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The Prohibition of Torture in International Law: The Case of Post-9/11 Interrogations of Al-Qaeda Suspects

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LIST OF ACRONYMS

AChHPR – African Charter on Human and People's Rights
ACHR – American Convention on Human Rights
AI – Amnesty International
AP I – Additional Protocol I to the Geneva Conventions
AP II – Additional Protocol II to the Geneva Conventions
ASIO – Australia Security Intelligence Organization
CAT – Committee Against Torture
CIA – Central Intelligence Agency
CPT – Committee for the Prevention of Torture
DIA – Defense Intelligence Agency
DoD – Department of Defense
DoJ – Department of Justice
DTA – Detainee Treatment Act
ECHR – European Convention on Human Rights
ECPT – European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECtHR – European Court of Human Rights
EITs – Enhanced Interrogation Techniques
FBI – Federal Bureau of Investigation
FISA – Foreign Intelligence Surveillance Act
FISC – Foreign Intelligence Surveillance Committee
FM – Field Manual
FOIA – Freedom of Information Act
GPW – Geneva Convention on Prisoners of War
GWOT – Global War on Terror
HRC – Human Rights Council
HRW – Human Rights Watch
HVDs – High-Value Detainees
IACommHR – Inter-American Commission on Human Rights
ICC – International Criminal Court
ICCPR – International Covenant on Civil and Political Rights
ICJ – International Court of Justice
ICRC – International Committee of the Red Cross
ICTR – International Criminal Tribunal for Rwanda
ICTY – International Criminal Tribunal for Former Yugoslavia
IHL – International Humanitarian Law
IL – International Law
ILC – International Law Commission
JIC – Joint Intelligence Center
JPRA – Joint Personnel Recovery Agency
LOAC – Law of Armed Conflict
MCA – Military Commissions Act
MEJA – Military Extraterritorial Jurisdiction Act
MI5 – British Security Service

MON – Memorandum of Notification
NCIS – Naval Criminal Investigative Service
NGOs – Non-Governmental Organizations
OAS – Organization of American States
OLC – Office of Legal Counsel
POW – Prisoners of War
RDI-Program – Rendition Detention Interrogation Program
SERE – Survival, Evasion, Resistance, Escape
SOUTHCOM – Unites States Southern Command
SSCI – United States Senate Select Committee on Intelligence
UCMJ – Uniform Code of Military Justice
UDHR – Universal Declaration of Human Rights
UN – United Nations
UNCAT – United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
UNGA – United Nations General Assembly
WCA – War Crimes Act

ABSTRACT

After the tragic terrorist attacks of 11 September 2001, the necessity and legitimacy of the absolute prohibition against torture are increasingly challenged, even in committed rule-of-law States. The absolute prohibition of torture on both the international and national levels constitute a fundamental achievement of modern human rights protection. It is considered the epitome of a rule-of-law government. However, the discrepancy between the prohibition in international law and actual State practice is greater for torture than any other human right. During the Bush Administration, the American interpretation of law changed to fight the "War on Terror" due to the role of the Office of Legal Counsel in the new Acts, the participation of the CIA in the extraordinary rendition program, and the torture program targeting al-Qaeda suspects.

INTRODUCTION

The necessity and legality of the outright ban on torture are being called into question by tragic occurrences even in firm rule-of-law governments, for instance, the terrorist attacks of 11 September 2001. Since torture was a recognized legal aspect of legal practice from antiquity to the modern era, its complete outlaw on both the international and national levels represent a significant advancement in modern human rights protection and is seen as the pinnacle of rule-of-law governance. Nevertheless, more than any other human right, torture is subject to actual state practice despite being illegal under International Law ('IL').

The ban on torture and other cruel, inhumane, and degrading treatment is absolute, according to a fundamental principle of international human rights law, meaning that an exception can be recognized, justified, or permitted under no circumstances. However, this is highly problematic for many reasons. First, rather than being an intrinsic legal need, as the doctrine maintains, absoluteness is not an express, inherent, self-evident, or necessary aspect of the rules in question. Instead, it is a matter of attribution. It is possible, but numerous renowned national human rights agreements explicitly support similar bans with other non-absolute meanings.

IL is a crucial tool required for an interdependent world's functioning. IL makes it possible for the global community we all rely on to function. Both US law and IL forbid torture. Almost every government today publicly condemns its use because it is regarded as one of the most terrible acts in human history. However, it is also regarded as an efficient technique for acquiring intelligence, and as a result, these same nations frequently use it "under the radar screen" in desperate circumstances. Could it be stated that IL is efficient in preventing the use of torture in the war against terror, though, considering the flagrant use in the Global War On Terror ('GWOT') by the very States that have ratified international treaties and conventions like the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ('UNCAT') and the European Convention on Human Rights ('ECHR')?

Since the devastating attacks of 11 September 2001, several eminent academics and politicians have supported torture in extreme circumstances. Others have expressed concern that legalizing torture might pave the way for morally repugnant State activities. Remarkably, there has been a substantial debate about using torture to get information from terrorists aware of future strikes. The mistreatment of detainees is prohibited under national, international, and European laws, indeed, detainees' behavior has no bearing on their ability to exercise their right not to be tortured, so suspected terrorists have the same freedom from cruel treatment as other citizens have. Nevertheless, could the torturing of 9/11 bombers and other terror suspects

(assuming they were in prison before they perished) be justifiable for intelligence purposes? To collect information from them to stop the atrocity? To learn the numbers of the flights that were going to be targeted?

Additionally, the phrase "cruel, inhuman, or degrading treatment", frequently used in the same sentences that forbid torture, does not imply that any of these incredibly distinct forms of damaging behavior must necessarily have the same legal standing. The often-repeated argument that the prohibition is absolute in theory but only applies to certain situations, is equally unpersuasive. The ability of any two competing examples of an "absolute" right to be equally "absolute" in any meaningful sense is illogical, not just from a moral or legal standpoint but also from a logical standpoint. Therefore, properly applying international human rights law, the rule on torture and other cruel, inhuman, and degrading treatment can only be "virtually" absolute. In other words, it holds in all except the most exceptional cases, but not, as is generally believed, to the exclusion of all possible justification, exoneration, excuse, or mitigation.

The first chapter analyses the international conventions prohibiting torture and cruel, inhuman, and degrading treatment. The chapter starts with the birth of the legal rules against torture and its current framework in the international sphere. What is internationally accepted as torture is then defined. The effectiveness of the law against torture is later analyzed through the absoluteness of its ban, its positive nature, the liability and jurisdiction over these acts, the enactment of criminal sanctions to alleged offenders and its non-refoulment obligation. The State parties' obligations under the international conventions are analyzed together with the international enforcement mechanisms. Another focus of this chapter is the usefulness of torture through the ticking bomb dilemma and the unreliability and unusability of information obtained through torture. The second chapter concerns the American interpretation and the change in adherence to IL. How the Bush Administration was fundamental in this process due to its composition and the particular role of Vice President Cheney, and the Secretary of Defense Rumsfeld is addressed. Another critical factor is the Office of Legal Counsel's ('OLC') role in creating a unitary executive power. The enactment of certain new acts aimed to deter and punish terrorism. These acts are the USA PATRIOT Act, the Detainee Treatment Act, and the Military Commissions Act ('MCA'). Complicitly with the withdrawal from the Rome Statute.

The third chapter goes into depth into the GWOT by explaining the extraordinary rendition program and, in particular, how other governments participated in the Central Intelligence Agency ('CIA') program of secret detention as a consequence of extraordinary rendition. The second part of the chapter goes through the tortures perpetrated on al-Qaeda suspects beginning with the CIA's Enhanced Interrogation Techniques ('EITs') inspired by the Survival, Evasion, Resistance, Escape ('SERE') techniques. Moreover, those

techniques were targeted at al-Qaeda suspects precisely in a way that could be even more personally attacked, and finally, the arbitrary detention and enforced disappearances. The areas concerned with these behaviors are detention facilities such as the CIA's black sites, especially for high-value detainees, Guantanamo Bay Detention Camp, and Abu Ghraib Prison. The fourth chapter regards the international reaction to the revelations of what was happening in the detention camps mentioned in the previous chapter. This last chapter starts with the international organization's condemnations, particularly the International Committee of the Red Cross ('ICRC'). Moreover, many legal cases were brought before international human rights courts. Some cases were particularly important for condemning the actions of the high ranks of the Administration. These cases are *United States v. Abu Zubaydah*, *Rasul v. Bush*, *Khaled el-Masri v. United States*, and *Hamdan v. Rumsfeld*. To conclude, the last chapter, the case of *United States v. Sabrina Harman*, regarding the scandal of photos which saw her as the main character. The photos in which she is portrayed reveal the misconduct of US soldiers in Abu Ghraib. Finally, conclusions will be drawn.

CHAPTER I – The International Conventions Against Torture

Notably, it is almost impossible for country States to handle issues such as torture on their own when they arise because of the complexity of the world's problems and, in some situations, their interconnectedness. Therefore, IL becomes "a potential remedy for problems outside the purview and realm of individual nation states"[1].

1. Torture in International Law

Some authors contend that governments seeking to further their interests on the international stage primarily produce IL. A State's national interests are taken into consideration while making judgments about its foreign policy, as well as decisions about signing treaties and abiding by IL. It is implied that IL lacks a particular normative authority and a life of its own. It is only the settling of differences in how States interact as they resolve relatively isolated issues of international cooperation. As a result, States do not see a reason to abide by treaties if they do not serve their current interests or as their interests and power structures change. When there are over 200 States with diverse interests, goals, and philosophies, it becomes challenging for IL to be effective.

There are not many topics where IL is as unambiguous as the ban on torture[2]. No State openly claims the right to use torture since it is against the rule of law and the ideals of democratic nations, degrading and ineffective in any case. However, nations which pride themselves on being pillars of human rights have been less prepared to accept the absolute prohibition at face value in reaction to international terrorism and other threats. Some nations, most notably the US, have been willing to redefine the idea in a way that would allow for its deployment in defiance of IL. Other countries, such as the UK, has continuously upheld a position opposing the use of torture and denouncing it anywhere it takes place in public[3]. However, UK has been ready to work with oppressive regimes and have been tied into operations where it would have been reasonable to have known that torture was taking place[4]. States and people must abide by fundamental legal principles outlined in significant international treaties regarding human rights. Legally speaking, liberal democratic nations are required to safeguard these rights even in dire situations, although these international agreements allowed for derogations in the event of threats to national security. Any derogation must abide by the country's obligations under IL. This has not been the case since 9/11. Most

[1] ANWUKAH (2016:2).
[2] FULTON (2012:773).
[3] FOREIGN AND COMMONWEALTH OFFICE (2010:2).
[4] HUMAN RIGHTS WATCH (2009:20).

liberal countries' anti-terrorism policies counter their obligations under IL. Numerous new agreements and laws have been passed or hinted in Australia, UK, Canada, and the US in the wake of the 9/11 attacks. Measures that have been implemented or are seriously being considered are indefinite detention without trial or judicial review, the trial of terrorists by military tribunal, the removal of the right to silence and legal counsel, the listening in on attorney-client conversations, the use of torture and drugs to extract confessions, increased surveillance and lowered privacy protections, and significantly increased funding for the military and paramilitary police involved in "homeland" security[5].

International humanitarian law ('IHL'), general IL, and several important international human rights treaties prohibit torture. Additionally, torture is acknowledged as an international crime for which everyone is criminally responsible and for which higher authority is not an acceptable defense[6]. The prohibition against torture is expressly mentioned in many conventions and is recognized as a rule of customary law with *ius cogens* standing[7]. As a result, it is acknowledged that the ban has a particular position and is an absolute rule of general IL from which no deviation is allowed. It is also an obligation *erga omnes*, a principle of IL that states that obligations are owed to all members of the international community and are something those members have a stake in preserving[8].

1.1 The Birth of Legal Rules Against Torture

The history of torture is as old as humanity. Torture was utilized in the interrogation of enslaved people by the ancient Greeks. An enslaved person's testimony did not weigh a court of law, therefore, for his word to be accepted as evidence, suffering had to be used to support it[9]. Torture of unarmed, sovereign persons was strictly forbidden. As Greece, the Roman Republic only tortured enslaved people[10]. However, during the Imperial time, the line between enslaved people and citizens was increasingly blurred, and the torture of the latter group increased. Additionally, as the emperor's power grew, he continued to use torture against his own internal "enemies" in cases of high treason[11]. The Barbarians persisted in torturing enslaved people after the collapse of the Western Roman Empire[12]. A new method of proof, the ordeal, such as the judicial duel or the test of fire, was essential for freemen[13].

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[5] ANWUKAH (2016:18).
[6] FULTON (2012:773).
[7] LAU (2016:1288).
[8] FULTON (2012:774).
[9] LEA (1973:7).
[10] *Ibid*, p. 8.
[11] *Ibid*, p. 9.
[12] SONDEREGGER (2014:339).
[13] LANGBEIN (2004:94).

The rise of rationalism caused the law of proof to change to one that involves an examination of the truth[14]. Two witnesses were required for a conviction. A defendant who denied involvement in the crime could not have been found guilty in court without the testimony of these two witnesses. The only way a court could find a defendant guilty without two witnesses was if he or she confessed to the crime. Circumstantial evidence could not, in any case, support a conviction[15]. Thus, the accused was tortured to extract a confession.

In Europe, it has also been often utilized as a method for questioning, particularly in cases involving claims of crimes against the State, sexual offenses, heresy, and witchcraft[16]. Although discussions on the benefits of torture during interrogation have been debated since antiquity, it was not explicitly outlawed in England until the 1640s and in the rest of Europe until the 18th and 19th centuries[17]. The Enlightenment's propagandists impacted this abolition, and a new law of proof called the free judicial examination of the evidence was established[18]. IHL has long forbidden torture, dating back to the 1899 Hague Convention on the Laws and Customs of Land Warfare and its later amendment in the 1907 Hague Convention on the Laws and Customs of Land Warfare, which is still in force today. However, torture could never completely disappear. It frequently happened throughout the Nazi era in the Third Reich. The battle against torture became a top priority for the international community following World War II. Major human rights accords and IHL both expressly forbid torture. Governments that utilized torture after World War II routinely denied it. The legal system clarified that harsh information-gathering techniques and punishment were unacceptable. The Geneva Convention on Prisoners of War ('GPW') of 1929, the fourth Geneva Conventions of 1949, and the two Additional Protocols to the Geneva Conventions of 1977 all established it as a war crime under customary IHL[19]. Thanks to the creation of national and international laws, it can no longer be used to get information, punish people, or for any other purpose. From the late 1940s onward, human rights-related legal documents, which were made stronger by the establishment of the United Nations ('UN'), established the standards for what actions were judged to be acceptable or repugnant, legal, or criminal[20].

The US has been at the forefront of efforts to have torture outlawed by IL for more than 50 years. The US played a significant role in creating and adopting the Universal Declaration of Human Rights ('UDHR') in 1948, which forbade

[14] LEA (1973:53).
[15] PEJIC, DROEGE (2013:537).
[16] MAIO (2000:75).
[17] GREER (2015:7).
[18] SONDEREGGER (2014:339).
[19] BASSIOUNI (2005:395).
[20] NOWAK (2012:313).

"cruel, inhuman, or degrading treatment or punishment"[21]. Subsequently, the UDHR was acknowledged as a part of IL. The International Covenant on Civil and Political Rights ('ICCPR') was adopted by the UN under the leadership of the US in 1966. All those actions deemed torture, and other cruel treatments were specified by the UNCAT. The US was a staunch advocate for UNCAT, which the UN approved in 1984[22]. Establishing groups like Amnesty International ('AI') and Human Rights Watch ('HRW') were crucial because they have called out and shamed governments who employ or permit torture[23]. The US was at the forefront of worldwide efforts between 1948 and 1984 to end torture in nations where their governments still engaged in this barbaric practice. Following that, the US kept track of such illegal actions and constantly opposed them in the Department of State's Annual Country Reports on Human Rights Practices, which Congress required[24].

However, the US did not start using torture in Afghanistan and Iraq. Numerous studies document the history of the US' use of torture beginning decades before[25]. Between 1964 and 1975, the CIA conducted psychological torture experiments in Guatemala and Vietnam[26]. Then, in 1979, the Nicaragua case before the International Court of Justice ('ICJ') brought some jurisprudence on humane treatment norms to the Central American insurrection. The court investigated whether specific recommendations, such as forceful interrogation techniques found in manuals purportedly given to contra rebels, violated accepted norms of IHL[27]. Therefore, torture is prohibited during war and peace and is considered an international crime under IL, IHL, and human rights law. There should be no exceptions[28]. However, since the horrific Twin Towers attack, torture has been publicly considered even in democratic States committed to the rule of law.

1.2 Current Legal Framework

Only totalitarian governments in the middle of the 20th century and some liberal democracies in the post-9/11 GWOT reopened the discussion on torture on a massive scale. Throughout reality, torture has never stopped occurring in the world. The techniques have been substantially improved. As Nowak, former UN Special Rapporteur on Torture, observes: "torture is practiced in more than 90 per cent of all countries and constitutes a widespread practice in more than 50 per cent of all countries"[29]. Evans, IL Professor, refers

[21] UNITED NATIONS (1948:12).
[22] UNITED NATIONS (1984:2).
[23] AGUIRRE (2009:143).
[24] BASSIOUNI (2005:394).
[25] SONDEREGGER (2014:340).
[26] AGUIRRE (2009:143).
[27] JACKSON (2015:106).
[28] PEJIC, DROEGE (2013:529).
[29] NOWAK (2012:313).

to such contentious issues as "torture debates" because other legal considerations that cannot be ignored, such as questions of criminal responsibility, the admissibility of evidence, questions of jurisdiction, immunity, due process, and fair trial, will have an impact on the absolute standards in international human rights obliging the conventions States to conduct themselves following the conventions[30]. Many global community members, including States, Non-Governmental Organizations ('NGOs'), and international organizations, have denounced these acts as immoral and questioned their legitimacy. Domestic actors, such as the media, legislative authorities, and sizeable portions of the populace, have voiced strong criticism and demands for responsibility.

IHL and other international legal instruments are more than contractual commitments holding States accountable. First, a new synthesis of the rules of war, human rights, and international justice gives them strength and scope. Second, by igniting public discourse, they can affect behavior. IHL and other international legal systems stand as normative "guardians" against processes of moral disengagement that make torture and the acceptance of civilian deaths more tolerable since they function in a complex moral and political milieu. Teitel claims:

> "What the waging of the "war on terror" has made abundantly clear is that humanity law need not run out – that, indeed, there is no category of persons on the globe that is not covered or protected. Indeed, by turning to the overlapping regimes, coverage can be ensured"[31].

Because when the enemy is not only dehumanized but also demonized and the conflict is framed in terms of loyalty, authority, or purity, violations of IHL can become morally imperative; it is the law that offers crucial support in the fight to define humanity of the enemy. Monitoring political discourse and social environments that foster moral disengagement and the demonization of the enemy is necessary to uphold IHL. A fundamental component of all significant human rights treaties and IHL is the outright prohibition of torture. This prohibition is a part of international customary law[32] and is frequently referred to as an absolute rule of IL (*ius cogens*)[33].

1.3 Definition and Interpretation of Torture, Inhuman, and Degrading Treatment

The UDHR is acknowledged as the cornerstone of the modern human rights movement, at least among Western nations. The tremendous human rights violations committed by States in the run-up to and during World War II

[30] MAHFUD (2014:223).
[31] LELLIO, CASTANO (2015:1292).
[32] NOWAK, MCARTHUR (2008:6).
[33] MAYERFELD (2007:111).

served as inspiration for the UDHR, in part. The UDHR outlines fundamental rights to which every person is entitled, despite not being a legally binding document on States. No one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment as defined in Article 5, which is pertinent to this debate[34]. Likewise, the ICCPR Article 7 states:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation"[35].

Additionally, according to Article 5(f) of the International Criminal Tribunal for Former Yugoslavia ('ICTY') statute, Article 3(f) of the International Criminal Tribunal for Rwanda ('ICTR') statute, and Article 7 s.1(f) of the International Criminal Court ('ICC') statute, torture is a crime against humanity as well as a war crime.

These Conventions were influenced by World War II. However, instead of placing restrictions on a State's authority over its citizens, the Geneva Conventions were intended to regulate the conduct of belligerents during armed conflict. Prior treaties offered some advice about the care of Prisoners of War ('POW'), but they were insufficient. The GPW of 1929 was clearer. It stipulates that:

> "no pressure shall be exercised on prisoners to obtain information regarding the situation in their armed forces or their country. Prisoners who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever"[36].

The Geneva Convention of 1949 significantly enlarged the guidelines for the treatment of POW. The directive is clear regarding interrogation: "No physical or mental torture, nor any other kind of pressure, may be imposed on POW to extract from them information of any sort whatsoever". Moreover, also the treatment guidelines for civilians during armed conflict and occupation are outlined. A protected person is entitled to respect for their person, their honor, their family rights, their religious convictions, practices, manners, and customs in all circumstances. Although there is no language focusing upon interrogation of protected persons, Article 13 states: "Protected persons are entitled, in all circumstances, to respect for their persons, […] shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity"[37].

The fundamental principles of care are even more clearly laid in the Additional Protocols to the Geneva Conventions. Building on Common

[34] PREGENT (2012:522).
[35] UN GENERAL ASSEMBLY (1966:5).
[36] UNITED NATIONS (1929:1).
[37] UNITED NATIONS (1949:97).

Article 3, Additional Protocol ('AP I'), which deals with international armed conflict, stipulates that anybody under the control of a party to the war has certain fundamental rights. Article 75 AP I, which reiterates the Common Article 3 standard for humane treatment, forbids, among other acts, "torture of all kinds, whether physical or mental"; "outrages upon personal dignity, in particular humiliating and degrading treatment'; and 'threats to commit any of the foregoing acts"[38]. The Additional Protocol II ('AP II') broadens the recommendations for standards of care in armed conflicts that are not international. Article 4 AP II mandates that all people not participating in hostilities be treated with "respect for their person, honors and convictions and religious practices" and explicitly prohibits "violence to the life, health and physical well-being of persons, in particular murder as well as cruel treatment"[39].

The most extensive and widely accepted definition of torture is in Article 1 of the UNCAT which goes as follows:

> "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"[40].

While obtaining information from "accused" or "suspect" people under duress is the essence of the crime of torture, certain essential elements must be present for an act to qualify as torture under Article 1 of the UNCAT. The purposeful inflicting of significant pain or suffering, either physical or mental, for a specific goal, such as extracting a statement, and the involvement of a public official are thus the distinguishing characteristics of torture. According to Article 1(a), the "accused" or "suspect" must experience great mental or physical anguish or grief as the first requirement. It should be noted that torture does not always involve physical harm; it can also involve agony or pain inflicted on the mind. Furthermore, torture must be committed by a government official or agent who purposefully causes pain to extract information or make a confession. Notably, a court authority's decision cannot be considered torture. The victim may be a suspect or tortured on someone else's behalf, but they cannot be the perpetrator. Discrimination may sometimes justify torture. The use of compulsion and intimidation are also forms of torture. To be considered torture, the anguish and suffering must be "severe", either mental or bodily. When pain and suffering are considered

[38] UNITED NATIONS (1977:280).
[39] *Ibid*, p. 315.
[40] UNITED NATIONS (1984:1).

sufficiently "severe", case law provides guidance. According to the Bybee memo[41], the pain is so intense that causes serious injuries, so severe that it is likely to cause death, organ failure, or permanent damage leading to a loss of significant body function. In addition to immediate suffering, the memo stated that extreme mental agony also needed to result in long-term psychological impairment, such as post-traumatic stress disorder or another mental disease.

The act must be purposeful to satisfy the second requirement of UNCAT Article 1(b). Even if an unintentional act results in "extreme" pain or suffering, it is not sufficient to satisfy this requirement. For torture, a specific intent is required rather than a general or fundamental one. In *D.P.P. v. Morgan*, Lord Simon stated that in crimes of fundamental intent, the *mens rea* does not go beyond the *actus reus*, which justifies this higher standard of intent. As a result, for an act to be considered intentional, the accused must not only aim to cause pain or suffering but also do so with the intent to violate the UNCAT.
According to Article 1(c), the third need is that the act's goal must be to obtain information or a confession. Whether the mental and physical pain is considered "severe" depends on the presence of this component. Although cruel, inhuman, or degrading treatment can also result in great pain and suffering, the difference between it and torture is in the act's intent[42]. For instance, the European Court of Human Rights ('ECtHR') noted in *Keenan v. United Kingdom* that it is the intentional component of torture that distinguishes it from cruel, inhuman, and degrading treatment. Under Article 1(d), the final requirement is that a public official or someone acting on their behalf must have caused the pain or suffering. Therefore, the State and its agents are engaging in the crime of torture. To collect information or confessions as part of his duty, a typical torturer will be a law enforcement official or a member of a security or intelligence service. Therefore, a perpetrator is not just a government agent who engages in direct torture. Another possibility is a non-official person working in concert with and for the benefit of public officials, typically to conceal their obligations.

There has also been discussion on the rationale behind the restrictions and the essential elements of each identified form of misconduct. Some contend, for instance, that the major goal is not primarily to stop physical or mental suffering but rather to safeguard human dignity, autonomy, and integrity. Others contend that deliberate suffering is perpetrated in a two-tiered hierarchy, with degrading treatment at the bottom and torture, cruel treatment, and inhumane treatment altogether at the top. Others assert that there are three levels of abuse: degrading treatment at the bottom, torture at the top, and cruel and inhumane treatment in the middle. Some also support the "horizontal model", according to which inhumane treatment includes both torture and

[41] ANWUKAH (2016:7).
[42] PEJIC, DROEGE (2013:533).

degrading treatment, with the former being a deliberate component[43] if torture necessitates the participation, or at the very least the consent, of a public official, a determined goal on the part of the offender, and the victim's complete helplessness.

White and Ovey argue that "inhuman treatment must meet a minimal level of severity"[44] when comparing it to torture. Additionally, unlike torture, it need not always be done on purpose; all the situation circumstances must be considered. It is evident that the critical distinction between torture and inhuman treatment is the deliberate action taken by the torturer that results in extremely serious and cruel pain that is not present in inhuman treatment. To ensure that everything that does not fit under the definition of torture is included by the definition of "other acts of cruel, inhuman, or degrading treatment or punishment", Article 16 of the UNCAT operates as a catch-all provision[45]. The UNCAT's authors were determined not to leave a gap in the definition of pain or suffering that potential torturers could use because different people have varying thresholds for tolerating pain and suffering[46]. It reads:

> "Each State party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"[47].

The international community has also put specific instruments to address torture in addition to these accords. By looking at how people who are deprived of their liberty are treated, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('ECPT'), e.g., established a preventive approach[48]. Most international conventions, such as the ICCPR or the ECHR, forbid torture without explicitly defining the term[49].

The ICRC distinguishes between torture and cruel, inhuman, and degrading treatment by stating that the former involves a specific purpose and the intentional infliction of severe suffering or pain; the latter involves no specific purpose but only that significant levels of suffering or pain are inflicted, and degrading treatment, also involving no specific purpose, requires that the

[43] GREER (2015:10).
[44] MAHFUD (2014:225).
[45] UNITED NATIONS (1984:5).
[46] BASSIOUNI (2005:397).
[47] UNITED NATIONS (1984:5).
[48] PEJIC, DROEGE (2013:36).
[49] SONDEREGGER (2014:340).

victim be subjected to an offense against their dignity. The phrasing is vague and unclear, nevertheless[50].

