" would similarly conjure up a vivid image in the readers mind and offers a rhetorical force that can be easily committed to memory. Most importantly, however, what we find in the quote above from Pufendorf is an effort to rule out preventive war.

We also find that Pufendorf took the time to disparage the reasoning that had been used to argue for a preventive war as he found it to be a particularly detrimental doctrine. In the same section of this work Pufendorf put forward,

'Tis a very gross Knack of Philosophizing that some Men have got, when they tells us by way of Advice, *He that is able to hurt you, undoubtedly is willing; and therefore, without farther Warning, down with him, as you love your own Safety.* This kind of Doctrine is manifestly destructive of all Sociable Commerce amongst men; and the Authors commonly cited in Defence of it, either are such whose Character prevents their Authority, or else in the Passages alleged from them, they speak only of Precaution, or of dealing with those Wretches, who have given us sufficient Tokens of Resolution to hurt us.¹¹³

Of course, this citation would beg the question of what might be classified as an adequate indication that an enemy has the resolve to do us harm. However, considering that Pufendorf

¹¹⁰ PUFENDOERF, S., *Of the Law of Nature and Nations*, Book II, chpt. V, sec. 6, (Oxford, L. Lichfield, 1703) at 145.

¹¹¹ For a discussion of the applicability, or lack thereof, of this case in the discussion of self-defense see KOLB, 'Self-Defence and Preventive War...', note 33 above, at 113; and DINSTEIN, *War, Aggression and Self-Defence*, note 21 above, at 184-5.

¹¹² The Caroline Incident (exchange of diplomatic notes between Great Britain and the United States [1842]), reprinted in (1906) 2 *Digest of International Law* 409, at 412. The point here is concerning the potency of language and a comparison between that chosen of Pufendorf and Webster. This is not meant as a discussion of the particular historical precedent of the Caroline incident.

¹¹³ PUFENDOERF, S., *Of the Law of Nature and Nations*, note 110 above, Book II, chpt. V, sec. 6, at 145.

is speaking of the selective use of authorities as support, the underlying point would continue to be that of a faulty reasoning being employed in the service of preventive war.

Much like Grotius, Pufendorf also excluded the use of force against a growing power due to the fact that it would be purely speculative since intentions in the future are unknown. In other words, there must be some type of verifiable trigger for military action in self-defense. Pufendorf wrote,

Nay, altho' such a Mighty Neighbour, hath shown himself to have the Will of Hurting as well as the Power, he doth not yet give me directly a just Cause of setting upon him, because he doth not yet express this ill Will towards me in particular. For it is not sufficient Proof that a Man designs to hurt me, because he hath already hurt others; in as much as he might be provok'd to his attempt on them by fame particular Reasons, which he doth not find against me.¹¹⁴

Thus, Pufendorf can be classified in the same category as Grotius on the points of immediacy and the growing power of an unfriendly neighboring state. Both believed that morality and law demanded an equity that would preclude the use of force at any sort of temporal distance less than immediacy.

In the same tradition of natural law, Swiss legal philosopher and diplomat Emerich de Vattel followed in the eighteenth century and also provided a pertinent view on the legal and moral use of force. An investigation of his thought on preventive war in *The Law of Nations or the Principles of Natural Law* reveals more ambiguous results than we have seen for Grotius and Pufendorf. Although the results on their face can be construed as to some extent similar, there is little doubt that Vattel pushed the temporal limits for anticipatory attack further than his predecessors analyzed here. That is to say, Vattel also drew a line of distinction between before and after a harm had been inflicted, but at the same time posited a more fluid boundary in the allowance for military attack. There are times when he seems to be arguing both sides, at once laying down strict boundaries followed by unclear exceptions. As an hypothesis for this perplexing presentation by Vattel on this specific issue, this author suggests that one must blame the subject matter. As Vattel moves onto the ground of unverifiable facts for his exemptions, combined with explicit prohibitions, the result tends to be a bit muddled demonstrating further the shaky ground he attempts to traverse.

One reason that Vattel allowed more flexibility for each state to engage in war was because he couched his legal framing as a positive right to self-defense that only required caution in the case of preventive war. This was an important variance from Grotius and

¹¹⁴ *Idem.*

Pufendorf since they had formulated their discussion on the matter as a negative right proscribing attack unless certain conditions were met. There is indeed a qualitative difference in focusing on the right of self-defense or on the prohibition of force and it can be seen here when comparing these authors.

Vattel opens his third book *Of War* by pointing immediately to a right rather than a prohibition. He begins by defining the phenomenon of war as “that state in which we prosecute our right by force”, and continues a few paragraphs below by asserting, “nature gives men a right to employ force, when it is necessary for their defense, and for the preservation of their rights”.¹¹⁵ This reversal of attention certainly had an impact on the final provisions that Vattel put forward as his conception of the natural laws of war concerning anticipatory attacks.

When speaking directly to the question of anticipatory war Vattel framed the issue clearly using the right to self-defense formulation by writing:

[i]t is safest to prevent the evil when it can be prevented. A nation has a right to resist an injurious attempt, and to make use of force and every honorable expedient against whosoever is actually engaged in opposition to her, and even to anticipate his machinations, observing, however, not to attack him upon vague and uncertain suspicions, lest she should incur the imputation of becoming herself an unjust aggressor.¹¹⁶

By approaching the subject from a positive right one can immediately discern the difference in tone, and even breadth, for anticipatory action. However, we do find that Vattel nevertheless went out of his way to explicitly underline that there was indeed a boundary that must not be crossed: that of becoming “an unjust aggressor”.

Of course, when discussing Vattel it should not be overlooked that when it came to the just war tradition he made considerable contribution to issues of *jus in bello* by furthering the concepts of noncombatant immunity and limitation of the destructiveness of war.¹¹⁷ Yet for

¹¹⁵ VATTEL, E., *The Law of Nations or the Principles of Natural Law in Four Books*, Chitty, J. (trans.) (1758) Book III, chpt. 1, §1, at 295.

¹¹⁶ *Idem*, Book II, chpt. 4, §50 at 169.

¹¹⁷ *Ibid.*, Book III, chpt. 8, §145 at 347-8 where Vattel recognizes women, children and feeble men of the foreign nation as enemies, “[b]ut these are enemies who make no resistance; and consequently we have no right to maltreat their persons or use any violence against them, much less to take away their lives. This is so plain a maxim of justice and humanity, that at present every nation in the least degree civilized, acquiesces in it. If, sometimes, the furious and ungovernable soldier carries his brutality so far as to violate female chastity, or to massacre women, children, and old men, the officers lament those excesses; they exert their utmost efforts to put a stop to them; and a prudent and humane general even punishes them whenever he can” (internal citations omitted); and Book III, chpt. 9, §168 at 361 concerning the destructiveness of war and the protection of civilian objects Vattel wrote, “[f]or whatever cause a country is ravaged, we ought to spare those edifices which do honor to human society, and do not contribute to increase the enemy's strength, — such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one's self an enemy to mankind”.

jus ad bellum, it is more noteworthy that Vattel does not speak of a prohibition against war making, but rather the positive right of self-defense in numerous circumstances including the right to punish injustice as a right to security.¹¹⁸ We can see this reversed formulation again in the manner in which Vattel focuses on a right to making war, even if subject to constraint. He wrote,

The right of employing force, or making war, belongs to nations no farther than is necessary for their own defense, and for the maintenance of their rights. Now, if any one attacks a nation, or violates her perfect rights, he does her an injury. Then, and not till then, that nation has a right to repel the aggressor, and reduce him to reason. Further, she has a right to prevent the intended injury, when she sees herself threatened with it. Let us then say in general, that the foundation, or cause of every just war is injury, either already done or threatened. The justificatory reasons for war show that an injury has been received, or so far threatened as to authorize a prevention of it by arms.¹¹⁹

We do see here that Vattel explicitly opens the door beyond an injury incurred, and speaks to the concept of ‘threat’. The reason why this is particularly interesting is because this word has at least two meanings, each with conceivably very different consequences. The first entry explains that the word threat refers to “a declaration of an intention or determination to inflict punishment, injury, etc. in retaliation for, or conditionally upon, some action or course”.¹²⁰ In other words, a threat can be an explicit and verifiable verbal statement. While the second entry presents a threat to be, “an indication or warning of probable trouble”.¹²¹ This second definition of course places us in the vague subjective territory that has been the topic of this entire section. Ultimately, we can see that Vattel’s meaning of the right to war being “no farther than necessary” becomes difficult to comprehend, as he introduces the concept of a threat being included as an injury itself. As we will see below, this double, and therefore ambiguous, meaning of ‘threat’ is a rhetorical space where the Bush administration tried to move conversations over policies of war.¹²²

As we have seen, Vattel indeed warned against pushing the temporal limits too far, but did so only after extolling the right to anticipate. His treatment of the aggrandizement of a neighboring power can be characterized in the same vein and quite illustrative of his overall approach to the issue. First, Vattel clearly laid out in detail what he sees as the precarious

¹¹⁸ *Ibid.*, Book II, chpt. 5, §69 at 174.

¹¹⁹ *Ibid.*, Book III, chpt. 3, §26 at 304.

¹²⁰ The Random House College Dictionary, Revised Edition, Jess Stein (ed.) (New York, Random House, 1982) at 1369.

¹²¹ *Idem*, entry (2).

¹²² See Section III below.

nature of waiting too long before addressing such a threat militarily, along with historical examples. He is then sure to state in no uncertain terms,

For the interest, therefore, and even the safety of nations, we ought to hold it as a sacred maxim, that the end does not sanctify the means. And since war is not justifiable on any other ground than that of avenging an injury received, or preserving ourselves from one with which we are threatened (§ 26 [cited above]), it is a sacred principle of the law of nations, that an increase of power cannot, alone and of itself, give any one a right to take up arms in order to oppose it.¹²³

Yet his analysis and full response does not end here. Vattel then puts forward how and when he thinks the appearances of a danger in fact provide a right to attack in anticipation. He explains that power alone is not a threat, as it must be accompanied with the will to do harm. Thus when a country has demonstrated itself to be of a dangerous ill will through “proofs of injustice, rapacity, pride, ambition, or an imperious thirst of rule” there may indeed come a time when her neighboring states may demand formal securities from her “at the moment when she is on the point of acquiring a formidable accession of power”.¹²⁴ If this rising, and perceived to be bellicose, power refuses to provide such guarantees, Vattel contends that neighbors may then resort to force in self-defense.

However, this ambiguous position taken by Vattel on anticipatory action when dealing with the rising power of a neighbor is rendered all the more unclear as he also outlines other fully lawful alternatives in a following section. After reiterating the obligation of a nation to vigilantly provide security for its population, asserting that “imprudent supineness would be unpardonable”, Vattel claims,

But force of arms is not the only expedient by which we may guard against a formidable power. There are other means, of a gentler nature, and which are at all times lawful. The most effectual is a confederacy of the less powerful sovereigns, who, by this coalition of strength, become able to hold the balance against that potentate whose power excites their alarms.¹²⁵

The idea of a balance of powers to deter potential aggressors was certainly not novel.¹²⁶ However, we do see that other means, which were deemed to be fully lawful no less, were indeed advocated by Vattel before simply launching armed hostilities against the rising power of a neighbor.

Finally we find that Vattel also applied this very same stance to the circumstance of a neighboring nation that is in preparations for war. That is, he advocated watchfulness and

¹²³ VATTEL, *The Law of Nations*, note 115 above, Book III, chpt. 3, §43 at 310.

¹²⁴ *Ibid.*, Book III, chpt. 3, §44 at 310.

¹²⁵ *Ibid.*, Book III, chpt. 3, §46 at 312.

¹²⁶ See e.g. GUICCIARDINI, F. *The History of Italy*. (London, Macmillan, 1969 [org. 1561]) at 4f.

alert. Yet, Vattel counseled that, “[w]e ought not, without sufficient cause, to presume him capable of exposing himself to infamy by adding perfidy to violence. As long as he has not rendered his sincerity questionable, we have no right to require any other security from him”.¹²⁷

As such, to classify Vattel’s exact position concerning military maneuvers in advance of an attack is more difficult than we have seen with Grotius or Pufendorf. Perhaps the most valid classification would be that Vattel pushed the envelope of preemptive attack to its very limits, beyond the temporal constraint of imminence, but still attempted to insist upon the requirement of necessity for an attack to remain moral and lawful. However, we do find that a careful reading of Vattel on this subject reveals an inevitable ambiguity because of his reliance upon subjective factors that materializes due to the distance to which Vattel pushed his secularized just war theory on anticipatory action. Thus, the subjective nature of the ground upon which Vattel wished to base his theory at the limits of morality and legality led to the ambiguity of his stance presented here.

4) Kant and a Discernible Exclusion of Preventive War

In the well-known text *Perpetual Peace* by Immanuel Kant, we find that direct reference was made to the philosophers discussed above who were interested in formulating a legal framework to regulate the interaction of states. Yet, Kant in no way meant to flatter the scholars he singled out when he wrote,

For Hugo Grotius, Pufendorf, Vattel and the rest (sorry comforters as they are) are still dutifully quoted in *justification* of military aggression, although their philosophically or diplomatically formulated codes do not and cannot have the slightest *legal* force, since states as such are not subject to a common external constraint.¹²⁸

When treating the issue of anticipatory war it might not seem at first glance as if these authors starkly differed from Kant’s own position. That is to say, Grotius, Pufendorf and Vattel did not go nearly as far as those of the humanist tradition in permitting attacks upon another state before an injury had been incurred.¹²⁹ However, Kant’s vehement objection voiced in the quote above was in fact related to the lack of “*legal* force” their works held for those who were subject to the natural law they were espousing. As he explained, “there is no instance of

¹²⁷ VATTEL, *The Law of Nations*, note 115 above, Book III, chpt. 3, §50 at 313-4.

¹²⁸ KANT, I., ‘Perpetual Peace: A Philosophical Sketch’ in *Political Writings*, ed. Hans Reiss (Cambridge : Cambridge University Press, 1991) (original emphasis) at 103.

¹²⁹ It should be remembered that there has been debate over whether Grotius himself should be classified within the humanist tradition, see Section II (3) above.

a state ever having been moved to desist from its purpose by arguments supported by the testimonies of such notable men”.¹³⁰ Such an opening by these early international lawyers allowed sovereigns to engage in war while still maintaining a veneer of conducting their foreign affairs legally and morally by putting forward creative and expedient interpretations of these philosophers’ work. Kant saw this as a real problem inherent in these works, and suggested that explicit consent to agreements between states would offer a first step out of a lawless state of nature.

Before discussing the idea of consent, it should first be recognized that Kant did not deal explicitly with the concept of preventive strikes and their relation to a peace among nations in as categorical a manner as we have seen from the previous authors analyzed. However, it is argued here that one can indeed discern Kant’s position on this important issue through work treating his vision of relations among states, along with law and morality in general.¹³¹ Most importantly, to understand this position in his thought, it is necessary to recognize that Kant spoke both about conditions as he saw them currently existing, and how he envisioned how they would need to be so as to create a *Perpetual Peace*. As a clear portion of the latter, in the Appendix of this well-known text, we find that Kant disqualified the use of force when dealing with a state that posed a future danger because of its increasing strength. He explicitly ruled out an open tenet of allowing weaker powers to ally themselves and attack in defense of future actions of a fearsome sovereign because it would only provoke an anticipatory attack from the stronger state on the very same grounds. Kant wrote,

If a neighboring power which has grown to a formidable size (*potential tremenda*) gives cause for anxiety, can one assume that it will *wish* to oppress other states because it *is able* to do so, and does this give the less powerful party a right to mount a concerted attack upon it, even if no offense has been offered? If a state were to *let it be known* that it affirmed this maxim, it would merely bring about more surely and more quickly the very evil it feared. For the greater power would anticipate the lesser ones, and the possibility that they might unite would be but a feeble reed against one who knew how to use the tactics of *divide et impera*. Thus this maxim of political expediency, if acknowledged publicly, necessarily defeats its own purpose and is consequently unjust.¹³²

One thing that should be noticed here is that Kant was basing his argument against a preventive military action on reason, rather than dictating prohibitions or rights. In other words, he wished to show *why* states have it in their own interest to follow his precepts and to

¹³⁰ KANT, ‘Perpetual Peace’, note 128 above, at 103.

¹³¹ Another scholar who also arrived at this conclusion on Kant’s position concerning anticipatory strikes is TUCK, *The Rights of War and Peace*, note 4 above, at 219.

¹³² KANT, ‘Perpetual Peace’, Appendix II, note 128 above, (original emphasis), at 128.

work to make them codified standards. What we also see in the above quote is Kant's philosophical conviction that there existed a necessity of transparency in public relations. He believed that the most efficacious method of ensuring that justice drives actions in an international society is if all deeds possessed a publicly avowable character that can be defended on the grounds of equal application.¹³³ Further along in the Appendix of this work Kant explained this transparency as a necessity of transcendental principle that could bring together politics and morals, between which a tension has frequently been identified. Kant formulated this idea in the terms, "[a]ll maxims which require publicity if they are not to fail in their purpose can be reconciled both with right and with politics".¹³⁴ Kant here laid some of the groundwork for a complete exclusion of preventive strikes by stipulating that transparent action open to public scrutiny would curb the possibilities for launching war.

While the concept of an anticipatory defense was not explicitly discussed in Kant's work, nor defense with hostilities authorized on the grounds of certainty and proximity in time, there are indeed portions of his work that would point to their exclusion. In the *Second Definitive Article of a Perpetual Peace: The Right of Nations shall be based on a Federation of Free States* (the same section that contains the discussion of Grotius, Pufendorf and Vattel), Kant declares that "reason, as the highest legislative moral power, absolutely condemns war as a test of rights and sets up peace as an immediate duty".¹³⁵ The reader can thus begin to definitively grasp the stark terms in which Kant views the recourse to war and thus the need to emerge from a lawless state of nature. As a starting point, Kant put forward that,

The concept of international right becomes meaningless if interpreted as a right to go to war. For this would make it a right to determine what is lawful not by means of universally valid external laws, but by means of one-sided maxims backed up by physical force. It could be taken to mean that it is perfectly just for men who adopt this attitude to destroy one another, and thus to find perpetual peace in the vast grave where all the horrors of violence and those responsible for them would be buried.¹³⁶

To accomplish the abandonment of war Kant saw the need to establish an international institution to sit above all states. This is certainly an idea that has been scoffed at as impossible by many since its invocation. Even Kant acknowledged that this was not the will of states during his own time. However, what is of critical importance is that Kant also put forward intermediate steps to move in this direction.

¹³³ TUCK, *The Rights of War and Peace*, note 4 above, at 221.

¹³⁴ KANT, 'Perpetual Peace', Appendix II, note 128 above, at 130.

¹³⁵ *Idem*, at 104.

¹³⁶ *Ibid.*, at 105.

There is only one rational way in which states coexisting with other states can emerge from the lawless condition of pure warfare. Just like individual men, they must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form an *international state* (*civitas gentium*), which would necessarily continue to grow until it embraced all the peoples of the earth. But since this is not the will of the nations, according to their present conception of international right (so that they reject *in hypothesi* what is true *in thesi*), the positive idea of a *world republic* cannot be realised. If all is not to be lost, this can at best find a negative substitution in the shape of an enduring and gradually expanding *federation* likely to prevent war.¹³⁷

The recognition found in this excerpt is essential because it helps to distinguish the particularity of Kant's proposal. There is no doubt that he demonstrated an appreciation of Hobbes' idea of the international realm as a state of nature without a powerful leviathan sitting above in judgment. However, the important difference we find here is that Kant suggested that there is indeed something between the two. Unlike Hobbes who thought that "Covenants, without the Sword, are but Words",¹³⁸ Kant believed that explicit public agreements based on consent could create a condition beyond the state of nature and establish an intermediary condition that would pull towards what reason demanded. The governing rules would be much thinner than in a civil society to be sure, but nevertheless thicker than in a state of nature.

To clarify Kant's position on preventive strikes, attention must also be drawn to the fact that he also spoke to this specific issue in *Metaphysics of Morals, The Theory of Right*. In it, Kant addressed preventive strikes that are launched in response to actual military provisions undertaken, as well as the growing power of a neighbor and concluded that there was indeed a place for such attacks. Kant explained that "in the state of nature, the *right to make war* (i.e. to enter into hostilities) is the permitted means by which one state prosecutes its rights against another."¹³⁹ Yet, it is very important to recognize that Kant is exclusively dealing here with a wholly lawless condition, which must be understood as contrary to what he advocates in *Perpetual Peace*. It was simply in the context of a state of nature that Kant put forward,

[t]hreats may arise either if another state is the first to make military preparations, on which the right of *anticipatory attack* (*ius praeventionis*) is based, or simply if there is an alarming increase of power (*potentia tremenda*) in another state which has acquired new territories. This is an injury to the less powerful state by the mere fact

¹³⁷ *Ibid.*, (original emphasis).

¹³⁸ HOBBS, T., *Leviathan*, chpt. XVII, Tuck, R., (ed.) (Cambridge: Cambridge Univ. Press. 1991) at 117.

¹³⁹ KANT, I., 'The Metaphysics of Morals; The Theory of Right, Part II: Public Right', in Reiss, H. (ed.), *Political Writings* (Cambridge, Cambridge University Press, 1991) (original emphasis) §56 at 167.

that the other state, even without offering any active offence, is *more powerful*; and any attack upon it is legitimate in the state of nature.¹⁴⁰

By explicitly qualifying the use of such preventive attacks as a form of defense in a *state of nature*, we may directly contrast this with what he promoted as an exit. This point should be explicitly noted.¹⁴¹ Kant saw that rights in the state of nature must be “provisional”.¹⁴² That is to say, he believed that rights in such a lawless condition must leave open the possibility of departing from this undesirable and unstable state, and always allow a path for arriving at a more rightful condition. Thus we may begin to conclude that Kant indeed was aiming at the full exclusion of preventive war in a more structured, less violent, society of states.

As evidenced throughout the work of *Perpetual Peace*, Kant promoted the idea that morality must play a role in achieving this desired condition. Advice he explicitly offered to this end was to, “[s]eek ye first the kingdom of pure practical reason and its *righteousness* and your object (the blessing of perpetual peace) will be added unto you’. For morality, [...] has the peculiar feature that the less it makes its conduct depend upon the end which it envisages [...], the more it will in general harmonise with this end”.¹⁴³

To find perhaps the most convincing argument that what Kant intended was a full exclusion of preventive war in all its forms on moral grounds, one should turn to his familiar moral precept of a ‘categorical imperative’. Kant put the most coherent formulation of this principle forward in *Fundamental Principles of the Metaphysic of Morals*. This work was intended to outline and define the concepts that he was later to employ more fully in other works, and served as the center of his moral philosophy. In this widely read article, Kant attempts to present a clear and precise development of moral principle so that it can be discussed and more frequently put into operation without the normal distractions that tend to divert our attention. No doubt, there are many elements of this work that are worthy of discussion, but which are not directly pertinent to our work here. For example, the elevation of reason as the highest human faculty creating a duty of its embrace, the contention that all actions must be borne of pure reverence and respect for the moral law to be considered fully moral, and the principle that humans must not be ever used as means since it must be respected that each of us are ends in and of ourselves.

¹⁴⁰ *Idem*, (original emphasis).

¹⁴¹ Cf. FLETCHER and OHLIN, *Defending Humanity*, note 36 above, “Kant, surprisingly, argued in favor of preemptive war,” at 156. This argument by Fletcher and Ohlin seems to have missed the fact that Kant argued that in a state of nature such attacks were viable, but that reason demanded a departure from this condition.

¹⁴² TUCK, *The Rights of War and Peace*, note 4 above, at 215.

¹⁴³ KANT, ‘Perpetual Peace’, Appendix II, note 128 above, at 123.

However, Kant most importantly provides in this article his basic and coherent formulation of how to assess and understand morality. As he put it, “[i]n forming our moral judgement of actions, it is better to proceed always on the strict method and start from the general formula of the *categorical imperative*: Act according to a maxim which can at the same time make itself a universal law”.¹⁴⁴ In other words, fundamental moral principle must be abstracted from individual circumstances, and all action must be defensible as within a rule that can be envisioned and endorsed for everyone.

An example that Kant uses to demonstrate the duty he sees as incumbent upon all is that of a person forced by necessity to borrow money even though she knows repayment to be impossible. While one’s individual circumstances might call for the making of a false promise so as to forge a path out of misery, an application of the categorical imperative reveals it to be only momentarily expedient. The conscious offering of promises known to be fallacious can not be an applicable rule of action on a wider scale because it would ultimately break down any working system of contractual obligations and agreements. As Kant put it,

I presently become aware that while I can will the lie, I can by no means will that lying should be a universal law. For with such a law there would be no promises at all, since it would be in vain to allege my intention in regard to my future actions to those who would not believe this allegation, or if they over hastily did so would pay me back in my own coin. Hence my maxim, as soon as it should be made a universal law, would necessarily destroy itself.¹⁴⁵

We can readily see that Kant’s formulation of “the supreme principle of morality” can be extremely useful because its high level of abstraction allows for an application in various circumstances. We can also see a correlation between Kant’s categorical imperative and Rawls’ original position and the veil of ignorance. There is even enough of a coincidence for Rawls himself to assert, “[t]he notion of the veil of ignorance is implicit, I think, in Kant’s ethics”.¹⁴⁶ We can also notice how Kant’s categorical imperative might be related to that of the Golden Rule or the ethic of reciprocity, a tenet found in the scriptures of all major religions.¹⁴⁷ Of course, there are some who contend that the two concepts are not comparable

¹⁴⁴ KANT, I. *Fundamental Principles of the Metaphysic of Morals*, Thomas Kingsmill Abbott (trans.) (Univesity Park, Penn State Electronic Classic Series Publication, 2010) (my emphasis) at 251.

¹⁴⁵ *Idem*, at 219.

¹⁴⁶ RAWLS, J., *A Theory of Justice* (Cambridge, Mass., The Belknap Press of Harvard Univ. Press, 1999) at 121.

¹⁴⁷ See e.g. ARMSTRONG, K., *A History of God: The 4,000-Year Quest of Judaism, Christianity and Islam* (New York, Random House, 1993). The author is a former Catholic nun who rose to prominence with this particular work along with her other critically acclaimed investigations of the way in which religious ethical traditions overlap. See additionally the *Charter for Compassion*, a project launched to explore and spotlight this intersection of compassion, calling us to treat all others as we wish to be treated ourselves, available at : <<http://charterforcompassion.org/>>.

because Kant solely based his conclusions of moral good in reason, while the Golden rule has been said to conform only to one's own standard. There is surely a difference that exists here, but to delve too deeply into the subtle and philosophical differences of these concepts would quickly transplant them out of a general and widespread understanding, and into a more profound philosophical discussion that would remove everyday people from wielding the ability to judge and determine the legitimacy of their own government. This is in addition to the fact that in a pluralistic society there will inevitably be some differences in the conception of morality. This does not mean, however, that morality will be diminished to nothingness simply because diversity exists. It will suffice here to present the essence of these principles as quite related and useful in analyzing the moral worth of preventive war launched before any injury has been incurred.

As a final way to grasp the fundamental nature of an interconnectivity and compassion for the other that provide for a foundation of morality, one can simply look again to Kant's own account of the categorical imperative. He explains,

although, no doubt, common men do not conceive it in such an abstract and universal form, yet they always have it really before their eyes and use it as the standard of their decision. Here it would be easy to show how, with this compass in hand, men are well able to distinguish, in every case that occurs, what is good, what bad, conformably to duty or inconsistent with it, if, without in the least teaching them anything new, we only, like Socrates, direct their attention to the principle they themselves employ; and that, therefore, we do not need science and philosophy to know what we should do to be honest and good, yea, even wise and virtuous.¹⁴⁸

Thus it is necessary to understand that there are indeed basic forms of morality that are in fact accessible to all, even if discussions over morality often veer into relativism that tend to cloud simpler shared judgments.

It is our contention that there is a fundamental moral failure in authorizing preventive war because it is, by nature, based upon pure speculation of at least intent, and at times capabilities. While the latter can at times be empirically proven (if one has the on the ground access, or 'perfect' intelligence), the former is impossible to discern with any certainty because there is no such thing as a window into another's mind. Even with the qualifying terms of a 'certain' and 'imminent' attack, a passageway to justification is still left open because there was clearly no one in the international community with the mandate to make this final determination in Kant's time. Hence, this assessment of certainty and immediacy must be left to each state as its own judge. In terms of the 'categorical imperative', this would

¹⁴⁸ KANT, *Fundamental Principles*, note 144 above, at 219-20.

raise a significant problem since a prohibition that places only a self-assessed constraint, is hardly a constraint at all. As well, the intention to attack may have not even yet materialized in the enemy's mind or planning. Therefore, it is quite problematic to assert that conjecture on future events can be clearly construed as justification that an action is one of self-defense. Once we have removed the verifiable certitude that accompanies the concept of a harm incurred, one begins to deal with worst case scenarios and decisions driven by Hobbesian diffidence.

There are few who would assert that fear brings clarity in decision-making, and fear is thus rightfully eschewed from drafting legal standards whenever possible. This is something we have seen clearly exposed in Grotius' discussion on fear, in which he cited both Greek and Roman authors from the humanist tradition on this point. Thus, the central distinction that exists between preventive war and a reactive response to attack is based on an essential divergence we have been discussing throughout this section on anticipatory attacks and the just war doctrine. It certainly can be construed as absurd to contend that preventive war is the standard for any multilateral or bilateral treaty since it is, by its definition, based on unsubstantiated and unverifiable claims. And it is important to remember that this unverifiable status of an assertion remains true both before and after an attack. Each country would expose itself to an attack based on the subjective assessments of another. In essence, a system allowing for preventive war does nothing to enhance anyone's security because it would simply codify a state of nature in which all must continue to fear all. Under such a standard, every nation's individual estimation, no matter how empirically flawed, would continue to be the particularized criterion for the use of force. To suggest that such a rule could in fact be considered any kind of prohibition at all, or a step out of the state of nature, is surely absurd. So how could preventive war possibly be applied as a universal law? Kant believed that the responsibility he spoke of in *Fundamental Principles of the Metaphysic of Morals* was indeed a duty and universal. As he wrote,

[f]inally, there is an imperative which commands a certain conduct immediately, without having as its condition any other purpose to be attained by it. This imperative is categorical. It concerns not the matter of the action, or its intended result, but its form and the principle of which it is itself a result; and what is essentially good in it consists in the mental disposition, let the consequence be what it may. This imperative may be called that of morality.¹⁴⁹

Under this Kantian standard of only endorsing a norm that can be applicable to the entire community when in similar circumstances, and following the other citations from Kant found

¹⁴⁹ *Idem*, at 231-2.

in this work, it is possible to conclude that his intent was to exclude all forms of preventive war.

We have already seen that Kant held a certain amount of disdain for the approach of Grotius, Pufendorf and Vattel. He found that the openings for recourse to war left available in the reasoning of an obligation to their *jus gentium* were deplorable for the justifications they still offered for military aggression. In particular, Kant's protest was against the misrepresentation of their suggested framework for the international realm as *legal*, which seemed a farce to him due to the lack of a "common external constraint". For this reason, Kant saw his plan for perpetual peace as based on a proposition other than that of a natural law to which all were obliged by the simple declaration of informed and reasoned philosophers. He believed that consent was the central first step out of the state of nature and into a more structured rule-based society.¹⁵⁰ In the absence of such consent, Kant believed international relations were destined to be conducted in the Hobbesian state of "warre, as is of every man, against every man".¹⁵¹ This point is particularly contradictory to the philosophy of Pufendorf, for the essence of whose approach was that all were obliged to act on the basis of his laws of nations in the absence of a leviathan because they were compulsory laws for all.¹⁵² Thus what we find in Kant's proposition, in contrast to Grotius, Pufendorf and Vattel, is not a disagreement over the description of the condition in which states find themselves, but rather a disagreement over the means of departure from it. In his *Metaphysics of Morals, The Theory of Right*, which in very large measure agreed with his predecessors, Kant provided a depiction of this circumstance. He then went on to propose,

[t]hus the first decision the individual is obliged to make, if he does not wish to renounce all concepts of right, will be to adopt the principle that one must abandon the state of nature in which everyone follows his own desires, and unite with everyone else (with whom he cannot avoid having intercourse) in order to submit to external, public and lawful coercion. He must accordingly enter into a state wherein that which is recognized as belonging to each person is allotted to him *by law*...¹⁵³

¹⁵⁰ See TUCK, *The Rights of War and Peace*, note 4 above, at 221; See also MURPHY, M., 'Acceptance of Authority and the Duty to Comply with Just Institutions: A Comment on Waldron', (1994) 23 *Philosophy & Public Affairs* 271, "Though [people in the state of nature] ought to commit themselves [to accept the authority of a just institution], they are under no moral requirement to comply with the institution's dictates until they have committed themselves" at 271; and KEENE, E., *Beyond the Anarchial Society: Grotius, Colonialism and Order in World Politics* (Cambridge, Cambridge University Press, 2002), "In line with positivist doctrines, and in contrast with theories of natural law, the only foundation for legally binding rules in international society is the volition of states, and the scope of international law is therefore restricted to rules to which states have given their consent" at 12; Cf. WALDRON, J., 'Kant's Legal Positivism' (May, 1996) 109, 7 *Harvard Law Review* 1535.

¹⁵¹ HOBBS, *Leviathan*, note 138 above, chpt. XIII, at 88.

¹⁵² TUCK, *The Rights of War and Peace*, note 4 above, at 221.

¹⁵³ KANT, *The Metaphysics of Morals*, note 139.above, §44 at 137.

We find here a great quantity of words specifically referring to volition or consent: decision, renounce, adopt, abandon, unite, submit, recognize. When an explicit, rational accord equally applicable to all is reached and committed to publicly, Kant believed that a force indeed would be built to pull the society of states out of the state of nature and toward a ‘perpetual peace’. Of course, this idea of consent comes from contract theory that has been predominant in political philosophy for centuries, and the particularity of Kant’s work was that he was conceptualizing how this would translate into the international sphere. It is asserted by this author that the proliferation of codified treaties in the 20th century indeed follows this Kantian notion of consent to set in motion a departure from the state of nature.

As exhibited earlier, there have certainly been more recent steps taken to harness the notion of consent and codify agreement to a prohibition of the wanton use of force in the Kellogg-Briand Act, the League of Nations, and now currently in force, the United Nations Charter. Due to the need for there to be meaning behind the words found in the Preamble of the Charter (often seen as its *raison d’être*), “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”,¹⁵⁴ the interpretation of the exclusion of the threat or use of force in Article 2(4) must surely rule out the unprovoked use of force absent any imminent attack. As well, Article 51 on self-defense must exclude unverifiable triggers based on the suspicions of future intent. If they do not, then nothing has been codified or promised in the Charter. And as we have seen throughout our tracing of the just war doctrine on this issue, there has been significant agreement on this subject. Whether we look at the classical doctrine, or its secularized form found in the beginnings of international law, moralists and jurists have congregated around the need for an injury to have been suffered to trigger a ‘just war’. Of course, we have seen that there was a bifurcation on this subject within the just war tradition in the form of an advocacy of holy war during the violence of the Protestant Reformation in Europe. Yet it must be remembered that this branch in the split has sown no direct progeny, and thus can be best described as arriving at a philosophical dead end. When it comes to interpreting the justifiable use of self-defense allowed in Article 51 of the Charter, it must not be understood in a way that, “would make peace among nations impossible and would lead to a perpetual state of nature”.¹⁵⁵ The prohibition of the use of force found in the Charter certainly creates a real constraint on states. If it does not, as Kant said, “no one would consider that anything was promised to him, but

¹⁵⁴ *Charter of the United Nations*, note 26 above, at 330.

¹⁵⁵ KANT, *The Metaphysics of Morals*, note 139 above, §60 at 170.

would ridicule all such statements as vain pretences”.¹⁵⁶ Thus such interpretations of the Charter must be considered as absurd, and contrary to its object and purpose.¹⁵⁷

III. The Bush Doctrine: Preemption or Preventive War?

Now that a brief survey of the historical treatment of anticipatory military attack has been put forward offering a clearer understanding of how the moral lines have been drawn within the just war tradition, it is necessary to clarify how exactly the policy of the Bush administration should be classified. As a starting point, it is useful to turn to the dictionary created by the United States Department of Defense (DOD) to demonstrate that the pertinent categories outlined above are indeed understood to be the same by the portion of the US government charged with war and defenses. Once again, in the dictionaries through October 2009,¹⁵⁸ we will see that there is an understanding that parallels our own since there is a notable distinction between the terms ‘preemptive attack’ and ‘preventive war’. It reads,

preemptive attack - An attack initiated on the basis of *incontrovertible* evidence that an enemy attack is *imminent*.¹⁵⁹

preventive war - A war initiated in the *belief* that military conflict, while not imminent, is inevitable, and that to delay would involve greater *risk*.¹⁶⁰

So we see that there is indeed a distinction made between the two terms by the Defense Department. By our analysis, it is of enormous difference since it creates a real moral and legal chasm between the two. Firstly, there is a marked difference in tone. The language used to define preemption is particularly commanding, leaving no room for doubt about the high level of burden of proof required for the cases in which it would be applied. While on the other hand, preventive war is based on a subjectivity that would allow for individual interpretation of each case in which such armed hostilities might be carried out. Additionally,

¹⁵⁶ KANT, *Fundamental Principles*, note 144 above, at 238.

¹⁵⁷ *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 Jan 1980) UN Doc. A/Conf.39/27, 1155 U.N.T.S. 331, Art. 31, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its *object and purpose*”, (my emphasis).

¹⁵⁸ Of particular interest here is the fact that the DOD dictionary has now been revised. The latest version of 8 November 2010 (as amended through 31 December 2010), no longer includes the term “preventive war”, available at: <http://www.fas.org/irp/doddir/dod/jp1_02.pdf> (last visited 3 Feb 2011). This change, which certainly could be described as a “scrubbing” of pertinent materials, is surely to be lamented. The most disturbing part of this change is the fact that it makes the possibility of discussion of this critical difference much more difficult because it removes an important authority on the matter. For another work that cites the previous existence of an entry for “preventive war” see LAWRENCE, R., ‘The Preventive/Preemptive War Doctrine Cannot Justify the Iraq War’, (Winter 2004) 33, 1 *Denver Journal of International Law and Policy* 16, at 16-17.

¹⁵⁹ Department of Defense Dictionary of Military and Associated Terms, Joint Publication 1-02, 12 April 2001 (as amended through 31 October 2009), entry for ‘preemptive attack’, (my emphasis) at 424, available at : <http://www.fas.org/irp/doddir/dod/jp1_02.pdf> (last visited Nov 2009).

¹⁶⁰ *Idem*, entry for ‘preventive war’, (my emphasis) (last visited Nov 2009) at 428.

there is a stark contrast in linguistic strength, and hence moral tone, between the words “incontrovertible” and “imminent” when compared with the terms “belief” and “risk”. It is difficult to argue against the notion that, by these descriptions, preemptive attack would be a moral act of self-defense. On the other hand, preventive war would always be of dubious moral standing because of its inherent subjectivity and lack of verifiability, either in advance or in retrospect.

The opening salvo for the executive to express its position on where to draw this line in the post-9/11 world was launched on June 1, 2002 in a graduation speech at West Point military college by President George W. Bush.¹⁶¹ The United States had recently achieved an initial military victory in Afghanistan and the President had just asserted in his State of the Union speech the existence of an “Axis of Evil” that included Iraq, Iran and North Korea.¹⁶² Tension from the terrorist attacks of September 11th, 2001 still gripped the nation and the President was intent on setting the tone for a response beyond Afghanistan. This is the first place that the Bush White House rolled out the term “preemptive action”, and began to put forward their understanding of its meaning. However, if we look at the manner in which the president was suggesting to exercise military action, we will see that what was being described was in fact a preventive war, and not preemption at all. To justify the need for a change in long time US policy President Bush emphasized what was seen to be a new circumstance. He asserted,

When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology -- when that occurs, even weak states and small groups *could* attain a catastrophic power to strike great nations [...] But new threats also require new thinking. [...] In the world we have entered, the only path to safety is the path of action. And this nation will act [...] And our security will require all Americans to be forward-looking and resolute, to be ready for *preemptive action* when necessary to defend our liberty and to defend our lives.¹⁶³

At the beginning of this quote we see that there is recognition that the proposal was indeed novel. Therefore we can ascertain that this would be a departure from previous doctrines or the traditional use of military force in foreign policy. It could be asserted that the administration believed that it was actually staying within established domestic and international norms of preemption, yet decided to present its tactics as innovative to garner

¹⁶¹ BUSH, P., Text of President Bush’s Speech at West Point (1 June 2002) *New York Times*, available at : <<http://www.nytimes.com/2002/06/01/international/02PTEx-WEB.html?pagewanted=1>>.

¹⁶² BUSH, P., ‘The State of the Union Speech 2002, President Bush’s State of the Union Address to Congress and the Nation’ (30 Jan 2002) *New York Times*, available at : <<http://www.nytimes.com/2002/01/30/us/state-union-president-bush-s-state-union-address-congress-nation.html?pagewanted=1>>.

¹⁶³ BUSH, Text of Speech at West Point, note 161 above, (my emphasis).

domestic support in a time of crisis and uncertainty. However, looking further into what is now referred to as the ‘Bush Doctrine,’ this proposed policy was in fact discernibly novel for the United States and a deviation from previous standards for a preemptive military attack, regardless of whether it was understood as such by policy makers.

Additionally, the assertion that the “only path to safety is the path of action,” is based on the simple binary notion that there are only two options available at a given time; military action or insecurity. In the section discussed above on the use of fear in decision making Grotius cited the Roman historian Titus Livy on this same subject, “[i]n the effort to guard against fear, men cause themselves to be feared, and we inflict upon others the injury which has been ward off from ourselves, as if it were necessary either to do or to suffer wrong”.¹⁶⁴ It is certainly problematic to suggest that at any given time there are no more than two alternatives, yet in political debates over security this is certainly not uncommon. More importantly, however, the notion that the unknown should move us to military action is no longer premised on incontrovertible evidence of an impending attack. It is based on the “belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk,” or preventive war as defined by the DOD.

In the speech, Bush continued to make the case that the unknown, or the “just feare” that we have seen argued by Francis Bacon in the seventeenth century,¹⁶⁵ was enough to trigger military action. As he put it,

We cannot defend America and our friends by *hoping* for the best. We cannot put our *faith* in the word of tyrants, who solemnly sign non-proliferation treaties, and then systemically break them. If we wait for threats to fully materialize, we will have waited too long. [...] Yet the war on terror will not be won on the defensive. We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.¹⁶⁶

Looking closely at this excerpt, we see that the language employed certainly does not advocate using irrefutable evidence of danger to justify action. Instead, the argument here rests on the severity of the threat and the imprudence of hesitation. The line of reasoning is that the potential for sizeable casualties would be so great if weapons of mass destruction fell into the hands of those who employ terrorism that not launching military action in advance of such a scenario no longer made sense. This framing of the issue points to the need for a

¹⁶⁴ GROTIUS, *De Jure Belli ac Pacis*, note 2 above, Book II, chpt. 1, sec. V, par. 1, at p. 174.

¹⁶⁵ See Section II (2) (A) above.

¹⁶⁶ BUSH, Text of Speech at West Point, note 161 above, (my emphasis).

foreign policy based on worst case scenarios since such scenarios could not be ruled out.¹⁶⁷ And of course, assuming the worst and acting upon this postulation, does not fit into the definition of preemption, but rather into that of preventive war.

Perhaps the most revealing and problematic assertion found in this speech is that this struggle against terrorism “will not be won on the defensive”. The reason why this declaration is so worrisome is because it raises serious concerns, and may even provide overwhelming evidence, that the conception of the ‘Bush Doctrine’ is in fact in direct violation of the UN Charter. Lest we forget that the Charter provides only one exception to the prohibition of the use of force found in Article 2(4), and that is the “inherent right to individual or collective self-defence” found in Article 51. If the counterterrorism project that is envisioned “will not be won on the defensive”, how exactly can this be squared with self-defence?

To further investigate the exact contours of the policy advocated by the Bush administration we will turn to the National Security Strategy (NSS) of September 2002 penned and distributed by the White House.¹⁶⁸ This document, which is prepared for the Congress periodically by the Executive, was the first text of its kind to be released after the terrorist attacks of September 11th and President Bush decided to use it to outline his overall strategy for combating terrorism. This is the first formal document detailing the framework of the vision of what is referred to as ‘preemption’. It reads,

Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an *imminent* danger – most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must *adapt* the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and *potentially*, the use of weapons of mass destruction – weapons that can be easily concealed, delivered covertly, and used without warning.

The targets of these attacks are our military forces and our civilian population, in direct violation of one of the principle norms of the law of warfare. As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorists and these losses would be exponentially more severe *if* terrorists acquired and used weapons of mass destruction.

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater the *risk* of inaction – and the more compelling the case for taking anticipatory action

¹⁶⁷ For one analyst who saw the framing as such see SUSKIND, R., *The One Percent Doctrine: Deep Inside America’s Pursuit of Its Enemies Since 9/11* (New York, Simon & Schuster Paperbacks, 2006).

¹⁶⁸ THE WHITE HOUSE, ‘The National Security Strategy of the United States of America’, September 2002, (NSS 2002 hereinafter), available at : <<http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>>. The strategy was slightly subdued in the following 2006 National Security Strategy but played less of a role in the public mind since this document was drafted and released after the invasion of Iraq, available at: <<http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/>>.

to defend ourselves, even if *uncertainty remains* as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.¹⁶⁹

What should first be noted here is that there is an explicit recognition of the fact that preemption is defined by anticipating an *imminent* attack, which of course falls in line with the historical analysis that has been put forward here, and the definition found in DOD dictionary. However, this traditional understanding is rejected and an argument is made for enlarging what actions are covered by the term of preemption. The problem of course being that a term already exists for this concept of anticipation, preventive war. Since once we leave the temporal constraint of imminence there are no longer any objective standards to be applied, one must inevitably cross the chasm between the two and arrive at the purely subjective term. The line of reasoning is that the destructive power of today's weapons warrants an immediate response, lest we suffer a terrible fate at the hands of weapons the world has not previously known. However, it should be remembered that every preceding generation, as is always the case with all discussions in the present tense, has not known the destructive power of today's weaponry. Due to humanity's proclivity for creating ever more devastating armaments, the course of history has continually introduced death and destruction on a level that has never been seen before. We are always at the apex of our potential for destruction. Therefore to assert that we are living in a new world describes the circumstances with which every human generation has had to struggle. This is not to minimize the prospective devastation that might come from terrorists if they obtain weapons of mass destruction and are able to elude a country's defenses. Yet, one question remains: what exactly is left to constrain speculation once the standard of incontrovertible evidence of an imminent attack has been dropped?

At this point, it is useful to take notice of the fact that the means for evaluating threats to the United States operated under an annual budget of 49.8 billion dollars in 2009¹⁷⁰ and the accuracy of the intelligence services conclusions was brought into question in several serious circumstances during this same time period. The Intelligence Community is under serious scrutiny after the failure to find weapons of mass destruction in Iraq,¹⁷¹ the discovery of an

¹⁶⁹ *Idem*, (my emphasis).

¹⁷⁰ Office of the Director of National Intelligence, ODNI News Release No. 33-09, Budget Figure for 2009 National Intelligence Program, available at <http://www.dni.gov/press_releases/20091030_release.pdf>.

¹⁷¹ DUELFER REPORT, Iraq Survey Group, (Posted on the CIA website 6 Oct 2004), Key Findings available at <https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004/Comp_Report_Key_Findings.pdf>.

elaborate black-market nuclear weapons proliferation program in Pakistan,¹⁷² the 2007 conclusion that Iran had halted its nuclear weapons program back in 2003 (which had been previously unknown),¹⁷³ and perhaps most gravely, the inability to foresee or forestall the attacks of September 11th. Highlighting these failures is not to criticize or disparage the intelligence services. It is rather to draw attention to the fact that these more recent revelations raise serious doubts about the capacity for reliable and accurate conjecture. Both anticipatory military actions of preemption and preventative war presuppose a capability to produce correct assessments of imminent and looming dangers. Thus, to base military action solely on the imprecise human activity of assessing the capacities and intentions, which is invariably speculation that cannot be proven, of human enemies who are attempting to hide their own plans surely portends the launching of war in wrongful circumstances. And in the circumstances of the Iraq invasion the ethical ramifications of launching military actions based upon much less than perfect intelligence were quite problematic indeed.

An additional moral question that would follow these disclosures is whether the Bush administration continued to advocate the same type of anticipatory self-defense policy that had been presented in 2002. In an interview with Tim Russert of Meet the Press on February 8, 2004 President Bush again discussed this issue. In light of the absence of weapons stockpiles that had been alleged to exist in Iraq, Russert asked about the decision to go to war and if a war can be launched without ironclad evidence. In this discussion the President responded:

I believe it is essential — that when we see a threat, we deal with those threats before they become imminent. It's too late if they become imminent. It's too late in this new kind of war, and so that's why I made the decision I made. [...] I repeat to you what I strongly believe that inaction in Iraq would have emboldened Saddam Hussein. He could have developed a nuclear weapon over time — I'm not saying immediately, but over time — which would then have put us in what position? We would have been in a position of blackmail.¹⁷⁴

By the definitions articulated one can conclude that the President continued to speak of preventive war, and not preemption. The justification for acting before the dangerous weapons might be produced is the rationale used for having waged war on another country,

¹⁷² BROAD, W., SANGER, D. and BONNER, R., 'A Tale of Nuclear Proliferation: How Pakistan Built His Network' New York Times (12 Feb 2004) available at : <<http://www.nytimes.com/2004/02/12/world/a-tale-of-nuclear-proliferation-how-pakistani-built-his-network.html>>.

¹⁷³ National Intelligence Estimate, 'Iran: Nuclear Intentions and Capabilities', National Intelligence Council, November 2007, available at : <http://www.dni.gov/press_releases/20071203_release.pdf>.

¹⁷⁴ Meet the Press with Tim Russert, Interview with President George W. Bush (8 Feb 2004) transcript available at: <<http://www.msnbc.msn.com/id/4179618/>>.

and the temporal constraint of imminence is explicitly removed. The President asserts that the danger comes from hesitation, not from existing circumstances and capabilities.

As further evidence of a continued belief in a policy of preventive war, and an abandonment of preemption as the standard, one can look to a 2004 article written by self-described neo-conservatives in the *Weekly Standard*, “The Right War for the Right Reasons”. The authors, Robert Kagan and William Kristol, were founding members of the influential think tank Project for the New American Century¹⁷⁵ and they argued the same point on anticipatory action. They wrote,

Did the administration claim the Iraqi threat was imminent, in the sense that Iraq possessed weapons that were about to be used against the United States? [...] Saying that action is urgent is not the same thing as saying the threat is imminent. In fact, the president said the threat was not imminent, and that we had to act (urgently) before the threat became imminent.[...] The non-discovery of weapons stockpiles has not changed the contours of that debate.¹⁷⁶

We again see here an explicit argument against the standard of preemption with the rejection of an imminent attack as the proper standard. Kagan and Kristol argue that it would be too restrictive to wait for an assault to arrive at the cusp of departure, and hence preventive war is necessary and just. In fact, the line of reasoning in this article was that anything less would be imprudent and irresponsible. This line of argument certainly reminds us of the subjective standard put forward by Francis Bacon in the seventeenth century: that of a “just feare”.

Finally, it is useful to analyze the academic article on this subject by one of the Bush administration’s prominent (and some would argue ‘infamous’ for his hand in writing the ‘torture memos’) international lawyers.¹⁷⁷ John Yoo published the article ‘Using Force’ in mid-2004, and this work offers a useful insight into some of the reasoning put forward before he left the administration in 2003, and his opinion of how international law on the use of force should be interpreted at the time of the invasion of Iraq.¹⁷⁸ Yoo explicitly recognized a consensus view in the international legal community that the use of force in Iraq, as well as the professed authority to use force against rogue nations in anticipation of future aggression,

¹⁷⁵ One way to ascertain the influence of this think tank is by noting the high level members of the Bush administration (i.e. Dick Cheney, Donald Rumsfeld, I. Lewis Libby, Paul Wolfowitz) who had signed on to the Statement of Principles, available at : <<http://www.newamericancentury.org/statementofprinciples.htm>>. This think tank has now shut down, but a new one has been created by the same founders under the banal name Foreign Policy Initiative, <<http://www.foreignpolicyi.org/>>. For a good discussion of the ideas of neo-conservatism and their philosophical failings as counterterrorism initiatives see FARER, T., *Confronting Global Terrorism and American Neo-Conservatism* (Oxford, Oxford University Press, 2008).

¹⁷⁶ KAGAN, R., and KRISTOL, W., ‘Right War for the Right Reasons’, *Weekly Standard*, 27 Feb 2004, available at : <<http://www.newamericancentury.org/iraq-20040217.htm>>.

¹⁷⁷ For analysis and discussion see Chapter 6, Section II.

¹⁷⁸ YOO, ‘Using Force’, note 3 above.

“violate core principles of international law”.¹⁷⁹ He also found, most pertinently, that while most legal scholars “admit that the law includes the right to use force in anticipation of a coming attack, they argue that this justification is available only if an attack is imminent”.¹⁸⁰ Thus he plainly agrees with the answer being put forward here to the question posed in this section: is the ‘Bush Doctrine’ preemptive or preventive war? That is to say, Yoo found that the administration he used to work for “virtually admits that this [Bush’s] approach is at odds with conventional international legal notions of self-defense” and that the National Security Strategy “provides no hints about how to modify imminence—a temporal concept—to address a future of rogue nations, hostile international terrorist organizations, and the potential destructiveness of weapons of mass destruction”.¹⁸¹ So we find that Yoo also found the Bush Doctrine as outside the DOD definition of preemptive attack, and therefore within its definition of preventive war.

With this conclusion, Yoo put forward an alternative approach to the use of force. He found there to be three major methods of treating the age-old question posed by *jus ad bellum*: doctrinal (formal legal readings of the UN Charter), realist (rejecting the notion that international law can govern the use of force), and moral (which he does not expand upon). Without explaining whether his approach would or would not be classified as realist, Yoo explained that, “rather than pursuing these doctrinal or moral approaches, this Article addresses the rules governing the use of force from an instrumental perspective”.¹⁸² Additionally, to arrive at an application of standards allegedly warranted by the changing nature of weaponry and enemies, we find that Yoo depends on the oft employed tactic of suggesting that the realm of the international should not be subjected to “notions of individual right and criminal law-based norms of liability”.¹⁸³ However, it is this author’s opinion that this ostensibly novel technique runs aground due to the very reasoning put forward throughout this chapter. Yoo once again relies on wholly subjective assessments that cannot be understood to constrain any actor within the international community. The idea is merely to accept a system in which all retain the right to launch hostilities on the basis of their own one-sided, speculative assessments. The manner in which it is possible to re-conceptualize the consensus understanding of the prohibition of the use of force, according to Yoo, is to apply a test consisting of three factors. They are:

¹⁷⁹ *Idem*, at 734.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*, at 733-4.

¹⁸² *Ibid.*, at 730.

¹⁸³ *Ibid.*

(1) the *probability* of an attack; (2) the *likelihood* that this probability will increase, given the practicality or impracticality of diplomatic alternatives, and therefore the need to take advantage of a window of opportunity; and (3) the magnitude of the harm that *could result* from the threat. If a state instead were obligated to wait until a threat was temporally imminent, it could miss a limited window of opportunity to prevent the attack and to avoid harm to civilians.¹⁸⁴

While at first blush these suggested standards might appear to raise further hurdles and impediments for nations to go to war, they are simply purported to be restrictions. In the end, they only feign at establishing rules with which compliance can be verified. But verification can be ascertained neither before nor after the launching of hostilities. The use of the terms “probability”, “likelihood” and “could result” all reveal that what Yoo proposes is based solely on subjective criteria. Most interestingly, all of these conditions absolutely carry no weight when the primary assumption of capabilities (i.e. the possession of weapons of mass destruction) is incorrectly assessed or assumed, as was the case with Iraq. Therefore, all we see being put forward by John Yoo, as was the case with the Bush administration’s National Security Strategy of 2002, is merely the codifying of a state of nature. Once again, the suggested subjective standard most closely aligns with the “just feare” model of Francis Bacon. In light of what has been presented concerning the development of just war and international law, this interpretation of the applicable law and moral standards is extremely problematic, to say the least.

IV. ‘Last Resort’ and a Moment for Deliberation

The phrase of a “moment for deliberation” has quite clearly been borrowed from Secretary of State Daniel Webster’s well-known statement regarding the Caroline incident in the 19th century, which has come to be frequently invoked in discussions of anticipatory self-defense. While the circumstances surrounding the incident make the particular case ill-suited for application to many discussions of self-defense in international law,¹⁸⁵ there is however an important usefulness in the language that was wielded in that instance. Webster states that the, “necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation”.¹⁸⁶ There is a powerful force behind the words used in the Caroline incident because they capture a sentiment of great consequence in the discussion over anticipatory self-defense. The rhetorical force of the words used by Webster, and not its

¹⁸⁴ *Ibid.*, (my emphasis) at 758.

¹⁸⁵ KOLB, ‘Self-Defence and Preventive War...’, note 33 above, at 113; and DINSTEIN, *War, Aggression and Self-Defence*, note 21 above, at 184-5.

¹⁸⁶ The Caroline Incident, note 112 above, at 412.

legal applicability as a case, is the reasoning for borrowing one portion of the famous phrase for our heading here. The expression puts a spotlight on *choice* and *free will* that inevitably draw the element of morality into discussions over war.

Michael Walzer, in one of the best known contemporary forms of moral analysis of war, opened his work by exploring the familiar Melian dialogue of Thucydides' ancient text *The Peloponnesian War*.¹⁸⁷ His intention in doing so at the outset of his writing was to directly confront the classical Realist view on international politics in an attempt to dissolve at least one form of the argument that rises from it; that of *necessity*. This Realist view would challenge the idea that there is any room for moral or legal perspectives in matters as serious and absolute as war, and suggests that the only real security available lies in the expansion of power. Thus there is at times a conclusion drawn by some that there is a necessity for action, or more specifically, the use of military force. In illustration of this frame of mind, Thucydides recounts the exchange between the Athenian generals and the magistrates of Melos concerning their subjugation to the growing empire. The Athenians argue that while they do not really wish to expand their control over the inhabitants of Melos, they are beholden to the laws of power that dictate any backpedaling from the expansion of their domain would result in a show of weakness which would inevitably be exploited. Because from the Athenian perspective the difference in strength stipulates that justice is no longer applicable, or "right, as the world goes, is only in question between equals in power",¹⁸⁸ the only relevant factors in their debate are what is feasible and required by necessity. The Athenians make clear in the discussion that their intention to subjugate the Melians is not based on their own choosing, but rather fated and required by the circumstances of our human condition. In their words,

[o]f the gods we believe, and of men we know, that by a necessary law of their nature they rule wherever they can. And it is not as if we were the first to make this law, or to act upon it when made: we found it existing before us, and we shall leave it to exist forever after us; all we do is to make use of it, knowing that you and everybody else, having the same power as we have, would do the same as we do.¹⁸⁹

Hobbes translated this same segment describing the idea of an inherent requirement to dominate wherever possible as a "necessity of nature",¹⁹⁰ and would later make this phrase his

¹⁸⁷ WALZER, *Just and Unjust Wars*, note 4 above, at 5-13.

¹⁸⁸ THUCYDIDES, *The Landmark Thucydides: A Comprehensive Guide to the Peloponnesian War*, Strassler, R., (ed.) (New York, Touchstone, 1998) at 352.

¹⁸⁹ *Idem*, at 354.

¹⁹⁰ THUCYDIDES, *The Peloponnesian War: The Complete Hobbes Translation*, ed. David Grene (Chicago & London, University of Chicago Press, 1989) at 368.

own because it dovetailed so nicely with his own philosophy.¹⁹¹ However, there is an important piece of history missing from the Melian debate which colors our understanding of the Athenian argument. At the point of contact with the magistrates of Melos another debate had already occurred and a decision had been previously made. The Athenian generals described their course of action as inevitable, yet there certainly was a deliberation over this decision in Athens, even though it is not described in Thucydides account. It is at this point of discussion, within the Athenian senate, that the notion of necessity and inevitability dissolve. There indeed was a moment of political deliberation over whether war was or was not a worthy *choice*. As Walzer so evocatively put it, “[s]tand in imagination in the Athenian assembly, and one can still feel a sense of freedom”.¹⁹² From this point of view, at this moment of decision, the Hobbesian ‘necessity of nature’ is simply an argument for a particular course of action. This argument can be, and has been for centuries, disputed. The moment of deliberation is the definitive evidence that morality is a factor in the use of force. Choice and free will inexorably mean alternatives are available, morality is involved, and *necessity* does not command all that is to come.

This was surely the case for the United States, as there was indeed a moment of time in which decision, the freedom of choice, was available on whether or not to invade Iraq. Even if it was a short-lived debate, sometimes described as manipulated and truncated,¹⁹³ there was a time period in which the ideas of necessity and immediacy were only argument. However, even though there was indeed a moment for deliberation, consideration and caution, this does not mean that this actually took place. Our focus in this section will be on how the UNSC debate and public protest forced the US administration to put forward an argument for war but this does not mean that true deliberation occurred within the corridors of power itself. Nevertheless, one can say that this official debate over the invasion of Iraq, although there were certainly other examples of its occurrence in the public sphere beforehand,¹⁹⁴ began in earnest with President Bush’s general address at the United Nations on September 12, 2002.

¹⁹¹ WALZER, *Just and Unjust Wars*, note 4 above, at 5.

¹⁹² *Idem*, at 10.

¹⁹³ See e.g. BARSTOW, D., ‘Message Machine: Behind TV Analysts, Pentagon’s Hidden Hand’ *New York Times*, (20 April 2008) available at: <<http://www.nytimes.com/2008/04/20/us/20generals.html?scp=2&sq=retired%20generals%20talking%20points%20run-up%20war%20in%20iraq&st=cse>>. This well-known article uncovered “a Pentagon information apparatus that has used [...] analysts in a campaign to generate favorable news coverage of the administration’s wartime performance. The effort, which began with the buildup to the Iraq war and continues to this day, has sought to exploit ideological and military allegiances, and also a powerful financial dynamic: Most of the analysts have ties to military contractors vested in the very war policies they are asked to assess on air”.

¹⁹⁴ SCOWCROFT, B., ‘Don’t Attack Saddam: It Would Undermine Our Antiterrorism Efforts’ *Wall Street Journal* (15 April 2002) available at: <<http://www.opinionjournal.com/editorial/feature.html?id=110002133>>.

While this speech at the UN marked an important turn in the administration's internal struggle over whether there was a need to make the case for invasion before the world community and seek a Security Council authorization,¹⁹⁵ it also signaled the launch of a national, indeed a global, debate over the use of force in Iraq. In the speech President Bush presented, and commingled, the three arguments that the administration would use as a justification for the invasion of Iraq: the interpreted violations of UN Security Council resolutions,¹⁹⁶ the human rights abuses committed against the Iraqi people by its government,¹⁹⁷ and the allegation of the continued development of weapons of mass destruction that posed a threat to the U.S. and its allies either directly or through terrorist connections. In conclusion, President Bush clearly and bluntly stated his government's position, "[t]he purposes of the United States should not be doubted. The Security Council resolutions will be enforced—the just demands of peace and security will be met—or action will be unavoidable".¹⁹⁸

However, the most grave claims and imagery invoked while putting forward the argument for the necessity of immediate action meant for domestic consumption tended to come from other members of the administration and fellow Republicans. For example, Vice President Dick Cheney gave a public speech to the Veterans of Foreign Wars in which he asserted,

The Iraqi regime has in fact been very busy enhancing its capabilities in the field of chemical and biological agents. And they continue to pursue the nuclear program they began so many years ago. These are not weapons for the purpose of defending Iraq; these are *offensive weapons* for the purpose of inflicting death on a massive scale, developed so that Saddam can hold the threat over the head of anyone he chooses, in his own region or beyond. [...] *Simply stated, there is no doubt that Saddam Hussein now has weapons of mass destruction. There is no doubt he is amassing them to use against our friends, against our allies, and against us.*¹⁹⁹

Additionally, the future Republican nominee for president in 2008, Senator John McCain, took on the role of leading advocate for extended military action beyond Afghanistan. During

¹⁹⁵ MARTIN, C., 'Going to the United Nations: President Bush's 2002 Decision to Seek Security Council Backing against Iraq' *Paper presented at the annual meeting of the International Studies Association, Le Centre Sheraton Hotel, Montreal, Quebec, Canada, Mar 17, 2004*. Available at: <http://www.allacademic.com/meta/p72260_index.html> (last visited 9 Oct 2009).

¹⁹⁶ Directly cited in the speech are UNSC resolutions 686, 687 and 688. The exact formulation of the interpreted violations which triggered the use of force by coalition forces will be analyzed in Section V(1) below.

¹⁹⁷ The President cites UN Commission on Human Rights report from the previous year which found that Iraq continued to commit "extremely grave violations" of human rights. In Section V(2) below find an analysis of how such violations may or may not give rise to what a "legitimate" humanitarian intervention.

¹⁹⁸ BUSH, P., 'Text Of Iraq Speech To U.N.: President Urges World Body To Act Against Iraq', New York (12 Sep 2002) *CBS News*, available at : <<http://www.cbsnews.com/stories/2002/09/12/national/main521781.shtml>>.

¹⁹⁹ CHENEY, D., 'Speech to Veterans of Foreign Wars', National Convention, Nashville, TN (27 Aug 2002) available at: <<http://www.guardian.co.uk/world/2002/aug/27/usa.iraq>>.

the campaign for military action, Senator McCain, “advanced misleading assertions not only about Mr. Hussein’s supposed weapons programs but also about his possible ties to international terrorists, Al Qaeda and the September 11 attacks”.²⁰⁰ National Security Advisor Condoleezza Rice then alluded to the most serious claim by evoking visions of a nuclear explosion. While this same imagery would later be again invoked by the President,²⁰¹ it was on the mainstream media outlet CNN that Secretary Rice famously claimed, “[w]e do know that he is actively pursuing a nuclear weapon. [...] The problem here is that there will always be some uncertainty about how quickly he can acquire nuclear weapons. But we don't want the smoking gun to be a mushroom cloud”.²⁰² Interestingly, the National Security Advisor here clearly ties the idea of uncertainty to urgency. That is to say, she argues that a lack of information prompts action, and creates necessity. Such an argument would certainly raise questions as to the sincerity of the administration’s intentions in the debate. Was it prepared to consider all the possibilities for dealing with an uncomfortable circumstance, or was it already decided on a course of action?

While there is certainly justifiable criticism that the responses from the political opposition to the grave and foreboding claims by the executive branch of the U.S. government were muted at best, there were still some discernable voices that publicly spoke out in opposition. Soon after the president’s speech at the UN, an authorization from the Congress for the use of military force against Iraq was sought by the White House. Even this legislation,²⁰³ introduced in both Houses of Congress and passed in less than two weeks, begins to demonstrate that a moment for deliberation indeed existed. The primary reason that opposition to this act was so muffled surely stems from the fact that midterm elections for the Congress were fast approaching in the following month, and Democrats did not want to depart for the break before the voting with a fresh cudgel of ‘soft on security’ in the hands of campaigning Republicans only one year after the attacks of September 11th. The timing of the request from the White House has been attributed by some to political calculation in what can be called a deft legislative maneuver and a consummate understanding of the political

²⁰⁰ KIRKPATRICK, D., ‘Response to 9/11 Offers Outline of McCain Doctrine’ *New York Times* (17 Aug 08) available at: <<http://www.nytimes.com/2008/08/17/us/politics/17mccain.html>>.

²⁰¹ BUSH, P., ‘Speech About the Use of Force Against Iraq’ CNN.com, (7 Oct 2002) available at: <<http://edition.cnn.com/2002/ALLPOLITICS/10/07/bush.transcript/>>. Very importantly in this speech, the President invoked a nuclear threat with the words, “[f]acing clear evidence of peril, we cannot wait for the final proof -- the smoking gun -- that could come in the form of a mushroom cloud”.

²⁰² CNN Late Edition with Wolf Blitzer, Interview with Condoleezza Rice (8 Sept 2002) CNN.com Transcripts, available at : <<http://transcripts.cnn.com/TRANSCRIPTS/0209/08/le.00.html>>.

²⁰³ Authorization for Use of Military Force Against Iraq Resolution of 2002, Public Law 107–243, 116 STAT. 1499, 16 Oct 2002.

environment. And such a claim of political calculations dominating the White House timing can be partially evidenced in a quote published in the New York Times newspaper by the White House chief of staff Andrew Card explaining, “[f]rom a marketing point of view, you don’t introduce new products in August”.²⁰⁴

Nonetheless, Democratic Senator Kennedy from Massachusetts rose to the floor in Congress to clearly point out that a decision had not been taken by the president whether force was in fact necessary. The Congress was in fact being asked to delegate its constitutional war making powers before a conclusion had even been reached. Additionally, Kennedy drew attention to the exact point under discussion here, “you want to be sure that you’re using force and expending American blood and lives and treasure as the ultimate *last resort*”.²⁰⁵ In the end, the brisk congressional debate resulted in passage of the legislation, with many democratic presidential hopefuls voting for the bill.²⁰⁶ The act handed over the authority of Congress to the president to use military force “as he determines to be necessary and appropriate” in order to “defend the national security of the United States against the continuing threat posed by Iraq; and enforce all relevant United Nations Security Council Resolutions regarding Iraq”.²⁰⁷

However, the debate which evidences a moment for deliberation was not confined to the consideration in Congress over delegating its war making authority. At the same time as the first version of this joint resolution was announced by President Bush and members of Congress for authorizing the Iraq war, in the Federal Plaza of Chicago, there was an anti-war rally organized by Chicagoans Against War in Iraq. An estimated 1,000 people were there to demonstrate and voice their opposition to an invasion of the sovereign country of Iraq, and despite what might be considered a small turnout, it represented what was the first high-profile public disapproval in Chicago.²⁰⁸ The reason that this particular rally draws more

²⁰⁴ QUOTATION OF THE DAY, “White House chief of staff, on why the Bush administration waited until September to press for public support of its Iraq policy.” New York Times [A1] (7 September 2002) available at: <<http://www.nytimes.com/2002/09/07/nyregion/quotation-of-the-day-766518.html?scp=9&sq=%60%60From%20a%20marketing%20point%20of%20view,%20you%20don%27t%20introduce%20new%20products%20in%20August.&st=cse>>.

²⁰⁵ Statement of Senator Edward Kennedy on the Military Consequences of War with Iraq, Senate Floor (8 Oct 2002) (my emphasis) available at: <<http://kenedy.senate.gov/newsroom/statement.cfm?id=a57bc5ab-182c-48d2-8718-a7eaf2b05da9>>.

²⁰⁶ U.S. Senate Roll Call Votes 107th Congress - 2nd Session, On the Joint Resolution (H.J.Res. 114) (11 Oct 2002) Kerry (D-MA)-Yea, Clinton (D-NY)-Yea, Edwards (D-NC)-Yea, Biden (D-DE)-Yea, Dodd (D-CT)-Yea, available at : <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00237>.

²⁰⁷ Authorization for Use of Military Force Against Iraq Resolution of 2002, Section 3, note 203 above.

²⁰⁸ GLAUBER, B., ‘War protesters gentler, but passion still burns’ *Chicago Tribune* (3 Oct 2002) available at: <<http://pqasb.pqarchiver.com/chicagotribune/access/203569621.html?dids=203569621:203569621&FMT=ABS>>

attention today than some of the others²⁰⁹ is because at the very moment that an authorization for war became a real legislative possibility, the future president of the United States stepped out onto a public stage to voice his opposition. Barack Obama, a State Senator of Illinois at that time, attended the manifestation and delivered a short speech demonstrating the manner in which he was in alignment with the crowd. He explicitly stated that he was not opposed to all wars, but that he was against “a dumb war...a rash war”.²¹⁰ For those who are familiar with Obama’s major speeches, and with what has become known as an eloquent and gifted speaking style, the text of this speech would not seem to reveal an oratory of extraordinary worth. However, the intention of this analysis is not to examine the resonance of then State Senator Obama’s words, but rather to emphasize that the necessity described by those advocating war was not so great as to forestall the mobilization of what would eventually become massive numbers of protesters worldwide. As Obama put it at this very early stage of the debate that day, more than five months before the eventual invasion,

I also know that Saddam poses *no imminent and direct threat* to the United States or to his neighbors, that the Iraqi economy is in shambles, that the Iraqi military a fraction of its former strength, and that in concert with the international community he can be contained until, in the way of all petty dictators, he falls away into the dustbin of history.²¹¹

It should be kept in mind that although Barack Obama was involved in this demonstration against a war in Iraq at the beginning of October 2002, there is no record, nor any claim on his part, that he was involved with what has been described as “disparate organizations and individuals combin[ing] their efforts in an unprecedented, global outpouring of anti-war sentiment”.²¹² Most consider the protests that took place in Washington D.C. and San Francisco, with approximations of 100,000 and 50,000 attendees respectively,²¹³ on October 26th as the starting point of this global movement dedicated to questioning the necessity for war. No doubt, the intention of the millions of protesters worldwide certainly had something, if not everything, to do with stopping an impending war.

&FMTS=ABS:FT&type=current&date=Oct+3%2C+2002&author=Bill+Glauber%2C+Tribune+staff+reporter&pub=Chicago+Tribune&edition=&startpage=1&desc=War+protesters+gentler%2C+but+passion+still+burns>.

²⁰⁹ For an analysis and listing of the major worldwide protests in the lead up to war in Iraq see e.g. SIMONSON, K., ‘The Anti-War Movement: Waging Peace on the Brink of War’ (Geneva, 2003) Researcher Associate at CASIN, prepared this report for the Programme on NGOs and Civil Society of the Centre for Applied Studies in International Negotiation, available at: <<http://www.casin.ch/web/pdf/The%20Anti-War%20Movement.pdf>>.

²¹⁰ OBAMA, B., ‘Transcript: Obama’s Speech Against the Iraq War’ National Public Radio, Federal Plaza Chicago (2 Oct 2002) available at : <<http://www.npr.org/templates/story/story.php?storyId=99591469>>. (last visited 13 Oct 2009). A copy is also available on the presidential campaign website of Barack Obama: <http://www.barackobama.com/2002/10/02/remarks_of_illinois_state_sen.php>. (last visited 14 Oct 2009).

²¹¹ *Idem* (my emphasis).

²¹² SIMONSON, ‘The Anti-War Movement’, note 209 above, at 4.

²¹³ This author was present at the large rally in Washington D.C. on 26 October 2002.

However, while this hope was certainly not fulfilled, the some 36 million people that took part in nearly 3,000 protests²¹⁴ did indeed succeed in demonstrating that argument and debate were most definitely an essential element of the circumstance surrounding the run-up to the invasion of Iraq. As such, these people did in fact clarify that there was indeed a moment for deliberation.

While there were large protests organized²¹⁵ on January 18th in conjunction with celebrations for the birthday of Dr. Martin Luther King Jr.²¹⁶ (due to his sometimes overlooked opposition to the Viet Nam war),²¹⁷ the culmination of these manifestations were certainly those that were globally coordinated for the 15th of February 2003 in an open and public cry of defiance against the case for immediate war that was being put forward in the UN Security Council. Of course, the debate and discussions taking place in the Security Council over weapons inspections and the need for war at that time also provide further evidence of the existence of a moment for deliberation that defied the argument of necessity.²¹⁸ Previously the norm for anti-war demonstrations had been localized protests only after war had begun. However, the eruption of global public outcry in this case represented a sharp historical difference both in quantity and quality. The number of participants outstretched previous public demonstrations in some of the nearly 600 participating cities worldwide²¹⁹ (if this event is counted as one global entity of some six to ten million people, the numbers are historic²²⁰). The fact that the protests took place before a shot had been fired also qualified this phenomenon as something new in human history. The worldwide events of that February 15th had enough of an effect for one journalist to claim in the New York Times

²¹⁴ CALLINICIOS, A. 'Anti-War Protests Do Make a Difference' Socialist Worker Online (19 March 2005) citing Dominique Reynié, available at: <http://www.socialistworker.co.uk/article.php?article_id=6067>.

²¹⁵ CNN.com, 'Anti-war demonstrators rally around the world: Organizers put turnout in Washington at 200,000' (19 Jan 2003), available at: <<http://edition.cnn.com/2003/US/01/18/sproject.iq.us.protests/>>.

²¹⁶ See e.g. SIMONSON, 'The Anti-War Movement', note 209 above, at 13. As additional evidence of the coincidence this author attended just such a celebration/march in Denver, Colorado.

²¹⁷ As clear evidence of this moral and political stance of Dr. Martin Luther King Jr., look to his speech *Beyond Vietnam -- A Time to Break Silence*, Delivered 4 April 1967, at a meeting of Clergy and Laity Concerned at Riverside Church in New York City. "Over the past two years, as I have moved to break the betrayal of my own silences and to speak from the burnings of my own heart, as I have called for radical departures from the destruction of Vietnam, many persons have questioned me about the wisdom of my path.", available at: <<http://www.americanrhetoric.com/speeches/mlkatimetobreaksilence.htm>> (last visited 14 Oct 2009).

²¹⁸ This inter-state dialogue will be discussed in the following section of this chapter under the treatment of 'right authority' and the case for war under UN Resolutions.

²¹⁹ In London, the estimates of attendees of the protest are between 750,00 to 2 million, which would make it "one of the biggest days of public protest ever seen in the UK", see *BBC News*, 'Anti-War Rally Makes Its Mark' (19 Feb 2003), available at: <http://news.bbc.co.uk/2/hi/uk_news/2767761.stm>. See also SIMONSON, note 209 above, with estimates of 3 million in Rome, 1.3 million in Barcelona and 500,000 in Melbourne, Australia. Again, this author was present at the massive march in London.

²²⁰ 'Largest Anti-War Rally', *Guinness Book of World Records*, History and Society << War & Weapons << Anti-War Rally, available at: <http://web.archive.org/web/20040904214302/http://www.guinnessworldrecords.com/content_pages/record.asp?recordid=54365>.

that there could very well be another “superpower” in the world along with the United States; that of “world public opinion”.²²¹ The journalist went on to assert,

In his campaign to disarm Iraq, by war if necessary, President Bush appears to be eyeball to eyeball with a tenacious new adversary: millions of people who flooded the streets of New York and dozens of other world cities to say they are against war based on the evidence at hand.²²²

Assessing the effectiveness of these copious and persistent demonstrations might be left to sociologists to analyze were it not for their direct relevance to questions of morality and its relationship to legitimacy. As mentioned before, the organizing of millions of people coming together in the streets did not have the vocalized intention of preventing an invasion of Iraq by coalition forces (although it may have affected the size of the coalition and the available geographic tactics of that coalition).²²³ However, the limited discussion over and passage of an authorization by Congress for the president to determine whether or not to launch a war, the debate in the UN Security Council over resolutions, weapons inspections and their effectiveness, and the dogged determinedness of millions of ordinary citizens flooding the streets of cities all over the United States and the world leave no doubt that *necessity* was only an argument. There was indeed a ‘moment for deliberation’ between President Bush’s speech before the UN on the 12th of September 2002 and the commencement of ‘shock and awe’ operations in Iraq the following March 19, 2003. This space of six months, and very public debate, are clear indications that a moral choice had entered into the debate on war. Whether the administration actually used this moment for true deliberation of the options is another question. However, these events clearly demonstrated that the opportunity to do so in fact existed.

In a speech delivered on the Senate floor the day bombs began to fall in Baghdad, Senator Robert Byrd captured our point quite succinctly. At the cusp of war, the Senator from West Virginia exclaimed,

We cannot convince the world of the necessity of this war for one simple reason. This is a *war of choice*.²²⁴

²²¹ TYLER, P., ‘Threats and Responses: News Analysis; A New Power In the Streets’ *New York Times* (17 Feb 2003) available at: <<http://www.nytimes.com/2003/02/17/world/threats-and-responses-news-analysis-a-newpower-in-the-streets.html?pagewanted=all>>.

²²² *Idem*.

²²³ This is to suggest that the highly public nature of the debate over an invasion of Iraq made it all the more difficult for Turkey to support the US strategy even though it had given its vital support in the first Gulf War. For an examination of Turkey’s changing foreign policy see HALE, W., *Turkey, the US and Iraq* (London, Saqi Books, 2007) 200 pp.

²²⁴ Statement of Senator Robert Byrd, ‘Arrogance of Power’, Senate Floor (19 March 2003) (my emphasis) available at the Senator’s website: <http://byrd.senate.gov/speeches/byrd_speeches_2003march/byrd_speeches_2003march_list/byrd_speeches_2003march_list_4.html>.

Of great significance for morality and legitimacy, this phrase “war of choice” is one that slowly seeped into the public discourse and crystallized the final assessment for many. It did so to such an extent that three years after the invasion a majority of US citizens, by a stark two to one margin, classified the war in Iraq in these very terms of a “war of choice”.²²⁵

V. ‘Right Authority’

Even though it is possible to trace back the just war tradition further, its formal coalescence as doctrine developed in later medieval times, particularly on the question of ‘right authority’.²²⁶ A difficulty that was raised by earlier theorists of just war, Augustine and Gratian specifically, was how to determine who exactly had the authority to settle disputes with force. In response to the legacy bequeathed to them and social conditions spawned by the congealing feudal structure of the time, canon lawyers in the thirteenth century focused quite intently on this specific question. It was felt to be important to circumscribe such a powerful license, otherwise there would be nearly no limits emanating from the doctrine, and thus no reduction in the incidence of warfare. Therefore to delineate the important difference between private and public violence it was first necessary to define the proper locus of sovereign power within a political community, and even to contemplate the nature of political authority itself. As such, much of the canon law of this time focused on defining who possessed the ‘right authority’ to pronounce and launch a just war. This determination was surely not easy. Even though the pyramidal structure of the feudal system had become quite universal in Europe, “lines of fealty could become hopelessly tangled, and responsibilities could contradict each other”.²²⁷ Despite this difficulty, two primary lines were drawn, one vertical and one horizontal. First, the vertical line established that, generally, all religious leaders were separated out as not possessing the right authority to conduct war. Second, a horizontal line was drawn so that only secular leaders who had no earthly superior had such a mandate. In the end, what the canonists of this medieval period put together was largely formalistic and useful for their time, but because their solution was so narrowly temporal that what they provided is of little later relevance.

²²⁵ LOBE, J., ‘POLITICS-US: Most Now Say Iraq Invasion Was a "War of Choice" Inter Press Service News Agency, citing a poll by University of Maryland's Programme on International Policy Attitudes, available at: <<http://ipsnews.net/news.asp?idnews=32509>> (last visited 14 Oct 2009).

²²⁶ JOHNSON, *Just War Tradition...*, note 4 above, at 150-65.

²²⁷ *Idem*, “such confusion [over lines of authority] provides part of the explanation of the causes of the Hundred Years War”, at 45-6.

In contemporary times the nature of war and global society is quite different. As international law has developed to become the normative framework of a state-structured system, it is the codified treaty that has become its principle expression and the accepted form for states to communicate their will and consent to legally binding obligations. As one international lawyer has coherently and eloquently expressed it, “[t]he international agreement and the associated norm that agreements voluntarily concluded should be obeyed within their terms and reasonably construed form the vertebra of modern international law”.²²⁸ As it has been discussed above,²²⁹ Kant was one philosopher who advocated for explicit consent to be publicly avowed so that states could be pulled towards a departure from the state of nature. We can thus rightfully interpret the proliferation of codified treaties in the 20th as following this Kantian idea. Therefore it is more than reasonable to look into treaty law concerning this question of ‘right authority’, even if it is acknowledged that the specific norm investing the UN Security Council with this power is controversial and no position holds absolute unanimity among legal scholars.²³⁰

The United Nations Charter has been ratified by virtually all countries in the world, and member states agree to a principle of the non-use of force and the peaceful settlement of disputes.²³¹ As discussed in Chapter 3,²³² the Charter provides for two exceptions to the prohibition of force between states: 1) in self-defense of an armed attack; or 2) when a military is deployed across borders because it has been authorized by the UN Security Council under Chapter VII. While the implications of the first case were discussed in the section covering anticipatory defense, what concerns us here is the second exclusion. Under Chapter VII, Article 39 of the UN Charter reads,

“[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”.²³³

While Article 41 addresses means to be employed that do not include force, Article 42 gives the Security Council the power to deem those measures to be inadequate and to authorize the use of armed force. This authority is tremendously significant when we consider that the ultimate purpose of this international organization is enshrined in Article 1(1) explicating that

²²⁸ FARER, ‘Un-just War Against Terrorism...’, note 14 above, at 376. For the international treaty underlying this point see *Vienna Convention on the Law of Treaties*, note 157 above.

²²⁹ See Section II (4) above.

²³⁰ FARER, ‘Un-just War Against Terrorism...’, note 14 above, at 375-8.

²³¹ *Charter of the United Nations*, note 26 above.

²³² For a fuller discussion of UN Charter law on the use of force see Chapter 3, Section IV.

²³³ *Charter of the United Nations*, note 26 above, at 343.

it is has been founded, “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace”.²³⁴ Hence, it is safe to say that under the Charter framework (excluding cases of self-defense), it is the Security Council that is meant to be the ‘right authority’ in international society.

Although it is often forgotten, there was a call within the United States (if only by poll) for a sanctioned justification by the UN Security Council before the invasion of Iraq,²³⁵ lending validity to the idea that in the people’s minds this body indeed holds the mandate found in Article 39. It should be remembered that in this work we are looking at legitimacy, so the moral argument for a war against Iraq will indeed need to be seen through the very individual and domestic analogy deplored by many realists and advocates of *realpolitik*. What this means here is that the intersection of law and morality that has been demonstrated to be central in the local sphere will also be the manner in which a majority of citizens are going to assess the actions of their own government. When a person poses to themselves the question of whether their government is legitimately exercising the coercive authority that has been vested in it, the criteria used to answer this question must be comprehensible to each individual. As such, the idea of constraining wanton violence, whether domestically or internationally, makes perfect sense at a very basic moral level. Equally, it is widely understood and accepted on a legal level that there must be a restriction upon unprovoked attacks. Once again, the public nature of war brings into sharp focus that some sort of criteria must be employed for judging the legitimacy of such action. In this circumstance, the moral and legal line of not waging an unprovoked war is so basic and fundamental that a majority of persons will begin here with their judgments of legitimacy. There are few things in war that can be predicted ahead of time, but there is one calculation remains absolutely certain. When the dogs of war are unleashed, destruction and death will ensue. If the justification for that injury and killing holds no water, if it becomes palpably untrue, then there will inevitably be a moral disquiet because the suffering is seen to be needless and thus the legitimacy of that policy or government will surely suffer.

It should be pointed out that the inevitably public nature of the use of force is in part related to the growth of codified international law. This is due to the fact that any case for war

²³⁴ *Idem*, at 331.

²³⁵ KULL, S., RAMSEY, C. and LEWIS, E., ‘Misperceptions, the Media, and the Iraq War’ (Winter, 2003/2004) 118, 4 *Political Science Quarterly*, 569. “Asked in a Chicago Council on Foreign Relations poll in June 2002 about their position on invading Iraq, 65 percent said the United States ‘should only invade Iraq with UN approval and the support of its allies’; 20 percent said ‘the US should invade Iraq even if we have to go it alone’; and 13 percent said ‘the US should not invade Iraq.’” at 569 note 1.

today becomes largely couched and argued within its framework because of the forum of the United Nations where the Security Council, 192 states, and the general public sit with an unobscured view of the case for war.²³⁶ In other words, the existence of a specific treaty dealing with international legal obligations concerning the use of force, or threats of force, provide a structure within which arguments for war must be formulated so as to justify a military action because it was called for by both other states and domestic forces. Thus it is in this way that we can see how the Kantian idea of explicit consent (through codified treaties) has become an irrefutable part of international society today. The duties found in the UN Charter brought into plain view the case for an invasion of Iraq, even if war was not averted. This is perhaps best described as a condition that is thinner than that found in civil society, but nonetheless thicker than in a state of nature.²³⁷

Within international institutions the language of treaty obligations has become the common idiom, and as such the primary form of communication is indeed through law. So it can be expected that the increasing public nature of the use of force would require any who wish to preserve their status as a member in good standing of the international community would need to formulate their arguments within this idiom of international law. Of course, there are some who see standing in the international community as simply distracting from what is vital: power politics and the national interest.²³⁸ Regardless of whether this is true or not, the United States did indeed go before the UN Security Council to debate their case for a war on Iraq, and did so undoubtedly using the common language of that body. Thus someone in the administration, presumably President Bush as the “decider”,²³⁹ arrived at the conclusion that it was necessary to at least feign an attempt to engage the body. Therefore the public aspect of a decision (be it already concluded in secret,²⁴⁰ or still to be made at a later date), in the end required that the United States speak overtly in the language of codified public

²³⁶ This function of the UN Security Council has been aptly described with the term “jurying” to describe the scrutiny in full-view of a case for armed hostilities, see FRANCK, *Recourse to Force*, note 28 above, “[s]ome of this fact-and-context-specific calibration goes on in international tribunals, but most of it occurs in the political organs of the UN system, which constitutes something approximating a global jury: assessing the facts of a crisis, the motives of those reacting to the crisis, and the *bona fides* of the pleas of extreme necessity. This *jurying* goes on not only in instances of humanitarian intervention but whenever there is a confrontation between the strict, literal text of the Charter and a plea of justice and extenuating moral necessity,” at 186 (my emphasis).

²³⁷ For a fuller discussion of Kant’s ideas of ‘consent’ and ‘perpetual peace’, see Section II (4) above.

²³⁸ See e.g. MORGENTHAU, H., ‘Political Power and International Morality’, chapt. 2.3 in *The Morality of War: A Reader* (Ed. Kinsella, D. and Carr, C.) (Boulder and London, Lynne Rienner Publishers, 2007) at 24-7.

²³⁹ This term, “decider”, comes from a reference President Bush made to himself when he was pushing back against the calls from six retired military officers for the resignation of Secretary of Defense Donald Rumsfeld. ‘Bush: “I’m the Decider” on Rumsfeld’, CNN.com, Politics (18 April 2006) available at: <http://articles.cnn.com/2006-04-18/politics/rumsfeld_1_secretary-rumsfeld-military-personnel-fine-job?_s=PM:POLITICS>.

²⁴⁰ SUSKIND, R., *The Price of Loyalty* (New York, Simon & Schuster, 2004) at 76.

international law. The case put forward by the U.S. is best encapsulated in the presentation delivered on the 5th of February 2003 by the Secretary of State Colin Powell, as it was at this point that the U.S. was trying to secure an explicit authorization for an invasion.²⁴¹ It is important to note that enormous energy and attention was exerted by the Bush administration to make a public case for war before this body and its consideration of that case captivated the world.

The case in actual fact differed slightly when presented in an open public forum, as in the domestic news media, versus what was put before an international institution charged with overseeing treaty obligations. The case put before the Security Council focused on the material breach of Security Council resolution 687 and then on resolution 1441 requiring disarmament, and thus on the weapons of mass destruction presumed to be possessed and hidden by that country. Whereas the case put before the domestic audience, while still focusing on weapons of mass destruction, was mainly attentive to their destructive power and the direct threat they posed to the nation.²⁴² Therefore, one might say that there was a legal argument (compliance with Security Council resolutions) put forward at the United Nations, and a moral one (the need for preventive war, though described as preemptive) presented to the people of the United States,²⁴³ with each based upon the presence of weapons of mass destruction. Essentially, however, both arguments possessed a moral as well as legal dimension because an unprovoked attack, as has been shown, transgresses a line that exists for both codes. To next treat the overlapping issues of morality and legality we will analyze the question of 'right authority' since the UN Security Council is ostensibly meant to have this power under Chapter VII of the Charter. Even if we are to consider this to be an unsettled international norm, it is suggested by this author that it is absurd to assert that this means we must simply revert to each and every sovereign state exercising force however and whenever it determines this to be necessary.

²⁴¹ POWELL, C., 'A Policy of Evasion and Deception: Address to the United Nations Security Council' (5 Feb 2003) *The Washington Post*, available at: <http://www.washingtonpost.com/wp-srv/nation/transcripts/powelltext_020503.html>.

²⁴² The domestic case for war is perhaps best captured by President Bush's 'State of the Union Address' (29 Jan 2003), *CNN.com*, available at: <<http://edition.cnn.com/2003/ALLPOLITICS/01/28/sotu.transcript/>>.

²⁴³ The concept of 'preemption' was further discussed in the two previous sections, but for here it is pertinent to mention that while the State of the Union speech of 2003 did not contain the specific language, the formulation of the argument for war was certainly there within. For use of this specific terminology see e.g. CHENEY, D., 'Speech to Veterans of Foreign Wars', National Convention, Nashville, Tennessee (27 Aug 2002) available at: <<http://www.guardian.co.uk/world/2002/aug/27/usa.iraq>>; However, this language is specifically used by the White House in the NSS 2002, note 168 above.

1) Chapter VII and Iraq

In response to Iraq's invasion of Kuwait in August of 1990 the UN Security Council passed resolution 678 four months later explicitly stating that it was acting under Chapter VII of the Charter.²⁴⁴ This resolution authorized states to use "all necessary means" to uphold previous resolutions and "to restore international peace and security in the area".²⁴⁵ This was the first time since the Korean conflict in 1950 that the Security Council had exercised its authority for the use of force against an aggressor,²⁴⁶ which can be largely attributed to the logjam in the UNSC created by the Cold War. It is generally accepted that the formulation of "all necessary means" was meant to include the use of force, thus this resolution served as the authorization for the first Persian Gulf War in 1990-1, and later became the basis of legal reasoning by which the United States and the United Kingdom launched their invasion of Iraq in 2003. As mentioned, "members of the Bush administration variously suggested that military action was necessary and justified because of the urgent need for an end to the repression of the Iraqi people, for regime change, for preventive war to stop a possible future threat, and for anticipatory self-defence against an imminent threat".²⁴⁷ However, it was the reliance upon UN resolutions that has been called "the strongest part of the legal case for military action against Iraq".²⁴⁸ Nonetheless, our intention is to demonstrate that even though this legal reasoning was the least flawed of those put forward, it still had its own moral failures under the concept of 'right authority'.

At the close of the Gulf War in 1991 the Security Council passed resolution 687 establishing the terms of the cease-fire agreement which would require Iraq to surrender all weapons of mass destruction, and set up the UN Special Commission on Iraq (UNSCOM) to monitor its compliance.²⁴⁹ By the authority created in the UN Charter, Iraq was required to disclose the locations, and submit to inspections, of all chemical and biological weapons and ballistic missiles with a range of over 150 kilometers and thus, "unconditionally accept the destruction, removal, or rendering harmless, [of them] under international supervision".²⁵⁰ Specifically, this meant that UNSCOM would, "carry out immediate on-site inspection of

²⁴⁴ U.N. Doc. S/RES/678 (1990); see also GREENWOOD, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law' (March 1992) 55, 2 *The Modern Law Review* 153.

²⁴⁵ *Idem*, U.N. Doc. S/RES/678 (1990).

²⁴⁶ U.N. Doc. S/RES/82 (1990), U.N. Doc. S/RES/83 (1990), U.N. Doc. S/RES/84 (1990).

²⁴⁷ ROBERTS, A., 'International Law and the Iraq War 2003: Memorandum from Professor Sir Adam Roberts' (Session 2002-3) House of Commons, *Foreign Affairs Committee Publications*, para. 8, available at: <<http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmfaaff/405/405we01.htm>>.

²⁴⁸ *Idem*, para 7.

²⁴⁹ U.N. Doc. S/RES/687 (1991).

²⁵⁰ *Idem*, para. 8.

Iraq's biological, chemical and missile capabilities, based on Iraq's declarations and the designation of any additional locations by the Special Commission itself".²⁵¹ Additionally, Iraq was obliged to, "unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapons-usable material or any subsystems or components or any research, development, support or manufacturing facilities related to the above".²⁵² In other words, the Security Council required Iraq to fully disarm, and submit to international verification of this disarmament, to bring an end to the use of force authorized in resolution 678.

After a series of confrontations between the Iraqi government and UNSCOM in 1997 and 1998, the United States unilaterally threatened a re-initiation of the use of force against Iraq, accompanied by a build up U.S. troops in the region, to coerce its compliance with the inspections regime. At that time various scholars put forward competing positions as to whether the United States was entitled under international law to make this threat of force. In a debate that would foreshadow the final legal position taken by the U.S. and the U.K. for the invasion of Iraq in 2003, there is much to be gleaned. In 1998, Ruth Wedgewood wrote an article in the *American Journal of International Law* arguing that, "compliance by Iraq with its disarmament obligations is central to restoring peace and security in the area, and that serious interference with inspections constitutes a material breach of the cease-fire".²⁵³ Her legal opinion was that the United States possessed the authority to threaten or use force at its own discretion by the authority granted to it by the combination of UNSC resolutions 678 and 687. Shortly afterwards, putting forward an argument that would presciently warn of troubles to come in 2002-3, Jules Lobel and Michael Ratner published an article in the same journal arguing that, "the tendency to bypass the requirement for explicit Security Council authorization, in favor of more ambiguous sources of international authority, will probably escalate in coming years".²⁵⁴ Furthermore, the title of this article captures the point that is being made in this section concerning 'right authority': 'Bypassing the Security Council'.

While Wedgewood makes several important points concerning the lack of compliance by the Iraqi state to its obligations under the cease-fire agreement of resolution 687, she ultimately does not deal with some of the most pressing questions that arise from her position. She rightly points out that there were real concerns expressed by the Security Council itself

²⁵¹ *Ibid.*, para. 9.

²⁵² *Ibid.*, para. 12.

²⁵³ WEDGEWOOD, R., 'The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction' (Oct 1998) 92, 4 *The American Journal of International Law* 724, at 727.

²⁵⁴ LOBEL, J., and RATNER, M., 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime' (Jan 1999) 93, 1 *The American Journal of International Law* 124, at 125.

regarding the Iraqi compliance. For example, in 1997 the UNSC passed resolution 1134 which found that Iraqi, “refusals to cooperate constitute a *flagrant violation* of Security Council resolutions 687 (1991)...[et al.]”.²⁵⁵ This unequivocal determination of how to characterize the specific circumstances of Iraq’s actions in 1997 is indeed useful for capturing the Security Council’s assessment; however, it does not provide any insight into an agreement for how to deal with such non-compliance. As Wedgewood herself points out,

Iraq's calculated defiance of these cease-fire terms in the 1997-1998 confrontation allowed the United States to deem the cease-fire in suspension and to resume military operations to enforce its conditions, *subject to the requirements of necessity and proportionality*.²⁵⁶

It is suggested by this author that these customary international law requirements of “necessity” and “proportionality”, emanating from the just war doctrine, are exactly the critical elements upon which the Security Council did not agree in 1997 and 1998, not to mention 2003. And these are the precise questions which Wedgewood deftly dodges. Is there a necessity to use armed force in these circumstances? How much force would be proportional to non-compliance with the terms of the cease-fire? Wedgewood suggests that these questions can be answered without quandary by Member States themselves, and that attributing such power to them would not infringe upon the Security Council’s mandate as the ‘right authority’.

Lobel and Ratner point out that the basis for any future authorization to use force without explicit sanction by the Security Council ultimately went back to UNSC resolution 678 of 1990, which had only been suspended by the cease-fire agreement of resolution 687. That is to say, the interpretation being put forward held that the original resolution of 1990 does not in fact ever extinguish itself because no temporal time limit was included in the text and thus it can be eventually resurrected by any failure to meet the obligations of the cease-fire. The ultimate question, however, is who has the authority to enact this resurrection. It was this legal interpretation that was found to be so dangerous by Lobel and Ratner because it ultimately must be understood as, “a loaded weapon in the hands of any member nation to use whenever it determined Iraq to be in material breach of the cease-fire”.²⁵⁷

It was against the backdrop of this bleak forewarning of potentially dangerous interpretations of the authority to use force against Iraq that the Security Council was called upon to assess the need for further action. Additionally, this was to occur in the tense

²⁵⁵ U.N. Doc. S/RES/1134 (1997), at para. 2 (my emphasis).

²⁵⁶ WEDGEWOOD, ‘The Enforcement of SC Resolution 687...’, note 253 above, at 726 (my emphasis).

²⁵⁷ LOBEL, and RATNER, ‘Bypassing the Security Council...’, note 254 above, at 125.

international environment that followed the attacks of September 11th. In the final months of 2002 the United States returned to the Security Council to discuss this issue and was able to secure resolution 1441 which clearly stated that, “Iraq has been and remains in material breach” and “warned Iraq that it will face serious consequences as a result of its continued violations of its obligations”.²⁵⁸ This action succeeded in getting weapons inspectors back into Iraq at the end of that year to verify its destruction of weapons of mass destruction so as to comply with the cease-fire agreement of 1991. Nonetheless, the United States very shortly began to make a case that Iraq was still in material breach, and was thwarting the efforts of UNSCOM once again, culminating with Secretary of State Colin Powell’s high-profile presentation of February 5, 2003. In the end, the United States and the United Kingdom were unable to secure a “second resolution”²⁵⁹ from the Security Council clarifying the position of its members after the reentry of weapons inspectors, and perhaps again explicitly authorizing the use of force. The difficulty of getting a majority of the Security Council to agree on authorizing the use of force against one of the organization’s members cannot be denied.²⁶⁰ Yet, considering that weapons of mass destruction were never found in Iraq after the invasion, it can also be said that the actual case for authorizing a war was weak and unconvincing because the allegation of Iraq possessing these weapons was simply untrue. In fact, UN weapons inspectors remained in the country until they were notified of the imminent invasion by troops primarily from the U.S. and Great Britain on March 19, 2003.

It has been pointed out by one eminent British scholar who elaborated on this concept of “continuing authority” in a memorandum submitted to the House of Commons shortly after the invasion of 2003. He pointed out that it is an understanding that has not been widely accepted, even if it was the strongest legal reasoning for the use of force.²⁶¹ On at least one particular instance this reading of the UNSC resolutions on Iraq was directly contested by a permanent member of the Security Council, namely Russia.²⁶² In the specific case of 2003 this scholar pointed directly to the issue of a full understanding of ‘right authority’,

[p]roblems that have emerged have included the question of what consequences flowed from the Iraq breaches: in particular, even if the US and partners have

²⁵⁸ U.N. Doc. S/RES/1441 (2002), at paras. 1 and 13 respectively.

²⁵⁹ This is the common term employed for describing a UNSC resolution to follow 1441 and clarify the Council’s position, but the reality is that this actually would have been the eighteenth resolution regarding the use of force and the disarmament of Iraq.

²⁶⁰ ROBERTS, ‘International Law and the Iraq War 2003’, note 247 above, at para. 13.

²⁶¹ *Idem*, 5.

²⁶² *Ibid.*, “[t]he argument of continuing authority was also advanced at the time of the December 1998 crisis over inspections, when the US and UK launched *Operation Desert Fox* against Iraq. It was contested in the Security Council, most notably by Russia, which asserted that the US and UK had no right to act independently on behalf of the UN or to assume the function of ‘world policeman’”, at para. 17.

continuing authority to use force, it remained a question whether that entitles them to launch a full-scale attack to achieve regime change. In addition the notion of ‘continuing authority’ might seem to be undermined by the doubtful quality of the evidence that Iraq still possessed weapons of mass destruction in significant quantities.²⁶³

With these fundamental flaws in the interpretation of the resolutions, it is extremely difficult to conclude that the concept of ‘right authority’ had been contemplated and respected. This is particularly difficult to assert when each of the resolutions in question explicitly reference the Security Council’s intention to continue to deal with the issue of Iraq. The most unambiguous declaration comes in the cease-fire resolution 687 which affirms that it, “[d]ecides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area”.²⁶⁴

This argument for the legality of Operation Iraqi Freedom is set out explicitly by Attorney General Goldsmith of Great Britain in a late statement made just days before the launching of the war, though a similar assertion was never required or made in the United States.²⁶⁵ The statement was remarkably simple, and consisted of only nine paragraphs. The proclamation of legality by the Attorney General rested largely on the previous assessments made by the Security Council (clearly recognizing its authority) that Iraq had been in material breach of its obligations, but then shifted to assuming the authority of Member States to make the final determinations and consequences. The most pertinent paragraphs read,

7. *It is plain* that Iraq has failed so to comply and therefore Iraq was at the time of Resolution 1441 and continues to be in material breach.

8. Thus, the authority to use force under Resolution 678 has revived and so continues today.²⁶⁶

The remarkable consequence of this memo is that just three little words, “it is plain”, are considered enough to cover the determination of just cause, necessity, proportionality and authority.

The truth is that such an interpretation sidelined the Security Council as the ‘right authority’ once it granted its initial authorization for the use of force over a decade earlier. While this may have seemed expedient at the moment, it is hardly a reading that embodies and supports the object and purpose of the Charter system. Nor does it fall completely in line

²⁶³ *Ibid.*, at para. 21.

²⁶⁴ U.N. Doc. S/RES/687 (1991), at para. 34.

²⁶⁵ For a discussion of the different approaches to international law and the invasion of Iraq by the U.S. and the U.K., see SANDS, P., *Lawless World* (New York, Viking Press, 2005) at 174-6.

²⁶⁶ UK Foreign and Commonwealth Office, ‘Legal Basis for the Use of Force’ (17 March 2003)(my emphasis), reproduced in (2003) 52 *The International and Comparative Law Quarterly* 811.

with the moral standard of limiting the use of violence in the international realm. The question must be asked: what is to stop any other nation (e.g., Iran as one dangerous possibility) from declaring that Iraq is in material breach of the cease-fire agreement and thus asserting that it can militarily enforce a regime change? It is this author's opinion that if Chapter VII is meant to make the Security Council the 'right authority' on determining threats to the peace and then to sanction the use of force, then this must remain the case even after an initial authorization. Just because the authority to use force has been delegated through Article 42, this does not mean that it then delegates the authority of Article 39 to determine when a threat exists. Equally important, this does not then hand over the determination of what constitutes a proportional response from that moment forward. Otherwise, the concept of 'right authority' as understood in the Charter has very little meaning. As it has been rightfully expressed,

[i]f one's deepest concern is to minimize human suffering and to promote progress toward global order in which the vulnerable will be better protected and individual human potential more fully realized, [...] then one would seem obligated to at least consider the question of whether those noble goals are best advanced through the unqualified attribution to states of legitimate [right] authority to make war.²⁶⁷

2) Humanitarian Intervention in Iraq

The moral question of a humanitarian intervention to bring a halt to the serial human rights abuses carried out by the Iraqi regime will be dealt with briefly in a very similar manner, in that 'right authority' again provides an important understanding of the issue at hand.²⁶⁸ There has been much debate on the importance of motivations being primarily for humanitarian purposes,²⁶⁹ and it is this author's opinion that this criterion will inevitably be inconclusive due to the mixed rationale behind most military incursions. However, the 'jurying' procedure that an international organization,²⁷⁰ primarily the Security Council in this particular instance, provides can be extremely useful in drawing out both the motivations and the evidence demonstrating the need for such cross-border humanitarian exercises. Additionally, it should not be overlooked that one of the criteria often proposed for meeting the need for such an intervention is that of a 'spike test'. That is to say, it is important to limit the risk of its use as an excuse for aggression and thus the chronic human rights abuses of the Saddam Hussein regime can be generally recognized as insufficient to meet this threshold.

²⁶⁷ FARER, 'Un-just War Against Terrorism...', note 14 above, at 377.

²⁶⁸ For a good discussion of humanitarian intervention in the 20th century see WHEELER, N., *Saving Strangers* (Oxford, Oxford University Press, 2000) 319 pp.

²⁶⁹ WHEELER, N., 'Legitimizing Humanitarian Intervention' in Roundtable: Humanitarian Intervention After 9/11, (2005) 19 *International Relations* 211, at 238.

²⁷⁰ FRANCK, *Recourse to Force*, note 28 above, at 186.

During the 1990s there was a noticeable adjustment in the general understanding of the principle of sovereignty in response to the debates over the legality and validity of humanitarian intervention. This shift is best encapsulated in the Report of the International Commission on Intervention and State Sovereignty (ICISS) entitled, *The Responsibility to Protect*.²⁷¹ The essence of this ‘emerging norm’ is based on the meaning of sovereignty itself. The principle of sovereign equality is clearly enshrined in Article 2(1) of the UN Charter; while Article 2(7) lays out that there shall be no intervention “in matters which are essentially within the domestic jurisdiction of any state”.²⁷² At the same time, this provision does provide for the same exception under discussion in this section in that, “this principle shall not prejudice the application of enforcement measures under Chapter VII”.²⁷³ What was identified by the international commission in its report was a possible tension between two different conceptions of sovereignty: one vested in the state, and the other in its peoples.²⁷⁴ Former Secretary-General Kofi Annan was a strong advocate for the understanding that the UN Charter belongs to the peoples of the world and not the states who are their representatives. In a speech in 1998 he made this clear in stating, “[t]he Charter protects the sovereignty of peoples. It was never meant as a license for governments to trample on human rights and human dignity. Sovereignty implies responsibility, not just power”.²⁷⁵ However, this should not be understood as a challenge to the traditional notion of sovereignty, but rather an attempt to infuse it with additional meaning. That further meaning is captured in the phrase, ‘sovereignty as responsibility’. Those who claim the rights of sovereignty must also take responsibility for the protection of their citizens. If they do not, then the international community has a responsibility to provide this protection itself.

One year after the attacks of September 11th the Policy Planning Director from the U.S. State Department, Richard Haass, took this changing conception of sovereignty as his point of departure to put forward one of the justifications that would arise for an invasion of Iraq. In a speech to the International Institute for Strategic Studies in London, Haass spoke of the “limits of sovereignty”. His contention was that “sovereignty should only provide immunity from intervention if the government upholds basic, minimum standards of domestic

²⁷¹ *Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, Ottawa, Canada (Dec 2001). This report was written by an independent commission set up by the former foreign minister of Canada, Lloyd Axworthy. Available at: <<http://www.iciss.ca/pdf/Commission-Report.pdf>>.

²⁷² *Charter of the United Nations*, note 26 above, at 332.

²⁷³ *Idem*.

²⁷⁴ *Responsibility to Protect*, note 271 above, at 13 para. 2-13.

²⁷⁵ ANNAN, K., ‘Reflections on Intervention’ 35th Annual Ditchley Foundation Lecture, (26 June 1998), cited in WHEELER, N., ‘The Bush Doctrine: The Dangers of American Exceptionalism in a Revolutionary Age’ (2003) 27, 4 *Asian Perspective* 183, at 195.

conduct and human rights”.²⁷⁶ The NATO intervention in Kosovo was cited as evidence that the international community had come to support such humanitarian intervention despite the fact that it went unendorsed by the Security Council. A few months earlier, Haass had made a very similar statement in an interview explaining,

[w]hat you’re seeing from this Administration is the emergence of a new principle or body of ideas—I’m not sure it constitutes a doctrine—about what you might call the limits of sovereignty. Sovereignty entails obligations. One is not to massacre your own people. Another is not to support terrorism in any way. If a government fails to meet these obligations, then it forfeits some of the normal advantages of sovereignty, including the right to be left alone inside your own territory. Other governments, including the United States, gain the right to intervene.²⁷⁷

However, what was never explicitly addressed by Haass was who exactly was meant to hold this awesome power of determining whose sovereignty had been forfeited and when. While it is reasonable to depict the changing international consensus on the concept of sovereignty in the way that this member of the U.S. State Department has here, there is an enormous problem in simply ignoring the question of ‘right authority’. If the question of ‘right authority’ is left undetermined, then there is no limitation on the use of humanitarian grounds as a justification for military action.

The example put forward by Haass of the Kosovo intervention can be instructive on this point. Although there was no Security Council Resolution supporting ‘Operation Allied Force’ in Kosovo the wider membership of the Council rejected a resolution put forward by Russia condemning the action afterwards (with only the support of China and India) showing an understanding of the moral context in which NATO had been forced to take their action. It is important to recognize that the authorization of the use of force in this case was blocked by the veto of permanent members. This forced the operation to be carried out instead by a regional international organization, which still demonstrated a broad support for the moral necessity of intervention. In this case a ‘jurying’ process over intervention indeed took place in the Security Council, and it can even be said that something similar took place within NATO. The international organization processes certainly went a long way towards bolstering the conclusion from the Independent International Commission in *The Kosovo Report* that the

²⁷⁶ HAASS, R., Director, Policy Planning Staff, U.S. Department of State ‘Reflections a Year After September 11’, Remarks to International Institute for Strategic Studies’ 2002 Annual Conference, London, the United Kingdom (13 Sept 2002).

²⁷⁷ Cited in LEMANN, N., ‘The Next World Order: The Bush Administration May Have a Brand-New Doctrine of Power’ *The New Yorker* (1 April 2002), available at: <http://www.newyorker.com/archive/2002/04/01/020401fa_FACT1>.

‘Operation Allied Force’ was “illegal but legitimate”.²⁷⁸ Thus, it is inaccurate to assert that the absence of an authorization passed by the UNSC in this case means that it played no part in determining the validity of humanitarian action. Even if the Security Council can at times be dysfunctional as the ‘right authority’ in cases of humanitarian intervention, this certainly does not give automatic license to each and every state to usurp this role for themselves.

Finally, one can look at the specific case of Iraq in 2003 to understand how the humanitarian justification obliquely put forward was of modest importance in the case for invasion by the U.S. administration. In Secretary of State Colin Powell’s speech before the United Nations in February of 2003 he gave a “long and a detailed presentation”, but when he turned to the issue of Saddam Hussein’s violations of human rights it was only a subject to “touch on briefly”.²⁷⁹ Just three short paragraphs were dedicated to this grave matter in this significant presentation, demonstrating it as almost an afterthought. One important reason for this minor position in the reasoning put forward was certainly because of the chronic condition of the Iraqi regime’s human rights abuses. This is not to deny the horrendous moments at which this particular government indeed engaged in gross violations, but rather to point out that in 2003 there was no spike in human suffering. As one human rights lawyer explained the situation,

what arguably distinguishes Iraq from the Kosovo intervention (to which in other respects it bears a certain similarity) is that the former arguably aborted a conspiracy to uproot and expel a large portion of the Albanian ethnics, while the latter occurred at a time when the condition of core human rights was, if anything, less awful than the norm for Saddam’s regime, the Shiite opposition having been decimated in 1991

²⁷⁸ Independent International Commission on Kosovo, *The Kosovo Report*, (Oxford, Oxford University Press, 2000), 368 pp. “The Commission concludes that the NATO military intervention was illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule”, at 4. It was also explained, “[i]n summary, a certain degree of consensus existed in the UNSC. UNSC members shared the view that the FRY was primarily responsible for an imminent humanitarian catastrophe in Kosovo; that this catastrophe involved severe denials of internationally protected human rights; that it posed a threat to international peace and security; and that it was not regarded as a matter “essentially within the domestic jurisdiction” of the FRY. To address this unacceptable situation in Kosovo, support was given to the idea of establishing an unarmed international monitoring presence, even if it was not under the direct authority of the United Nations. Furthermore, the UN gave no encouragement to the KLA as a liberation movement or to the broader quest for Kosovo independence, but nor did it implement any steps to restrict international support for insurgency. At the same time, there was no consensus regarding the threat or use of force. The UNSC never explicitly authorized its use. Russian and Chinese positions clearly emphasized that any attempt at such authorization would be vetoed. Simultaneously, subsequent Resolution 1203 endorsed the Holbrooke-Milosevic agreement, which is generally believed to have been secured only as a result of the NATO threat”, at 142.

²⁷⁹ POWELL, ‘Address to the United Nations Security Council’, note 241 above.

and the habitually restive Kurdish areas being protected by British and American air power.²⁸⁰

This is one reason why the idea of a “spike test” has been put forward as an element of this scholar’s “five-part test”. While at first glance the disallowing of a right to intervene in the case of chronic removals of human rights can be morally repugnant, it is meant to avert a similar situation as we find here. Regrettably, human rights abuses are found in a great number of states. Hence it is sound to limit the use of “humanitarian intervention” as a pretext for actions that would otherwise be aggression and are in fact motivated by other goals. This same logic was also at play in the High Level Panel’s report commissioned by the Secretary-General in 2004 when it declared, “[t]he principle of nonintervention in internal affairs cannot be used to protect *genocidal* acts or *large-scale* violations of international humanitarian law or *large-scale* ethnic cleansing”.²⁸¹ Without limitation, excuses for aggression creep in very quickly.

Consequently, we see that in the case of the invasion of Iraq the United States administration directly confronted this issue of ‘right authority’ now found in the UN Charter. Much like in its original form in the just war doctrine, the determining of who possesses the ‘right authority’ to launch armed hostilities is meant as a means for limiting the use of force in international society. While it has been recognized that the norm which would invest an unmitigated authority in the Security Council is one that continues to be controversial and there is no one view that is accepted by all legal scholars on this question, our contention is in line with one historian on aggression who claims, “for the ordinary man for public opinion [war is] always loaded with moral significance, demanding full approval if waged with right and condemnation and punishment if without”.²⁸² Therefore, it is surely excessive to entirely discount the authority vested in the Security Council, especially when we are analyzing how citizens analyze their government’s exercise of “*legitimate use of physical force*”.

VI. Conclusion

In this chapter we have analyzed an important portion of the space of overlap between morality and legality: the prohibition of wanton violence. Even though it is often dismissed or forgotten, there is indeed a place at which these vital concepts have been found to coincide.

²⁸⁰ FARER, T., ‘Cosmopolitan Humanitarian Intervention: A Five-Part Test’ in Roundtable: Humanitarian Intervention After 9/11, (2005) 19 *International Relations* 211, at 216.

²⁸¹ United Nations, *A More Secure World: Our Shared Responsibility – Report of the Secretary-General’s High Level Panel on Threats, Challenges and Change*, 59th Session, Agenda Item 55, New York, (2 Dec 2004) at 65 (my emphasis).

²⁸² POMPE, *Aggressive War*, note 21 above, at 152.

The key to this understanding turns on being able to focus on the “modest aim of survival”, and, “[t]his simple thought has in fact very much to do with the characteristics of both law and morals”.²⁸³ As such, the association of individuals requires both a legal and moral demarcation of the forbearance from gratuitous attacks. Yet, the Bush Doctrine launched in reaction to the attacks of September 11th suggested that in a world that was believed to be changed by that event, armed hostilities could be triggered by the suspicions of what other countries might do in the future. It is this expedient and self-serving standard that has been shown to leave no legal or moral constraints in place, thus opening real problems for the legitimacy of a government that would promote such an anarchic norm as its own.

This was not the first time policymakers inside the United States contemplated extending the temporal limits for anticipatory military action. At the dawn of the nuclear age, President Truman was confronted with advisors who believed the threat of such weapons changed the rules by which security must be preserved. However, he opposed those who suggested dealing with the threat with preventive war, and he did so mostly on moral grounds. Truman made a public statement explaining, “[w]e do not believe in aggression or preventive war. Such a war is the weapon of dictators, not of free democratic countries like the United States”.²⁸⁴ Thus the idea of extending the limits of anticipatory war was not novel within the history of the United States. Yet, tellingly, it had been rejected.

Using the just war doctrine as our moral guide through this chapter we have also seen that the three elements of ‘anticipatory attacks’ for self-defense, war as a ‘last resort’ and the questions of ‘right authority’ were particularly strained by the arguments put forward justifying an invasion of Iraq. When it comes to the idea of anticipating future events and aiming to avoid unwanted outcomes or perceived dangers by using war, the prohibition of such usage runs deep within the just war theory. Throughout the classic doctrine it was well understood that war must be launched in response to an actual wrong received, and it was not enough for evil intentions to have existed. Most pertinent is the fact that there was a conspicuous bifurcation over this very question in the sixteenth and seventeenth centuries while Europe was steeped in bloody religious conflict. These pervasive clashes throughout the continent helped give rise to two distinct views on the valid trigger for war. One was a concept of holy war that allowed for ‘just feare’ to be a sufficient *casus belli*, which sowed no progeny and dried up as a defensible justification within the just war tradition. While at the very same historical moment, legal philosophers and theologians aimed to focus the just war

²⁸³ HART, *The Concept of Law*, note 8 above, at 191.