According to Article 7(2)(e) of the Rome Statute, "torture" is defined as the willful infliction of great bodily or mental suffering upon a person in the accused's custody or under his or her control; however, torture shall not include pain or suffering resulting only from, inherent in, or incidental to, lawful sanctions. An assault is described as "a course of activity involving the multiple commission" of illegal acts, "pursuant to or in furtherance of a State or organizational policy to commit such attack," in Article 7(2) of the Rome Statute. The crimes can include any violence committed against a civilian population; a military attack is unnecessary. Similarly, the jurisprudence of the ad hoc tribunals has established that an attack can also include mistreating the civilian population and is not just limited to using armed force. According to the policy component, the State or Organization must actively support or encourage the attack on the civilian population. The Rome Statute's Article 7(1)(k), which deals with "other inhumane acts", is the all-encompassing clause regulating individual criminal behavior[51]. It has been determined that this clause is essential because "one would never be able to keep up with the imagination of future torturers who wanted to satisfy their bestial instincts, and the more exact and complete a list strives to be, the more restrictive it becomes"[52]. According to Article 7(1), the forbidden actions can be enough to qualify as an attack in and of themselves. However, the Rome Statute's authors avoided providing definitions for the terms "widespread" or "systematic" attacks. Both the ICTR and ICTY have repeatedly stated that an attack need not be both widespread and systematic to be considered criminal; it need only be one of the two. To ensure that not every inhumane act qualifies as a crime against humanity, drafters of the Rome Statute agreed that a strict threshold test was required for the criterion that the attack be "widespread or systematic". The *Tadic* Judgment states that a systematic attack must involve a "pattern or meticulous plan". and "the number of victims". According to this interpretation, the current case of extraordinary rendition might not satisfy these criteria because the 28 High-Value Detainees ('HVDs') might not meet the quantitative standard of "widespread", which is to be at least minimally incorporated into the concept of "attack". While the circumstance with the 28 HVDs may not be an obvious case of a "widespread attack", there is a strong argument that it is a "systematic attack" if the far more frequently accepted disjunctive understanding of "widespread attack", or "systematic attack" is embraced[53].

[50] PREGENT (2012:523).
[51] PEJIC, DROEGE (2013:530).
[52] AMBOS, WIRTH (2002:90).
[53] LAU (2016:1281).

Torture prohibitions are also present at the regional level. No one shall be subjected to torture or to inhuman or degrading treatment or punishment, according to Article 3 of the ECHR. Article 5 (2) of the American Convention on Human Rights ('ACHR') contains a similar prohibition[54]. Similarly, the ECtHR ruled in *Ireland v. United Kingdom* that torture contained a specific "intensity" and "cruelty", giving deliberate inhuman treatment that results in extremely "serious" and "cruel" suffering a particular stigma. Authorities in Northern Ireland implemented the "five techniques"[55] methodically in the situation. The ECtHR reviewed whether wall-standing, "hooding", exposure to noise, restriction of sleep, and deprivation of food, which were utilized against terror suspects, constituted torture in violation of Article 3 of the ECHR. The ECtHR found that the "five ways" were not torture by adopting their definition of torture, which was "deliberate inhuman treatment producing very serious and painful suffering"[56].

2. Effectiveness of the law

A decision must be made about international terrorism and human rights. Counterterrorism initiatives tightened the tension between these two areas after 9/11. IL is a fundamental concept. However, it is a primitive system with explicit restrictions on its usefulness. Although it is a key tool for creating answers, it is insufficient to address all world issues. As a result, many have questioned whether IL works to control nation-States and other international players' behavior in real-world situations. The habit of nations, groups, and individuals to participate in internationally illegal actions without any restrictions on their conduct by the international legal system gives rise to the mystery surrounding the effectiveness of IL. The detention of terrorist suspects without a trial, the use of torture in the GWOT, the unrestrained use of indiscriminate violence against civilians by organizations based in existing States, and the denial of procedural and substantive rights to those in detention are all examples of this unlawful behavior. Under IL, these illegal actions represent serious abuses of human rights. As a result, IL is seen as having failed in one of its fundamental goals: to uphold order in society and protect the weak from the arbitrary actions of the powerful. Are specific conditions like global terrorism not considered, given the gross violation before the rules against torture were passed? Or do nations that have ratified the conventions against torture does not view them as "legal" in the strictest sense?[57] Whatever the motivation, it must be made abundantly apparent that State players are necessary for IL. The behavior or adherence of State actors determines, in large part, how effective IL is. It is required of nation-States that are parties to the Convention to take the necessary procedures, such as legislative,

[54] SONDEREGGER (2014:340).
[55] ANWUKAH (2016:7).
[56] TURNER (2012:10).
[57] ANWUKAH (2016:20).

administrative, judicial, and other measures, to prevent acts of torture in any territory under their jurisdiction, according to a close reading of Article 2 of the UNCAT[58].

The positive element of the anti-torture right is highly valued by IL, which obliges nations to protect their citizens from harm. How well will these articles prevent torture when it is carried out by officials or other members of the public? Since 9/11, governments have been committing torture with impunity. Positive outcomes from adopting such provisions in any criminal code will only be a fantasy in the absence of a functioning judicial system. For the benefit of victims' justice, States have a positive obligation to prevent acts of torture and to take proactive measures to eradicate impunity. Since acts of torture are frequently committed by nations that are expressly required under the principles of international human rights law to abide by its jus cogens norms, these provisions of international agreements become illusory.

Article 3 of the UNCAT states that governments may not deport, return, or extradite someone to another State if there are good reasons to believe they will be subjected to torture. Protecting human rights is the primary objective of international human rights law. Some of the national policies or executive privileges of nation-States significantly impact the effectiveness of IL. For instance, when there is a claim of torture against a State that has ratified the UNCAT, some of those States plead the "State secrets privilege". This privilege frequently goes against international human rights rules like Article 14 of the UNCAT. In a lawsuit, the government may utilize this privilege to prevent the revelation of any information if doing so would compromise national security. The prohibition of torture is frequently referred to as having the status of *jus cogens*, an absolute rule of IL from which no deviation is permitted. Torture and other cruel or inhumane treatment are not permitted, not even during times of war or a national emergency. One could argue that the suffering a victim endures due to the concealment of the facts in their case and the denial of his right to redress and remedy constitutes torture in and of itself.

Since torture is a crime perpetrated by State actors or agents, strict devotion to the right not to be tortured at the national level will also manifest internationally. It is impossible to separate the issue of compliance from the subject of efficacy. The degree to which State action complies with an agreement's prescriptions or prohibitions is called compliance. However, an agreement's success is influenced by how much it affects State behavior. The effectiveness of a law's provisions depends on whether a State complies with its obligations under international conventions and treaties. Moreover, some argue that the definitions of torture and other forms of cruel treatment are overly broad and difficult to define. To avoid the challenges of interpretation,

[58] UNITED NATIONS (1984:2).

this has occasionally prompted proposals for lists of acceptable behavior, particularly acceptable interrogation techniques. Serious questions concerning the effectiveness of IL are raised by the gross violations of human rights regulations, such as Article 3 of the ECHR. One starts to wonder if some nation-States are exempt from following IL's rules and principles even though they have signed treaties and conventions requiring them to obey such rules and principles[59]. One of the most complex legal problems in the battle against terrorism is the issue of how much human dignity contemporary society can still "afford" in interrogation scenarios and whether the outright prohibition of torture should be relativized[60].

2.1 Absolute Ban of Torture

Torture is a "heinous crime" that crosses national boundaries and endangers "civilized norms". Western nations have viewed torture as "the supreme opponent of humane jurisprudence, of liberalism, and the greatest threat to law and reason" since the 19th century[61]. Major international treaties on human rights and humanitarian law expressly forbid torture. The outright prohibition is seen as universal and has been incorporated into IL. Most people agree that torture is against both civil standards and IL. Revelations about the inappropriate use of force by military or law enforcement officers when questioning suspects. Governments frequently tell the public that such activities are not representative of any general policy when these revelations are made. There was little discussion about making the prohibition of torture absolute, according to Rumney, who extensively uses the ECHR and the UNCAT[62]. Rumney also explains that no customary exceptions apply to torture, not even "an emergency threatening the life of a nation"[63]. The law against torture and other cruel, inhuman, or degrading treatment has no "terrorist exception". A State cannot use coercive techniques to question a terrorist suspect[64].

There is little disagreement that an absolute right cannot be modified under any circumstances and that an absolute obligation supersedes all other obligations that might conflict with it. The moral presumption that tortures is inherently and self-evidently the worst violation of human dignity and autonomy, the worst form of subordination, objectification, and forced self-betrayal of or by the defenseless, as well as the worst harm or suffering that can be inflicted upon anyone, including killing them, underlies the belief that there cannot be an exception to the right not to be tortured[65]. Some

[59] ANWUKAH (2016:2).
[60] SONDEREGGER (2014:338).
[61] ANWUKAH (2016:9).
[62] RUMNEY (2015:25).
[63] *Ibid.*
[64] PREGENT (2012:523).
[65] GREER (2015:8).

commentators provide more pragmatic justifications, claiming, for instance, that even though an outright ban on torture may be difficult to defend morally, it may still be necessary legally to prevent the risk of institutionalization even when exceptions may otherwise be justified in exceptional circumstances. It is also frequently asserted that even allowing a single exception will undoubtedly result in institutionalization or, at the very least, pose a significant risk of institutionalization. Accordingly, torture should be prohibited globally and by law as it cannot be justified under any circumstances[66]. It follows that those who experience it should also have access to appropriate legal assistance and reparations, and those who caused it should consistently and universally face harsh punishment. According to some, this is basically what international human rights law does when it expresses the ban of torture and other cruel, inhuman, and degrading treatment in formal terms that are unrestricted or unqualified and, therefore, "absolute". However, the only justifications typically offered for this conclusion are the absence of express exceptions, provision-specific restrictions hedge other rights in the relevant documents, and the non-derogable nature of the rights derived from the formally unqualified prohibitions[67].

One of the few unquestionable and inalienable human rights is prohibiting torture and other cruel, inhuman, or degrading treatment. There is no need to mix these two ideas. Not all unalienable rights are absolute, and vice versa[68]. A right is deemed absolute if, in most cases, no limitations are allowed, such as when weighing a person's claim against State interests. On the other hand, a human right is deemed non-derogable if governments are not allowed to break their treaty duties in connection to it in exceptional situations like war or other public emergencies[69]. Thus, the outright ban on torture and other cruel, inhuman, or degrading treatment mean that it cannot be balanced against any other objective, such as protecting human life or national security[70]. It is also non-derogable, which means that States cannot escape their responsibility to uphold this strict restriction even in extraordinary situations like war or terrorism[71].

Legally, there are no restrictions on the right to be free from torture and other forms of cruel treatment under any conditions. No extraordinary circumstances, including a state of war or danger of war, internal political instability, or any other public emergency, may be claimed as a justification for torture, according to Article 2(2) of the UNCAT[72]. Discerning the various categories of illegal conduct is a major focus of the pertinent Strasbourg case

[66] PAUST (2009:1550).
[67] NOWAK (2012:314).
[68] GREER (2015:9).
[69] OVEY, WHITE (2006:74).
[70] NOWAK, MCARTHUR (2008:881).
[71] *Ibid*, p. 890.
[72] TURNER (2012:3).

law. Article 3 of the ECHR is the international human rights law forbids torture and other cruel, inhuman, or degrading treatment and has received the most detailed judicial examination. In around half of the reported Article 3 cases, the absoluteness of this rule should be mentioned. Where they do, it is typical to see statements in the judgments that the rights in question are "absolute," which are then followed in the next sentence or paragraph by comments that they may need to be applied based on subjective assessments as well as other circumstances[73]. Again, it does not define what constitutes torture or other brutal treatment; it just specifies that prohibition is unaffected by times of war or national emergency[74]. There is no question that for ill-treatment to be covered by Article 3, it must reach a minimum level of severity. However, determining whether this threshold has been reached is "relative". It depends on "all the circumstances of the case, such as the duration of the treatment, its physical and mental effects, and, in some cases, the sex, age, and state of health of the victim"[75]. Some observers contend that Article 3's absoluteness is unaffected by relativism in its application. However, the unpredictability of the pertinent criteria has been noted by most to undercut this status or, at the very least, make one wonder what it signifies. According to Article 3, "Ill-treatment must reach a minimum level of severity". The standard "is relative" and "depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects, and, in some cases, the victim's sex, age, and health", as well as whether "the suffering and humiliation" went "beyond the inevitable element of suffering or humiliation connected with a given form of legitimate" treatment[76].

2.2 The Positive Nature of Torture

A State may be compelled by its international duties to prohibit specific actions by another State or, at the very least, to stop the harm that would result from such conduct, according to IL, which is publicly acknowledged[77]. Some have argued that all nations have the right and duty to employ all available means to stop such violations whenever other States violate *erga omnes* duties that contain jus cogens standards. Although recent developments at the UN regarding the "Responsibility to Protect" concerning genocide, war crimes, and crimes against humanity provide some support, it is generally believed that it has not yet solidified into a principle of customary IL[78]. However, by-standing States have been held accountable by international courts and tribunals for failing to act when necessary. For instance, in the Genocide Convention case, the court limited its examination to the duty to stop the

[73] GREER (2015:16).
[74] MAHFUD (2014:223).
[75] GREER (2015:16).
[76] RODLEY (2006:744).
[77] FULTON (2012:783).
[78] ZIMMERMAN (2011:630).

genocide that resulted from the convention's explicit language[79]. While the Genocide Convention contains a clause on prevention that is not limited by any language respecting the State's territory or jurisdiction, the similar provision in Article 2 of the UNCAT is so limited. This makes it impossible to apply this directly to the subject of torture[80].

Holding States accountable for their use of torture is necessary under IL, but States must also take "positive" steps to stop future abuse. Like Article 2(1) of the UNCAT, States bound by the ECHR must take measures to prevent torture and other cruel, inhumane, or degrading treatment of their citizens, especially when committed by non-State actors. Therefore, there would need to be more than just a generic risk of harm to people from terrorism, but rather a specific threat to identified victims to use the State's positive responsibility under Article 3 as a justification for torture.

2.3 Liability and Jurisdiction over Acts

Complicity can signify many different things, both morally and legally. In a legal sense, the phrase originally refers to the concepts of accomplice liability (such as aiding and abetting) present in domestic criminal law[81]. International criminal law has adopted a similar position[82]. The term can be used in a variety of contexts in IL, including attribution of conduct to States ('examining the relationship between a State and the individual perpetrators of a given act to see if there is a strong enough link to attribute the perpetrators' conduct to that State'); and "derivative" State responsibility (i.e., the international responsibility of States which aid and assist other States in the commission of internationally wrongful acts), as set out in Article 16 of the International Law Commission ('ILC') Articles on State Responsibility[83], and in the context of a "failure to fulfill a positive obligation", such as "where a State must prevent certain conduct" by an individual or another State.

Furthermore, there are more laws that forbid complicity in particular behaviors that might be added to this, such as the UNCAT's ban on complicity in torture[84]. Therefore, there are generally two ways in which States that might be considered "complicit" may be held liable: "either a complicit State is responsible for the violation of a primary rule to which it is bound itself, or it incurs derivative responsibility for its assistance to the internationally wrongful act of another State"[85]. Numerous circumstances make it difficult to discuss who is to blame for participating in torture committed by a third party.

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[79] UN GENERAL ASSEMBLY (1948:1).
[80] TURNER (2012:12).
[81] AUST (2011:9).
[82] STEWART (2012:186).
[83] INTERNATIONAL LAW COMMISSION (2001:31).
[84] UNITED NATIONS (1984:2).
[85] FULTON (2012:778).

Two of these are briefly highlighted. The first is the torture being carried out outside the State's borders. Human rights treaties typically place three types of responsibilities on States: a negative requirement to respect the rights at issue and a positive obligation to safeguard and uphold those rights[86]. However, the terminology in the treaty about a State's "territory" or "jurisdiction" frequently restricts the implementation of some responsibilities in these agreements[87]. Therefore, States have maintained that the exact requirement does not apply to them regarding acts of torture done by people outside of their territory and jurisdiction, even though a State may have a clear obligation to take concrete action to prevent acts of torture in its jurisdiction[88]. The overlap, if any, between State and individual responsibilities is a second problematic aspect. Most human rights treaties address States, but they also outline the actions States should take in response to individual actions. Therefore, the UNCAT requires States to make torture illegal and to establish jurisdiction over torture committed by their citizens or by those who are present on their territory (regardless of where the torture occurred) but nowhere does it state expressly that States must refrain from torturing their citizens or from refraining from being complicit in it[89].

There is a stricter prohibition against complicity when peremptory norms are seriously violated. One example of this is the different approach the ILC took to grave breaches of prescriptive norms in the Articles on State Responsibility, outlining specific rules applicable in such situations that require a lower threshold of knowledge for attribution of responsibility. Additionally, primary rules, such as a rule on non-refoulment, apply less stringent requirements for the necessary information[90]. There are four conceivable justifications for lowering the bar for participation in torture by another State. These are not competing for claims; they are proposed to support one another. First, persons and States are forbidden from consenting to torture under the UNCAT. Article 4 represents a requirement on governments not to participate in torture through the activities of their organs or individuals or groups whose actions can be linked to them, even though it is not stated expressly in the convention. If, under the UNCAT, the phrase "complicity" includes consenting to torture, nations must also be held accountable. Therefore, if torture happens, the State will likewise be liable where its officials have consented[91]. In cases when there are plausible claims that someone has engaged in or been complicit in torture, Article 5 of the UNCAT also puts affirmative obligations on nations. No matter where the alleged torture occurred, States must investigate the claims and try to bring its citizens up on charges. If a State fails to comply, it has broken the convention's requirements and done something unacceptable

[86] MCCORQUODALE (2009:246).
[87] UNITED NATIONS (1984:2).
[88] *Ibid*, p. 3.
[89] FULTON (2012:779).
[90] *Ibid*, p. 780.
[91] UNITED NATIONS (1984:2).

internationally[92]. Second, States must work together to end systematic torture and refuse to uphold its legality. In addition to the negative commitment to preventing, States also have a primary responsibility to refrain from taking any action that could put persons in danger of torture. Although the UNCAT itself does not expressly require that domestic law include a specific crime of torture, the Committee Against Torture ('CAT') has adopted the position that States Parties to the UNCAT should enact a specific crime of torture consistent with the UNCAT definition and provide for appropriate punishment as required by Article 4 UNCAT to ensure that no instances of torture will fall between the cracks of other offenses that ostensibly cover all prohibited acts. In addition to making acts of torture illegal, the UNCAT requires States Parties to set up efficient procedures for investigating allegations of torture and prosecuting those responsible. States Parties must also guarantee that torture victims have an upholdable right to just and sufficient compensation. Any statement made because of torture must be excluded from consideration as evidence under UNCAT Article 15, except for cases involving the accused of torture. Inter-American Torture Convention Article 10 contains a similar clause[93]. The ECtHR has held that evidence "obtained as a result of acts of violence or brutality or other forms of treatment which can be characterized as torture should never be relied upon as proof of the victim's guilt, irrespective of its probative value", noting that the ECHR does not expressly forbid the use of evidence obtained in violation of the right to be free from torture[94].

2.4 Enacting Criminal Sanctions to Alleged Offenders

The calls for the prosecution and accountability of those who have committed acts of torture are not driven by feelings of retaliation, revenge, or malice. The justification for prosecution can be formed from communicative or expressive conceptions of punishment and is like the justification for censure and punishment in arguments based on "dirty hands". Both situations call for punishment to denote that a moral wrong has been committed and to reinforce the value that has been subverted[95]. Despite the prevalence of extraterritorial torture cases involving terrorist inmates, the CAT regrets that no offenders have been held accountable for torturing someone in violation of Articles 1, 2, 4, and 5 of the Statute[96]. Furthermore, the lack of a federal torture crime results from the Rome Statute's limited understanding of the term, as specific provisions forbid the federal criminal authority from bringing extraterritorial cases to trial. When there is cause to think that an act of torture has been perpetrated in a region under their jurisdiction, governments are required by Article 12 UNCAT to launch an immediate and impartial investigation. The

[92] NOWAK, BIRK, MONINA (2019:254-5).
[93] PEJIC, DROEGE (2013:546).
[94] KRETZMER (2010:9).
[95] HIRSCH (1993).
[96] MAHFUD (2014:236).

UNCAT Committee has taken the position that States Parties to the UNCAT may not apply amnesty laws to the crime of torture considering this obligation and the duty of States to prosecute individuals where the investigation supports doing so[97].

The UNCAT accepts the notion of universal jurisdiction for acts of torture to stop torturers from acting with impunity. Even though the alleged torture was carried out elsewhere, States Parties are needed to establish jurisdiction to prosecute any person in the territory that falls under their purview. Torture must be an extraditable crime. A State Party is required to bring charges against a person accused of torturing if it refuses to extradite that person. The CAT has determined that a State Party violated its obligations under the UNCAT by failing to establish legal frameworks allowing its courts to exercise universal jurisdiction and by failing to bring charges against the overthrown dictator of another country who was allegedly responsible for widespread torture. The UNCAT Committee emphasized that the requirement to prosecute did not depend on whether the accused had previously requested extradition. The *ex-ante* authorization does more than only exclude a criminal penalty. It creates an *ex-ante* administrative power to employ harsh interrogation techniques in ticking time bomb scenarios[98].

In contrast to *ex-ante* authorizations, *ex-post* justifications do not establish administrative authority to conduct torture during interrogations. The use of torture is criminally responsible, and the *ex-post* justification strategy does not provide administrative authority to conduct torture in interrogations. There is no legal justification for harsh measures, and torture carries criminal liability. However, the faulty agent's criminal liability can be disregarded if his actions were justified or excused based on necessity or self-defense[99].
Some academics support this relativization of the outright prohibition of torture under specific tragic choice circumstances[100]. They contend that the outright prohibition of torture and other cruel treatment does not exclude the use of defenses[101]. The outright ban primarily refers to States and State activities[102]. On the other hand, criminal culpability deals with the personal blameworthiness of a particular activity rather than the legality of State action. An agent who uses torture to protect himself or another person's life is not criminally accountable[103]. However, an agent who uses torture is not prohibited from claiming necessity as a defense in court, giving these authorities an excuse rather than a reason[104]. The distinction between these

[97] KRETZMER (2010:9).
[98] OVEY, WHITE (2006:70).
[99] SONDEREGGER (2014:350).
[100] PARRY, WHITE (2002:763).
[101] AMBOS (2008:269).
[102] *Ibid,* p. 285.
[103] CIA (2004:5).
[104] AMBOS (2008:285).

two ideas, which do not include criminal culpability, is between behavior that is not wrong (justified) and harmful but not blameworthy (excused)[105].
Torture would become morally and legally acceptable if it were justified. However, because the prohibition of torture and other cruel, inhuman, or degrading treatment is a fundamental value of free democratic nations that uphold the rule of law, the legal system cannot find an act of torture to be justified because doing so would render the act of torture permissible[106]. The absolute prohibition would be compromised as a result. Even though there is never a justification for torture, it cannot be inferred that the torturer should face legal repercussions. So, an excuse rather than a defense should be used to exclude criminal guilt.

Torture is particularly likely to happen to those who are in detention. A person in any form of detention must not be subjected to torture or other cruel, inhuman, or degrading treatment, according to the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment adopted by UN General Assembly ('UNGA') in December 1988. No justification can be offered for exceptions to this rule. Special provisions must be established to safeguard detainees and inmates against torture and other cruel, inhumane, or humiliating treatments or punishments due to their unique vulnerability. The Human Rights Council ('HRC') of the UN stated its stance in General Comment No. 20 on Article 7 of the ICCPR as follows:

> "To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present, and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members"[107].

Torture may be assumed when a State provides an inadequate justification for severe injuries sustained by a person in custody. Although the right to *habeas corpus* for those who are detained is not listed as a non-derogable right under human rights conventions, the Inter-American Commission on Human Rights ('IACommHR') and the HRC have both ruled that States may not suspend the right in emergencies to protect the non-derogable right not to be subjected to

[105] SONDEREGGER (2014:350).
[106] AMBOS (2008:278).
[107] KRETZMER (2010:10).

torture[108]. To do this, the US has been evasive in upholding its commitments under international treaties. The US has rejected accusations that it had mistreated alleged former members of al-Qaeda in Guantanamo Bay in breach of the Geneva Convention. By refusing to designate the captives as POW, the US Administration avoided legal responsibility under the terms of the Convention[109]. Under no circumstances is the prohibition against torture under IL revocable. The signatories of the Torture Convention are required to bring charges against and punish torturers and their collaborators. Individuals are subject to criminal liability under the Geneva Convention Common Article 3 and are required to bring charges. Not bringing charges would go against the law's requirement to punish. When political expediency replaces the law and torture are perpetrated without legal repercussions, human rights laws are reduced to ineffective legal language[110].

2.5 Non-refoulment

Inherent in the ban against torture is the requirement for States to refrain from taking any action that could put a person in danger of being tortured[111]. The non-refoulment obligation, which forbids the transfer of individuals from one State to another where there is a genuine risk that they may be subjected to torture, is a striking illustration of this principle[112]. Notably, the obligation is understood as arising directly from the prohibition of torture rather than from the State's duty to prevent torture, which can be limited territorially[113]. A person may not be expelled, returned, or extradited to another State if there are good reasons to think that doing so would put him in danger of being tortured, according to Article 3 of the UNCAT. This regulation is known as the "non-refoulment principle" in IL[114]. The UN and the ECtHR's case law both uphold the non-refoulment concept. Further reinforcing this rule, the UN stated in the 2002 UNGA Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that States must not hand over individuals intended for extradition on terrorism or other charges unless the receiving government has given a specific guarantee that the rights of the individuals concerned, under Article 3 of the ECHR, will not be violated.

Therefore, the UNCAT stipulates that States Parties may not extradite a person to another State if there are good reasons to think the person would face torture. Although this need to protect people from torture is not expressly stated in general human rights agreements, it results from a State Party's

[108] *Ibid.*
[109] MOHER (2004:475).
[110] RAMSAY (2011:638).
[111] POLLARD (2005:365).
[112] DROEGE (2008:671).
[113] FULTON (2012:783).
[114] ANWUKAH (2016:11).

obligations under the ICCPR, ACHR, and African Charter on Human and People's Rights ('AChHPR') and is now recognized as an element of IL. The explicit non-refoulment commitment in the UNCAT and the implied obligation in other human rights treaties are absolute. They may not be weighed against State interests, such as national security or public order, like other responsibilities of States not to subject people to torture. The ECtHR rejected the claim that a State may seek a higher burden of proof of the danger of torture when the individual being deported poses a risk to its security interests. A given person does not necessarily face a significant risk of torture if they are repatriated to a State just because there is an ongoing pattern of severe human rights breaches in that State. However, the lack of a pattern of torture in a State does not necessarily mean that a specific person is not at risk. Additional evidence must demonstrate that the person would be in danger.

Diplomatic guarantees that someone being transferred to another State will not experience torture or cruel, barbaric, or humiliating treatment or punishment are only valid for nations that do not routinely abuse their citizens. It is not enough for the deporting State to demand guarantees that the deportee's rights would be maintained when there are good reasons to believe that a specific person poses a risk of torture in each State, even if there is evidence of a persistent pattern of torture in that State. When the deporting State agrees to these assurances, it must set up a monitoring system to ensure they are followed[115].

There are arguments to imply that governments have obligations to use their best efforts to stop torture from occurring outside their jurisdiction at its most general level, looking directly at the UNCAT. The Convention was established to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world". The Convention recognizes a group of crimes against IL that every State must prosecute regardless of where they may have been committed[116]. Comparatively speaking, the Genocide Convention only called for prosecuting crimes committed on a State's territory[117].

3. State Parties' Obligations

The rule against torture has become a permanent part of IL and is consistently denounced by most countries. Torturers are now viewed as *hostis humani generis*, enemies of all humans[118]. According to Article 2(1) UNCAT, all States are obligated to refrain from using torture and to take measures to prevent it from happening to people under their control. All law enforcement,

[115] KRETZMER (2010:11).
[116] UNITED NATIONS (1984:2).
[117] UN GENERAL ASSEMBLY (1948:2).
[118] MOHER (2004:471).

military, civilian, and other workers who might be engaged in the custody or interrogation of others must get training that includes instruction on the prohibition of torture[119]. Only Article 2(1) of the UNCAT imposes new responsibilities on governments to prevent torture. States are additionally responsible for stopping individuals in their custody from suffering cruel treatment while under the control of another State.

It has been argued that the non-refoulment obligation is a particular manifestation of a more general principle that States must ensure that their actions (whether by extradition or otherwise) do not expose a person to a significant risk of torture anywhere in the world[120]. This is because the non-refoulment obligation's foundation is the prohibition of torture itself. One could argue that any such restriction is geographically circumscribed because, in the non-refoulment scenario, the individual who is subjected to torture is, by definition, already under the State's authority at the time the State takes the risky action. Treaty authorities, such as the ECtHR, have emphasized the significance of this fact in establishing the difference between this situation and others where people beyond the jurisdiction were in danger of further violations by State action[121]. Does this imply that the general principle only holds when the potential victim is now under the State's jurisdiction? It has been persuasively claimed that a State's prohibitions on torture apply everywhere in the world, regardless of the location of the torture. The idea is that it does not[122]. This must also be true for the prohibition against putting someone in danger of torture. Although the relevant treaty organizations have not adopted this strategy, it must at least result from the universal, non-discriminatory ban on the use of torture included in customary IL.

The need to prosecute and punish is separate from the obligation to prevent torture. However, it is closely related and one of the best strategies to stop torture wherever it occurs. There is a compelling normative case that States must prosecute and punish, whenever possible, torture when they are in a position of control over another State and are collaborating with that State in a way that increases the danger of torture generally. In such cases, the State must do its best to prevent wrongdoing and wrongful acts[123]. The general repugnance against torture, the ban includes even possible breaches, and the prohibition gives rise to a claim for compliance accruing to every member of the international community serve as its three main pillars, according to the ICTY[124]. The conventional ban on torture, which is unrestricted by responsibilities particular to a given jurisdiction, lends greater credence to this argument. A State's failure to take action to reduce the risk of such torture

[119] KRETZMER (2010:8).
[120] POLLARD (2005:370).
[121] FULTON (2012:783).
[122] POLLARD (2005:364).
[123] ZIMMERMAN (2011:635).
[124] FULTON (2012:785).

must be viewed as internationally wrong when its behavior violates the absolute ban on torture and materially encourages or permits violations by another State to continue. In such cases, the State must be in a position of influence over the other State in question[125]. In this approach, the negative requirement to not support the danger of torture described in the previous section can be considered to reflect somewhat and flow from the positive obligation. The State is required to do its best to stop torture from taking place when its acts or inactions indirectly allow another State to conduct torture, and it is anticipated that such torture will take place or there is a serious risk that it will.

When there is a claim of torture or ill, and degrading treatment made by an "accused" or "suspect", governments are additionally required by IL to guarantee that an effective and independent inquiry is conducted. States do not, however, regularly use these measures[126]. Idealistically, serious accusations of unjust or degrading treatment should be followed by a thorough investigation. There are some procedural requirements, such as impartiality and transparency, that must be met to gauge the effectiveness of the investigation[127]. Despite the unequivocal prohibition on torture and the non-refoulment principle, nations work together to engage in torture violating IL as part of the fight against terrorism.

4. International Enforcement Mechanisms

Several international institutions are in place to ensure the torture ban is followed. The CAT evaluates State Party reports on the steps States Parties have taken to carry out their obligations under the UNCAT. After reviewing the reports, the CAT publishes its findings regarding the State Parties' adherence to their UNCAT duties and offers suggestions for increasing compliance. The only treaty body with authority to request an investigation into State practices is the CAT. According to UNCAT Article 20(1), the Committee shall invite the State Party in question to cooperate in the examination of the information and to submit observations concerning the information in question if it receives credible information that appears to contain well-founded indications that torture is being practiced systematically on its territory. The Committee must enlist the assistance of the concerned State Party whenever such an investigation is conducted. The CAT may go to a State Party's territory with that State Party's consent. Under UNCAT Article 20, all sessions are private. However, following an agreement with the State Party, the Committee may provide a summary of its conclusions in its yearly report. According to UNCAT Article 20, States Parties may state that they do not acknowledge the Committee's authority to investigate at the time of

[125] HAKIMI (2010:376).
[126] ANWUKAH (2016:13).
[127] PEJIC, DROEGE (2013:547).

signature, ratification, or accession. The CAT also evaluates and expresses its opinions on communications from individuals who allege that States Parties to the Convention that have agreed to the individual communications procedure have violated their responsibilities under the Convention. In recent years, many communications brought before the CAT have been about claims that States must abide by their non-refoulment duties. The Committee can investigate interstate complaints about UNCAT violations under Article 21 UNCAT. Although 61 States have acknowledged the Committee's jurisdiction, it has never been used.

The ECPT, which went into effect in 1989, had an optional protocol that went into effect in 2006. To avoid torture and other forms of cruel, inhuman, or degrading treatment or punishment, this Optional Protocol aims to "create a system of regular visits made by independent international and national bodies to facilities where persons are deprived of their liberty". To prevent torture and other forms of cruel, inhumane, or humiliating treatment or punishment, States Parties to the Optional Protocol must appoint or create national visiting bodies. It also establishes a special subcommittee to prevent torture and other cruel, inhumane, or degrading treatment or punishment. The purpose of the Sub-Committee is to travel to locations under the authority or control of States Parties where people may be deprived of their liberty and to advise States Parties on how to safeguard such people from torture. The Sub-Committee is also tasked with giving national visiting bodies advice, supporting them, and working in conjunction with international, regional, and national institutions and organizations to strengthen the protection of all people against torture and other forms of cruel, inhumane, or degrading treatment and punishment[128]. This cooperation is for the prevention of torture in general. These delegations have unrestricted access to detention facilities and the freedom to roam inside them. They can speak freely and in private with anyone who can provide information, including those deprived of their freedom. A report is delivered to the State Party in question and includes any suggestions the Committee for the Prevention of Torture ('CPT') may make based on the information gathered during the visit. The engagement with the affected State should continue after the release of this report. There have been 118 ad hoc visits and 178 periodic visits to States Parties since December 2010. The CPT has released 247 reports[129].

The HRC also keeps an eye on how States Parties to the ICCPR are abiding by their obligations not to torture people or subject them to cruel, inhumane, or degrading treatment or punishment through the system of States Parties' reports. When these messages concern States Parties to the Optional Protocol to the ICCPR, it receives communications from alleged victims of torture. The UN Commission on Human Rights appointed a Special Rapporteur on Torture

[128] KRETZMER (2010:13).
[129] *Ibid,* p. 14.

and asked him to report on his activities regarding torture, including the occurrence and extent of it, in 1985 to encourage the full implementation of the IL against torture. The Special Rapporteur's primary duties include visiting countries to get a firsthand account of the situation regarding torture, including institutional and legislative factors that support such practices; contacting governments when he receives credible information indicating that a person or group of people is at risk of being tortured by public officials, or with their consent or acquiescence, and bringing up allegations of torture. The UNGA and the HRC receive annual reports from the Special Rapporteur on his work.

Other responses were the Anti-terrorism Crime and Security Act 2001 was passed as part of the UK's response to the war on terror[130]. The Act limits certain civil liberties of foreigners suspected of supporting terrorism. Non-suspects may be detained solely for interrogation and intelligence collecting under the Australia Security Intelligence Organization ('ASIO') Security Legislation Amendment (Terrorism) Act 2002, which is inconsistent with Australia's legal obligation under the ICCPR.

Cohen contends that although IL calls for the prosecution of individuals accused of violating human rights, there has never been a historical instance where even a partial policy of criminal accountability has been put into place[131]. He highlights how challenging it is to establish justice in the courts comprehensively. It is difficult to convict and punish individuals guilty of serious atrocities committed under previous governments. Holding persons accountable for violations can be difficult during prosecutions and criminal trials. Criminal prosecutions are challenging in environments with a poorly functioning legal system, corrupted, compromised officials, a lack of witness protection programs, police and public prosecutors lacking investigative and case-building expertise, judges and prosecutors being underpaid, and courts lacking administrative support[132]. Trials being what Ackerman refers to as "constitutional moments", such as a socio-political drama that individualizes guilt, raises further concerns[133]. Trials tend to be narrowly focused on assigning blame for certain crimes to specific individuals rather than addressing and offering a more comprehensive justification of the system.

State and individual adherence to fundamental legal principles established in significant international treaties, including the UNCAT and the European Convention for the Protection of Human Rights and Fundamental Freedoms, is crucial considering human rights. Even though these international agreements allowed for derogations in the event of threats to national security,

[130] ANWUKAH (2016:3).
[131] COHEN (2001:228).
[132] RAMSAY (2011:637).
[133] ACKERMAN (1991:84).

any such derogation would have to abide by the country's obligations under IL. Most liberal countries' anti-terrorism policies counter their obligations under IL[134]. This has not been the case since 9/11. Numerous new agreements and laws have been passed or hinted in Australia, UK, Canada, and the US in the wake of the 9/11 attacks. Indefinite detention without trial or judicial review, the trial of terrorists by military tribunal, the removal of the right to silence and legal counsel, the listening in on attorney-client conversations, the use of torture and drugs to extract confessions, increased surveillance and lowered privacy protections, and significantly increased funding for the military and paramilitary police involved in "homeland" security are all measures that have been implemented or are seriously being considered[135].

5. Usefulness of Torture

Whether compulsion generates trustworthy intelligence is the subject of an ongoing, frequently contentious public discussion. Some contend that torture is the sole approach for obtaining information from the most committed and radicalized terrorists, some of whom have been taught to resist conventional, non-coercive interrogation techniques. One school of thought has even suggested "rupture warrants" to justify force[136]. This disregards the overwhelming evidence showing that many "fanatics, martyrs, and heroes" do not divulge trustworthy information while being tortured. With other subjects, coercion can frequently result in various psychological issues that either increase resistance or render a subject incapable of responding[137]. In contrast, opponents of coercive interrogation tactics typically claim that any evidence in favor of its effectiveness is anecdotal and devoid of proof that non-coercive approaches would not have produced the same outcomes. The two most frequently used defenses against the claim that coercion produces unreliable data are that coerced subjects of torture or other forms of coercion will say whatever they think the interrogator wants to hear[138].

5.1 Ticking Bombs

As evident from the brief historical perspective, torture was frequently used in courtroom trials. To secure a conviction, it was intended to elicit a confession. In contrast, torture has a different purpose when used to combat terrorism. Not getting a confession is the goal of torture; it is to get intelligence that will help stop a terrorist attack before it happens. The ticking time bomb paradigm is central to this new definition of torture. A bomb is detonated in the densely populated center of a large metropolis. While the bomb is detonating, the terrorist who planted it has been apprehended. He is the only

[134] PEJIC, DROEGE (2013:555).
[135] ANWUKAH (2016:18).
[136] DERSHOWITZ (2002:157).
[137] ARRIGO (2003).
[138] PREGENT (2012:533).

one with the knowledge required to disarm the device and prevent the loss of hundreds of lives[139]. So, the goal of this kind of torture is to spare lives. The goal of torture in the war on terrorism changed from getting a confession to getting knowledge that could save lives. Would the police have enough knowledge, such as the location of a bomb, to stop it from going off if such a circumstance ever occurred in real life and a person in detention was suspected of knowing about a planned terrorist atrocity? Before using cruel treatment, would the interrogator have known this with a high enough level of suspicion? How soon must a terrorist assault occur in terms of seconds, minutes, hours, or days? When would more aggressive questioning techniques be used if the torturer did not receive the desired information? Or at what point would it be acknowledged that a detainee did not know anything, or at the very least did not know anything that was specifically pertinent to the investigation? When a suspect is taken into custody, their conspirators may become aware that the authorities may soon learn crucial details, such as the location of a potential explosion. Does the so-called "ticking bomb" scenario, which is frequently used as justification for injuring a terror suspect, occur in practice, demonstrating the absolute nature of torture? Is there going to be a case when the police require information from a detainee immediately because otherwise, a bomb will go off? Does this kind of counterterrorism scenario genuinely correspond to real-world circumstances? Rumney recounted the ticking bomb allegory's historical inceptions and increased application since 9/11. He draws attention to the intriguing fact that the words "may" and "could" are frequently used while discussing the efficacy of interrogational torture[140]. The section focusing on each of the ticking bomb hypothetical's key elements – imminence, intelligence, the nature of the threat, the selection of people to be tortured, and effectiveness – is critical.

Rumney discusses all the main points of contention concerning each component, clarifies the critical distinction between ticking bomb intelligence and infrastructure intelligence, and, most importantly, emphasizes that proponents of the ticking bomb argumentation do not require that torture be successful as a condition for its use. In keeping with his vow to be as neutral as possible, Rumney then critiques people who find the ticking bomb hypothetical "unrealistic" after outlining his reservations over it[141]. Although he acknowledges that the hypothetical is utopian, he also cautions against opposing legislation that supports interrogational torture based solely on the absence of ticking bomb scenarios. He also urges that empirical data be utilized to back up all objections made by opponents[142]. Rumney's essential claim is that while there is evidence to support torture during interrogation, there is no evidence to support the use of alternative, non-coercive questioning

[139] BRUGGER (2000:662).
[140] RUMNEY (2015:53).
[141] *Ibid,* p. 60.
[142] *Ibid,* p. 65.

techniques as less successful[143]. Rumney reminds the reader of the vital distinction between infrastructure intelligence and ticking bombs, which is frequently overlooked. Theoretically, ticking bomb intelligence, which pertains to an impending attack, should be obtained by interrogational torture. Even so, it is infrequently, if ever, mentioned that planned assaults were impending or, if so, how impending in assertions that torture was effective in stopping them. In other words, while intelligence may not be immediately valuable, it may be in the long run. As a result, torture during interrogations may not be viewed as a purely emergency power, which is obviously in conflict with the current total ban on torture.

5.2 Unreliability and Unusability of Information

Torturing someone has repercussions because it continues a violent cycle that never ends. The citizens of those States are held just as accountable as the government and those who work for it. The citizens of those nations which use torture run a higher chance of falling victim to retaliatory terrorist attacks as innocent bystanders. Terrorists go so far as to use the horrible crimes that some have performed against others to justify targeting innocent bystanders. However, if there was a genuine chance that they had knowledge that could stop a terrible deed from happening and "intense questioning" was, likely, the only way to get this knowledge, do terrorists have the ultimate right to be protected from State harm? Perhaps the anti-torture right's strict prohibition might be loosened too. For instance, avoid a terrorist attack – a practice known as "preventative torture" – especially in the case of a ticking bomb.
Perhaps such intensive or "enhanced" questioning techniques should only be used in connection with potentially more serious terrorist acts[144]. Furthermore, torture is widely acknowledged to be fundamentally incompatible with any moral or legal system, to be "tyranny in microcosm", to produce information that is likely to be compromised in terms of reliability, and to have adverse effects on both those who use it and the societies and legal systems that sanction it[145].

The hypocrisy of torturing terrorist detainees has the power to radicalize individuals who would not often be associated with terrorism or acts of terrorism. Inadvertently supporting the objectives or ideology of the terrorist suspect is the employment of illegal tactics against terrorist suspects. Some innocent people join terrorism-related activities as they witness or learn about the type of treatment out of compassion for their ethnicity or religious affiliation. The failure of torture as a method of counterterrorism has another set of repercussions. One negative effect of overzealous torture programs to uncover suspects is torturing innocent persons. This can cause interrogators to

[143] *Ibid*, p. 78.
[144] TURNER (2012:4).
[145] GREER (2015:9).

receive inaccurate information. Suppose an innocent person is being subjected to torture while being treated like a terrorist suspect to extract information or a confession. In that case, his likely response will either be to remain silent because he does not know terrorism or to give his interrogator false information to end the treatment (torture) on him. In the latter scenario, the truthfulness of the information is irrelevant to the victim since he wants the torture to stop. There are other situations where torture has led to incorrect conclusions. For example, faulty intelligence gleaned through torture supported the case for the Iraq War. Another effect is that using torture as a weapon is an enormous waste of money because it is expensive and yields ineffective outcomes. For instance, US law enforcement personnel and operatives have squandered millions of dollars and countless person-hours pursuing several false leads[146].

Information about torture could be inaccurate for various reasons. Terror threats against the US and its allies have persisted since 9/11 and are still quite severe, Bush's comments have undoubtedly rekindled interest in the effectiveness of mistreating terror suspects[147]. A renowned British human rights lawyer, Philippe Sands QC, responded to recent claims by former US President George W Bush that methods of cruel treatment against terror detainees in Cuba "saved lives" by saying that while torture may produce information, it does not always produce reliable information, as every seasoned interrogator has repeatedly told him. Instead, it produces the information the subject thinks the interrogator wants to hear[148]. At Guantanamo Bay, three British men named Shafiq Rault, Asif Iqbal, and Rhuhel Ahmed allegedly experienced that after several months of seclusion and forced questioning, the men admitted to having been with Osama bin Laden in Afghanistan. As British Security Service ('MI5') officers eventually discovered the validity of their alibis, their three "confessions" were fraudulent. It has been suggested that the exact reverse happened to those who have claimed that the torture revealed Osama bin Laden's whereabouts in Pakistan: according to reports, Khalid Sheikh Mohammed, who underwent 183 waterboarding sessions at Guantanamo, did reveal to interrogators the existence of a Pakistani courier who was particularly close to the al-Qaeda chief, but this information was not revealed until after the torture had concluded[149]. However, it has been said to have been revealed via the use of torture at Guantanamo by Bush's former vice president, Dick Cheney[150].

IL acknowledges the accuracy of information obtained through torture. For instance, Article 15 of the UNCAT specifies that no statement made because

[146] ANWUKAH (2016:15).
[147] TURNER (2012:6).
[148] TURNER (2012:31).
[149] PREGENT (2012:516).
[150] TURNER (2012:20).

of torture may be used as evidence in any proceedings except to prove that the statement was made against the person who is accused of using torture[151].

For instance, a US Federal criminal court suppressed the testimony of a crucial prosecution witness in late 2010 because the defendant had revealed the witness's identity during forceful interrogation, and the witness would have testified that the defendant had purchased explosives from him. The defendant was subsequently exonerated of all charges save for one[152]. However, although only evidence obtained through torture is prohibited by Article 15 of the UNCAT, information obtained through other forms of cruel or inhumane treatment, such as humiliation, may be acceptable. Because the defendant, Rangzieb Ahmed, who is presently serving a life sentence in the UK, among other things, for having been a member of al-Qaeda, recently obtained the right to appeal against his conviction, these problems were extensively debated in the case of Ahmed. Ahmed alleged that he had suffered beatings, whippings, and sleep deprivation[153]. In that instance, the House of Lords had to decide whether evidence gained by torture might be used in administrative law cases. The judges unanimously agreed that it could not[154], using forceful language in their rulings to emphasize the absolute nature of the law against torture.

[151] PREGENT (2012:535).
[152] *Ibid*, p. 519.
[153] GEYER (2007:12).
[154] FULTON (2012:776).

CHAPTER II – American Interpretation and the Change in Adherence to International Law

President Bush issued an Executive Order that circumvented the Congress and unilaterally established a new parallel system of justice to deal with "terrorists" through the MCA[155], all of which contributed to the institutionalization of torture. He also determined that the Geneva Conventions did not apply to combatants captured in Afghanistan (the Taliban and Al-Qaeda)[156] and approved the use of EITs. The methods at Guantanamo and the interrogation guidelines released by the Secretary of Defense only worsened the conduct of government officials that could act under the Detainee Treatment Act ('DTA'). These soldiers and other military personnel deserve praise for becoming the protagonists of this awful chapter in modern history. The implicit institutionalization of torture, which was openly referred to in several legal documents as an acceptable interrogation method – a euphemism for torture – has been the sole exception. This policy and practices which have been publicly revealed are in violation of: US Constitution's Eighth Amendment which forbids "cruel and unusual punishment"[157]; the UNCAT, which the US ratified[158]; the 1907 Hague Convention on the Laws and Customs of War on Land, which is binding on the US; the Geneva Conventions, which the US ratified, and the Uniform Code of Military Justice ('UCMJ'), which in its war crimes provision and other provisions, violate this policy and the ensuing practices[159].

Sadly, many others have disregarded the situation, turned a blind eye, and broken their oath by complying with the political demands of the Bush Administration. For their clients to ultimately escape culpability, the Government lawyers did this by letting them rely on the OLC. Most of these clients are President George W. Bush, Vice President Dick Cheney, Defense Secretary Donald Rumsfeld, and former Attorney General John Ashcroft. Cofer Black, director of the CIA's Counterterrorism Center at the time, claimed in a subsequent Congressional testimony that "there was 'before' 9/11 and 'after' 9/11. After 9/11 the gloves come off"[160].

1. The Bush Administration

IL has been seriously questioned considering the American military response to the al-Qaeda threat. Following 9/11, the US's national security interests underwent a significant change. Any country that might be home to foreign

[155] BASSIOUNI (2005:389).
[156] PEJIC, DROEGE (2013:517).
[157] COLE (2003).
[158] UNITED NATIONS (1984), Article 19.
[159] Uniform Code of Military Justice, 10 U.S.C. §§ 801-941 (2000).
[160] OPEN SOCIETY JUSTICE INITIATIVE (2013:12).

terrorists capable of endangering US security interests was immediately and resolutely attacked by the Bush Administration with military action. As a result, in the fight against terrorism, established legal restrictions on using force had to make way for a new understanding of national security and, most countries complied with their domestic and international commitments. After 9/11, President Bush spoke on national television and declared that he would use all available tools to pursue not only the terrorists but also those who harbor them. Alternatively, to put it another way, all the guidelines were no longer applied[161]. The State must "dirty its hands with terrible things that must be done"[162], but within the bounds of the law, given that the West is up against enemies who could use nuclear weapons for terrorist attacks. Sadly, the reality has been quite different because of the atmosphere created after 11 September 2001, which allowed President Bush and his team to adopt measures almost entirely without opposition. The White House joined forces as resistance grew[163].

The President of the US has clarified that the country opposes torture and will never tolerate it. The Fifth, Eighth, and Fourteenth Amendments of the US Constitution are all directly in conflict with the use of torture. Some proponents of legalizing torture have claimed that each of these modifications has flaws, and that torture is legal under current law. Important court rulings emphasizing preserving personal liberty from political interference further support this claim. The use of torture is categorically incompatible with the Constitution. The Eighth Amendment prohibits all cruel and unusual punishment. Given that the amendment's authors were against torture, this prohibition would appear to cover it "mainly focused on banning torture and other cruel punishment methods"[164]. On the other hand, the Supreme Court has interpreted the Eighth Amendment to protect those who have been found guilty of crimes. Therefore, it makes sense that while the Eighth Amendment protects those convicted of a crime, others (such as POW or so-called "enemy combatants') are not. The Eighth Amendment would most likely be ineffective in cases involving suspected terrorists who have not yet been found guilty by a court of law, thanks to this loophole constructed under the pretext of the Supreme Court's interpretation. Even if torture were to avoid the Eighth Amendment successfully, it would almost definitely be ruled unconstitutional under the Fifth and Fourteenth Amendments' guarantees of due process.

Many international agreements that forbid the use of torture also bind the US[165]. International treaties are valid if they do not violate the Constitution. Standards of care for personnel taken prisoner were specified by the GPW of 1929, which applied to numerous nations throughout World War

[161] LELLIO, CASTANO (2015:1289).
[162] AGUIRRE (2009:150).
[163] *Ibid.*
[164] MOHER (2004:471).
[165] UNITED NATIONS (1984).

II. The Hague Regulations of 1907 and the GPW of 1929 and 1949, which governed the treatment of captured enemy combatants and applied these same standards to their capture and treatment, were the primary law of war treaties of the 20th century[166]. The US participated fully in their negotiation and ratification. The high standards of care mandated by the GPW of 1929 were upheld by the US Army Field Manual ('FM') published for use during and after World War II. According to the demands of the GPW Article 5, coercion was forbidden in the 1940 and 1945 interrogation field guides. The 1940 edition noted that coercion was ineffective and suggested "known law enforcement" techniques instead, adding that "resort to third degree or torture typically indicates that the examiner lacks ability or training or is too indifferent and indolent to utilize sound methods of interrogation"[167]. According to the Geneva Convention of 1949, the US is required to treat POW humanely[168]. The ICCPR, which forbids torture in all situations, likewise binds the US to its provisions[169]. Another subsidiary of the ICCPR ratified by the US in 1994 is UNCAT, which the US is a party. Recently, the State Department asserted that the UNCAT had been fully incorporated into American law. Every act considered torture under the UNCAT would be illegal under American law[170].

Moreover, according to Article 106 of the Organization of American States ('OAS') Charter, the IACommHR is one of the two supervisory institutions of the Inter-American system of human rights and a principal organ of the OAS. The IACommHR was established in 1959 and served as a regional oversight body, a promoter and defender of human rights, and has also had a considerable impact on the political development of OAS Member States by publicly denouncing human rights abuses[171]. The one of the first worldwide human rights document of the modern age was the American Declaration of the Rights and Duties of Man[172]. The Declaration of Independence lists civil and political rights[173] such as the right to life, liberty, and personal security, the right to freedom of religion and worship, the right to a family and its protection, the right to freedom of speech[174].

The US is a signatory to the Geneva Conventions, and its UCJM includes these conventions' prohibitions[175]. Federal laws prohibiting torture and war crimes were approved in 1990, and Congress approved the Torture Victim

[166] JACKSON (2015:103).
[167] *Ibid.*
[168] UNITED NATIONS (1949).
[169] UN GENERAL ASSEMBLY (1966).
[170] MOHER (2004:474).
[171] GROSSMAN (2021:2).
[172] *Ibid,* p. 1.
[173] ORGANIZATION OF AMERICAN STATES (1948).
[174] GROSSMAN (2010:3).
[175] AGUIRRE (2009:144).

Protection Act in 1992. Furthermore, *jus cogens* must be followed by the US, which means that the international community accepted and recognized by the as a norm from which no derogation is permitted, as stated in the Vienna Convention on the Law of Treaties[176]. In Federal Court, torture has long been recognized as an unchangeable breach of *jus cogens*, consequently requiring the US to refrain from using torture in any situation[177].

The UN Security Council adopted Resolution 1373 on 28 September 2001, requiring all nations to "take essential steps to prevent the commission of terrorist attacks". As a result of this call to action, governments around the globe rushed to pass laws[178]. The Department of Defense ('DoD') policy on the Law of War, incorporated into 1998 DoD Directive 5100.77, solidified this patchwork of rules and binding IL. When the GWOT started in 2001, the command called for military troops to:

> "Ensure that all members of their Components abide by the law of war during all armed engagements, regardless of how they are classified, as well as the law of war's guiding principles and spirit during all other activities"[179].

The "General Protection Policy", based on Common Article 3 of the Geneva Conventions, was never violated by the US military in interrogation or any other kind of treatment at the start of the GWOT[180]. The President reaffirmed the continuing significance of these safeguards and the US's responsibility to work for the abolition of torture under the UNCAT. He declares that any torture or other cruel conduct will be investigated and prosecuted by the US in all areas under their jurisdiction[181]. The report continues to emphasize the US position by reiterating legal obligations under US law and the US constitution, including awareness of the need to apply US law and the UNCAT extraterritorially and investigating and prosecuting violations. It also affirms the obligations of the US in the applicability of the UNCAT to the US Armed Forces in Afghanistan and Guantanamo Bay[182].

1.1 The Role of the Vice President and the Secretary of Defense

In 2001, Vice President Cheney issued a distressing warning stating that "out there, there are dirty matters, and we have to operate in this arena", therefore, "we must act in an unpleasant, dangerous manner if we are to defeat terrorism"[183]. The phrase "enemy burdened by bureaucracy or regulation – or any legal, moral, or structural restraints" was also used by Rumsfeld. Cheney

[176] UNITED NATIONS (1969).
[177] BOWDEN (2003:53).
[178] ANWUKAH (2016:17).
[179] JACKSON (2015:110).
[180] PEJIC, DROEGE (2013:518).
[181] UNITED NATIONS (1984), Article 19.
[182] BASSIOUNI (2005:391).
[183] AGUIRRE (2009:129).

spoke on the necessity for the US to operate "on the dark side", spend time "in the shadows", and "essentially employ any means at our disposal to achieve our purpose". EITs, black sites, ghost detainees, and even the GWOT are euphemisms for this conflict. Its torture tactics, extraordinary rendition, drone strikes, targeted assassinations, and military commissions represent the rapid descent into the abyss[184].