²⁸⁴ Cited in WHEELER, ‘The Bush Doctrine...’, note 275 above, at 192.

doctrine on more objective factors and provided the naissance of international law. This division, and their subsequent lineage (or lack thereof), are particularly revealing of the moral foundations of ‘anticipatory attacks’.

On the question of war as a ‘last resort’, it was found that two factors in the buildup to the invasion of Iraq were significant for demonstrating that this was in fact not the case. The first was the debate that took place in the United Nations Security Council displaying both the occurrence of a deliberation and making explicit the justifications for an invasion. The second was the millions of people that took to the streets, both inside the United States and in other countries, culminating with six to ten million people worldwide on February 15, 2003 to protest a war that had not yet begun. While this clearly did not stop the invasion of Iraq, it did draw attention to the fact that there was indeed a ‘moment for deliberation’ and therefore it was a *war of choice*.

Finally, the concept of ‘right authority’ today is best understood by beginning with the United Nations Charter. In simple terms it has been explained, “[t]he main objective of the framers [...] was to introduce into international relations a genuine mechanism of collective security. The UN organ entrusted with the task of activating and supervising the mechanism is the Security Council”.²⁸⁵ While this norm cannot be said to have congealed as a solid rule governing international society, it is also rash to portray Chapter VII authority as meaningless. As it was suggested by Kant, explicit consent (through codified treaty in this case) creates obligations that are recognizably less robust than those found in a domestic legal community, but beyond that of a state of nature, thus pulling towards an intermediary condition. When it came to interpreting the UN Security Council resolutions relating to Iraq, the United States and Great Britain wished to disregard this legal responsibility found in the Charter by ascribing to themselves the authority to determine non-compliance with the pertinent resolutions, along with the consequences. At the same time, the grounds for a humanitarian intervention in Iraq collapsed on similar reasoning because the United States assigned itself as the ‘right authority’ to unilaterally determine when the human rights of other citizens need to be protected through military invasion, even without a spike in violations or abuse.

Considering this important point of overlap between legality and morality, it is quite comprehensible that the citizens of the United States would have doubts about the exercise of force by its own government. This is particularly true in the light of the suspicions of weapons of mass destruction possessed by the Iraqi regime coming to be shown as patently false

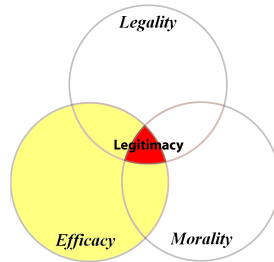
²⁸⁵ DINSTEIN, *War, Aggression, and Self-Defense*, note 21 above, at 247.

through evidence produced by the invasion itself. In the end, the moral and legal grounds for the Bush Doctrine undermined the legitimacy of the ‘war on terror’ because it blatantly flaunted the concept of any sort of equal treatment within the international community. As this doctrine was aptly described, “[t]his revolutionary response to the threat from global terrorism establishes the United States as the sovereign that decides when the sovereignty of others can be infringed”.²⁸⁶ While it may be true that many U.S. citizens believe in a sort of ‘American Exceptionalism’, this doctrine was a step too far.

²⁸⁶ WHEELER, ‘The Bush Doctrine...’, note 275 above, at 185.

Chapter 6

Through the Lens of Efficacy: Torture on Suspicion



Some locutions begin as bland bureaucratic euphemisms to conceal great crimes. As their meanings become clear, these collocations gain an aura of horror. In the past century, final solution and ethnic cleansing were phrases that sent a chill through our lexicon. In this young century, the word in the news — though not yet in most dictionaries — that causes much wincing during debate is the verbal noun waterboarding.

If the word torture, rooted in the Latin for “twist” means anything (and it means “the deliberate infliction of excruciating physical or mental pain to punish or coerce”), then waterboarding is a means of torture.
—William Safire, Conservative Language Columnist¹

I. Introduction

In this final chapter we shall gaze through the lens of efficacy to analyze torture as an intelligence gathering tool, and this examination will reveal that the issue shares a manifest overlap with our other two lenses of legality and morality. As seen in Chapter 3, Section V, the prohibition of torture in international law has reached the special status of an absolute norm of *jus cogens*,² putting it on par with the crimes of slavery and piracy. Put another way, the international law on torture has a clarity and comprehensiveness –no torture, by any authority, against any individual, in any circumstances, anywhere in the world– that places it in a very select category of illegality. For international courts interpreting the laws against torture, this stark status of illegality is not affected by notions of efficacy and thus it is recognized that the approach of this chapter is perhaps legally unorthodox.

¹ SAFIRE, W., ‘Waterboarding’ New York Times Magazine (9 March 2008) available at : <<http://www.nytimes.com/2008/03/09/magazine/09wwlnSafire-t.html>>.

² See e.g. NOWAK, M., and McARTHUR, E., *The United Nations Convention Against Torture: A Commentary* (Oxford, Oxford University Press, 2008) at 118; RODLEY, N. with POLLARD, M., *The Treatment of Prisoners under International Law*, 3rd ed. (Oxford, Oxford University Press, 2009) at 81; and PAUST, J., *Beyond the Law* (Cambridge, Cambridge University Press, 2007) at 4-5.

However, there is valid reasoning for this unconventional approach. As has been discussed in Chapter 1, some national courts have entered into evaluations of efficacy that have traditionally been reserved for the political branches. Considering that there have been important decisions dealing with counterterrorism policies by national courts from Israel to Germany which utilized the aspect of efficacy to render their judgment,³ this tack is not entirely novel. Yet what must remain front and center is that this work focuses on the legitimacy of the ‘monopoly of physical force’ exercised by the government, and therefore policies should aim at defending this vital core of society that is being targeted by terrorism. When we speak about state sanctioned torture, we are looking at the exercising of the government’s most potent coercive and violent dominance over a defenseless individual, and such ill-treatment is almost always carried out without any check on that power. Because of the perceived immediacy and necessity that is often coupled with the use of torture for intelligence gathering, any systematized controls that might exist are discarded and the end result is that torture becomes an arbitrary exercise of the government’s most monstrous power. Employing such profoundly coercive authority that turns out to be seemingly capricious is a counterterrorism policy does not bode at all well for defending legitimacy.

To begin, it is first necessary to define what is meant by *efficacy* in the specific context of a program of counterterrorism interrogation. As discussed in Chapter 1, because the idea of effectiveness is an enormously complex subject, and often deceptively simple, it is possible for there to be various tools employed for testing empirical validity. Along with the fact that different policies are going to lend themselves to a range of testing instruments to be able to illuminate their efficacy. Therefore it is necessary to put forward the precise manner in which this test will be carried out when discussing the policy concerning interrogation for counterterrorism.

Building off of the definition of efficacious (“having or showing desired result or effect”⁴), *efficacy* in our context will mean that *the application of severe pain or suffering on detained suspects, be it physical or mental, can be shown to produce timely and reliable intelligence information for stopping attacks against non-combatants*. In this context it is necessary for the elements of *timeliness* and *reliability* to be a part of this definition of efficacy otherwise there will always be the possibility that other non-coercive methods would have provided the very same results. Therefore it is insufficient to simply claim that the

³ See Chapter 1, Section VII (3).

⁴ ‘Efficacious’ in Stein, J., (ed.) *The Random House College Dictionary*, Revised Edition, (New York, Random House, 1982) at 421.

acquisition of information that turns out to be true or useful, perhaps even at some much later point in time, is enough to demonstrate the utility of torture. For torture to be determined to be efficacious, it must be shown to be a superior technique. Lest we forget, torture is patently illegal and widely accepted as immoral in (nearly)⁵ all circumstances.

Most critically, our definition also includes the necessity that it must be shown, or calculable, that this method of coercive interrogation produces the desired result. No doubt, there are terms dealing with effectiveness that suggest no need for this standard. For example, the term ‘effectual’ is defined as “producing or capable of producing an intended effect; adequate”.⁶ The idea that a technique is “capable” of bringing about a desired result, or that it is “adequate”, simply will not do in this context. Shots fired randomly into a crowd have the capacity for immobilizing a suicide bomber, but without the calculability of how many shots must be fired, and innocent people killed, its true efficacy as a method for stopping suicide bombers simply cannot be judged. This brings us to the crux of our argument.

Can torture of innocent or ill-informed individuals ever be considered to be effective? This essential question clarifies the inquiry of this chapter, and even helps explain the manifest international movement towards the comprehensive illegality of torture. Because the inherent nature of ill-treatment for intelligence gathering obligates the use of unverifiable suspicions as a trigger for abuse, the result is that such a program will always include the innocent and ill-informed as among its victims. It is impossible to know in advance (or even afterwards, for that matter) what is inside the head of a detainee, and therefore those who do not have the information we seek will inevitably be brought into an intelligence gathering program. The result is that their torture leads to completely unpredictable outcomes coupled with the guaranteed abuse of human beings. This conspicuous and insurmountable hurdle obligating an arbitrary application of torture in a program is one reasoning by which this author defends the international and domestic legal ban on the purposeful use of severe pain and suffering at all times, in all circumstances and in all places. And because terrorism targets legitimacy, counterterrorism policies in particular must be designed while being wholly conscious of the fact that terrorist acts are meant to provoke a government into overreaching and an exercise of force deemed to be illegitimate. Violent force wielded arbitrarily is undoubtedly a surefire way to jeopardize legitimacy.

⁵ There are some who argue that in the narrowest of circumstances, there are moments when torture can be employed morally. The one instance that often comes under question is that of the “ticking bomb”. This will be dealt with throughout this chapter, and its morality specifically discussed below in Section IX.

⁶ ‘Effectual’ in Stein, J., (ed.) *The Random House College Dictionary*, Revised Edition, (New York, Random House, 1982) at 421.

Also, we must of course distinguish between punishment for past crimes and the intention to prevent future ones. When we speak of the efficacy of torture in this chapter it has nothing to do with the former, and everything to do with the latter. Demonstrating agreement with this point, former Vice President Dick Cheney gave a speech in 2009 discussing the security measures that had been implemented when he was in office and spoke directly to the intention behind the use of the “enhanced interrogation techniques” in the prosecution of the ‘war on terror’. In the speech he made clear that the administration’s use of coercion was solely for intelligence gathering purposes. While oddly claiming that the tactic worked, without offering any evidence to back up the claim, Cheney propounded,

[w]e know the difference in this country between justice and vengeance. Intelligence officers were not trying to get terrorists to confess to past killings; they were trying to prevent future killings. From the beginning of the program, there was only one focused and all-important purpose. We sought, and we in fact obtained, specific information on terrorist plans.⁷

The defense of the institutionalization of a program of ill-treatment here was because information was gained “on terrorist plans”. The standard that is asked to be applied to the counterterrorist campaign was not that of imminent or timely plans, but just plans. This negligible hurdle does nothing to explain why torture should be chosen over other methods.

It is acknowledged that presenting the work of this chapter as an analysis through the lens of efficacy might be construed as a utilitarian argument. There is no doubt that the classic debate on the subject of torture has taken place primarily within a utilitarian v. deontological framework, and for this reason it is natural to want to classify arguments within this structure. While there are some reasons that this can be a problematic conclusion, in the end it is not critical to our study to rigidly classify it either inside or outside of these confines.

As for the reasoning opposed to such a classification, it should first be remembered that our conception of legitimacy requires that policies also conform to the other aspects of legality and morality for the most secure uncoerced pull towards compliance. Traditionally, utilitarianism is based solely on the principle which accepts “that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness”.⁸ This standard is judged not by the agent’s own happiness, “but the greatest amount of happiness altogether”.⁹ Therefore the fact that our model of legitimacy is rooted in

⁷ CHENEY, R., ‘Remarks before the American Enterprise Institute for Public Policy Research’ (21 May 2009), available at : <<http://www.aei.org/speech/100050>>.

⁸ MILL, J.S., *Utilitarianism*, reprinted from ‘Fraser’s Magazine’ (2nd edition) (London, Longman, Green, Longman, Roberts, and Green, 1864) at 9-10.

⁹ *Idem*, at 16.

the integration of *legality*, *morality* and *efficacy* would place our concept outside of a utilitarian or consequentialist formula because it does not rely exclusively on utility. Additionally, what we will find in this chapter is that our investigation will lead us to the conclusion that institutionalized torture in interrogation for the gathering of intelligence cannot be calculated in utilitarian terms because the inherent number unknowns in the circumstances in which it is advocated are too great. This means that gazing through the lens of efficacy will demonstrate that an interrogation program based on ill-treatment cannot be determined to be effective because the necessary conditions dictate that its consequences are incalculable. Therefore it is our conclusion that the utilitarian method of calculating the happiness for the greatest number of people cannot be applied in this circumstance.

Two contemporary figures who explicitly apply the utilitarian creed, and in doing so arrive at an advocacy for a legalizing the use of “coercive interrogation”, are Eric Posner and Adrian Vermeule in their 2007 work entitled, *Terror in the Balance*.¹⁰ As a starting point, they recognize the important difference between act and rule consequentialism (or utilitarianism). While act consequentialism focuses on the benefits outweighing the costs in individual cases, rule consequentialism deals with what regulations will produce the greatest net benefits. Posner and Vermeule look to the latter and suggest that, “[t]he great strength of [rule consequentialism] is that it cannot, by its nature, be ruled out of bounds in the abstract”.¹¹ The authors claim that this approach is wholly dependent on the empirical facts available, and because the details of a given circumstance are not known in advance, it is necessary to leave open the option that the lesser evil might be to authorize torture to prevent gross harm.

However, they claim that the subject they are treating is when coercive interrogation involves, “(1) the application of force, physical or mental, (2) in order to try to extract information (3) necessary to prevent severe harm to others, such as terrorist attacks, suicide bombings, and the like”.¹² Thus there are two fundamental problems here that we dispute in this chapter. The first is that they advocate coercion to, “try to extract information”, revealing that they are aware that its results are unknowable. The second assumption, which is central to our argument, is that it is possible to know in advance that torture is factually, “necessary to prevent severe harm to others”. Because the empirical facts upon which rule utilitarianism is

¹⁰ POSNER, E., and VERMEULE, A., *Terror in the Balance: Security, Liberty, and the Courts* (Oxford, Oxford University Press, 2007) at 183-215.

¹¹ *Idem*, at 192.

¹² *Ibid.*, at 184.

based will always be, without exception, imperfect. Therefore, on their same proposed utilitarian grounds, rule utilitarianism can never be ruled in on knowledge, but only suspicion.

That torture could be known to be necessary to avert serious injury and death presents an onerous burden of proof that must lie on the shoulders of those who wish to subvert or change the comprehensive international and domestic ban on torture and ill-treatment.¹³ Because it is impossible to know that the information being sought to prevent harm actually exists within the mind of a proposed victim, and that coercion will actually extract it if it does exist therein, there is never any way of knowing that the use of ill-treatment will further that cause. If it were actually possible to know what is in the mind of a specific detainee, torture would in fact be unnecessary. The absurd claim is that we can know the mind of the proposed victim, but not in its entirety. This is surely an insurmountable hurdle created by the very constraints of our humanity. As one thorough scholar on torture suggested when speaking to the possibility of technological advancements providing a means to overcome such human limitations: “if such technology existed, it would surely be just as widespread as electricity”.¹⁴

Consequently, torture becomes an arbitrary act of exercising the most forceful violence of government on a powerless human being. In this case, ‘arbitrary’ means that torture is authorized on unverifiable suspicions, and ungoverned by law. Posner and Vermeule claim that the latter should be changed,¹⁵ but nothing is proposed to overcome the unmanageable and inherent problems of the former. It is often accepted that in a single circumstance it is possible for the ‘ticking bomb scenario’ (further discussed below) to come to life and pose a daunting moral question for an individual.¹⁶ However, this is not the situation we will be dealing with here. After the attacks of 9/11 it was an intelligence gathering program based on suspicion and ungoverned by law that was initiated, and therefore the already grave problems of *certainty*,¹⁷ *immediacy*,¹⁸ *targeting*,¹⁹ and the *effectiveness of*

¹³ This legal status of torture is acknowledged explicitly by Posner and Vermeule, *ibid.* Thus they describe their inquiry as normative.

¹⁴ For an extensive scholarly work investigating the contemporary use of “clean torture” techniques that leave no trace, researching military and police reports in fourteen languages in over 800 pages and 3,400 notes, see REJALI, D., *Torture and Democracy* (Princeton and Oxford, Princeton University Press, 2007) at 453.

¹⁵ Although Posner’s father, a judge on the U.S. Court of Appeals, claimed that it is better for torture to occur outside of the law. See POSNER, R., ‘Torture, Terrorism and Interrogation’, in Levinson, S. (ed.) *Torture: A Collection* (Oxford, Oxford University Press, 2004). “It is better I think to stick with our perhaps overly strict rules, trusting executive officials to break them when the stakes are high enough to enable the officials to obtain political absolution for their illegal conduct”, at 297-8.

¹⁶ For a deep analysis of this theoretical circumstance in both the private and public setting see GINBAR, Y., *Why Not Torture Terrorists? : Moral, Practical and Legal Aspects of the ‘Ticking Bomb’ Justification for Torture* (Oxford, Oxford University Press, 2008) 397 pp.

¹⁷ This difficulty is well summarized, but is still not exhaustive, in STATMAN, D., ‘The Absoluteness of the Prohibition Against Torture’ [Hebrew] 4 *Mishpat u-Mimshal* 161 (1997) at 173, “an extremely heavy onus of proof rests on the shoulders of whoever seeks to justify it [torture]. He must know with certainty that a bomb

*coercive techniques*²⁰ all become multiplied exponentially. This is particularly true when we consider that information which enters a system of intelligence gathering thorough ill-treatment is always of questionable reliability due to initial incorrect suspicions and purposeful deceit. Thus the subsequent grounds of suspicion used for identifying suspects become tainted and corrupted, creating an even more unregulated and uncontrollable system than before. And the nearly impossible to know “error costs”, spoke of by Posner and Vermeule, grow to be well beyond incalculable for a program of ill-treatment. While the use of the arithmetical term “cost” gives the impression of scientific and empirical inquiry, this simply cannot be achieved in the case of torture intrinsically based on suspicion.

The focal point of this chapter will be an investigation into the empirical validity of treatment during interrogation, and the intelligence gained thereof, by drawing out the facts acknowledged as such by the U.S. government concerning six high profile detainees.

really exists (despite the fact that no one saw it besides the terrorists); that it will explode if we do not defuse it (that the terrorists have been sufficiently professional); that it really can be defused (that it will not explode the minute it is handled); that the person in our possession does indeed know where the bomb is (perhaps he was compartmentalized out, or perhaps they moved the bomb to another location when they heard that he had been captured); that if we torture him he would provide the needed information (and not die first, or keep silent, or provide false information); that if he provides the information we will be able to defuse the bomb (it will not be too late); and that there is no other way to discover the bomb (for instance, using sophisticated electronic methods); and so on”. Cited in *idem*, at 119.

¹⁸ This concept is encapsulated well in KREMNITZER, M., and SEGEV, R., ‘The Application of Force in the Course of GSS Interrogation – A Lesser Evil?’ [Hebrew] 4 *Mishpat u-Mimshal* (1998) 702, at 717, “...the importance of the requirement for immediacy of action in the defence of necessity stems mainly from its role as a significant indication of two related conditions, the importance of whose existence is uncontroversial: the certainty of the danger’s materialization and the need for the act, namely the impossibility of preventing the danger from materializing by other means. The necessity for immediate action is a central indicator for the certainty of the danger, which, in turn, is the main indication of the need for the act”. Cited in *ibid.*, at 121.

¹⁹ STATMAN, ‘The Absoluteness of the Prohibition Against Torture’, note 17 above, at 173-4, elucidates this problem of choosing targets for torture, “[o]ne of the problems which deciding that the person who is the object of torture does in fact possess the required information creates, is that this person is the only source, or at least the only authoritative source, capable of denying that. But once we have determined that he is a legitimate candidate for torture, this possibility no longer exists: even if the person shouts that he does not have the information till he is blue in the face, this would, for the interrogators, only prove that he should be beaten more severely. If he provides false information, this would be proof the he is trying to mislead the interrogators and evidence, again, that more force is needed to break him down. In other words, the moment we allow torture in order to extract vital information from a certain person, if we are wrong and he does not possess the required information, he has no way of proving this and stopping the torture, and the moral horror associated (by all accounts) with torturing a person without justification continually increases”. Cited in *ibid.*, at 124.

²⁰ Whether there is any “science” that exists to prove or disprove the effectiveness of particular techniques is doubtful, and none has been found by this researcher. One useful summary of this enormous problem comes from a Behavioral Science Consultant on counterterrorism and national security, BORUM, R., ‘Approaching Truth: Behavioral Science Lessons on Educing Information from Human Sources’ in Intelligence Science Board, *Educing Information Interrogation: Science and Art*, Washington D.C.: National Defense Intelligence College, 2006) at 35, “[t]he potential mechanisms and efforts of using coercive techniques or torture for gaining accurate, useful information from an uncooperative source are much more complex than is commonly assumed. There is little or no research to indicate whether such techniques succeed in the manner and contexts in which they are applied. Anecdotal accounts and opinions based on personal experiences are mixed, but the preponderance of reports seems to weigh against their effectiveness”. Cited in *ibid.*, at 129.

Specifically, we will analyze a host of government documents and official statements now available in the public sphere that catalogue the suspicions, treatment, and level of cooperation of individuals who have been touted at one time or another as important figures within the al Qaeda organization. While these assumptions still held true, their capture and interrogation were lauded as advancements in the ‘war on terror’. However, we will see that in several cases the original assumptions turned out to be erroneous, thus drastically recasting the efficacy of the program. The cases of the six detainees that will be presented here are that of Ibn al-Shaykh al-Libi, Abu Zubaydah, Jose Padilla, Binyam Mohamed, Mohammed al Qahtani and Khalid Shaykh Mohammed. Two of these individuals were considered to be of such extreme importance that they were subjected to the harshest technique of controlled drowning evoking death, otherwise known as waterboarding. Demonstrating the importance of these particular figures is that even following his presidency, Former President Bush still stands behind the value of the program of “enhanced interrogation techniques” that he authorized and claims he would even do it again.²¹ Most importantly for our purposes, what will be clearly seen through the tracing of the known facts relating to these six cases is that even when it came to dealing with the detainees considered to be the most valuable, the program at its highest rigour still pulled in the innocent and ill-informed, and thus not surprisingly amounted to arbitrary torture on suspicion.

Nonetheless, when it comes to discussing the ill-treatment of detainees in U.S. military or intelligence agency custody since September 11th there are regrettably numerous cases that can be explored. Today it is possible to find extensive official reports providing empirical data from U.S. Senate Committees,²² internal military reports,²³ Inspector General Reports from the Central Intelligence Agency (CIA)²⁴ and the Federal Bureau of Investigation (FBI),²⁵ the

²¹ BUSH, G., *Decision Points* (New York, Crown Publishers, 2010) at 168-71.

²² See e.g. Report of the United States Senate Committee on Armed Services, ‘Inquiry into the Treatment of Detainees in U.S. Custody’ (20 Nov 2008) 110th Congress, 2nd Session, available at: <http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf>.

²³ See e.g. The “Taguba Report” On Treatment Of *Abu Ghraib* Prisoners In Iraq, ‘ARTICLE 15-6 INVESTIGATION OF THE 800th MILITARY POLICE BRIGADE’ available at: <http://www.npr.org/iraq/2004/prison_abuse_report.pdf> (last visited Feb 2011); Church Report, Office of the Secretary of Defense Review of Department of Defense Detention Operations and Detainee Interrogation Techniques (7 March 2005) available at : <http://www.aclu.org/files/images/torture/asset_upload_file625_26068.pdf> and <<http://www.defense.gov/news/Mar2005/d20050310exe.pdf>> (last visited June 2010); and Schmidt-Furlow Report, ‘Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility’ (1 Apr 2005 [Amended 9 Jun 2005]) available at : <http://humanrights.ucdavis.edu/resources/library/documents-and-reports/schmidt_furlow_report.pdf> (last visited June 2010).

²⁴ Central Intelligence Agency Inspector General (CIA-IG 2004 Report hereinafter), ‘*Counterterrorism Detention and Interrogation Activities*’ (Sept 2001 – Oct 2003)’ (2003-7123-IG) (7 May 2004) available at the Homeland Security Digital Library : <<http://www.hsdl.org/hslog/?q=node/5015>> (last visited June 2010).

International Committee of the Red Cross (ICRC),²⁶ or investigative manuscripts from major book publishers.²⁷ All of these works detail prisoner abuse and sometimes death in both Afghanistan and Iraq, along with the ill-treatment and torture of a detainee in Guantánamo. There is also little doubt that a major U.S. news program broadcasting photographs which vividly and graphically exhibited prisoner abuse being carried out by U.S. soldiers in the Iraqi detention facility of Abu Ghraib brought this issue to the fore of citizens' minds and began to demonstrate the extensive nature of ill-treatment being meted out in the 'war on terror'.²⁸ However, this chapter will not attempt to detail the widespread abuse that infected nearly all parts of the U.S. detention system in the 'war on terror', but rather focus on just one particular aspect that can be established through the investigation of six high profile detainees. That specific characteristic is that torture must be carried out on suspicion, and not on certain knowledge, resulting in its arbitrary application. Thus it cannot serve to undergird an effective program seeking reliable intelligence information from the enemy.

The idea that using forceful coercion can and will be useful in gathering vital intelligence to save lives is certainly not new. A version of this argument, in one form or another, has been widely used by philosophers for some time now and today comes in the form of the "ticking bomb scenario".²⁹ This formulation of the question has now become quite popularized in the U.S. as the public learned about the use of abuse in interrogation at the onset of the 'war on terror'. Previously, we have even seen this scenario turn up in adjudication by the Supreme Court of Israel in 1999, where the Court largely accepted the

²⁵ Office of the Inspector General, 'A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq' (FBI-IG 2008 Report hereinafter) (May 2008) at 68, available at : <<http://www.justice.gov/oig/special/s0805/final.pdf>> (last visited June 2010).

²⁶ See e.g. Report of the International Committee of the Red Cross (ICRC 2004 Iraq Report hereinafter) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation (Feb 2004), available at <<http://www.cbsnews.com/htdocs/pdf/redcrossabuse.pdf>> (last visited Feb 2001); see also ICRC Confidential Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody (ICRC 2007 Confidential Report on "High Value Detainees" hereinafter), February 2007, Regional Delegation for the United States and Canada, available at: <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf> (last visited Feb 2011).

²⁷ For a superbly investigated early look into the questions of ill-treatment of major suspects in the 'war on terror' see MAYER, J., *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York, Doubleday, 2008) 369 pp.

²⁸ CBS *60 Minutes* broadcast the first report on the photos of abuse from Abu Ghraib. See LEUNG, R., 'Abuse Of Iraqi POWs By GIs Probed : 60 Minutes II Has Exclusive Report On Alleged Mistreatment' (28 April 2004) available at : <<http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>>.

²⁹ For a superior dissection of the various angles for argument in the 'ticking bomb scenario' see GINBAR, *Why Not Torture Terrorists?*, note 16 above.

premise and decided that it was only necessary to broach the subject from the point of view of a “necessity” versus a “justification” defense.³⁰ In that case the Court described this scenario,

[a] given suspect is arrested by the GSS [General Security Service]. He holds information regarding the location of a bomb that was set and will imminently explode. There is no way to diffuse the bomb without this information. If the information is obtained, the bomb may be neutralized. If the bomb is not neutralized, scores will be killed and injured. Is a GSS investigator authorized to employ physical means in order to obtain this information?³¹

The problems, presented as assumptions, that we find repeated in such a “ticking bomb” scenario are that we are *certain* the detained individual has the knowledge needed to diffuse the bomb, therefore we hold the correct *target* for torture, time is of the essence and so there is *immediacy*, and that severe *coercion* techniques will surely grant access to the required information.³² These are all immensely complicated questions to resolve in an isolated situation, but settling these difficulties to institute a program of ill-treatment is truly insurmountable. It should also be noted that presenting the circumstances in this manner attempts to make the question at stake wholly tactical, and in no way strategic. In other words, the question focuses attention only on a one-time scenario and ignores any further implications for a government involved in a larger campaign.

Importantly, there is an angle on this ticking bomb scenario that is less often stressed. This relates to the point that the application of torture on any person for gaining intelligence will inevitably be based on *suspicion*. The scenario is often presented in a manner that conceals the importance or centrality of this point. In a precursor of this scenario, but devoid of bombs, Jeremy Bentham put forward the philosophical question in the 19th century with a formulation that underscores the root of suspicion in this question. Bentham wrote,

Suppose an occasion, to arise, in which a *suspicion* is entertained, as strong as that which would be received as a sufficient ground for arrest and commitment as for felony—a *suspicion* that at this very time a considerable number of individuals are actually suffering, by illegal violence inflictions equal in intensity to those which if inflicted by the hand of justice, would universally be spoken of under the name of torture. For the purposes of rescuing from torture these hundred innocents, should any scruple be made of applying equal or superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was practicing or about to be practised, should refuse to do so? To say nothing of wisdom, could any pretence be

³⁰ *Public Committee Against Torture in Israel v. The State of Israel*, Israeli High Court of Justice, HCJ5100/94 (6 Sept 1999) at 30-5.

³¹ *Idem*, at 30-1.

³² For a very useful discussion of these problems found in the immediate context see GINBAR, *Why Not Torture Terrorists?*, note 16 above, at 119-31. Also see notes 17-20 above for citations spelling out these problems.

made so much as to the praise of blind and vulgar humanity, by the man who to save one criminal, should determine to abandon a 100 innocent persons to the same fate?³³

In this scenario formulated by Bentham we find that there is an explicit recognition that the intentional application of severe physical or mental pain or suffering would be inflicted on the grounds of *suspicion*. While Bentham acknowledges this would be a high level of suspicion by which a court would find it sufficient to convict the detainee, this element of speculation which is inherent to all such scenarios is often glossed over. Additionally it should be remembered that the level of evidence that would actually satisfy a court is one that can be quite diverse in different jurisdictions, and even differs with each judge and jury. Nevertheless, because we are speaking about what might or might not be found inside someone's mind, we are unavoidably discussing an unverifiable suspicion.

Suggesting that this judicial process can be bypassed, or that its outcome might be known in advance, ignores the underlying essence of the judicial system. Human rights law and many national constitutions require that a due process of law be fulfilled before any punishment is imposed on a detainee precisely because this is the best method that societies have developed to be able to exercise their monopoly on force legitimately. To give a brief sketch of what is at stake, Black's Law Dictionary defines the "due process of law" as follows,

[e]mbodied in the due process concept are the basic rights of a defendant in criminal proceedings and the requisites for a fair trial. These rights and requirements have been expanded by the Supreme Court and include, timely notice of a hearing or a trial which informs the accused of the charges against him or her; the opportunity to confront accusers and to present evidence on one's own behalf before an impartial jury or judge; the presumption of innocence under which guilt must be proven by legally obtained evidence and the verdict must be supported by the evidence presented; [...] protection against self-incrimination; assistance of counsel at every critical stage of the criminal process;³⁴

To dismiss this system at the outset of a government's engagement with a suspect, and to jump ahead (and beyond) to inflicting pain or suffering that is nearly always illegal in the constitutional order, is to wholly sacrifice individual liberty for the sake of national security. Therefore, it should not be surprising that short-circuiting the entire judicial process on the basis of suspicion is posited here as directly undermining the legitimacy of a government.

³³ BENTHAM, J., Mss Box 74.b, 429 (27 May 1804), cited in GINBAR, *Why Not Torture Terrorists?*, note 16 above, (my emphasis) at 357.

³⁴ BLACK, H.C., *Black's Law Dictionary: Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (6th edition) (St. Paul, Minn., West Publishing Co., 1990) at 501.

As such, in this chapter we shall delve into the facts that are known concerning the interrogation of six high profile detainees to address the sphere of empirical validity. Social science provides the most useful tools for ascertaining what techniques have or have not been effective in the past, but this discipline has been largely prevented from applying them to torture because governments have not allowed access to the raw data necessary for a full and objective assessment.³⁵ It is also the case that historians have not been able to locate any reports produced on torture's effectiveness for any government. As one thorough scholar on the subject has put it, "[t]hose who believe in torture's effectiveness seem to need no proof and prefer to leave no reports".³⁶ Due to the dearth of information on the subject, this chapter will rather focus on putting forward and analyzing the empirical data that has become available on the use of brutal interrogation methods implemented on six particular suspected terrorists in the 'war on terror'. Because the available facts and figures for all of the suspects captured and interrogated in this campaign are incomplete, and might likely always remain so considering the subject matter and the historical precedents, what will be presented here is the empirical evidence that torture has been applied on suspicion because, by its very nature, it has not been, and cannot be, confined to those knowledgeable of imminent attacks.

This is not to say that torture can never provide short-term tactical successes. When we look closely at the assumptions of who is in custody and that coercion can extract authentic intelligence, it is certainly possible that this could occur. However, it will most definitely not be carried out with any reliable accuracy as there will inevitably be cases in which these starting assumptions of who the detainee is and what is known were incorrect. Yet, just because it is arbitrary does not mean that there cannot be successes. Arbitrary torture will at times bring in valid intelligence because suspicions can and will be correct. However, to define a program as effective simply because there are moments when true information enters the system misses the point. It is incumbent on those who advocate the use of ill-treatment to prove that it is in some way a superior intelligence gathering method, and that its efficacy can be calculated. Demonstrating that torture is simply an adequate technique is clearly insufficient. The fact that proving torture to be superior has never been done, after centuries upon centuries of its use, is extremely telling. This is not to mention the fact that the absolute and non-derogable international prohibition on torture also speaks volumes to the available evidence of its efficacy, or better said its inefficacy. If there were conclusive empirical data showing its effectiveness, it is extremely hard to believe that there would be such an

³⁵ See REJALI, *Torture and Democracy*, note 14 above, at 521-523.

³⁶ *Idem*, at 522.

unmistakable international movement towards torture's prohibition without exception. Otherwise, this would suggest that all of these state actors are behaving irrationally.³⁷ This, of course, makes little sense.

The distinction that must be kept clearly in mind in this particular situation is that, when it comes to torture, assumptions are transformed into an operational justification for taking the investigative process into the minds of suspects through severe pain or suffering. Persons are callously turned into means for verification of the original assumptions.³⁸ That is to say, it is assumed that what is inside another's mind is somehow knowable and can be extracted. Through this empirical investigation it will become clear that there will inevitably be times when assumptions are incorrect, thus leading to an arbitrariness of the enterprise. This means that the innocent and those who are ill-informed will be periodically tortured, and it is of course impossible to argue that any such interrogation, torturous or not, will be efficacious. As a result, immeasurable damage will surely be wrought on the legitimacy of the policy and the government by such an arbitrary exercise of power.

In this chapter, we will begin by further presenting the legal side of the overlap with efficacy in Section II and analyze the "torture memos" that were issued by the Office of Legal Counsel in an attempt to cast the program as within the color of law. Through our analysis it will become clear that these memos were drafted with the intent of interpreting the international laws regarding torture, and by extension the domestic law passed as one of its treaty obligations, in a permissive manner to clear the way for the proposed policy. The feeble and flawed legal reasoning and the selective use of cited support will further lay the groundwork for the question of legality on this issue.

Section III will then offer a brief look at other instituted programs of ill-treatment to demonstrate the soundness of the methodology chosen here to address the sphere of empirical validity. Next, to cast a spotlight on the inefficacy of torture in a counterterrorism program as an intelligence gathering tool we will present the cases of Ibn al-Shaykh al-Libi, Abu

³⁷ This argument is meant to refute the facile assertion that we can assume torture works because states have employed it as a tactic for centuries. Posner and Vermeule suggest that states are not irrational actors, therefore there must be an efficacy of this tactic. POSNER, and VERMEULE, *Terror in the Balance*, note 10 above, at 195.

³⁸ Moral argument against such action that uses people as means can of course be traced back to KANT, I. *Fundamental Principles of the Metaphysic of Morals*, tr. Thomas Kingsmill Abbott (1829-1913), Second Section: Transition from Popular Moral Philosophy to the Metaphysic of Morals; As well, this moral argumentation was used by the German Federal Constitutional Court in 2006 to strike down a law that converted individuals into a means for fulfilling national security, and not an end in themselves. For a discussion of the decision in English see, LEPSIUS, O., 'Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-Transport Security Act' (2006) 7 German Law Journal 761; See also discussion of this judgment in Section IX below, as well as in Chapter 1, Section VII (3).

Zubaydah, Jose Padilla, Binyam Mohamed, Mohammed al Qahtani and Khalid Shaykh Mohammed in Sections IV through VIII. By presenting the empirical data from these cases we will see that not only was torture and ill-treatment inflicted on suspicion, it was at times done with dire consequences that were not just limited to the detainees themselves. Although it appears that some valid intelligence was gathered, particularly in the case of Khalid Shaykh Mohammed, this does not address the fact that since none of it was timely this inevitably means that other options were always available. Nor do correct suspicions make torture any less arbitrary.

In Section IX we will argue that since the hurdle of removing unverifiable suspicion from a torture program is insurmountable, the innocent and ill-informed will unavoidably be included in the torment. This will clarify the grounds upon which a narrow moral argument for a limited use of torture is put forward. That is to say, those who have argued that there are moments when using institutionalized torture on a detainee suspected of having a certain knowledge that will save many lives is the most moral choice have based their argument upon the assumption that we can definitively deduce who the detainee is, what exactly is known and that severe pain or suffering will extract this information in the least time possible. Importantly, the moral argument would need to be that this can be done over and over again in a program. By illuminating that torture in a government program must always be arbitrarily carried out on unverifiable suspicion, which is exactly what was done in the case of the six detainees in our investigation, we will find that the moral question becomes clarified.

Finally, in Section X we will present the conclusion that employing torture on suspicion undermines one's own strategic goals by unavoidably torturing those who are of no use for intelligence gathering. Since such a policy cannot meet the necessary requirements of *legality*, *morality* and *efficacy*, it also plays directly into the hands of those trying to target the legitimacy of a government by provoking an overreach of the exercise of force.

* * *

II. Legality – The Torture Memos

It was the legal interpretation employed by the lawyers of the Office of Legal Counsel, an office that assists the Attorney General in his function as legal adviser to the President and all the executive branch agencies, which provides evidence of the efforts by the Bush administration to legally justify harsh interrogation techniques. In what has become one of the most highly publicized and politically damaging aspects of the 'war on terror', a series of

memoranda were authored inside the administration concerning the question of limitations on coercive interrogations, and they have become known as the “torture memos”.³⁹ Those that fall under this name are primarily from the Office of Legal Counsel (OLC) which provides interpretations of law that are legally binding on the Executive Branch and have been claimed to effectively, “immunize officials from prosecutions for wrongdoing”.⁴⁰ While a comprehensive analysis of all of these legal documents is not within the scope of this particular study, there is a vital significance that can indeed be discerned for our questions of legitimacy and international law. Even a cursory reading of these memos reveals the extent to which any discussion of torture demanded a reference to international legal norms. Chapter 3, Section V provides an overview of the international law on torture, and it has become integral to the domestic debate on legitimacy of the exercise of government power. Most importantly, the Bush administration saw itself as obliged to analyze its own policies through international legality since the Convention Against Torture required this prohibition become a part of domestic law. It is therefore reasonable to conclude that average citizens too were going to be concerned that counterterrorism policies align with this applicable law. Thus through these torture memos we will see that international law has become intricately intertwined with the rule of law and the constraints on the legitimate use of force.⁴¹

One of the most comprehensive accounting and legal analyses of these memos and their drafting can be found in a report by Justice Department’s Office of Professional Responsibility (OPR) released to the public in February of 2010.⁴² This report was the product of a five year investigation into the memos produced by the OLC concerning “enhanced interrogation techniques” (EITs). The original torture memos themselves were written in response to a specific request from the Central Intelligence Agency in relation to the detention

³⁹ See e.g. COLE, D., ed., *The Torture Memos* (New York, The New Press, 2009) 304 pp; and GREENBERG, K., and DRATEL, J. *The Torture Papers: The Road to Abu Ghraib* (Cambridge, Cambridge University Press, 2005) 1242 pp.; See also GOLDSMITH, J., *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York, W.W. Norton & Co., 2007), at 142.

⁴⁰ *Idem*, GOLDSMITH, *The Terror Presidency*, at 150. This idea that the OLC opinions possess such an awesome power to legally protect those who rely on them is indeed contentious. Cf. New York attorney known for his work in human rights law, Scott Horton, “[s]o can the OLC memos really shield the actors here? If you believe the analysis of the torture memoranda themselves, you’ll believe that too, because you guzzle legal Koolaid. If you have retained your analytical faculties, you’ll say “no way.” The argument that Mukasey [and Goldsmith] makes isn’t consistent with the most fundamental rule of our legal system: the rule of law”, ‘Golden Shield or Achilles Heel?’, Talking Points Memo, 26 Nov 2008, available at : <http://tpmcafe.talkingpointsmemo.com/2008/11/26/golden_shield_or_achilles_heel/>.

⁴¹ For a valuable work on the vital link between the ‘rule of law’ and terrorism see BERNARD, F., *L’Etat de droit face au terrorisme* (Genève, Schulthess Médias Juridiques SA, 2010) 377 pp.

⁴² U.S. Department of Justice, Office of Professional Responsibility (Final) Report, *Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists* (July 29, 2009) available at : <http://judiciary.house.gov/issues/issues_OPRReport.html>.

and treatment of Abu Zubaydah in 2002.⁴³ Their task at the OPR was to assess whether the lawyers involved in drafting and signing these official memos had failed in their professional duties. This office receives allegations against Department of Justice attorneys that can come from a variety of different sources, and then it is up to the office to independently determine whether a full investigation is warranted. In October of 2004, in the wake of the public broadcasting of prisoner abuse photos from Abu Ghraib detention center in Iraq and the leak to the press of one of the central memos authorizing these ‘enhanced techniques’, the OPR launched a full investigation into all of the memos that found certain abusive interrogation techniques to be legally authorized.

It was during the presidency of Ronald Reagan that the United States first signed the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment treaty (CAT)⁴⁴ in April of 1988. In his message to the Senate in view of receiving advice and consent for ratifying the treaty, President Reagan explained his administration’s understanding of the obligations of the treaty stating, “[t]he core provisions of the Convention establish a regime for international cooperation in the criminal prosecution of torturers relying on so-called ‘universal jurisdiction,’” and that all parties who undertake the treaty are “required either to prosecute torturers who are found in its territory or to extradite them to other countries for prosecution”.⁴⁵ Hence we see that the Reagan administration interpreted the torture treaty to indeed create real obligations for state parties to the treaty, and even made specific reference to the sometimes controversial concept of ‘universal jurisdiction’.⁴⁶ The Senate passed the treaty in October of 1990, and when the U.S. officially ratified the CAT treaty it registered a reservation highlighting a distinction made in the treaty between torture (Article 1) and cruel, inhuman and degrading treatment (Article 16). The reservation stated,

[t]hat the United States considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment,’ only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual

⁴³ For a full discussion on the case of Abu Zubaydah see Section IV below.

⁴⁴ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1952, entered into force 26 June 1987) 1465 U.N.T.S. 85 (CAT Treaty hereinafter).

⁴⁵ U.S. signs UN convention against torture, MESSAGE TO THE SENATE, MAY 20, 1988, sup.1, available at : <http://findarticles.com/p/articles/mi_m1079/is_n2137_v88/ai_6742034/>.

⁴⁶ See e.g. KISSINGER, H., ‘The Pitfalls of Universal Jurisdiction’ (July/Aug 2001) 80 *Foreign Affairs* 86; Cf. ROTH, K., ‘The Case for Universal Jurisdiction’ (Sept/Oct 2001) 80 *Foreign Affairs* 150; and cf. COLANGELO, A., ‘The Legal Limits for Universal Jurisdiction’ (2005) 47, 1 *Virginia Journal of Int’l Law*.

and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.⁴⁷

This reservation points to one of the initial ways, among others,⁴⁸ that lawyers in the Bush administration argued for the legality of implementing aggressive interrogation techniques against those suspected to be members of al-Qaeda.

In memoranda authored by Justice Department lawyers working in the OLC,⁴⁹ the concept of two different forms of ill-treatment was treated to the point of exploitation. By explaining there to be a notable space between the two forms of ill-treatment, and then claiming that the United States was not treaty bound to refrain from the lesser forms of abuse, these attorneys claimed there to be a loophole. To arrive at such a conclusion it was argued that the U.S. domestic statute required by Article 4 of the CAT to legislate torture as a criminal offense in national law (§2340)⁵⁰ was the proper standard to begin to analyze the nation's obligations. One of the memos remarked that what mattered was that methods comply only with the domestic statute because "[w]hen it acceded to the Convention, the United States attached to its instrument of ratification a clear understanding that defined torture in the exact terms used by §2340".⁵¹ Hence we do find that the U.S. reservation provided these lawyers an opening for an internal domestic interpretation of certain types of ill-treatment as ungoverned by treaty obligations. Reference to this reservation was put forward, along with opinions of the Reagan and first Bush administrations regarding the treaty, and the final result of their analysis was that the U.S. international legal duties were only relating to torture and *not* cruel, inhuman and degrading treatment. These lesser forms of maltreatment were instead governed by U.S. constitutional jurisprudence, and not the CAT treaty under Article 16.

⁴⁷ U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. I(2), Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990), available at : The Library of Congress, THOMAS < <http://thomas.loc.gov/cgi-bin/ntquery/z?trty:s:100TD00020>>.

⁴⁸ The other primary argument was "specific intention", which will not be treated in this work.

⁴⁹ The two first documents leaked into the public sphere were Memorandum from Jay Bybee, Assistant Attorney General, to Counsel to the President (1 Aug 2002) *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 230-2340A*, (Bybee Memo, *Re: Standards of Conduct* hereinafter); and Memorandum from John Yoo, Deputy Assistant Attorney General, to Counsel to the President (1 Aug 2002) *Re: Letter regarding "the views of our Office concerning the legality, under international law, of interrogation methods to be used on captured al Qaeda operatives"*, reprinted in *The Torture Papers* at pp. 172-217 and pp. 218-222 respectively.

⁵⁰ 18 U.S.C. §§ 2340-2340A.

⁵¹ Memo from Yoo, 'Letter Regarding...', note 49 above, at 220.

1) The Bybee Memo

Perhaps the most infamous communication in this series is known as the Bybee Memo, entitled *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, though it was largely drafted by John Yoo and only signed by Jay Bybee.⁵² It was the wake of the horrifying and shocking photos of detainee abuse in the Iraq detention facility of Abu Gharib that drove the leak in June of 2004 of this particular memo.⁵³ After the appalling images of widespread prisoner abuse by U.S. soldiers and contractors hit the airwaves and newsstands, citizens of the United States began to piece together what had been reported in the nation's leading newspapers since late 2002, and at times on their front pages.⁵⁴ That is, a realization started to dawn that a different type of interrogation regime had been instituted and now governed the questioning of detainees in the global 'war on terror'. With this national wince towards prisoner abuse in the face of incontrovertible photographic evidence, someone inside the government leaked the Bybee Memo to the press which sent out a signal that the coincidence between the treatment of detainees in Iraq and other reports from the 'war on terror' had a common thread.

The reaction from commentators, law professors and others in the legal community was highly critical of the level of professional work found in the Bybee Memo. Dean of the Yale Law School Harold Koh, a former member of the OLC during the Reagan administration and currently serving as the Legal Adviser of the Department of State in the Obama administration, said on record, "in my professional opinion as a law professor and a law dean, the Bybee memorandum is perhaps the most clearly legally erroneous opinion I have ever read".⁵⁵ In a New York Times article just after the leak of this memo assessing the reaction by the legal community, a law professor at the University of Chicago said, "[i]t's egregiously

⁵² Bybee Memo, *Re: Standards of Conduct for Interrogation*, note 49 above. For evidence of J. Yoo being the actual author of this memo see Final OPR Report, *Investigation into the Office of Legal Counsel's Memoranda...*, note 42 above, at 1; see also GOLDSMITH, J., *The Terror Presidency*, note 39 above, "according to press reports and John Yoo's public comments, it was drafted by Yoo himself", at 142.

⁵³ PRIEST, D., 'Justice Dept. Memo Says Torture "May Be Justified"' *The Washington Post* (13 June 2004) available at : <<http://www.washingtonpost.com/wp-dyn/articles/A38894-2004Jun13.html>>. This was the first public disclosure of the full OLC memo written by Yoo and signed by Bybee, 1 Aug 2002. This was just six weeks after the CBS '60 Minutes' first broadcast of the photos of abuse from Abu Ghraib, note 28 above.

⁵⁴ See PRIEST, D., and GELLMAN, B., 'US Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities' *The Washington Post* (26 Dec 2002) pg. A01, available at : <<http://www.washingtonpost.com/ac2/wp-dyn/A37943-2002Dec25?language=printer>>; and VAN NATTA, D., 'Questioning Terror Suspects in Dark and Surreal World' *New York Times* (9 March 2003) available at : <<http://www.nytimes.com/2003/03/09/world/threats-responses-interrogations-questioning-terror-suspects-dark-surreal-world.html?pagewanted=1>>.

⁵⁵ This statement was made before the U.S. Senate and was cited in DEAN, J., 'The Torture Memo By Judge Jay S. Bybee That Haunted Alberto Gonzales's Confirmation Hearings' *Find Law* (14 Jan 2005) available at : <<http://writ.news.findlaw.com/dean/20050114.html>> .

bad. It's very low level, it's very weak, embarrassingly weak, just short of reckless".⁵⁶ Another article struck directly at the legal ethics involved in writing a memo that the author knows is not going to ever be reviewed by an independent judiciary and at the same time create legal limits for the executive to follow. According to the article's authors, this very distinct circumstance requires a presentation of all differing views on the law. To elucidate this unique situation of the OLC, professors Kathleen Clark and Julie Mertus wrote,

[w]e often think of lawyers as advocates, such as courtroom lawyers who make zealous arguments that may or may not convince a judge. But the Department of Justice lawyers who wrote the memo on interrogation and torture were acting as advisers. As such, their responsibility was to advise their "client," the executive branch, as to what the law requires.⁵⁷

With this basic outline of what was required of the OLC attorneys, Clark and Mertus found that the authors of the Bybee Memo, "essentially said the president could authorize torture even though our laws and treaties prohibit it" and these attorneys, "reached this conclusion, quite simply, by distorting the law".⁵⁸ While not all of the criticism was as harsh, the overall reaction of the legal community was indeed negative.⁵⁹ Best capturing this mood was a letter signed by nearly 130 lawyers, retired judges, law school professors and a former director of the FBI condemning the released memoranda and calling for an investigation into the possible connections between the OLC opinions and the detainee abuse evidenced at the Abu Ghraib prison facility.⁶⁰

A) An Inapposite Health Care Statute

One major flaw in the Bybee Memo is that it analyzes an obscure and inapposite federal statute of 2000 which addressed health care benefits as an attempt to shed further light upon the legal meaning of the critical phrase "severe pain".⁶¹ The reasoning for this was that if the meaning of torture could be raised to an extremely high level of pain and suffering, then this would allow for other tactics that do not reach this threshold to be used. This particular choice

⁵⁶ LIPTAK, A., 'Legal Scholars Criticize Memos on Torture' *New York Times* (25 June 2004) available at : <<http://www.nytimes.com/2004/06/25/politics/25LEGA.html?pagewanted=1>>.

⁵⁷ CLARK, K., and MERTUS, J., 'Torturing the Law: The Justice Department's Legal Contortions on Interrogation' *The Washington Post* (20 June 2004) pg. B03, available at : <<http://www.washingtonpost.com/wp-dyn/articles/A54025-2004Jun19.html>>. For a furthering of this argument, see also CLARK, K., 'Ethical Issues Raised by OLC Torture Memorandum' (Winter 2005) 1, 2 *Journal of National Security Law and Policy* 455.

⁵⁸ *Idem*.

⁵⁹ Cf. one of the few articles supporting the legal analysis found in the Bybee Memo, POSNER, E. and VERMEULE, A., 'A "Torture" Memo and Its Tortuous Critics' *Wall Street Journal* (Eastern edition)(6 Jul 2004) pg. A.22, available at : <<http://www.ericposner.com/torturememo.html>>.

⁶⁰ HIGHAM, S. 'Law Experts Condemn US Memos on Torture' *Washington Post* (5 Aug 2004) pg. A04.

⁶¹ Bybee Memo, *Re: Standards of Conduct for Interrogation*, note 49 above, at 176.

to try to bolster a decisive legal opinion has been severely criticized, even by conservative colleague Jack Goldsmith that followed as head of the OLC for the Bush administration.⁶² Goldsmith openly disparaged the choice of this health care statute, saying it made no sense because “it had no relationship whatsoever to the torture statute”. He found it to be a “clumsy definitional arbitrage [that] didn’t seem even in the ballpark”.⁶³ The application of these unrelated statutes led the OLC lawyers to conclude that torture only occurred in the narrowest of circumstances with a focus only on when there is medically identifiable damage. The infamous result that drew worldwide attention when this memo was leaked to the press was that torture, “as defined and proscribed [...] covers only extreme acts. Severe pain is generally of the kind difficult to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure”.⁶⁴ Very worrisome is the fact that the Office of Professional Responsibility Report found that reliance upon this unrelated statute “provided little or no support for the conclusion that ‘severe pain’ in the torture statute must rise to the level of pain associated with ‘death, organ failure, or serious impairment of body functions’”.⁶⁵ Hence the OPR found that even applying this inapposite law should not have led Yoo to the drastic conclusions he put forward concerning ‘severe pain’. As such, nearly all processes of ‘clean torture’, or coercive techniques designed to leave little or no trace that a detainee had been physically or mentally pressured during interrogation,⁶⁶ would not fall under the OLC’s definition of torture. Although the memo certainly did not refer specifically to ‘clean torture’, it explicitly stated that, “there is a wide range of such techniques that will not rise to the level of torture”.⁶⁷

B) CAT Negotiating History

One of the more odd, if not simply troubling, components of this memo is the authors’ reading of the CAT treaty itself. It is argued that the negotiating history of the treaty, along with the U.S. ratification history, clearly show that the intention of the treaty was to apply to only the most absolutely heinous of abusive treatment. To demonstrate this point, Bybee and Yoo indicate examples of how there was specific attention during the drafting of the treaty to distinguish torture as an aggravated form of cruel, inhuman and degrading treatment. The

⁶² GOLDSMITH, *The Terror Presidency*, note 39 above, at 141-176.

⁶³ *Idem*, at 145.

⁶⁴ Bybee Memo, *Re: Standards of Conduct for Interrogation*, note 49 above, at 213-4.

⁶⁵ Final OPR Report, *Investigation into the Office of Legal Counsel’s Memoranda...*, note 42 above, at 184.

⁶⁶ For a superior scholarly work tracing the rise of ‘clean torture’ methods in the second half of the 20th century, particularly in democracies, see REJALI, *Torture and Democracy*, note 14 above.

⁶⁷ Bybee Memo, *Re: Standards of Conduct for Interrogation*, note 49 above, at 173.

commentary to the treaty certainly shows that the *travaux préparatoires* included an effort by many states to distinguish between the two types of treatment.⁶⁸ But it is also true that the United States effort to entirely exclude the less severe forms of ill-treatment was in fact defeated and these were explicitly included in Article 16, meaning that the final treaty still included, “the obligation to *prevent* other forms of ill-treatment”.⁶⁹ Yet, significant attention is put on this distinction,

CAT thus establishes a category of acts that are not to be committed and that states must endeavour to prevent, but that states need not criminalize, leaving those acts without the stigma of criminal penalties. CAT reserves criminal penalties and the stigma attached to those penalties for torture alone. In doing so, CAT makes clear that torture is at the farthest end of impermissible actions, and that it is distinct and separate from the lower level of “cruel, inhuman, or degrading treatment or punishment”.⁷⁰

However, the obvious problem here is that just because torture can and should be categorized into its own class of treatment does not mean that somehow this creates a gap between it and the less egregious forms of ill-conduct. It is wholly natural and necessary that the drafters of the CAT distinguished the behavior of torture that is explicitly defined in its Article 1 for the first time in international law. This is the only way to criminalize torture as a specific act. Perhaps most problematic is how the work to give precise shape to the prohibition of government sanctioned severe abuse was twisted to somehow permit certain forms of violence against detainees.

The OPR final report also raised an issue concerning the treatment of the U.S. ratification history of the CAT treaty in the Bybee Memo.⁷¹ Yoo put a large focus on the Reagan administration’s submission to the Senate which equated “severe pain” with that which is “excruciating and agonizing”. However, this language was specifically changed before ratification largely due to the fact that the first Bush administration, along with the voting Senate, wanted it removed in response to criticism that the U.S. would be raising the standard to one that is different than the international definition and could be seen as establishing too high a threshold. Yet, the importance of this change was downplayed by the memo’s authors as merely rhetorical, and they inexplicitly maintained that it was legally proper to continue to equate ‘severe’ and “excruciating and agonizing” as substantially equivalent despite its explicit removal.

⁶⁸ NOWAK, and McARTHUR, *The UN CAT: A Commentary*, note 2 above, at 539-40.

⁶⁹ *Idem*, (original emphasis) at 539.

⁷⁰ Bybee Memo, *Re: Standards of Conduct for Interrogation*, note 49 above, at 185.

⁷¹ Final OPR Report, *Investigation into the Office of Legal Counsel's Memoranda...*, note 42 above, at 184-6.

All of this certainly raises real problems when this interpretation of the CAT is viewed through the Vienna Convention of the Law of Treaties (VCLT). The very first section of the treaty treating the question of interpretation, Article 31(1), deals directly with the reading of treaties in a way that is contradictory to a pact's *object and purpose*. It reads, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its *object and purpose*”.⁷² The International Court of Justice has indeed ruled on this very issue in its 1959 advisory opinion when the Court looked to the purpose of the treaty that created the Maritime Safety Committee to arrive at its findings for the opinion.⁷³ Additionally, the VCLT of course speaks to the issue of reservations to a treaty. States are certainly entitled to register a reservation to a treaty at the time of acceptance, signing, ratification or acceding to the instrument *unless* “the reservation is incompatible with the *object and purpose* of the treaty”.⁷⁴ Thus the reading by Bybee and Yoo found in this memo is quite problematical since it claims that, “[e]ven the negotiating history displays a recognition that torture is a *step far-removed* from other cruel, inhuman or degrading treatment or punishment”.⁷⁵ This formulation certainly attempts to open a space between the two kinds of violent action in direct contradiction to the plain language of the convention, the failed attempt by the U.S. to exclude the lesser forms of ill-treatment from the treaty,⁷⁶ and indeed its very title.

In the same vein, it is an explicit overreach for lawyers or judges to read beyond the plain language of a statute if its clear meaning can be taken from the words themselves. The U.S. Supreme Court ruled on the need to interpret the language of statutes with their plain meaning in *Caminetti v. United States* where it said, “[w]hen the language of a statute is plain and does not lead to absurd or impracticable results, there is no occasion or excuse for judicial construction; the language must then be accepted by the courts as the sole evidence of the ultimate legislative intent, and the courts have no function but to apply and enforce the statute accordingly”.⁷⁷ In this case, John Yoo came to the remarkable conclusion that the language of “severe physical or mental pain or suffering” was somehow ambiguous and thus needed their own (distorting) interpretation. This phrasing could be described as vague, primarily because the jurisprudence on this question is only starting to develop and proliferate. However it is

⁷² *Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 Jan 1980) 1155 UNTS 331, Art. 31 (my emphasis).

⁷³ Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, ICJ Advisory Opinion of 8 June 1960, General List No. 43 (1959-1960).

⁷⁴ *Vienna Convention on the Law of Treaties*, note 72 above, Art. 19.

⁷⁵ Bybee Memo, *Re: Standards of Conduct for Interrogation*, note 49 above, at 191 (my emphasis).

⁷⁶ NOWAK, and McARTHUR, *The UN CAT: A Commentary*, note 2 above, at 539.