According to Cheney, EITs provided "phenomenal" results; without them, the US would not have been able to find Osama bin Laden[185]. In February 2009, Cheney vehemently defended the need for "tough, cruel, ugly, nasty" methods to maintain national security. He thought that the rules put in place were essential for the US to survive the past seven years without suffering a significant casualty attack[186]. Bush agreed that harsh interrogation methods and CIA renditions were required to stop another 9/11. Former Bush speechwriter, Marc Thiessen, claimed that waterboarding was morally acceptable and effective. These arguments contributed to the loss of moral and legal certainty on torture in the US[187]. The former President acknowledges in his recently released autobiography, *Decision Points*, that he gave the consent for the CIA to employ waterboarding and other EITs while vehemently defending their use because "my most solemn mission as president was to protect the country"[188]. Bush, Cheney, and Rumsfeld did not welcome much disagreement. The Vice President and Secretary of Defense were essentially aggressive and ruthless realists, with the religiously minded President falling prey to the seductive promise of achieving American greatness through militantly executing God's work. The Al-Qaeda attacks served as the ideal justification for Cheney's campaign for unrestricted presidential power and Rumsfeld's campaign for a modernized military. The OLC, housed under the Department of Justice ('DoJ'), was established by Rumsfeld, as a group of officials and consultants on security and legal matters. These figures included Alberto Gonzales, a former US attorney general and advisor to the White House, John Yoo, a lawyer, and Lieutenant General William G. Boykin[189]. This legal team played a crucial part in redefining the way the US battled terrorism, blurring the lines between coercive interrogation and torture, bolstering the executive branch, attempting to redefine US compliance with the Geneva Convention, encouraging active complicity of allies, and legitimizing the restriction of civil liberties in the US[190]. According to Bassiouni, the Bush Administration "essentially re-wrote the law under the

[184] ASTORE (2016).
[185] MCGREAL (2011).
[186] HARRIS, ALLENA, VANDEHEI (2009).
[187] DAVIDSON (2014).
[188] BUSH (2010:169).
[189] AGUIRRE (2009:124).
[190] *Ibid,* p. 125.

euphemistic pretext of interpreting it", lawyers for the Government plotted with former Vice President Cheney[191].

If Cheney and his top advisers, David Addington, and Scooter Libby, were incredibly successful in controlling much policy by regulating the paper flow and attendance at meetings and subsequently by regulating which Executive Branch officials were in or out of the game of decision-making, whether on energy policy, environmental policy, or prisoner policy, it was because Bush allowed that to happen. It is because the President let the Vice President – and his supporter, Secretary of Defense – win the internal fights that National Security Advisor Condoleezza Rice and Secretary of State Colin Powell frequently found themselves on the outside looking in during Bush's first administration[192]. Because Bush surrounded himself with weaker legal figures like attorneys Alberto Gonzales and Harriet Miers, who were no match for the brash and outspoken Addington, who may have ended up being a key architect of much of Cheney's prisoner policy. Bush's lack of attention to detail gave Cheney, Rumsfeld, and their advisors plenty of room to maneuver[193]. Bush's inexperience and carelessness gave rise to the "co-presidency" of Bush and Cheney, with Cheney initially in charge of matters such as detainee policy and national security[194]. William Haynes, the chief civilian attorney at the Pentagon, served as Rumsfeld's primary prisoner affairs advisor. As we shall see, he collaborated closely with Addington to frequently preempt their concern for military dignity and the Geneva Conventions by excluding essential military attorneys from significant prisoner treatment decisions[195].

The US-DoJ saw torture as harsh behavior. The victim typically finds it difficult to tolerate severe discomfort. If the pain is bodily, it must be of a degree comparable to that which comes along with serious physical harm, such as organ failure or death. To experience severe mental anguish, one must endure not only immediate psychological harm but also long-lasting psychological harm, as is the case with mental diseases like post-traumatic stress disorder. Due to the extreme nature of acts that constitute torture, there is a broad spectrum of actions that, while they may be cruel, inhumane, or degrading treatment or punishment, may not qualify as torture[196]. A new memorandum with a revised definition of "torture" was issued in 2004 to replace this one, which was later withdrawn. The term "torture" is still used to refer to only the most extreme acts of brutality[197], even if the new interpretation abandoned the idea that severe pain must be of an intensity

[191] BASSIOUNI (2010:105).
[192] FORSYTHE (2011:28).
[193] FEITH (2008: 62).
[194] WARSHAW (2009).
[195] FORSYTHE (2011:39).
[196] GREENBERG, DRATEL (2005:213).
[197] GREENBERG (2005:326).

comparable to that of serious physical injuries, such as death or organ failure[198].

According to a report on US accountability for abuses by the International Centre for Transitional Justice ('ICTJ'), the evidence suggests that DoD officials pressured commanders on the ground to deliver intelligence, which led those commanders to request authorization and use harsh interrogation techniques[199]. High-ranking officials in the Bush Administration granted the CIA and DoD's requests for permission to deploy cruel methods on prisoners. The mistreatment that followed was made possible by President Bush's important determination that members of Al-Qaeda and the Taliban were exempt from the Geneva Convention's restriction on coercive interrogation. Various interrogation methods that breached the ban on torture and cruel treatment followed Rumsfeld's approval, first in Guantanamo, then in Afghanistan and Iraq[200]. The OLC's senior Bush Administration lawyers provided the legal justification for the interrogation program. Supporters of the torture program have grown more confident due to the lack of criminal prosecution or other kinds of responsibility. The Bush Administration dismisses more and more lawsuits before they even begin. As a result, the rights of torture victims to redress and remedy cannot be upheld, suffocating the law's effectiveness. For instance, after he left office, Bush admitted personally approving the waterboarding of terrorist suspects, which he had justified as necessary to safeguard the country's security[201]. Bush also asserted that it was legal to conduct waterboarding, citing the advice provided by his attorneys[202]. The Bush Administration and its acts, supported by national apathy, are comparable to earlier historically oppressive regimes, which the US has made openly denouncing a national pastime. Bassiouni spends little time and language in bringing this out. Bassiouni clarifies that the Bush Administration refers to the DoJ, the White House, and the DoD[203].

Despite being a signatory to all Conventions, the Bush Administration is the first in decades to be actively working to mainstream the use of torture and other cruel treatment. National legislation is prioritized over IL to exercise more local authority and persuade other nations to contest the instruments for defending human rights[204]. The first goal was to undermine the international order, and the second was to increase US dominance over other nations inside the multilateral system. Thirdly, it sought to restrict civil rights, and fourth, aimed to strengthen the Executive's control over the Judicial and Legislative arms of government.

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198 *Ibid,* p. 361.
199 PLUM, MARGARRELL, WIERDA (2009:12).
200 RAMSAY (2011:629).
201 BUSH (2010).
202 HAFETZ (2015:440).
203 BASSIOUNI (2010:52).
204 LAGOS, RUDY (2003:425).

2. The Role of Office of Legal Counsel

Tom Parker's book, *Avoiding the Terrorist Trap*, illustrates how overreacting by States can polarize the opposition and give a terrorist group legitimacy. Attacks are planned to cause an overreaction because terrorists know that States will retaliate to their actions[205]. He points out that, because politicians in democracies are more in tune with the electorate, they are more prone to overreact[206]. Rules for law enforcement must be established by the law, follow due process, and be "reasonable, necessary, and proportionate to the threat posed by criminal behavior"[207]. Investigative interviewing that complies with human rights law provides a chance to gather crucial intelligence when terrorists are apprehended. Instead of abusing individuals physically and mentally, authorities should work to win their trust. Cooperation is more likely to result from respectful treatment.

It has been painfully shown that the US has broken several critical legal frameworks, including its Constitution[208]. The three branches of government argued that by failing to "assert its constitutional prerogatives", the legislative branch supported the policy and practices of torture, much like how the judicial branch failed to uphold the rule of law, allowing the executive branch to implement its policy of torture[209]. The institutionalization of the crime of torture began when the civilian leadership of the DoD ignored the Judge Advocates General of the various branches of the military and senior non-lawyer military officers. Their knowledge of the law and sense of honor caused them to oppose such practices by the US military. These brave men and women in uniform who fought torture undoubtedly thought about the repercussions of such actions in terms of retaliation by the US adversaries against its military members, even if such actions are against IHL. The civilian lawyers in the DoD, the DoJ, and the White House used their legal expertise to undermine the law after the military lawyers and others were excluded from all discussions and duties. They broke the US Constitution and the US laws, which they had sworn to uphold, and the legal profession's ethics. Alberto Gonzalez, John Yoo, Jay S. Bybee, assistant attorney general and now a federal judge, and William J. Haynes II, general counsel for the DoD, used their expertise to defend seriously dubious positions[210]. These legal opinions and other government memoranda were drafted and presented to allow the

[205] PARKER (2019:99).
[206] *Ibid,* p. 142.
[207] PARKER (2019:491).
[208] BASSIOUNI (2010:98).
[209] *Ibid,* p. 186.
[210] GREENBERG, DRATEL (2005:215).

Administration's leaders to establish a policy that these legal advisors knew or should have known were in violation of US law and IL[211]. These legal advisors tried to tread the fine line between moral and legal objection. Arguments that the definition of torture should be changed to allow actions that would otherwise be prohibited, as well as claims that some fighters are exempt from the Geneva Conventions' application to the laws of armed conflict[212], may be made at some time. As a result, in blatant violation of Article 5 of the GPW, warriors who fought for the Taliban were arbitrarily determined not to be entitled to any benefits under that convention. These legal interpretations by capable government attorneys – who knew that lawyers and others would find them to conflict with US law and IHL – raise significant concerns about their legal and moral obligations.

Several legal opinions written by the Justice Department's OLC and supported by Alberto Gonzalez significantly altered the law of war interrogation and treatment paradigm used for GWOT[213]. The "status" problem raised in the previous chapter and the Taliban and al-use Qaeda's of Article 4 of the Geneva Convention on POW dominated the legal discussion. However, there was also much discussion about the complexity of interpreting the Common Article 3 requirement for humane treatment and how US officials would be affected by the War Crimes Act ('WCA'), which carried criminal penalties for vague Common Article 3 infractions[214]. According to Gonzales, the language of Common Article 3 of the Geneva Convention on POW is "undefined" since it forbids conduct that might be necessary "in the course of the war on terrorism", such as "outrages upon personal dignity" and "inhuman treatment"[215]. Colin Powell, and his legal adviser, William Howard Taft IV, tried to persuade the President that the Geneva Conventions should be applied to combat in Afghanistan because of reciprocity and our "international legal commitments". Powell underlined that despite maintaining "our flexibility under domestic and international law"[216], applying the Geneva Conventions to the conflict "provides the strongest legal foundation for what we intend to undertake". The State Department's objections were dismissed, and the legal minimum standards of Common Article 3 were virtually abandoned in favor of a nebulous "humane treatment" criterion solely. The President's subsequent

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[211] WALLACH (2004:566).
[212] BASSIOUNI (2005:400).
[213] Memorandum, U.S. Dep't of Justice Office of the Legal Counsel, to Counsel to the President (7 February 2002), *Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*, available *online.*
[214] Draft Memorandum, Yoo, Deputy Assistant Attorney General, U.S. Department of Justice & Delahunty, Special Counsel, U.S. Department of Justice, to General Counsel, U.S. Department of Defense (9 January 2002), *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, available *online.*
[215] JACKSON (2015:111).
[216] Memorandum, U.S. Sec. of State to Counsel to the President and Assistant to the President for National Security Affairs (26 January 2002), *Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan*, available *online.*

statement further complicated the situation and made it more challenging to determine how the law should be applied to the care of Taliban and al-Qaeda prisoners. The Taliban were found to violate Article 4 of the Geneva Convention on POW, which required them to carry their arms openly, wear distinctive insignia, and comply with the law of war. As a result, the President declared on 7 February 2002, that the Geneva Conventions did not govern the conflict with al-Qaeda and that the Taliban were not subject to Geneva Convention. The US Armed Forces shall continue to treat prisoners humanely and, to the degree necessary and compatible with military necessity, in a manner consistent with the principles of Geneva, as a matter of policy, he did nonetheless invoke[217].

In an article for his employer Jay Bybee, John Yoo gave William Haynes, the DoD General Counsel, an opinion on legal interrogation methods in August 2002[218]. This controversial "Torture Memorandum", which Yoo's successors later rejected, gave wide latitude for how interrogations were conducted. These documents produced the "golden shield" requested by the CIA to insulate the Administration from possible war crimes prosecution. These memos explicitly defended the highly aggressive techniques sanctioned by Rumsfeld while rejecting the application of the Geneva Conventions to detainees from the war in Afghanistan. These detainees were reclassified as enemy combatants[219] and offered a new definition of torture to assist US interrogators in avoiding prosecution. Yoo's view requires "specific intent" to break the law, which US officials who relied on it are likely not to have. Additionally, he explained that "severe mental pain" can only exist if there is "lasting psychological harm, such as seen in mental disorders like post-traumatic stress disorder" and that "severe physical pain" must be "so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result"[220]. Finally, Yoo proposed that anyone forced to employ torture to extract crucial information about an impending al-Qaeda danger to national security could claim "necessity" and "self-defense" as legal defenses[221]. This legal opinion laid the foundation for a proposal for DoD personnel to use interrogation techniques forbidden by the Geneva Conventions and the "minimum humane treatment" clauses of Common Article 3.

Other classified legal opinions on specific techniques allegedly followed this legal opinion. US Senator Richard J. Durbin stated that John Yoo and Jay

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[217] Memorandum, President Bush, to Vice President et al. (7 February 2002), *Humane Treatment of al Qaeda and Taliban Detainees*, available *online.*
[218] Memorandum, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Counsel to the President (1 August 2002), *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, available *online.*
[219] HUMAN RIGHTS FIRST (2008:7).
[220] SCOTT (2016:158).
[221] *Ibid*, p. 159.

Bybee, the writers of the infamous Torture Memorandum, "may maintain their law licenses, but they will not escape the verdict of history" after the Justice Department decided not to pursue disciplinary action against them[222]. The verdict will indeed be decided by history, if only because of the superior position that its decisions hold in the temporal spectrum. However, the actions that a State takes – or does not take – in response to the conduct of significant human rights abuses impact historical judgment.

2.1 Unitary Executive Power

The attempt to increase the President's power and his cabinet because the Head of State should make all crucial decisions during times of war has been related to the legitimization of torture. Applying this reasoning suggests that the President should have discretion and that Congress should not have any influence over his ability to declare war, handle foreign policy, or enact domestic and international legislation. In times of crisis, he serves as the military's Commander in Chief. Given that Bush's Administration frequently said that the fight against terrorism would be protracted, this presidentialism would be acceptable because the US would be perpetually under a state of emergency[223]. The Administration officials who personally approved and authorized the techniques, including the President, the Vice President, Attorney General John Ashcroft, National Security Advisor Condoleezza Rice, and Secretary of Defense, should be the first to face criminal charges[224]. Leaders with command responsibility, *de facto* or *de jure* power "may also be accountable for dereliction of duty concerning acts of torture committed by subordinates" when they should have known that the subordinates were using torture and had the chance to stop it[225].

Due to their unique role as the gatekeepers of legality, lawyers are even more accountable than other essential actors. By providing illegal policies with legal legitimacy, they misused their position of power. They were the ones who made the most contributions to this violation of the law. Thus, bringing them to justice would help to reassert the legality of everything[226]. Between September and August 2002, Yoo authored several studies, referred to as memorandums, in which he asserted that the President could declare war, determine foreign policy, and order torture if it did not immediately threaten life. David Addington, who served as Vice-President Cheney's security advisor from 2001 to 2005, collaborated closely with him. Addington was essential to Cheney's authoritarian vision and had a crucial role in defining US policy on the use of torture[227]. Yoo has given the President justifications

[222] LICHTBLAU, SHANE (2010).
[223] AGUIRRE (2009:136).
[224] RAMSAY (2011:636).
[225] PAUST (2009:1575).
[226] RAMSAY (2011:637).
[227] COLE (2007).

for using these unusual tactics, for holding terrorist suspects or potential terrorists in custody without charges, and for sending detainees to nations where they can be interrogated in ways that are illegal in the US[228]. By defining an unconventional war in this way, the attorney attempts to defend presidentialism by drawing on instances in American Constitutionalism's past when the executive branch enjoyed greater independence[229].

This Administration has made significant progress toward institutionalizing the presidency's power, decisively and fundamentally reducing the influence of Congress, and reforming the law. The starting point was the regressive action taken by the Bush Administration and Congress's complacent stance in 2001. In general, transitional justice is linked to regime change, usually when it comes together with democratization, the reconstruction of States, and the reconstitution of national communities, frequently following a protracted period of armed conflict. However, it has also been used better to comprehend the accountability procedures of stable and developed democracies, particularly when States violate grave human rights while fending against challenges to their security, such as terrorism. Given President Obama's efforts to cast his Administration in the language of change, it is especially appropriate to utilize transitional justice as a heuristic for evaluating the wrongdoings carried out by the US during the war on terrorism[230].

3. Acts to Deter and Punish Terrorism

After 9/11, it had been extensively researched and documented that the US used torture to gain intelligence by al-Qaeda suspects. Freedom Of Information Act ('FOIA') lawsuits, leaks by government officials, congressional investigations, and political and public pressure had all combined to help reveal many of the details surrounding the US mistreatment of terrorism suspects at Guantanamo, Abu Ghraib, and secret CIA-run black sites. NGOs have assembled in-depth reports analyzing the campaign of torture[231]. The remaining portions of the Senate's investigation into the CIA's torture program are among the details that have still not been made public[232]. To avoid extending IHL rights to people under its control, the Bush Administration tried to define the war broadly. Its definitions of the enemy and the armed conflict protected officials from legal action under the WCA, which punished severe violations of the Geneva Conventions, including any violation of Common Article 3[233]. This allowed for the military treatment of terrorist suspects, which took place outside the protections of the civilian justice system. To maintain secrecy and avoid court review, the Government

[228] LAGOS, RUDY (2003:428).
[229] AGUIRRE (2009:137).
[230] HAFETZ (2015:430).
[231] *Ibid,* p. 431.
[232] SIEMS (2012).
[233] UNITED STATES CONGRESS (1996).

kept detainees incommunicado at offshore prisons, ranging from CIA black sites to Guantanamo, lowering the possibility that questions would be raised about the legitimacy of its activities. The Administration claimed that because detainees in the war on terrorism were exempt from the Geneva Conventions, these restrictions did not apply to them[234].

Terrorism is portrayed as a massive threat and, in addition to endangering our lives, it also imperils "our way of living" and "civilization" to the point that any existing international norms are seen as insufficient. To prevent terrorism, the US kept more than 700 detainees at Guantanamo in 2002, and 400 were still being held there as of 2007. Most prisoners had been held for more than four years and were denied access to legal safeguards, such as those provided by the Geneva Convention. As a result, in times of emergency, countries turn to torture to obtain quick intelligence and thwart terrorist threats[235]. The spirit of IL maintained a complete ban on torture despite these defenses. The Bush Administration ignored torture's condemnation and developed a legal justification for it. This actively undercut the norm's prescriptive status, significantly impacting US and international conduct[236].

Post 9/11, the Bush Administration tried to use the anti-terrorism counter-norm to justify torture during interrogations and incarceration without charge. A grieving and stunned American public embraced the declaration of a state of emergency as a necessary counterterrorism action. Even some well-known human rights activists considered weakening the prohibition on torture because they believed it to be a "lesser evil"[237]. The early lack of internal and external conflict resulted from the first counterterrorism agreement embraced by US partners. Scholars, international and domestic human rights organizations, the media, local legislatures, Supreme Court justices, and individuals working for the organizations[238] that developed and frequently secretly carried out the Bush Administration's illegal policies nevertheless mounted a strong critique. Some of these people and NGOs successfully exposed these practices and, if not put a stop to them, at least reined in their excesses.

3.1 The USA PATRIOT Act

"Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001" is the USA PATRIOT Act full name[239]. This law aims to improve law enforcement investigative tools and deter and punish terrorist crimes in the US and abroad,

[234] ANWUKAH (2016:4).
[235] AGUIRRE (2009:129).
[236] LELLIO, CASTANO (2015:1280).
[237] *Ibid,* p. 1279
[238] AGUIRRE (2009:124).
[239] UNITED STATES CONGRESS (2001:1).

among other things[240]. These instruments are used to strengthen US measures to prevent, detect, and prosecute international money laundering and the financing of terrorism; to subject foreign jurisdictions, foreign financial institutions, and classes of international transactions or types of accounts that are susceptible to criminal abuse; to require all appropriate elements of the financial services industry to report potential money laundering; to strengthen measures to prevent the use of these instruments; and to monitor them more closely.

The Foreign Intelligence Surveillance Act ('FISA') and its application could be an intriguing model for a torture warrant procedure. The US Government established FISA as an extension of the public judicial system to execute search warrants against alleged terrorists and spies covertly. The Foreign Intelligence Surveillance Committee ('FISC') was the court where FISA was first formed, which gave specially designated judges the authority to approve surveillance to gather foreign intelligence data in specific situations. The 2001 USA PATRIOT Act increased the seven-judge FISC court to eleven judges. Insofar as an eleven-judge panel might help expedite decisions on torture warrants and make difficult decisions with ticking-bomb terrorists, this model can be applied to the torture warrant idea. Sadly, as altered by the USA PATRIOT Act and other laws, the FISC paradigm has also proven to be a physical manifestation of the critics' worst nightmares. Case files and records concerning FISC search warrants are sealed and may only be disclosed under specific circumstances[241]. Additionally, according to the annual reports submitted to Congress for 2002, the FISC had authorized search warrants in 1,226 out of 1,228 petitions[242]. The FISC, the supplementary appeals council to the FISC, authorized the final two. The system's goal would be flatly defeated if applications for torture warrants were always approved. Additionally, sealing the documents would be contrary to the principles of accountability and transparency. Torture would only be justified if a proper warrant system was implemented under a system that considered these fundamental problems with government-run tribunals[243].

It should be noted that the USA PATRIOT Act broadened the US's maritime and territorial jurisdiction to include "premises of any diplomatic, consular, military, or other US Government missions or entities in foreign States, including the buildings, part of the buildings, and land appurtenant or ancillary to that, or used for these missions or entities, irrespective of ownership"[244]. This means that all the locations mentioned above can be under the territorial jurisdiction of the US. As such, they are no longer considered to be outside the US's territorial jurisdiction for the jurisdictional application of the Military

[240] *Ibid,* p. 2.
[241] MOHER (2004:488).
[242] ASHCROFT (2003).
[243] MOHER (2004:489).
[244] BASSIOUNI (2005:411).

Extraterritorial Jurisdiction Act ('MEJA'). However, since 2005, the application of MEJA has depended on the procedural guidelines issued by the DoD. Under these purposefully drawn complex procedures, it has been impossible for the DoJ to prosecute any civilian contractor, irrespective of the crime[245]. Through this legal rule, civilian contractors escape all sorts of criminal prosecution for their actions abroad, regardless of the crimes they may have committed. Part of the legal evasion scheme has also been to assign the interrogation of detainees, which includes the use of torture, to contractors operating under an award by a federal agency other than the DoD. As a result, MEJA and the DoD regulations mentioned above would not apply to such non-Department contractors[246].

Most of the modifications to monitoring law enacted by the USA PATRIOT Act were already on a long list of requests from law enforcement that Congress had previously refused, in some cases more than once[247]. In the tense weeks following the 11 September attacks, the Bush Administration intimidated Congress into changing course. These country's surveillance laws significantly increased the Government's ability to spy on its people while also weakening the checks and balances that would have allowed the public to challenge government searches in court and judicial scrutiny[248]. The USA PATRIOT Act expands the government's surveillance powers in the record, secret searches, and intelligence searches. It also increases the government's ability to look at records of an individual's activity kept by third parties and conduct secret searches on private property without the owner's knowledge. It broadens a specific Fourth Amendment exemption made for "trap and trace" searches and the gathering of foreign intelligence data[249].

3.2 The Withdrawal from the Rome Statute

The US participated in the negotiations that led to the creation of the Rome Statute, and US President Bill Clinton signed the Rome Statute in 2000. However, he did not submit the treaty to the Senate for ratification. In May 2002, the Bush Administration withdrew the Rome Statute, sending a note to the United Nations secretary-general that the US no longer intended to ratify the treaty and did not have any obligations toward it. According to commentators[250], the US was concerned that the ICC would have jurisdiction over its nationals; nevertheless, the departure coincided with US plans to use EITs for interrogation. Rumsfeld stated that the ICC's "flaws" are "particularly troubling in the middle of a difficult, dangerous war on terrorism" because they raise the possibility that "the ICC could attempt to

[245] *Ibid,* p. 415.
[246] BASSIOUNI (2005:416).
[247] *Surveillance under the USA/Patriot Act* (2010).
[248] *Ibid.*
[249] *Ibid.*
[250] HUMAN RIGHTS WATCH (2002).

assert jurisdiction over US servicemembers, as well as civilians, involved in counter-terrorist and other military operations"[251]. On 1 August, the DoJ told the White House that US interrogators could not be the subject of a criminal inquiry or prosecution over the interrogations of al-Qaeda members since the US had removed its signature from the Rome Statute. This occurred three days before Abu Zubaydah's 'aggressive' round of interrogation.

Even though the US is not a signatory to the Rome Statute, there are some instances in which the ICC may exercise jurisdiction over US citizens who have committed crimes that fall under the Court's purview. The use of such jurisdiction is nevertheless subject to restrictions. In three circumstances, the Rome Statute grants the ICC jurisdiction over nationals of non-parties. First, the ICC may prosecute such citizens if the UN Security Council submits a situation to the ICC Prosecutor. Second, non-party nationals will be subject to the ICC's jurisdiction if they committed a crime on the territory of a State that is a party to the Rome Statute or has acknowledged the Court's jurisdiction over that crime. Thirdly, nationals of a non-party will fall under the purview of the ICC when the non-party has granted permission to exercise jurisdiction over a particular crime. The agreement of the State of Nationality is not a requirement for the exercise of ICC jurisdiction in the first two circumstances. It should be noted that several of the US' complicit partner States, as identified by AI, in the case of the extraordinary rendition program for HVDs – whether they be the State where the arrest and abduction occurred, the State that allowed for air transfers between detention facilities, or the State of custody – are signatories to the Rome Statute. Even though the US is not a State party, Article 12(2)(a) states that the ICC may exercise its jurisdiction over the actions of non-party State nationals who are alleged to have committed crimes under the Rome Statute while on the territory of, or while aboard, an aircraft registered in, a State party to the ICC. AI lists the following nations as parties to the Rome Statute and involved in various stages of the situation: Poland, Lithuania, Djibouti, Romania, the UK, Macedonia, Germany, Afghanistan, Georgia, and Jordan.

Nevertheless, according to the analysis above, the ICC has jurisdiction over US citizens as well as citizens[252] of complicit nations that are not parties to the Rome Statute, like those of Thailand, Morocco, and Pakistan, when they are discovered on State party territory after having committed a crime under the Rome Statute. Thailand, Morocco, Pakistan, Iran, Egypt, and the United Arab Emirates are the other complicit States that AI has identified; regrettably, they are not signatories to the Rome Statute. As a result, the Court lacks jurisdiction over crimes committed on these States' soil. The fragmentation of the situation's jurisdictional reach makes prosecution more challenging. The network of criminals' coordinated cover-up only makes this situation

[251] LAU (2016:1268).
[252] HUMAN RIGHTS WATCH (2002).

worse[253]. It also raises questions about the ICC's jurisdictional boundaries, such as those related to immunity. The ICC may request the arrest and surrender of serving State officials without *ratione personae* immunity as well as former officials where the alleged crime falls under the purview of universal jurisdiction due to the development of the principle of universal jurisdiction concerning the enforcement of international criminal law. Those in the Bush Administration's higher echelons might argue that immunity is a defense. Aside from limited exceptions under customary IL, specific international agreements may forbid surrendering to the Court of some non-party citizens who are already present on the territory of ICC parties. When the ICC requests a person on their territory, Article 98(2) of the Rome Statute essentially permits countries to uphold their duties under bilateral international agreements to stop the transfer of such persons to the ICC. Agreements under Article 98(2) may limit the Court's jurisdiction to seize non-party citizens from the territory of some State Parties. Article 98(2) agreements may restrict the jurisdiction of the ICC over nationals of non-parties because the ICC is not authorized to ask the non-party to transfer the accused to the Court.