⁷⁷ 242 U.S. 470 (1917) at 242.

unreasonable to suggest that the plain meaning is obscure. Severe pain is something that anyone who has given birth, broken a bone or been kicked in the groin can understand without legal interpretation. As such, it is at the very least misleading to suggest that “severe pain or suffering” has a meaning beyond the comprehension of common citizens and can only be discerned by trained lawyers.

It is suggested by this author that, in light of the object and purpose of creating a prohibition of harsh treatment through the codification found in the CAT treaty, the series of terms defining abuse are much better understood as a an unbroken continuum with torture holding the most severe criminal punishment because a serious threshold of brutality has been passed. The notion of a “step far-removed” between the two types of ill-treatment would simply and clearly contradict the ordinary meaning of the plain language of the treaty’s title, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The convention, by its very title, is clearly meant to prohibit all of the listed categories of ill-treatment, not just torture. Thus to hoist the definition of torture to the exceptionally high level of physical pain that “accompanies serious physical injury such as death or organ failure”,⁷⁸ (a standard that only the dead and very few living can actually know) and then to interpret away any treaty obligation to refrain from lesser forms of abuse because of a reservation attached by the U.S. to the CAT, resulted in grave questions of the state’s undermining the object and purpose of the convention. The U.S. position on its obligations under this treaty, as a result of the Bybee Memo, can be largely summed up in one sentence found in its conclusion, “[b]ecause the acts inflicting torture are extreme, there is a significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture”.⁷⁹

C) “Pain or Suffering”

Another form in which the Bybee Memo attempts to confuse the matter of torture is by providing a reading of both the domestic statute and the CAT treaty that simply asserts (without citing any legal authorities) that there was no intention to legally distinguish between two different terms employed in the torture law itself. Both §2340 and the international torture convention use the language of causing severe “pain OR suffering” (my emphasis). However, we find in this memo there is a frequent usage of the phrase “pain AND suffering” (my emphasis), which is justified in one footnote at the end of the sentence, “[t]hese statutes

⁷⁸ Memo, *Re: Standards of Conduct for Interrogation*, note 49 above, at 191 (my emphasis) at 214.

⁷⁹ *Idem*.

suggest that ‘severe pain,’ as used in Section 2340, must rise to a similarly high level – the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions – in order to constitute torture”.⁸⁰ As we see in this sentence there is no reference to ‘suffering’ whatsoever. The explanation for this comes in the attached footnote explaining that it is believed that the best reading of the prohibition is to view the two terms as one single concept. Support for this understanding oddly relies on a comparison to “severe mental pain or suffering”, yet there is a conspicuous legal problem with the reading of ‘physical’ and ‘mental’ torture together. In the domestic statute §2340, which is relied upon here, there is a separate and distinct meaning of “severe mental pain or suffering” that defines it as “prolonged mental harm”.⁸¹ That is to say that duration is a key legal aspect of mental suffering. Another critical memo by the same authors on the very same day (1 August 2002) that remained classified until 2009 suggests,

Even if one were to parse the statute more finely to attempt to treat "suffering" as a distinct concept, the waterboard could not be said to inflict severe suffering. The waterboard is simply a controlled acute episode, lacking the connotation of a *protracted* period of time generally given to suffering.⁸²

The reason why this reading is so problematic is because it ignores a basic rule of statutory construction; *expressio unius est exclusio alterius*. That is, mention of a requirement in one place, excludes it from the others. Put another way, the express mention of a qualification in one part of a statute, excludes it in all other sections of the law. The fact that the U.S. Congress explicitly defined mental torture by including reference to its duration (i.e., prolonged), means that you simply can not read this same requirement into a separate part of the statute. The lawyers cut this duration requirement for ‘physical suffering’ from whole cloth because it is undoubtedly not in the U.S. domestic law, nor is it to be found anywhere in international law.

To complete the fusing of two distinct terms, the footnote in the first leaked Bybee Memo put forward,

[f]urther, even if we were to read the infliction of severe physical suffering as distinct from severe physical pain, it is difficult to conceive of such suffering that would not

⁸⁰ *Ibid.*, at 176.

⁸¹ 18 U.S.C. § 2340.

⁸² Signed by BYBEE, J. and authored by YOO, J., ‘Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency: Interrogation of al Qaeda Operative’, (Classified Bybee Memo hereinafter) at 11 (my emphasis). This memo relates to the legality of specific techniques requested by the CIA to be used against Abu Zubaydah, all of which were found to be legal, and was only released in full by the Obama administration in April of 2009. Available at: <http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_08012002_bybee.pdf>. For fuller analysis of the memo see Section IV, 3.

involve severe physical pain. Accordingly, we conclude that “pain or suffering” is a single concept within the definition of Section 2340.⁸³

Yet, there is indeed an important difference in the meaning that should be noted between the terms ‘pain’ and ‘suffering’, and thus the use of the term “or” in the international and domestic legislation is surely consequential and deliberate. Yoo and Bybee suggest that it is “difficult to conceive of physical suffering that would not involve pain”. However, if we think about the feelings endured under insufferable heat, freezing cold weather, an intolerable itch, persistent nausea or the inability to breathe, it is easily possible to conceive of suffering that does not necessarily include pain. Of course, the inability to breathe directly relates to the suffering (and perhaps also pain) that one bears when subjected to the controlled drowning (or suffocation) evoking death, now commonly known as waterboarding.

D) Highly Qualified, yet Incompetent?

It is useful to point out that this classified legal analysis was put forward by a distinguished law professor with sterling credentials from a reputable university (John Yoo from the University of California Law School at Berkley), and a now sitting federal judge with a lifetime appointment on one of the highest courts in the United States (Jay Bybee of the Court of Appeals for the Ninth Circuit). So this assertion that “it is difficult to conceive” that it is possible to have suffering without overt pain that we have endeavoured to debunk without serious difficulty raises an important question. How is it possible for such highly qualified lawyers who have arrived at the upper echelons of the U.S. legal community to make such facile assertions that can be so easily questioned? Were these attorneys incompetent, or were they making intentionally disingenuous arguments for the sake of person(s) they saw to be their client?⁸⁴

This is the primary question that the Office of Professional Responsibility tried to resolve in its 261 page report which was released to the public in 2010. The OPR concluded that the legal work by John Yoo for the memos under discussion demonstrated, “intentional professional misconduct when he violated his duty to exercise independent legal judgment

⁸³ *Idem*, at 176-177 note 3.

⁸⁴ The question of who exactly was their client is an important one. Was their client the President himself, or the people of the United States? Yoo and Bybee worked for the separate and independent Justice Department and the President has his own counsel to advise him. In the both of the first two drafts of the OPR report (also available at: <http://judiciary.house.gov/issues/issues_OPRReport.html>, last visited 5 March 2010), it was explicitly stated in the conclusion that Yoo and Bybee had failed to meet their responsibilities “to provide competent representation to their client, the United States” (at 190 and 201 respectively). However, in the final draft this explicit language was abandoned and there was no mention of to whom their “independent legal judgment” (which the OPR found not to exist) was to be directed.

and render thorough, objective, and candid legal advice.”⁸⁵ However, this conclusion was not accepted by the Assistant Attorney General, David Margolis. It was incumbent upon Margolis to either accept or reject the conclusions of the OPR and give final validity to its conclusions. Legal ethicist David Luban lucidly wrote about the final decision in an article entitled ‘Margolis Is Wrong’. In it he wrote,

The focus of OPR’s investigation is two memos from Aug. 1, 2002. They were written in secrecy by John Yoo and an assistant in the Office of Legal Counsel whose name is redacted. Bybee, as head of OLC, signed off on the memos. [...] The question for OPR was whether Bybee and Yoo had violated ethics rules by twisting the law to the breaking point to give CIA operatives maximum assurance and leeway. Both the OPR report and Margolis agree that (in Margolis’ understatement) “these memos contain some significant flaws.” There they part company. The OPR report finds that Yoo and Bybee violated two rules of professional conduct: Rule 1.1, requiring competence, and Rule 2.1, requiring lawyers to “exercise independent professional judgment and render candid advice.” Margolis rejects OPR’s analysis and concludes that “poor judgment” rather than professional misconduct “accounts for the entirety of Yoo’s work” on the torture memos.

But that’s not the right characterization for memos that used extravagant legal reasoning to approve torture. It’s like saying that Iago’s advice to Othello showed poor judgment. OPR made a powerful case against Bybee and Yoo. In response, Margolis went after OPR like a defense lawyer, upped the burden of proof beyond what the ethics rules require, and minimized the liberties that Yoo and Bybee had taken with the law.⁸⁶

At the same time, human rights lawyer Scott Horton explained that the final decision by Margolis should be understood as a *political* document that bowed legal ethics to what were seen as political necessities.⁸⁷

Nonetheless, the OPR itself found that Jay Bybee committed professional misconduct when he acted in “reckless disregard of his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice.”⁸⁸ To reach these severe conclusions on the professional effort, or lack thereof, of these two attorneys while in the OLC it was necessary for the OPR to dig deep into the drafting of these memos concerning the legality of interrogation techniques. As such, the central task of the OPR work was to demonstrate that Yoo and Bybee had knowingly and wilfully distorted the legal conclusions to provide a desired result for the White House. While the Assistant Attorney General, David Margolis,

⁸⁵ OPR (Final) Report, *Investigation into the OLC’s Memoranda*, note 42 above, at 260.

⁸⁶ LUBAN, D., ‘Margolis Is Wrong: The Justice Department’s ethics investigation shouldn’t leave John Yoo and Jay Bybee home free’ (22 Feb 2010) *Slate.com*, Jurisprudence: The Law, Lawyers and the Court, available at: <<http://www.slate.com/id/2245531/pagenum/all/#p2>>.

⁸⁷ HORTON, S., ‘The Margolis Memo’ (Feb 2010) *Harper’s Magazine*, available at: <<http://www.slate.com/id/2245531/pagenum/all/#p2>>.

⁸⁸ OPR (Final) Report, *Investigation into the OLC’s Memoranda*, note 42 above, at 260.

did not accept the most grave conclusions of this report in 2010, which would have required a notification to the bar counsel of the states where they hold their license for consideration of reprimand up to and including disbarment, it was decided that the report, including two initial drafts, would be released in their near entirety to the public. Since it was indeed the conclusion of the OPR that Yoo's distortion of the law was "intentional" and that Bybee had acted in "reckless disregard of his duty", this report serves as a commanding legal analysis of the intentions behind their work. Of course, this needs to be juxtaposed against the conclusions of Margolis, who despite the downgrading of the admonishment still concluded that,

my decision not to adopt OPR's misconduct finding should not be misread as an endorsement of the subjects' efforts. [...] the unclassified Bybee memo consistently took an expansive view of executive authority and narrowly construed the torture statute while often failing to expose (much less refute) countervailing arguments and overstating the certainty of its conclusions.⁸⁹

To attempt to resolve the different conclusions of the OPR and Margolis is certainly not within the scope of this work. However, there is explicit indication that full release of the report and memos was so that, "the number of flaws and the significance of them can be debated".⁹⁰ As well, Margolis also put forward that, "OPR's findings and my decision are less important than the public's ability to make its own judgments about these documents and to learn lessons for the future",⁹¹ indicating that further debate is both warranted and welcome. As such, one final point will be made regarding the Bybee Memo, in addition to the many defects and distortions that have been already pointed out in this section which are surely grave and disturbing flaws.

To assess the conclusion of the report it is necessary, and of course very difficult, to know what these men were thinking in order to prove intentionality. Thus this must be inferred through their conduct as subjective intent requirements are normally satisfied. The OPR presented a very strong case by demonstrating that there was a consistent pattern in the Bybee Memo of twisting every possible angle to conclude that the CIA could employ extremely abusive techniques, which was combined with the absence of any acknowledgement of weaknesses within the argument. And Margolis concluded that in the

⁸⁹ MARGOLIS, D., U.S. Department of Justice, *Memorandum of Decision Regarding the Objections to the Findings Of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of Enhanced Interrogation Techniques" on Suspected Terrorists* (5 Jan 2010) at 68, available at : <http://judiciary.house.gov/issues/issues_OPRReport.html>.

⁹⁰ *Idem*, at 67.

⁹¹ *Ibid.*, at 67-8.

end it was indeed a “close question” whether Yoo had “intentionally or recklessly provided misleading advice to his client”.⁹²

Yet for Margolis to speak of “stellar backgrounds” in reference to Yoo, and which is evidenced by both of their professional accomplishments discussed above, raises a significant problem. If these men deserve the high status in the legal community that they have achieved (which Margolis recognizes in his own memo), then it would not be possible for them to issue such patently skewed and narrow memos without recognizing what they were doing. This result can be read in one of two ways: 1) either both Yoo and Bybee rose to an unmerited high status in the legal community of the U.S. because their incompetence had remained well hidden for their entire careers; or 2) that there was an intentional attempt to mislead their audience (not necessarily their client) and distort the law. Since it is not possible to be both highly qualified and incompetent at the same time, these are mutually exclusive possibilities. It is highly unlikely, if not impossible, that two different men were able to successfully hide their incompetence from a host of decision makers involved in the series of high-level promotions throughout their careers which took them to the OLC (a post that should be equated to working in one of the most elite law firms in the country) at the very same point in history when requests for “enhanced interrogation techniques” were being made by the CIA and seriously discussed as policy within the White House. Therefore, the second option of intentional misconduct is much more likely. Lawyers are trained to construct, as well as recognize, the strongest arguments of which they are capable. For competent, educated attorneys to be unable to see the string of weaknesses that are found in the memos without addressing them is absurd. Therefore it is this author’s opinion that John Yoo and Jay Bybee were fully aware of the frailty of their work, when they submitted it to policy makers who would use it to justify aggressive interrogations and torture, and they relied on the memos remaining classified to shield them from scrutiny.

2) The Bradbury Memos

This is where the interpretation of the legal obligations under the CAT stood as of August 2002, and it was under this legal regime that the most severe consequences from abusive interrogations began. The most notable detainee interrogated under it was Abu Zubaydah, the suspected al Qaeda operative captured in March of that year whose exact position in the organization was misconstrued to be significantly higher than it actually was (if he was even a

⁹² *Ibid.*, at 67.

member of the organization) and thus the Bush administration pressed for the need for aggressive interrogation tactics.⁹³ Also interrogated under this legal regime as high-value detainees were Khalid Shaykh Mohammed, the alleged mastermind behind the 9/11 attacks, and several other undisclosed detainees who were said to have been key architects of terrorist attacks.⁹⁴ However, it should be noted that evidence has come to light in courts both in the United States and the United Kingdom that one detainee, Binyam Mohammed, who was in U.S. custody between April and May of 2002, was subjected to, “at the very least cruel, inhuman and degrading treatment by the United States authorities”.⁹⁵ This raises important questions as to how the described treatment came to be authorized *before* the Bybee Memo of August 2002. Nevertheless, for the primary questions of efficacy that will be dealt with in this chapter the first legal regime was established by the memoranda discussed above.⁹⁶

However, it is still necessary to provide a brief timeline and survey of the progression, or perhaps the regression, of the memos that next emerged from the OLC behind closed doors to demonstrate the need for secrecy that this legal regime required. The clandestine conclusions in the memos of the OLC that were to follow the Bybee Memo after it was publicly revoked were in fact even more far-reaching and shocking than those of those of 2002, even though the actual policy concerning interrogations had been pulled back to become less brutal. This is one of the reasons that we will focus in this chapter on the efficacy of the initial policy. That is to say, the trajectory of legal interpretation of the state’s obligations on torture does not align completely with what was being carried out on the ground by interrogators. Therefore it is much more complicated to assess how exactly the legal regime that was to follow in this case of torture affected the legitimacy of the policy and policymakers of the ‘war on terror’. The legal interpretations of the OLC on this matter, as throughout the Bush administration, remained shrouded in secrecy until the memos

⁹³ Some questions still remain as to when specific abusive interrogation techniques were introduced against Abu Zubaydah since we know that he was captured in March of 2002 and held in a secret detention facility for interrogation during the four months until the Yoo and Bybee memo was instated 1 August 2002. For a detailed discussion of the Zubaydah case see Section V below.

⁹⁴ GOLDSMITH, J., *The Terror Presidency*, note 39 above, at 142-3.

⁹⁵ MILIBAND, D., Foreign Secretary of the United Kingdom, Foreign and Commonwealth Office, RE: The Binyam Mohammed Case, “quoted from the first judgment of the Divisional Court in the Binyam Mohamed case on 21 August 2008”, available at : <<http://www.fco.gov.uk/en/news/latest-news/?view=News&id=21722320>>. In a case before the British courts started in 2009, B. Mohammed filed to determine the British involvement in his unlawful treatment. On 10 Feb 2010 three senior judges, sitting in the Court of Appeal, ordered the British government to release seven paragraphs of text that demonstrated MI5 and MI6 complicity in the ill-treatment of Binyam Mohamed, overruling the foreign secretary, David Miliband. Binyam Mohammed’s treatment is discussed below in more length in Section VI (2) below.

⁹⁶ There is an additional memorandum of the very same date, 1 Aug 2002, that is also critical to this legal regime which treats specific techniques to be employed specifically against Abu Zubaydah. Details of this memo will be discussed in Section V (3) below.

themselves were revoked as any basis for governing interrogation by the Obama administration on his second full day in office.⁹⁷ These were then fully exposed when the later memos of the Bush administration were released to the public nearly three months later in April of 2009.⁹⁸ Most importantly, it was the problem of public knowledge of the actual tactics employed in interrogations that weakened the legitimacy of the ‘war on terror’ as more and more parts of it became leaked into the public sphere by dissenters from the inside of the Bush administration. This is one reason why the secrecy of the memos that established the legal regime to follow this initial disclosure in 2004 was of such importance. The public could react only to what was known to them. Specific abuses of detainees did certainly become known, but the far-reaching conclusions of undisclosed memos were kept under wraps.

On June 15, 2004 the Assistant Attorney General for the Office of Legal Counsel, Jack Goldsmith, informed his boss at the Department of Justice of the decision to withdraw the opinion of August 1, 2002, the unclassified Bybee Memo, that had now become public in the wake of the Abu Ghraib photos disclosure. In 2007 Goldsmith published an invaluable memoir shedding a light on many of the previously undisclosed episodes that led to this decision and why he ultimately tendered his resignation after less than a year of working in the OLC.⁹⁹ Within a week of the appearance of the Bybee Memo on the Washington Post newspaper website, the now unclassified memo was publicly vacated of its legal status.¹⁰⁰ However, what was reported to have the greatest impact on Goldsmith’s decision was a 2004 Inspector General’s report by the CIA investigating the actual application of the interrogation program.¹⁰¹ Goldsmith was required to review this report to settle a sharp dispute within the agency. The details of the report specifying the application of the ‘enhanced interrogation techniques’, along with the affect on detainees and interrogators alike, has been described to be quite appalling.¹⁰²

Because the actual withdrawal of the Bybee Memo came about rather suddenly and was precipitated by other events, no legal opinion had been prepared to replace it. It was not

⁹⁷ Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (22 Jan 2009), “All executive directives, orders, and regulations inconsistent with this order, including but not limited to those issued to or by the Central Intelligence Agency (CIA) from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order”. available at : <<http://www.glin.gov/view.action?glinID=215976#>>.

⁹⁸ ‘Department of Justice Releases Four Office of Legal Counsel Opinions’, Department of Justice – Office of Public Affairs (16 April 2009) available at : <<http://www.justice.gov/opa/pr/2009/April/09-ag-356.html>> (last visited April 2010).

⁹⁹ GOLDSMITH, J., *The Terror Presidency*, note 39 above.

¹⁰⁰ *Idem*, at 156-65; See also ROSEN, J., ‘Conscience of a Conservative’ *New York Times Magazine* (9 Sept 2007) available at : <http://www.nytimes.com/2007/09/09/magazine/09rosen.html?pagewanted=all>.

¹⁰¹ CIA-IG 2004 Report, note 24 above.

¹⁰² MAYER, *The Dark Side*, note 27 above, at 288.

until December 30th of that same year of 2004 that the temporary successor to Jack Goldsmith, Dan Levin, completed an opinion on the issue of legal interrogation by U.S. agents under the domestic torture statute §2340. This memo rejected some of the broadest interpretations put forward in the previous memo and began with the ever conciliatory phrasing, “[t]orture is abhorrent both to American law and values and to international norms”.¹⁰³ However, it did include an enormously important footnote stating, “[w]hile we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum”.¹⁰⁴ Therefore, while it did contain an ostensibly contrite tone in the reverberations of the public outcry, the memo still gave legal cover to the previous opinion. In addition, this time there was a notable difference to the standard OLC protocol. This opinion was unclassified and published for public consumption.

However, what happened next behind closed doors was most disturbing because neither this cosmetic memo, nor those that were to follow, did anything to pull back from the conclusions of allowable interrogation methods found in the August 2002 memos. Around the edges the analysis became more scholarly with additional attention on pertinent precedent, acknowledgement of contrary arguments and an abandonment of the doctrine that allowed the president to bypass congressional legislation in wartime because of his constitutional commander-in-chief powers. Yet what was to come out of the OLC subsequently, and in secret, reached even broader, more sweeping conclusions on what standards the same coercive interrogation techniques met as the other two branches of government explicitly weighed in on the matter. In May of 2005, the lawyer who would later assume the permanent position as the head of the OLC, Steven Bradbury, issued three critical memos whose conclusions reached even further than before. This time it was found that all of the very same authorized abusive techniques that were previously not believed to be torture, were now found not to even be cruel, inhuman or degrading treatment. And this conclusion indeed included controlled drowning evoking death, or waterboarding.¹⁰⁵

¹⁰³ Memorandum from Dan Levin, Acting Assistant Attorney General to James B. Comey, Deputy Attorney General (30 Dec 2004) *Re: Legal Standard Applicable Under 18 U.S.C. §§2340-2340A*, available at : <<http://www.justice.gov/olc/18usc23402340a2.htm>>.

¹⁰⁴ *Idem*, at 2, note 8.

¹⁰⁵ For a timeline and a brief description of the secret memos that put forward these explicit conclusions see the document created by the Senate Intelligence Committee, in conjunction with the Justice Department, *Release of Declassified Narrative Describing the Department of Justice Office of Legal Counsel’s Opinions on the CIA’s Detention and Interrogation Program*, Submitted by Senator John D. Rockefeller IV (22 April 2009) available at: <<http://intelligence.senate.gov/pdfs/olcopinion.pdf>>; see also COLE, D., ‘The Torture Memos: The Case

The Bradbury Memos, which were later released by the Obama administration in 2009, arrive at the conclusion that none of the interrogation techniques, whether used individually or in combination, constitute cruel, inhuman and degrading treatment primarily on the basis of two facts. The first is that the U.S. personnel subjected to many of the same techniques in the counter-torture training program, *Survival, Evasion, Resistance and Escape* (SERE),¹⁰⁶ have reportedly not suffered severe pain or suffering nor prolonged mental harm. Secondly, the fact that doctors would be present at the interrogations would permit them to stop the application of particular techniques if it was deemed that the threshold into cruel, inhuman or degrading treatment was going to be crossed. Whether the previous application of certain techniques in an explicitly finite and voluntary environment, or the presence of medical personnel charged with monitoring pain which is inherently subjective,¹⁰⁷ are enough to avoid legal liability for treaty violation will not be fully assessed here. Suffice it to say that reciprocity seems to have no place in this analysis because the SERE program had already been originally and explicitly built on preparing “American personnel to withstand interrogation techniques considered illegal under the Geneva Conventions”.¹⁰⁸ The idea that the U.S. government would accept such treatment of their own soldiers and agents because of the presence of medically trained persons, and that it was a controlled environment, would appear to be dubious at best.

Against the Lawyers’ (8 Oct 2009) 56, 15 *The New York Review of Books* available at : <http://www.nybooks.com/articles/23114>.

¹⁰⁶ This program has been revealed to be the primary source for the building of the abusive interrogation program instituted by the Bush administration. They were the result of the reverse-engineering of a U.S. military and private military contractor program instituted at the end of the Korean War intended to prepare them for “illegal” treatment at the hands of governments that were not compliant with their treaty obligations. For an in-depth analysis of how this occurred see report adopted without dissent, Senate Armed Services Committee ‘Inquiry into the Treatment of Detainees...’, note 22 above. “The abuse of detainees in U.S. custody cannot simply be attributed to the actions of ‘a few bad apples’ acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees. Those efforts damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemies, and compromised our moral authority. This report is a product of the Committee’s inquiry into how those unfortunate results came about,” Executive Summary at xii.

¹⁰⁷ The subjectivity of pain is explicitly recognized with a citation of a medical journal in the 30 Dec 2004 public memo: “Pain is a complex, subjective, perceptual phenomenon with a number of dimensions – intensity, quality, time course, impact and personal meaning – that are uniquely experienced by each individual and, thus, can only be assessed indirectly. *Pain is a subjective experience and there is no way to objectively quantify it.* Consequently, assessment of a patient’s pain depends on the patient’s overt communications, both verbal and behavioral. Given pain’s complexity, one must assess not only *its* somatic (sensory) component but also patients’ moods, attitudes, coping efforts, resources, responses of family members, and the impact of pain on their lives.” TURK, D. *Assess the Person, Not Just the Pain*, Pain: Clinical Updates, Sept 1993, cited in Memorandum from Dan Levin, (30 Dec 2004), note 103 above, at note 18 (emphasis added).

¹⁰⁸ U.S. Senate Armed Services Committee ‘Inquiry into the Treatment of Detainees...’, note 22 above, at xiii.

The Bradbury memo that has been identified as the most egregious and problematical by respected legal scholars¹⁰⁹ is the memo of May 30, 2005 pertinently entitled *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used In Interrogation of High Value al Qaeda Detainees* (Article 16 Memo).¹¹⁰ As Article 16 of the CAT convention speaks specifically of ill-treatment that does not rise to the level of torture, i.e. cruel, inhuman and degrading treatment, this is the memo that rightfully drew critical attention. The most noteworthy criticism came from a former member of the Bush administration who had been fully engaged behind the scenes in pushback against the legal analysis found in these memos. Philip Zelikow was the policy representative to the National Security Council Deputies Committee on intelligence/terrorism issues for Secretary of State Condoleezza Rice and thus gained access to the OLC opinions shortly after they were issued in May of 2005. Just five days after the Obama administration made a public release of further memos in 2009, Zelikow published his ‘The OLC “Torture Memos”: Thoughts from a Dissenter’ article detailing some of his own actions in response to an analysis that he found to be deeply flawed.¹¹¹

Because Zelikow was directly involved in working through some of the internal legal minutia on the interrogation program, much like another inside dissenter Jack Goldsmith, his evaluation is particularly useful here. The first point he makes is that the attention on the technique of waterboarding, used as an expedient to extract information in dire circumstances, distracted the public from the fact that what had developed was a *program* of interrogation intended to “disorient, abuse, dehumanize, and torment individuals over time”.¹¹² The detainee, before ever getting to controlled drowning, would be stripped naked, dowsed regularly with cold water, slapped around, thrown into hollowed walls, forced into cramped boxes, and most importantly, be shackled to the ceiling to force the prisoner into a standing position to be deprived of sleep for extended periods of time.

While he wrote that all of the memos “have grave weaknesses”,¹¹³ Zelikow reserved his most severe condemnation for the ‘Article 16’ Bradbury memo mentioned above because it had downgraded all of the previously authorized techniques (since they did not constitute

¹⁰⁹ See e.g., COLE, ‘The Case Against the Lawyers’, note 105 above, at §3.

¹¹⁰ BRADBURY, S., ‘*Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used In Interrogation of High Value al Qaeda Detainees*’ (Article 16 Memo hereinafter) (30 May 2005).

¹¹¹ ZELIKOW, P., ‘The OLC “Torture Memos”: Thoughts from a Dissenter’, *Foreign Policy Magazine* (21 April 2009) available at : <http://shadow.foreignpolicy.com/posts/2009/04/21/the_olc_torture_memos_thoughts_from_a_dissenter>.

¹¹² *Idem*.

¹¹³ *Ibid*.

“torture”) to being considered even less than cruel, inhuman or degrading treatment. This memo was deemed to be “weakest of all” because of the specific legal knowledge Zelikow had gained earlier working for many years on the jurisprudence of the U.S. constitutional standard of “shocks the conscience”.¹¹⁴ As discussed above, the United States attached a reservation of understanding to the CAT treaty when it was ratified in 1994 saying that it would interpret Article 16 dealing with the lower forms of ill-treatment to mean “the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States”.¹¹⁵ As such, and this is of central importance to the Zelikow denunciation, this legal question became directly and completely intertwined with domestic constitutional law. This is why he took steps at that time, outside of his normal duties, to explicitly refute this ‘Article 16’ memo that he believed to present a, “distorted rendering of relevant U.S. law”.¹¹⁶ In this way we can again see that the ratification of an international treaty has in this case been bolstered by the domestic jurisprudence giving the CAT further shape and meaning for the U.S. due to its own jurisprudence on the matter of ill-treatment. As Zelikow understood the legal interpretation of the “shocks the conscience” standard that controls this question of ill-treatment in the domestic context, there was no way that these techniques could be deemed legal. As he put it,

The underlying absurdity of the administration's position can be summarized this way. Once you get to a substantive compliance analysis for “cruel, inhuman, and degrading” you get the position that the substantive standard is the same as it is in analogous U.S. constitutional law. So the OLC must argue, in effect, that the methods and the conditions of confinement in the CIA program could constitutionally be inflicted on American citizens in a county jail.¹¹⁷

That is to say, for the legal analysis in the ‘Article 16’ memo to be a viable reading of the law, one must argue through domestic constitutional jurisprudence that federal courts have ruled in the past, and could be reasonably expected to rule in the future, that U.S. citizens can be stripped naked, handcuffed to the ceiling to prevent them from sleeping for extended periods, and even subjected to controlled drowning. Bush administration attorney Philip Zelikow, according to his own study of the pertinent case law, did not believe this was in any way a reasonable argument. As Bradbury had put it in the Memo,

[g]iven that the CIA interrogation program is carefully limited to further the Government’s paramount interest in protecting the Nation while avoiding unnecessary or serious harm, we conclude that the interrogation program cannot ‘be

¹¹⁴ *Ibid.* ‘Shocks the conscious’ is a phrase used as a U.S. constitutional standard prohibiting ill-treatment.

¹¹⁵ U.S. reservations, declarations, and understandings to the CAT Convention, note 47 above.

¹¹⁶ ZELIKOW, P., ‘Thoughts from a Dissenter...’, note 111 above.

¹¹⁷ *Idem.*

said to shock the contemporary conscience' when considered in light of 'traditional executive behavior' and 'contemporary practice.'¹¹⁸

To stand up for what he believed was the proper and normal reading of interrogation standards under applicable U.S. law, and by extension the Article 16 criterion for cruel, inhuman and degrading treatment under the CAT treaty, Zelikow drafted his own memo and distributed it within the administration. As counselor to the Secretary of State, his position did not entitle him to provide such a legal opinion, but he felt obliged to do so under the circumstances. Though his colleagues were under no compulsion to act on his views, the administration took the troubling step of attempting to collect and destroy all the copies of this Zelikow memo.¹¹⁹

3) Pushback from the Legislature and the Judiciary

What must be fully understood about this series of secret memos by Stephen Bradbury is that, while their conclusions pushed even farther than before, the other branches of government were placing explicit and public limits on legal interrogations. As seen in Chapter 4, the Congress passed specific legislation in 2005 concerning detainee interrogation known as the Detainee Treatment Act of 2005 (DTA).¹²⁰ This legislation contains provisions that require Department of Defense personnel to employ the United States Army Field Manual guidelines while interrogating detainees, and prohibit the use of "cruel, inhuman and degrading treatment or punishment of persons under the detention, custody, or control of the United States Government".¹²¹ It is commonly known as the "McCain Amendment" since these provisions were added to the defense spending bill via amendments introduced by Senator John McCain who, notably, was tortured in detention during the Vietnam War. The overwhelming bipartisan support for the bill when passed in the Senate by a vote of 90-9 was reported to suggest, "a new boldness among Republicans to challenge the White House on war policy".¹²²

¹¹⁸ BRADBURY, *Article 16 Memo*, note 110 above, at 3-4.

¹¹⁹ ZELIKOW, P., 'Thoughts from a Dissenter...', note 111 above. After this was revealed by Zelikow in the cited article, Congressmen Conyers and Berman sent a letter to Secretary of State Clinton to request the public release of this memo to "shed important light on the process by which these interrogation practices were evaluated, approved, and implemented by the former Administration". ROTH, Z., 'Congress Seeking Zelikow's "Alternative" Torture Memo' *TPM Muckraker* (4 May 2009) available at : <http://tpmmuckraker.talkingpointsmemo.com/2009/05/congress_seeking_zelikows_alternative_torture_memo.php>. Unfortunately, because Zelikow's memo has not been released to date, investigating the specific case law he studied and cited cannot be accomplished.

¹²⁰ Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739.

¹²¹ *Idem*.

¹²² BABINGTON, C and MURRAY, S., 'Senate Supports Interrogation Limits' *The Washington Post* (6 October 2005) A01, "[t]he Senate defied the White House yesterday and voted to set new limits on interrogating detainees in Iraq and elsewhere, underscoring Congress's growing concerns about reports of abuse of suspected

As also discussed in the fourth chapter, there was the June 2006 landmark decision of *Hamdan v. Rumsfeld*,¹²³ which established, among other things, that Common Article 3 of the Geneva Conventions was fully applicable to the ‘war on terror’. This provision specifically deals with torture and ill treatment with the language,

the following acts are and shall remain prohibited at any time and in every place whatsoever [...] (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture [...] (c) outrages upon personal dignity, in particular, humiliating and degrading treatment.¹²⁴

Thus, we find both the Legislative and the Judicial branches of government visibly and palpably pushing back against the Executive on the specific issue of interrogation limits. This certainly gives rise to the question of what might have happened had the Bradbury Memos, secretly defying these overt acts by the other branches of government, become public. One certainly can envision an even further destabilization of legitimacy than already occurred had the public learned that certain acts from the judicial and legislative branches were being thwarted behind closed doors via legal interpretation from the OLC.

However, if we look at the dates of the initial Bradbury Memos issued in May of 2005, we see that they were tendered months before the legislature had passed the McCain Amendment, voted by the Senate in October of that year. Nonetheless, one report interviewing over two dozen officials from inside the Bush administration indicates that the introduction of this language into legislation, first by Senator Levin and later by Senator McCain, spurred the administration into dealing with what it considered to be a significant legal modification.¹²⁵ Previously, the administration had concluded that the requirements of Article 16 dealing with the lower forms of ill-treatment did not apply to detainees being held

terrorists and others in military custody”. Available at : <<http://www.washingtonpost.com/wp-dyn/content/article/2005/10/05/AR2005100502062.html>>.

¹²³ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹²⁴ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (GC I) (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (GC II) (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 85; *Geneva Convention relative to the Treatment of Prisoners of War* (GC III) (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 135; *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (GC IV) (signed 12 Aug 1949, entry into force 21 Oct 1950) 75 UNTS 287, Common Article 3.

¹²⁵ SHANE, S., JOHNSTON, J. and RISEN, J., ‘Secret US Endorsement of Severe Interrogations’, *New York Times* (4 Oct 2007) “More than two dozen current and former officials involved in counterterrorism were interviewed over the past three months about the opinions and the deliberations on interrogation policy. Most officials would speak only on the condition of anonymity because of the secrecy of the documents and the C.I.A. detention operations they govern.” available at : <http://www.nytimes.com/2007/10/04/washington/04interrogate.html?_r=2&sq=bradbury%20drowning&st=nyt&adxnnl=1&oref=slogin&scp=5&adxnnlx=1203028444/-k1FFT+XnTb+q92HHwtnDA>.

outside of U.S. territory in the custody of the CIA (on what specific grounds is not clear).¹²⁶ The administration chose to deal with this proposed change in the law by adjusting its own legal interpretation. The first public revelation of this secret memo came in 2007 in the New York Times reporting,

[a]t the administration's request, Mr. Bradbury assessed whether the proposed legislation would outlaw any C.I.A. methods, a legal question that had never before been answered by the Justice Department. [...] In the end, Mr. Bradbury's opinion delivered what the White House wanted: a statement that the standard imposed by Mr. McCain's Detainee Treatment Act would not force any change in the C.I.A.'s practices...¹²⁷

What should also be noticed about the timing of these Bradbury Memos is that, although they were signed by him and issued in May, it was not until June that Bush actually nominated Bradbury to head the OLC. After the difficulties that the administration had encountered with Jack Goldsmith and his revocation of the Bybee Memo, there was a hesitancy to name just anyone to this critical post of interpreting the law for the executive to follow. As such, Bradbury was held in limbo and not named immediately to the post, raising serious questions as to whether holding back this nomination had an influence on the memos he issued before receiving an official nod from the president.¹²⁸

4) The Unitary Executive and Signing Statements

What must also be mentioned here is what happened when the legislation containing the McCain Amendment came across the desk of President Bush. The bill that banned the use of cruel, inhuman and degrading treatment by detainees being held by the Department of Defense was indeed signed into law. However, attached to it was a 'signing statement' —an official document in which the president explains his interpretation of the new legislation—that brought into question the intention of the Executive branch to enforce this new provision. In this signing statement President Bush expressed that he would understand this new law,

in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.¹²⁹

¹²⁶ U.S. Senate Intelligence Committee, *Release of Declassified Narrative*, note 105 above, at 11.

¹²⁷ SHANE, et al, 'Secret US Endorsement...', note 125 above.

¹²⁸ *Idem*.

¹²⁹ *President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006"*, available at : <<http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/print/20051230-8.html>>.

While this statement may seem rather innocuous at first blush, particular attention should be focused on the terms *constitutional authority*, *unitary executive*, and *Commander in Chief*. As we have seen above, the Bybee Memo and other internal legal memos¹³⁰ had interpreted the president's constitutional power in wartime as the Commander and Chief to be unassailable by the other branches of government. So when we read that the president will interpret this new law in the context of a 'unitary executive', particularly concerning wartime due to terrorist attacks, we must understand that the President is saying the he will act in a manner, and enforce the law in such a way that will leave the president's action unfettered by this law which is meant to curtail and constrain his authority on interrogation techniques. That is to say, the president as Commander and Chief is the sole 'decider' in matters of war.

President Bush had attached a host of signing statements to the legislation he had signed over his years in office, but it was this one in particular concerning interrogation limits that began to draw attention on this practice. Presidential signing statements were not a new invention of the Bush administration, as they have been used by U.S. presidents since James Monroe, but their increased usage with a more active intent on shaping legal interpretation is certainly a more modern experience.¹³¹ It was during the Reagan presidency that the nature of signing statements changed both quantitatively and qualitatively, and continued under both Democratic and Republican administrations. Signing statements became a way for presidents to assert their authority over legislation found to be an encroachment on their constitutional powers, particularly since the Nixon administration when Congress made palpable inroads into presidential power due to its abuse by that president. Specifically, the signing statement has at times become a way for the president to express his view that a law, or some of its provisions, are unconstitutional and therefore will not be enforced. In this way it bypasses the other branches of government by placing the constitutional, and final, power of the interpretation of law within the Executive branch, rather than with the Judiciary.¹³² Under the second Bush administration the use of signing statements also became a way to express the ideology of a 'unitary executive' held dear to powerful figures within the Bush

¹³⁰ See e.g. Memorandum from John Yoo, Deputy Assistant Attorney General (my emphasis), U.S. Department of Justice, Office of Legal Counsel, to Timothy Flanigan, Deputy Counsel to the President, (25 Sept 2001), reprinted in *The Torture Papers*, at 24.

¹³¹ American Bar Association, *Report: Task Force on Presidential Signing Statements and the Separation of Powers Doctrine*, (7-8 Aug 2006), at 7-14, available at: <<http://www.abanet.org/op/signingstatements/>>.

¹³² Established very early in U.S. jurisprudence, *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803).

administration, most particularly Vice President Dick Cheney and his initial legal counsel David Addington.¹³³

In the summer of 2006, shortly after the signing statement attached to the law concerning cruel, inhuman and degrading treatment came into the public discussion through reporting in the *Boston Globe* newspaper,¹³⁴ the Republican controlled Senate Judiciary Committee held a hearing on the subject even before the sweeping electoral victory by Democrats in November of that year (indicating that this was not completely a partisan issue). The opening statement by Senator Leahy described the issue before them as such,

[w]e are at a pivotal moment in our Nation's history, where Americans are faced with a President who makes sweeping claims for almost unchecked Executive power. One of the most troubling aspects of such claims is the President's unprecedented use of signing statements. Historically, these statements have served as public announcements containing comments from the President, on the enactment of laws. But this Administration has taken what was otherwise a press release and transformed it into a proclamation stating which parts of the law the President will follow and which parts he will simply ignore.¹³⁵

There is no doubt that this statement can, if only partially, be attributed to political posturing against an increasingly unpopular president. However, in these words we can see the growing instability caused by what was becoming considered to be an overreaching abuse of power.

As discussed in Chapter 3, in an act that can be described as real concern and dissent from the civil society, the American Bar Association appointed a Task Force for investigating the signing statements as a challenge to the constitutional structure of the United States democracy. The conclusions of the esteemed members were stark and grave finding that the practice had become, "contrary to the rule of law and our constitutional system of separation of powers".¹³⁶ The report also clearly outlined alternatives for a president who questioned the constitutionality of a law passed by Congress. The president could always veto a bill that it

¹³³ Once a relatively obscure concept, the 'Unitary Executive' is a theory of expanding and protecting presidential power that has gained ground during the second Bush presidency. See e.g. KELLEY, C., 'Rethinking Presidential Power—The Unitary Executive and the George W. Bush Presidency', Paper prepared for the 63rd Annual Meeting of the Midwest Political Science Association, 7-10 April 2005, Chicago, IL, available at <http://www.pegc.us/archive/Unitary%20Executive/kelly_unit_exec_and_bush.pdf>, (last visited 8 Dec. 2008); and see MANHEIM, K. and IDES, A., 'The Unitary Executive', Loyola Law School, Los Angeles, Legal Studies Paper No. 2006-39, November 2006, available at <<http://ssrn.com/abstract=943046>> (last visited 8 Dec. 2008). For specific reference to the 'unitary executive' by a Supreme Court Justice see Chapter 2, note 174.

¹³⁴ SAVAGE, C., 'Bush Could Bypass New Torture Ban', *The Boston Globe*, (4 Jan 2006) available at : <http://www.boston.com/news/nation/articles/2006/01/04/bush_could_bypass_new_torture_ban/?page=2>; and SAVAGE, C., 'Bush Challenges Hundreds of Laws' *The Boston Globe*, (20 April 2006) available at : <http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/>.

¹³⁵ Statement of Senator Patrick Leahy from Vermont, Ranking Member, Judiciary Committee Hearing on Presidential Signing Statements (27 June 2006) available at : <http://judiciary.senate.gov/hearings/testimony.cfm?id=1969&wit_id=2629>.

¹³⁶ American Bar Association, *Report: Task Force on Presidential Signing Statements...*, note 131 above, at 1.

believed to infringe upon the executive branch's constitutional authority. The report held that for a president to simply interpret the legislation in contradiction to the congressional intent usurped the power of the Supreme Court to determine "what the law is".¹³⁷

The reason that the rise of this issue of 'signing statements' and the 'unitary executive' within the public sphere is extremely pertinent here is because the question of an abuse of power, through the very public McCain Amendment concerning limits on abusive interrogation in the 'war on terror', directly addresses the issue of legitimacy. In assessing the torture memos and the response to their public disclosure, we see that through the lens of legality there were indeed very serious troubles exposed for the Bush administration. The deep flaws in the Bybee Memo were evidenced by its immediate retraction by Jack Goldsmith just after the public gained knowledge of it and began its outcry. This was followed by actions in Congress to pass legislation to place explicit constraints upon lower forms of ill-treatment in DOD detentions and interrogations. Additionally, the Supreme Court found Common Article 3 of the Geneva Conventions to be applicable law in the 'war on terror' furthering the legal constraint on interrogation. Despite these explicit moves by the other branches to curb what was considered to be an overreach, the administration proceeded in secret to provide legal cover for its actions. Yet through the issue of signing statements, the sense of an illegitimate use of force or abuse of power was taking root in a growingly uneasy public.

5) A Flawed Attempt at Efficacy for Legality

While it is quite clear that it was necessary for administration lawyers to push directly against international legality for extending coercive interrogation limits, the issue of efficacy also came to the fore. One purported relationship between legality and efficacy can be observed by the fact that the effectiveness of the applied coercive interrogations is treated quite extensively within this series of OLC memos, in the legal analysis of the Office of Professional Responsibility,¹³⁸ and in the 2004 CIA Inspector General report.¹³⁹ However, the fact that this issue of efficacy has been widely analyzed in these documents does not mean there is a legal link between the concepts in the way it has been described in the memos. As we have discussed, the CAT treaty and international courts have explicitly dismissed the use of balancing such competing interests.¹⁴⁰ What we find in these documents rather represents a

¹³⁷ *Marbury v. Madison*, 1 Cranch 137 at 177 (1803).

¹³⁸ OPR (Final) Report, *Investigation into the Office of Legal Counsel's Memoranda*, note 42 above, at 96, 146-7, 158, 243-51, 259.

¹³⁹ CIA-IG 2004 Report, note 24 above, at 82-91.

¹⁴⁰ For further discussion on this question see Chapter 3, Section V.

flawed analysis of a connection between legality and efficacy, made particularly gross by the use of erroneous empirical data.

Both the OPR and Inspector General reports identify the same three difficulties in arriving at an objective assessment of the applicable value of coercive interrogations. Using the exact same wording, they each assert that,

[m]easuring the overall effectiveness of EITs is challenging for a number of reasons including: (1) the Agency cannot determine with any certainty the totality of the intelligence the detainee actually possesses; (2) each detainee has different fears of and tolerance for EITs; (3) the application of the same EITs by different interrogators may have different results and [redacted].¹⁴¹

In assessing the efficacy of ill-treatment during interrogation, we will continually return to the first element put forward here as it is a hurdle that we claim can not be surmounted under the conditions of humanity as we understand them today. That is, knowing all that a detainee knows is never possible.

It is the Article 16 Memo authored by Stephen Bradbury that treats the issue of effectiveness most fully for the OLC, if only because he was forced to meet this argument raised in the CIA Inspector General report. In this memo, Bradbury acquiesces that, “it is difficult to quantify with confidence and precision the effectiveness of the program”.¹⁴² He then refers to the CIA IG report and the complexity of parsing out the direct successes of the techniques employed against the high value detainees, but stresses the increased general knowledge that has been gained on how al Qaeda and its affiliates operate. Bradbury asserts that there has indeed been “specific actionable intelligence” gained, and additionally cites the CIA as having produced over 6000 intelligence reports as a result of the authorized coercive techniques.¹⁴³ However, one thing that must be noticed in this memo by Bradbury as he makes the best case for the effectiveness of the program is that there is absolutely no reference to any imminent threat being averted, nor any other timely action of necessity. Although many who argue for the use of it point to coercion as the most time efficient means in moments of a crisis, this lacuna in the government’s assessment of the interrogation program leaves wide open the possibility that the intelligence gained could have been obtained through other means.

To evaluate whether the coercive interrogation techniques would transgress the standard of cruel, inhuman or degrading treatment in the Article 16 Memo, Bradbury leaned

¹⁴¹ CIA-IG 2004 Report, note 24 above, at 89; and OPR (Final) Report, *Investigation into the Office of Legal Counsel's Memoranda*, note 42 above, at 96.

¹⁴² BRADBURY, *Article 16 Memo*, note 110 above, at 10.

¹⁴³ *Idem*, at 11.

heavily on the information provided to him by the same agency that wanted to have legal authorization to employ this type of pressure. He began by assessing the circumstances under which they would be applied, and the CIA informed those writing the legal memos that the EITs would only be used on a *High Value Detainee*. The agency defined this as,

a detainee who, until time of capture, we have *reason to believe*: (1) is a senior member of al Qai'da or an al-Qai'da associated terrorist group [...]; (2) has knowledge of imminent terrorist threats against the USA, its military forces, its citizens and organizations, or its allies; Or that has/had direct involvement in planning and preparing terrorist actions against the USA or its allies, or assisting the al-Qai'da leadership in planning and preparing such terrorist actions; and (3) if released, constitutes a clear and continuing threat to the USA or its allies.¹⁴⁴

There are several elements that should be noticed about this definition. Firstly, as has been pointed out as a reoccurring and vital aspect to remark upon overall about the issue of ill-treatment, is that the CIA uses the phrase “reason to believe” to qualify who exactly will be considered a high value detainee. This of course will help to determine the type of treatment such an individual will receive in this case. Yet, this classification is not based on a verified, proven or confirmed association or specific action. It is based solely upon *suspicion*.

The other thing to notice in the description of a High Value Detainee is that these individuals are believed to be so dangerous that it is not foreseen that they will be set free. It is not mentioned how long this danger or threat might last, but it is conceivable that, according to this formulation, such an individual would be held in perpetuity. At least there is no clear indication that we should conclude otherwise. If there is no anticipation of release, one certainly can see this permanent detention as having a direct bearing on the sort of treatment to which this person might be subjected.

However, for the use of the most extreme enhanced technique, waterboarding, there would need to be even further criteria met. This technique is sometimes referred to as the ‘water-cure’ or ‘water torture’. The CIA IG report described this procedure as,

binding the detainee to a bench with his feet elevated above his head. The detainee's head is immobilized and an interrogator places a cloth over the detainee's mouth and nose while pouring water onto the cloth in a controlled manner. Airflow is restricted for 20 to 40 seconds and the technique produces the sensation of drowning and suffocation.¹⁴⁵

Waterboarding drew the focus of attention by the public among the authorized techniques for both legal and historical reasons. The technique has been legally considered torture by the United States throughout the twentieth century. This can be evidenced by the

¹⁴⁴ *Ibid.*, (my emphasis) at 5.

¹⁴⁵ CIA-IG 2004 Report, note 24 above, at 15.

U.S. experience in the Philippines at the turn of the century where it was employed by soldiers leading to courts martial,¹⁴⁶ the Tokyo War Crimes trials that followed World War II,¹⁴⁷ and in the *United States v. Lee* case before domestic courts in 1984.¹⁴⁸ This interrogation technique was placed in the CIA's arsenal for the first time in the nation's history in 2002,¹⁴⁹ and Bradbury legally authorized it for future application.

The use of this controlled drowning necessitated, according to the CIA document of August 2004 cited by Bradbury, that a series of further conditions were met before it could be employed. The only circumstances in which it could be introduced, which interestingly aligns very closely with what is often thought to be the 'ticking bomb' scenario, were when,

credible intelligence that a terrorist attack is imminent; substantial and credible *indicators* that the subject has actionable intelligence that can prevent, disrupt or delay this attack; and other interrogation methods have failed to elicit the information [or] CIA has clear *indications* that other...methods are *unlikely* to elicit this information within the *perceived* time limit for preventing the attack.¹⁵⁰

In this document we find more stringent criteria for authorizing the use of this suffocation by water technique. However, there is no discussion of how the host of new qualifiers are to be determined. Who determines what is "credible", and how is it measured? What is the time frame used for an understanding of the word "imminent"? For how long are other methods tried before they are determined to have "failed"? What are considered to be "clear indications" that other methods will not work in time? How is the "perceived time limit for the attack" measured? Are there any checks on these determinations? Are there any consequences if these many qualifiers are misconstrued from the outset or found to be patently incorrect? None of these questions are addressed by Bradbury in the memo, and all of them clearly indicate the ultimate reliance upon suspicion.

Additionally, it is important to look at the date of the document provided by the CIA. This letter from the Acting General Counsel to the CIA that Bradbury is citing was provided to the acting head of the OLC less than a month after the Bybee Memo was leaked to the press and then retracted by Jack Goldsmith. There is no doubt that at the beginning of August 2004 there would be good reason for the CIA to want to place new, more stringent limits on an interrogation program that was causing a public uproar. Most importantly, however, there is

¹⁴⁶ WALLACH, E., 'Drop by Drop: Forgetting the History of Water Torture in U.S. Courts' (2007) 45 *Columbia Journal of Transnational Law* at 477-493.

¹⁴⁷ *Idem*, at 494-501.

¹⁴⁸ *United States v. Lee*, No. 83-2675 (5th Cir. Nov. 9, 1984) and *ibid.*, at 502-3.

¹⁴⁹ Classified Bybee Memo, *Interrogation of al Qaeda Operative*, note 82 above; and MAYER, *The Dark Side*, note 27 above, at 139-181.

¹⁵⁰ Letter from John A. Rizzo, Acting General Counsel, Central Intelligence Agency, To Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel at 5 (August 2, 2004), cited in *ibid* (my emphasis).

no indication that these qualifiers, even without the numerous questions raised above about how limiting they would be in practice, existed for restraining the use of the waterboard before August 2004. And as indicated in this very memo, controlled drowning was employed on three High Value Detainees between the institution of the program on August 1, 2002 and March 2003.¹⁵¹ Therefore it seems safe to assume that the use of controlled drowning evoking death was employed without any of the above standards reflecting a ‘ticking bomb’ scenario.

A) The CIA Effectiveness Memo’s Attempted Link to Legality

Of importance for the legal analysis of the Article 16 Memo, Bradbury strongly relied on what he was provided with from the CIA, including a still undisclosed document from March of 2005 entitled *Re: Effectiveness of the CIA Counterterrorist Interrogation Techniques* (Effectiveness Memo).¹⁵² Based primarily on this memo, Bradbury concluded in his analysis that the program employed against the High Values Detainees had indeed been effective in producing important information including “specific, actionable intelligence”.¹⁵³ However, we find here that the OPR report is extremely useful in dissecting the reliance upon this CIA Effectiveness Memo for Bradbury’s legal conclusions.¹⁵⁴ The Article 16 Memo, as discussed above, arrived at the conclusion that, due to the reservation attached to the CAT treaty by the United States, the restriction on cruel, inhuman and degrading treatment would be punishment prohibited by the Fifth Amendment since it was the part of the Bill of Rights applicable in this particular context. As such, the relevant standard was treatment that ‘shocks the conscience’, which Bradbury took to mean that an action must not be arbitrary in a constitutional sense. More precisely, this meant that an act must have “reasonable justification in the service of a legitimate governmental objective”.¹⁵⁵ To fulfil this legal requirement manufactured by Bradbury, enhanced interrogation techniques needed to be effective. To discern whether the action of waterboarding was constitutionally arbitrary, Bradbury relied on the Effectiveness

¹⁵¹ *Ibid.*, at 6.

¹⁵² Cited in BRADBURY, *Article 16 Memo*, note 110 above, at 8. The CIA Effectiveness Memo was also used in the memo entitled *Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees*, (2007 Bradbury Memo hereinafter) available at : <<http://www.aclu.org/accountability/olc.html>>. After nearly 80 pages of analysis which relied on some of the reasoning and conclusions of the 2005 Bradbury Memo (note 160 below), the *Combined Techniques Memo*, and the *Article 16 Memo*, this ‘2007 Bradbury Memo’ arrived at the conclusion that the six EITs in question did not violate the DTA, the War Crimes Act, or Common Article 3. This conclusion was largely based on the same analysis under discussion concerning the ‘shocks the conscience’ standard and what is ‘constitutionally arbitrary’. Therefore the *CIA Effectiveness Memo* is again cited (at 31) here demonstrating further legal reliance on the issue of efficacy.

¹⁵³ *Idem* at 10.

¹⁵⁴ OPR (Final) Report, *Investigation into the Office of Legal Counsel's Memoranda*, note 42 above, at 243-51.

¹⁵⁵ BRADBURY, *Article 16 Memo*, note 110 above, at 2-3.

Memo to establish that it did indeed further a government's legitimate objective. He determined that preventing future terrorists attacks by al Qaeda surely fulfilled the concept of a legitimate objective, and since the technique was said to have worked in the CIA memo, the standard of "furthering" said objective was met. The OPR report further points out that Bradbury articulated this reasoning to the Senate Select Committee in 2007 explaining that, "with regard to the CIA interrogation program, the government interest was of the 'highest order'".¹⁵⁶

However, the OPR report was disparaging of Bradbury's uncritical reliance on the Effectiveness Memo to conclude that EITs were successful, and therefore furthered a legitimate objective. The representations as to the effectiveness of the techniques that the CIA provided were fully accepted, and no further investigation was undertaken by Bradbury to verify, or even question, this information. While Bradbury did not see further probing as a function of his post, others within the government did believe that it was necessary to gather additional information regarding the efficacy of the EITs. As an example the OPR drew attention to John Bellinger, the Legal Advisor to Secretary of State Condoleezza Rice, and his push to acquire more specific details on the effectiveness of the program. The report read,

Bellinger told OPR that he pushed for years to obtain information about whether the CIA interrogation program was effective. He said he urged AG Gonzales and White House Counsel Fred Fielding to have a new CIA team review the program, but that the effectiveness reviews consistently relied on the originators of the program. He said he was unable to get information from the CIA to show that, but for the enhanced techniques, it would have been unable to obtain the information it believed necessary to stop potential terrorist attacks.¹⁵⁷

As such, it was found to be problematical that Bradbury came to rely solely on a single source of information for his legal conclusion of 'furthering a legitimate governmental objective', particularly considering that the same agency that was requesting the legal authorization was also the one providing the unverified claims of efficacy.

The most blatant flaw in this reliance on the Effectiveness Memo came from the fact that there was patently false information found within the document that could have been easily crosschecked. This memo from the CIA attesting to the efficacy of the EITs claimed that they had directly led to the capture of an al Qaeda suspect in May of 2003. Considering the enhanced coercive questioning procedures were first authorized by the Bybee Memo of August 2002, this was feasible. However, the suspect in question was apprehended with much public fanfare as the "dirty bomb" suspect, and an official announcement was made by

¹⁵⁶ OPR (Final) Report, *Investigation into the OLC's Memoranda*, note 42 above, at 158.

¹⁵⁷ *Idem*, at 243 note 201.

Attorney General John Ashcroft from Moscow, Russia where he was meeting with his counterpart officials over the ‘war on terror’.¹⁵⁸ The suspect was taken into custody in May and the pronouncement took place in June; of 2002 (one year earlier). Therefore it would be impossible, as the Effectiveness Memo claimed, for this capture to have resulted from intelligence gained from the EITs as they had not yet been authorized.¹⁵⁹ As is quite evident, such a gross error could have been easily caught by any of the memo’s original drafters, the attorney who relied on this claim to assert the legality of the techniques because they furthered a legitimate objective, or any of the policy makers touting it as a victory in the ‘war on terror’ as a result of expanded tactics in interrogation. In any case, what is abundantly clear is that the capture of this suspect was not the fruit of any authorized enhanced techniques.

B) Waterboard Excesses

Additionally, the application of the specific technique of waterboarding is said to have often, if not always, “exceeded the limitations, conditions, and understandings recited in the Classified Bybee Memo and the Bradbury Memos”.¹⁶⁰ In other words, the application of the waterboard did not stay inside its authorized limits. The reason this is particularly troublesome for the manner in which the efficacy of waterboarding was being spoken about in the Article 16 Memo¹⁶¹ is because it is enormously problematic to claim to know the efficacy of a technique that has never been applied in the specifically described and authorized way. Bradbury was certainly well aware of these systematic excesses as he wrote his memos in the wake of the most devastating internal report on the CIA program of interrogation to that date. The fact that the waterboard was repeatedly applied outside of the authorized limits was one of the important conclusions put forward in the 2004 CIA Inspector General Report. For this reason Bradbury was forced to acknowledge this excess and address it in his legal analysis head on, if only in a footnote. He wrote,

[t]he *IG Report* noted that in many cases the waterboard was used with far greater frequency, than initially indicated, and also that it was used in a different manner, (“[t]he waterboard technique was different...from the technique described in the DoJ opinion and in the SERE training. The difference was in the manner in which the detainee’s breathing was obstructed. At the SERE school and in the DoJ opinion, the subject’s air flow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled

¹⁵⁸ CNN.com/US, ‘U.S. Authorities Capture “Dirty Bomb” Suspect: His Associate Arrested in Pakistan’ (10 June 2002) available at : <<http://archives.cnn.com/2002/US/06/10/dirty.bomb.suspect/index.html>>. This is a reference to Jose Padilla’s capture and interrogation which is treated in more detail in Section VI (1) below.

¹⁵⁹ OPR (Final) Report, *Investigation into the OLC’s Memoranda*, note 42 above, at 246-7.

¹⁶⁰ *Idem*, at 247.

¹⁶¹ The ‘Effectiveness Memo’ was also used in the 2007 *Bradbury Memo*, note 152 above, at 31.

manner. By contrast, the Agency interrogator...applied large volumes of water to a cloth that covered detainee's mouth and nose. One of the psychologists/interrogators acknowledged that the Agency's use of the technique is different from that used in the SERE training because it's "for real and is more poignant and convincing."¹⁶²

As we see, Bradbury uses a citation from one of the psychologists who is said to have engineered the transfer of the SERE torture-resistance training program used for U.S. personnel over to the CIA interrogation program to bolster his argument for the stark difference in application.¹⁶³ However, this argument is clearly flawed. Serious weight in the whole series of torture memos was put behind the fact that the techniques could not be construed as ill-treatment because they had been applied regularly to U.S. personnel in the SERE program. If they were significantly different in their application to High Value Detainees, regardless of the reason, this argumentation falls apart. The techniques cannot be acceptable because they have been applied to U.S. personnel, and at the same time warrant a different usage in real interrogations. The fact that the waterboard in this circumstance is "for real and is more poignant and convincing" undoubtedly means that it must be legally assessed as such.

Nonetheless, the CIA Inspector General report raised much more grave issues that are certainly not dealt with by this psychologist/interrogator's statement. The 2004 IG Report spoke of serious concerns introduced by medical personnel (withheld from Yoo and Bybee),¹⁶⁴ and that were fully available to Bradbury. In fact this trouble was indeed cited and treated by Bradbury in the same footnote discussed above.¹⁶⁵ In the original report it reads,

OMS [CIA's Office of Medical Services] contends that the reported sophistication of the preliminary EIT review was exaggerated, at least as it related to the waterboard, and that the power of this EIT was appreciably overstated in the report. Furthermore, OMS contends that the expertise of the SERE psychologist/interrogators on the waterboard was probably misrepresented at the time, as the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant.¹⁶⁶

And of direct consequence to the issue of efficacy, the CIA report went on to state,

¹⁶² BRADBURY, S., 'Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques that May Be Used In Interrogation of High Value al Qaeda Detainees' (Bradbury 2005 Memo hereinafter) (10 May 2005) (internal citations omitted) at 41 note 51. Available at : <<http://www.aclu.org/accountability/olc.html>>. To clarify, this is not the same Article 16 Memo that has encompassed the bulk of our discussions here, but Bradbury addressed part of this particular issue in another memo that same month.

¹⁶³ MAYER, *The Dark Side*, note 27 above, at 156-165.

¹⁶⁴ ACKERMAN, S., 'CIA Witheld Medical Information from the Justice Department to Obtain Torture Approvals' *The Washington Independent* (24 Aug 2009) available at : <<http://washingtonindependent.com/56278/cia-withheld-medical-information-from-the-justice-department-to-obtain-torture-approvals>>.

¹⁶⁵ BRADBURY, *Bradbury 2005 Memo*, note 162 above, (internal citations omitted) at 41 note 51.

¹⁶⁶ CIA-IG 2004 Report, note 24 above, at 21-22, note 26.

Consequently, according to OMS, there was no *a priori* reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe.¹⁶⁷

Bradbury was instead working with both the OMS concerns directly through its personnel in that office, and with a full copy of the internal CIA report. He dealt with this expanded knowledge of genuine disquiet with the drastic difference in the application of the waterboard between the SERE program and the CIA interrogation program by asserting,

[w]e have carefully considered the IG Report and discussed it with OMS personnel. As noted, OMS input has resulted in a number of changes in the application of the waterboard, including limits on the frequency and cumulative use of the technique. Moreover, OMS personnel are carefully instructed in monitoring this technique and are personally present whenever it is used. Indeed, although physician assistants can be present when other enhanced techniques are applied, ‘use of the waterboard requires the presence of a physician.’¹⁶⁸

However, there continues to be a huge problem with these changes addressed only in a footnote. While it certainly is more humane for the detainee to reduce the frequency and intensity of the use of the waterboard, it does not in any way address the efficacy upon which Bradbury’s analysis relies. If the program indeed produced results in the past (yet serious doubts have already been raised as to the veracity of this claim), it did so under different conditions. Bradbury can not both rely on the Effectiveness Memo and its conclusions for his legal analysis, while at the same time institute meaningful changes to the application of the waterboard. If the modifications are consequential, and he states them to be just that, then any evidence of previous efficacy is inapplicable.

One intriguing aspect of what we have found here in our analysis of the torture memos is the attempted integration or overlap of legality and efficacy. Even though the CAT treaty explicitly rules out exceptions, Bradbury saw fit to include it into his legal analysis. While this must be characterized as legally flawed, it also speaks to the profound draw that many feel towards wishing to calculate what could be the lesser evil. For Bradbury’s legal analysis the facet of effectiveness was essential to his finding that a specific act did not ‘shock the conscience’ and was thus not “constitutionally arbitrary”. Bradbury claimed that an action must further a valid purpose of government, and the only way for this to occur was if the coercive interrogation implemented produced results for avoiding additional terrorists attacks. What is most disturbing to find, however, is that Bradbury’s complete reliance on the

¹⁶⁷ *Idem.*

¹⁶⁸ BRADBURY, *Bradbury 2005 Memo*, note 162 above, (internal citations omitted) at 41 note 51.

information he was provided by the CIA had such palpable empirical weaknesses regarding the claims of the program's efficacy. Thus, this dearth of valid evidence proving the program's efficacy raises even further questions about his conclusions concerning the legality of the program, which further undermines a legal analysis that was flawed at its outset.

It is now necessary to dig deeper into the aspect of efficacy in actual application of this enhanced interrogation program. Ill-treatment was authorized and used on specific detainees in the 'war on terror' in an attempt to gather intelligence to avert further attacks and to disrupt and dismantle the al Qaeda organization, and certain cases were touted as successes by the Bush administration. We will look into the precise circumstances of the interrogation of the alleged members Ibn al-Shaykh al-Libi, Abu Zubaydah, Jose Padilla, Binyam Mohamed, Mohammed al Qahtani and Khalid Shaykh Mohammed to better analyse the empirical validity of the enhanced program. Through these cases it will be possible to grasp the true frailty of torture on suspicion for intelligence gathering.

* * *

III. Efficacy – Six High Profile Suspects

As pointed out above, social scientists have never been given access to the raw and complete empirical data on the use of torture employed by a government in a systematic manner, nor have historians uncovered documents that reveal such a methodical tracking approach used by the government itself.¹⁶⁹ Therefore, what we are left with when exposing empirical validity is what is to be found here in this chapter: a fair-minded assessment of the data that has become public. In this case this means that we will delve into the information in the public domain via government documents on six high profile detainees whose capture has specifically been touted as individual victories in the 'war on terror'. Therefore, the cases that have been put forward by its own architects to demonstrate the efficacy of the program are those that will guide the analysis of this chapter. First, however, to establish that the analysis of empirical data in this chapter will not expose a distorted picture of what can be expected when a government authorizes a program of torture and ill-treatment, it is possible to look at some of the other compiled empirical data from previous campaigns systematically employing torture.

The United States has indeed has had its own historical experience with the use of physical and psychological coercion for interrogation purposes, and so it is most pertinent to

¹⁶⁹ REJALI, *Torture and Democracy*, note 14 above, at 521-523.

begin here. While there are two CIA interrogation manuals which describe the use of coercive interview techniques for intelligence gathering that now appear online, the *Kubark: Counterintelligence Interrogation* (1963) and the *Human Resources Exploitation Training Manual* (1983),¹⁷⁰ neither one of them offer any formal instruction in applying torture techniques or suggest how to ascertain who exactly is to be interrogated. However, in the mid-1960s during the Vietnam War the CIA did in fact run what was called the Phoenix Program with the purpose of capturing, interrogating, and killing Vietcong operatives.¹⁷¹ It consisted of managers who coordinated intelligence across numerous organizations and action squads who were to perform ‘snatch and grab’ operations and assassinations.

The managers of the violent program left behind a unique database that documented their own assessment of the reliability of the intelligence being used. The conclusions are very telling of what might be expected in field operations absent any independent oversight. The standard for confirming a target was simply three independent pieces of intelligence. Nevertheless, one important statistic that emerges is that 94 percent of those who were actually confirmed to be Vietcong by this process eluded capture or death and were able to remain at large. At the same time, 20 percent of those who never reached the level of being fully confirmed by three separate sources had been terminated by the action squads. This statistic alone of the less suspicious being more likely to suffer than the highly suspicious begins to illuminate the gross problems with authorizing the serious uses of force without any independent processing. When the database from the Phoenix Program was organized and analyzed for the numbers of innocent persons wrongly suffering from the program it was found that there were “at least” 38 innocents for every actual Vietcong agent victimized.¹⁷² Additionally, the most conservative estimate was that 4.7 innocent individuals were killed for every member of the Vietcong successfully exterminated.¹⁷³

What these frightening results imply is that the database for the program “contained some incredibly poor information”.¹⁷⁴ This begs the question of how such shoddy intelligence came into the system that was being used to run the operations. There are at least two possibilities available for the existence of such weak information: 1) the selection of the individuals to be interrogated; 2) the method of interrogation. Sadly, and expectedly, there

¹⁷⁰ The National Security Archive, The George Washington University, Prisoner Abuse: Patterns from the Past, National Security Archive Electronic Briefing Book No. 122, <<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/>> (last visited Feb 2011).

¹⁷¹ REJALI, *Torture and Democracy*, note 14 above, at 470-2.

¹⁷² *Idem*, at 471.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

were individuals brought into the system that had no information, or the interrogators could simply not always distinguish the good intelligence from the bad. The conclusions drawn by this investigator of the Phoenix Program were that,

[E]ven if torture was completely effective, the database indicates that it would still be unreliable as a source of information because the way individuals are chosen in insurgencies guarantees many prisoners with no information. But it seems plausible that torture compounded the selection errors: the ignorant fingered the innocent and deceived the torturers, and the innocent were then interrogated or terminated.¹⁷⁵

The difficulties highlighted here point to the validity of the picture to be presented in this chapter by the sampling of detainees from the ‘war on terror’. At the same time, the Phoenix Program underlines the insidious nature of torture on suspicion since it guarantees that false information is injected into the intelligence system.

It is also instructive to look at another historical case where a good deal of empirical data has been collected and analyzed concerning the application of torture: the Battle of Algiers. The French General Massu re-established colonial authority in the capital city of Algeria in just seven short months after being given “*carte blanche*” to clear out the *Front de Libération Nationale* (FLN) group that was employing terrorist tactics in an insurgency against the foreign power.¹⁷⁶ While there are some who cite this case to silence critics of torture due to this simple fact,¹⁷⁷ the archives on the war in Algeria are now partially open and interrogators have written their biographies revealing a more complete view of what happened in that armed conflict. A wider purview exposes a general failure to produce reliable information through torture and, “the devastating consequences of torture for any democracy foolish enough to institutionalize it”.¹⁷⁸

Of significance to our work, even though torture was instituted as an official military tactic and widely applied in the Casbah of Algiers to avert terrorist attacks there is not one soldier who has ever claimed to have secured timely information and prevented a ticking bomb from exploding.¹⁷⁹ Additionally, because members of the FLN had been instructed that if under duress they were to give up the names of their rivals from a more accommodating

¹⁷⁵ *Ibid.*, at 472.

¹⁷⁶ DUQUESNE, J., *Pour comprendre la guerre d’Algérie* (Paris, Perrin, 2001) at 69-78 ; see also HORNE, A., *A Savage War of Peace : Algeria 1954-1962* (Great Britain, Macmillan Ltd., 1977) at 183-207.

¹⁷⁷ See e.g. BRANCHE, R., *La torture et l’armée pendant la guerre d’Algérie : 1954-1962* (Paris, Gallimard, 2001) « L’action des parachutistes à Alger paraît un succès indéniable. [...] L’argument des moyens contre-révolutionnaires est toujours renforcé par l’idée de leur efficacité. » at 218 ; See also BEHR, E., “that without torture the F.L.N.’s terrorist network would never have been overcome...The Battle of Algiers could not have been won by General Massu without the use of torture”, cited in *idem*, HORNE, *A Savage War of Peace*, at 205.

¹⁷⁸ REJALI, *Torture and Democracy*, note 14 above, at 480.

¹⁷⁹ *Idem*, at 481 and 489.

nationalist organization, the French unknowingly helped liquidate some of the less violent Algerians working for a compromise and drove events further into the hands of extremists.¹⁸⁰

It is also important to recognize that what was carried out in this ostensibly successful military campaign unapologetically instituting torture was that it did not apply a selective process to filter out the innocent from among its victims. A wide net was cast in the center of Algiers. In the end, nearly 30 percent of the population of the Casbah, 24,000 of the total population of 80,000, had been taken into custody with a great majority of them subjected to torture (80 percent of the men and 66 percent of the women).¹⁸¹ One historian of the conflict has claimed that 1400 operators of the FLN had actually been assembled in Algiers.¹⁸² This means that, even if every single one of these members had been detained, there were still around 22,600 innocents unconnected with the terrorist organization who suffered from wrongful detention, with a great many of them also being tortured. When these figures are compiled and worked out, we see that the French military was torturing nearly fifteen individuals to be able to stumble upon one actual member of the insurgency. Looking at such astounding figures and analyzing the efficacy of torture for gathering reliable counterterrorist information, one historian wrote,

From a purely intelligence point of view, experience teaches that more often than not the collating services are overwhelmed by a mountain of false information extorted from the victims desperate to save themselves from further agony. Also, it is bound to drive into the enemy camp the innocents who have wrongly been submitted to torture.¹⁸³

But what about the successful military campaign in Algiers? With all of this false intelligence rolling in how did the French root out the FLN in such a short time span? One scholar looked into this particular question and points out that the same French army had used similar torture techniques in Vietnam just years earlier, yet failed miserably.¹⁸⁴ Therefore, the use of the tactic of torture itself cannot be the answer for what led to a successful military campaign. General Massu himself identified the drastically different terrain of a small inner-city of the Casbah that could be cordoned off and controlled with informants, identity cards and relatively reliable block wardens monitoring very few inhabitants. Extensive research by one academic thus revealed that, “[t]he French gained accurate intelligence through public

¹⁸⁰ *Ibid.*, at 482.

¹⁸¹ *Ibid.*

¹⁸² HORNE, *A Savage War of Peace*, note 176 above, at 184.

¹⁸³ *Idem.*, at 205.

¹⁸⁴ REJALI, *Torture and Democracy*, note 14 above, at 480-93.

cooperation and informants, not torture”.¹⁸⁵ Of course, simply looking at what happened in Algiers in 1957 narrows our purview to only one battle in a war that lasted from 1954 to 1962. The former French secretary-general at the Algiers’ prefecture, Paul Teitgen, concisely stated that to focus attention on the overall strategic goals of a military operation rather than just one armed encounter: “Massu won the Battle of Algiers; but that meant losing the war”.¹⁸⁶

Nevertheless, even if one were to dispute this conclusion of what was the deciding factor in the Battle of Algiers, it would still mean that an effective torture program would need to follow the same wide-net strategy of the French to achieve the same efficacy. In other words, if we accept the argument that torture brought about victory in the Battle of Algiers, it was with the use of blanket and indiscriminate torture applied to a wide swath of the population in the community that housed the members of the terrorist group that led to the demise of the FLN. Therefore torture as a tactic was employed as a deterrent. We will see that this is surely not what was instituted with the notion of “high value detainees” that were to be targeted with enhanced interrogation techniques for their intelligence value in the ‘war on terror’. Therefore this model cannot be seen as applicable to our circumstance.

With this brief look into the Phoenix Program and the Battle of Algiers we can see that an examination of the empirical data on a selection of six high profile suspects detained in the ‘war on terror’ would not present a picture of torture on suspicion that is skewed or unfair. In the CIA program it was found that 38 innocents were victimized for every actual member of the Vietcong subjected to similar treatment. Even the French, who cast a wide net in Algiers, caught and tortured some fifteen individuals to secure just one true insurgent. Therefore it seems more than reasonable to put forward the stories and circumstances of the six individuals, Ibn al-Shaykh al-Libi, Abu Zubaydah, Jose Padilla, Binyam Mohamed, Mohammed al Qahtani and Khalid Shaykh Mohammed, to paint a general picture of a reality that cannot, and might never be, put into pure social science terms to be studied and analyzed. Yet, one thing is certain. The program that these high profile individuals were subjected to, with the worst action building slowly but surely upon lesser forms of ill-treatment until reaching the apex of controlled drowning evoking death, was based on a suspicion of who they were and what they knew. Indeed, this is the very nature of such a program.

¹⁸⁵ *Idem*, at 481.

¹⁸⁶ HORNE, *A Savage War of Peace*, note 176 above, at 207.

IV. Ibn al-Shaykh al-Libi – *Casus Belli*

On December 19, 2001 Ibn al-Shaykh al-Libi was captured by Pakistani officials blocking the chaotic escape through the mountains of those fleeing the war and disorder caused by the invasion of Afghanistan by U.S. armed forces in response to the attacks of September 11th.¹⁸⁷ Considered to be the first big al Qaeda prize in the ‘war on terror’, alleged to have trained hundreds, if not thousands, of jihadis at a camp in Afghanistan, al-Libi was quickly handed over to the United States. He was first interrogated by an FBI team comprising a seasoned terrorism agent and a New York detective who had been working on a joint terrorism task force. These two U.S. agents had been advised to run the interrogation strictly by the book with the criminal justice model in mind and with the idea of securing his testimony as a future witness in domestic court against two alleged al Qaeda agents being held in the United States. They were able to build a rapport with al-Libi that paid off in “specific actionable intelligence – information that could save American lives”.¹⁸⁸ Without coercion, al-Libi provided information on a terrorist bomb plot in its final stages to strike the U.S. embassy in Yemen, which was later corroborated and averted what would have likely been a deadly attack. Nearly as importantly, al-Libi was pressed hard on ties between al Qaeda and the Saddam Hussein regime in Iraq and he told his interrogators that he did not know of any.¹⁸⁹

While all of the details concerning al-Libi’s detention and treatment have not been disclosed, what is known about what happened next casts a bright light on torture and the efficacy of abusive interrogation for gathering accurate intelligence in the ‘war on terror’. After several days of traditional interrogation by the FBI team building trust with the detainee, a CIA officer burst into the cell at Bagram Air Force Base in Afghanistan and began yelling at al-Libi. Informing him of his pending rendition to Egypt, the officer screamed, “And while you’re there, I’m going to find your mother and f*** her!” Shortly after this, other CIA officers entered the room and strapped al-Libi to a stretcher, wrapped his feet, hands and mouth in duct tape, and loaded him into a pickup truck that drove directly into the cargo hold of a waiting airplane. The agent leading the FBI team from back in the U.S. realized that this astonishing event marked a new day dawning, and it was time to retire from a twenty-seven year career. Looking back at this inter-agency battle lost to the CIA over custody of al-Libi, and his reported subsequent treatment, this FBI agent declared, “At least we got information

¹⁸⁷ MAYER, *The Dark Side*, note 27 above, at 103-4.

¹⁸⁸ *Idem*, at 105.

¹⁸⁹ *Ibid*.

in ways that wouldn't shock the conscience of the court. And no one will have to seek revenge for what I did".¹⁹⁰

In 2006 the U.S. Senate Select Committee on Intelligence released a long awaited report on the use of intelligence by Bush administration officials in the run-up to an invasion of Iraq, and this account reveals and provides valuable evidence regarding the inefficacy of torture.¹⁹¹ This government document provides a record of how exactly abusive interrogation, in the specific instance of al-Libi, lent false support for the invasion of a sovereign country. Most importantly for the purely self-interested lens of efficacy, dependence on the intelligence gathered through coercion helped provide a *casus belli* to invade Iraq at the estimated cost of somewhere between 1 and 3 trillion dollars in the end,¹⁹² the lives of at least 4,400 U.S. troops,¹⁹³ more than 30,000 troops wounded in action¹⁹⁴ and immeasurable damage to the international stature and credibility of the United States.

Following the unusual and volatile internal transfer between U.S. agencies, al-Libi was then moved to a third country under a program of rendition that was originally aimed at the handover of criminal suspects to find justice before a court. After September 11th, the program was transfigured into what has now been generally labelled "extraordinary rendition", meant to abduct terror suspects, not to bring them before a court of justice in the U.S., but instead to conceal the detainee from the legal system by transferring them to a third country for immobilization and interrogation.¹⁹⁵ Under questioning in this third country,¹⁹⁶ al-Libi did indeed produce information concerning a link between al Qaeda and the Saddam Hussein regime in Iraq. Al-Libi told his captors that weapons of mass destruction training had been

¹⁹⁰ *Ibid.*, at 106-7.

¹⁹¹ U.S. Senate Select Committee on Intelligence, 'Postwar Findings About Iraq's WMD Programs and Links to Terrorism and How They Compare with Prewar Assessments: Together with Additional Views' (8 Sept 2006) available at : <http://www.fas.org/irp/congress/2006_rpt/srpt109-331.pdf>.

¹⁹² See e.g. Congressional Budget Office Testimony, Statement of Peter ORSZAG, *Estimated Costs of U.S. Operations in Iraq and Afghanistan and Other Activities Related to the War on Terrorism*, (24 Oct 2007) available at : <http://www.cbo.gov/ftpdocs/86xx/doc8690/10-24-CostOfWar_Testimony.pdf>; BILMES, L. and STIGLITZ, J. *The Economic Costs of the Iraq War: An Appraisal Three Years After the Beginning of the Conflict*, Working Paper No. 12054 (Cambridge, Mass.: National Bureau of Economic Research, February 2006) available at : <http://www.nber.org/papers/w12054.pdf?new_window=1>; and BILMES, L. and STIGLITZ, J., 'The Iraq War Will Cost \$3 Trillion, and Much More' *The Washington Post* (9 March 2008) available at: <<http://www.washingtonpost.com/wp-dyn/content/article/2008/03/07/AR2008030702846.html>>.

¹⁹³ CNN.com, Forces: U.S. and Coalition Casualties, Special Reports from CNN.com, available at: <<http://edition.cnn.com/SPECIALS/2003/iraq/forces/casualties/>>.

¹⁹⁴ GlobalSecurity.org, US Military Casualties in Iraq Casualty Notes – Monthly Summaries, available at: <http://www.globalsecurity.org/military/ops/iraq_casualties.htm>.

¹⁹⁵ WEISSBRODT, D. and BERGQUIST, A., 'Extraordinary Rendition and the Torture Convention' (2006) 46 *Virginia Journal of International Law* 585, at 588-91; Minnesota Legal Studies Research Paper No. 06-39. Available at SSRN: <<http://ssrn.com/abstract=925880>>.

¹⁹⁶ The "third country" discussed here has been generally understood to be Egypt, but to date there has been no official confirmation of this fact.

made available to two al Qaeda operatives, and the CIA relied heavily on this intelligence information in its January 2003 paper *Iraqi Support for Terrorism*. It was provided that,

Iraq –acting on the request of al-Qa’ida militant Abu Abdullah, who was Muhammad Atifs emissary– agreed to provide unspecified chemical or biological weapons training for two al-Qa’ida associates beginning in December 2000. The two individuals departed for Iraq but did not return, so al-Libi was not in a position to know if any training had taken place.¹⁹⁷

Yet, how exactly this information was gathered is of critical importance to the question before us in this chapter. This was the first time that al-Libi had made this claim of any official relationship between Iraq and al Qaeda and it was brought forward only after the use of abuse and ill-treatment. When al-Libi was questioned on this subject he had a very tough time since he had already decided to fabricate information so as to avoid mistreatment, but knew nothing on the subject and thus even inventing a story proved difficult.¹⁹⁸ His interrogators were displeased with his initial lack of response to the line of questioning and forced him into a tiny box where he was left for some 17 hours. After being let out of the box, he was again questioned on the link between Iraq and al Qaeda and then pushed to the floor and beaten for 15 minutes when he did not satisfy his interrogator. While there are not an enormous number of details concerning this beating and ill-treatment, the government report makes clear that al-Libi was repeatedly punched until he was willing to provide the information being sought about a connection between al Qaeda and Iraq. As such, al-Libi began to concoct the story of an operational link using names of al Qaeda members he knew that pleased the foreign interrogators, and his treatment from that point began to slowly improve.¹⁹⁹

Of great consequence, this “intelligence” information made it all the way the Secretary of State’s critical speech before the UN Security Council in February of 2003. This address to the international community was seen as particularly important in the case for a war against Iraq because Colin Powell was seen by many as one of the figures within the Bush administration with the most credibility. It has been well recounted that Powell spent a good deal of time at the CIA headquarters combing through the available intelligence in preparation for this high-profile speech so as to put forward the most reliable arguments for the invasion of a country that had not attacked the United States.²⁰⁰ However, this corrupted intelligence,

¹⁹⁷ U.S. Senate Select Committee on Intelligence, ‘Postwar Findings...’, note 191 above, at 76.

¹⁹⁸ *Idem*, at 80-82.

¹⁹⁹ *Ibid.*

²⁰⁰ See e.g. Interview with Lawrence Wilkinson, Former Chief of Staff to Secretary of State Colin Powell, *PBS: Now with David Brancaccio* (2 March 2006) available at : <<http://www.pbs.org/now/politics/wilkerson.html>>, “...there have been some revelations. Principally about Sheik Al Libi's testimony and how it was obtained. And how there was a DIA, for example, Defense Intelligence Agency, dissent on that testimony, [...] I can tell you

although not referring to al-Libi by name, made it into his final speech before the Security Council,

I can trace the story of a senior terrorist operative telling how Iraq provided training in these weapons to al-Qaida. Fortunately, this operative is now detained, and he has told his story. I will relate it to you now as he, himself, described it. This senior al-Qaida terrorist was responsible for one of al-Qaida's training camps in Afghanistan. His information comes first-hand from his personal involvement at senior levels of al-Qaida. He says bin Laden [...] did not believe that al-Qaida labs in Afghanistan were capable enough to manufacture these chemical or biological agents. They needed to go somewhere else. They had to look outside of Afghanistan for help. Where did they go? Where did they look? They went to Iraq.

The support that (inaudible) describes included Iraq offering chemical or biological weapons training for two al-Qaida associates beginning in December 2000. [...]

As I said at the outset, none of this should come as a surprise to any of us. Terrorism has been a tool used by Saddam for decades. Saddam was a supporter of terrorism long before these terrorist networks had a name. And this support continues. The nexus of poisons and terror is new. The nexus of Iraq and terror is old. The combination is lethal.

With this track record, Iraqi denials of supporting terrorism take the place alongside the other Iraqi denials of weapons of mass destruction. It is all a web of lies.

When we confront a regime that harbors ambitions for regional domination, hides weapons of mass destruction and provides haven and active support for terrorists, we are not confronting the past, we are confronting the present. And unless we act, we are confronting an even more frightening future.²⁰¹

During the preparation for this speech, Powell became so frustrated with the thin evidence that he nearly threw out all of the information relating to a connection with terrorism. But it was this key nugget of information from al-Libi that swayed Powell in a dramatic moment to, “put his name and reputation behind the most fateful speech of his life”.²⁰²

Almost one year to the day, al-Libi recanted these statements of collusion between Iraq and terrorists that he had made under duress. In 2004 he was back in CIA custody in Afghanistan, and a cable was sent back to headquarters at Langley that al-Libi’s story of a connection was no longer reliable. This cable seems to have sat idle for some time back in the United States, until it was picked up and given political life by the Senate committee in its

that having been intimately involved in the preparation of Secretary Powell for his five February 2003 presentation at the UN Security Council, neither of those dissents in any fashion or form were registered with me or the Secretary by the DCI, George Tenet, by the DDCI, John McLaughlin, or by any of their many analysts who were in the room with us for those five, six days and nights at the Central Intelligence Agency.

²⁰¹ POWELL, C., ‘Full Text of Colin Powell’s Speech: US Secretary of State’s Address to the United Nations Security Council’ *The Guardian*, guardian.co.uk (5 Feb 2003).

²⁰² MAYER, *The Dark Side*, note 27above, at 137.

report of 2006. Interestingly enough, the CIA had previously voiced serious concern over the veracity of the content of what had been transmitted from this third country detaining al-Libi in at least three other documents that never made it to Colin Powell during his preparations.²⁰³ In the end, some have suggested that we are left to decide between which one of al-Libi's statements was a lie,²⁰⁴ because clearly one of them must be false. However, the United States invaded Iraq and gained full access to all of its internal documents, and the governing party had a profound political motivation for finding corroborating evidence of this specific link. All the available facts indicate that the original assessments found in the CIA documents (which never made it to Secretary of State Powell), were indeed accurate. As the Senate Intelligence Committee wrote, "[p]ostwar information indicates that DIA's initial assessments, that al-Libi was likely misleading debriefers, were correct".²⁰⁵ Thus all signs are that al-Libi concocted, "information in response to physical abuse and threats of torture", since we now know that, "[t]he Intelligence Community has found no postwar information to indicate that Iraq provided CBW [Chemical and Biological Weapons] training to al-Qa'ida".²⁰⁶

As such, we must conclude that the interrogation of Ibn al-Shaykh al-Libi was indeed ineffective since his ill-treatment led directly to providing false intelligence that helped bolster a *casus belli* at enormous costs in blood and treasure. It is still not clear what sort of relationship al-Libi actually had with al-Qaeda, but there is little doubt that the suspicions of what information he might possess were incorrect, and extremely costly to the United States. Posner and Vermeule speak of "error cost" for wrongful ill-treatment. How would one calculate the error cost in these circumstances?

V. Abu Zubaydah – The Pivotal Moment in Torture Policy

In the early morning of March 28, 2002 local law enforcement officers in Faisalabad, Pakistan, joined by personnel from the CIA and FBI, raided 10 different suspected safe houses and captured a 30-year-old Saudi Arabian by birth (although he refers to himself as a Palestinian because he migrated there as a youth)²⁰⁷ who had been familiar to U.S. terrorism analysts for years. In a bloody firefight they apprehended Zayn al-Abidin Muhammad Hussein, or as he is most widely known, Abu Zubaydah. At the location of his capture, what

²⁰³ *Ibid.*; U.S. Senate Select Committee on Intelligence, 'Postwar Findings...', note 191 above, at 77-78.

²⁰⁴ TENET, G., *At the Center of the Storm: My Years at the CIA* (London, Harper Collins, 2007) at 353-354.

²⁰⁵ U.S. Senate Select Committee on Intelligence, 'Postwar Findings...Conclusions', note 191 above, at 107.

²⁰⁶ *Idem*, at 108.

²⁰⁷ Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10016 (27 March 2007) at 25. Available at : <<http://www.aclu.org/national-security/verbatim-transcript-combatant-status-review-tribunal-csrt-hearing-abu-zubaydah>>.

appeared to be plans for an attack were found along with the remnants of a bomb that he and two others had been building along side a soldering iron that was still hot. This certainly is the closest scenario to the ‘ticking time bomb’ that has been described by U.S. authorities, and so it was strongly believed that Zubaydah had timely, and potentially life-saving, actionable intelligence. For an administration that felt itself under intense pressure to demonstrate positive advancements and victories in its response to the 9/11 terrorist attacks, Zubaydah provided one of the first testing grounds for its practical theories on intelligence gathering for achieving this end. As such, we should consider this case of Abu Zubaydah as the pivotal moment at which it was decided what interrogation techniques would be employed, and what philosophical approach towards intelligence gathering would be followed, in the ‘war on terror’.

In 2006, when the administration first divulged information about him in a speech before families of the victims of 9/11 announcing his transfer along with 13 other High-Value detainees from undisclosed sites to Guantánamo, President Bush explained the importance of this particular detainee when he said, “[w]e believed that Zubaydah was a senior terrorist leader and a trusted associate of Osama bin Laden”.²⁰⁸ A productive and thorough interrogation of this detainee was thus at the very forefront of the administration’s agenda, but the CIA agency that had been put in the lead by the administration had zero experience in detention and no trained interrogators.²⁰⁹

Unlike the terror suspect discussed above, Ibn al-Shaykh al-Libi, who was dealt with under the program of ‘extraordinary rendition’ by sending him to a third country for detention and interrogation, the United States decided that this time (some three months later) Abu Zubaydah would be classified as a High-Value Detainee and kept under United States custody. As he was nearly fatally wounded during apprehension, the first step the U.S. took was to fly over a top trauma surgeon from John Hopkins Hospital to save the life of Zubaydah in “an extraordinary feat of medicine”.²¹⁰ Yet at his Combatant Status Review Tribunal Hearing in March of 2007 Zubaydah testified that he still suffered medical complications

²⁰⁸ BUSH, P., ‘Speech on Terrorism’ (6 Sept 2006) transcript available at New York Times : <http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all>. Also notice the use of language in this sentence. The use of the term “believed” is extremely important for understanding the centrality of the concept of suspicion in interrogation, as well as the fact that it indicates an acknowledgement that the first beliefs of Zubaydah’s role in the al Qaeda organization were wrong.

²⁰⁹ MAYER, *The Dark Side*, note 27 above, at 139-181.

²¹⁰ *Idem*, at 142.

resulting from bullet wounds to his head and thigh, continued to endure seizures and speech problems, and was left with only one testicle.²¹¹

1) The Clash between the FBI and CIA

To best understand what unfolded next the most illuminating information comes from Ali Soufan, a highly experienced FBI agent practised in interrogation through the questioning of numerous al Qaeda terrorists. Soufan grew up in Lebanon and later moved to Philadelphia with his parents. This helped him achieve the rare and significant capability to fluently conduct questioning in both English and Arabic. He was a key investigator of the USS Cole bombings in 2000 and “could quote Qur’anic passages to radical jihadist prisoners, challenging them about the meaning of the prophet’s words and ultimately gaining trust to engage them in extended conversations about their lives”.²¹² The former legal and policy representative to Secretary of State Condoleezza Rice, Philip Zelikow, described him as “one of the most impressive intelligence agents – from any agency”.²¹³

Soufan was one of the first to question Zubaydah at the black site in Thailand where he was installed for detention and interrogation. Zubaydah himself had spent three days circling the world in an aircraft, with a changing of pilots along the way to ensure that none of them knew the whole itinerary that brought him to the secret location.²¹⁴ Soufan and his fellow FBI agent were very familiar with Abu Zubaydah, and were able to gain important actionable intelligence from the severely wounded prisoner within the first four hours of interrogation.²¹⁵ Demonstrating an intimate knowledge of his suspect’s background, Soufan was able to dismiss the alias that Zubaydah tried to lead with and instead asked if he could just call him “Hani”, the nickname his mother had used with him as a child. With this knowledge-based approach the FBI team was able to secure an important piece of information. Zubaydah confirmed that the mysterious “Mukhtar” that had been referred to in many of the transmissions relating to the attacks of September 11th was indeed Khalid Shaykh Mohammed, and that he was behind the attacks. The swift information gained, much of it still classified, was deemed so important that the Director of the CIA wanted to extend them

²¹¹ Verbatim Transcript of CSRT..., note 207 above, at 25.

²¹² ISIKOFF, M., “‘We Could Have Done This the Right Way’: How Ali Soufan, an FBI agent, got Abu Zubaydah to talk without torture” *Newsweek* (4 May 2009) available : <<http://www.newsweek.com/id/195089>>.

²¹³ *Idem*.

²¹⁴ MAYER, *The Dark Side*, note 27 above, at 149.

²¹⁵ For the best first hand source on this particular interrogation see SOUFAN, A., Testimony before the U.S. Senate Judicial Committee, Subcommittee on Administrative Oversight and the Courts, ‘What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration’ (13 May 2009) available at : <<http://judiciary.senate.gov/hearings/hearing.cfm?id=3842>>.

official congratulations on behalf of the agency, until he learned that they were in fact from the FBI. He instead immediately ordered a CIA counterterrorism team to the site in Thailand. It must be clearly noted that this intelligence was gathered using what Soufan calls the “Informed Interrogation Approach”, wholly free of any physical or mental coercion.²¹⁶

Within days the CIA team arrived at the site with a contractor that was a psychologist who claimed to be a specialist in human behavior borne of his experience working with the SERE program teaching resistance techniques to U.S. personnel in the eventuality that they were captured by an enemy who did not respect the international laws prohibiting ill-treatment. It was under the instruction of this contractor, James Mitchell,²¹⁷ that the FBI team was removed and Zubaydah was promptly stripped naked and subjected to low-level sleep deprivation (between 24 and 48 hours). After a few days of getting no information with the application of coercion, Soufan and his colleague were called back in and they resumed with the Informed Interrogation Approach. Soufan asserts that this time the rapport building led to the gathering of further intelligence providing details about Jose Padilla, a U.S. citizen suspected of working with al Qaeda, along with other intelligence that remains classified.²¹⁸ Yet the contractor stepped back in again to take over the interrogation and had the CIA apply further force including loud noise and temperature manipulation. This back and forth between competing interrogation approaches continued as far as introducing a confinement box that looked, “like a coffin”,²¹⁹ and one CIA psychologist left the location because he objected to what was being done to the detainee.

A direct confrontation eventually erupted between the FBI agent Ali Soufan and the CIA contractor, with the latter insisting that, “Science is science. This is a behavioral issue.”²²⁰ The contention that it has been somewhere scientifically proven that it is possible to coerce away an individual’s will, and that the most efficient and effective method for doing so is through brutal physical and psychological treatment, must have been particularly galling for an experienced interrogator. Another fact that Ali Soufan was forced to confront at this pivotal moment of the ‘war on terror’ was that the contracted psychologist brought in to assist an agency that had little previous experience in interrogation, was himself applying an

²¹⁶ *Idem.*

²¹⁷ For excellent investigative research into the role of the contracted psychologists in the construction of this interrogation program see EBAN, K., ‘Rorschach and Awe’ *Vanity Fair* (17 July 2007) available at : <<http://www.vanityfair.com/politics/features/2007/07/torture200707>>; see also ISIKOFF, ‘We Could Have Done This...’, note 212 above.

²¹⁸ SOUFAN, Testimony..., note 215 above.

²¹⁹ ISIKOFF, ‘We Could Have Done This...’, note 212 above.

²²⁰ *Idem.*

“untested theory” and conducting an “experiment”.²²¹ Mitchell’s experience came from training personnel to deal with enemies who did not follow the law, and never sat across the table (nor across a confinement box, for that matter) from a suspected terrorist. He had no background in the Middle East, no intelligence experience, was unversed in the Muslim religion and spoke no Arabic.²²² One Air Force expert in human intelligence operations was astonished that the CIA would bring in a clinical psychologist, “who had no intelligence background whatsoever, who had never conducted an interrogation [...] to do something that had never been proven in the real world”.²²³ While this expert accepts that the harsh techniques would indeed get a detainee talking, he keenly points out that, “getting somebody to talk and getting someone to give you valid information are two very different things”.²²⁴ Most importantly when it comes to the question of efficacy that drives our analysis here, it has been stressed by some familiar with the development of the interrogation program that those who brought the CIA the theory of reducing a detainee to complete helplessness and dependence, “had no proof of their tactics’ effectiveness”²²⁵

In May of 2009, Ali Soufan testified on this pivotal episode in the ‘war on terror’ before the U.S. Senate Judiciary Committee, but was forced to do so behind a screen to protect his identity. In this testimony, Soufan lays out some of the most powerful arguments supporting the Informed Interrogation Approach, and the condemning reasoning against the introduction of harsh techniques for gathering intelligence from suspected terrorists.²²⁶ He directly correlates the knowledge-based approach with what is laid out in the Army Field Manual, and it leverages everything thing that is known personally, culturally, and ideologically about the detainee to focus on the primary points of influence. Soufan identifies the first as the fear that swiftly arises for the detainee in realizing that they have been isolated from their base of support, and it can be turned into an advantage because all people crave human contact which is a role the interrogator can fulfill to gain the upper hand. Next, the detainee wants to feel as if they are still of value and have something to offer, and the interrogator can coax and cajole information out because the detainee has a natural desire not to jeopardize the only human contact available. Finally, the interrogator can study every detail of what is known about the detainee and terrorist organization to give the impression that any lie will be easily caught, which removes or reduces the motivation to provide false

²²¹ SOUFAN, Testimony..., note 215 above.

²²² MAYER, *The Dark Side*, note 27 above, at 156.

²²³ EBAN, ‘Rorschach and Awe’, note 217 above.

²²⁴ *Idem*.

²²⁵ *Ibid*.

²²⁶ SOUFAN, Testimony..., note 215 above.

information. Soufan explains that this approach combines interpersonal, emotional and cognitive strategies, and “[i]f done correctly it’s an approach that works quickly and effectively because it outwits the detainee using a method that they are not trained for, or able to resist”.²²⁷

On the other hand, the thinking behind the use of harsh techniques ignores the knowledge we have on the mindset, history, vulnerabilities and culture of those to be interrogated, and instead focuses on what is believed to be a “science” of how to remove the volition from any human regardless of their background. This theory can be described as operating on a ‘force continuum’ that gradually applies rougher and rougher techniques in an attempt to,

“subjugate the detainee into submission through humiliation and cruelty. [...] The idea behind the technique is to force the detainee to see the interrogator as the master who controls his pain. It is an exercise in trying to gain compliance rather than eliciting cooperation”.²²⁸

Soufan then continued to describe the four major problems he sees with applying this untested approach on terror suspects. Most interestingly, not one of these four critiques from the experienced interrogator use the perspective of morality or legality. Soufan only addresses efficacy.

The first problem Soufan identifies is that coercion is tactically ineffective. Al Qaeda terrorists are trained to resist much worse techniques than those employed by a democracy because their operatives often have direct experience with dictatorships. He points out that looking at the facts that have been leaked and released from the interrogation of High-Value detainees clearly demonstrates that this ‘force continuum’ was predictably mounted to its highest point of waterboarding, where the only option was to apply it repeatedly to a total of 266 times between two detainees because a ceiling had been reached and the detainee called the interrogator’s bluff.²²⁹ This is not to mention the fact that, since al Qaeda operatives are expecting harsh treatment and applying it simply plays into their expectations, this gives them a sense of predictability, and strengthens the will to resist.

The second problem is that there is no way to know whether the detainee is being truthful, and thus unreliable and incorrect information will inevitably be introduced into the intelligence gathering. It has been rightly indicated that under duress most people will bark

²²⁷ *Idem.*

²²⁸ *Ibid.*

²²⁹ The fact that Abu Zubaydah was waterboarded 83 times, and Khalid Shaykh Mohammed 183 times in one month, was first made public (perhaps mistakenly) in the memo, BRADBURY, *Article 16 Memo*, note 110 above, at 37.

out whatever information they have in their mind at the time, be it true or false. An interrogator who focuses on the application of pain as the means for extracting information has not taken the time to become an expert on the detainee or subject matter. As such, this interrogator is even less able to know whether the information being squeezed out is within the realm of believability. As an example of the disastrous consequences that can result from pursuing this approach Soufan points to the false information that was blurted out by Ibn al-Sheik al-Libi of weapons training given to al Qaeda members by the Iraqi regime discussed above.

The next major problem listed by Soufan is that the method is slow. The public argument for incorporating harsh treatment into interrogation has often been that there is not time for a patient and methodical application of the informed approach because it might be the case that information needs to be acquired as quickly as possible to save lives that are in imminent danger. However, the “enhanced interrogation techniques” were a part of progressively harsher program detailed in the torture memos. This was to take place over a long period of time, with sleep deprivation being the most obviously time-consuming. In the Classified Bybee Memo of August 1, 2002 the CIA said that it would like to deprive Zubaydah of sleep for up to eleven days, which would total 264 hours, and Yoo and Bybee authorized its use along with all the other requested techniques.²³⁰ Considering that guerilla groups have for decades made “torture contracts” with their members affirming that if one is captured they must try and keep the interrogators busy for 24 hours while codes, passwords and locations are changed,²³¹ it is reasonable to assume that terrorist organizations would be agile enough to change plans that are known by the captured. This is in addition to the fact that both eleven days of sleep deprivation, and 183 applications of the waterboard over one month, are absurdly slow when we think about the case of the ‘ticking bomb’.

Finally, Soufan powerfully points out that this approach ignores the endgame. Because these brutal methods certainly do not intend to take the life of the detainee, what is to happen next to the detainee is a critical question. As terrorist operatives have clearly transgressed the laws of war by targeting civilians, a trial condemning them of this violation is the logical and legal next step. However, there are rules of evidence in the due process afforded to defendants before U.S. courts, which are exactly where FBI agents anticipate bringing the criminal detainees they interrogate.²³² When abuse is introduced into the system all evidence runs the

²³⁰ Classified Bybee Memo, *Interrogation of al Qaeda Operative*, note 82 above, at 3.

²³¹ REJALI, *Torture and Democracy*, note 14 above, at 475.

²³² SOUFAN, *Testimony...*, note 215 above.

severe risk of becoming “tainted”, even that which was obtained through other means. A sharp example of the way in which this ill-treatment has rendered one specific detainee “disposable”, and of direct consequence to bringing those responsible for the attacks of 9/11 to justice, will be discussed further below with the case of al Qahtani.²³³

What Ali Soufan saw at the black site in Thailand was only the beginnings of a program of ill-treatment that would become much more extensive and cruel. Soufan witnessed Abu Zubaydah having been stripped naked, subjected to low-level sleep deprivation, blaring noise, temperature manipulation, and the presence of, and the request to use, a wooden confinement box. While this treatment is clearly short of the worst treatment listed in the torture memo responding to the request for the application of further techniques, Soufan characterized what he already saw as “borderline torture”.²³⁴ In fact, he was so aghast at what he saw being perpetrated against Zubaydah that at one point he got on a secure line to his agency’s headquarters, and found himself yelling, “I’m going to arrest these guys!”²³⁵

2) The FBI Pulls Out of Harsh Interrogations

As a result of this second volatile confrontation between FBI and CIA agents in the field there was palpable fallout in the form of a decision by the Director of the former agency to no longer participate “in interviews in which aggressive interrogation techniques were being used”.²³⁶ Soufan immediately left the secret facility, followed later by his FBI partner. Thus the CIA interrogators were free to mount the force continuum uninhibited by these agents, and they were also deprived of the presence of the agency with an expertise in counterterrorism interrogation and experience in detention. This is not to mention that they lost the language capability, knowledge of the specific detainee, culture and religion possessed by FBI agent Ali Soufan. In the 2008 FBI report that details how this crucial decision made at a pivotal moment in the internal dispute over interrogation methods, there were a few differing arguments put forward for opposing the aggressive techniques advocated, and employed, by the CIA. Most interestingly, it is efficacy that looms the largest.

Pasquale D’Amuro, then the FBI assistant director for counterterrorism, was a strenuous advocate for removing all FBI agents from interrogations involving ill-treatment, and Director Mueller agreed with this assessment. In the meeting where this decision was taken, D’Amuro put forward that,

²³³ See Section VII below.

²³⁴ SOUFAN, Testimony..., note 215 above; and FBI-IG 2008 Report, note 25 above.

²³⁵ ISIKOFF, ‘We Could Have Done This...’, note 212 above.

²³⁶ FBI-IG 2008 Report, note 25 above, at 71.

he felt that these techniques were not as effective for developing accurate information as the FBI's rapport-based approach, which he stated had previously been used successfully to get cooperation from al-Qaeda members. He explained that the FBI did not believe these techniques would provide the intelligence it needed and the FBI's proven techniques would. He said the individuals being interrogated came from parts of the world where much worse interview techniques were used, and they expected the United States to use these harsh techniques. As a result, D'Amuro did not think the techniques would be effective in obtaining accurate information. He said what the detainees did not expect was to be treated as human beings. He said the FBI had successfully obtained information through cooperation without the use of "aggressive" techniques. D'Amuro said that when the interrogator knows the subject matter, vets the information, and catches an interviewee when he lies, the interrogator can eventually get him to tell the truth. In contrast, if "aggressive" techniques are used long enough, detainees will start saying things they think the interrogator wants to hear just to get them to stop.²³⁷

Additionally, D'Amuro echoed the idea that these harsh techniques were shortsighted because they failed to consider, if not directly undermined, the "endgame". His contention was that even a military tribunal would need to take into account the legitimacy of its decision and thus would need to establish some standard for the admissibility of evidence. Not only would extracting information by way of ill-treatment jeopardize the use of the information against the detainees themselves, it might also corrupt or "taint" them as witnesses against any other terrorist operators in future proceedings. As well, this type of brutal treatment would complicate the agency's, and the country's, ability to develop potential sources as few want to be associated with assisting a government perceived as violent and dishonorable. Finally, D'Amuro stated that not only were these techniques ineffective and shortsighted, they were wrong and helped al Qaeda spread negative views of the United States.

As such, the entire FBI agency, being the most experienced in interrogation for intelligence and for detaining terrorist suspects, consciously and conspicuously bowed out of taking any part in any of the harsh interrogations that were to follow. And as evidenced by the FBI Inspector General report detailing the meeting at which this crucial decision was made, it was largely because it was not believed that the coercive tactics to be employed would work to gather accurate intelligence or serve the strategic goals of the nation in its conflict with Islamic extremists. So not only was the employment of ill-treatment in interrogation thought to be inefficacious by the firsthand sentiment of one of the most experienced agents in the field dealing directly with the this important detainee in the 'war on terror', it was also a belief that traveled with ease up the chain of command to the highest levels and upon which

²³⁷ *Idem*, at 71-72.

the FBI agency as a whole decided to opt out of participating in the top priority policy of the nation less than one year after the attacks of 9/11.

3) Authorizing Further Ill-Treatment and Torture on Suspicion

After the FBI withdrew its agents from the scene at the black site in Thailand, the interrogation of Abu Zubaydah certainly moved forward and the next significant step that is publicly known was the submission of the infamous OLC Bybee Memo discussed above. However, there was an additional memo submitted the very same day of August 1, 2002, but this one remained classified until President Obama authorized its release in April 2009 (Classified Bybee Memo).²³⁸ This memo was less theoretical, and dealt directly with the specific techniques requested by the CIA to be employed against Zubaydah. Soufan suggests that the fact that Zubaydah again shut down and the team being consulted by the contractor drove further up the force continuum indicates again the inefficacy of this theory. While on the other hand, the proponents of this model based on force would suggest that this simply denoted that Zubaydah was not sharing the intelligence information he knew and so something more had to be done. The fact that the exact same behavior by the detainee can be interpreted in various ways reveals one of the essential problems with torture that is truly insurmountable: the interrogator can not know with certainty what exactly the subject knows or is hiding. Torture and ill-treatment must be based on suspicion.

Nevertheless, the CIA believed Zubaydah to be withholding information. The fact that the request to use harsher interrogation techniques was based on belief, and not on knowledge or fact, can simply be borne out by reading the legal document authorizing the specific techniques. In the very first paragraph the memo speaks to an appreciation of the perceived circumstance and not a known fact. The OLC lawyers wrote, “[a]s we understand it, Zubaydah is one of the highest ranking members of the al Qaeda terrorist organization, with which the United States is currently engaged in an international armed conflict following the attacks on the World Trade Center and the Pentagon on September 11, 2001”.²³⁹ Of course, the phrase “as we understand it” can be referring only to the OLC’s understanding and not the government as a whole, or the understanding of the CIA together with the OLC. However, this critical contention of who exactly Zubaydah was, and what role he played in the al Qaeda organization, will be later called directly into contention. As this error plays a vital role in

²³⁸ Classified Bybee Memo, *Interrogation of al Qaeda Operative*, note 82 above.

²³⁹ *Idem*, at 1.

demonstrating the dangers of arbitrary torture on suspicion it will be discussed more fully below in the case of the alleged “dirty bombers”.²⁴⁰

The next contention found in the following paragraph is interesting because it mixes the idea of conviction with information that directly contradicts this certitude. It reads,

The interrogation team is *certain* that he has additional information that he refuses to divulge. Specifically, he is withholding information regarding terrorist networks in the United States *or* in Saudi Arabia and information regarding plans to conduct attacks within the United States *or* against our interests overseas.²⁴¹

Although the team has asserted that it is “certain” and claims to be knowledgeable of a specific piece of intelligence the detainee has, the use of the word “or” two different times belies such certainty. If the interrogation team does not know whether the possessed information relates to the U.S. or Saudi Arabia, then it does not *know* at all. It suspects. These two countries are not even found in the same region, let alone adjoining, which might lead to some confusion over intelligence. And the claim that Zubaydah is “withholding information regarding terrorist networks” is so wildly vague that it could refer to absolutely anything at all. Does the interrogation team believe that he knows about their plans, their goals, their operational systems or simply their dietary habits? Any of these bits of information would seem to fit the claim being made here for the authorization of harsh techniques. As well, the claim that he has information on plans for attacks within the country, or anywhere else in the world (“or against our interests overseas”) is again immensely imprecise. There is nothing “specific” about this claim at all. At least the final sentence of this paragraph uses the proper language to describe what is being requested, “[i]n light of the information you *believe* Zubaydah has and the high level of threat you *believe* now exists, you wish to move the interrogations into what you have described as an ‘increased pressure phase’”.²⁴²

Another important aspect to note about this request from the CIA is that the only focus that is put on the need for timely information in this case of Zubaydah comes in the form of a discussion of the then current level of “chatter”. As we have noted before, the reasoning often put forward for promoting abusive techniques is based on the belief that there is no time to employ a patient, methodical approach based on knowledge of the subject and the detainee. In this circumstance the legal memo treating the mounting of the force continuum points out that the CIA intelligence, “indicates that there is currently a level of ‘chatter’ equal to that which

²⁴⁰ See Section VI below.

²⁴¹ Classified Bybee Memo, *Interrogation of al Qaeda Operative* (my emphasis), note 82 above, at 1.

²⁴² *Idem*, (my emphasis).

preceded the September 11 attacks”.²⁴³ There is no doubt that this would be concerning, even deeply so, to those following this issue in the first summer following the terrorist attacks. However, this increased level of communications certainly does not create certainty, it only raises suspicions.

We must also not forget that by the time the OLC authorized the most brutal techniques to be used, Zubaydah had been in U.S. custody for four months. If we accept that the al Qaeda organization is at all skilled in applying its insurgent tactics, and is able to move as nimbly and flexibly as any mildly competent insurgent group must, it is nearly impossible to believe that, during the 126 days that Zubaydah was in confinement between his capture at the end of March and the signing of the first torture memos on August 1st, the plans he would have been privy to had not been changed. If he did at one time possess ‘actionable intelligence’, it was by this time surely stale. The level of ‘chatter’ could easily be, and would most likely be four months later, in reference to plans to which Zubaydah never was a party.

As additional evidence of the extent to which suspicion was used as a basis for this particular case of Zubaydah, one can look at the section describing his background and experience so as to render traditional interrogation methods insufficient, and thus harsher techniques imperative. The Classified Bybee Memo reads,

Your psychological assessment indicates that it is *believed* Zubaydah wrote a Qaeda manual on resistance techniques. You also *believe* that his experiences in al Qaeda make him well-acquainted with and well-versed in such techniques. As part of his role in al Qaeda, Zubaydah visited individuals in prison and helped them upon their release. Through this contact and activities with other al Qaeda mujahedin, you *believe* that he knows many stories of capture, interrogation, and resistance to such interrogation. Additionally, he has spoken with Ayman al-Zawahiri, and you *believe it is likely* that the two discussed Zawahiri’s experiences as a prisoner of the Russians and the Egyptians.²⁴⁴

Clearly, none of this information concerning Zubaydah’s personal history was firmly verified. Thus we can assume that, in fact, the CIA was not exactly sure who they had in custody. There were obviously some very worrisome suspicions about his exact role and identity, but this paragraph surely reveals that all the CIA had were clues, not knowledge.

With no indication that the language employed directly pointed to the application of further harsh or brutal procedures on the basis of suspicion, the CIA requested, and indeed received authorization, to apply ten techniques. They were as follows:

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*, (my emphasis) at 7.

(1) *attention grasp* – grasping the collar with both hands and quickly pulling the individual towards the interrogator

(2) *walling* – individual is pushed quickly against a false wall that is meant to shock, particularly due to the loud noise created by a constructed hollow wall that will also absorb the blow – individual wears a towel around neck for protection from whiplash

(3) *facial hold* – meant to hold the head immobile, fingers are far from eyes

(4) *facial slap (insult slap)* – not to induce pain, but to invade physical space and to shock

(5) *cramped confinement* – a small dark holding space

(6) *wall standing* – to induce muscle fatigue; individual stands four feet away from wall and leans forward to support weight with only fingertips against the wall.

(7) *stress positions* – not designed to produce pain, but rather muscle fatigue; sitting on the floor with legs extended straight out in front of him with his arms raised above his head; and kneeling on the floor while leaning back at a 45 degree angle.

(8) *sleep deprivation* – to reduce ability to think on his feet, for no more than eleven days

(9) *insects placed in a confinement box* – detainee appears to have a fear of insects; while he will be told it is a stinging insect, it would rather be something harmless like a caterpillar

(10) *the waterboard* – individual is bound securely to an inclined bench with feet elevated, water is then poured over a cloth covering the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual's blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of "suffocation and incipient panic," i.e., the perception of drowning. The individual does not breathe any water into his lungs. During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated. This procedure triggers an automatic physiological sensation of drowning that the individual cannot control even though he may be aware that he is in fact not drowning.

As the memo indicates, every last one of the requested techniques was deemed legal by the OLC and authorized by the President. For whatever reason, although clearly not one of legality, it turns out that the CIA never placed Zubaydah into a confinement box with a harmless insect.²⁴⁵

²⁴⁵ BRADBURY, *Bradbury 2005 Memo*, note 162 above, at 9.

4) The Apex of the Waterboard

As predicted by Ali Soufan, the CIA found it necessary to continually mount the entire force continuum authorized and quickly arrived at its apex: waterboarding. It turns out that once the interrogators did reach this tortuous height, they subjected Zubaydah again and again to the technique of controlled drowning simulating death, for a total of 83 times.²⁴⁶ The consistent historical illegality of waterboarding in U.S. law has been discussed above,²⁴⁷ but the use of suffocation by water as a torture technique should be further explored here briefly in the context of Abu Zubaydah since he was the first detainee in the ‘war on terror’ to be subjected to this treatment. Since there are clearly other important aspects to this particularly harsh interrogation technique, we will look particularly at the overlapping portion of the lens of efficacy in this section.

The Classified Bybee Memo that authorizes this technique contends that the waterboard “inflicts no pain or actual harm whatsoever”.²⁴⁸ In fact, the memo put forward an enormously innocuous assessment of the technique that was said to be used to gather ‘actionable intelligence’ four months after Zubaydah had been captured in March of 2002. The OLC wrote in this August 1, 2002 memo,

when the waterboard is used, the subject's body responds as if the subject were drowning – even though the subject may be well aware that he is in fact not drowning. You have informed us that this procedure does not inflict actual *physical harm*. Thus, although the subject may experience the fear or panic associated with the feeling of drowning, the waterboard does not inflict physical pain.²⁴⁹

As can be seen, the authors of this memo are wholly dependent on the verbal or written descriptions of the techniques that the CIA wished to employ in the questioning of Abu Zubaydah. Yoo and Bybee had no practical experience with interrogation nor suspected terrorists and were thus offering their legal opinions with a host of qualifications, that are found throughout the series of Torture Memos, based on the information which they were given by the same agency that was seeking a legal assessment.

To put forward such bold statements concerning the harmless nature of suffocation induced by a constant stream of water poured over the nose and mouth, and to make it of legal consequence, the memo relies on two central interpretations of the act of waterboarding and the pertinent law. To begin, there is an attention put on the idea of ‘physical harm’. One way this attention can be evidenced in the Bybee Memo is through the finding that torture only

²⁴⁶ BRADBURY, *Article 16 Memo*, note 110 above, at 37.

²⁴⁷ See notes 146 to 149 above, and accompanying text.

²⁴⁸ Classified Bybee Memo, *Interrogation of al Qaeda Operative*, note 82 above, at 11.