3.3 The Detainee Treatment Act

In response to mounting public outrage over allegations of detainee mistreatment, Congress later passed the DTA of 2005, which forbids torture and other cruel, inhuman, and degrading treatment against anybody in US custody[254]. The DTA, which "established the legal standards for treatment of detainees wherever they are held"[255], was signed into law on the same day the President declared that "the United States does not torture"[256]. This new legislation governing detainees' treatment emphasized how terrorists are treated (so-called unlawful combatants). Cruel, inhumane, or humiliating treatment is expressly forbidden by the DTA[257], which defines it as behaviors that violate the US Constitution's 5th, 8th, and 14th Amendments[258]. The Due Process Clause[259] in the 5th and 14th Amendments applies to preventive interrogations, and the Supreme Court's test for assessing when harsh treatment infringes on that clause is whether it "shocks the conscience"[260]. This clause includes DoD and law enforcement activities (e.g., CIA) that occur inside and outside the US[261].

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[253] LAU (2016:1273).
[254] UNITED STATES CONGRESS (2005).
[255] ARSENAULT (2017:161).
[256] LAU (2016:1269).
[257] UNITED STATES CONGRESS (2005), Title X.
[258] *Ibid*, Title X, 1003 (a).
[259] *Ibid*, Title X, 1003 (d).
[260] GARCIA (2009:3).
[261] *Ibid*, p. 2.

The DTA restricts the techniques that can be used to question people who are in custody, under the DoD's effective control, or who are being held in a DoD facility to those that are outlined in the US Army FM on Intelligence Interrogation[262]. The FM expressly forbids the use of military dogs and tactics like waterboarding[263]. The only permitted methods of questioning are those specified in the FM. The approaches that have been deemed acceptable include "soft techniques" like direct inquiry, deception, and rewards, as well as "harsher" methods like "separation", which to some extent permits solitary confinement, sensory deprivation, and sleep deprivation[264]. However, this further restriction on the FM-approved techniques did not apply to CIA operatives questioning HVDs in secret detention facilities. President Bush vetoed legislation restricting the CIA only to employ interrogation methods approved by the FM[265]. Considering this, all "enemy combatants" captured in the GWOT must henceforth be protected against torture and other cruel, inhuman, or degrading treatment strictly limited to the methods authorized by the FM[266].

By stating that the UNCAT's ban on cruel, inhuman, and degrading treatment applied extraterritorially and encompassed everyone held in US custody, the DTA was intended to bridge a perceived gap in US detention policy. However, even prior to the DTA's adoption, the OLC had already created further classified memos that came to the same conclusion that the GWOT interrogation techniques did not amount to cruel, inhumane, or humiliating treatment[267]. The memos aimed to strengthen liability defenses for a succeeding administration and allow the CIA to continue using interrogation methods authorized after 9/11. The main goal of these latter OLC memos may be viewed as shielding against accountability for previous behavior rather than aiding future action since the Bush Administration had by then stopped deploying several EITs. The memoranda went so far as to assert that neither torture nor harsh, inhuman, or humiliating treatment was involved when the methods authorized in the August 2002 memo were applied, even when combined[268].

Decisions made by the Supreme Court to uphold detainee rights met with a similar backlash; regardless of how the armed war against al-Qaeda was framed, the Supreme Court ruled in *Hamdan v. Rumsfeld* in 2006 that Common Article 3 of the Geneva Conventions extended to all prisoners detained by the US[269]. Hamdan's most significant long-term impact was on

[262] UNITED STATES CONGRESS (2005), Title X, 1002.
[263] MAHFUD (2014:226).
[264] CRELINSTEN, SCHMID (1993:45).
[265] GARCIA (2009:12).
[266] SONDEREGGER (2014:344).
[267] SHANE, JOHNSTON, RISEN (2004).
[268] HAFETZ (2015:433).
[269] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

detainee treatment, despite being best recognized for invalidating the military commissions that the President had established without congressional permission following 9/11. The decision opened the door to future prosecutions under the WCA for violations of Common Article 3, especially given that that provision forbade torture and the cruel or degrading treatment standard at Guantanamo, Bagram, and CIA black sites. The Bush Administration had argued that detainees used in the war on terrorism fell outside the purview of the Geneva Conventions. However, the Bush Administration took swift action to ensure Hamdan would not serve as a springboard for a later accountability procedure. Detainees' right to thoroughly examine their designations needed to be recognized; the writ of *habeas corpus* typically provides a prompt opportunity to challenge the legality of incarceration with the aid of lawyers before an impartial adjudicator. Detainees are only allowed to challenge the DC Circuit Court of Appeals[270] under the DTA and not contest the Government's evidence or the method by which it was obtained. Instead, they must question whether the Government followed its procedures and whether those procedures were legal. Because President Bush issued a signing statement stating that the executive branch shall understand the DTA in the scope of the President's constitutional authority and accordance with the Constitution's limitations on the judicial branch[271].

3.4 Military Commissions Act to Amend the War Crimes Act

Bush Administration pressured Congress to pass the MCA of 2006, which was passed four months after the *Hamdan* decision, and it granted immunity to people who participated in the war on terrorism interrogations by redefining grave breaches of the Geneva Conventions[272]. In response to this ruling, the Bush Administration retrospectively changed the federal WCA to narrow the MCA's application[273]. Because they could not risk facing charges because they were carrying out their duties, according to the President, the MCA had the effect of not criminalizing individuals who had broken the old law. According to the Bush Administration, detainees classified as enemy combatants are not covered by the US Constitution and are not subject to the jurisdiction of federal courts. To treat and prosecute detainees in secret detention facilities and at Guantanamo, the Administration's approach provided the executive branch unfettered power[274]. As was already mentioned, the US has maintained that it has been fighting a war of self-defense since 9/11. This was the rationale for setting up a court to try "illegal belligerents". By presidential order, the Bush Administration established a military tribunal

[270] United Sates Court of Appeals for the District of Columbia Circuit.
[271] MAHFUD (2014:237).
[272] UNITED STATES CONGRESS (2006).
[273] *Ibid.*
[274] HUMAN RIGHTS FIRST (2008:8).

system shortly after the September 2001 attacks to bring these Law of Armed Conflict ('LOAC') violators to justice.

The MCA became law on 17 October 2006. The MCA reinterprets IL and IHL while addressing several issues pertaining to US domestic laws. It established the Administration's strict definition of torture, which permits evidence to be gathered through pressure to bring charges against detainees even when brutal treatment is prohibited[275]. The MCA added a new barrier to a future administration's imposition of criminal liability and offered the functional equivalent of amnesty legislation.

The MCA also strips federal courts of the authority to hear *habeas corpus* cases, denying those held without charge for an indeterminate period the chance to question the legality of their confinement. This bill will allow the CIA to continue its program for questioning influential terrorist leaders and operatives[276], as the President underlined in his support of the MCA, thus sanctioning the CIA's secret detention program. The MCA purportedly disallows "evidence gathered by means of torture". However, the use of testimony obtained by torture or other harsh, brutal, or humiliating treatment is permitted by the rules of evidence, which established essential reliability standards for the acceptance of confessions made by defendants[277]. The military commission judges must decide where to draw the line between torture and cruel treatment because the law does not define which interrogation techniques are considered torture. Brigadier General Hartmann, the legal counsel for the DoD's military commission appointment authority, refused to specify which techniques was considered torture. Instead, he clarified that if the evidence was trustworthy and conclusive, it was in the court's best interest to introduce that evidence[278].

The threshold test of reliability is almost meaningless due to these provisions. First, the MCA enables the acceptance of second-hand or hearsay evidence. It sets the burden of proof on the defendant to show that this information is unreliable or lacking in probative value, which is a departure from long-standing standards of due process. Due to this, the defendant cannot face and cross-examine the source of the evidence, which is frequently the only efficient way to show its unreliability. Second, under some conditions, the MCA enables the Government to keep secret the sources, techniques, and actions used to gather the evidence. Third, under the military commission guidelines, compelled statements are admissible without corroborating evidence. In martial and civil tribunals, confirmation of even voluntary confessions is essential. It is also unclear whether a military commission could

[275] AGUIRRE (2009:134).
[276] LAU (2016:1270).
[277] PEJIC, DROEGE (2013:529).
[278] HUMAN RIGHTS FIRST (2008:8).

find a defendant guilty based only on uncorroborated statements. Ultimately, several circumstances could result in compelled evidence being used to get convictions and even executions. First, a military judge may approve the use of a detainee's coerced confessions without demanding supporting documentation or disclosing the precise interrogation techniques employed on the detainee. The prosecutor could claim that the interrogation techniques are secret and refuse to grant access to the interrogators or transcripts or notes of the interview. Second, the prosecution may use hearsay evidence obtained from a third-party witness under duress without the defendant's knowledge or that of his attorney. The prosecution may claim that the witness's identity and interrogation techniques are secret and refuse to give the court access to the witnesses for questioning or to release transcripts or notes of the interrogations. Because the abuse of some detainees has been made public by Government sources, it may occasionally be relatively easy to identify the information's sources. Even military judges might be denied access to information necessary to determine whether statements were coerced and to assess their reliability. However, in other cases, defendants could be denied access to less well-known witnesses, whom the Government keeps behind a curtain of classification, making it impossible for detainees to establish that information was obtained through coercion, let alone that the information is unreliable. Third, the prosecution may refuse to give the accused access to crucial exonerating evidence by claiming that it is classified, depriving them of the chance to construct a strong defense[279]. According to the Bush Administration, none of the CIA's interrogation tactics qualifies as torture in the context in which they have been applied.

These MCA features demonstrate the Memorandums of the OLC's effect. The MCA amends the Article to include new offenses, although they are only considered breaches when there is physical contact, and their definitions are ambiguous. Sexual intimidation or humiliation is therefore excluded[280]. The MCA was revised by the US Congress in 2009, "making military commissions like traditional Federal Criminal Courts. The amendments prohibited the use of any evidence derived from torture or cruel, inhuman, and degrading treatment before or after 2005"[281]. To punish terrorists, the US has two judicial systems: military commissions and federal criminal tribunals based on Article III of the US Constitution. Article III courts deal with terrorists according to the federal criminal statutes and procedures that govern traditional criminal law. When prosecuting terrorism suspects for LOAC violations, military commissions may be used. They are governed by Federal legislation, have unique processes, and are under the jurisdiction of Article III courts. As a result, military commissions do not have sole authority. With the recent addition of the US Congress' oversight, the Attorney General

[279] *Ibid,* p. 9.
[280] AGUIRRE (2009:136).
[281] PEJIC, DROEGE (2013:530).

ultimately decides to which court any matter will be brought. However, it is essential to clarify that as of right now, neither the Federal Criminal Court nor military commissions will accept as evidence any acts of torture or other cruel, inhuman, or degrading treatment.

CHAPTER III – Global War On Terror

The President declared the fight against terrorism the top national security priority just days after the assaults on the Pentagon and World Trade Center. The President made it quite apparent that the goals were considerably more expansive, even though the initial focus was unmistakably on the al-Qaeda network and its Taliban allies. These would include destroying not only the international network of al-Qaeda but also other transnational terrorist organizations. Additionally, State sponsors and sympathizers of terrorism were warned. The President further stressed how long-lasting this conflict was going to be[282].

The legal debates surrounding the al-Qaeda and Taliban individuals held by the US Government at the start of the GWOT in October 2001 focus on interrogations. From the fall of 2001 to late 2008, when Supreme Court cases, legislation, and policy developments restored specific law of war standards to the US military's treatment and interrogation of detainees, the discussion was driven by the need to gather timely and accurate intelligence from terrorists who had been captured[283]. In the interim, the military essentially abandoned its long-standing reliance on the law of war treaties and principles applicable to international armed conflict as the baseline for the treatment of detained terrorists in favor of a narrowly drawn legal position that allowed the US Government to use aggressive interrogation techniques that violated human rights selectively. This was done with substantial policy direction from the leadership of the US DoD, the US DoJ's OLC, and the White House. The military legal profession fought against the shift in how the rules of war were applied at every level. However, some of the harsh interrogation and treatment methods used on these terrorists spread to the field and led to the maltreatment of detainees in several cases. Between 2005 and 2009, those treatment norms were reinstated and strengthened for military troops taking part in GWOT.

Since the horrors of 9/11, the treatment of suspected terrorists by the US during the GWOT has been closely examined from a human rights standpoint. The use of extraordinary rendition against suspects apprehended in the GWOT is one tactic the US Government used in reaction to the 9/11 attacks. This technique involves the secret CIA targeting of HVDs in cooperation with other States for their alleged use of illegal force or to detain them to gather "actionable intelligence" on al-Qaeda and associates[284]. Although the term "extraordinary rendition" is not legally recognized, it typically refers to the kidnapping of a person from the US or international territory and the transportation of that person to a US or foreign detention facility.

[282] NARDULLI (2003:2).
[283] JACKSON (2015:102).
[284] ARSENAULT (2017:148).

In difficult situations where there is a choice between two evils, dirty hands problems arise, and whatever choice is made, a moral principle is broken. The moral paradox of decisions involving dirty hands emerges when, despite being deemed politically necessary and justified, the lesser evil option has a bad moral standing. Given the severity of the post-9/11 terrorist danger, having filthy hands has been seen as inevitable. The Bush Administration and scholars debating what measures can be justified to get valuable intelligence from prisoners have evoked dirty hands scenarios to support torture in the GWOT[285]. US military doctors have upheld their professional oaths by signing death certificates indicating that torture was the cause of death when such situations have arisen in Afghanistan and Iraq, much like how military lawyers in the US have opposed the use of torture within the context of the DoD[286]. The environment that 9/11 established in the US and throughout the international system allowed the Government to proceed in this direction. Press commentators, academics, journalists, and politicians backed the idea that the US should take the lead in the GWOT since the UN, Canada, and Europe were, in their words, "weak, timid, and too slow and conciliatory and they had grown accustomed to not fighting wars"[287].

1. Extraordinary Rendition Program

The practice of extraordinary rendition is the most blatant illustration of US involvement in torture. Torture is frequently used in the rendition program, which involves transporting prisoners to nations with laxer human rights laws to subject them to more harsh interrogations[288]. Without a doubt, the US's extraordinary rendition program involves several human rights violations, including arbitrary detention, the absence of due process, torture, or other cruel, inhumane, or degrading treatment, as well as the denial of life and liberty. Many detractors claim that by engaging in such exceptional renditions, the US effectively approved extra-judicial deprivations of liberty for permitting the employment of coercive interrogation techniques[289]. The CAT, the UN Working Group on Enforced or Involuntary Disappearances, the UN Human Rights Committee, regional organizations like the Council of Europe, and other NGOs have also kept an eye on these crimes.

All suspected terrorists associated with Al-Qaeda in the GWOT are classified as HVD. States use specialized Government-run programs (e.g., the HVD Program) established by the US to carry out acts of torture. As a counterterrorism measure, the Rendition Detention Interrogation Program ('RDI-Program'), involves the specific interrogation and imprisonment of suspected terrorists. The RDI-Program, run by the CIA and formed by the US

[285] RAMSAY (2011:628).
[286] BASSIOUNI (2005:401).
[287] AGUIRRE (2009:144).
[288] CHANDRASEKARAN, FINN (2002).
[289] PEJIC, DROEGE (2013:531).

as an anti-terrorism tool following the 9/11 attacks, is the most recent example of *ex-ante* permission. The following description is based on records made public by the CIA and the US DoJ. Four distinct elements made up the RDI-Program: the restriction of harsh interrogation techniques to a specific group of people, restrictive interpretation of the term "torture", a relativization of the prohibition of cruel, inhuman, and degrading treatment, an institutionalized interrogation process with a restricted list of interrogation techniques.

All suspected terrorists associated with Al-Qaeda in the GWOT classified as HVD are subject to abduction, transfer to secret prisons in secret locations around the world with incommunicado detention, and exposure to various combinations of EITs during interrogation, according to US Government policy, particularly under the Bush Administration. These shared traits show that the HVDs are a target-specific population. There are good reasons to believe that the US Government's classification of suspected terrorists as HVDs and its subsequent treatment amount to a "distinguishing feature" that targets this group of people, even with the potentially narrower characterization. As has already been mentioned, the GWOT is not an armed battle. There can only be "civilians" where there is no armed warfare. According to Robinson, all people are "civilians" when there is no armed war[290]. According to this analysis, there is no doubt that the individuals classified as HVDs and forced into the extraordinary rendition program because of this classification, in contrast to Yoo's legal advice[291] that the US's actions against al-Qaeda constitute "an attack on a non-State terrorist organization and not a civilian population".

Practices for extraordinary rendition have been created and implemented over time, especially with the GWOT. Due to their secrecy, the total number of cases involving extraordinary renditions at any given moment is difficult to estimate. However, it is generally acknowledged that the program has grown dramatically after 9/11. The faster procedures that President Bush permitted to provide the CIA with more freedom can be partly blamed for the increased usage of this method. For instance, in some situations, charges are not filed until the CIA has apprehended the culprit and asked for assistance. More significantly, the 17 September 2001 presidential authority provided the CIA permission to create and test a set of EITs to gather information from a group of detainees designated as HVDs[292]. The US DoJ OLC wrote down these verbal authorizations via a memorandum on 1 August 2002. It is unquestionably true that victims of this crime are far more vulnerable when the extraordinary rendition program is considered. The secrecy of this program, combined with the increased public apprehension over the need for counterterrorism measures in the wake of 9/11 (also fueled by political

[290] ROBINSON (2001:78).
[291] YOO (2002:5).
[292] LAU (2016:1266).

rhetoric to win the public's support), has significantly lessened the impact of public disapproval on such criminal behavior, creating a favorable environment for crimes against humanity. The extraordinary rendition program typically involved four distinct types of conduct: the forced abduction of the identified HVD; detention in a secret facility typically run by the CIA in conjunction with a foreign partner State; transfer to other detention facilities on CIA or foreign partner State operated aircraft; and interrogation to obtain intelligence deemed necessary in the GWOT using harsh interrogation techniques.

In the secret sites, the suspects went through three phases. The first is the initial condition phase, during which they are inspected and photographed entirely naked. The second is the changeover into the interrogation phase, during which the interrogators try to gauge the detainees' receptivity to disclosing information. The extent of the detainee's willingness to provide information during this stage propels him to a high level of interrogation. The third stage is full-fledged questioning, during which interrogators use various techniques to get the desired results. During this time, detainees are subjected to various physical and psychological cases of abuse[293]. NGOs have long argued that such a practice violated several human rights prohibitions, including those against torture, arbitrary deprivation of liberty, and harsh, inhumane, and degrading treatment. It has additionally been connected to a case of forced disappearances. Early ICC case law has generated substantial concerns over the Court's dubious propensity to add demanding new standards when interpreting the policy element[294].

There is no question that the US hid the kidnapping, detention, and transfer of suspected HVDs to secret facilities around the globe. Their subsequent interrogation using EITs constitutes a course of conduct involving numerous commissions of acts following a State policy. Insofar as it is known through declassified documents, leaked papers and publicly acknowledged past conduct of the US Government, there is evidence of these commissions. They were choosing victims who were not US citizens, kidnapping them beyond US territory and then delivering them to yet another State while abusing the jurisdictional gaps in Title 18 criminal violations. The CIA also advances credible denial by not implicating any US officials in the torture. Suppose it is possible to show a link between the CIA agents' delivery of these victims to foreign Government agents and the subsequent torture carried out by those Governments. In that case, it is evident that these CIA agents have broken the UNCAT and should be prosecuted under this Convention in any nation with authority to do so. They might also face charges under the UCMJ. It should be emphasized that, despite taking place outside the US's territorial authority, kidnapping, and transferring individuals from one nation to another are

[293] MAHFUD (2014:228).
[294] *Rasul. v. Bush*, 542 U.S. 466 (2004).

virtually always likely to occur inside another state's borders. Since kidnapping is illegal under IL and many nations have ratified the UNCAT or included provisions prohibiting torture in their criminal codes, any actions taken by CIA agents or private contractors would be illegal under the laws of the country where the kidnapping or torture occurred[295].

The US's extraordinary rendition program has been established and improved across several US Administrations as an investigative method for potential terrorists[296]. In hindsight, it was recognized that many nations had participated in this effort. For instance, Ioan Talpes, the national security adviser to the country's President at the time, has acknowledged cooperation with the CIA regarding the operation of "one or two" detention facilities in Romania where people were "probably" detained between 2003 and 2006 and subjected to inhumane treatment[297].

Even though the CIA must now compete with Geneva Convention-based interrogation standards and black sites have been ordered to close, extraordinary rendition continues to be a case of a state trying to combat a terror threat by ignoring the law, with unfavorable severe political and legal repercussions[298]. Given that many HVDs are still being held without charges and in questionable conditions, the Obama Administration's subsequent unwillingness to effectively investigate and punish those responsible also implicates his Administration and suggests that his Government also had a policy of maintaining the extraordinary rendition program. However, the Obama Administration ended the RDI-Program [299].

1.1 Foreign Government Participation in CIA Secret Detention and Extraordinary Rendition

In addition to other nations with a known history of torturing detainees, the US has transported inmates to Pakistan, Saudi Arabia, Egypt, Morocco, and Uzbekistan since 11 September. The US did this to obtain crucial information while maintaining its denial that they have "no firsthand knowledge" of the host nation's interrogation techniques. The Bush Administration covertly approved this practice[300]. George Tenet, the CIA director at the time, recommended to the White House that captives be sent to other nations for harsh questioning and that Government aircraft not be used[301]. Additionally, Former CIA Inspector General Fred Hitz made the following statement on rendition: "We don't do torture, and we can't countenance torture in terms of

[295] LAU (2016:1267).
[296] LAGOS, RUDY (2003:422).
[297] SONDEREGGER (2014:346).
[298] PEJIC, DROEGE (2013:531).
[299] SONDEREGGER (2014:346).
[300] BOWERS (2005).
[301] AGUIRRE (2009:140).

we can't know of it. But if a country offers information gleaned from interrogations, we can use the fruits of it"[302]. The US Administration and its participating partner States would find it very difficult to deny knowing that the individual acts of kidnapping, transferring, detaining, and questioning formed a component of the more powerful attack. These actions demonstrated the use of a more comprehensive policy. Additionally, former State officials of several involved States have since come forward and admitted that they were aware of the more significant circumstances underlying specific acts of kidnapping, transfer, incarceration, and interrogation that eventually formed a component of the more powerful attack.

Additionally, American warships and aircraft carriers have served as captives' initial ports of entry. According to European media reports, attack warships like the USNS Stockham[303] were being utilized as "floating Guantanamos" while navigating a grey area of the law. Around 17 of these vessels carrying captives have been reported by the London-based NGO Reprieve, and more than 200 new rendition incidents have been reported since 2006 when President Bush claimed that the practice had ended[304]. It is also unclear and uncertain how many prisoners have not yet been put on trial.

Investigations are also being conducted by the Council of Europe, which described the US practice as "'outsourcing' torture"[305], as well as by several other Governments concerning the illegal use of their territory for extraordinary rendition and possibly for locations where torture-related interrogations may have occurred. All of this must demonstrate the illegality of the conduct, putting the US in the awkward position of being discovered engaging in officially sanctioned criminal activity. In any case, it makes CIA agents subject to criminal prosecution under foreign law when they were following their own Government's orders and believed they were legal. If these agents are brought to justice abroad, their justification will be that they carried out their superiors' instructions after consulting with legal counsel provided by the US Government[306]. According to Smith, Governments worldwide knew about these sites and the interrogation techniques inside them, so they were complicit in human rights abuses"[307]. Others, like Boys, took advantage of the collaboration to expose the hypocrisy of the partnering states[308]. As Aldrich put it bluntly, saying that European politicians played the public opinion with their criticisms of American secret activity, meanwhile

[302] PRIEST, GELLMAN (2002).
[303] USNS *GySgt Fred W. Stockham* (T-AK-3017) is a *Shughart*-class container & roll-on roll-off support vessel in the Unites States Navy's Military Sealift Command (MSC).
[304] CAMPBELL, NORTON-TAYLOR (2008).
[305] PRIEST (2005a).
[306] BASSIOUNI (2005:413).
[307] SMITH (2010:209).
[308] BOYS (2011:596).

they were approving discreet cooperation with the very same programs[309].This worry that states have too quickly disregarded fundamental human rights principles in their persecution of the GWOT is significantly heightened by the fact that several states openly collaborated with the CIA in the black site program[310].

The extent and scale of collaboration between national secret agencies have dramatically increased worldwide since the attacks on the World Trade Center, increasingly with "improbable partners"[311]. The methods by which this cooperation takes place are typically shrouded in mystery. However, it is apparent that rather than being largely international, such cooperation is multilateral[312]. One form of collaboration that has grown in importance for States is the exchange of intelligence[313]. A State participating in such an exchange with different partners will receive considerably more information than it can gather, given its limited resources and geographic reach. These agreements, especially when they are bilateral, are consequently frequently predicated on a *quid pro quo* structure for the information exchange that benefits both parties[314].

Following revelations by HRW about the suspected involvement of several Eastern European States, various European countries have investigated the Yoo-recommended practice of transporting inmates and keeping them in third countries. Indeed, several European Governments attempted withholding information and refused to cooperate with the probe[315]. AI thought the Governments responsible for these actions were the ones of Bosnia, Germany, Italy, Macedonia, Sweden, Turkey, and the UK[316]. However, the Open Society Justice Initiative Report more exhaustedly reveals that the foreign Governments that took part were up to 54. These States participated in operations in a variety of ways, including by hosting CIA prisons on their soil, holding, questioning, torturing, and abusing people, aiding in the capture and transportation of detainees, allowing the use of domestic airspace and airports for secret flights transporting detainees, and providing information that resulted in the secret detention and extraordinary rendition of individuals. Foreign Governments also failed to safeguard detainees from extraordinary rendition and secret detention on their soil and to conduct thorough investigations into the organizations and personnel involved in these activities. The 54 Governments listed in this Report are from the following countries: Afghanistan, Albania, Algeria, Australia, Austria, Azerbaijan,

[309] ALDRICH (2009:123).
[310] KEATING (2016:938).
[311] ALDRICH (2011:18).
[312] FORCESE (2011:75).
[313] *Ibid,* p. 74.
[314] ALDRICH (2011:20).
[315] AGUIRRE (2009:139).
[316] PAGLEN, THOMPSON (2006).

Belgium, Bosnia-Herzegovina, Canada, Croatia, Cyprus, the Czech Republic, Denmark, Djibouti, Egypt, Ethiopia, Finland, Gambia, Georgia, Germany, Greece, Hong Kong, Iceland, Indonesia, Iran, Ireland, Italy, Jordan, Kenya, Libya, Lithuania, Macedonia, Malawi, Malaysia, Mauritania, Morocco, Pakistan, Poland, Portugal, Romania, Saudi Arabia, Somalia, South Africa, Spain, Sri Lanka, Sweden, Syria, Thailand, Turkey, United Arab Emirates, UK, Uzbekistan, Yemen, and Zimbabwe[317].

Over the past ten years, the UK's dedication to opposing torture has come under scrutiny, partly due to cooperative agreements it engaged in with security services that are known to employ such techniques[318]. Despite the Government's best efforts to keep information hidden, allegations that UK authorities participated in torture have gained widespread recognition as evidence has gradually entered the public realm. This alleged involvement allegedly involved UK operatives directly taking part in the unlawful capture and rendition to Libya of a suspected "terrorist" to subject him to torture[319]. It has also been claimed that British agents have been known to use torture and secret detention to hold and question terrorist suspects, provided questions to be used against such suspects, and participated in detained suspect interrogations where torture is being used or is anticipated to be used. Many allegations center on the UK's participation in the US extraordinary rendition program. Other claims focus on the routine receipt from the US of data allegedly obtained through torture in a third country. These allegations have shed light on the tight cooperation ties between the UK and other nations infamous for using torture while detaining people incommunicado. A substantial number of the claims also imply close and direct communication between the UK authorities and their counterparts in Pakistan and Libya[320].