²⁴⁹ *Idem*, (my emphasis) at 11.

occurs when there is, in the now infamous phrase, “serious physical injury, such as organ failure, impairment of bodily function, or even death”.²⁵⁰ As mentioned above in the discussion of the torture memos, much of the legal analysis found within the memos aimed at interpreting as legal all the forms of ill-treatment that leave no marks or trace that coercion has been wrought on a person’s body or mind. We can see that this is exactly the standard also proposed here in the Classified Bybee Memo. As there has been a growth over the last six decades in international law and public monitors checking states’ comportment with their treaty obligations addressing torture and ill-treatment, there has also been a discernable trend towards increased usage of ‘clean torture’ techniques.²⁵¹ One directly pertinent reason that has been underlined for this movement towards the use of stealth torture, is that democracies in particular are concerned with preserving the *legitimacy* of the exercise of the use of force.²⁵² So we can justifiably posit that this is at least part of the reason why Yoo draws attention to the idea of ‘physical harm’ in his memos, although there is no such reference to this need for identifiable material evidence of ill-treatment in the ICCPR, the CAT nor the domestic law.

Secondly, an examination of these memos shows that part of the interpretation of waterboarding as not causing the “severe pain or suffering, whether physical or mental” legally defined in the CAT treaty, was based on a fusing of the two concepts of ‘pain’ and ‘suffering’. As discussed above, a footnote in the Bybee Memo attempts to explain that, even though the statutes specifically use a verbiage that clearly expresses a separation indicating a difference in meaning between the two words, “[w]e believe the better view of the statutory text is, however, that they are not distinct concepts”.²⁵³ After the Classified Bybee Memo was disclosed in April of 2009 by the Obama administration, the legal reasoning of this footnote became clearer. This second memo of the same day exposed that OLC attorneys were indeed violating the basic rule of statutory construction, *expressio unius est exclusio alterius*. The fact that there is specific mention of a temporal requirement in the discussion of a ‘prolonged *mental* harm’ in the U.S. domestic law §2340, excludes it from the being applied as a requirement to *physical* pain or suffering.²⁵⁴ Yet this is exactly what we find in the Classified Bybee Memo. It reads,

²⁵⁰ Bybee Memo, *Re: Standards of Conduct for Interrogation*, note 49 above.

²⁵¹ For a superior work tracing the rise of ‘clean torture’ methods in the second half of the 20th century, particularly in democracies, see REJALI, *Torture and Democracy*, note 14 above.

²⁵² *Idem*, at 8-11.

²⁵³ Bybee Memo, *Re: Standards of Conduct for Interrogation*, note 49 above, at 176-7 note 3.

²⁵⁴ It should be noted that the idea of “prolonged mental harm” is one that exists only in the domestic law of the United States meant to codify its obligations under the CAT. This is not an idea found in international law provisions concerning torture and ill-treatment.

[a]s we explained in the Section 2340A Memorandum, “pain and suffering” as used in Section 2340 is best understood as a single concept, not distinct concepts of “pain” as distinguished from “suffering”. The waterboard, which inflicts no pain or actual harm whatsoever, does not, in our view inflict “severe pain or suffering.” Even if one were to parse the statute more finely to attempt to treat “suffering” as a distinct concept, the waterboard could not be said to inflict severe suffering. The waterboard is simply a controlled acute episode, lacking the connotation of a protracted period of time generally given to suffering.²⁵⁵

So we see that Yoo and Bybee meant to reject the entire notion of ‘suffering’ based solely on the fact that waterboarding is an “acute episode” (of what?) and not of a “protracted period”. It certainly now appears clear that the legal reasoning behind this fusion of ‘pain’ or ‘suffering’ was for the benefit of the waterboard procedure specifically. One of the supposed benefits of the use of the waterboard is that it would ‘work’ quickly. This surely helps explain the phrase in the Classified Bybee Memo, “[y]ou have also orally informed us that it is likely that this procedure would not last more than 20 minutes in any one application”.²⁵⁶ There was no need for any prolonged or protracted suffering (or if you prefer: anguish, distress, agony, torment, misery, pain) because even hardened criminals would crack under its intense pressure. Not only is there no legal reason to suggest that ‘suffering’ must be of an extending period of time to qualify as torture, there are a plain rules of statutory construction that exclude it from application beyond the provision dealing with *mental* harm. In writing a memo that seeks to find legal justification to authorize the brutal technique of controlled drowning one might find reason to downplay its effect and severity with rhetorical tools. However, the legal amateurishness of cutting requirements from whole cloth so as to feign the appearance of legality is quite problematic, to say the least.²⁵⁷

While this was the safe and mild view of waterboarding held by the OLC attorneys without any field experience, there are indeed others with first hand knowledge of this specific technique that took serious umbrage when they learned of its application by U.S. agents. One former Master Instructor and Chief of Training at the Survival, Evasion, Resistance and Escape School (SERE), Malcolm Nance, wrote a powerful article in 2007 in

²⁵⁵ Classified Bybee Memo, *Interrogation of al Qaeda Operative*, note 82 above, at 11 (internal citations omitted).

²⁵⁶ *Idem*, at 4.

²⁵⁷ This critical point of analysis treating the series of Torture Memos was found in the indispensable legal blog Balkinization. D. LUBAN added a post on 26 Feb 2010 that pointed out the repeated use of this manufactured time requirement for *physical* suffering can be found in all the OLC memos of Yoo and Bybee, Levin and then Bradbury <<http://balkin.blogspot.com/search?q=pain+and+suffering>>. Luban gives credit to M. LEDERMAN for his speculation of use of this “trick” in his post of 28 Oct 2006, which was posted well before the April 2009 release of memos that confirm his supposition <<http://balkin.blogspot.com/2006/10/yes-its-no-brainer-waterboarding-is.html>> (all pages last visited April 2010).

reaction to the public disclosure that waterboarding had been consciously and purposefully reverse-engineered from the controlled training setting he knew intimately to live interrogation of suspected terrorists. Nance knows this technique personally by having undergone the process himself, along with leading, supervising and witnessing hundreds of individuals being subjected to the same treatment for training purposes. He unequivocally entitled his piece, “Waterboarding Is Torture... Period”.²⁵⁸ This expert continued that the media got it wrong when it reported that waterboarding is ‘simulated drowning’. Nance insisted that it is best described as “controlled drowning” because the lungs are actually filling with water, insisting that there is no way to simulate, “the agonizing feeling of the water overpowering your gag reflex, and then [to] feel your throat open and allow pint after pint of water to involuntarily fill your lungs”.²⁵⁹ He continues that waterboarding is,

slow motion suffocation with enough time to contemplate the inevitability of black out and expiration –usually the person goes into hysterics on the board. For the uninitiated, it is horrifying to watch and if it goes wrong, it can lead straight to terminal hypoxia. When done right it is controlled death. Its lack of physical scarring allows the victim to recover and be threaten [sic] with its use again and again.²⁶⁰

Additionally, this former SERE instructor, who did broad research into the use of torture techniques to help rewrite the training program to prepare U.S. agents to be as ready as possible for an enemy that does not respect the Geneva Conventions, recounts his visit to the torture camps of the Khmer Rouge in Cambodia. There he came across a fully intact inclined bench, labelled as a “waterboard” by Nance, which was used by the regime to torture the country’s perceived subversive elements during the late 1970s. Next to the haunting empty bench there was a painting demonstrating how the apparatus was to be employed by agents of the totalitarian ruling party. Apart from the iron shackles used to strap the victim down, and the flower pot sprinkler to regulate the water flow, Nance found that this depiction of the waterboard procedure to be the same device he would undergo and supervise in his capacity as a trainer for the U.S. government. Below is the image that Nance encountered at the Tuol Sleng prison in Phnom Penh :

²⁵⁸ NANCE, M., ‘Waterboarding is Torture...Period’ *Small War Journal* (31 Oct 2007) available at : [<http://smallwarsjournal.com/blog/2007/10/waterboarding-is-torture-perio/>](http://smallwarsjournal.com/blog/2007/10/waterboarding-is-torture-perio/).

²⁵⁹ *Idem.*

²⁶⁰ *Ibid.*



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Nance also speaks about the panoply of “enhanced interrogation techniques” that were approved in the Classified Bybee Memo of 2002 and warns that their discussion in the media often became a form of “doublespeak” which would conceal the true nature and purpose of the approved procedures. Because these techniques applied to Zubaydah and other High Value Detainees were reversed-engineered from the SERE program that Nance knew personally and in detail, his knowledge and views on the matter should surely carry significant weight. His position was that, while the interrogation techniques under discussion might be applied in a training setting for short periods of time without endangering those subjected to them, “when performed with even moderate intensity over an extended time on an unsuspecting prisoner – it is torture, without doubt. Couple that with waterboarding and the entire medley not only ‘shock the conscience’ as the statute forbids -it would terrify you”.²⁶²

It is clear that this article, written by a 20-year veteran and counterterrorism expert with extensive experience in the field and in combat, does not offer us insight into the current jurisprudence on torture. Nor does it necessarily put forward a definitive moral analysis when Nance writes that choosing to employ such tactics in the ‘war on terror’ was, “a short sighted and politically motivated trade that is simply disgraceful”. However, his professional opinion is very constructive in grasping a fuller understanding of the pivotal choice made with Abu Zubaydah. His judgment in this discussion should be taken seriously when he says, “[a]nyone strapped down will say anything, absolutely anything to get the torture to stop. *Torture. Does. Not. Work.*”²⁶³

²⁶¹ Picture taken by Jonah Blank in 2005 at the Tuol Sleng Prison in Phnom Penh, Cambodia. The prison currently serves as a torture museum. Available at: <<http://en.wikipedia.org/wiki/File:Waterboard3-small.jpg>>.

²⁶² NANCE, ‘Waterboarding is Torture...Period’, note 259 above. Nance’s reference to ‘shock the conscience’ addresses, “the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States”.

²⁶³ *Idem*, (original emphasis).

5) Concluding the Controlled Drowning – The 83rd Waterboard

Abu Zubaydah was thus subjected to repeated controlled drowning evoking death 83 times. It has been reported that he confessed, confessed to a whole host of terrorist plots to blow up supermarkets, malls, banks, bridges, statues and nuclear power plants.²⁶⁴ As a result, law-enforcement agents were deployed across the nation chasing down every plot, every lead and every indication of a terrorist threat that Zubaydah offered. As one investigative journalist and writer put it, reflecting the view of one former FBI agent who had the opportunity to study Zubaydah's extensive (yet largely tactically irrelevant) six-volume journal, "the United States would torture a mentally disturbed man and then leap, screaming, at every word he uttered".²⁶⁵ This same former FBI agent was extremely wary of the value of the intelligence that was gained from this abusive treatment and stated that there is, "nothing in the way of intelligence that I've seen from the program".²⁶⁶

All of the exact intelligence that came out of this interrogation – the first time in U.S. history that the brutal technique of waterboarding was authorized by the President in the interrogation of a terror suspect – is still not publicly known. Bush did speak publicly about some of the information that assisted in the counterterrorism effort. In his speech announcing the transfer of fourteen High Value Detainees to Guantánamo from their previous undisclosed black sites, there was only a small amount of aid catalogued that was specifically extracted by the use of the innocuous sounding, "alternative set of procedures" employed by the CIA.²⁶⁷ It was put forward that Zubaydah provided "information that *helped* us find and capture" some of those responsible for the 9/11 attacks. Particularly, intelligence was gathered that "*helped lead to the capture of Binalshibh*" and "*helped in the planning and execution of the operation that captured Khalid Sheikh Mohammed*".²⁶⁸ No doubt, the capture of these two key terror suspects was a veritable advancement in the 'war on terror' launched by the Bush administration. However, looking at the language used by the President to describe Zubaydah's role in this progress in the counterterrorism effort, it is impossible to assess its importance. In every single reference Bush made to what the 83 applications of the waterboard produced, the adverb "helped" was used. With such a qualification, any bit of information that facilitated, even in the slightest form, could be construed as leading to the

²⁶⁴ MAYER, *The Dark Side*, note 27 above, at 178-9.

²⁶⁵ SUSKIND, R., *The One Percent Doctrine* (New York, Simon & Schuster, 2006) at 111. A reference to former CIA agent Daniel Coleman.

²⁶⁶ MAYER, *The Dark Side*, note 27 above, at 179. Attributed to former CIA agent Daniel Coleman.

²⁶⁷ BUSH, 'Speech on Terrorism' (6 Sept 2006) (my emphasis), note 208 above.

²⁶⁸ *Idem*, (my emphasis).

capture of these two terror suspects. Indeed, whatever assistance came from Zubaydah in this regard was touted as the success of choosing to use torture and ill-treatment as the means.

Yet, it must be underlined and in boldface that none of this data extracted from Zubaydah refers to any timely information. This of course means that there is no argument available that there was no time available for the use of traditional interrogation techniques absent of coercion. As mentioned above, the fact that makes this abundantly clear is that the authorization to use waterboarding came on August 1, 2002 while Zubaydah was captured four months earlier at the end of March. Which, of course, raises enormous questions as to the freshness of any intelligence gained considering that insurgent groups have made ‘torture contracts’ for decades based on changing any plans in progress within 24 hours of the capture of members who are knowledgeable of operations.

One of the most grave accusations that came from Zubaydah, although it certainly does not appear to have come from waterboarding because of the timing, is that of the plot to detonate radioactive material with conventional explosives, or a ‘dirty bomb’. However, the details of the two detainees that were implicated in this accusation will be discussed in more detail below since their individual cases also illuminate the subject of torture on suspicion.²⁶⁹ Of pertinence here is that the application of the most severe technique of controlled drowning paralleled the increase in information given to interrogators. As the Inspector General from the CIA put it,

[i]t is not possible to say definitively that the waterboard is the reason for Abu Zubaydah's increased production, or if another factor, such as the length of detention, was the catalyst. Since the use of the waterboard however, Abu Zubaydah has appeared to be cooperative.²⁷⁰

So at first blush one might be tempted to take the increased information flow as evidence of torture’s efficacy in intelligence gathering. However, this is premised on the idea that it is possible to *know* with certainty Zubaydah’s role in the al Qaeda organization, and to be able to distinguish accurate from misleading (be it intentional or simply to bring a stop to the anguish) information. Otherwise the intelligence he provides may or may not be valuable for preventing imminent terrorist attacks (dismantling the al Qaeda network is not an objective that leaves no choice of means). At least as importantly, such a certainty about the knowledge of a detainee would also allow the interrogators to know when it is no longer necessary to twist and squeeze the detainee for further intelligence.

²⁶⁹ See Section VI below.

²⁷⁰ CIA-IG 2004 Report, note 24 above, at 90.

In fact, it is upon this question of knowing how and when to stop torture that we see one of the clearest acknowledgements from the authors of the torture memos that the concept of employing torture is based on suspicion, and not on knowledge. In the Article 16 Memo by OLC lawyer Stephen Bradbury we find in a footnote a vital admission: that torture indeed occurred, at least at one particular point, with no demonstrable purpose for furthering a legitimate end. Bradbury discussed the manner in which the waterboarding of Zubaydah came to a close, and it is here that a grave, but clarifying, set of circumstances came together. The footnote reads,

This is not to say that the interrogation program has worked perfectly. According to the IG Report, the CIA, *at least initially*, could not always distinguish detainees who had information but were successfully resisting interrogation from those who did not actually have the information. On at least one occasion, this may have resulted in what might be determined in retrospect to have been the unnecessary use of enhanced techniques. On that occasion, although the on-scene interrogation team judged Zubaydah to be compliant elements within CIA Headquarters still believed he *was* withholding information. [redacted] At the direction of CIA Headquarters interrogators therefore used the waterboard one more time on Zubaydah. [redacted]

This example, however, does not show CIA “conduct [that is] intended to injure in some way unjustifiable by any government interest,” or to the possibility of such unjustifiable injury. As long as the CIA reasonably believed that Zubaydah continued to withhold sufficiently important information, use of the waterboard was supported by the Government’s interest in protecting the Nation from subsequent terrorist attacks.²⁷¹

At the outset, we find a most interesting and important claim that is not backed up in the memo, and is even contradicted in the same footnote. Bradbury admits (at least partially because the comprehensive CIA Inspector General Report investigating the program necessitated such an admission because of its devastating conclusions) that the CIA enhanced interrogation program had problems in its implementation. While he states that there was a difficulty in distinguishing those who had information from those who did not, he hints that this obstacle was somehow later overcome with the phrase, “at least initially”. With this verbiage Bradbury suggests that this was only an impediment at beginning stages of the program. This gives the impression that being able to know what is known by a detainee is no longer an issue because this problem has somehow been solved and eradicated from the program. Yet there is absolutely no discussion of how exactly reading a detainee’s mind (but only to the extent of knowing that the needed information is trapped there within, and not exactly what are the details of that information), is now accomplished to avoid this problem.

²⁷¹ BRADBURY, *Article 16 Memo*, note 110 above, (internal citations omitted)(my emphasis) at 31 note 28.

Furthermore, and this clearly indicates that in fact the problem had never been solved, he goes into a brief explanation of “reasonable, good faith, belief” as the proper standard.

The existence of a reasonable, good faith, belief is not negated because the factual predicates for that belief are subsequently determined to be false. Moreover, in the Zubaydah example, CIA Headquarters dispatched officials to observe the last waterboard session. These officials reported that enhanced techniques were no longer needed. Thus the CIA did not simply rely on what appeared to be credible intelligence but rather ceased using enhanced techniques despite this intelligence.²⁷²

However this is not actually an explanation but rather an unsupported assertion. There are no cases cited, no legal authorities quoted, no dictionaries referenced nor even full justification as to why this particular standard of suspicion is enough to subject a detainee to controlled drowning even if, “the factual predicates for that *belief* are subsequently determined to be false”.²⁷³ This is precisely the essence of the problem. Although this issue is often ignored, a government program of torture must be based on belief or suspicion. This explains the need for an *ex post facto* legal justification attempting to authorize that standard.

This is clearly no small issue as this is a legal memo meant to be advising the president as to the contours of the laws concerning torture, and in this case the international law of Article 16 in the CAT dealing specifically with the lesser forms of ill-treatment. This is especially problematic considering that, in this very same memo, Bradbury cited the Effectiveness Memo from the CIA (found by the OPR to have had blatant factual flaws), and reasoned that it was necessary for an action to meet the standard of not being arbitrary in a constitutional sense. In other words the act must be, “in the service of a legitimate governmental objective”,²⁷⁴ not a *belief* that it might further a legitimate government aim. However, as discussed above,²⁷⁵ the idea that there is an exception to the rule on the prohibition of torture is wholly fallacious and legally flawed in the first place.

Nevertheless, even this flawed legal argument by Bradbury collapses upon itself here. It was suggested that for an action to be legal it must materially further a legitimate governmental objective, and hence Bradbury cited the Effectiveness Memo to evidence this furtherance. If we suddenly adjoin a “reasonable belief” that this furtherance of a government objective will occur, then there would be no reason for Bradbury himself to speak of efficacy. He claims that waterboarding is legal because it has been shown to work, evidenced by the

²⁷² *Idem.*

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*, at 2-3.

²⁷⁵ See Section II (5) above.

Effectiveness Memo.²⁷⁶ Yet in this footnote he claims that it is only necessary to have a “reasonable belief” that the detainee has the desired information. In the body of the text he suggests (falsely) that a material fact of effectiveness is the proper standard for determining what is constitutionally arbitrary. In this footnote Bradbury simply, and contradictorily, asserts that it only needs to be reasonably believed that the detainee possesses the information, and thus that waterboarding will further a legitimate governmental objective. This is surely a massive failing that undermines, if not obliterates, a legal analysis that was flawed at its inception.

The final point about this quote from the Article 16 Memo that needs to be brought up is the manner in which the use of controlled drowning came to a close for Abu Zubaydah. What can be clearly seen in this citation is that this was indeed a concern for Bradbury, and again this is primarily because it was a difficulty he was forced to confront by its appearance in the CIA Inspector General Report of 2004. In fact, in the pertinent section of this report we find information that partially supports Bradbury’s assessment that the initial gaps in knowledge possessed by the interrogators had been somewhat filled by the interrogation program itself. The Report reads,

[a]ccording to a number of those interviewed for this Review the Agency's intelligence on Al-Qa'ida was limited prior to the initiation of the CTC Interrogation Program. The Agency lacked adequate linguists or subject matter experts and had very little hard knowledge of what particular Al-Qa'ida leaders –who later became detainees— knew. This lack of knowledge led analysts to speculate about what a detainee ‘should know,’ vice information the analyst could objectively demonstrate the detainee did know.²⁷⁷

There is no doubt that advancements were made in knowledge of the al Qaeda organization. However the point of this author is that it will never be possible to overcome the final hurdle of knowing everything that is known by a detainee, and the question remains of how exactly any analyst “could objectively demonstrate [what] the detainee did know”. Nevertheless, what is vital in this discussion of the conclusion of Zubaydah’s waterboarding is that, “[w]hen a detainee did not respond to a question posed to him, the assumption at Headquarters was that the detainee was holding back and knew more; consequently Headquarters recommended resumption of EITs”.²⁷⁸

This is exactly what we see at the end of the quote from the footnote in Bradbury’s Article 16 Memo. Even though the onsite interrogators thought that all intelligence had been

²⁷⁶ BRADBURY, *Article 16 Memo*, note 110 above, at 8.

²⁷⁷ CIA-IG 2004 Report, note 24 above, at 83.

²⁷⁸ *Idem*.

extracted from Zubaydah, this was not believed to be the case by the higher-ups back in the U.S. Amazingly, Bradbury concludes by writing that the CIA, “ceased using enhanced techniques despite this intelligence”. However this is directly contradictory to what he himself explains. The interrogators were forced to subject Zubaydah to the 83rd session of controlled drowning in front of their superiors to personally satisfy them that the intelligence they were relying on was incorrect. As the CIA Inspector General wrote, “at the time it generated substantial pressure from Headquarters to continue use of the EITs”.²⁷⁹ It was only after senior officers saw this brutal technique practiced on the detainee with their own eyes did they come to believe Zubaydah rather than an intelligence report. If this does not palpably demonstrate that torture is based upon suspicion, and that this suspicion can be markedly different depending on perspective, it is hard to know what else could prove this point.

6) Mistaken Beliefs

Of course, suspicions can be wrong. The previous pages detail the treatment of a man that was presumed to be, “[o]ne of the top operatives plotting and planning death and destruction on the United States”, as he was referred to by the President two weeks after his capture.²⁸⁰ Under this presumption, one can certainly understand why there was a sense of urgency to find out everything that this “top operative” was preparing for his enemies. As has been already pointed out, the freshness of any intelligence he possessed was surely compromised during the four months before the most severe interrogation techniques were authorized. Hence the urgency can not be said to have translated into practice, while brutality in fact did. Yet, this was a presumption. Perhaps it was based upon strong intelligence and even Zubaydah’s own confessions, but nonetheless it was a supposition. What has now come to light, years after his torment, is that Abu Zubaydah was not who he was believed to be.

Following a multitude of unauthorized disclosures and leaks from agents and career officers from inside the government that had moral and legal concerns with the enhanced interrogation program, a more coherent and complete story can be pieced together. Almost exactly seven years after his capture, subsequent to a review by the CIA that had difficulty refusing authorization for publication because of the quantity of leaks pertaining to Zubaydah and the interrogation program, an editorial article was published by Abu Zubaydah’s

²⁷⁹ *Ibid.*, 84-5.

²⁸⁰ BUSH, P., ‘Remarks by the President at Connecticut Republican Committee Luncheon’ Hyatt Regency Hotel, Greenwich, Connecticut (9 April 2002), The White House, President George W. Bush, available at : <<http://georgewbush-whitehouse.archives.gov/news/releases/2002/04/20020409-8.html>>.

lawyer.²⁸¹ As to be expected, this article painted a very different picture of the detainee. He repeatedly referred to by his given name Zayn al-Abidin Muhammad Husayn in attempt to re-brand his client whose name had become quite notorious, and that was presumed to be one of al Qaeda's top operatives.

To begin, reference was made to a remarkable article published in the Washington Post just the previous day entitled, "Detainee's Harsh Treatment Foiled No Plots".²⁸² This article revealed that there were a good number of officials inside the government that believed that absolutely nothing had been gained in the way of intelligence after the CIA began the use of controlled drowning. There doesn't seem to be any disagreement that the introduction of waterboarding, "prompted a sudden torrent of names and facts. Abu Zubaida began unspooling the details of various al-Qaeda plots, including plans to unleash weapons of mass destruction".²⁸³ But was this intelligence accurate? As a result, the revelations triggered a series of alerts and sent the FBI and CIA tracking down the leads from the High Value Detainee leading one former intelligence official to assert, "[w]e spent millions of dollars chasing false alarms".²⁸⁴ Providing an answer to the critical question of efficacy, the article concluded,

[i]n the end, though, not a single significant plot was foiled as a result of Abu Zubaida's tortured confessions, according to former senior government officials who closely followed the interrogations. Nearly all of the leads attained through the harsh measures quickly evaporated, while most of the useful information from Abu Zubaida -- chiefly names of al-Qaeda members and associates -- was obtained before waterboarding was introduced, they said.²⁸⁵

Of great significance to Zubaydah's lawyer was why this information led nowhere. For an answer to this question it is necessary to understand Zubaydah's role in the jihadi movement. It is uncontested that he indeed worked and organized for extremist Muslim groups training to fight their enemies. He began to become involved with these groups when he came to Afghanistan to join the mujahedeen fighting Afghan communists in 1991, a conflict during which he suffered a severe head injury that continues to compromise his memory. However, to assume that there is just one monolithic extremist Muslim force with uniform plots and plans that are being widely implemented by all those involved in armed

²⁸¹ MICKUM, B., 'The Truth About Abu Zubaydah' *The Guardian*, guardian.co.uk (30 March 2009) available at: <<http://www.guardian.co.uk/commentisfree/cifamerica/2009/mar/30/guantanamo-abu-zubaydah-torture>>.

²⁸² FINN, P. and WARRICK, J., 'Detainee's Harsh Treatment Foiled No Plots' *The Washington Post* (29 March 2009) available at: <<http://www.washingtonpost.com/wp-dyn/content/article/2009/03/28/AR2009032802066.html?hpid=topnews>>.

²⁸³ *Idem*.

²⁸⁴ *Ibid*.

²⁸⁵ *Ibid*.

struggle is an oversimplification, and incorrect according to his lawyer. Zubaydah was a committed jihadist that did move men in and out of Afghanistan and through military training camps, and some of them were indeed members of al Qaeda. He became widely known as a type of travel agent for those seeking such training, which is exactly why his name resurfaced again and again in terrorism intelligence traffic.²⁸⁶ Because of these many figurative fingerprints that had been found linking him to jihadi military training, Zubaydah was assumed to be a major figure in the al Qaeda organization. In fact, it was precisely because he was the above-ground support that his name kept cropping up in intelligence data, and why he did not possess the timely and actionable intelligence that was so urgently sought by the administration. His role was much more like that of a front desk clerk, which is not someone who would be in the loop on upcoming major attacks and plots.

Zubaydah's lawyer addressed this very different status than that which had been portrayed in the media for years, which was of course vastly different from the one that the administration had composed itself. The article points out,

[t]hese facts really are no longer contested: Zayn was not, and never had been, a member of either the Taliban or al-Qaida. The CIA determined this after torturing him extensively and [...]. Zayn was never a member or a supporter of any armed forces that were allied against the United States. He had no weapon when he was taken into illegal custody. He never took up arms against the United States nor against its coalition allies. He was not picked up on a battlefield in Afghanistan at the time of his detention, but was taken into custody in Pakistan, where he was wrongfully attacked, shot, and nearly killed. So serious were his wounds that a surgeon from John Hopkins University was flown to Pakistan to perform emergency surgery to save the life of a man the Bush administration believed to be the number three man in al Qaeda.²⁸⁷

Due to this mistaken identity issue Zubaydah's attorney argued for an open process in which he can present exculpatory evidence of his client's innocence. While at first glance there would seem to be difficulties with the argument that he was wrongfully brought into custody in Pakistan since the operation was led by local law enforcement, there is little doubt that what Zubaydah would know, and be able to reveal under interrogation would be extremely limited.

Zubaydah's habeas corpus proceedings in U.S. domestic court are proving of significant value since allowing for an independent judiciary to determine the lawfulness of detention in Guantánamo has forced justification backed by solid evidence. As we have seen, the contention that someone held in the 'war on terror' can be held without any legal rights

²⁸⁶ MAYER, *The Dark Side*, note 27 above, at 140.

²⁸⁷ MICKUM, 'The Truth About Abu Zubaydah', note 281 above, (omissions are from CIA redactions).

led to the undisclosed detention of Zubaydah from March 2002 until September 2006 when he was transferred to Guantánamo. Then it was not until the *Boumediene v. Bush* decision in June of 2008 that the right of habeas corpus was extended to the prisoners of that facility in Cuba.²⁸⁸ Now that courts have become involved, we see that critical information related to the defensible positions in court of the administration's detention of Zubaydah are coming to light. That is to say, as his detention became governed by law, admissible evidence and provable theories beyond mere suspicion become the proper standard.

This higher standard of evidence by which courts operate has indeed brought about a significant change in the government's position concerning the detention of Abu Zubaydah. In the 2002 Classified Bybee Memo that authorized controlled drowning, in addition to parts of the memo that have been analyzed above demonstrating the extent to which the administration was relying on suspicion, important suppositions were put forward about Zubaydah. As discussed, it was asserted for this legal authorization that he was, "one of the highest ranking members of the al Qaeda terrorist organization".²⁸⁹ Additionally, this legal memo assessing the urgency and necessity of extracting all intelligence information out of Zubaydah, later went on in great detail to describe what was thought to be his authority within the organization, and his involvement in other plots and attacks. The enormously detailed presumptions of his status were laid out as follows :

According to this assessment, Zubaydah, though only 31, rose quickly from very low level mujahedin to *third or fourth man in al Qaeda*. He has served as Usama Bin Laden's *senior lieutenant*. In that capacity, he has managed a network of training camps. He has been instrumental in the training of operatives for al Qaeda, the Egyptian Islamic Jihad, and other terrorist elements inside Pakistan and Afghanistan. He acted as the Deputy Camp Commander for al Qaeda training camp in Afghanistan, personally approving entry and graduation of all trainees during 1999-2000. From 1996 until 1999, he approved all individuals going in and out of Afghanistan to the training camps. Further, no one went in and out of Peshawar, Pakistan without his knowledge and approval. He also acted as al Qaeda's coordinator of external contacts and foreign communications. Additionally, he has acted as al Qaeda's Counterintelligence officer and has been trusted to find spies within the organization.

Zubaydah has been *involved in every major terrorist operation carried out by al Qaeda*. He was a planner for the Millennium plot to attack U.S. and Israeli targets during the Millennium celebrations in Jordan. Two of the central figures in this plot who were arrested have identified Zubaydah as the supporter of their cell and the plot. He also served as a planner for the Paris Embassy plot in 2001. Moreover, he

²⁸⁸ For full discussion of the *Boumediene* decision see Chapter 4, Section VI.

²⁸⁹ Classified Bybee Memo, *Interrogation of al Qaeda Operative*, note 82 above, at 1.

*was one of the planners of the September 11 attacks, Prior to his capture, he was engaged in planning future terrorist attacks against U.S. interests.*²⁹⁰

No doubt, the detail and extent to Zubaydah's presumed role was worrisome, to say the least. However, the position of the government holding him was to change significantly in 2009.

In a court document submitted to the District Court of Washington D.C. in September of 2009, the Justice Department's substantial retreat from these grave accusations became clear. In response to 213 discovery requests, the government denied the necessity for many of them because the charges for which Zubaydah was being held no longer needed such substantiation.²⁹¹ Documents proving what had been the position of the government when it authorized his harsh treatment in the Classified Bybee Memo did not now need to be disclosed to Zubaydah because, "the Government has not contended in this proceeding that Petitioner was a member of al-Qaida or otherwise formally identified with al-Qaida. Instead, the Government's detention of Petitioner is based on Petitioner's actions as an affiliate of al-Qaida".²⁹² This is clearly a far cry from what was suspected of Zubaydah when there was no court overseeing the admissibility of evidence. The document went on in further detail explaining that the,

Respondent does not contend that Petitioner was a "member" of al-Qaida in the sense of having sworn bayat (allegiance) or having otherwise satisfied any formal criteria that either Petitioner or al-Qaida may have considered necessary for inclusion in al-Qaida. Nor is the Government detaining Petitioner based on any allegation that Petitioner views himself as part of al-Qaida as a matter of subjective personal conscience, ideology, or worldview. Rather, Respondent's detention of Petitioner is based on conduct and actions that establish Petitioner was "part of" hostile forces and "substantially supported" those forces.²⁹³

It is also worth pointing out that the government additionally backed away from perhaps the most emotionally volatile, not to mention vital, charge when analyzing what pertinent and timely information might be known by Zubaydah and thus discovered through interrogation, in the supplement to this document. Firstly, there was a retreat from claiming his "direct role in or advance knowledge of" the 1998 terrorist attacks on the U.S. embassies in Kenya and Tanzania.²⁹⁴ And secondly, "[t]he Government has not contended in this proceeding that Petitioner had any direct role in or advance knowledge of the terrorist attacks

²⁹⁰ *Idem*, (my emphasis) at 7.

²⁹¹ *Zayn al Abidin Muhammad Husayn v. Gates*, Civil Action No. 08-cv-1360 (RWR), Respondent's Response to Request for Disclosure. Available at : <<http://www.truthout.org/files/memorandum.pdf>>.

²⁹² *Idem*, at 35-6.

²⁹³ *Ibid.*, at 36.

²⁹⁴ *Ibid.*, at 8.

of September 11, 2001”.²⁹⁵ While this latter withdrawal is in direct contradiction to the emotional claim that he was “one of the planners of the September 11 attacks” found in the authorization for his controlled drowning, the former clearly contradicts that Zubaydah was, “involved in every major terrorist operation carried out by al Qaeda”. Together they surely raise serious questions about what knowledge he possessed when he was tortured and ill-treated, especially four months after his capture.

Lastly, it should be pointed out that much of this information turned on a misinterpretation of the relationship between al Qaeda and other military training camps in Afghanistan. Zubaydah’s acknowledged role was linked to the Khalden training camp that had been established in Afghanistan back during the Soviet occupation in resistance to their invasion. This also happens to be the same camp to which Ibn al-Shaykh al-Libi was linked (discussed above as the detainee who claimed there to be an al Qaeda link to Saddam Hussein under ill-treatment in a third country).²⁹⁶ However, it now is clear that there had been confusion over how exactly the Khalden camp was tied to al Qaeda. Most importantly, the government came to agree with Zubaydah’s contention that this camp was, “organizationally and operationally independent” from al Qaeda camps.²⁹⁷ This is very much in line with the way that Zubaydah had described the Khalden camp back in his CSRT hearing of 2007.²⁹⁸ Importantly for his defense, Zubaydah describes the camp as being dedicated to “defensive jihad”, which he depicts as fighting against an aggressor on Muslim lands.²⁹⁹ As examples of this type of aggression he points to the Soviets in Afghanistan, the Serbians in Bosnia, the Russians in Chechnya and the Israelis in Palestine. At the same time Zubaydah drew a distinction between what he was involved in with the Khalden camp and the “offensive jihad” that was advocated by Osama bin Laden. He claims that ‘defensive jihad’ only targeted the military and their direct civilian support, and disagreed with the idea of targeting civilians as had been done at the World Trade Center. It is not within the scope of this work to discern the veracity of Zubaydah’s claim. However, if this is truly the case, then this ignorance of the subtleties of the jihadist movement would certainly help explain how Abu Zubaydah (and even al Libi for that matter) were swept up and ill-treated in the ‘war on terror’. More pertinently, it would help explain the inefficacy of torture because its basis in suspicion

²⁹⁵ *Ibid.*, at 9.

²⁹⁶ See Section IV above.

²⁹⁷ *Zayn al Abidin Muhammad Husayn v. Gates*, Supplement to Respondent’s Response, note 291 above, at 23.

²⁹⁸ See Verbatim Transcript of CSRT Hearing, note 207 above, at 8-11.

²⁹⁹ *Idem*, at 9.

inevitably allows for misinformation, incorrect beliefs and wrongful identifications to become a part of the system of abusive interrogation at large.

7) Conclusions on the Abu Zubaydah Case

Through this tormented tale of torture and ill-treatment there are at least two conclusions that one should take away. Firstly, the Zubaydah case was indeed the pivotal moment for the beginning of the direct application of torture and ill-treatment by U.S. agents. This outcome was certainly not inevitable because there were agents on the ground from the FBI pushing vigorously for non-coercive interrogation. The second central conclusion is that this brutal treatment of Zubaydah was carried out on a presumption of who he was thought to be, and what he should therefore know.

Abu Zubaydah certainly appears to be a figure of interest, perhaps an important one, for the U.S. and its allies to follow closely to determine the veracity of a difference between ‘offensive jihad’ and ‘defensive jihad’. An extensive interrogation conducted by professional agents as knowledgeable as possible of his history and his role within the jihadi movement would appear a necessary and proper action for defending the United States from further terrorist attack. However, to engage in coercive ill-treatment and torture four months after his capture is a tactic that can be fully anticipated to fail in producing any timely intelligence. Most importantly, it is impossible to know with certainty what is in the mind of a detainee, even immediately upon capture. Asking legal counsel for official memos dissecting and analyzing the law in a distorted manner so as to ‘legally’ employ interrogation techniques that will not leave physical marks will not overcome this insurmountable hurdle. And repeatedly suffocating someone with water to the point of drowning so as to evoke death will not bring them to know what they never knew. Torturing defenseless detainees on suspicion will directly undermine the legitimacy of the government when those suspicions turn out to be erroneous, and this must be understood as an inherent possibility.

For this particular case, it is perhaps best summarized by FBI agent Ali Soufan, Zubaydah’s first interrogator:

In summary, the Informed Interrogation Approach outlined in the Army Field Manual is the most effective, reliable, and speedy approach we have for interrogating terrorists. It is legal and has worked time and again.

It was a mistake to abandon it in favor of harsh interrogation methods that are harmful, shameful, slower, unreliable, ineffective, and play directly into the enemy's handbook. It was a mistake to abandon an approach that was working and naively replace it with an untested method. It was a mistake to abandon an approach that is

based on the cumulative wisdom and successful tradition of our military, intelligence, and law enforcement community, in favor of techniques advocated by contractors with no relevant experience.

The mistake was so costly precisely because the situation was, and remains, too risky to allow someone to experiment with amateurish, Hollywood style interrogation methods -that in reality- taints sources, risks outcomes, ignores the end game, and diminishes our moral high ground in a battle that is impossible to win without first capturing the hearts and minds around the world. It was one of the worst and most harmful decisions made in our efforts against al Qaeda.³⁰⁰

Again, the question must be asked: how are we to calculate the so-called “error costs” for misconstruing the identity of Abu Zubaydah and torturing him as a result?

VI. The “Dirty Bombers”

It can be very difficult to assess the exact usefulness of the techniques employed to acquire intelligence from Zubaydah for several different reasons. One is that he was interrogated by both FBI agents and CIA agents using very different methods. While some of that information can be parsed and accredited to either the non-coercive or to the coercive approach, all of the details of what Zubaydah said, when, and under what circumstances has never been publicly released nor analyzed. Other reasons for this difficulty arise from those mentioned above from the CIA Inspector General and OPR reports: i.e. the impossibility of determining the totality of intelligence a detainee possesses; the differing level of fears and tolerance for particular techniques; and the fact that the same techniques applied by different interrogators have produced different results.³⁰¹ However, the May 2004 report of the CIA Inspector General did highlight that perhaps the most significant intelligence gained from Zubaydah (even though the suspect was detained for months before the full panoply of ‘enhanced techniques’ were introduced) related to a very worrisome terrorist threat indeed. The report indicates that,

information from Abu Zubaydah helped lead to the identification of Jose Padilla and Binyam Muhammed – operatives who had plans to detonate a uranium-topped dirty bomb in either Washington, D.C., or New York City.³⁰²

Yet a thorough investigation of all the public information pertaining to these two individuals, including what was only recently released and accepted as credible by a court of law in December of 2009, gives real reason to doubt this was a victory in the ‘war on terror’.

³⁰⁰ SOUFAN, Testimony..., note 215 above.

³⁰¹ See note 141 above and accompanying text.

³⁰² CIA-IG 2004 Report, note 24 above, at 87.

1) Jose Padilla

While the detention of Jose Padilla and Binyam Mohammed was publicized for years as a major advancement in protecting the homeland from the terrifying threat of plans to blow up radioactive material with conventional explosives inside a major U.S. city (clearly attributed above as vital intelligence gained from Zubaydah), the results of the judicial processes they finally underwent indicate something very different and far less dire. As previously mentioned, the capture of the “dirty bomber”, Jose Padilla, was announced with much fanfare on June 10th of 2002. Subsequently, his federal court case was followed diligently by the media at least partially due to the attention given to him as a serious terrorist threat contained by the administration, along with his status as a U.S. citizen. In the end, it was his citizenship that seemed to spare him the same fate as his alleged accomplice who was captured outside of the country and extraordinarily renditioned to Morocco.

At the time, Padilla’s suspected connection with Abu Zubaydah surrounding the ‘dirty bomb’ plot was widely reported in the media and fueled by state officials. For example, in one publication, the relationship and the terrorist plan were described as follows:

[i]nformation leading to Padilla's arrest came in part from U.S. questioning of captured Al Qaeda leader Abu Zubaydah, one of Usama bin Laden's top lieutenants, said two U.S. officials. Ashcroft said information about the plot came from “multiple independent and corroborating sources.”

Padilla first met Zubaydah in Afghanistan in late 2001 after the Sept. 11 terror attacks, then went to Lahore, Pakistan, to research dirty bomb techniques with an unidentified associate, officials said. At Abu Zubaydah's request, Padilla traveled to Karachi, Pakistan, in March to meet several senior Al Qaeda officials and discuss bombings of U.S. gas stations and hotels, officials said.³⁰³

Padilla was first apprehended at Chicago O’Hare International Airport in May of 2002 on a material witness warrant, but was one month later deemed an “enemy combatant” by President Bush and transferred to a military brig in Charleston, South Carolina. Padilla’s case made its way through the U.S. federal court system to be argued before the Supreme Court in April of 2004.³⁰⁴ To be sure, the issues at stake were strikingly similar to another case decided on the same day, the *Rasul* decision of June 28, 2004,³⁰⁵ only in the *Padilla* decision the swing vote of Justice Kennedy oscillated to the other side.³⁰⁶ The majority found that the court where the original habeas petition was filed lacked jurisdiction. There was no

³⁰³ “‘Dirty Bomb’ Suspect Had an Accomplice’ FOXNews.Com (11 June 2002) available at : <<http://www.foxnews.com/story/0,2933,54908,00.html>>.

³⁰⁴ *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

³⁰⁵ For full discussion of the *Rasul* decision see Chapter 4, Section IV.

³⁰⁶ *Rumsfeld v. Padilla*, note 304 above, J. Kennedy Concurrence, at 451.

impediment for Padilla to file his petition in the jurisdiction of his immediate-custodian, Commander Marr in South Carolina, and not in the Southern District of New York which was the site of his original detention. To distinguish this from the *Rasul* case dealing with detention at the Guantánamo facility in Cuba, Justice Kennedy wrote in his concurrence, “in the ordinary case of a single physical custody within the borders of the United States [...] the immediate-custodian and territorial-jurisdiction rules must apply”.³⁰⁷ Also of interest is that Justice Stevens pertinently pointed out in his dissenting opinion that, in the written command by the President deeming Padilla an enemy combatant, the government claimed to have a particular interest in this detainee because, “he possesses intelligence that, ‘if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda’ on U.S. targets”.³⁰⁸ As such, we see that part of the justification for transferring Padilla out of the civilian courts system into military custody hinged on the need for gathering intelligence from the detainee. This is clearly troubling because it indicates that the administration believed there to be a significant and pertinent difference in interrogation standards between the two systems.

At that point Padilla’s petition for habeas corpus was then re-filed in the jurisdiction of his military confinement, and as such his case rebooted and proceeded forward anew. After a finding in the District Court that his detention had not been authorized by Congress and was therefore unlawful, the Fourth Circuit Court of Appeals reversed that decision and found that the president was indeed authorized to detain enemy combatants under the Authorization of Use of Military Force Joint Resolution.³⁰⁹ What happened next was most problematic in the context of vital intelligence given up by Abu Zubaydah. Just days before the government’s brief in response to Padilla’s petition for certiorari was due to be filed in the Supreme Court, an indictment was sought and gained in the civilian courts of Florida for terrorism charges against Jose Padilla. However, the charges were enormously less serious than the original intelligence detailing a “uranium-topped dirty bomb”. Instead he was charged only with providing material support to terrorists which were part of a cell said to have sent money and

³⁰⁷ *Idem*, at 453-4.

³⁰⁸ *Ibid.*, J. Stevens Dissent, at 456-7. There is indeed a question as to the severity of treatment Padilla endured while under extended detention, and sustained solitary confinement, in the military brig in South Carolina. For example, it was reported that a brig official familiar with Padilla detention confirmed that he was held, “[w]ith no clock, watch or natural light to guide him, [...] in timeless isolation while anonymous jailers monitored him around the clock [...] and had little human contact during his 3 1/2 -year incarceration in the brig”. WILLIAMS, C. ‘Aspects of Padilla’s Treatment Confirmed’ Los Angeles Times (28 Feb 2007) available at : <<http://www.latimes.com/news/nationworld/nation/la-na-padilla28feb28,1,4895939.story?coll=la-headlines-nation&ctrack=1&cset=true>>. However, we will not enter further into the allegations of ill-treatment here.

³⁰⁹ *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

recruits overseas. As a result of this palpable backpedaling by the government,³¹⁰ and the government's requests of the Court of Appeals 1) to transfer Padilla to civilian custody and 2) to withdraw its opinion of the 9 September 2005 in an attempt to avoid review by the Supreme Court of the president's sweeping authority to indefinitely detain citizens as enemy combatants, the Court responded with an unusual opinion denying both requests.

In a stinging rebuke of the government's odd management of the case a justice who during the same time period was reported to be on the shortlist for an appointment to the Supreme Court by President Bush, Circuit Judge Luttig, wrote the opinion denying the transfer of Padilla and the withdrawal of the court's earlier judgment.³¹¹ It was said that the government's request smacked of manipulation and an attempt at the "intentional mooting" of the previous court judgements. While there was an effort made in the opinion to suggest there could be legitimate reasons for the government's stark change in position in this case of significant public consequence, most importantly without any explanation by the administration, this ruling was most assuredly a poke in the eye. Not only did the court deny both requests, it went out of its way to highlight the dangers of diminishing the government's credibility (or legitimacy) before the courts and in the mind of the public. It read,

On an issue of such surpassing importance, we believe that the rule of law is best served by maintaining on appeal the status quo in all respects and allowing Supreme Court consideration of the case in the ordinary course, rather than by an eleventh-hour transfer and vacatur on grounds and under circumstances that would further a perception that dismissal may have been sought for the purpose of avoiding consideration by the Supreme Court. [...]

For, as the government surely must understand, although the various facts it has asserted are not necessarily inconsistent or without basis, its actions have left not only the impression that Padilla may have been held for these years, even if justifiably, by mistake — an impression we would have thought the government could ill afford to leave extant. They have left the impression that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla for this time, that the President possesses the authority to detain enemy combatants who enter into this country for the purpose of attacking America and its citizens from within, can, in the end, yield to expediency with little or no cost to its conduct of the war against terror — an impression we would have thought the government likewise could ill afford to leave extant. And these impressions have been left, we fear, at what may ultimately prove to be substantial cost to the government's credibility before the courts, to whom it will one day need to argue again in support of a principle of assertedly like importance and necessity to the one that it seems to abandon today. While there could be an objective that could

³¹⁰ It should be noted that by 2005 the Justice Department had already retreated from the original charge of a plan to detonate a radioactive bomb, and instead claimed that Padilla was intent on blowing up apartment buildings with gas lines to magnify the explosion and perhaps the casualties, *idem*, at 4.

³¹¹ *Padilla v. Hanft*, 432 F.3d 582 (2005).

command such a price as all of this, it is difficult to imagine what that objective would be.³¹²

Within a couple of weeks, the Supreme Court authorized the transfer of Padilla to civilian custody (where he was eventually tried, convicted and sentenced in the U.S. District Court for the Southern District of Florida for a prison term of 17 years and four months).³¹³ Before this though, in April of 2006, the Supreme Court denied certiorari for the Padilla case, with an atypical attached opinion by Justices Stevens, Kennedy and Chief Justice Roberts explaining their position for voting against an acceptance of the case.³¹⁴ And as Justices Stevens and Kennedy have been identified as the two critical players in the series of historic decisions on Guantánamo and judicial protections,³¹⁵ their opinion and vote certainly carries great weight here. In the opinion, attention was drawn to the extensive due process rights that Padilla would now be afforded with this change of venue, and they continued, “[w]ere the Government to seek to change the status or conditions of Padilla's custody, that court would be in a position to rule quickly on any responsive filings submitted by Padilla”.³¹⁶

One might indeed speculate on some sort of backroom deal being struck between these two key Justices considering the landmark *Hamdan* decision finding Common Article 3 of the Geneva Conventions applicable to the ‘war on terror’ that was to be handed down just three months later with the votes of both Kennedy and Stevens. One reason such conjecture could arise can be found in the dissenting opinion for denial of certiorari filed by Justice Ginsburg at this time who went out of her way to highlight and cite Justice Stevens himself, who just two years earlier had written that the Padilla case raises a question, “of profound importance to the Nation”.³¹⁷ So Stevens’ vote against certiorari in 2006 certainly seems odd.

Most importantly for the context of the Zubaydah interrogation, we see that when evidence was required to back the ominous allegations that sprung from this pivotal detainee alleged to be a top al Qaeda operative, the government was unable to put forward enough substantiation regarding the threat of a “dirty bomber” to satisfy the requirements of an independent judicial process. Or at least that the government did not feel like they had a strong enough case to do so. Whether this means that Zubaydah asserted this claim under duress to stop the pain is unclear because there is a question of what exact conditions

³¹² *Idem*, at 7-8.

³¹³ *U.S. v. Jose Padilla, Adham Amin Hassoun, and Kifah Wael Jayyousi*, U.S. District Court Southern District of Florida, Case No. 04-60001-CR-Cooke/Brown (s)(s)(s)(s)(s) (2007).

³¹⁴ *Padilla v. Hanft*, 126 S.Ct. 1649.

³¹⁵ For full discussion of their role in the series of Guantánamo decisions see Chapter 4.

³¹⁶ 126 S.Ct. 1649, at 1650.

³¹⁷ *Idem*, at 1651.

Zubaydah was subject to when he put forward this specific accusation against Padilla. While we do know that Zubaydah gave up information regarding Padilla in the early stages of non-coercive interrogation by the FBI team,³¹⁸ it is not publicly known whether this specific claim of a radioactive bomb plan to be detonated inside the U.S. came before or after FBI agent Ali Soufan, a strong advocate of non-coercive means, departed the black site facility. What we do know is that, while Soufan left the undisclosed interrogation and detention facility at some point in May of 2002 after what he described as “borderline torture” had begun under the direction of the CIA and its contractor,³¹⁹ the public announcement of the capture of a “dirty bomber” by Attorney General Ashcroft occurred only weeks later on the 10th of June.³²⁰ Clearly, this provides plenty of time for coercive methods to be applied, and one must ask why there was no public announcement until one month after Padilla’s arrest at the Chicago airport on May 8th. There is no doubt that this is not dispositive evidence, but it does raise questions that can only be answered by, “a prompt and impartial investigation” obligated by Article 12 of the CAT treaty because there is surely a, “reasonable ground to believe that an act of torture has been committed”.³²¹

Regardless of whether this specific “dirty bomber” allegation against Jose Padilla was wrought out of Abu Zubaydah via torture and ill-treatment, there is one dominant element of this account that underlines our point here on efficacy: this intelligence was gathered from someone whose identity was erroneously construed. As it turns out, there was enough concrete evidence on Padilla to convict him of conspiracy and material support for terrorism. Padilla is now a convicted criminal serving his prison term for crimes committed, and those of us concerned with effectual counterterrorism policy should be pleased with this outcome. However, the three and a half years he spent in military custody when the president declared him an “enemy combatant” was based on an allegation made by Abu Zubaydah. He was detained by the military until the Supreme Court granted his release January 4, 2006 with a total of five federal court hearings judging his right to habeas corpus in the intervening years. In the end, this allegation of a plot to detonate a radioactive bomb with conventional explosives simply vanished, most likely because the intelligence gathered from Zubaydah was false. It was indeed a very serious and frightening accusation. Nonetheless, it was one based solely on the suspicions coming from someone who was falsely identified and ill-treated.

³¹⁸ SOUFAN, Testimony..., note 215 above.

³¹⁹ FBI-IG 2008 Report, note 25 above, at 68-9.

³²⁰ *CNN.com*, ‘U.S. Authorities Capture “Dirty Bomb” Suspect’, Pakistan (10 June 2002) available at: <http://articles.cnn.com/2002-06-10/us/dirty.bomb.suspect_1_dirty-bomb-abdullah-al-muhajir-conventional-bomb?_s=PM:US>.

³²¹ CAT Treaty, note 44 above, Art. 12.

2) Binyam Mohamed al Habashi

Which brings us to Jose Padilla's suspected accomplice in the disquieting 'dirty bomb' plot. Binyam Mohamed al Habashi, an Ethiopian national and a British resident as an asylum seeker from 1994, was arrested in the airport of Karachi, Pakistan in April of 2002. He was traveling on a forged passport and, in what appears to be an extreme misfortune, attempted to do so in the same airport where Jose Padilla was also briefly detained on a passport irregularity.³²² His whereabouts were then concealed and unknown to the outside world until he appeared back in formal U.S. custody in May 2004 when he was transferred to the publicly acknowledged Bagram Airfield prison in Afghanistan. Not coincidentally, it is at this official facility where Binyam Mohamed was allowed to visit with a representative of the International Committee of the Red Cross for the first time in his two years of detention.³²³ Mohamed had been held incommunicado, kept off the records of any justice system and after almost four months of interrogations by Pakistani and FBI agents was extraordinarily renditioned to a third country we now know to be Morocco, where he was kept for 18 months. In January of 2004 he was relocated to what has been called the "Dark Prison" in Afghanistan (the reference being to the unacknowledged prison where detainees were held in total darkness for weeks on end)³²⁴ until his transfer to Bagram. Then in September of 2004, Binyam Mohamed was transferred to Guantánamo where he became a part of the prison population referred to as the "worst of the worst". This phrase certainly makes one wonder what he could possibly have been considered to be before his transfer to this offshore detention center. Eventually, on February 23rd of 2009 Binyam Mohamed was given interim leave to remain in the United Kingdom where he was detained for a few short hours under the Terrorism Act of 2000, never arrested, and soon released.³²⁵

The details of his detention and treatment extending over nearly seven years have only been slowly trickling out into the public domain, and it remains an incomplete story that will certainly continue to be augmented over time. However, the most critical portions of

³²² Charge Sheet of BINYAM AHMED MOHAMED under the U.S. Military Commission Act of 2006 (28 May 2008) available at : <<http://www.defense.gov/news/d20080529Qahtani.pdf>>. CHARGE I: Violation of 10 U.S.C. §950v(b)(28), Conspiracy (letter n.) and CHARGE II: Violation of 10 U.S.C. section 950v(25), Providing Material Support for Terrorism (letter n.), "[o]n April 4, 2002, Binyam Mohamed and Jose Padilla were both detained by Pakistani authorities at passport control at the airport in Karachi, for apparent passport irregularities. The Pakistanis released them both the following morning. Binyam Mohamed then obtained a different forged passport, while Jose Padilla continued on to Chicago, Illinois".

³²³ *Farhi Saeed Bin Mohammed, et al. v. Obama*, Civ. Action No. 05-1347 (D.D.C.) at 57.

³²⁴ 'U.S. Operated Secret "Dark Prison" in Kabul', Human Rights Watch (19 Dec 2005) available at : <http://www.hrw.org/english/docs/2005/12/19/afghan12319_txt.htm>.

³²⁵ NORTON-TAYLOR, R., WALKER, P. and BOOTH, R., 'Binyam Mohamed Returns to Britain After Guantanamo Ordeal' [guardian.co.uk](http://www.guardian.co.uk) (23 Feb 2009) available at: <<http://www.guardian.co.uk/uk/2009/feb/23/binyam-mohamed-guantanamo-plane-lands>>.

Mohamed's ordeal have now been brought into the light. The most complete source of information to date is the decision in *Farhi Saeed Bin Mohammed, et al. v. Obama*,³²⁶ which did not deal directly with Binyam Mohamed himself, but rather his allegations against another detainee at Guantánamo. In an unclassified opinion from the U.S. District Court for the District of Columbia released on December 16, 2009, Judge Kessler reviewed the testimony of Binyam Mohamed that was relied upon by the U.S. government to hold this habeas petitioner in lawful confinement. In doing so, Judge Kessler found that, although the statements that were being used did not come directly from coercion at Guantánamo, she did accept that they were the product of earlier mistreatment.³²⁷ In other words, she indeed acknowledged the veracity of Binyam Mohamed's claims that he had been tortured and abused prior to his arrival at the U.S. facility in Cuba. Of great importance as well, is the fact that the United States did not confirm or deny these claims. Instead, the position was taken by the government that the allegations were not pertinent because the statements made by Binyam Mohamed at Guantánamo were admissible and relevant because they were not made under coercion at that time. Any possible effect of alleged mistreatment would have dissipated by the time he offered his voluntary testimony against the petitioner, Farhi Saeed Bin Mohammed. However, the Judge ruled that, "the Court finds that Binyam Mohamed's will was overborne by his lengthy prior torture, and therefore his confessions to Special Agent [redacted] do not represent reliable evidence to detain Petitioner".³²⁸

This habeas case, forced into the courts by the *Boumediene* decision of 2008,³²⁹ was the first place in which many of the gruesome and relevant details of Binyam Mohamed's extended suffering outside of the law came to be entered into the public record. Over a third of the 85-page opinion in *Farhi Saeed Bin Mohammed* was dedicated to describing the extended suffering undergone by Binyam Mohamed and explaining why his later testimony was not admissible in court. Binyam Mohamed had given a statement shortly after his arrival in Guantánamo, in October and November of 2004, that he knew the petitioner from an al Qaeda training camp they had both attended in Afghanistan. However, after his release from Guantánamo in 2009 he signed a sworn declaration retracting this allegation and saying that he had never met the petitioner before his arrival at the island detention center.³³⁰ In that statement he also asserted that he was forced to make many more such untrue allegations

³²⁶ *Farhi Saeed Bin Mohammed, et al. v. Obama*, note 323 above.

³²⁷ *Idem*, at 70.

³²⁸ *Ibid.*

³²⁹ See Chapter 4 for a full discussion of the series of Supreme Court decisions on Guantánamo detainees.

³³⁰ *Farhi Saeed Bin Mohammed et al. v. Obama*, note 323 above, at 42.

against other detainees, and that they were made as a result of, “‘torture and coercion’, that he was ‘fed a large amount of information’ while in detention, and that he resorted to making up some stories. The Government does not challenge Petitioner’s evidence of Binyam Mohamed’s abuse.”³³¹

In this episode we can begin to glimpse another one of the enormously insidious elements of torture beyond the obvious. Suspicion again ultimately leads to inefficacy within an organized system aimed at intelligence gathering. When torture is introduced, it is already at its inception based upon suspicion. Since torture must occur outside of the legal system because its fruits are considered too tainted for any credible system of justice, there is no filter holding back the introduction of false information into the intelligence apparatus. When this information is indeed false it raises more suspicions on the partially innocent and wholly innocent and there is never a sieve to keep it from infecting the others already within, and to be later introduced into, the lawless system. Hence false information snowballs into more false information without a check. Suspicion leads to ill-treatment, which creates more suspicion, which leads to more ill-treatment, *ad nauseam*. With this insidious outcome, it is also possible to clearly see why such a program should be defined as ‘torture on suspicion’.