2. Torture Perpetrated on Al-Qaeda Suspects

The following treatment of captured al-Qaeda terrorists responsible for the 9/11 attacks, as well as those who "aided and abetted" them and "knowingly harbored" them, was mandated by the President's "Military Order of 13 November 2001":

> "Any individual subject to this order shall be:
> (a) Detained at an appropriate location designated by the Secretary of Defense outside or within the United States,
> (b) Treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria,
> (c) Afforded adequate food, drinking water, shelter, clothing, and medical treatment,

[317] OPEN SOCIETY JUSTICE INITIATIVE (2013:6).
[318] FULTON (2012:775).
[319] COBAIN, CHULOV (2011).
[320] *Ibid.*

> (d) Allowed the free exercise of religion, consistent with the requirements of such detention,
> (e) And detained in accordance with such other conditions as the Secretary of Defense may prescribe"[321].

However, State actors have turned to torture as a tactic to quickly get information about terrorist attacks or terrorist networks through confessions. The Military Order was never observed and, according to an unknown officer who spoke with the *Washington Post*, "If you don't occasionally violate someone's human rights, you probably aren't performing your job"[322]. A detainee who, at the time of capture, was believed to be a senior member of al-Qaeda or an al-Qaeda affiliated terrorist group, to know imminent terrorist threats against the US, its military forces, its citizens and organizations, or its allies, or had direct involvement in planning and preparing terrorist actions against the US or its allies, and if released, constituted a clear threat to the US or its allies[323], were subjected to EITs. Prisoner torture at Guantanamo, Afghanistan, and Iraq was allegedly "standard operating procedure", according to soldiers' testimonies[324].

Institutionalized torture has been carried out by two different groups of operators, members of the CIA and civilian contractors for the DoD[325], in addition to instances where it occurred in a military setting or at the hands of military personnel. It has been claimed that these agents have tortured victims directly or indirectly. They engaged in direct torture by committing the crimes themselves, as well as indirect torture by ordering others to commit the crimes at their direction or for their advantage, with knowledge or foreknowledge.

The CIA, the Federal Bureau of Investigation ('FBI'), and DoD civilian contractors are not excluded from the UNCAT and should be mentioned at the outset[326]. On 26 September 2006, President Bush revealed that the CIA had kept suspects incommunicado and subjected them to EITs in secret sites worldwide. Bush declined to impose the same anti-torture limitations required by the FM on the CIA interrogators in a radio broadcast on 8 March 2008, according to Bush. He claimed that these measures were required to stop terrorist attacks and protect the lives of innocent people. A legalistic interpretation of US law would hold that DoD contractors are exempt from

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[321] Military Order, Detention, *Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (2001).
[322] PRIEST, GELLMAN (2002).
[323] Memorandum for Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (10 May 2005), *Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee*, available *online*, p. 4.
[324] RAMSAY (2011:639).
[325] JEHL (2005).
[326] GOLDBERG (2006).

the UCMJ even if they worked on US bases and accompanied US military personnel[327].

The two groups of interrogators active during the GWOT make it challenging to evaluate the role of interrogators. The historical examples shown here show how drastically different the cultures of the DoD and CIA are. Given their distinct aims and approaches, it is not surprising that they are different. Nevertheless, under the life-cycle theory of normative development, the differences between the cultures of the DoD and the CIA have further significance. The different cultures of the CIA and DoD further show that the interrogators were not a homogenous bunch, even though the four opposing narratives show a variety of motivations for their actions[328]. Military police tasked with detainee treatment and security rather than interrogation made up the DoD interrogators and trained military intelligence personnel. As a result of the accessibility of interview transcripts, court records, and inquiry reports, more information regarding the experiences of military interrogators than those of the CIA is currently known to the public. Outside of the United States Senate Select Committee on Intelligence ('SSCI') Report, the CIA comments on the report, and comparable congressional testimonies that disclose procedures and practices, little is known about the experience of CIA interrogators[329]. It is also challenging to draw general comparisons between these two groups due to the need for more information regarding the interrogators' objectives at the CIA. Nevertheless, there are a few broad generalizations that can be made based on the evidence that is at hand. Fear, rage, and – in some cases – a desire for vengeance pervaded the interrogators at the CIA and DoD. The CIA personnel were uncompromising that actionable intelligence was required to stop, deter, or neutralize the upcoming attack. Military interrogators' animosity and a sense of mission importance may have contributed to their impatience with the prisoners[330].

Severe abuse of a person is referred to as torture. Modern forms of torture include using electric shocks, infliction of physical harm, waterboarding, mock executions, beatings, and threats of violence against a person and their family, or other types of sexual violence[331]. Defecating and urinating on a detainee, intense light exposure, solitary confinement, "hooding", exposure to continuous high-pitched noise, lack of hygiene, food, and sleep are examples of less severe forms of mistreatment.

[327] BASSIOUNI (2005:411).
[328] ARSENAULT (2017:158).
[329] *Ibid,* p. 148.
[330] *Ibid,* p. 144.
[331] AGUIRRE (2009:130).

2.1 CIA's Enhanced Interrogation Techniques

Since the attacks, the Bush Administration has vigorously advocated "law-free zones", denying the detainees detained in secret CIA custody and at Guantanamo Bay the application of some core rights under US law and IL. The right to decent treatment during questioning is one of these fundamental defenses[332]. After the publication of a *Washington Post* report in December 2002 on black sites in Afghanistan, the public has been aware of the existence of CIA black sites[333]. However, it was not until November 2005 that news broke that the CIA was holding captives of al-Qaeda in Eastern Europe and questioning them there using EITs[334]. There is no chance that the State leaders could not have anticipated that some form of abuse may occur in these facilities, even if they were not aware of it directly. Throughout these four years, there was no shortage of proof suggesting something other than routine interrogations or detentions might be going on. The Vice President acknowledged on a prominent television news program[335] that the Bush Administration's tone from the start indicated that the US was willing to go beyond the lines of acceptable behavior[336].

The DoD General Counsel's Office requested information on detainee "exploitation" from the Joint Personnel Recovery Agency ('JPRA') in December 2001, more than a month before the President signed his memorandum. The JPRA specialized in preparing American personnel to withstand interrogation methods prohibited by the Geneva Conventions[337]. Trainers created these "counter-resistance techniques" for the SERE Committee to prepare US military captives to resist torture and other coercive measures used by hostile Governments in violation of Geneva Convention rules[338]. Every military branch now participates in the SERE program, which frequently offers certification and training at the undergraduate and graduate levels. JPRA representatives sent Richard Shiffrin, the DoD's Deputy General Counsel for Intelligence, and members of the Defense Intelligence Agency ('DIA') copies of the SERE techniques, including waterboarding[339]. The request was made with the intention of "reverse engineering" the procedures to use them on Guantanamo inmates who were being recalcitrant. As part of their research to better understand torture and its consequences, SERE instructors kept regular records of "fluctuations in trainee's level of cortisol, a stress hormone"[340]. Cortisol aids the body in enduring stressful conditions

[332] HUMAN RIGHTS FIRST (2008:5).
[333] PRIEST, GELLMAN (2002).
[334] PRIEST (2005a).
[335] *Meet the Press* (2001).
[336] KEATING (2016:940).
[337] ARSENAULT (2017:144).
[338] COMMITTEE ON ARMED SERVICES (2008).
[339] JACKSON (2015:113).
[340] MAYER (2005).

by boosting energy and alertness. However, it can sometimes heighten anxiety. Clinical research by Army psychologists and psychiatrists revealed that SERE trainees' cortisol levels were higher than average "were some of the greatest ever documented in humans"[341]. Such high levels of stress have a significant impact on the human body, particularly on testosterone production. The SERE pupils' testosterone levels "fell from normal to castration levels"[342] after eight hours of simulated torture. This mental torment is emasculating and poses serious health dangers because stress is used to manipulate vital physical functions. SERE instructors have concluded from this data that "an environment of extreme uncertainty" can significantly impair a detainee's ability "to control or limit his conduct[343]. The SERE program is at the cutting edge of the science of torture, and all evidence points to the possibility of captives being extraordinarily flexible through severe psychological and physical assault. US officials recruited from the pool of former SERE instructors to apply SERE tactics. A Report from the Senate Select Committee on Intelligence was made public on 3 December 2014[344].

A week later, a group of Guantanamo behavioral scientists who recently received SERE training at Fort Bragg military base[345] put together a list of novel questioning strategies[346]. To prevent inflicting extreme pain or suffering, any other long-lasting or significant harm, and to reduce the risk of any harm that does not further this important Government goal, the interrogation tactics have been meticulously constructed[347]. Three additional aggressive categories of approaches were requested: Category II included stress positions, use of false documents, up to 30 days of isolation, deprivation of auditory *stimuli*, prolonged interrogations, removal of comfort items (including religious items), switching to MREs, removal of clothing, forced grooming, and exploitation of detainee phobias (for example, fear of dogs). Category I included shouting at the detainee, deception techniques, and false flags (interrogators claiming to be from a harsh allied regime); The use of scenarios that put him or his family in danger of dying, exposure to freezing temperatures or water, the use of dripping water to create the "misperception of suffocation" (such as during waterboarding), and the use of "moderate, non-injurious physical contact" would all fall under Category III[348].

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341 OTTERMAN (2007:105).
342 *Ibid*, p. 106.
343 MAYER (2005).
344 SENATE SELECT COMMITTEE ON INTELLIGENCE (2014:4).
345 Fort Bragg is an important US Army military base in North Carolina. U.S. Army special forces train there.
346 FROOMKIN (2005).
347 Memorandum for Rizzo, Senior Deputy General Counsel, Central Intelligence Agency (30 May 2005), *Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees*, available *online*, p. 28.
348 Memorandum for Rizzo, Acting General Counsel of the Central Intelligence Agency (1 August 2002), *Interrogation of Al Qaeda Operative (Abu Zubayda)*, available *online.*

The Army Division Chief, Colonel John Ley, stated that the Category III techniques would violate the UCMJ and the Torture Act. He included the following as well:

> "Regarding the Category II techniques, numbers 2 (prolonged use of stress positions), 5 (deprivation of light and auditory *stimuli*), and 12 (using individual phobias to induce stress), in my opinion, cross the line of "humane" treatment, would likely be considered maltreatment under Article 93 of the UCMJ, and may violate the Federal torture statute if it results in severe physical pain or suffering. Techniques 10 (removal of clothing) and 11 (forced grooming) are certainly permissible for health reasons but are problematic and may be considered inhumane if done for interrogation purposes"[349].

Despite the legal issues brought up by the services, Mr. Haynes recommended that the Category I and II techniques are approved and the "use of mild, non-injurious physical contact" from Category III. He also noted that approval of other Category II techniques was "not warranted" at the time because our forces are "trained to a standard of interrogation that reflects a tradition of restraint"[350].

Haynes was worried that the methods of interrogation being utilized were ineffective. Mr. Haynes visited the brand-new detention facility at Guantanamo Bay Naval Station shortly after receiving these legal views from the OLC in August 2002. He was accompanied by several prominent members of the Administration's legal team, including Mr. David Addington, counsel to the Vice President, and Mr. John Rizzo, counsel to the CIA. One week later, at a meeting with Jonathan Fredman, the head of the CIA's Counterterrorist Center, the Guantanamo staff discussed harsh interrogation techniques[351] like sleep deprivation, death threats, and waterboarding. According to Fredman's interpretation of the Yoo/Bybee Memo, "Severe physical pain is described as anything causing permanent damage to major organs or body parts". In essence, it is open to interpretation, but if the prisoner dies, the interrogation technique was not used correctly. In response to a request, on the same day in August 2002 for authorization to apply several EITs to Abu Zubaydah who was considered a senior member of al-Qaeda, the OLC prepared a Memorandum of Notification ('MON'), which the resident later signed. This document "authorized the capture, detention, and questioning of al-Qaeda leaders, but was silent about the means by which any of it could be carried out"[352], as it was written at the time. Abu Zubaydah was then being held at a

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[349] Memorandum, Ley Chief, International and Operational Law Division, U.S. Army Office of Judge Advocate General, to Office of the Army General Counsel (November 2002), *Review – Proposed Counter Review Techniques*, available *online.*

[350] Memorandum, Haynes II, General Counsel, for Secretary of Defense (27 November 2002), *Counter-Resistance Techniques*, available *online.*

[351] Memorandum, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Counsel to the President (1 August 2002), *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, available *online.*

[352] ARSENAULT (2017:150).

secret CIA black site overseas and from whom CIA officials believed they could obtain more information through EITs[353]. The specifics were left up to the CIA to ascertain. According to Rizzo, the CIA first encountered this issue while questioning Abu Zubaydah[354]. The memo claimed that the President could disregard a congressional ban on torture by using his Commander in Chief authority under Article II of the US Constitution and that officials could only be held accountable if their specific intent was to cause pain rather than if they intended to obtain information by using painful techniques, and that interrogators could use a broadly defined good-faith or necessity defense based on the generalized threat to the nation posed by terrorism[355]. Secretary Rumsfeld approved the interrogation methods Mr. Haynes suggested on 16 April 2003.

The Staff Judge Advocate at Guantanamo, Lieutenant Colonel Beaver, wrote a legal brief outlining "counter-resistance techniques", which the Commander, Major General Dunleavy, sent to United States Southern Command ('SOUTHCOM') for consideration[356]. The convening authority would need to grant military members using some techniques "immunity, in advance, from the convening authority" because they would be considered "assaults" under the UCMJ"[357]. She suggested that the procedures be authorized with care and scrutiny. She felt under pressure, knowing that if we got it wrong, thousands of innocent lives might be lost when she testified at a Senate hearing on these approaches. She stressed the need for medical, mental, and legal reviews before approving these interrogation plans, so her legal judgment was not a blank check permitting endless interrogations[358]. In fact, when the Bybee memo was leaked in 2004, there was a massive uproar from the public. The DoJ subsequently denied the document's accuracy, and CIA Inspector General John Helgerson concluded that the agency's interrogation methods constituted cruel, inhuman, and degrading treatment[359]. The Bybee Memorandum was officially replaced in December 2004 by another memo that offered a fresh interpretation of the ban on torture. However, the new memorandum does not explicitly describe torture or even indicate that any forms of questioning are forbidden, distancing itself from the President's Commander in Chief power to do so[360].

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353 SCOTT (2016:163).
354 Memorandum (1 August 2002), *Interrogation of Al Qaeda Operative (Abu Zubayda)*.
355 GREENBERG, DRATEL (2005:222).
356 Memorandum, Commander, Joint Task Force 170 to Commander, United States Southern Command (11 October 2002), *Counter-Resistance Strategies*, available *online.*
357 JACKSON (2015:116).
358 Memorandum, President Bush, to Vice President et al. (7 February 2002), *Humane Treatment of al Qaeda and Taliban Detainees*, available *online.*
359 JEHL (2005).
360 HUMAN RIGHTS FIRST (2008:6).

According to reports, the CIA used interrogation methods approved by the DoJ[361]. A CIA official explained how a typical high-level terrorism suspect[362] would have been interrogated, noting that he would have most likely been kept naked in a cell with no sign of sunshine. He would be unable to stand up straight, sit properly, or recline because the area would be so cramped and packed with noise and light day and night. He would be cold, kept up all night, and probably wet. He would be roughly woken if he was able to fall asleep. He would receive meager, bland meals only occasionally and irregularly. Before being questioned, he may occasionally be given a substance to improve his mood. Heroin, marijuana, and sodium pentothal have all been proven to help people who are reluctant to talk, while methamphetamine can unleash a torrent of talk in even the most stubborn subjects[363].

If national security interests support the proportionate use, EITs that fall short of torture are acceptable[364]. Initial conditions, transition to interrogation, and questioning are the HVD interrogation program's procedure stages. During the initial circumstances, the inmate was transported to a black site after being given an HVD by the CIA. Once at the black site, the detainee had total command over the CIA. A careful, quiet, almost clinical, administrative process and medical evaluation were conducted on him. The HVD's head and face were shaved during this operation[365]. Switching to questioning, in the initial interview, the interrogators assessed the HVD's willingness to cooperate with the CIA interrogators in a generally peaceful setting[366]. The interrogation team created an interrogation strategy, which typically called for the employment of harsh techniques in an escalating manner if the detainee failed to produce information on threats that could be acted against them[367]. Before any EIT was permitted, medical and psychological experts thoroughly evaluated detainees as part of the development of the interrogation plan to ensure that the detainee was not likely to experience extreme bodily or mental pain or suffering due to the interrogation[368]. Additionally, during any EIT interrogation, medical and psychological experts continuously assessed the detainee's health to halt the use of techniques or the interrogation altogether if the detainee's state of health suggested that the detainee might sustain "significant" physical or mental harm, as defined by the HVD program.

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[361] *Ibid.*
[362] MOHER (2004:479).
[363] BOWDEN (2003:61).
[364] Memorandum (30 May 2005), *Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees*, p. 30.
[365] CIA (2004:1).
[366] *Ibid*, p. 3.
[367] Memorandum (30 May 2005), *Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees*, p. 7.
[368] *Ibid*, p. 8.

Conditioning, corrective, and coercive techniques are the three categories into which the EITs can be divided and adopted in an escalating manner. The inmate was brought down to a baseline, dependent state via conditioning techniques, showing the HVD that he had little control over his fundamental demands. The methods included naturopathy, sleep deprivation ranging from 48 to 180 hours[369], and dietary manipulation[370]. The primary purposes of the corrective approaches were to correct or startle the inmate. While the HVD was subjected to the conditioning approaches, the techniques were frequently used[371]. The interrogation techniques were Attention Grab, Facial Hold, and Abdominal or Facial Slap. In the latter, the interrogator used the back of his open palm to strike the detainee in the face or the abdomen. Instead of causing bodily harm, the intention was to shock, startle, or degrade the target. The Facial Hold was applied to keep the interrogator's head immovable. The Attention Grasp involved controlling and quickly grabbing the person with both hands, one on each side of the collar opening[372]. The most successful methods of questioning were thought to put the subject under the most physical and psychological strain – the techniques comprised of Walling, Water Dousing, Stress Positions, Cramped Confinement and Waterboarding[373]. A flexible, fake wall was used for Walling. The heels of the HVD were resting against the wall and the interrogator slammed him solidly into the wall after dragging the subject forward. The DoJ claims that this tactic was not intended to inflict great agony but rather to wear out the prisoner and shock or surprise him or her, changing the prisoner's expectations about the treatment he or she thought he would receive. The duration of Water Dousing varied depending on the water temperature: for a water temperature of 41°F/5°C, the total duration of exposure was limited to a maximum of 20 minutes without drying and rewarming. Water Dousing consisted of pouring cold water on the detainee either from a container or from a hose without a nozzle[374]. The HVD was required to hold a specific position, such as standing, for an extended time when using the Stress Position approach. Cramped Confinement included putting the HVD in a small, dimly lit area whose dimensions were intended to limit the person's ability to move. Depending on the container's size, different confinement lengths were experienced. The most strenuous method was the Waterboard. The detainee was positioned on a slanted downward barrow in this method. A cloth was placed over the detainee's face, and cold water was poured on the cloth as he lay on his back with his head pointing toward the bottom of the barrow. Breathing through the

[369] *Ibid*, p. 11.
[370] CIA (2004:4).
[371] *Ibid*, p. 5.
[372] Memorandum (30 May 2005), *Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees*, p. 8.
[373] CIA (2004:5).
[374] Memorandum (30 May 2005), *Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees*, p. 9.

moist towel was challenging or occasionally impossible. This treatment consequently caused a feeling of drowning[375].

2.2 Tortures Targeted at Al-Qaeda Suspects

The photos of Guantanamo and Abu Ghraib are a stark reminder of the acts that took place and serve as an example of the kinds of actions that unquestionably violate the GPW, the definition of torture found in the UNCAT, and US law[376]. According to Article 7(1)(f) of the Rome Statute, a variety of people could be held accountable for the charge of torturing someone or performing other inhumane acts as a crime against humanity. Due to the many levels of engagement, the complete spectrum of modes of culpability under Article 25(3) of the Rome Statute may be asserted against individuals involved in EITs. For instance, the Administration and monitoring of the EITs entailed significant involvement from medical professionals and psychologists.

The authorization of Category I, II, and some Category III techniques was sent to Guantanamo, where at least one detainee, Mohammed Al Qahtani, the alleged "20th hijacker", who had been refused entry into the US and sent back to Afghanistan following the 11 September attacks, was subjected to several of the techniques[377]. Al Qahtani endured weeks without sleep, was stripped naked, was subjected to military working dogs and loud music was made to wear a leash and was made to perform dog tricks. Midway through December 2002, Naval Criminal Investigative Service ('NCIS') agents on the Criminal Investigation Task Force sent "back-channel" reports to Alberto Mora, the Navy General Counsel, expressing shock that detainees at Guantanamo were "being subjected to physical abuse and degrading treatment"[378]. Rumsfeld authorized the use of 24 specific interrogation techniques for use at Guantanamo. However, he also stated that if more were needed for a particular detainee, "you should provide me, via the Chairman of the Joint Chiefs of Staff, with a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee"[379]. The Staff Judge Advocate for Combined Joint Task Force 180 (the command at the time in charge of military operations in Afghanistan) produced a memorandum on 24 January 2003, which authorized some of the interrogation

[375] SONDEREGGER (2014:349).
[376] GREENBERG, DRATEL (2005:229).
[377] WOODWARD (2009).
[378] Memorandum, Navy General Counsel to Inspector General, Department of the Navy (7 July 2004), *Statement for the Record – Office of General Counsel Involvement in Interrogation Issues*, available *online*.
[379] Memorandum, Secretary of Defense to Commander, U.S. Southern Command (16 April 2003), *Counter-Resistance Techniques in the War on Terrorism*, available *online*.

techniques outlined in the earlier Secretary of Defense memorandum, such as "removal of clothing" and "exploiting the Arab fear of dogs"[380].

Examples of what was deemed acceptable and what was done include: making a father watch his son's mock execution; putting a lit cigarette in a detainee's ear to burst his eardrum; dousing someone's hand in alcohol and setting it ablaze; chaining people to the floor for 18 to 24 hours; shackling people from the top of a door frame to dislocate their shoulders; and gagged people to simulate intoxication; beatings with bare hands and sharp instruments result in broken bones and lacerations; banging heads against walls; knee and boot strikes to body parts that produce excruciating pain, depriving the afflicted of medical attention[381]. The OLC of the Administration absurdly asserted that for severe pain and suffering to be considered torture, as stated in Article 1 of the UNCAT, it "Must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death"[382]. Bybee contended that psychological harm must persist "months or even years" to qualify as torture regarding psychological tactics. He also claimed that the Geneva Conventions and customary IHL did not apply to combatants who battled the US when it invaded Afghanistan[383].

However, several errors[384] that have resulted in the arrest and torture of innocent people have been found since 2002[385]. Tragically, it has been revealed that over 200 people have died while being held in US custody due to interrogation methods that the Administration's Government lawyers sanctioned[386].

2.3 Arbitrary Detention and Enforced Disappearance

Although there are conceptual differences between secret detention and extraordinary rendition operations, there is not much difference in how they operate. It is difficult to argue against the political and historical similarities between extraordinary rendition and enforced disappearance as a tactic used by State officials to disregard human rights. Both involved kidnapping and disappearing detainees, transporting them extralegally on secret flights to unidentified locations worldwide and then holding them incommunicado

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[380] Report, Major General Fay, Investigating Officer (25 August 2004), *AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade*, available *online.*
[381] BASSIOUNI (2005:399).
[382] Draft Memorandum, Yoo, Deputy Assistant Attorney General, U.S. Department of Justice & Delahunty, Special Counsel, U.S. Department of Justice, to General Counsel, U.S. Department of Defense (9 January 2002), *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, available *online.*
[383] Draft Memorandum (9 January 2002), *Application of Treaties and Laws to al Qaeda and Taliban Detainees.*
[384] PEJIC, DROEGE (2013:519).
[385] ACKERMAN (2006).
[386] GREENBERG, DRATEL (2005:230).

while subjecting them to interrogation, torture, and abuse. Several international declarations and treaties list forced disappearance as a crime against humanity. Noteworthily, the "Night and Fog Decree", issued by the Nazis to execute people while keeping their relatives in the dark about what happened to them, has previously been recognized as an international crime against humanity[387]. Due to the arbitrary detention and forced disappearance of people, the CIA's secret detention and extraordinary rendition programs were illegal under IL. Even when there was no possibility of post-transfer mistreatment, renditions frequently involved abductions, forced disappearances, and arbitrarily detaining the detainee. As a result, they also breached international legal standards[388].

There has been a considerable attempt to conceal pertinent facts and information, as seen by the US's subsequent actions to place HVDs outside the standard judicial system, culminating in a plea by NGOs for the reality of this program to be known. The motion argued that because the US refused to treat the detainees as POW until a competent tribunal resolved, the detainees were in danger of suffering irreparable harm[389]. The claim was brought out because of the detainees' arbitrary detention, lengthy incommunicado detention, lack of access to counsel during interrogations, risk of trial, and potential death penalty before military trials. The Geneva Conventions are predicated on the idea that POW and civilian detainees in armed situations must be recorded and detained in facilities with official recognition. IHL forbids secret detention and is only relevant in armed conflict situations[390]. Another IHL principle relevant in all armed conflicts is the prohibition against forced disappearances. According to Article 49 of the Fourth Geneva Convention, which protects civilians during armed conflict, individual or mass transfers, deportation of protected persons from one country to another are prohibited, regardless of their motive.

The definition of "enforced disappearance" according to the International Convention for the Protection of All Persons from Enforced Disappearance[391] of 2006 is:

> "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"[392].

[387] LAU (2016:1289).
[388] OPEN SOCIETY JUSTICE INITIATIVE (2013:27).
[389] MAHFUD (2014:231).
[390] INTERNATIONAL COMMITTEE OF THE RED CROSS (2005).
[391] UNITED NATIONS (2006:2).
[392] *Ibid.*

The IACommHR has expressed grave concern regarding the State's use of extraterritorial torture in the Declaration on the Protection of All Persons from Enforced Disappearance of 1992 and the Inter-American Convention on the Forced Disappearance of Persons of 1994[393]. The Commission certified preventative measures in March 2002 on behalf of terrorist detainees held by the US in Guantanamo[394].

According to the ICCPR, everyone has the right to liberty and personal security. No person shall be arbitrarily detained or arrested. No one may be deprived of liberty unless certain conditions are met, and legal procedures are followed[395]. It has also determined that 26 people whom the CIA unlawfully detained in connection with the GWOT were subject to arbitrary detentions that violated Article 9 of the ICCPR and fell in Category I, which is used "when it is obviously impossible to invoke any legal basis justifying the deprivation of liberty".

The UDHR and the Inter-American Convention on Human Rights are the foundation for the Rome Statute definition in Article 7(1)(i), and further clarified in Article 7(2) (i). When the HVDs were forcibly "disappeared", several culprits took part in this "systematic attack" to gather "actionable intelligence" for counterterrorism measures, according to the allegation of enforced disappearance under Article 7(1)(i) of the Rome Statute. Article 25 of the Rome Statute governs individual criminal responsibility in front of the ICC. The full range of Article 25 modes of liability under the Rome Statute may apply due to the various levels of participation involved, for the same reasons as in the preceding two charges relating to the imprisonment and severe deprivations of liberty and torture or inhumane treatment as a crime against humanity[396]. The variety of involvement strategies thus highlights the significance of individual accountability when considering each charge of an international crime. To qualify as a crime against humanity, the detention must be arbitrary. Elements of Article 7(1) of the Rome Statute do not necessarily come into play when the ICCPR's provisions on arbitrary detention are violated. Following the fundamental principles of IL, the Rome Statute forbids "imprisonment or other severe restriction of physical liberty". The issue with this practice is that individuals assessed as HVDs are held for lengthy periods without being charged and without having the option to contest the legality of their custody. According to the CAT, indefinite incarceration without trial constitutes, per se, a violation of the UNCAT[397]. However, as mentioned in Part III, several cooperating States – among them Pakistan – are not signatories to the Rome Statute. As a result, there will be questions about the

[393] ORGANIZATION OF AMERICAN STATES (2003).
[394] *Precautionary Measures Granted by the Inter-American Commission of Human Rights During* (2002:1).
[395] OPEN SOCIETY JUSTICE INITIATIVE (2013:26).
[396] LAU (2016:1292).
[397] *Ibid,* p. 1287.