By the time Binyam Mohamed arrived at Bagram in May of 2004, and then Guantánamo in September of that year, it certainly appears as if the most severe abuse had come to an end. However, he himself had no way of knowing this to be the case since he had always been in United States control and custody during his entire detention, even though it took place in a series of different foreign facilities. However, it is important to dig deeper into the extent of Binyam Mohamed’s treatment before that time to better understand the entirety of his circumstance. Judge Kessler points to sworn declarations under penalty of perjury, recorded testimony and a diary created for his attorney, and various media interviews in which he repeats the same claims that construct, “the harrowing story that Binyam Mohamed has told about his abuse”.³³²

After his initial detention by Pakistani officials in Karachi, four FBI agents turned up participating in his daily interrogations. However, according to Binyam Mohamed all of the abuse was left to the Pakistani agents and began just weeks after his detention commenced. If the U.S. agents were unsatisfied with his responses, they would leave the room while he was threatened, beaten with a leather strap, and subjected to a mock execution with a semi-

³³¹ *Idem* (internal citations omitted).

³³² *Ibid.*, at 48-9.

automatic weapon in his chest.³³³ About three and a half months later Binyam Mohamed was flown to Islamabad where he was handed over to U.S. authorities dressed in black and wearing masks. He was then stripped, searched, shackled, blindfolded and made to wear earphones for his next flight to Morocco, where the most severe abuse and torture took place. Most problematic was that he was told the United States wanted a story from him because he had been linked to, “important figures in al-Qaida, including Khalid Shaykh Mohammed [the alleged mastermind of 9-11],³³⁴ Abu Zubaydah, Ibn Shaykh Al Libi, and Jose Padilla”.³³⁵ As we have already seen, three out of four of these figures were of questionable importance to the al Qaeda organization, if not formally unconnected. Thus we can see serious problems with the use of suspicion as the U.S. was using these figures as an initial baseline for guilt.

Within a couple weeks after his arrival in Morocco the threats of intense ill-treatment became real as his food was rationed, he no longer had access to a bathroom, was repeatedly punched and kicked, and left on the floor where he vomited and urinated on himself.³³⁶ Demonstrating the extent to which this was an “intelligence gathering” exercise, Binyam Mohamed asserts that,

While being beaten, he was fed information about himself and told to verify it. If he denied it, he was beaten; he would then confirm the information, and be ordered to provide more details about it. When he failed to provide more information, he was again beaten.³³⁷

Of course, one immediately sees the patent ineffectiveness of such crude interrogation for intelligence gathering. If Binyam Mohamed was being “fed” the information he is to confirm, there is absolutely nothing being gained from an intelligence perspective. And this description of his abuse with a specific aim was repeated again and again in his testimony. The summary from Judge Kessler is replete with more such descriptions: “He was told that if he simply repeated in court the information being fed to him, then the torture would cease”, “captors coached Binyam Mohamed on what to say”, “[h]e was given names of people he allegedly knew”, and the two to three interrogation sessions a month he was regularly subjected to in Morocco were, “described as being ‘more like trainings, training [him] what to say’”.³³⁸ Under such conditions, the efficacy of torture surely crumbles to pieces.

³³³ *Ibid.*, at 49-50.

³³⁴ See Section VIII below.

³³⁵ *Farhi Saeed Bin Mohammed et al. v. Obama*, note 323 above, at 50.

³³⁶ *Idem*, at 51.

³³⁷ *Ibid.*

³³⁸ *Ibid.*, at 53-4.

However, the worst of Binyam Mohamed's treatment came under the direction of a man named "Marwan", and it is claimed that this interrogator made it clear that the Moroccans were working for the United States.³³⁹ This time he was beaten by three "goons" while tied to a wall when he faltered in repeating the proper information, was left hanging by his hands after the beating and was subjected to this same beating throughout the night. After Binyam Mohamed made the error of mocking his interrogator,

[t]hree men stripped him of his clothes with 'some kind of doctor's scalpel.' The witness claims he feared rape, electrocution, or castration. His captors cut one side of his chest with the scalpel, and then the other. One of the men then 'took [Binyam Mohamed's] penis in his hand and began to make cuts' with the scalpel as Marwan looked on. They cut 'all over [his] private parts' while Binyam Mohamed screamed. He estimates that they cut him 20-30 times over two hours; '[t]here was blood all over.' He was given a cream from some doctors. This precise conduct continued about once per month for the 18 months that he was in Morocco. (describing 'routine' cuttings and use of liquids to burn him). He reports that a guard told him that the purpose of the scalpel treatment was to 'degrade' him, so that when he left, he'd 'have these scars and [he'd] never forget. So [he'd] always fear doing anything but what the US wants.'³⁴⁰

When Binyam Mohamed was transferred back into the direct control of the United States in January of 2004, the female soldier that was assigned to photograph his stripped body, to document his condition, was horrified by the scars on his penis.³⁴¹

Unfortunately, the treatment under the CIA did not occur without coercion either. Binyam Mohamed asserts that while in the "Dark Prison" in Kabul he attempted to renounce the story that he had been coached to adopt because the CIA interrogators looked more amiable than what he had been used to in Morocco. However, his attempt to retract the stories he had been forced to learn was met with two weeks of being chained to the rails.³⁴² They simply wanted him to repeat the tale that he had been taught for a year and a half, which included his involvement in the radioactive 'dirty bomb' plot.³⁴³ As discussed, this was an extremely serious accusation that rightfully caused much alarm among the public who was made aware of it ever since Attorney General Ashcroft's very public video announcement from Moscow in June of 2002. Within one day, the media was reporting on his accomplice named "Benjamin Ahmed Mohammed".³⁴⁴ This 'dirty bomb' charge continued to be levied against Binyam Mohamed for years to come, and even appeared in his charge sheet as late as

³³⁹ *Ibid.*, at 52.

³⁴⁰ *Ibid.*, at 52-3 (internal citations omitted).

³⁴¹ *Ibid.*, at 54-5.

³⁴² *Ibid.*, at 56.

³⁴³ *Ibid.*

³⁴⁴ "'Dirty Bomb' Suspect Had an Accomplice", note 303 above.

May 2008.³⁴⁵ It was only in October of that year, over six years later, that this grave charge mysteriously disappeared from the government's accusations against Binyam Mohamed, along with the vanishing of the plan to blow up apartment buildings in the United States and release cyanide gas in nightclubs.³⁴⁶ Just as we saw this 'dirty bomb' charge disappear from Jose Padilla's indictment once the transfer request was made to move him from military into civilian custody in 2005, we see the same accusation evaporate into thin air without explanation by the government in the case of Binyam Mohamed at the end of 2008. Although the U.S. government originally said they were going to re-file other charges against him, it is of critical importance to remember that Binyam Mohamed returned to Great Britain in February 2009, and was released without charge within hours.

However, Binyam Mohamed's lawyers did have a theory as to why this radioactive charge disappeared, why all charges were dropped within days³⁴⁷ and why he was released from custody. The belief was that all charges were based upon admissions and confessions that were the direct result of torture and ill-treatment, and the government wished to avoid disclosing any evidence that would substantiate such a charge. Bolstering this theory was that this case drew international attention and caused diplomatic tensions across the Atlantic as Binyam Mohamed pursued the release of documents in courts of both the United States and the United Kingdom that would shed light on his whereabouts and treatment from April 2002 until May 2004. October 6, 2008 was the scheduled deadline in the habeas corpus proceedings before District Court Judge Emmet Sullivan for the government to release all exculpatory evidence to Binyam Mohamed's attorneys.³⁴⁸ The material included 42 classified British intelligence documents and among them were the communications with the United States about his fate after arrest in April 2002. The High Court in London also ordered the release of the documents to the defense attorneys, but the UK government argued that it could not do so due to the "control principle" (meaning that only the provider of intelligence information can disclose it, not the receiver of it), and such disclosure would damage the vital intelligence cooperation and relationship with the United States.³⁴⁹ The day that the documents were

³⁴⁵ Charge Sheet of BINYAM AHMED MOHAMED, note 322 above, CHARGE I: Violation of 10 U.S.C. §950v(b)(28), Conspiracy (letter i. and k.) and CHARGE II: Violation of 10 U.S.C. section 950v(25), Providing Material Support for Terrorism (letter i. and k.).

³⁴⁶ FINN, P., 'Key Allegations Against Terror Suspect Withdrawn: Justice Department Had Tied Guantanamo Detainee to Plot to Explode "Dirty Bomb" in US' The Washington Post (15 Oct 2008) available at: <<http://www.washingtonpost.com/wp-dyn/content/article/2008/10/14/AR2008101403146.html?hpid=topnews>>.

³⁴⁷ "'Farce' claim over Guantanamo man' BBC NEWS (21 Oct 2008) available at : <http://news.bbc.co.uk/2/hi/uk_news/7681738.stm>.

³⁴⁸ *Habashi, et al., v. Bush, et al.* (District Court docket 05-765).

³⁴⁹ *The Queen on the Application of Binyam Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*, Neutral Citation Number: [2008] EWHC 2048 (Admin), IN THE HIGH COURT OF JUSTICE

ordered by the U.S. District Court judge to be handed over to the petitioner, the Justice Department filed a notice with the court that it was withdrawing assertions against Binyam Mohamed for the most severe allegations and war crimes. All of this indeed gives credence to the lawyers' theory of the extended legal battle to avoid disclosing any evidence substantiating his involvement in a radioactive 'dirty bomb' plot.

Eventually, as evidenced in the account put forward above, much of Binyam Mohamed's story has surfaced and been considered veritable by a U.S. District Court in the *Farhi Saeed Bin Mohammed* case. In summary of his ordeal Judge Kessler put forward,

Binyam Mohamed's trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculcate himself and others in various plots to imperil Americans. The Government does not dispute this evidence.³⁵⁰

Interestingly, it was this disclosure by the U.S. Court that helped bolster the decision in a UK Court of Appeals to order the public release of seven paragraphs from an earlier judgment containing summaries of U.S. intelligence reports in UK files relating to Binyam Mohamed's case. The case in British courts had begun in May of 2008, and his lawyers were seeking documents that would help support his case before a Military Commission in Guantánamo. On February 10, 2010 the Foreign Secretary that had been battling vigorously to avoid any public disclosure at the behest of both the Bush and Obama administrations, was forced by court order to publish seven paragraphs that had been previously redacted. As such, this text was made public on the website of the Foreign & Commonwealth Office.³⁵¹ It read,

It was reported that a new series of interviews was conducted by the United States authorities prior to 17 May 2001 as part of a new strategy designed by an expert interviewer.

v) It was reported that at some stage during that further interview process by the United States authorities, BM [Binyam Mohammed] had been intentionally subjected to continuous sleep deprivation. [...]

vi) It was reported that combined with the sleep deprivation, threats and inducements were made to him. His fears of being removed from United States custody and "disappearing" were played upon.

QUEEN'S BENCH DIVISION DIVISIONAL COURT Case No: CO/4241/2008 Royal Courts of Justice, Strand, London. WC2A 2LL Date: 21/08/2008 Before: LORD JUSTICE THOMAS and MR JUSTICE LLOYD JONES.

³⁵⁰ *Farhi Saeed Bin Mohammed et al. v. Obama*, note 323 above, at 64.

³⁵¹ Foreign Secretary, David Miliband, 'Binyam Mohamed Case', Foreign & Commonwealth Office (10 Feb 2010) available at: <<http://www.fco.gov.uk/en/news/latest-news/?view=News&id=21735373>>.

vii) It was reported that the stress brought about by these deliberate tactics was increased by him being shackled in his interviews

viii) It was clear not only from the reports of the content of the interviews but also from the report that he was being kept under self-harm observation, that the interviews were having a marked effect upon him and causing him significant mental stress and suffering.

ix) We regret to have to conclude that the reports provide to the SyS made clear to anyone reading them that BM was being subjected to the treatment that we have described and the effect upon him of that intentional treatment.

x) The treatment reported, if had been administered on behalf of the United Kingdom, would clearly have been in breach of the undertakings given by the United Kingdom in 1972. Although it is not necessary for us to categorise the treatment reported, it could readily be contended to be *at the very least cruel, inhuman and degrading treatment* by the United States authorities.³⁵²

In this last paragraph we find an important legal assessment that even the earliest treatment undergone by Binyam Mohamed was illegal under international law. It should also be noted that the text does not treat the allegations of the most serious abuse, most specifically the intentional cutting all over his body including his genitals, because they address only the treatment that he was subjected to before transfer to Morocco. However, there is no doubt that they go a long way to substantiating the claims of abuse that Binyam Mohamed suffered. This is not to mention that they provide a damaging legal assessment made by a very close ally.

In conclusion of the two cases of Jose Padilla and Binyam Mohamed who were accused of the alarming charge of a ‘dirty bomb’ plot to explode a uranium tipped device inside the United States, there are three main points that should be taken away from this appalling episode. The first is that the whole idea of this startling conspiracy was borne of the interrogation of Abu Zubaydah that was already described as “borderline torture” by FBI agent Ali Soufan before his departure from the undisclosed site of detention.³⁵³ It seems reasonable to assume (but not imperative to our point) that after the departure of Soufan, the primary agent strongly opposing the coercive treatment of Zubaydah, that pressure was ratcheted up on this detainee before Padilla was transferred into military custody as an “enemy combatant” on June 9th, and the Attorney General’s public announcement of a ‘dirty bomb’ plot on June 10th. This accusation came out of Zubaydah in the interim time period and

³⁵² *Idem* (my emphasis).

³⁵³ SOUFAN, Testimony..., note 215 above.

it should be understood as the product of some sort of highly coercive treatment, even if we don't know the details of its severity.

Secondly, as it became necessary for this allegation of commenced preparations to explode a bomb containing radioactive material to be proven before a court of law, this allegation conspicuously disappeared from the charges against both of the suspected detainees. In the case of Jose Padilla, although he was convicted of supporting terrorist activities and it was thus possible to keep him from furthering any illegal actions targeting innocent civilians, there was no effort to provide evidence linking him to what would surely have been a deadly and chaos-inducing terrorist act of exploding a 'dirty bomb'. In the case of Binyam Mohamed, there was never an attempt to prove such an allegation in criminal court proceedings and in the end there was no charge that merited confinement whatsoever. With this result of Mohamed being set free when it was time to prove his culpability before a court, it is fair to say that a guiltless man was tortured on the suspicions created by the foul fruit of ill-treatment.

Thirdly, this deplorable episode demonstrates an insidious nature of torture that cannot be ignored when analyzing its efficacy. Torture will predictably lead to untrue accusations for at least three reasons: 1) because it is based on suspicion at its inception; 2) purposeful misleading; and 3) because one can expect harsh treatment to produce both false information along with any possibly available truth since the interrogator in intelligence gathering is pursuing information she does not know leaving her unable to distinguish between the two. Because this takes place outside of a system governed by law, as leads and suspicions expand there is no filter in this unlegislated system to sift through and discard falsehoods. It must be remembered that it was the case of Farhi Saeed Bin Mohammed that exposed the two-year torture and ill-treatment of Binyam Mohamed. A U.S. District Court judge found that the testimony of the latter was inadmissible against the former because torture had tainted the evidence. Thus it was the entrance of the courts into this filterless system that uncovered the way Binyam Mohamed's treatment led to further accusations that could not be deemed trustworthy. This vividly displays the snowballing effect of torture. Suspicion leads to torture, which leads to suspicions, which leads to torture. This less discussed aspect of torture is surely a part of its nature, and can only be described as insidious.

As a result of these three major points that can be taken away from the ill-treatment of Abu Zubaydah that led to the 'dirty bomb' accusations against Jose Padilla and Binyam Mohamed, we can conclude that a program of torture as an intelligence gathering tool faces a fundamental problem of efficacy. This insurmountable obstacle is acutely demonstrated by

the fact that Abu Zubaydah's name was eventually scrubbed from the charge sheets of other detainees in Guantánamo.³⁵⁴ Torture of a man who was wrongly suspected of being a major figure in the al Qaeda organization led to false leads and more torture making it necessary to expunge his testimony against other detainees. Therefore the attempt to collect intelligence through the use of a method that is both illegal and immoral, which is without question when applied to the innocent and uniformed, also clearly fails the test of efficacy. The expression 'arbitrary torture on suspicion' captures well what has been fleshed out here in these cases, and its damage to the target of legitimacy is indeed beyond measure.

VII. Mohammed al Qahtani – Oblivious to the Endgame

As has been aptly pointed out by FBI agent Ali Soufan and his colleagues in the bureau who made the critical decision to pull out of all interrogations involving 'enhanced techniques', choosing to engage in coercive interrogation is a mistake because it overlooks the endgame. Those detained in the 'war on terror' presumably have taken part in planning and carrying out attacks on unarmed civilians, meaning that they can be tried in a court of law for their crimes. However, every court, including a military tribunal, faces the vital task of having their judgments considered to be valid because they are based on truth, or as close as we can get to it. One of the essential ways in which this is accomplished is through rules of evidence that rightfully exclude testimony gathered under torture. This clearly is a human right found in Article 15 of the CAT codifying that parties to the treaty, "shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings".³⁵⁵ Alternatively, as it has been properly explained by a well-known U.S. constitutional lawyer, speaking in part to the evidence produced from Abu Zubaydah's abusive interrogation, "[b]ecause evidence obtained through coercion is universally viewed as inadmissible in court, the tactics effectively immunize suspects and those they implicate from prosecution".³⁵⁶ In the particular case of Mohammed al Qahtani that will be discussed in this

³⁵⁴ This point can be most clearly evidenced by the examining the charge sheets of Binyam Mohamed. In his November 2005 charge sheet, "Abu Zubayda" is directly referenced as a central al Qaeda figure no less than 10 times. (<<http://www.defense.gov/news/Nov2005/d20051104muhammad.pdf>>) However, in Binyam Mohamed's charge sheet of May 2008, Zubaydah is not mentioned once (<Binyam_Mohamed_charge_sheet_Guantanamo_military_commission_charge_sheet_(2008-05-28).pdf>); See also FINN and WARRICK, 'Detainee's Harsh Treatment Foiled No Plots', note 282 above.

³⁵⁵ CAT Treaty, note 44 above, Art. 15.

³⁵⁶ COLE, D., 'Torture Makes Justice Impossible' Los Angeles Times (3 Dec 2005) available at : <<http://www.latimes.com/news/opinion/commentary/la-oe-cole3dec03,0,5352424.story?coll=la-news-commentopinions>>.

section, the threshold of intentionally inflicted severe pain or suffering for the purpose of intelligence gathering, i.e. torture, was determined to have been legally surpassed.

Mohammed Mani' Ahmad Sha'Lan al Qahtani is a Saudi national captured near Tora Bora, Afghanistan in December of 2001 and who was then transferred to the newly opened Guantánamo detention facility in early 2002.³⁵⁷ For months al Qahtani's captors did not know who he was, or his relationship with al Qaeda. It was only after seven months in captivity on the island of Cuba that visiting FBI agents put together his identity through fingerprint analysis, one year old surveillance footage from the Orlando airport and phone records. It turned out that al Qahtani had attempted to enter the United States one month before the September 11th attacks and had been stopped by an alert customs agent who was disquieted by him and his demeanor. With conventional investigative work the FBI pieced together that the 9/11 ringleader Mohammed Atta was waiting outside the airport in a rental car and that a phone call was made from the very Orlando port of entry to one of the central al Qaeda numbers in the United Arab Emirates that was being monitored. As a result of this evidence, they came to believe that al Qahtani was the missing 20th hijacker of 9/11 who was meant to fill the fifth 'muscle' position on the aircraft that crashed in Pennsylvania. In the end, the al Qaeda members on that plane were overpowered by passengers who came to understand what was intended and charged the cockpit. Consequently, the U.S. government became extremely keen on gathering any and all intelligence information from someone who was supposed to be a part of the largest terrorist attack carried out on U.S. soil in its history.

Due to the fact that Guantánamo was under military control the rules meant to govern acceptable interrogation in the facility would be found in Army Field Manual 34-52 of 1992. Even a cursory glance at this document would reveal the extent to which international humanitarian law was interwoven into the fabric of this rule-based institution. For example, on the first page of the Preface it is clearly and explicitly laid out that, along with the Uniform Code of Military Justice, "principles and techniques of interrogation are to be used within the constraints established by" the Geneva Conventions.³⁵⁸ Of course, there is nothing surprising about this since the United States has done as much as any other country to put international rules into place.³⁵⁹ What must surely be remembered is that, not only do the Geneva Conventions explicitly listed in this document include protection in international armed conflict for prisoners of war in the third convention and civilians in the fourth, Common

³⁵⁷ MAYER, *The Dark Side*, note 27 above, at 190-1.

³⁵⁸ U.S. Army Field Manual, FM 34-52, Intelligence Interrogation, Headquarters, Department of the Army, Washington, DC (28 September 1992) at iv.

³⁵⁹ See generally SANDS, P., *Lawless World* (New York, Viking, 2005) 256 pp.

Article 3 provides the baseline of protection for all persons caught in the middle of an armed conflict. This protection includes freedom from cruel treatment and torture, along with “outrages upon personal dignity”, and is fully applicable to this circumstance as found in the *Hamdan* ruling of 2006.³⁶⁰

In addition to this plain attention to legality, what can also be found in this document is a focus on the intention of extracting *reliable* information from those under interrogation. Dependability of the information is critical. It should go without saying that the extraction of false information is counterproductive to the goal of intelligence gathering, but the Army is surely not an institution that could risk leaving the obvious unsaid as its existence is based on fighting in life or death situations. To clarify this point the manual relies on its history of successful interrogation practices and explains that,

[e]xperience indicates that the use of prohibited techniques is not necessary to gain the cooperation of interrogation sources. Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.³⁶¹

As well, the manual points out some of the other adverse effects of failing to live up to legal obligations in saying, “[r]evelation of use of torture by U.S. personnel will bring discredit upon the U.S. and its armed forces while undermining *domestic* and international support for the war effort”.³⁶² Also of extreme importance, directly contradicting the argument used by some for combating terrorists, it is explicitly stated that, “knowing the enemy has abused U.S. and allied PWs [prisoners of war] does not justify using methods of interrogation specifically prohibited by the GWS [Geneva Convention I], GPW [Geneva Convention III], or GC [Geneva Convention IV], and U.S. policy”.³⁶³

What can also be found in the manual are extremely useful and illuminating ways of expressing a simple understanding of the legal and practical restrictions under which all military interrogators were acting. In the simplest terms, contrary to what was put forward in the torture memos, it is indeed possible for non-lawyers to understand the prohibition of torture and ill-treatment. The Army Field Manual put forward that, “[p]hysical or mental torture and coercion revolve around eliminating the source's free will, and are expressly prohibited”.³⁶⁴ Additionally, uncomplicated questions are offered for any interrogator to keep

³⁶⁰ For discussion of this decision of 2006, see Chapter 4.

³⁶¹ FM 34-52, note 358 above, at 1-8.

³⁶² *Idem*, (my emphasis).

³⁶³ *Ibid*. The acronyms found in this quote refer to the three specific Geneva Conventions generally applicable.

³⁶⁴ *Ibid*.

in mind in case there are doubts in her mind. That is, would a reasonable person consider your action a violation and, if your contemplated conduct were carried out by the enemy, would you consider such actions to violate international or U.S. law?³⁶⁵ The second question is based on the underlying premise of international law, or reciprocity. As seen above it was already explicitly ruled out that the failure by the enemy to live up to legal obligations offers any reason to counter with like action.

Nonetheless, the clear and unambiguous rules that governed the military interrogators did not have the effect of avoiding the torture and ill-treatment of al Qahtani. The first evidence of this abuse became public in June of 2005 when *Time* magazine published extracts of the interrogation log of “Detainee 063”, as al Qahtani was known by his captors.³⁶⁶ Then in March of the following year the same magazine published on its website the 83 page military log in its entirety.³⁶⁷ One striking thing about this record is the superior professional capacity of the U.S. military to document in extensive detail their work down to the minute.

Additionally, there was a host of other internal government investigations into the allegations of abuse at Guantánamo which revealed further details of al Qahtani’s treatment and provided documentation of his abuse. For example, during the course of an internal FBI investigation it became known that agents from the agency had witnessed aggressive interrogation techniques being administered at the Guantánamo facility, which led to an Army Regulation 15-6 investigation and the 2005 document known as the Schmidt-Furlow Report.³⁶⁸ In addition, there is a heavily redacted version of a report commissioned by Admiral Church in 2004 investigating allegations of abuse at this facility which was obtained and released by the American Civil Liberties Union, along with an unclassified executive summary known as the Church Report.³⁶⁹ Then in 2008 there was the Inspector General’s report from the FBI detailing the witnessing by agents from that bureau of aggressive interrogations carried out by other agencies which treated the al Qahtani interrogation in one of its chapters.³⁷⁰ In December of that same year, the Senate Armed Services Committee voted without dissent to adopt an inquiry into the treatment of detainees in U.S. custody that focused

³⁶⁵ *Ibid.*, at 1-9.

³⁶⁶ BENNETT, B., BURGER, T., DONNELLY, S. NOVAK, V., ‘Inside the Interrogation of Detainee 063’ *Time Magazine* (12 June 2005) available at : <<http://www.time.com/time/magazine/article/0,9171,1071284,00.html>>.

³⁶⁷ ZAGORIN, A., ‘Detainee 063: A Broken Man?’ *Time Magazine* (2 March 2006) available at : <<http://www.time.com/time/nation/article/0,8599,1169310,00.html#ixzz0rlsGSDxp>>.

³⁶⁸ Schmidt-Furlow Report, note 23 above.

³⁶⁹ Church Report, note 23 above.

³⁷⁰ FBI-IG 2008 Report, note 25 above, at 77-129.

on the migration of aggressive SERE techniques meant to prepare personnel for illegal interrogation into a more general U.S. practice.³⁷¹

Lastly, one extensive research applying an international legal analysis into the precise manner in which coercive techniques were authorized by government officials for use by the military, most specifically Secretary of Defense Donald Rumsfeld, in spite of the clear regulations governing interrogation in the Army Field Manual 34-52, comes from Philippe Sands in his 2008 book, *Torture Team*.³⁷²

Although the FBI strongly resisted the implementation of coercive techniques for al Qahtani largely on the grounds of efficacy,³⁷³ the verbal authorization of Secretary Rumsfeld began the aggressive interrogation on November 23, 2002. Then on the 2nd of December, the memo that has been described as the key document that opened the door to the torture of al Qahtani was signed by Secretary of Defense Rumsfeld and it stayed in effect until it was suspended on the orders of the same bureaucrat six weeks later.³⁷⁴ This document drafted by William J. Haynes, the General Counsel at the Defense Department and one of the Secretary of Defense's closest and most trusted advisors, has become infamous for at least two reasons. The first is the ill-treatment that it unleashed. Secondly, Secretary Rumsfeld scrawled a note below his signature questioning some of the limitations, "However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?"³⁷⁵

Additionally, it should be pointed out that not all of the techniques listed in this document were authorized. There was a catalog of three progressively more aggressive categories of techniques that could be administered to uncooperative detainees, or in other words those who were not producing the information suspected to be withheld. While this Haynes memo was approved, it was not found to be necessary to apply the full panoply of techniques to the detainees in Guantánamo generally, and the suspected 20th hijacker specifically. That is, all Category I and II techniques were authorized along with the Category III method of using "mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing".³⁷⁶ Other Category III techniques, such as "use of wet towel and dripping water to produce the misperception of suffocation"³⁷⁷ (the most innocuous

³⁷¹ U.S. Senate Armed Services Committee 'Inquiry into the Treatment of Detainees...', note 22 above.

³⁷² SANDS, P., *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (New York, Palgrave McMillan, 2008) 249 pp.

³⁷³ FBI-IG 2008 Report, note 25 above, at 86-91 and 113-4.

³⁷⁴ Church Report, note 23 above, at 120-1.

³⁷⁵ Action Memo: Counter-Resistance Techniques, From: William J. Haynes II, General Counsel (27 Nov 2002) at 1. Available at : <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>>.

³⁷⁶ *Idem*.

³⁷⁷ *Ibid*.

sounding description of waterboarding found by this author), were not made available. As it was described in the memo,

While all Category III techniques may be legally available, we believe that, as a matter of policy, a blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint.³⁷⁸

It should of course be remembered that at this point in time both of the Bybee Memos, which analyzed controlled drowning as below the applicable legal standard of torture, had been completed and instituted as of August 1st of that year of 2002. Yet the Secretary of State wished to demonstrate the “tradition of restraint” embodied in the Armed Forces.

As a result of the multiple investigations into the al Qahtani interrogation and the memos that spawned it, a list can be compiled of some of the most egregious coercive techniques employed, almost entirely determined to fall within the authorized Category I and II techniques. The 48 of 54 days of consecutive days (or nearly two months), of 18 to 20 hour interrogations included: threatening him with a military dog; telling the detainee he is lower than a dog, attaching a dog leash to the detainee, walking him around the room on the leash, and having him perform dog tricks; stress positions; forced shaving for psychological purposes; repeatedly pouring water on his head; stripping him naked in the presence of a female; holding him down while a female interrogator straddled over him; manipulation of temperature; describing his mother and sister to him as whores; instructing him to pray to an idol shrine; a female interrogator telling him she was menstruating and showing him her finger (red with ink) then wiping it on the detainees arm; discussing repressed homosexual tendencies attributed to him in his presence; a male interrogator dancing with him; a female interrogator massaging his neck and back over his clothes and placing women’s underwear on his head and a bra over his clothing.³⁷⁹ While much of this treatment could certainly be understood as a kind of retributive punishment for someone suspected of being the missing 20th hijacker of 9/11, it is extremely difficult to conclude that such amateurish work, which could even be characterized at times as little more than childish, would be effective in soliciting actionable intelligence.

However, there is one thing that is undoubtedly certain. No matter how coercive, even sophisticatedly so (if brutality and cruelty can be sophisticated), the interrogators were never going to extract timely information from Mohammed al Qahtani. Simply look at the timeline. Al Qahtani was captured in December of 2001, and it was not until nearly one year later that

³⁷⁸ *Ibid.*

³⁷⁹ FBI-IG 2008 Report, note 25 above, at 104-5 and Schmidt-Furlow Report, note 23 above.

his aggressive interrogation began. It has already been pointed out that insurgents have long made agreements amongst their members that if captured they should resist divulging any vital information for as little as 24 hours so that plans and locations could be changed. After over 11 months of detention, it is virtually impossible that al Qahtani was up to date on any of al Qaeda's planning for attacks. Any sophisticated terrorist group must be assumed to be extremely controlled with such sensitive material that could quickly unravel the goals of the organization. Additionally, al Qahtani was captured fleeing Afghanistan into Pakistan during the invasion of coalition armed forces in 2001.³⁸⁰ This was most certainly a moment of turmoil and chaos for al Qaeda and thus one must assume that the group had undergone enormous reorganization, and without a doubt relocation. Certainly, if all of the suspicions of who al Qahtani was were correct, he possessed some useful knowledge concerning the basic structure and operational procedures even a year after his capture. But there is absolutely no doubt that he did not hold any *timely* information. It will thus forever be arguable that other non-coercive methods are more effective (not to mention legal and moral) in securing this structural, and not time sensitive, intelligence. We must thus conclude that there is absolutely no reason to believe that this case shows torture to be any kind of a superior method.

As for specific intelligence, it has been put forward that under these coercive tactics al Qahtani admitted being a member al Qaeda and that he was sent to the United States in August of 2001 to fulfil a mission, where he had obtained his entrance visa, and the names of three possible associates.³⁸¹ What's more, the commander in charge of the Guantánamo facility at the conclusion of the al Qahtani interrogation wrote in internal memos that the techniques were "essential to mission success".³⁸² However, an analysis of the al Qahtani case through the military Memorandum For Record documents (MFRs) that indicate the methods used, the detainee's reaction to them, the information provided by the detainee, the interrogations team's analysis of that information, an assessment of the detainee's truthfulness and level of cooperation, concluded otherwise. It was found that al Qahtani became fully cooperative with interrogators in April 2003, several months after the intensive coercion. After failing a polygraph test, al Qahtani began to become noticeably concerned about cutting a deal and avoiding U.S. prosecution for his crimes. As the FBI Inspector General put it,

The next day, AI-Qahtani began to describe his knowledge of al Qaeda in great detail, and the subsequent MFRs reflect that from that point on he provided a

³⁸⁰ *Idem*, FBI-IG 2008 Report, at 77.

³⁸¹ *Ibid.*, at 118.

³⁸² *Ibid.*

significant amount of detailed information about al-Qaeda and its pre-September 11 operations.³⁸³

The military interrogators and analysts investigating the case found that the major factors which influenced al Qahtani's shift in attitude were the failing of the polygraph test, a perception of betrayal by other al Qaeda members, lack of contact with others and the incentive of being returned to Saudi Arabia. Of central importance to the issue of the efficacy of torture, "[t]he analysis did not cite the application of harsh interrogation techniques prior to January 15, 2003, as a factor in Al-Qahtani's changed behavior".³⁸⁴

Nonetheless, the primary intent in addressing the al Qahtani case here is more about what torture does to justice. While some would care to focus attention on an immediate imperative, even if it must be recognized as speculative, the human reality is that time keeps moving and questions that are left for later must eventually be answered. The central question that will never fade away, and certainly continues to plague the Obama administration, is: "What do you do with a detainee who has been tortured?" This was indeed the question directly faced by Susan Crawford, named the convening authority for military commissions in February 2007, which made her the official in charge of deciding whether to bring Guantánamo detainees to trial. Just days before the commencement of the Obama administration an interview with Crawford was published in the Washington Post in which she is quoted as saying "[w]e tortured Qahtani".³⁸⁵ In her exhaustive review of his treatment under interrogation, along with the abundant evidence against him as the 20th hijacker, Crawford came to the conclusion, "[h]is treatment met the legal definition of torture. And that's why I did not refer the case".³⁸⁶ Hence al Qahtani's treatment immunized him from prosecution in a court of law, even in a military tribunal with a wider standard of admissible evidence due to the Military Commission's Act of 2006.³⁸⁷

What had the largest impact on Crawford's decision was the life-threatening medical condition that al Qahtani suffered during the interrogations. On two different occasions during the fifty-four days of aggressive interrogation he needed to be hospitalized for bradycardia, a condition in which the heart rate falls to dangerous levels below 60 beats per minute, and in extreme cases can lead to heart failure and death. One of those instances was about two weeks

³⁸³ *Ibid.*, at 119.

³⁸⁴ *Ibid.*

³⁸⁵ WOODWARD, B., 'Detainee Tortured, Says U.S. Official : Trial Overseer Cites "Abusive" Methods Against 9/11 Suspect' The Washington Post, page A01 (14 Jan 2009) available at : <<http://www.washingtonpost.com/wpdyn/content/article/2009/01/13/AR2009011303372.html?hpid=topnews>>.

³⁸⁶ *Idem.*

³⁸⁷ MARTINEZ, J., 'The Military Commissions Act and "Torture Lite": Something for a Great Nation to Be Proud Of?' (2007) 48 Harvard International Law Journal 58.

into the intensive 20 hour interrogations when al Qahtani's heart rate dropped to just 35 beats per minute, and thus he was immediately taken to the hospital for medical treatment. With medical approval, he was then hooded, shackled and restrained to return to the interrogation booth in less than 48 hours for interrogations that would continue for five more weeks.³⁸⁸ In her assessment of the overall treatment Crawford said, "[i]t was that medical impact that pushed me over the edge".³⁸⁹

So what we find is that the U.S. government's decision to scrap the constraints of the Army Field Manual 34-52, because it was determined nearly a year after the beginning of his detention that a suspect's status and resistance necessitated an aggressive approach to interrogation, led to treatment that was legally determined by a life-long Republican to be torture. As a result, justice cannot be served. Although it has been suggested that "clean teams" can now come in and interrogate al Qahtani, it is not clear that this would result in a court overlooking the abusive treatment he was subjected to for two months in 2002-3. As such, the severe physical and mental pain and suffering that al Qahtani was intentionally subjected to at the hands of military personnel for the purposes of extracting information has meant that someone suspected of being involved in most horrendous crime ever committed on U.S. soil can not be brought to justice. Crawford explained that her analysis of the evidence led her to conclude,

There's no doubt in my mind he would've been on one of those planes had he gained access to the country in August 2001. He's a muscle hijacker. He's a very dangerous man. What do you do with him now if you don't charge him and try him? I would be hesitant to say, 'Let him go.'³⁹⁰

What to do with Mohammed al Qahtani? Can it be said that this interrogation that immunized from prosecution the only living 9/11 hijacker (by his own admission) was effective in furthering the goals of the 'war on terror'? What is the so-called "error cost" here?

VIII. Khalid Shaykh Mohammed – Correct Suspicions and Efficacy

Of course, it is entirely possible for suspicions to be correct. It is readily admitted here that this appears to be the case with Khalid Shaykh Mohammed who is alleged to be the mastermind behind the September 11th attacks. On March 1, 2003 he was captured in Rawalpindi, Pakistan by local authorities and U.S. officials hung back while he was

³⁸⁸ Interrogation Log of Detainee 063, episode of 7-9 Dec 2002, at 26-7, available at : <http://www.time.com/time/2006/log/log.pdf>.

³⁸⁹ WOODWARD, 'Detainee Tortured, Says U.S. Official', note 385 above.

³⁹⁰ *Idem*.

handcuffed and hooded. By March 4th, this high value detainee was moved into the CIA black site prison system that kept him out of reach of the International Committee of the Red Cross, the body which is given legal authority for visitation rights to prisoners of war and interned civilians in international armed conflict by the Geneva Conventions.³⁹¹

The intention behind this mandated access is to protect the life and dignity of all those held in detention by verifying that they are being held in accordance with relevant international humanitarian law and standards, and to help ensure that they are not subjected to ill-treatment and torture. The simple fact of documenting each prisoner's exact location, health condition and allowing human contact with someone not involved with holding her in detention helps to avoid abuse because it becomes clear that someone is watching, if only through confidential reports. This practice of holding someone in secret and outside of the law, without information concerning the reasons for their detention nor access to an independent judiciary to determine that the detention is in fact lawful, is one that is gaining an increased recognition of international illegality with the recent entry into force of the International Convention for the Protection of All Persons from Enforced Disappearance.³⁹² In this instance, even though such visits in non-international armed conflict are not legally obligated, they are a constant practice of the Red Cross and internationally recognized.³⁹³ Yet, the ICRC was not given such access to Khalid Shaykh Mohammed during the three and a half years of his initial detention in this CIA-run system, and at least one result was that his treatment in interrogation was not in accordance with Common Article 3, protecting all those caught in a non-international armed conflict, and later ruled to be applicable by the U.S. Supreme Court. Nevertheless, our primary concern in this section is that of efficacy.

Khalid Shaykh Mohammed was subjected to the whole series of techniques designed for and applied to Abu Zubaydah (once again, except a harmless insect placed inside a confinement box with the detainee), discussed above in the Classified Bybee Memo.³⁹⁴ As a

³⁹¹ GC III, Articles 123 and 126; and GCIV, Articles 76, 140 and 143, note 124 above.

³⁹² *International Convention for the Protection of All Persons from Enforced Disappearance* (adopted 20 Dec 2006, entry into force 23 Dec 2010) G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006), Article 2, "For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law". The United States is not a signatory, nor a party, to the treaty. However, for a legal determination that this was indeed the case for Khalid Shaykh Mohammed, along with other detainees in the 'war on terror', see ICRC 2007 Confidential Report on "High Value Detainees", see note 26 above, at 23-5.

³⁹³ Aeschlimann, A., 'Protection of Detainees: ICRC Action Behind Bars' (March 2005) 87, 857 *International Review of the Red Cross* 83, at 87-8.

³⁹⁴ Classified Bybee Memo, *Interrogation of al Qaeda Operative*, note 82 above, at 2-4.

result, knowledgeable officials have stated that he was, “singing like a bird”.³⁹⁵ The meaning was that he was giving up valuable intelligence on the al Qaeda organization, other terrorist operatives and plans for future attacks.

As a starting point for the overwhelming combination of harsh techniques this individual was subjected to, he was stripped naked and forced into a prolonged stress standing position with his arms shackled above his head to a hook in the ceiling (he was left undressed for over a month, and continuously shackled for nineteen months).³⁹⁶ In addition to the pain and discomfort produced from this stress position, this was also meant to deprive Mohammed from sleeping during the time that he was not being directly interrogated (which started at about eight hours a day, and was later reduced to around just four).³⁹⁷ Mohammed was also cited as explaining that, “a thick plastic collar would be placed around my neck so that it could then be held at the two ends by a guard who would use it to slam me repeatedly against the wall”.³⁹⁸ To aggravate the distress of the extended time he was kept in complete nudity (even during waterboarding),³⁹⁹ Mohammed’s cell was kept at an exceptionally cold temperature, and he was repeatedly doused with cold water (used to awake him or rinse away the feces that had run down his legs).⁴⁰⁰ Additionally, Khalid Shaykh Mohammed did not have a solid meal during the first month of his detention, other than the two times he was rewarded for perceived cooperation. He was instead given (or forced to swallow) a drink of Ensure every four hours.⁴⁰¹ In addition to this, threats to the detainee and his family were inveighed, along with beating and kicking, including slapping and punching to the body and face.⁴⁰² Finally, on top of all this other ill-treatment, Khalid Shaykh Mohammed was subjected to torturous controlled drowning a total of 183 times in March of 2003.⁴⁰³

At the site where Khalid Shaykh Mohammed was captured, a vast quantity of raw data was collected indicating that he was directly involved in the operational planning of future attacks on the United States. Demonstrating the subjectivity with which any decision to move into coercive interrogation must be taken (similar to what we have seen in the above cases), Former President Bush wrote in his 2010 memoir, “[i]t *didn’t sound like* he was willing to

³⁹⁵ MAYER, *The Dark Side*, note 27 above, at 269.

³⁹⁶ See *idem*, at 273-9; and ICRC 2007 Confidential Report on “High Value Detainees”, note 26 above, at 16.

³⁹⁷ *Idem*, ICRC 2007 Confidential Report on “High Value Detainees”, at 11-12.

³⁹⁸ *Ibid.*, at 12.

³⁹⁹ *Ibid.*, at 11.

⁴⁰⁰ *Ibid.*, at 14-15.

⁴⁰¹ *Ibid.*, at 18.

⁴⁰² *Ibid.*, at 13.

⁴⁰³ BRADBURY, *Article 16 Memo*, note 110 above, at 37; see also CIA-IG 2004 Report, note 24 above, at 45 and 91.

give us any information about them”.⁴⁰⁴ Bolstering his reasoning for this swift conclusion the former president quoted the alleged 9/11 mastermind as saying, “I’ll talk to you, after I get to New York and see my lawyer”. While such a statement from a suspected high-level terrorist could certainly be disconcerting, to conclude that non-coercive interrogation methods would be fruitless on the basis of a single statement appears to be more of a predetermined supposition rather than a reasoned determination. As such, when the question was posed by the Director of Central intelligence as to whether the President himself would go ahead and give the order to engage in this abusive treatment for the sake of intelligence gathering, President Bush simply stated, “[d]amn right”.⁴⁰⁵

From the available reports, it does seem that the application of the intense regime of combined ‘enhanced interrogation techniques’ did indeed provide actionable intelligence. To be sure, this is the case put forward by the Former President himself since it was the circumstance of Khalid Shaykh Mohammed that he used in his post-presidency account to justify his fateful decision to employ this ill-treatment. As he explained,

Khalid Sheikh Mohammed proved difficult to break. But when he did, he gave us a lot. He disclosed plans to attack American targets with anthrax and directed us to three people involved in the al Qaeda biological weapons program. He provided information that led to the capture of Hambali, the chief of al Qaeda’s most dangerous affiliate in Southeast Asia and the architect of the Bali terrorist attack that killed 202 people. He provided further details that led agents to Hambali’s brother, who had been grooming operatives to carry out another attack inside the United States, possibly a West Coast version of 9/11 in which terrorists flew a hijacked plane into the Library Tower in Los Angeles.⁴⁰⁶

We see that the former president stands firmly behind his decision to authorize these tactics of questionable legality and morality, and directly points to the gathered intelligence as the justification for them. Yet, at the same time, this characterization of the effectiveness of the enhanced techniques is oversimplified. The way in which it has been presented here by the former President is that all information gained after the application of forceful coercion should be considered as proving its efficacy. However, the reality is much more nuanced.

The CIA Inspector General Report of May 2004 made a concerted effort to directly address this issue in a section entitled “Effectiveness”. And to open a more complex discussion of the success of the application of the enhanced tactics it was explained,

[t]he detention of terrorists has prevented them from engaging in further terrorist activity, and their interrogation has provided intelligence that has enabled the

⁴⁰⁴ BUSH, *Decision Points*, note 21 above, (my emphasis) at 170.

⁴⁰⁵ *Idem.*

⁴⁰⁶ *Ibid.*, at 170-1.

identification and apprehension of other terrorists, warned of terrorists plots planned for the United States and around the world, and supported articles frequently used in the finished intelligence publications for senior policy makers and war fighters. In this regard, there is no doubt that the Program has been effective. Measuring the effectiveness of EITs [enhanced interrogation techniques], however, is a more subjective process and not without some concern.⁴⁰⁷

Simply capturing those who are intent on carrying out attacks on civilians clearly prevents them from causing such death and injury as they would have desired. But this is a benefit of the rightful detention of all enemies who mean to inflict harm. Therefore the attention has been correctly located on information gained by the specific techniques that has led to the further capture of terrorists or, “warned of terrorist plots”.⁴⁰⁸ In this regard it was pointed out that, “[m]any other detainees [...] have provided leads to other terrorists, but probably the most prolific has been Khalid Shaykh Muhammad”.⁴⁰⁹ Therefore it is reasonable to acknowledge that the interrogation of this high value detainee did produce important and quantifiable results.

As to what particular technique seemed to unlock access to this actionable intelligence the Inspector General looked to waterboarding. However, due to the severity of this particular interrogation tool, it was not simply flagged as effective. The report began by explaining,

[i]n as much as EITs have been used only since August 2002, and they have not all been used with every high value detainee, there is limited data on which to assess their individual effectiveness. This Review identified concerns about the use of the waterboard, specifically whether the risks of its use were justified by the results, whether it has been unnecessarily used in some instances, and whether the fact that it is being applied in a manner different from its use in SERE training brings into question the continued applicability of the DoJ [Department of Justice, or the OLC within it] opinion to its use. Although the waterboard is the most intrusive of the EITs, the fact that precautions have been taken to provide on-site medical oversight in the use of all EITs is evidence that their use poses risks.⁴¹⁰

However, in its specific use on the high value detainee in question there is a distinct mention of its medical impact. The work carried out by the Inspector General also discovered that there was a change in behavior in this detainee after the controlled drowning was applied. As it was explained in the report,

On the other hand, Khalid Shaykh Muhammad, an accomplished resistor, provided only a few intelligence reports prior to the use of the waterboard, and analysis of that information revealed that much of it was outdated, inaccurate, or incomplete. As a means of less active resistance, at the beginning of their interrogation, detainees

⁴⁰⁷ CIA-IG 2004 Report, note 24 above, at 85.

⁴⁰⁸ *Idem.*

⁴⁰⁹ *Ibid.*, at 87.

⁴¹⁰ *Ibid.*, at 89.

routinely provide information that they know is already known. Khalid Shaykh Muhammad received 183 applications of the waterboard in March 2003 [some ten further lines of redacted text].⁴¹¹

The large amount of redacted text makes it extremely difficult to fully analyze the conclusions concerning the application this extreme interrogation tool. However, it is possible to conclude that what had been produced prior to its application was largely, “outdated, inaccurate, or incomplete”. Additionally we know that Khalid Shaykh Mohammed, by most accounts, did produce valuable intelligence.

At the same time, it is important to focus our attention on two points, one of them being a fundamental and critical piece of information also found in this report. At first glance this information would seem to point in the direction of a conclusion that applying the most severe of the ‘enhanced interrogation techniques’ is a successful interrogation tool in questioning detainees in the ‘war on terror’. However, it must not be forgotten that on this specific occasion the suspicions of Khalid Shaykh Mohammed’s exact position in the al Qaeda organization appears to be correct. As such, the physical and mental twisting of this detainee wrought out intelligence that was at times accurate and useful. There is no doubt that much false intelligence was interspersed with the valid information, and of course it took a good amount of valuable time and effort to distinguish between the two.⁴¹² As discussed in the introduction, such moments of valid information interjected into the intelligence system cannot be used to characterize the entire program as effective because such results are unpredictable since suspicion undergirds the whole program. The torture of the innocent and ill-informed must clearly remain a part of the assessment of efficacy of a program.

Secondly, the CIA Inspector General’s Report dealt with the terrorist plots of which the interrogators were warned by all of the high value detainees. The plots that were not redacted in the report were: an attack on the U.S. Consulate in Karachi, Pakistan; the hijacking of planes to fly into London Heathrow Airport; a loosening of track spikes in an attempt to derail a train in the United States; the blowing up of several gas stations in the U.S. to create a panic; the cutting of lines on suspension bridges in New York in an effort to make them collapse; and the hijacking of an aircraft to fly it into the tallest building on the West Coast to emulate the September 11th attacks. However, one decisive element of these disrupted plots cannot be overlooked. The report explicitly spelled out one critical component,

⁴¹¹ *Ibid.*, at 91.

⁴¹² For a refutation of the specific intelligence gained, and the admissions of guilt made, see MAYER, *The Dark Side*, note 27 above, at 277-78 and 325.

*[t]his Review did not uncover any evidence that these plots were imminent.*⁴¹³

In other words, none of the gathered intelligence was timely information that left no alternative means available. The decision to use a mounting form of ill-treatment as the interrogation tactic and strategy was determined as necessary very shortly after KSM's capture according to the former President himself.⁴¹⁴ The fact that it took at least one full month of constant nudity, shackling, threats, beatings, walling, dietary and temperature manipulation, stress positions and 183 episodes of controlled drowning evoking death to acquire not one piece of timely information is particularly problematic from the point of view of efficacy. There was always the possibility that other means would have produced the same, if not better, results.

Once again, such a conclusion from the Inspector General also perfectly coincides with the argument put forward by one scholar that points out that insurgents have been making 'torture contracts' with their members to hold out on giving any pertinent knowledge of operations for 24 hours upon capture to ensure that any timely information becomes obsolete.⁴¹⁵ Considering that none of the information gathered in the interrogation of Khalid Shaykh Mohammed was timely, it is possible to conclude that his capture itself was enough to disrupt future plots, regardless of what he divulged.

In the report it was also found that even though none of the plots were imminent, "senior managers *believe* that lives have been saved as a result of the capture and interrogation of terrorists who were planning attacks".⁴¹⁶ As discussed, the capture of real terrorists indeed helped prevent future attacks. Yet, the value of harsh physical and psychological interrogation is not demonstrated in the report. It is a belief. It is one held by some of the highest ranking members of the government involved in the program instituting torture and ill-treatment who would thus have a clear personal investment in that belief. The fact that none of the gathered information was dealing with an imminent threat also certainly explains why Former President Bush wrote in 2010 that the plot foiled by Khalid Shaykh Mohammed's interrogation was, "*possibly* a West Coast version of 9/11 in which terrorists flew a hijacked plane into the Library Tower in Los Angeles".⁴¹⁷ No empirical certainty can be brought to this claim, or any of the others, made by the former President or other policymakers implicated in this program. It is an argument based only 'what might have

⁴¹³ CIA-IG 2004 Report, note 24 above, (my emphasis) at 88.

⁴¹⁴ BUSH, *Decision Points*, note 21 above, at 170.

⁴¹⁵ REJALI, *Torture and Democracy*, note 14 above, at 475.

⁴¹⁶ CIA-IG 2004 Report, note 24 above, (my emphasis) at 88.

⁴¹⁷ BUSH, *Decision Points*, note 21 above, (my emphasis) at 171.

happened otherwise', and can never be proven. Although the use of suspicion seems to have resulted in torturing the right target in this case, there is nothing to show it to be a superior or necessary method.

* * *

IX. Torture on Suspicion – Clarifying the Moral Argument

To complete our discussion of the use of torture and ill-treatment through the lens of efficacy we shall briefly focus on its place of overlap with morality. In particular, demonstrating the inefficacy of torture as an intelligence gathering tool since its arbitrary nature grows out the fact that it is based upon unverifiable suspicion helps to clarify the moral question at stake. In other words, the morality of an act is drastically altered by its efficacy or inefficacy. For the man standing at the edge of a cliff offering feathered wings to believers who have enough faith to fly themselves to the heavens to be embraced by God, the morality of such an act at least partially turns on whether there is any chance that this flight is humanly possible. Therefore, this final section will flesh out the way the question that is usually posed in the ticking bomb scenario (would you torture a terrorist who knows where a bomb is hidden that is due to imminently explode to save the lives of hundreds or thousands of people?), is in fact changed by the acknowledgement that torture program is meted out on suspicion and thus inevitably pulls in innocent and ill-informed individuals as targets of torture.

As discussed in our introduction, the ticking bomb scenario is traditionally framed within one of moral philosophy's great ethical debates of utilitarianism (or consequentialism) versus deontology. However, for our purposes the specific classification of our argument is unnecessary since our concern is with legitimacy as a target of terrorism. As well, this framing is somewhat changed when we are speaking about a government program of ill-treatment for intelligence gathering rather than the case of the private morality of an individual.⁴¹⁸ In the latter case, it is much more viable to contemplate a scenario with no strategic implications for a larger campaign, along with the fact that operating within the uncertainty and murkiness of accessible knowledge is common and more readily accepted.

Yet, when we are thinking about the public sphere and drafting a rule for regulation this is not the same circumstance, nor is the morality exactly the same. Most importantly,

⁴¹⁸ For a useful discussion on these different approaches to the ticking bomb scenario, and the important difference between the private and public sphere on this question leading perhaps to two different moralities, see GINBAR, *Why Not Torture Terrorists?*, note 16 above, at 3-164. This distinction can also be discussed through the difference between act and rule utilitarianism.

while it is often accepted that a ‘ticking bomb’ scenario could be plausible in an individual case (even if highly unlikely), in a program of torture and ill-treatment calculating the so-called ‘error costs’ becomes unachievable. The already demanding questions of *certainty*, *immediacy*, *targeting*, and the *effectiveness of coercive techniques* all become exponentially more complicated and beyond calculation.⁴¹⁹ This is particularly the case as the errors multiply upon themselves as false information enters the intelligence gathering apparatus due to the use of abusive interrogation.

Another difference is that a government must concern itself with the consequences (including moral) for its overall military campaign. The words of the former French secretary-general at the Algiers’ prefecture, when speaking to the use of torture in their campaign in this territory, make this point on torture very clearly, “Massu won the Battle of Algiers; but that meant losing the war”.⁴²⁰ A government must also pay heed to what is often referred to as the “slippery slope” of inadvertently introducing unwanted and uncontrollable actions into a larger institutionalized system. According to the U.S. Senate Armed Services Committee, this is exactly what happened in the ‘war on terror’ when it came to abusive interrogation practices. One of the conclusions of their 250 page report, accepted without one dissenting vote in 2008, was that actions taken by the President and lawyers in the OLC led to abuse through the U.S. military detention system, including in Iraq where the Geneva Conventions were in full force.⁴²¹ While some argue that some sort of “slippery slope mechanism” must be constructed to show evidence of a causal relationship between the two,⁴²² it is farfetched that the exact same techniques (i.e. hooding, nudity, use of dogs, stress positions and a preponderance of female interrogators) utilized in Guantánamo just happened to crop up later in Iraq.

Additionally, the critical difference between that of private and public morality is the central thesis of this work: the latter directly affects the legitimacy of the government. It is vital that a government exercise its monopoly of the use of force in a manner that is deemed

⁴¹⁹ For further discussion of these essential elements necessary to bring torture within the bounds of morality in the context of the ‘ticking bomb’ scenario see notes 17-20 above, and accompanying text.

⁴²⁰ HORNE, *A Savage War of Peace*, note 176 above, at 207.

⁴²¹ U.S. Senate Armed Services Committee ‘Inquiry into the Treatment of Detainees...’, note 22 above. “Conclusion 8: Detainee abuse occurred during JPRA’s [Joint Personnel Recovery Agency] support to Special Mission Unit (SMU) Task Force (TF) interrogation operations in Iraq in September 2003. JPRA Commander Colonel Randy Moulton’s authorization of SERE instructors, who had no experience in detainee interrogations, to actively participate in Task Force interrogations using SERE resistance training techniques was a serious failure in judgment. The Special Mission Unit Task Force Commander’s failure to order that SERE resistance training techniques not be used in detainee interrogations was a serious failure in leadership *that led to the abuse of detainees in Task Force custody*. Iraq is a Geneva Convention theater and techniques used in SERE school are inconsistent with the obligations of U.S. personnel under the Geneva Conventions”, (my emphasis) Executive Summary at xxvii.

⁴²² POSNER, and VERMEULE, *Terror in the Balance*, note 10 above, at 201.

legitimate by its citizens or the structure of the society itself can suffer. Therefore introducing torture as a policy for the gathering of intelligence, even in a campaign that has been explained to be one of imperative national security, runs serious risks of diminishing the legitimacy of the policy and the government. As the historian by training, and human rights scholar by vocation, Michael Ignatieff wrote,

[t]here is not much doubt that liberal democracy's very history and identity is tied up in an absolute prohibition of torture. The elimination of torture from the penal process, beginning with Voltaire's campaign on behalf of Calas and Beccaria's great Enlightenment *Essay on Crimes and Punishments*, has always been seen as an intrinsic feature of the story of European liberty itself. In this story, constitutional freedoms matter positively because they enable men and women to choose the lives they want to live, and matter negatively because they help to eliminate needless and unjustifiable cruelty from the exercise of government. Liberal democracy stands against torture because it stands against any unlimited use of public authority against human beings, and torture is the most unlimited, the most unbridled form of power that one person can exercise against another. Certainly the United Nations Convention on Torture –to which all liberal democracies, including the United States, are signatories– forbids it under any circumstances and does not allow the prohibition to be derogated even in conditions of national emergency.⁴²³

Understanding the gravity of this particular prohibition in this way sheds a bright light on how torture has become directly tied up with the legitimacy of government power itself. As such, this author believes that by demonstrating three primary points in this chapter we have provided extremely strong evidence of the inefficacy of this public policy for intelligence gathering: 1) in the 'war on terror' torture and ill-treatment has been systematically employed without any timely atrocities averted (or ticking bombs); 2) that the suspicions of a detainee's role in the al Qaeda organization have been shown to be manifestly incorrect after his having been tortured; and 3) that false information implicating other detainees who at times came to be tortured themselves was introduced into the system. Essentially, since we can never know the mind of another human being, torture must always be carried out on a suspicion of what they know, And this is a hurdle that cannot be surmounted under the human conditions we know today.

It is clear by now that a thesis of this work is that efficacy is one of the pillars of legitimacy. At the same time it is believed that this unattainable calculability of the efficacy of a torture program helps to also clarify the moral argument when it comes to public policy, which is where we will now turn our attention.

⁴²³ IGNATIEFF, M., *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, Princeton University Press, 2004) (internal citations omitted) at 136-7.

A useful way to confront this moral question is through the work of an academic who has become quite well-known for his argument that torture is going to happen whether it is outlawed or not, and therefore the best way to deal with this reality is to allow courts to issue “torture warrants” when there is a ticking bomb case. Harvard Law Professor Alan Dershowitz put forward this argument in his 2002 book *Why Terrorism Works*, and received a good deal of attention for doing so.⁴²⁴ While there is no doubt that there are some glaring legal errors in his reference to international law,⁴²⁵ the argument is meant to be largely focused on the moral questions raised by the ticking time bomb scenario since he believes there to be room for a legal argument in domestic law.

In his chapter discussing the issue of torture Dershowitz has a section entitled “The Case for Torturing the Ticking Bomb Terrorist”. He begins it by presenting the situation described by Jeremy Bentham in our introduction. Dershowitz does not address the issue of suspicion as it has been raised by Bentham (“a *suspicion* is entertained, as strong as that which would be received as a sufficient ground for arrest and commitment as for felony”⁴²⁶), which would seem to indicate that he is satisfied with this suggested standard.