ICC's jurisdiction in cases where the nationals of both Americans and Pakistanis are involved. Due to the CIA's cooperation with foreign States and the various modes of liability available under Article 25 of the Rome Statute, all secret detention facilities outside of US territory – yet under their *de facto* control – would be subject to the charge of imprisonment or other severe deprivations of physical liberty as a crime against humanity under Article 7(1)(e). For instance, the secret detention facilities in Poland and Romania have either been jointly run by the respective foreign Governments and the CIA, have been run by the CIA with express or implied permission from the relevant foreign Government, or have been run by the relevant foreign State with significant US Government influence.

On 6 September 2006, President Bush declared that the CIA had imprisoned and interrogated detainees in black sites outside of the US before transporting 14 of them to Guantanamo Bay, marking the first time he had publicly acknowledged the secret detention program. The current transfers, he continued, suggesting that there are no longer any terrorists participating in the CIA program. However, when high-ranking terrorists are detained, the need to collect intelligence from them will remain essential. A CIA program for interviewing terrorists will therefore be essential to obtaining information that could save lives[398].

3. Areas Concerned with the Detention of Al-Qaeda Suspects

Torture was used in various international settings, including the US military bases in Guantanamo Bay, Cuba; Bagram, Kandahar, and other locations in Afghanistan; Abu Ghraib, and other locations in Iraq; and through proxies in several countries, including Egypt, Syria, Pakistan, Romania, and Poland[399]. Despite assurances and denials, the latter subterfuge – using the CIA to abduct non-US citizens and send them to the secret services of other nations for torture – is still illegal under the laws that forbid torture cited above. This was done in violation of the legal obligations. It should be highlighted that the GWOT was the only stated basis for these policies and procedures. It served as the setting for the crimes, both domestic and foreign, that were perpetrated without consequence[400].

The SSCI Report, released on 1 January 2006, verified that the CIA had imprisoned at least 112 people in its detention and interrogation program since 9/11. It was discovered that the CIA was holding 28 HVDs. The Report also reveals that the CIA separated 25 "mid-value and high-value detainees" into two categories on 5 May 2011. While roughly 112 detainees were participating in the entire CIA detention and interrogation program, it appears

[398] OPEN SOCIETY JUSTICE INITIATIVE (2013:16).
[399] MASTERS (2022).
[400] BASSIOUNI (2005:406).

that only a small subset of this already exclusive group of detainees was chosen to be subjected to the various combinations of the EITs.

3.1 CIA's Black Site Program for High-Value Detainee

The US Government was secretly holding unidentified accused terrorist "enemy combatants" in detention facilities around the globe as part of the GWOT, the President publicly acknowledged on 6 September 2006. Bush gave the go-ahead for the CIA to start a secret detention program in which terrorism suspects were imprisoned in CIA prisons, sometimes known as black sites, outside the US and subjected to abusive interrogation techniques like torture[401]. Black sites, coined by the Bush Administration, are seen as just another term for clandestine prisons. They were developed in response to demands from the White House for intelligence and suspect capture. The CIA was reportedly given the mandate to "create paramilitary teams to hunt, capture, detain, or kill designated terrorists almost anywhere in the world"[402] by President Bush, who reportedly did so on 17 September 2001. The CIA is given expanded competencies concerning its covert actions under the RDI-Program, including the power to hold terrorist detainees in custody and build secret detention facilities outside the US in cooperation with the Governments of the relevant countries[403]. Due to the presidential authorization given for the program of secret detention to be run by participating agents from this agency, the CIA faced accusations of crimes against humanity from roughly 2002 to roughly 2009, including imprisonment or severe deprivation of liberty, torture and inhumane acts, and the enforced disappearance of persons[404].

The HVD program use of black sites for torture execution is another essential aspect. The CIA built black sites for this purpose, which are run in Cuba, the Middle East, and Europe. According to reports, HVDs who had spent between 16 months and four and a half years in captivity at black sites before being sent to Guantanamo in September 2006 gave in-depth stories of torture[405]. It unsettlingly aligns with earlier investigations into the rendition program, which uncovered networks of collaboration between the US and other states in the kidnapping, transporting, and torturing of terrorist suspects. These investigations raised concerns about the state of international human rights norms. It should be of particular concern how many nations permitted these secret detention facilities, believed to have included Poland, Romania, Lithuania, Thailand, and Afghanistan, to be used by the CIA to torture captives. Many of these jurisdictions are liberal democracies, which are considered the most likely to defend fundamental human rights; as a result,

[401] OPEN SOCIETY JUSTICE INITIATIVE (2013:11).
[402] BASSIOUNI (2010:145).
[403] ANWUKAH (2016:13).
[404] LAU (2016:1265).
[405] RAMSAY (2011:630).

their behavior calls into doubt the integrity of the ban on torture[406]. According to former CIA agent Robert Baer, "If you want a serious interrogation, you send a prisoner to Jordan. If you want them to be tortured, you send them to Syria. If you want someone to disappear, never to see them again, you send them to Egypt"[407].

Even while the black site program was kept a secret, giving financial incentives to the Governments hosting black sites took place and was also considered a crucial component in ensuring collaboration. The CIA frequently had to provide financial inducements, up to tens or hundreds of millions of dollars, in exchange for other Governments to accept the sites, which is the first significant difficulty indicating that collaboration was only sometimes possible[408]. The SSCI Report's conclusion suggests that to encourage Governments to host CIA detention sites clandestinely or to increase support for existing sites, the CIA provided millions of dollars in cash payments to foreign Government officials[409]. A multi-million dollar "wish list" was created by the CIA Station, and CIA Headquarters eventually sanctioned several million dollars more than what was asked for the "purposes of the [REDACTED] subsidy"[410]. Additionally, CIA headquarters understood the connection between this cash assistance and cooperation. Host Governments requested financial support in exchange for the continued functioning of the facility[411]. "We cannot have enough black site hosts, and we are loathe to let one we have slip away"[412], so in 2003, they asked one CIA station to "advise if additional funds may be needed to keep the facility viable over the coming year and beyond".

The US was also worried about how any leaks may affect the host countries. According to a study from Cofer Black in October 2001, the likelihood of exposure would only grow over time. It may "inflame public opinion against the host Government"[413], endangering the collaboration required to assure the facility's survival. Procuring and maintaining these facilities proved to be a persistent challenge for the CIA. Importantly, even if the locations were kept a secret, it is clear from the behavior of the participating states and internal CIA debates that all parties were concerned about the possible repercussions of breaking the anti-torture norm. Due to this worry, the CIA had to incur significant financial and diplomatic resources to maintain their installations[414].

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406 KEATING (2016:937).
407 BASSIOUNI (2010:145).
408 SENATE SELECT COMMITTEE ON INTELLIGENCE (2014:139).
409 *Ibid,* p. 16.
410 *Ibid,* p. 97.
411 KEATING (2016:946).
412 SENATE SELECT COMMITTEE ON INTELLIGENCE (2014:140).
413 BLACK (2001).
414 KEATING (2016:952).

Even if the media refrained from disclosing Abu Zubaydah's location, the possibility of doing so prompted the decision to close the site[415]. Individuals within the CIA understood that there could be significant problems generated by any potential disclosure of the black site program, were concerned about the legal repercussions on CIA agents participating and faced opposition and questioning from other US Government officials. Together, these factors suggest, consistent with partner state behavior, that an awareness or partial internalization of the anti-torture norm made cooperation challenging, if not impossible. There is evidence that the US worries about the program's possible repercussions and the harm it could do to the states and their bilateral relations. Despite the presence of secrecy, which may otherwise enable states to escape the costs of acting illegally concerning the anti-torture norm, there were still significant issues[416].

Thus, the November 2005 disclosure of the black site operations served as the death knell. At least two states marched to the US as soon as the Washington Post report was published, with one claiming its contribution might be in jeopardy[417]. The CIA immediately recognized away that there was a serious issue with their behavior considering international human rights standards. These worries proved to be justified. The state that operates the prisons and detention centers demanded and won the site's immediate closure. Additionally, the discovery led to more significant issues with intelligence cooperation. One Government forbade April 2006 sharing information that would result in the capture or arrest of members of al-Qaeda or other terrorist organizations for interrogation, stating their belief that the ICCPR forbade them from doing so[418]. The CIA faced significant difficulties when even states that continued to host black sites tightened up on their helpful behavior.

The US Senate Select Committee on Intelligence issued its preliminary findings and recommendations regarding the CIA's Detention and Interrogation Program on 3 December 2014. The actions of the CIA and their agents at several black sites were harshly criticized[419]. There is no doubt that in their pursuit of the GWOT, the US and its black site allies violated the *jus cogens* anti-torture norm. Giving money to foreign Governments alone is insufficient to assert that human rights standards were being upheld. One could argue that the smaller Governments may perceive this as a chance to receive extra compensation for cooperating. This has some credibility, without a doubt[420]. In addition, to pointing out issues with the program's Administration and accusing the CIA of misleading other US Government agencies, it also concluded that the EITs were "not an effective means of

[415] SENATE SELECT COMMITTEE ON INTELLIGENCE (2014:24).
[416] KEATING (2016:949).
[417] SENATE SELECT COMMITTEE ON INTELLIGENCE (2014:152).
[418] *Ibid,* p. 153
[419] KEATING (2016:936).
[420] *Ibid,* p. 947

acquiring intelligence or gaining cooperation"[421], undermining the core intent of the program.

3.2 Guantanamo Bay Detention Camp

The Guantanamo Bay Detention Camp, often known as Gitmo, is a US prison on the Guantanamo Bay Naval Base situated on the shore of Guantanamo Bay, in southeast Cuba. The prison facility was built in phases beginning in 2002 and housed Muslim militants and suspected terrorists apprehended by American forces in Afghanistan, Iraq, and other places[422]. Proponents see Guantanamo as a suitable storage facility for the GWOT's "worst of the worst". They claim that it has prevented some of the most dangerous men in the world from attacking the US while also providing crucial counterterrorism intelligence and aiding in the prosecution of war criminals, including the suspected 9/11 plotters[423]. However, it is seen by its detractors as a somber memorial to the human rights abuses the US carried out in the name of national security. Numerous prisoners have said throughout the years that their American captors subjected them to severe physical and psychological abuse, some of which amounted to torture, illegal detention, denial of due process, and unlawful detention. Guantanamo has allegedly diminished American moral and diplomatic influence throughout the world as a result, according to detractors[424].

Early in 2002, the camp started taking in alleged al-Qaeda militants, Taliban combatants, and members of the Islamic fundamentalist group that had previously dominated Afghanistan (1996–2001). Eventually, hundreds of detainees from many nations were detained at the camp without being given a reason for imprisonment and without access to legal defense[425]. There were no prisoners imprisoned here; instead, they were "unlawful enemies' combatants" or "detained enemy combatants", as defined by the US Army at the site rather than as a prison. There are no guilty or innocent parties involved, only enemies[426]. The US successfully exploited a clear labelling gap in the Geneva Convention by rejecting any classification of the Guantanamo detainees, allowing the US to question the prisoners without being constrained by the Convention[427].

In the first week of January 2002, when it became clear that detainees from the Taliban and al-Qaeda may be brought to Guantanamo Bay Naval Base in Cuba, the US Southern Command Staff Judge Advocate conferred with the

[421] SENATE SELECT COMMITTEE ON INTELLIGENCE (2014:2).
[422] NOLEN (2023).
[423] MASTERS (2022).
[424] *Ibid.*
[425] NOLEN (2023).
[426] GREENBERG (2007).
[427] MOHER (2004:476).

ICRC and suggested using the GPW principles to establish the camp. Lieutenant Colonel Timothy Miller, one of his attorneys, referred to GPW as his "working handbook"[428]. The US Marine Corps Brigadier General Lehnert, the commander of Joint Task Force in charge of caring for the prisoners in Guantanamo, made a valiant effort to implement those provisions of the conventions that guaranteed the "prisoners' safety and dignity". A preliminary standard of care for the Guantanamo detainees that included ICRC oversight and, to the extent practicable, GPW standards of treatment was developed after Lehnert instructed his attorneys to study the 143 Articles of the GPW, paying particular attention to Common Article 3. The housing of detainees at Guantanamo was initially governed by these treatment standards, with reasonable accommodations for pressing security concerns. However, the treatment standards changed after Lehnert left in March 2002, and the interrogation-focused detention program at Guantanamo began.

According to HRW's 2008 research, Guantanamo detainees were kept in less sanitary conditions than those found in the country's maximum-security facilities. They were only permitted two hours of exercise each day and were forced to spend 22 hours in cells with little to no light. They were prohibited from seeing their relatives. The Pentagon permitted one annual phone contact to their family[429]. According to the ICRC Report, 14 HVDs were being held at Guantanamo Bay as of 2007; this number was confirmed by President Bush's statement to the public on 6 September 2006. This public statement was made at the same time the SSCI Report revealed that high-level negotiations had a place to move some of the HVDs to Guantanamo Bay in early January 2006. Obama pledged to abolish the Guantánamo jail within a year of entering office. However, he later backed down in the face of legislative opposition. He refused to pursue executive options that could have avoided congressional financing limitations on extraditing convicts to the US for trial in federal courts[430].

Since the 9/11 attacks, the US has detained 780 individuals at Guantanamo, all Muslims. In 2003, the prison had a maximum capacity of 660 men. The final prisoner entered in 2008. Nine people perished there. President George W. Bush released more than 500; President Barack Obama transferred nearly 200; President Donald J. Trump issued just one; and President Joe Biden issued three. In September 2022, 36 people were still there[431]. All the remaining 27 never faced charges. Inadequate medical care and even access to medical records are commonplace, making the prison a living memorial to the human rights abuses brought on by 9/11[432]. Fundamental flaws exist in the military commissions established at Guantanamo to try suspects. Due process

[428] GREENBERG (2009).
[429] AGUIRRE (2009:141).
[430] HUMAN RIGHTS WATCH (2022).
[431] MASTERS (2022).
[432] HUMAN RIGHTS WATCH (2022).

has thus far been denied to the five convicts accused of planning the 9/11 attacks, as well as the right to justice for the survivors and families of the almost 3,000 victims of the attacks[433].

3.1 Abu Ghraib Prison

A large prison complex in the Iraqi province of Baghdad, called Abu Ghraib, gained notoriety for the use of torture and the enormous number of political prisoners held under Saddam Hussein's rule (1979–2003)**[434].** The US military reopened it in August 2003 following the invasion of Iraq by US and allied forces earlier that year. In 2004, reports – and photographs – detailing the abuse, torture, and deaths of its prisoners at the hands of members of the US Army surfaced, sparking an international backlash. The pictures of American soldiers torturing Iraqis in the Abu Ghraib prison will endure long after other aspects of the Iraq War have been forgotten. The abusers are not indicative of Americans in Iraq; instead, the torture symbolizes how American ideals have been subverted and how expectations have been dashed during this misguided conflict[435].

Without sufficient legal monitoring, the methods authorized at the DoD level for restricted application at Guantanamo moved to Afghanistan and Iraq[436]. These ambiguous standards were open to abuse, leading to multiple probes into wrongdoing concerning detainees in Iraq[437]. The findings of the investigations into the abuses at Abu Ghraib, including the comprehensive Schlesinger Report that examined the chain of command's role in the incident, were consistent[438]. In line with the abuse timeline, harsher techniques started to be used during prisoner interrogations at Abu Ghraib in the fall of 2003[439]. Under Brigadier General Karpinski's direction, the Uniondale, New York-based 800th Military Police Brigade managed the jail, but many of the interrogators and translators were hired by outside companies[440].

Major General Antonio Taguba's initial investigation into alleged military police misconduct concluded that numerous instances of "sadistic, blatant, and wanton criminal abuses intentionally inflicted on several detainees from October to December 2003"[441] had occurred. He advised that those soldiers be subject to criminal prosecution. After looking into the role of military

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[433] *Ibid.*
[434] VOLLE (2022).
[435] STARR (2004).
[436] SCHLESINGER (2004).
[437] Report (25 August 2004), *AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade*.
[438] TAGUBA (2004).
[439] ARSENAULT (2017:148).
[440] VOLLE (2022).
[441] SCOTT (2016:165).

intelligence interrogators, Major General George Fay concluded that "much of the violent or sexual abuse occurred separately from interrogations and was not driven by ambiguity about law or policy. Soldiers were aware that they were going against accepted methods and practices. He also discovered that Colonel Pappas, the commander of the Joint Intelligence Center ('JIC'), approved of "clothing removal and the use of dogs" without proper approval from higher headquarters; nevertheless, such activities were unrelated to the physical or sexual abuse at Abu Ghraib. The range of sexual assaults conducted by the military police was wide. A female detainee was allegedly raped by at least one male guard, according to the report produced under Taguba. Male prisoners were also compelled to engage in sexual actions on one another or excite their desire while being photographed or recorded by the guards. Captives were forced to remain naked for extended periods, and photos and recordings of naked male and female detainees were taken for pleasure[442]. Other claimed abuses against inmates included beating them with phosphoric acid and urinating on them[443].

According to the 2004 Schlesinger Report, which was the work of an independent four-person group chaired by the Former Secretary of Defense James Schlesinger, contents that Secretary Rumsfeld's December 2002 memo authorizing the use of interrogation techniques was the cause of abuse in the field. He declared that although the Secretary of Defense specifically limited the EITs to Guantanamo and requiring his personal approval, these techniques migrated to Iraq where they were neither limited nor safeguarded[444]. At Abu Ghraib, the circumstances brought on by Administration policies encouraged inmate misbehavior. The DoD allocated too few American soldiers concerning the number of prisoners to maintain service levels. The soldiers had no training for their work and minimal supervision. None of this justifies jail guards engaging in torture. The policies that led to this catastrophe and the overall mindset that the pressing demands of the GWOT require us to set aside law and liberty are, however, the responsibility of the president, not only the secretary of defense[445].

[442] VOLLE (2022).
[443] *Ibid.*
[444] ARSENAULT (2017:149).
[445] STARR (2004).

CHAPTER IV – The GWOT Showdown to the International Public

In 2001, human rights groups and journalists started criticizing the abuse in detention camps. A few times after the US forces invaded Iraq on foot, reports of human rights violations by the US military started to surface. In response to claims of torture in Afghanistan that were reported in *The Washington Post* in 2002, HRW encouraged the US Government to investigate the matter and take appropriate action[446]. The Associate Press[447] released the first press article concentrating exclusively on the atrocities at the Abu Ghraib prison in November 2003. When the US television news program *60 Minutes* aired a report in April 2004[448] that featured multiple photographs of the detainees being abused, it eventually became a public controversy. The following week, information on Major General Taguba's Report[449] from early 2004 was leaked, and its conclusions confirmed the terrible behaviors shown in the pictures to the public. The study found that dysfunctional leadership, insufficient staffing, inadequate training, and low morale contributed to the abuse[450]. In their investigation, HRW also noted that captives were "struck all night long and subjected to electric shocks. Roth, the Executive Director of HRW, expressed his worry that the US would be "in violation of some of the most fundamental prohibitions of international human rights law"[451].

The UN Special Rapporteur on Human Rights and the Countering of Terrorism Report and the Joint Parliamentary Committee on Human Rights Report on allegations of UK Complicity in Torture were used by the appellant in the Ahmed case to support his claims[452]. The UN Special Rapporteur had emphasized that States must not support or facilitate acts of torture or acknowledge such practices as legal, including relying on intelligence data gained via torture, in the portions of his Report cited in the verdict[453]. Additionally, the Court stated that engaging in the active or passive interrogation of people detained by another country constitutes an internationally wrongful act if the participating nation knew or should have known that the detainee faced a genuine risk of torture or other unlawful treatment, such as arbitrary detention. States that use information obtained via torture or other cruel or inhumane treatment are involved in committing such crimes abroad[454]. The Joint Committee on Human Rights came to similar conclusions when it discovered that they believe that whether such passive

[446] PRIEST, GELLMAN (2002).
[447] Cooperative 24-hour news agency, the oldest and largest in the US.
[448] VOLLE (2022).
[449] TAGUBA (2004).
[450] VOLLE (2022).
[451] COOPERMAN (2002).
[452] FULTON (2012:777).
[453] SCHEININ, UNHRC (2010), para. 53.
[454] *Ibid*, paras 53-5.

receipt can be equated to cooperation in torture depends on whether such information is used routinely[455]. This argument was dismissed by both the trial judge and the Court of Appeal[456]. This indicates the severity of comparable attempts to legitimize torture in the public realm and the extent to which resistance to criminal culpability had become entrenched within the legal culture.

However, "in the wake of the public disclosure of detainee abuse at Abu Ghraib"[457], the evolution of policy and law continued inexorably. Unquestionably, there was significant policy debate following the investigations exposing detainee mistreatment in Guantanamo, Afghanistan, and Iraq. The Common Article 3 of the Geneva Conventions was ultimately reaffirmed due to this discussion. Nevertheless, in the fall of 2005, a substantial shift in DoD policy started. To incorporate the criteria for humane treatment into a revised DoD directive on the treatment of prisoners, Mr. Haynes, the DoD General Counsel, oversaw a working group. The White House rejected its first policy suggestion that Common Article 3 be adopted as the minimal level of care[458].

1. The Condemnation by International Organizations

Over 200 detainees in US custody are estimated to have died due to these interrogation practices, most likely due to torture[459]. Several thousand people have likely also been tortured during interrogation at US-controlled detention facilities and at foreign detention facilities where officials acting for and on behalf of the US have engaged in torture. The media, Pentagon records made available through the FOIA, some autopsy Reports, a few investigations, a few Courts-martial, and a few officers' statements have all revealed what is known about these policies and practices. However, these revelations only provide a glimpse of what may have occurred[460]. Since 2008, torture and rendition have been openly debated, criticized, and essentially abandoned[461]. Goldsmith and Sikkink approach the issue differently and come to various conclusions. However, they broadly concur that pressure from within the Bush and, later, the Obama Administrations was a factor in the actual practice being reversed.

Reports and legal proceedings show that groups like HRW, Human Rights First, and the American Civil Liberties Union ('ACLU') have been at the

[455] FULTON (2012:777).
[456] *Ibid*, p. 778.
[457] COMMITTEE ON ARMED SERVICES (2008).
[458] MAYER (2006).
[459] SHAMSI (2006).
[460] RAJIVA (2005).
[461] LELLIO, CASTANO (2015:1282).

forefront of bringing these problems up[462]. NGOs like the ACLU, the Centre for Constitutional Rights, the International Centre for Transitional Justice, AI, and the ICRC have called for criminal investigations and strategic prosecutions at the highest level of officials in charge of approving and justifying the policy of torture[463].

AI lists at least 111 nations in its 2010 annual Report as using torture or other cruel, inhumane, or degrading treatment. According to AI, certain nations have increased their ability to suppress legitimate political dissent, torture detainees, subjecting them to enforced disappearances, and pass them over to other states in breach of the norms of non-refoulment[464]. Although this list is incomplete, AI attacks the counterterrorism legislative frameworks in Ghana, Russia, the US, the UK, Spain, Denmark, Norway, France, Turkey, Algeria, Morocco, Tunisia, India, Chile, Australia, South Africa, and Iraq. The broad and ambiguous definition of terrorism, the increase of the state's power to hold suspects incommunicado, the absence of notification of the offense, and the lack of access to legal representation have generally been the targets of criticism. One concern that has been left out is that EITs are permitted under any regime. In this area, practice rather than law is under attack. For instance, although the Saudi Arabian Law on Criminal Procedure was revised in 2001 to forbid torture and mandate that statements based on interrogations must be voluntary, Saudi Arabia is criticized by AI for "severe abuses of human rights".

1.2 International Committee of the Red Cross

For President Bush, Cheney, and a sizeable portion of the American people, torture is more than just a disgusting set of "procedures" that have been used on a small number of prisoners held in American custody over the past six or seven years; procedures that are described in this authoritative Report by the ICRC with chilling and patient particularity. Torture involves more than just the exact methods used on those fourteen HVDs and probably many more at the black site that the CIA secretly ran on three continents[465], including forced nudity, sleep deprivation, prolonged standing, and drowning.

Since early 2002, ICRC personnel have visited detainees regularly at the US detention facility at Guantanamo Bay to assess whether they are being treated in conformity with IL standards. Additionally, a year before *60 Minutes II* broke the story[466], the ICRC had submitted reports to the Coalition Forces in Iraq outlining abuse at Abu Ghraib. According to the ICRC assessment,

[462] BASSIOUNI (2005:419).
[463] RAMSAY (2011:636).
[464] PEJIC, DROEGE (2013:524).
[465] INTERNATIONAL COMMITTEE OF THE RED CROSS (2007).
[466] MURPHY (2004).

detainees under the control of Military Intelligence were highly likely to be subjected to harsh techniques, some of which amounted to torture[467].

In 2004, the ICRC wrote a secret report, and *The New York Times* published it. According to this assessment, the methods utilized were "tantamount to torture", and the medical staff at Guantanamo Bay flagrantly violated their profession's ethical standards by supporting these methods[468]. The ICRC noted that between 2002 and 2004, the US Government's use of torture increased in sophistication and nuance[469]. The ICRC team discovered in June 2004 a far higher frequency of mental disease brought on by stress than the American medical authorities had discovered. They added that a large portion of this was brought on by lengthy solitary confinement[470].

The ICRC also documented the confinement conditions under which 14 HVDs were detained in Guantanamo Bay in 2006. These detention conditions were a crucial component of the interrogation process and the HVDs' overall treatment, excluding them from access to open spaces, exercise areas, and facilities for personal hygiene[471]. Other detention conditions included prolonged nudity, restricted access to solid food, continuous solitary confinement, and incommunicado detention. The prisoners displayed signs of concentration problems, memory issues, verbal expression problems, incoherent speech, severe anxiety reactions, abnormal behavior, and suicidal tendencies, according to the examination conducted by the medical delegation of the ICRC. Additionally, the delegation discovered a person in isolation who was unresponsive to verbal and painful *stimuli*[472]. As a result, there are solid foundations for a case to be made that extreme physical deprivation of liberty and incarceration constitute a crime against humanity.

According to the ICRC's interpretation guidelines, "civilians lose protection against direct attack for the duration of each individual conduct amounting to direct participation in hostilities" is a legal act that is acceptable under the difficult conditions of war[473]. However, knowing this background makes reading the ICRC Report feel like an odd exercise in going back in time. The ICRC experts were listening to descriptions of techniques used on the fourteen HVDs, who had been imprisoned covertly in the black sites for anywhere between sixteen months and four and a half years, that had originally been intended to be illegal "under the rules listed in the 1949 Geneva Conventions"[474]. Then, the ICRC investigators were asked to decide whether

[467] INTERNATIONAL COMMITTEE OF THE RED CROSS (2004).
[468] AGUIRRE (2009:133).
[469] LEWIS (2004).
[470] *Ibid.*
[471] LAU (2016:1287).
[472] MAHFUD (2014:234).
[473] LELLIO, CASTANO (2015:1288).
[474] INTERNATIONAL COMMITTEE OF THE RED CROSS (2007).

the methods initially complied with the Geneva Treaties as members of the organization appointed by the conventions to oversee the treatment of POWs and to determine the legality of that treatment. Unsurprisingly, in their opinion, the claims of detainee mistreatment show that, in many instances, the mistreatment they endured while imprisoned in the CIA program, either individually or collectively, constituted torture. Numerous additional aspects of the mistreatment also constituted cruel, inhuman, or degrading treatment, either separately or in combination[475].

2. The Cases of the High-Value Detainees

Reports and eyewitness accounts of torture have been published by the media more frequently, and some have started calling for the Government to answer for its actions. Due to his determination to defeat a Bill in Congress in 2005 that would have outlawed any form of abusive treatment by American security agencies, *The Washington Post* dubbed Cheney the "Vice President of Torture"[476]. According to *The New York Times*, the scenario violated "basic standards of human decency", and Hersh's statement, "such dehumanization is unacceptable"[477], captured the general outrage. Dehumanization and demonization of the enemy are a case in point[478]. Violence is made more accessible by dehumanization, which in turn, makes the victim's dehumanization worse.