However, there are two main problems here. The first is that to unquestioningly accept this standard is to disregard the value of the adversarial system in common law, which is also accepted as a portion of the working courtroom method in international criminal law.⁴²⁷ Suspicions are inherently particular to an individual (or even at times a group of individuals working together), and thus the point of an independent judge or jury is to sit in judgment of two competing arguments with equal arms at their disposal. In this scenario of the ticking bomb the interests or argument of the detained are wholly disregarded on the basis of an unchecked standard of a belief that life-saving information exists in the mind of the prisoner. To dismiss the entire procedure of adjudication as unnecessary and unimportant for arriving at the truth behind accusations means that the government is ultimately exercising the most potent of powers on the disarmed and helpless without any oversight. In essence, this

⁴²⁴ DERSHOWITZ, A., *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, Yale University Press, 2002) at 131-63.

⁴²⁵ There are two places where M. Dershowitz refers to the “Geneva Convention Against Torture”. Of course, these are two different treaties: 1) the Geneva Conventions; and 2) the UN Convention Against Torture and Cruel, Inhuman and Degrading Treatment or Punishment. They have different temporal applications and scopes, so to fuse the two makes no legal sense. More importantly, he went on to cite the United States reservation to the CAT treaty that deals only with the lesser forms of ill-treatment (cruel, inhuman and degrading treatment) as seemingly applicable torture itself. There are important legal implications to such an error, and it is lamentable that M. Dershowitz made these errors right at the opening of his chapter perhaps tainting its overall value.

⁴²⁶ DERSHOWITZ, *Why Terrorism Works*, note 424 above, (my emphasis) at 142-3.

⁴²⁷ FLETCHER, G., ‘The Influence of Common Law and Civil Law on International Criminal Law’ in Cassese, A., (ed.) *The Oxford Companion to International Criminal Justice, Volume II* (Oxford, OUP, 2009) at 104-110.

translates into a leap-frogging of any judicial process to land well beyond what is permitted in most constitutional orders. It is suggested by this author that this is precisely the reason why we have seen torture and ill-treatment spread like a virus thorough the U.S. detention system (or in other words, a slide down the slippery slope), because introducing ill-treatment based on suspicion has no inherent check. Dershowitz suggests that a truncated procedure, or a torture warrant,⁴²⁸ could be enough to replace this judicial process. However, while this would make it less arbitrary (although still based on suspicion),⁴²⁹ this would still bypass the adversarial system that has been instituted to attempt to ascertain the truth and justify the government's exercise of its "*monopoly on the legitimate use of physical force*".

The second problem is more basic to the constraints of our human condition. To secure information from a detainee, the essential idea is to pry into her mind. To say that we "know" that this individual possesses the life-saving information we seek is absurd on its face. If we are able to know what is inside this person's mind, there would be no reason to contemplate torture. Our level of suspicion might be extremely high, but it will always remain a suspicion. As cited above, one scholar of torture has pointed out in a discussion of technological advancements which could circumvent this human constraint, "if such technology existed, it would surely be just as widespread as electricity".⁴³⁰ Needless to say, resolving this limitation would fundamentally change our human existence as we know it and would be a piece of knowledge nearly impossible to conceal. Therefore, due to the fact that suspicion must be the basis for an intelligence gathering operation, with only a curtailed judicial involvement at best, we must assume that the guiltless and the ignorant will be unavoidably drawn into the program.

Nonetheless, to make his point, Dershowitz extrapolates on a real-life circumstance to make his point on torture. He puts forward the case of Zacarias Moussaoui who was captured a few weeks before the attacks of September 11th, 2001 after flight instructors had reported suspicious requests and statements during his flying lessons, coupled with his large advance payments in cash. Although in actuality the government did not seek a warrant to search his computer at that moment, Dershowitz conjures up a scenario in which this had happened and it was revealed that he was a part of the plan for an upcoming terrorist attack on large

⁴²⁸ DERSHOWITZ, *Why Terrorism Works*, note 424 above, at 156-60.

⁴²⁹ Indicating this to be the standard in such a case see also HEYMANN, P., and KAYYEM, J. *Preserving Security and Democratic Freedoms in the War on Terrorism*. Report for Belfer Center for Science and International Affairs (16 Nov 2004). "Authorized interrogators have probable cause to believe..." at 33.

⁴³⁰ REJALI, *Torture and Democracy*, note 14 above, at 453.

occupied buildings, but “without any further details”.⁴³¹ After all legal interrogation methods, and then injections of sodium pentothal and other truth serums, did not produce information about the approaching attack, which somehow then becomes believed to be imminent, an FBI agent might then propose the use of nonlethal torture (i.e. a sterilized needle placed under the fingernail to produce unbearable pain).

This set of circumstances would appear to be sufficient for Dershowitz to justify the need for torture, although he never actually takes a clearly identifiable position himself.⁴³² To begin to break down the flaws in what is put forward here it should be recognized that Dershowitz is using the most high profile terrorist attack in human history, which was caught on film and viewed by millions of people. In doing so he is able to produce shock and horror in the mind of the reader that never could have existed at any moment before its occurrence. Therefore it must be understood that the strong sense of urgency aroused by his scenario would never have been in place beforehand, or arguably, even years after the attacks. While nearly everyone, including this author, would have wanted a way to avoid those terrible events, the point is that the use of this example just one year after the vicious attacks is certainly one that is charged. Secondly, while it can be believed that Moussaoui would have had critical information that would have led to disrupting the attack, it is also very conceivable that he did not.

We have seen above that it is now believed that Mohammed al Qahtani was actually meant to be the 20th hijacker on September 11th.⁴³³ This would mean that the initial reports and suspicions that this role was meant to be played by Moussaoui were actually incorrect. Therefore to suggest that torture could have been, in an alternative scenario of course, an effective tool for avoiding this major disaster is extremely misplaced. In fact, it is a vivid demonstration of how terribly suspicions can go awry if they are used to justify the most severe violations of human dignity. If torture were on the table that day as Dershowitz suggests, and had actually been implemented on Moussaoui, we now understand that this abuse would have been carried out on someone who was not involved in the plot of that fateful day. Therefore he was not a “ticking bomb terrorist” as it had previously seemed. Hence the hypothesis that Moussaoui would have had information that could have broken up the 9/11 plot appears wildly off the mark and demonstrates the arbitrariness of using unverifiable suspicions as a trigger for torture.

⁴³¹ DERSHOWITZ, *Why Terrorism Works*, note 424 above, at 143.

⁴³² Dershowitz puts the proposal to torture in the mouth of a hypothetical FBI agent, but never explicitly put forward what his own recommendation would actually be.

⁴³³ See Section VII above.

At the same time, even if he were going to be involved in the terrorist assault a few weeks after his capture this does not mean that the target, specific flights and airports of departure would have been communicated to him ahead of time. Additionally, even if he were in fact knowledgeable of this critical and pertinent information, it is conceivable that his capture would have forced an immediate change of plans from a competent terrorist organization. In reality, the fact that the 9/11 attacks proceeded even after Moussaoui's capture is likely an indication that the terrorist conspirators of that day were well aware that he could not have given up information that would place their operation at risk. In this case, even torture that extracted everything Moussaoui knew would not likely have led law enforcement agents to the terrorists because he was not given the information in advance.

It is also interesting to note the timing of this argument put forward by Dershowitz. His book containing this alternative ticking bomb scenario was published in September of 2002, and it was that very same month that the FBI first learned that al Qaeda had intended to join the other hijackers of 9/11.⁴³⁴ Therefore when Dershowitz wrote this chapter on torture and the ticking bomb, he could not have known that the actual 20th hijacker was being detained in Guantánamo. And he certainly could not know that Moussaoui was two months later going to undergo 48 of 54 consecutive days of 18 to 20 hour interrogations to try to gather intelligence that was surely known to be stale 10 months after his capture. This means that when Dershowitz wrote this chapter, all indications (or suspicions) were that Moussaoui was the 20th hijacker and perhaps a "ticking bomb terrorist", not some other detainee in Guantánamo. At that moment, it must have seemed to be an extremely potent argument to Dershowitz. Today, now that our knowledge and intelligence has changed, we know that this is an argument that could lead to torturing the wrong "ticking bomb terrorist", on a false suspicion. Once again, this vividly demonstrates the inherently arbitrary nature of a torture program.

Finally, Dershowitz also raises a scenario that was in fact dealt with later by the German Federal Constitutional Court in 2006, and which also reveals the crucial overlap of *morality*, *efficacy* and *legality* on this issue. It is also believed by this author that this hypothetical situation precisely captures the intrinsic problem with torture that we are highlighting here. He introduces the choice of evils that would be faced, and suggests that it could be a reality in the future, if a hijacked passenger plane is on a collision course with a large, populated building in a major city and the only way to avert this tragedy were to shoot

⁴³⁴ MAYER, *The Dark Side*, note 27 above, at 190-3.

down the aircraft.⁴³⁵ Dershowitz recognizes that it would be “*probable*, not certain”⁴³⁶ that the plane was going to be used as a projectile weapon to kill people on the ground as well as those inside the aircraft, but this does not deter his argument. He suggests that cell phone transmissions could reveal that the passengers are struggling to regain control of the aircraft (though he does not indicate how to determine whether the passengers will or will not succeed), and that the plane is off course and heading for a densely populated city (a frighteningly light burden for proving the case for using deadly force on a passenger jet).

As we have seen in Chapter 1, a law was passed in Germany in 2004 authorizing the minister of defense to have the authority to shoot down an aircraft in this very circumstance. However, the law was challenged and in 2006 the *Bundesverfassungsgericht*, or the German Federal Constitutional Court, ruled on the constitutionality of the legislation and struck it down in a manner that distinctly shows an overlap of *legality*, *morality* and *efficacy*.⁴³⁷ Demonstrating the presence of morality in their legal decision the Court first used a Kantian logic and ethics to determine that, “[h]uman dignity [...] will be violated if the state treats individuals as objects or denies them the status to be an end in themselves”.⁴³⁸ Next, it looked into questions of fact and proportionality and found that the statute must pursue a legitimate end. This meant that the law must meet the three requirements of being, “suitable (*geeignet*); necessary (*erforderlich*); and appropriate or reasonably fair (*angemessen*)”.⁴³⁹ It is in this argumentation that we find the application of efficacy to help determine legality. The Court found that, “[t]he statute, simply, could never achieve what it pretended to pursue” because it could never be definitively determined ahead of time that a passenger aircraft was being directed as a weapon against civilians on the ground.⁴⁴⁰ As such, the German Court acted upon on all three elements of our model of legitimacy by treating morality and efficacy to arrive at legality.

Along with the conspicuous overlap of the three elements under discussion in this work, the portion of this decision that is useful in illuminating our specific question on torture is that in which the Court discusses the reliance on external means for drawing conclusions. The Court found that terrorists will not announce their intentions in advance, and that the pilots would not sign their own death warrant by reporting such a hijacking even if they could. Therefore the best that can be expected is to deduce what is occurring through “uncertainty”,

⁴³⁵ DERSHOWITZ, *Why Terrorism Works*, note 424 above, at 154-5.

⁴³⁶ *Idem*, (original emphasis) at 154.

⁴³⁷ LEPSIUS, ‘Human Dignity and the Downing of Aircraft’, note 38 above.

⁴³⁸ *Idem*, at 776.

⁴³⁹ *Ibid.*, at 774.

⁴⁴⁰ *Ibid.*

“presumption” and “conjecture”.⁴⁴¹ Treating Dershowitz’s light burden for employing deadly force on a passenger aircraft (albeit perhaps unknowingly), the Court explains,

[t]his conjecture becomes even more problematic since there are dubious incidents in air traffic every other day. It is quite common that planes lose radio contact and that the tower has lost control over a flight. If one would accept uncertain information as a sufficient base for downing decisions there would be a significant danger of fatal errors with regard to the amount of unclear situations in today’s air traffic.⁴⁴²

It is also suggested by the Court that the aircraft would likely be monitored by a dispatched military jet sent out to accompany the suspicious passenger plane. Yet it is found that even this would not reveal much pertinent information to resolve the grave dilemma. It is keenly observed, “But what will they see? It is almost impossible to look into the cockpit windows from the outside in the air”.⁴⁴³

It is this author’s contention that the depiction of events put forward here is quite analogous to the circumstance we find when faced with a detainee suspected of involvement in a perceived imminent terrorist attack. While any number of suspicions can arise as to what is actually occurring inside the aircraft, or inside the mind of the prisoner, our external means do not allow us to penetrate inside. We cannot definitively ascertain what plots this detainee is a party to, whether plans have changed since her capture, or whether this person is even intimately involved with our enemies who wish us harm. In the case of torture, we do not even have the luxury of windows to peer through to glean what is happening inside. Therefore, the authorization to violate human dignity with torture, much like the German Court found that the use of deadly force to down a suspect aircraft, “could never achieve what it pretended to pursue”.⁴⁴⁴ A downed aircraft could in fact have been hijacked by terrorists, but this does not mean that the policy meets the legitimacy requirements of “suitable, necessary, and appropriate or reasonably fair”. It is this absence of reliable efficacy that clarifies the question of morality for us, and puts us into the realm of an arbitrary act of force.

As such, it is necessary to reformulate the questions that arise from the ticking bomb scenario in the case of public policy or a program. Traditionally, the dilemma of the ticking bomb has been posed as, “[w]here it is known that a bomb has been planted in a crowded building, it is perhaps justifiable to torture the suspect so that lives may be saved by

⁴⁴¹ *Ibid.*, at 775.

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.*, at 774-5.

⁴⁴⁴ *Ibid.*, at 774.

discovering its location”.⁴⁴⁵ Or alternatively, “[t]here is not time to evacuate the innocent people [...] – the only hope of preventing tragedy is to torture the perpetrator, find the device, and deactivate it”.⁴⁴⁶ In neither of these formulations, nor any of the others surveyed by this author,⁴⁴⁷ is the element of suspicion allowed to play a sufficient role in the formulation of the moral dilemma for a public policy of torture and ill-treatment. Therefore it is this author’s conclusion, particularly in light of the series cases that have been analyzed above, that the insurmountable element of suspicion must indeed be included in the moral questions raised by a program of torture. As such, the moral questions are better formulated as follows:

- *If someone is captured and they are suspected of being involved in an attack that appears to be imminent, should the government authorize torture on this person?*
- *Should the government authorize torture on someone knowing that they may or may not have the information necessary to halt an approaching attack?*
- *Should the government authorize torture on someone knowing that the plans they are knowledgeable of have possibly, or perhaps even likely, been changed?*

X. Conclusion

Torture is illegal in all circumstances, and this prohibition cannot be limited nor derogated. Not only is its illegality clear and absolute, this norm has also reached the same level of prohibition as slavery and piracy. As it was explained by the former United Nations Special Rapporteur on Torture,

[t]he *absolute prohibition of torture*, therefore, means that, under normal circumstances torture must not be balanced against any other interest, including national security or the protection of human rights of others. All attempts to justify the practice of torture in the ‘war against global terrorism’ in order to extract information from a suspected terrorist for the purpose of, for example, saving the life of innocent civilians who are in danger of being subjected to an imminent terrorist attack (the so-called ‘*ticking bomb*’ scenario), clearly violate the absolute prohibition of torture as laid down in Article 7 CCPR and Article 2(2) CAT.⁴⁴⁸

Thus the illegality of an intelligence gathering program that includes torture is crystal clear. Regardless of the flawed and feeble attempts made by the OLC in the torture memos to twist

⁴⁴⁵ ZUCKERMAN, A., ‘The Right Against Self-Incrimination : An Obstacle to the Supervision of Interrogation’ (1986) 102 *Law Quarterly Review* 45, cited in GIBAR, *Why Not Torture Terrorists?*, note 16 above, at 359.

⁴⁴⁶ SHUE, H., ‘Torture’ (1978) 7,2 *Philosophy and Public Affairs* 124, cited in GIBAR, *Why Not Torture Terrorists?*, note 14 above, at 360.

⁴⁴⁷ For a wide compilation of ticking bomb scenarios see GIBAR, *Why Not Torture Terrorists?*, note 16 above, at 357-64.

⁴⁴⁸ NOWAK, and McARTHUR, *The UN CAT: A Commentary*, note 2 above, at 119. The focus on the CAT treaty here, rather than the ICCPR, is due to U.S. interpretations of the latter. See Chapter 3, Section 5.

this legality, which maintained relevance only for as long as they were kept from the public eye, this unambiguous legal status remains.

However in this chapter, with legitimacy as the focal point of inquiry, it has been necessary to go beyond this stark illegality and investigate the efficacy and morality of a program of torture and ill-treatment. Because it is impossible to suggest that torturing the innocent and ill-informed will further the information gathering goals of counterterrorism, and since there is no way to ensure that a program will not include these individuals, it is the conclusion of this author that torture also fails the test of efficacy. At the very same time, the recognition that a program of torture becomes arbitrary because it must be carried out on unverifiable suspicions and is ungoverned by law, also clarifies the moral questions at stake for public policy. There is no one who suggests that torturing the guiltless and those who do not possess the information being sought would be the moral choice and a lesser evil. It is only by concocting a ticking bomb scenario, which might perhaps materialize in the real world in one isolated incident, can we truly contemplate the moral question of utilitarianism v. deontology. However, when we are speaking to a program of ill-treatment, our contention is that the so-called “error costs” grow well beyond calculability. Hence it is this author’s opinion that it is morally impossible to justify a program of ill-treatment that inevitably includes persons not in possession of the needed facts to avert a disaster.

When it comes to the ticking bomb scenario it is important to remember that, while our minds can dream up farfetched scenarios that would seem to satisfy most people that absolute certainty has been achieved, we still have not been able to find a way to predict the future nor to unlock the mind of another human being. The simple and ancient forms of ill-treatment employed in the ‘war on terror’ (e.g. sleep deprivation, nakedness, slapping and controlled drowning), demonstrate that even a well-funded agency of the richest country in the world had not made any real technological steps forward to change these human constraints.

As we have seen throughout this chapter in the six cases investigated, suspicions can often be incorrect. Whether those beliefs are about identity or membership status, getting them wrong drastically changes what will be accepted as correct answers from the brutal twisting. Additionally, we have also seen that false information seeps into the system when abusive treatment is employed and acts as an insidious ingredient in the intelligence apparatus. It creates even more suspicions which are based on fabricated confessions and accusations blurted out only to stop the pain and suffering. If we add on top of this the fact that any information possessed by a detainee who turns out to be correctly suspected of

terrorist planning quickly becomes stale as any competent insurgency will adjust to the capture of knowledgeable members, the efficacy and morality questions are in fact turned upside down. What we also now know after our analysis of numerous government documents and official statements is that the ticking bomb scenario never occurred in any of the interrogations relating to the ‘war on terror’, and thus other methods were always available. Thus there is no way to defend this illegal and immoral act as the only option. As it was explained in the Army Field Manual *Counterinsurgency* of 2006, overseen by General Petraeus,

Without good intelligence, counterinsurgents are like blind boxers wasting energy flailing at unseen opponents and perhaps causing unintended harm. With good intelligence, counterinsurgents are like surgeons cutting out cancerous tissue while keeping other vital organs intact. Effective operations are shaped by timely, specific and reliable intelligence...⁴⁴⁹

Generally, in scholarly discussions on torture there is a valid line drawn between criminal punishment and coercion used in an attempt to further national security. One reason this is necessary is to not muddle the act utilitarian argument meant to find the greatest happiness for the most people. However, this work is investigating the monopoly on the use of physical force exercised by a government and hypothesizes that terrorists aim to provoke an illegitimate use of this power. Therefore it is at times useful to make analogies to other forms of state authority, and in this case it is concerning capital punishment. In March of 2011, the Governor of Illinois signed legislation abolishing the death penalty in that state, and the signing statement he attached is very instructive on the point we make here in this chapter. Specifically using the legitimacy of the state as his primary reasoning, and the intolerable possibility of exercising violent authority over the innocent, he wrote,

I have concluded that our system of imposing the death penalty is inherently flawed. The evidence presented to me by former prosecutors and judges with decades of experience in the criminal justice system has convinced me that it is impossible to devise a system that is consistent, that is free of discrimination on the basis of race, geography or economic circumstance, and that always gets it right.

As a state, we cannot tolerate the executions of innocent people because such actions strike at the very legitimacy of a government.⁴⁵⁰

It is this author’s opinion that this is a very similar circumstance to the use of torture. However, in the case of capital punishment, it is possible to say that a defendant has received

⁴⁴⁹ Army Field Manual (FM 3-24), *Counterinsurgency*, U.S. Department of Defense (15 December 2006), available at: <<http://www.fas.org/irp/doddir/army/fm3-24.pdf>> (last visited March 2011) at 1-23, §1-26.

⁴⁵⁰ Statement from Governor Pat Quinn on Senate Bill 3539, (9 March 2011) available at : <<http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265>>.

her day in court and there has been a veritable judicial check on the exercise of government power. The fact that this possibility will not exist for those who are to be subjected to torture and ill-treatment undoubtedly decreases the chances that authorities will be able to exclude the innocent and unknowledgeable from brutal treatment. As such, it is our conclusion that the result will inevitably be arbitrary torture on suspicion that “strike[s] at the very legitimacy of a government”.

Conclusion:

Jeopardizing Legitimacy

It is the paramount duty of political leaders in a democracy under attack to keep the forces of order intently focused on the political requirement of maintaining legitimacy.

-- Michael Ignatieff¹

Throughout this work we have placed legitimacy at the center of our analysis of the asymmetrical tactic of terrorism. Because non-state actors do not have the weaponry to strike a government's forces head-on, it is necessary to investigate this line of attack differently than conventional warfare. Therefore it has been our hypothesis that adversaries who use public and political violence against non-combatants are in fact targeting legitimacy. They are principally engaged in, "a game of psychological warfare",² attempting to provoke the government into jeopardizing its own legitimacy. The Italian historian Guglielmo Ferrero has provided the most vivid and useful imagery for better understanding this vital element of society that is being targeted. He aptly explains,

[a]uthority comes from above: that we are agreed upon. This is one of man's necessities, expressed by a historical constant – authority comes from above, in democracies as in monarchies. But in monarchies as in democracies legitimacy comes from below. The government only becomes legitimate and is freed from fear by the active or passive, but sincere, consent of the governed. We must never forget this inverse dual movement of authority and legitimacy.³

This lucid description of society begins to give explanation to our redirecting of attention towards this bottom-up component of the social order, and hypothesizing legitimacy as a target. Terrorism expert Brian Jenkins suggested decades ago that, "terrorism is theater".⁴ If the dramatic effect of a terrorist act is what gives it its potency, it is because the people in the audience watching have a role to play. That role can be described as two-fold, and these two roles collide to create a veritable tension. Spectacular, violent events first ignite an outcry for security measures that will provide protection from such atrocity. What then follows, with attention still fixed on the implementation of such actions, is a judging of the exercise of force that is put into practice. People want bold action. At the same time this action must continue

¹ IGNATIEFF, M., *The Lesser Evil* (Princeton, Princeton University Press, 2004) (my emphasis) at 143.

² RICHARDSON, L., *What Terrorists Want* (New York, Random House, 2006) at 147.

³ FERRERO, G., *The Principles of Power* (New York, G.P.Putnam's Sons, 1942) at 295.

⁴ JENKINS, B.M. 'International Terrorism: A New Mode of Conflict', in Carlton, D. and Schaerf, C. (eds.), *International Terrorism and World Security* (London, Croom Helm, 1975) at 16.

to be legal, moral and effective for this power that has been granted to the government by its citizens. It is this tension that epitomizes the difficulties that any government under attack from the purveyors of terror must confront, particularly a constitutional democracy. However, it should be well understood that if overreach goes too far, and legitimacy at home is lost, this truly is the collapse our enemies crave.

This is the reason why the reaction to the attacks of September 11th is so disconcerting. There is no doubt that al Qaeda was astonishingly successful, tactically, in inflicting nearly three thousand casualties on the United States that fateful day. Nevertheless, from a strategic point of view, this terrorist group was even more successful in provoking a robust and fierce response with those spectacular events caught on film and widely broadcast. As one expert has concluded, “[t]hey were even more successful in eliciting a reaction even more powerful than the harm they inflicted”.⁵ Just as this type of non-state actor hopes, they were able to goad from their enemy a reaction in which, “[t]he discrepancy between the harm they inflicted and the impact they had was considerable”.⁶ The United States responded in the strongest way possible, and that was with a declaration of war: the ‘war on terror’.

As has been seen in this work, the seeds of this overreach were sown very early on by lawyers within the administration. Due to the growing importance given to law for steering a society and for comprehending its function and boundaries, it is indeed through the legal interpretations put forward that we can best grasp the policy of the ‘war on terror’. In January of 2005, in near temporal coincidence with the inauguration of President Bush’s second term, a voluminous tome of nearly 1300 pages of internal documents from the first term entitled *The Torture Papers*,⁷ had been compiled and published.⁸ Although this collection of documents ultimately turned out to be an incomplete picture of the extent to which the administration had pushed the law, and as we have seen, at times clearly transgressing it, this volume provides a stark look onto the reasoning behind the policies that had bounded their way into the public square. Most importantly for our purposes, inside these documents we have found the legal justification for circumventing the international obligations found in treaties such as the Geneva Conventions and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁵ RICHARDSON, L., *What Terrorists Want* (New York, Random House, 2006) at 147.

⁶ *Idem*.

⁷ GREENBERG, K., and DRATEL, J., (eds.) *The Torture Papers: The Road to Abu Ghraib* (Cambridge, Cambridge University Press, 2005) 1284.

⁸ GREENBERG, K., and DRATEL, J., (eds.) *The Torture Papers: The Road to Abu Ghraib* (Cambridge, Cambridge University Press, 2005) 1284.

In the very first memo of this edited book we have seen that John Yoo of the Office of Legal Counsel (OLC) pressed hard for no external limits on the President's authority in war. Two weeks after the horrible attacks he reasoned that neither domestic nor international law could bind the President; the U.S. Constitution gave the Commander-in-Chief wide authority to exercise force as he saw fit.⁹ Not only did the president have the authority to "retaliate against any person, organization, or State *suspected* of involvement", it was also concluded that he could do the very same against "foreign States *suspected* of harboring or supporting such organizations".¹⁰ At its inception, suspicion was put forward as the pertinent standard for this 'war'.

In the very last footnote of this foundational document of the 'war on terror', a more explicit explanation of this formula was to be found. It is attached to a brazen assertion that the President has the authority to launch military action against even those who "cannot be demonstrably linked to the September 11 incidents".¹¹ There is recognition that determining guilt is extremely difficult in the particular circumstances of confronting an organization built on secrecy and evasion. In this footnote it was claimed,

[w]e of course understand that terrorist organizations and their state sponsors operate by secrecy and concealment, and that it is correspondingly difficult to establish, by the standards of criminal law or even lower legal standards, the particular individuals or groups have been or may be implicated in attacks on United States. [...] But we do not think the difficulty or impossibility of establishing proof to a criminal law standard (or of making evidence public) bars the President from taking such military measures as, in his best judgment, he thinks necessary or appropriate to defend the United States from terrorist attacks. In the exercise of his plenary power to use military force, *the President's decisions are for him alone and are unreviewable*.¹²

The only standard presented by Yoo is that which comes from the President herself. There is no standard by any other measure. It would seem a plausible argument that the criminal standard, or even lower standards, of evidence could at times be too high in this circumstance. However, what is incredible about this recognition is that there is zero effort to replace the criterion that is thought to be prohibitive. The fact this would prove difficult at times could certainly be accepted by many reasonable people. But to suggest that, because it is difficult, there is absolutely no measurement that must be met is one major reason that the 'war on

⁹ Memorandum from John Yoo, Deputy Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel, to Timothy Flanigan, Deputy Counsel to the President, '*The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*' (25 Sept 2001), reprinted in *idem*, at 3-24.

¹⁰ *Idem*, (my emphasis) at 3.

¹¹ *Ibid.*, at 24.

¹² *Ibid.*, (internal citations omitted)(my emphasis).

terror' eroded the legitimacy of the government, along with hampering the counterterrorism policy of the nation. Most importantly here, we highlight the misguided notion that "the President's decisions are for him alone and are unreviewable".

What is not generally recognized is what occurs when the suspicions of the President are manifestly incorrect and his actions do not meet Weber's adage of the "*legitimate use of physical force*". What we have seen throughout this work is that this so-called standard, absolutely unchecked by any other branch, has led to *detention on suspicion*, *war on suspicion* and *torture on suspicion*. Relying on the discretion of just one person without oversight, constraint or check, produced an exercise of force based on mere suspicion. And this eroded legitimacy because such action is always 'reviewable' by the citizenry.

It is vital to remember that the very first rule of customary international humanitarian law is the Principle of Distinction: the requirement of distinguishing between combatants and civilians.¹³ As it was discussed in the introduction, the authoritative study directed by the International Committee of the Red Cross concluded such in 2005. It reads,

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.¹⁴

It can be said that carrying out this task, which becomes all the more difficult and demanding in asymmetrical warfare, is essential to the conduct of legitimate warfare. This onerous requirement is indeed the essence of armed conflict involving non-state actors who attempt to disappear and blend into a larger community of non-combatants. Yet this significant obstacle does not release a government from its duty to distinguish legitimate targets from civilians.

This principle of distinction certainly does not mean that violence against non-combatants, no matter how grave and unwelcome, is in itself a crime of war or illegitimate. The general public and government officials alike understand that war carries risks and regrettable losses. However, everyone believes that such violence against those who are not participants in an armed conflict must be avoided to the greatest extent possible, and this is what is embodied in the Principle of Distinction. It is indeed recognized that correlating this principle of distinction to the President having unconstrained authority to launch and carry out armed hostilities on her own suspicions is not a perfect analogy. There are many difficult legal questions that certainly arise, many of which we have discussed throughout this work. However, when we are speaking about the legitimacy of the government's exercise of force,

¹³ HENCKERTS, J., and DOSWALD-BECK, L., *Customary International Humanitarian Law*, International Committee of the Red Cross, Vol. I, (Cambridge, Cambridge University Press, 2005) at 3-8.

¹⁴ *Idem*, at 3.

the salient question becomes: have the citizens and public officials, whose pull towards compliance is essential to moving a society, or ‘acting in concert’, determined that the President can legitimately make these distinctions alone and unchecked?

As we saw in Chapter 4, when it came to detention, the President’s policy of removing any role for the national courts and asserting that there was no applicable law was struck down three consecutive times by the U.S. Supreme Court over a four year time span. The third time that the Court determined it necessary to pursue such a bold tack (to constrain executive action in times of armed conflict) it was in fact an historic first for an executive acting in conjunction with the legislative branch during wartime.¹⁵ In the first years after its opening in January of 2002, those being held at the Guantánamo Bay Detention Facility had absolutely no way to contest the reasoning for their confinement, nor was the administration tasked with defending its decision to detain this particular person. In other words, there was no check on the administration’s efforts, or lack thereof, to distinguish between combatants and civilians. A useful way to understand this circumstance is that it was *detention on suspicion*.

In the same memoranda of September 2001 discussed above, John Yoo of the OLC also arrived at the conclusion that, “[t]he President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11”.¹⁶ As we have plainly seen in Chapter 5, the absurd interpretation of “preemptively” was meant to disconnect the initiation of war from any empirical fact or action. Under the Bush Doctrine, *suspicion* of future intent was a satisfactory trigger for military action. This was a reading that would run counter to one of the primary currents throughout the just war doctrine (with just one short-lived exception), and a part of the naissance of international law. Since it is widely accepted as customary law that the only justifiable act in war is to “weaken the military forces of the enemy”,¹⁷ and President Bush contended that Iraq was “the central front in our war on terror”,¹⁸ one must ask, “How does the latter meet the directive of the former?” In this case, many have

¹⁵ COLE, D., ‘Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay’ (2008) *Cato Supreme Court Review*, Georgetown Public Law Research Paper No. 1272202, available at SSRN:<<http://ssrn.com/abstract=1272202>>.

¹⁶ YOO Memo, ‘*The President’s Constitutional Authority...*’, note 9 above, at 3.

¹⁷ St. Petersburg Declaration, preamble (11 December 1868), Saint Petersburg, cited in HENCKERTS, and DOSWALD-BECK, *Customary International Humanitarian Law*, Vol. II, at 15.

¹⁸ BUSH, P., Speech to the National Endowment for Democracy (6 Oct 2005), cited in Miles, D., ‘Bush Calls Iraq Central Front in Terror War, Vows Victory’, *American Forces Press Service*, U.S. Department of Defense, available at: <<http://www.defense.gov/news/newsarticle.aspx?id=18145>>.

concluded that the administration failed to properly distinguish who was actually the enemy in this war. Thus this can be recognized as *war on suspicion*.

In Chapter 6, we have seen that the program of ill-treatment instituted to extract actionable intelligence from those believed to have such information had no external check on who was pulled into the system of brutal abuse. The result was disastrous from the point of view of efficacy in that the subjects of mistreatment were frequently incorrectly suspected, and for this very reason the morality of their treatment had absolutely no justification. In addition, their treatment at times surpassed the legal threshold of torture. The fallout was palpable: the case for a war against Iraq was partially rationalized on false information gained from ill-treatment; the program (which included controlled drowning evoking death) was first implemented on a man whose role within the al Qaeda organization was incorrectly suspected and led to false accusations and torture of other detainees; the application of such brutality made the prosecution of the missing 20th hijacker from the terrorist attacks of 2001 impossible; and not one shred of timely intelligence was extracted from the detainee who was correctly suspected of a high rank within the al Qaeda organization. Throughout this chapter we repeatedly observed the failings of instituting the use of speculation and conjecture for a program of ill-treatment to gather intelligence: i.e. *torture on suspicion*.

In May of 2007, as more and more information concerning the use of torture and ill-treatment bled into the public square through the continuation of leaks (which should be understood as a swelling of the acts of disobedience), two former high-ranking military officers took to the op-ed pages of one of the nation's leading newspapers.¹⁹ In their article, the authors, formerly positioned at the top the military command structure, condemned the "policy at the highest levels that condoned and even authorized torture of prisoners in our custody".²⁰ Since one of these men had been a member of the Joint Chiefs of Staff advising the Secretary of Defense, and the other was formerly at the head of U.S. Central Command, their speaking out publicly and forcefully against the sitting Commander-in-Chief represents a part of the legitimacy deficit to which we are speaking in this work. The traditional culture of salute was rejected because these officers had determined that the policy was illegitimate.

These former military officers explain what their experience in combat has taught them and explicitly recognize that this campaign against those who employ the tactic of terror is very different from conventional warfare. They calculate, just as we have seen in the Army

¹⁹ KRULAK, C., and HOAR, J., 'It's Our Cage Too: Torture Betrays Us and Breeds New Enemies', *The Washington Post* (17 May 2007) available at: <<http://www.washingtonpost.com/wp-dyn/content/article/2007/05/16/AR2007051602395.html>>.

²⁰ *Idem*.

Field Manual overseen by General Petraeus, “[v]ictory in this kind of war comes when the enemy loses *legitimacy* in the society from which it seeks recruits”.²¹ Because they understand the battle lines in this perspective they harshly criticize the approach that has been taken and conclude, “[t]his way lies defeat, and we are well down the road to it”.²² Importantly, they also assert that this policy grew out of fear of the unknown, and cite the former CIA director George Tenet as he promoted a new book saying, “[e]verybody forgets one central context of what we lived through: the palpable fear that we felt on the basis of the fact that there was so much we did not know.”²³

This candid acknowledgment clarifies the point we make here. There were, and will continue to be, large gaps in knowledge of the enemy faced by the United States. However, a lack of reliable information does not release a government from its first duty in armed conflict of distinguishing combatants from civilians. Not only is this a primary rule in the laws of war, it is exactly what asymmetrical foes try to use to their advantage as they conceal themselves within a larger population. This certainly makes the customary and codified law of distinction all the more difficult and demanding, and it indeed explains the provocation to which we have spoken throughout this work. If a spectacular act of terrorism can goad a government into exercising force based on *suspensions* of who the enemy is, the administration that carries this out faces the danger of eroding its own legitimacy. Such a suspicion-based policy both swells the numbers of those who are willing to take up battle against that government (multiplying the number of enemies), as well as whittling away at the uncoerced pull towards compliance that acts as the glue of any society. As such, exercising force solely on suspicion jeopardizes the legitimacy of a government.

As discussed in the introduction, this work implicates all three of the primary schools of thought in international theory outlined by Martin Wight in his lectures at the London School of Economics in the 1950s, i.e. the Machiavellians, the Grotians and the Kantians.²⁴ What we suggest is that this text recounts a collision between these three visions of the international realm, as each one of them has turned up in our accounting of the ‘war on terror’ of the Bush administration. The Machiavellian school, those who believe that there is no such thing as an international society and thus insist that states are not restrained by ‘rules’, was embodied in the Bush administration as we have clearly seen here. However, this was

²¹ *Ibid.*, (my emphasis).

²² *Ibid.*

²³ *Ibid.*

²⁴ WIGHT, M., *International Theory: The Three Traditions* (New York, Holmes & Meier, 1992) 278 pp.

certainly not the end of the story. Not only did an international community rise up and make itself known in various ways, through international bodies and the United Nations Security Council most prominently, the rules of international law were also used by the Supreme Court of the United States in its mounting of the ‘judicial ladder’ to rule that Common Article 3 of the Geneva Conventions was the applicable law to those held in detention in Guantánamo, Cuba. Moreover, the administration’s lawyers at the OLC had already explicitly acknowledged the existence of the laws emanating from this international society in their ‘Torture Memos’, even if this was only in an attempt to skirt these obligations.

As a part of this account it should be noticed that the revolution in information technology has drastically changed the way in which a society receives facts about the actions of its own government. As a reflection of this shift, this work has purposefully cited a number of the abundant sources found on the internet that have poured into the public sphere documenting illegal, immoral and ineffective policies in the ‘war on terror’. This is by no means meant to replace or avoid the toil of traditional scholarship, as it is believed that this too has been accomplished in this work. Rather, the intent has been to draw attention to the fact that the revelations that were widely disseminated via an online network had a direct impact on the views of citizens about the legitimacy of government actions. Many of the news reports, perhaps most vividly the photos leaked from the abuses endured by the detainees of the Abu Ghraib prison in Iraq, actually had a viral effect. That is, ghastly images of representatives of the government engaged in the abuse of prisoners spread from computer to computer and from home to home with never before known speed. In speaking to the issue of legitimacy, it is necessary to treat and analyze such sources that have come within the public domain since the citizenry indeed uses them to judge the exercise of force by their government.

We have discussed the ‘oxygen’ of publicity that gives shape to this type of asymmetrical conflict, along with the proliferation of international laws creating constraining obligations on states over the previous decades. In the context of international theory, we can see how two of the schools of thought framed by Wight have loosely merged to confront the Machiavellians who contend there to be no morality or rules in the international arena. In our introduction we presented an epigraph quoting the international jurist Antonio Cassese advising, “[a]n international lawyer should no longer write for rulers alone (who may or may not heed his words); he ought to write mainly for ordinary citizens: he should offer them parameters by which to judge international affairs, and analytical mechanisms for examining

the intricacies of the world community”.²⁵ What we see in this quote is a summons to international lawyers to address the individuals of the world community so as to share the framework that has been constructed by those of the Grotian school of thought. This can be understood as a call to an alliance with the Kantian school. Both share the belief that morality and constraints on action must and do exist in the international society, and that it is reasonable to set aside the difference over the inevitability of a state-based system to further this cause. Thus Cassese speaks to that coincidence in conviction between the two schools. Using Wight’s structure of international thought, and an alliance between the Grotians and Kantians confronting the Machiavellians, aptly captures the narrative we have put forward in this work.

It was back in 1989 when Cassese made this point that, “[i]nternational law is no longer a tool handled exclusively by national governments; it can also be used by individuals, by private organizations and by certain categories of peoples”.²⁶ Since that time there is no doubt that there has been significant development in international law, particularly in Cassese’s field of international criminal law, e.g. the world has witnessed the establishment of the International Criminal Tribunal for the Former Yugoslavia in 1993, and the adoption of the Rome Statute of the International Criminal Court in 1998. And as we have seen throughout this work, through the sourcing of newspaper and television reports, government studies backed by bipartisan support, leaked official government documents, international organization statements and non-governmental organization reports, the striking transformation in information technology has multiplied exponentially the amount of empirical data available. As such, the judgments made on the “*legitimate use of physical force*” have been transformed by the conceptual framework of international law now available to a wired citizenry.

The Obama Administration

In this work we have focused on the ‘war on terror’ launched by President Bush. As explained in our introduction, this was due both to the completeness of documents available and for analytical clarity. Additionally, it is important to note that the legitimacy deficit that we have described here was almost entirely suffered during his second term, which clearly indicates that the administration was believed to have enough legitimacy to be reelected to office. Yet, there was ostensibly a drastic change of the Commander-in-Chief as a result of the 2008

²⁵ CASSESE, A., *Terrorism, Politics and Law* (Cambridge, Polity Press, 1989) at viii.

²⁶ *Idem*.

election, and thus a replacement of who is directing this confrontation. On his second full day in office, President Obama issued an executive order directing the closure of the Guantánamo Bay detention camp to be carried out within one year, and he called for a full review of the legal status of the more than 200 detainees who remained in the facility at that time.²⁷ Additionally, on that day, the newly inaugurated president signed an executive order to “ensure lawful interrogation”. This order explicitly stated that any person held under the “effective control” of any agent of the United States could only be treated with techniques authorized by the Army Field Manual.²⁸ While these commands certainly carried important symbolic and political value at the beginning of his mandate, the January 2010 deadline passed without significant progress on the project of closing the Guantánamo facility, and a new legal regime for the detainees in the ‘war on terror’ (re-branded as ‘Overseas Contingency Operations’)²⁹ has only recently become more clear.³⁰

This is certainly not the place to carry out an in-depth evaluation of President Obama’s counterterrorism policies as it is outside the scope of this study. As well, it is still early to make useful judgments on how this policy is affecting his legitimacy. Nonetheless, similar seeds can be discerned as having been sown, and thus it is worthwhile to point out just some of them so as to offer an avenue to future investigation. Thus, we will present a very brief sketch of Obama’s detention, war-making and interrogation policies as seen chiefly through our starting lens of legality.

As for detention policy, a preliminary reading of the *Boumediene* decision of 2008 would certainly suggest that from today forward, with ever increasing advances in travel and technology, it will increasingly be more difficult to argue before a court that a habeas review is “impracticable and anomalous”.³¹ In the conclusion of Chapter 4 we discussed the fact that the case of *al Maqaleh, et al. v. Gates et al.* dealing with the right to habeas corpus in

²⁷ Executive Order No. 13,492, ‘Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities’, 74 Federal Register 4897 (22 Jan 2009), available at: <http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/>.

²⁸ Executive Order No. 13491, ‘Ensuring Lawful Interrogations’, 74 Federal Register 4893 (22 Jan 2009), available at: <http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/>. Very importantly, this order also annulled all the OLC Memos ‘Torture Memos’ that have been discussed here, “All executive directives, orders, and regulations inconsistent with this order, including but not limited to those issued to or by the Central Intelligence Agency (CIA) from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order”.

²⁹ WILSON, S., “‘Global War on Terror’ Is Given New Name’ The Washington Post (25 March 2009) available at: <<http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>>.

³⁰ Executive Order No. 13,567, ‘Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force’, 76 Federal Register 47 (7 March 2011), available at: <<http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava>>.

³¹ *Boumediene v. Bush*, 128 S.Ct. 2229 (2008) at 2255.

Afghanistan has been working its way through the lower courts. A U.S. District Court ruled in April 2009³² that application of the *Boumediene* test would lead to the conclusion that the Suspension Clause of the U.S. Constitution did indeed extend habeas rights to three of the four petitioners.³³ However, the D.C. Court of Appeals focused on Afghanistan as a theater of war and reversed the lower court's ruling in May of 2010.³⁴

From a human rights perspective, the most troubling part of this decision from the Court of Appeals is that the opinion explicitly rejected the idea that anyone subject to detention in a United States military facility has an automatic right to challenge her detention. The Court claimed that some sort of limiting principle must be asserted by the petitioners held in Bagram otherwise their argument, "would seem to create the potential for the extraterritorial extension of the Suspension Clause to noncitizens held in any United States military facility in the world".³⁵ It is here that we see the real shortcoming of the *Boumediene* decision. Because it was a narrow reading of the Constitutional application (part of the nature of the 'judicial ladder of review' we discussed), it left a wide margin for the interpretation of circumstances other than Guantánamo.

This leads us to a great failing of the Obama policy. During his campaign for president Barack Obama asserted that he would "restore habeas corpus",³⁶ and gave a cogent speech on

³² *Al Maqaleh, et al. v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009). While it was explicitly recognized that Afghanistan was still an active theater of war, thus making the burden more difficult for the government to provide such a hearing, Judge Bates found that this hurdle was "not insurmountable". Most importantly, it was found that, "for these petitioners, such practical barriers are largely of the Executive's choosing -- they were all apprehended elsewhere and then brought (i.e., rendered) to Bagram for detention now exceeding six years". (at 229). Therefore, although the Justice Department under the direction of a new President argued that there continued to be a facility in which detainees in the 'war on terror' could be held without access to a court to challenge their detention, Judge Bates followed the high court's reasoning by highlighting the centrality of habeas corpus as an instrument meant to achieve the delicate balance between three separate branches of government in a constitutional structure. The opinion cites the Supreme Court in *Boumediene* explaining that, "[w]ithin the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person" (at 208).

³³ *Idem*, the fourth detainee was an Afghan national and thus "there is a real possibility of friction with the Afghan government with respect to Afghan detainees" at 229.

³⁴ *Al Maqaleh, et al. v. Gates*, No. 09-5265 (D.C. Cir.) (May 21, 2010). Interestingly, in this overruling there was next to no mention of the principles of habeas corpus and the Separation of Powers as found in *Boumediene*, but instead a focus on the burdens created by the continuing state of war in the country of Afghanistan and the nature of the bilateral agreement creating the detention facility itself. Along with the want for a treatment of these key principles, there was a conspicuous absence of discussion over the real human consequences for the detainees held without charge or access to courts, for seven years thus far and without a foreseeable end. Nor was there any reference of the price to be paid in legitimacy for a government that is allowed to exercise authority over the liberty of individuals without any check on that power. In what has been described as a victory for the Obama administration, the Court of Appeals applied a three part test derived from *Boumediene* very strictly and did not venture into any of the philosophical reasoning for constraining the power of the executive that had been carried out by Justice Kennedy in that decision.

³⁵ *Al Maqaleh, et al. v. Gates*, No. 09-5265 (D.C. Cir.) (May 21, 2010) slip op. at 19.

³⁶ OBAMA, P., Speech in San Antonio, Texas, (24 June 2007) cited in White, E., 'Obama Says Gitmo Facility Should Close', *The Washington Post* (24 June 2007) available at: <<http://www.washingtonpost.com/wp-dyn/content/article/2007/06/24/AR2007062401046.html>>.

the Senate floor supporting a habeas corpus amendment to the Military Commissions Act of 2006 in an attempt to give detainees this protection. In this speech then Senator Obama explained the reasoning behind allowing a prisoner to challenge her detention. He avowed,

...it is understandable that mistakes will be made and identities will be confused. I don't blame the Government for that. This is an extraordinarily difficult war we are prosecuting against terrorists. There are going to be situations in which we cast too wide a net and capture the wrong person.

But what is avoidable is refusing to ever allow our legal system to correct these mistakes. By giving suspects a chance--even one chance--to challenge the terms of their detention in court, to have a judge confirm that the Government has detained the right person for the right suspicions, we could solve this problem without harming our efforts in the war on terror one bit.³⁷

Yet his administration argued against this principle before the District Court and immediately appealed the ruling when it lost. Because the detainees were captured aboard and then transferred to Afghanistan, this detention is in a site is “of the Executive's choosing” (as it was explained by the District Court judge).³⁸ This of course means that the Obama administration has always held the option of relocating the detainees to Guantánamo, where they would indeed enjoy habeas rights as per the *Boumediene* decision.

When it comes to the issue of war-making, even if it is not connected to the policies of counterterrorism, the most pertinent question might be the armed operation in Libya. From the perspective of international law, the Obama administration indeed took its case before the UN Security Council and was able to secure a resolution authorizing the NATO operation in March of 2011.³⁹ Thus legitimacy issues would not seem to arise from the perspective of international legality, save from the possibility of pushing too far the interpretation of the phrase, “take all measures to protect civilians”.⁴⁰ However, the more significant questions of exercising force legitimately arise from domestic law, specifically the War Powers Resolution of 1973.⁴¹ On June 15, 2011 the Obama administration submitted a report that described its interpretation of the situation in Libya and concluded,

The President is of the view that the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, because U.S. military operations are distinct from the

³⁷ OBAMA, Sen. B., Floor Statement on the Habeas Corpus Amendment (27 Sept 2006) available at: <<http://obamaspeeches.com/091-Floor-Statement-on-the-Habeas-Corpus-Amendment-Obama-Speech.htm>>.

³⁸ *Al Maqaleh, et al. v. Gates*, note 32 above, at 229.

³⁹ U.N. Doc. S/RES/1973 (2011).

⁴⁰ *Idem*, at para. 3. It is important to note in the following paragraph 4 it is explicitly stated, “excluding a foreign occupation force of any form on any part of Libyan territory”.

⁴¹ 50 U.S.C. 1541-1548.

kind of “hostilities” contemplated by the Resolution’s 60 day termination provision.⁴²

There are at least four reasons why this all bodes poorly for the determination of a legitimate exercise of force: the fact that this legal claim was met with bipartisan criticism;⁴³ the assertion that the military operations in Libya do not rise to the level of “hostilities” is rather absurd on its face; it was reported that President Obama overruled his lawyers in the Office of Legal Counsel on this precise legal question;⁴⁴ and at least one accomplished constitutional legal scholar published an article in a leading newspaper entitled “Legal Acrobatics, Illegal War”, voicing his deep concerns and solemn conclusions.⁴⁵

Another portion of the war-making policy of the Obama administration that raises important questions over legitimacy is that of the drone attacks carried out by the Central Intelligence Agency in countries in which it is not technically at war. The use of unmanned aerial vehicles has drastically increased under the Obama presidency. They have primarily been targeting persons in the Federally Administered Tribal Areas along the border on the Pakistan side of the border with Afghanistan to attack suspected leaders of the Taliban and al Qaeda.⁴⁶ These types of operations are labelled as “targeted killings” in international law,⁴⁷ and the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, submitted a study on targeted killings to the Human Rights Council in 2010.⁴⁸ Because this premeditated and deliberate use of force against specific individuals not in the physical custody of the perpetrator involves a very new technology that is little understood by the general public,⁴⁹ it is extremely difficult to judge how this will be received and interpreted in the context of legitimacy.

This novelty of technology is one of the primary reasons that, in the report by Alston, all of the conclusions and recommendations are principally pertaining to the further disclosure

⁴² Congressional Research Service Report for Congress, ‘War Powers Resolution: Presidential Compliance’, RL33532, (24 June 2011) available at: <<http://www.fas.org/sgp/crs/natsec/RL33532.pdf>>.

⁴³ See e.g., FAHRENTHOLD, D., and SONMEZ, F., ‘Congressman Criticize Obama’s Stand on Libya’ *The Washington Post* (16 June 2011) available at: <http://www.washingtonpost.com/politics/congressmen-criticize-obamas-stand-on-libya/2011/06/16/AGuvhdXH_story.html>.

⁴⁴ SAVAGE, C., ‘2 Top Lawyers Lost to Obama in Libya War Policy Debate’ *The New York Times* (17 June 2011) available at: <http://www.nytimes.com/2011/06/18/world/africa/18powers.html?_r=1&pagewanted=print>.

⁴⁵ ACKERMAN, B., ‘Legal Acrobatics, Illegal War’ *The New York Times* (20 June 2011) available at: <<http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html>>.

⁴⁶ For a very good article on what is a secret operation, see MAYER, J., ‘The Predator War’ *The New Yorker* (26 Oct 2009) available at: <http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer>.

⁴⁷ For an in-depth work on this timely subject, see MELZER, N., *Targeted Killing in International Law* (Oxford, Oxford University Press, 2008) 458 pp.

⁴⁸ ALSTON, P., ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions’ (28 May 2010) A/HRC/14/24/Add.6.

⁴⁹ The first open acknowledgement by a state of employing a policy of targeted killing was Israel in November of 2000 (MELZER, *Targeted Killing in International Law*, note 47 above, at xi).

of relevant information so that the operations can be legally assessed. For example, he recommended: states should publicly identify the rules of international law that are applicable; disclose the reasons why they have chosen to kill rather than capture; specify the procedural safeguards in place that ensure all operations remain legal; ensure there are measures taken in the aftermath of an operation to confirm the results; when the factual analysis was incorrect, a state should identify the remedial measures it would take; if a state carries out such an operation in the territory of another state, then that second state should state publicly whether it gave consent. Thus it is of significant importance that the Obama administration comes forward with facts that would lead to a conclusion that the drone attacks are indeed legal. Otherwise speculation and perception will drive the determination of the legitimacy of its actions. Along with this need for empirical data, Alston also clarified that one of the requirements of international humanitarian law is that,

[t]argeted killings should never be based solely on “suspicious” conduct or unverified – or unverifiable – information. Intelligence gathering and sharing arrangements must include procedures for reliably vetting targets, and adequately verifying information.⁵⁰

As we have explained, the use of suspicion to justify the exercise force is of primary concern when assessing judgments of legitimacy.

Finally, on the subject of ill-treatment used for interrogation purposes, the indications are that the Obama administration has lived up to its commitment to halt the illegal, immoral and ineffective techniques authorized by his predecessor. Yet the obligations under the Convention Against Torture include provisions to launch an investigation, “where there are reasonable grounds to believe that an act of torture has been committed”, and to provide remedy and redress when this has occurred.⁵¹ We have certainly seen throughout Chapter 6 that the ‘reasonable grounds’ standard has been met and surpassed. It is in this area that the Obama administration has certainly failed to live up to its international obligations. How exactly this might affect the legitimacy of the government’s counterterrorism policies in the long-term is yet to be determined. But simply ending a crime does nothing to prevent its reoccurrence. Nor does it even acknowledge the sufferings of the victims of the illegal policy.

⁵⁰ ALSTON, ‘Report of the Special Rapporteur...’, note 48 above, at 28.

⁵¹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1952, entered into force 26 June 1987) 1465 U.N.T.S. 85 (*CAT Treaty* hereinafter), Articles 12-14. For a quality investigation into the obligation to provide a remedy in such cases, see TAMS, C., ‘The Abuse of Executive Powers: What Remedies?’ in BIANCHI, A. and KELLER, A. (eds.), *Counterterrorism: Democracy’s Challenge*, (Oxford, Hart Publishing, 2008) at 313-334.

There are numerous signs of this failure by the Obama administration, but here we will present just one blatant case where this occurred.

In 2009 the Justice Department filed a far-reaching *amicus curiae* brief in the case of *Jose Padilla v. John Yoo* before the Ninth Circuit Court of Appeals.⁵² As we have discussed both of these individuals in this work, it suffices to explain that in this case one of the victims of the program of ill-treatment instituted by the Bush administration was attempting to hold one of its legal architects accountable in court. What concerns us here is the fact that the Obama administration had absolutely no legal requirement to step forward to defend John Yoo in this case. The Justice Department had initially taken on Yoo's defense, but then stepped aside so that he might bring in a high-powered lawyer for his defense (while taxpayers still covered the expenses).⁵³ Yet, even though it had no obligation to do so, the Department of Justice filed an *amicus* brief insisting that if the case was not dismissed there was "the risk of deterring full and frank advice regarding the military's detention and treatment of those determined to be enemies during an armed conflict".⁵⁴ Some nationally recognized legal scholars were appalled by this action.⁵⁵ One even likened it to reversing the principles laid down in Nuremberg, "where lawyers and judges were often guilty of war crimes in their legal advice and opinions".⁵⁶ Rather than simply standing aside to let the courts decide how to proceed on this delicate issue, the Obama administration's Justice Department argued in favor of reversing the lower court's decision to let the lawsuit continue and provide an avenue for a victim of ill-treatment to receive remedy and redress from an agent of government illegality.

It is unclear how all of this evidence of similar counterterrorism policies will affect the Obama administration and its legitimacy. The fact that this President ordered the raid that killed the leader of the organization that perpetrated the September 11th attacks will certainly have a significant impact. Some international lawyers raise questions as to whether the laws

⁵² *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009).

⁵³ KOPPEL, N., 'John Yoo Hires Miguel Estrada: DOJ Foots the Bill' *The Wall Street Journal* (17 July 2009) available at: <<http://blogs.wsj.com/law/2009/07/17/john-yoo-hires-miguel-estrada-doj-foots-the-bill/>>.

⁵⁴ HERTZ, M., Deputy Assistant Attorney General, 'Brief of the United States as *Amicus Curiae*', in the United States Court of Appeals for the Ninth Circuit, *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) at 25, available at: <http://harpers.org/media/image/blogs/misc/doj_amicus.pdf>.

⁵⁵ HORTON, S., 'DOJ to the Rescue... of John Yoo' *Harper's Magazine* (Dec 2009) available at: <<http://harpers.org/archive/2009/12/hbc-90006184>>.

⁵⁶ TURELY, J., 'Nuremberg Revisited: Obama Administration Files To Dismiss Case Against John Yoo' *jonathanturley.org* (9 Dec 2009) available at: <<http://jonathanturley.org/2009/12/09/obama-administration-files-to-dismiss-case-against-john-yoo/>>. Furthering dissemination, Turely spoke to this exact issue on national television on the show 'Countdown with Keith Oblerman' (9 Dec 2009) available at: <<http://www.msnbc.msn.com/id/3036677/vp/34354468#34354468>>.

of war or human rights law apply in the territory of Pakistan where there is no declared armed conflict, and the precise orders given to the Navy SEAL team (i.e. to capture or kill) to assess legality.⁵⁷ However, it appears that the large majority of U.S. citizens will likely conclude that this operation was legal, moral and effective. A first test of this legitimacy will certainly be in the upcoming 2012 presidential elections. If President Obama were to be successful in securing reelection, his second term would be the place where we might see an erosion in the pull towards compliance, as happened in the Bush administration. President Obama has unquestionably used a rhetoric of multilateralism and respect for international law that we surely did not see in his predecessor. So the question will be whether the policies we have identified as being of questionable legality will surmount his rhetoric to the contrary.

As such, it is fitting to return to the epigraph of this conclusion, “[i]t is the paramount duty of political leaders in a democracy under attack to keep the forces of order intently focused on the political requirement of maintaining *legitimacy*.”⁵⁸ Ignatieff unambiguously recognized this imperative. He identified the attackers of September 11th as persons who were willing to slaughter guiltless civilians thus totally rejecting established laws and institutions, and warned that those who confront them must not do the same. Ignatieff counseled,

[t]he only cure for nihilism is for liberal democratic societies –their electorates, their judiciary, and their political leadership– to insist that force is legitimate only to the degree that it serves defensible political goals. This implies a constant exercise of due diligence: strict observance of rules of engagement regarding the use of deadly force and the avoidance of collateral damage. Democracies must enforce such rules by dismissing from service any of the carnivores who disgrace the society they are charged to protect.⁵⁹

If we are correct in positing that this ‘strategy of provocation’ is meant to prod a violation of our laws, rules and principles, then it is undoubtedly vital to defend legitimacy as a target.

⁵⁷ O’CONNELL, M., ‘The bin Laden aftermath: Abbottabad and international law’ *Foreign Policy* (4 May 2011) available at: <http://afpak.foreignpolicy.com/posts/2011/05/04/the_bin_laden_aftermath_abbottabad_and_international_law>. For an in-depth discussion by legal scholars of the issues involved see Program on Humanitarian Policy and Conflict Research, Harvard University, Live Seminar 34: Beyond the attack on Bin Laden: Implications for Regulating Future Military Operations (15 June 2011) available at: <<http://www.hpcrresearch.org/events/live-seminar-34-beyond-attack-bin-laden-implications-regulating-future-military-operations>>. Interestingly, there was only one of four of the participants (O’Connell, M.) arguing for the application of human rights law (attempting to capture before resorting to lethal force) rather than humanitarian law where it is legal to kill combatants.

⁵⁸ IGNATIEFF, *The Lesser Evil*, note 1 above, at 143-4.

⁵⁹ *Idem*.

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