The accountability debate has shifted to other topics due to the lack of formal procedures like a truth and reconciliation commission or criminal prosecutions, such as the publication of the SSCI 6300-page Report into the CIA torture program and the career advancement of those connected to the program[479]. By outlining the breadth, systematic character, and sheer brutality of the abuses committed in connection with the detention and interrogation of terrorism suspects as well as the attempts to conceal the program, the Senate's release of the executive summary of that Report, the most thorough investigation into the CIA torture program to date, represents a significant step towards confronting the past. The investigations into Abu Ghraib, Bagram, and Guantanamo by general officers, which have so far been classified, as well as other internal reports and memoranda by military officers, CIA officers and staffers, and FBI agents, some of which decried and denounced interrogation practices, while others raised doubts about their usefulness and highlighted their counter-productivity, will also be a factor. The studies also draw attention to the fact that there is still no procedure to hold people accountable, leading to an accounting without responsibility[480]. Even in the

[475] *Ibid.*
[476] *Vice President of Torture* (2005).
[477] HERSH (2004).
[478] LELLIO, CASTANO (2015:1290).
[479] HAFETZ (2015:431).
[480] BASSIOUNI (2005:404).

face of evidence to the contrary in the SSCI Report, proponents of the program have persisted in saying that the CIA's torture program provided helpful intelligence that helped stop a future terrorist attack[481]. However, it was revealed in 2005 that few valuable pieces of intelligence had been gathered at Guantanamo and that many of the prisoners there had no connections to terrorism. According to a New Jersey Law School Report, 90 per cent of the prisoners had nothing to do with terrorism[482]. Similarly, a military intelligence officer from the coalition forces told the ICRC that between 70 and 90 per cent of prisoners in Iraq were mistakenly detained and of no intelligence value[483]. US authorities, meanwhile, have consistently asserted that they learned about al-Qaeda and terrorist networks through interrogations[484].

The number of inquiries and Court martial is still low. It is difficult to follow these cases because no military branch keeps statistics on the justifications for Court martial and other disciplinary actions. As a result, it is challenging to determine the precise causes of each inquiry, investigation, or disciplinary action. The 120 cases have been subject to inquiry, investigations, disciplinary actions, and Court martial[485]. However, in none of these instances, except for a few disciplinary measures, did these investigations and inquiries extend past the parties directly in question and up the chain of command. Enlisted men and noncommissioned officers were typically the ones who were apprehended, but they are the bottom of the ladder. Without investigating or requesting the resignation of senior military or civilian authorities, the Government's approach was to prosecute lower-level officials and soldiers. Bush, Cheney, Rumsfeld, Gonzales, and others have made laws that benefit them[486].

On *Meet the Press*, former Vice President Cheney bragged that he would "do the same thing again in a minute"[487]. Former officials also launched a new website to support the CIA initiative. John Brennan, former CIA Director, disagreed with the SSCI Report's findings even though he conceded that it was "unknowable" if the data might have been collected via other, non-coercive means[488]. Brennan, deferring to "the policy makers in future times"[489], made no guarantees that the Government would be precluded from using the same procedures.

2.1 United States v. Abu Zubaydah

[481] HAFETZ (2015:440).
[482] GOLDENBERG (2006).
[483] URQUHART (2004).
[484] Direct citations in Chapter 2 point 2.
[485] BASSIOUNI (2005:407).
[486] AGUIRRE (2009:153).
[487] DAVIDSCON (2014).
[488] MAZZETTI, APUZZO (2014).
[489] HAFETZ (2015:437).

According to reports, US, and Pakistani agents allegedly kidnapped Abu Zubaydah, a stateless Palestinian, on 28 March 2002, from a home in Faisalabad, Pakistan. He was first sent to a CIA black site in Thailand and another black site. Zubaydah and numerous others think the site was in Poland, even though the Government has never officially acknowledged its location[490]. CIA interrogators waterboarded Abu Zubaydah at least 83 times in August 2002, according to an OLC letter published on 30 May 2005, but he made no new revelations. According to reports, Abu Zubaydah was imprisoned in Rabat in 2003[491]. Abu Zubaydah was extraordinarily rendered to Lithuania on or about 17 February 2005, where he was held in a secret detention facility built and equipped specifically for CIA detention, in accordance with prior authorization from high-level Lithuanian authorities[492]. According to his application submitted to the ECtHR, "on an unknown date, Abu Zubaydah was transferred by extraordinary rendition from Lithuanian territory to detention in an undisclosed facility"[493], the application adds. In September 2006, Zubaydah, together with fourteen other HVDs, after being detained by the CIA in secret locations worldwide for four years[494], was sent to Guantanamo Bay. Since his detention on 28 March 2002[495], he has been held in Guantanamo Bay[496].

Osama bin Laden's close friend and suspected al-Qaeda commander Abu Zubaydah played a vital part in each significant terrorist attack carried out by al-Qaeda, including 9/11. The Bush Administration identified Abu Zubaydah as a "senior terrorist commander" and the third in charge of Al-Qaeda. CIA papers that President Obama made public[497]. CIA officials expressed particular concern about Abu Zubaydah at the beginning of 2002[498]. According to Rizzo's account of events, Zubaydah first complied with CIA interrogators because of concern that they would leave him to perish because he had suffered severe injuries during his abduction[499]. After a gunfight in Pakistan in which he was shot three times and seriously hurt, he was captured in 2002. Zubaydah was taken to a secret prison facility in Thailand, where he was questioned after obtaining medical care at a hospital in Lahore[500]. They thought that detained al-Qaeda suspects were hiding crucial information. According to numerous reports, the FBI had previously used conventional law

[490] SCHWEITZER (2022).
[491] GOLDMAN, APUZZO (2010).
[492] *Abu Zubaydah v. Lithuania*, Eur. Ct. H.R., Oct. 28, at para. 17 (2011).
[493] *The Guantanamo Docket* (2023).
[494] *Abu Zubaydah v. Lithuania*, Eur. Ct. H.R., Oct. 28, at para. 14 (2011).
[495] ARSENAULT (2017:160).
[496] *Ibid.*
[497] RAMSAY (2011:633).
[498] HUMAN RIGHTS FIRST (2008:5).
[499] Memorandum (1 August 2002), *Interrogation of Al Qaeda Operative (Abu Zubayda)*.
[500] HUMAN RIGHTS FIRST (2008:16).

enforcement techniques[501] to win Zubaydah's cooperation. Zubaydah reportedly gave intelligence that helped Jose Padilla be apprehended in May 2002 and proved Khalid Sheikh Mohammed's involvement in the September 11 attacks[502]. Rizzo asserts that Zubaydah stopped collaborating and turned scornful and contemptuous when it became clear that the CIA would not allow him to die. As a result, the CIA began questioning Abu Zubaydah without using force. The Agency interrogators were certain Zubaydah still had important information he was hiding due to this change in attitude, which led them to decide to use new questioning techniques[503]. In the words of President Bush,

> "We knew that Zubaydah had more information that could save innocent lives, but he stopped talking. As his questioning proceeded, it became clear that he had received training on how to resist interrogation. And so, the CIA used an alternative set of procedures. I cannot describe the specific methods used. But I can say the procedures were tough, and they were safe, and lawful, and necessary"[504].

Bush states in *Decision Points* that Zubaydah made much information about the al-Qaeda organization's tactics public. After Abu Zubaydah was waterboarded, CIA Officer John Kiriakov previously told *ABC News* that he provided information that prevented several, possibly dozens, of attacks[505]. Additionally, he gave information that helped identify Ramzi bin al Shibh, the 9/11 plots' logistical mastermind. According to reports, five detainees were taken into custody due to information from someone connected to Zubaydah[506]. This has been fiercely contested.

Abu Zubaydah was in the fourth month of CIA captivity in July 2002 when the Agency was getting ready to submit him to an "aggressive" phase of questioning. In this phase, the OLC at the US DoJ approved the use of 10 EITs, including the attention grasp, walling, facial hold, facial slap (insult slap), cramped confinement, wall standing, stress positions, sleep deprivation, insects placed in a confinement box, and waterboarding, which had the effect of an interrupted drowning mock execution. In addition, Zubaydah was stripped naked, exposing his wounds, exposed to so much air conditioning that he "seemed to turn blue", and subjected to rock music blasts. In addition, according to CIA sources, Zubaydah was denied medication, threatened with death, and exposed to loud, constant noise and intense lighting. In June or July 2002, the CIA stopped employing harsh measures against Zubaydah[507]. The

[501] *Ibid,* p. 5.
[502] *Ibid,* p. 16.
[503] ARSENAULT (2017:146).
[504] BUSH (2006).
[505] BUSH (2010:169).
[506] HUMAN RIGHTS FIRST (2008:17).
[507] MAZZETTI, JOHNSON (2007).

US anti-torture statute forbids "aggressive tactics" except for "dependence upon the principles of necessity or self-defense"[508].

Nevertheless, there is no denying that the US tortured Abu Zubaydah for a very long time. Despite the US Government's claim that it "has not contended that he had any personal involvement in planning or executing" the September 11 attacks or that he was "a member of al-Qaeda or otherwise formally affiliated with al-Qaeda"[509], he is still being held without charge. This was made in a 2009 *habeas corpus* case brought by Zubaydah. Zubaydah nevertheless experienced "permanent brain damage and physical impairment"[510]. According to medical records, Zubaydah experienced approximately 300 seizures between 2008 and 2011. The identical records demonstrate that the CIA removed his left eye at some time while he was being held captive. Other than "torture", there is no other word for this treatment. Zubaydah has endured significant bodily pain, suffering, and mental anguish over an extended time, even by the extremely high criteria established in Bybee's initial memo[511].

The Government continues to imprison Abu Zubaydah without bringing any charges despite later admitting that he did not occupy the high rank within al-Qaeda, as previously claimed. According to Zubaydah, he lied to appease his interrogators. Former FBI Agent Coleman, who worked on Zubaydah's case, also thinks Zubaydah lied. Coleman claims that Zubaydah's importance to al-Qaeda and his reliability have been called into question due to the CIA's harsh tactics and Zubaydah's mental health issues[512]. The CIA recorded Zubaydah's interrogations for at least several hundred hours; however, at Jose Rodriguez's request, the CIA's former head of clandestine operations, the tapes were destroyed in November 2005. Congress and law enforcement are considering Rodriguez's choice to delete the videos. According to Director Hayden, the tapes were destroyed because they were no longer helpful for gathering intelligence and concealing the interrogators' identities. However, many others think they were destroyed to protect the interrogators from prosecution for the criminal activity documented on the recordings and the senior Government officials who approved their behavior[513].

The Court concluded that Zubaydah's evidence fell under State secrets protection since it would either confirm or deny whether the black site existed in Poland. The Court rejected the claim that this evidence was no longer

[508] Memorandum, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Counsel to the President (1 August 2002), *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, available *online.*
[509] OPEN SOCIETY FOUNDATIONS (2013:209).
[510] *Ibid*, p. 211.
[511] SCOTT (2016:163).
[512] HUMAN RIGHTS FIRST (2008:17).
[513] MAZZETTI (2007).

protected by the privilege simply because it had been made available to the public via means other than official channels. According to the Court, Government confirmation "is different in kind from speculation in the press or even by foreign Courts because it leaves virtually no doubt as to the veracity of the information that has been confirmed"[514]. Like how it did not give much weight to Zubaydah's requests for information from "private parties", the Court acknowledged that the contractors' "confirmation (or denial) of the information Zubaydah seeks would be tantamount to a disclosure from the CIA itself"[515]. Given their official roles in Zubaydah's treatment, the Court also emphasized how crucial it was for the Government to retain its secrecy in situations like this one because counterterrorism measures frequently depend on delicate ties with other nations. The Court noted that by doing this, relationships between nations would be preserved in the present and other nations would be more likely to cooperate in the future.

2.2 Rasul v. Bush

The US Supreme Court ruled in *Rasul v. Bush* on 28 June 2004, that US Courts have the authority to hear *habeas corpus* petitions filed on behalf of foreign nationals detained at the Guantanamo Bay detention facility on the US Naval Base because the base, which the US has owned under lease from Cuba since 1899, effectively falls within US territory[516]. Rasul claims that while in custody, he was subjected to physical and psychological torture, including regular beatings, prolonged stays in the interrogation rooms under stress, months of isolation, and violations of his religious freedom out of fear for his safety[517]. The ruling implied that the many foreign people detained at the camp had a legal right to contest their detention.

Four British and Australian residents, Shafiq Rasul, Asif Iqbal, Mamdouh Habib, and David Hicks, detained in Pakistan and Afghanistan in 2001 and 2002 and subsequently handed over to US authorities, were the original subjects of the lawsuit. The four men were taken to the Guantanamo Bay prison, where they were imprisoned without being charged, going through a trial, or having access to legal representation. Rasul, Iqbal, and Hicks contested their detentions in 2002 before a US District Court, claiming that their imprisonment violated the Fifth Amendment's due process requirement because they had neither participated in terrorism nor engaged in the battle against the US.

Rasul v. Bush, the first case, was heard by the District Court, which dismissed the objections because foreign persons detained abroad are not permitted to

[514] SCHWEITZER (2022).
[515] *Ibid.*
[516] NOLEN (2023).
[517] MAHFUD (2014:226).

file *habeas corpus* petitions in US Courts since those Courts' authority is restricted to US territory[518]. Later, the Court overturned *Bush v. Habib* for similar reasons. The Supreme Court issued a writ of certiorari to hear the consolidated cases as *Rasul v. Bush* after a Court of Appeals upheld these rulings, and oral arguments were held on 20 April 2004. The petitioners, Shafiq Rasul and Asif Iqbal were released from Guantanamo custody while the case was underway and freed upon arrival in the UK.

All these opposing viewpoints were disregarded. Finally, several honorable former JAG officers, led by Navy JAG Admiral Hutson, submitted an *amicus curiae* brief to the US Supreme Court in *Rasul v. Bush*[519], objecting to the President's Executive Order creating MCA to prosecute the Guantanamo detainees outside the parameters of the UCMJ and without the benefit of the GPW protections[520]. The Court reversed the judgments of the lower Courts in a 6-3 vote on 28 June. Justice Stevens, who authored the majority opinion, claimed that although Cuba has "ultimate sovereignty", the US's "plenary and exclusive" authority over the Guantanamo Bay Naval Base is adequate to protect the *habeas corpus* rights of any foreign people detained there[521]. The Court rejected President George W. Bush's assertions of unchecked power to take away people's liberties without review[522]. Therefore, the detainees were free to file a lawsuit alleging their incarceration was unconstitutional[523].

2.3 Khaled El-Masri v. United States

The German national Khaled el-Masri was apprehended by Macedonian security personnel on 31 December 2003 at a border crossing after being mistaken for an al-Qaeda suspect with a similar name[524]. After being tortured and held incommunicado for 23 days in Macedonian detention, he was shackled, blindfolded, and transported to the airport in Skopje, where he was turned over to the CIA and brutally beaten[525]. El-Masri was stripped, hooded, chained, and sodomized by the CIA while Macedonian officials watched at the airport. The CIA then sedated him, flew him to Kabul, and imprisoned him in the "Salt Pit", a top-secret detention facility where he was beaten, kicked, pushed into walls, and exposed to various sorts of abuse. El-Masri was detained at the Salt Pit for four months without ever being charged, in front of a judge, or allowed to see his family or German Government officials. On 28 May 2004, he was transported by CIA-chartered Gulfstream aircraft with the tail number N982RK to Berat-Kuçova Aerodrome in Albania, where he was

[518] NOLEN (2023).
[519] *Rasul v. Bush*, 542 U.S. 466 (2004).
[520] BASSIOUNI (2005:405).
[521] NOLEN (2023).
[522] BASSIOUNI (2005:405).
[523] *Rasul v. Bush* (2023).
[524] OPEN SOCIETY JUSTICE INITIATIVE (2013:48).
[525] *El Masri v. Macedonia*, ECtHR, at paras. 18-21 (2012).

freed without any formal regrets or justifications. The US error in the el-Masri's case was publicly acknowledged by German Chancellor Angela Merkel at a press conference on 6 December 2005, with the then Secretary of State Rice by her side. However, senior US officials travelling with Rice disagreed with Merkel's assessment.

An executive claim of privilege is constitutionally supported to the extent that it relates to the efficient use of a President's powers. The Executive's constitutional mission encompasses the authority to protect national security information. The Executive's constitutional power is the largest regarding the armed forces and foreign policy[526]. As a result, the judiciary's ability to function as a check on the executive branch's foreign policy decisions is constrained. The State secrets privilege consequently has a substantial foundation in the Constitution and its base in the common law of proof. Since it relates to US Constitution Article II obligations in which the Courts have always paid the utmost deference to Presidential responsibilities, the State secrets privilege offers particularly robust protection. However, on Appeal, the Court held that dismissal of the complaint was proper because the information that was made public did not include the facts central to litigating the suspect's action. Facts concerning the CIA's means and methods of gathering intelligence remained State secrets. The suspect's action could not be litigated without threatening the disclosure of State secrets[527].

El-Masri's case was probed by the CIA's Office of Inspector General[528]. Although the Inspector General ruled that there had been "no legal rationale for el-Masri's rendition" and reprimanded a CIA analyst and a CIA lawyer responsible for the operation, the analyst was promoted, and the lawyer received just a reprimand[529]. On 13 December 2012, the ECtHR held that Macedonia had violated El-Masri's rights under the ECHR and found that his ill-treatment by the CIA at Skopje airport amounted to torture[530].

2.4 Hamdan v. Rumsfeld

Former Osama bin Laden driver Salim Ahmed Hamdan was apprehended by Afghan forces and detained by the American military in Guantanamo Bay. He petitioned the Federal District Court for a writ of *habeas corpus* to contest his incarceration. Before the District Court's decision on the petition, a Military Tribunal heard his case and declared him an enemy combatant[531]. A few months later, the District Court granted Hamdan's *habeas corpus* petition, saying that a Military Tribunal could not try him without first hearing to

[526] SUPREME COURT (2007).
[527] *Ibid.*
[528] PRIEST (2005b).
[529] GOLDMAN, APUZZO (2011).
[530] *Ibid.*
[531] *Hamdan v. Rumsfeld* (2006).

decide if he qualified as a POW under the Geneva Convention. However, the Circuit Court of Appeals for the District of Columbia overturned the judgment, concluding that the Geneva Convention could not be used in Federal Court and that because Congress had approved the creation of Military Tribunals, it was not unconstitutional[532].

In *Hamdan v. Rumsfeld*, the Supreme Court ruled in 2006 that al-Qaeda suspects must be treated humanely under Common Article 3 of the Geneva Conventions[533]. The CIA suspended their EITs after Hamdan. Nevertheless, it seems to be operating normally once more[534]. The President issued Executive Order No. 13440 on 20 July 2007, intending to interpret Common Article 3 regarding interrogation. In addition to failing to prohibit the use of EITs, the order appears to condone "willful and outrageous acts of personal abuse" if their objective is information gathering rather than the degradation of the prisoner. Director General Hayden of the CIA admitted the Agency's continued use of harsh methods in a television appearance in October 2007. He said they might use techniques forbidden in military interrogations but would not go into specifics[535].

However, in three significant rulings issued in 2004 and 2006, the Supreme Court invalidated several crucial tenets of the Administration's legal theory. *Hamdan v. Rumsfeld*, the final ruling from that period, invalidated the military commissions as President Bush had conceived them. According to the Hamdan Court, the UCMJ and the Geneva Conventions were broken. In its Hamdan ruling, the Supreme Court upheld the importance of Common Article 3 in creating GWOT behavior standards[536]. The Court of Appeals believed that Common Article 3 did not apply to Hamdan since his battle with al-Qaeda was "international in scope" and did not meet the criteria for a "conflict not of an international nature", and the Government agreed. That line of thinking needs to be revised. In contrast to a war between nations, the term "conflict not of an international character" is used here. The "basic logic of the Convention's provisions on its application" demonstrates a great deal. The present Convention shall apply in all situations of declared war or any other armed conflict between two or more signatories, according to Common Article 2. Even if one of the parties to a dispute is a non-signatory, signatories are still required to abide by all the requirements of the Conventions toward one another. If "the latter accepts and applies" the conditions, they must do so[537]. Contrarily, Common Article 3 provides individuals connected to neither a signatory nor a non-signatory involved in a dispute in a signatory's territory with some limited protection, falling short of complete protection under the

[532] *Ibid.*
[533] HUMAN RIGHTS FIRST (2008:6).
[534] IGNATIUS (2006).
[535] HUMAN RIGHTS FIRST (2008:6).
[536] *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).
[537] UNITED NATIONS (1949), Article 2.

Conventions. Since it does not include a fight between nations, the latter type can be distinguished from the conflict stated in Common Article 2. So, the phrase "not of an international character" means what it says in the context[538].

Following the Supreme Court's ruling in Hamdan, the Bush Administration used the MCA to win legislative approval for a military commission system that would let it continue and profit from many of its pre-existing legal arguments. The MCA permits the admission of statements gained by coercion so long as their entry furthers the "best interests of justice" and "the totality of the circumstances renders the statements credible and holding adequate probative value". Even statements gained through cruel, inhuman, or humiliating treatment can be used as evidence if they meet the criteria mentioned above and are acquired before the DTA was passed[539].

3. The scandal of photos (*United States v. Sabrina Harman*)

The photos of torture at Abu Ghraib have profoundly impacted people worldwide because they confirm the stereotype of an America that does not value human decency[540]. However, the Abu Ghraib incident might still have one upside. The Supreme Court heard arguments in instances involving two US citizens who were imprisoned without any of the rights that are constitutionally granted to citizens and were deemed by the President to be enemy combatants the morning before *CBS News* released the images of torture. The Court considered a Guantanamo Bay inmate's Appeal just one week earlier. The Government contends that the Courts lack subject-matter jurisdiction over these disputes; as a result, the President has asked the Supreme Court to ratify an executive branch with unrestricted power that is not subject to US law or IL[541].

Members of the Bush Administration attempted to depict the actions at Abu Ghraib as "exceptional, isolated" in the immediate wake of the Abu Ghraib revelations. Paul Wolfowitz, his then-deputy, agreed, saying that "a few bad apples" were responsible for the events at Abu Ghraib, which caused some enormous issues for everybody. A military police officer stationed at Abu Ghraib told his superiors about the occurrences of torture in a report and a collection of pictures on a CD in January 2004. President Bush and Rumsfeld both received this information. By then, numerous soldiers sent news and pictures to family and friends. On 28 April 2004, the *CBS* television program *60 Minutes II* aired a few photographs in which male and female soldiers could be seen terrorizing others with dogs and humiliating naked detainees[542]. Evidence indicates that prisoners were either shot or beaten to death. Weeks

[538] *Hamdan v. Rumsfeld*, 126 S. Ct. 2795-2796 (2006).
[539] HUMAN RIGHTS FIRST (2008:8).
[540] STARR (2004).
[541] *Ibid.*
[542] AGUIRRE (2009:125).

after the discovery of *CBS*'s *60 Minutes II*, President Bush repeated this theme in a speech in May 2004. He said many American soldiers engaged in "disgraceful conduct by a few American troops"[543] in Abu Ghraib. Bush characterized what transpired in Abu Ghraib as an act of national disgrace by a small number of American soldiers[544]. According to Rumsfeld, "these events occurred under my watch. As Secretary of Defense, I am accountable for them"[545]. He insisted still that a limited number of US military personnel were responsible for these awful deeds. He also denied any involvement among the upper echelons of the military, testifying, "when we first were told about these activities and saw those photographs, I and everyone at this table was as shocked and stunned as you were"[546], he further denied any complicity among the military's top brass. This claim is questionable, considering that Rumsfeld approved many memoranda allowing for the same abuse of detainees during interrogations. Rumsfeld should have been somewhat aware of the actions at Abu Ghraib, even considering how awful the photos were. He maintains that the knowledge of the torture should not have taken him by surprise. These actions were not just the sadistic few, as the two follow-up investigations and disclosures showed. The US Government's explicit approval and adoption of forceful interrogation techniques as a matter of policy came to light after the legal views on torture and interrogation mentioned above were made public. Moreover, before the horrible images were made public on American television, no charges were pursued against any known violators inside the military, as was shown in the Abu Ghraib case. Senior officials like General Taguba, who investigated the conditions of the prisons in Guantanamo Bay, Afghanistan, and Iraq, all reported in one way or another that torture or something comparable was occurring[547]. Most of these reports were classified. Therefore, the civilian and military leaders who ordered the classification of these reports were aware of the violations and were accountable for their inaction in the face of these reports and their concealment of the reports to avoid taking legal action following the law. The US has come under harsh domestic and international criticism for these measures. Even attempts have been made to charge Bush Administration officials with war crimes in Europe[548].

However, the people continued to hold the military interrogators accountable for these crimes. More than ten years later, names like Charles Graner, Sabrina Harman, and Lynndie England are associated with maltreatment, brutality, and abuse[549]. Due to her willful failure to protect detainees from abuse, cruelty, and maltreatment, Sabrina D. Harman, an army reservist assigned as

[543] ARSENAULT (2017:141).
[544] AGUIRRE (2009:128).
[545] SCOTT (2016:166).
[546] *Ibid.*
[547] JONES, FAY (2004).
[548] PEJIC, DROEGE (2013:537).
[549] ARSENAULT (2017:142).

a guard at the Abu Ghraib prison, was found guilty of several offenses, including dereliction of duty in violation of Article 92 of the UCMJ[550]. The two occurrences that happened in November 2003 led to the conviction. A detainee was made to stand atop a box for an hour on November 4 while wearing an empty sandbag over his head. The inmate had wires affixed to his hands, and Harman warned him that falling from the box would result in electrocution. On November 7, Harman documented additional guards striking a group of chained, hooded detainees as they were made to sit or lie in a heap on the ground. After stripping the prisoners, Harman scribbled "I'm a rapeist (sic)" on one of their exposed thighs[551]. The prisoners were then made to create a human pyramid while still nude. Harman smiled and gave the thumbs-up sign as she posed for a picture close to the pyramid. Before the November incidents, Harman once unbuckled a prisoner who had been handcuffed by another guard for several hours and reported the issue to the proper authorities. Another time, Harman expressed her concern about the treatment of convicts she had seen in a letter to her old roommate. Harman was found guilty by the convening authority, and following Article 66 of the UCMJ, her case was sent to the US Army Court of Criminal Appeals for review. She tearfully apologized for her actions:

> "As a soldier and military police officer, I failed my duties and failed my mission to protect and defend. I not only let down the people in Iraq, but I let down every single soldier that serves today. My actions potentially caused an increased hatred and insurgency towards the United States, putting soldiers and civilians at greater risk. I take full responsibility for my actions […]. The decisions I made were mine and mine alone"[552].

Harman received up to five years in prison, but the prosecution requested only three. With credit for time served, she then served slightly over four months. After serving her time, she was demoted to the rank to a private and given a poor conduct discharge[553]. Nevertheless, Harman contended during her Appeal that there was not enough evidence to support her conviction because it did not establish that she knew or had a reasonable expectation of knowing that she had a duty to protect the inmates. Harman argued that she was not properly schooled in the LOAC or trained as a prison guard to support this claim. Harman further stated that since she had been striving to expose the abuse by documenting it in photographs, she had not failed in her obligation[554]. Sabrina Harman sent her American partner dozens of digital images she had taken. The two November incidents rose to enormous fame because of the photos taken; in the first, a man is depicted standing with his head covered by a black hood, and the second shows her close to a dead man giving him the

[550] *United States v. Harman,* A. Ct. Crim. App., 66 M.J. 710 (2008).
[551] *Ibid.*
[552] AGENCIES (2005).
[553] *Ibid.*
[554] *United States v. Harman,* A. Ct. Crim. App., 66 M.J. 710 (2008).

thumbs up[555]. Manadel al-Jamadi, the man in the second photo, asphyxiated to death after being hooded, fractured ribs, and being shackled such that his arms supported the weight of his body during questioning. Then, to conceal the circumstances of Jamadi's murder, his body was packed in ice[556]. Harman provided a detailed account of her experiences in Abu Ghraib to two journalists who wrote a book and made the movie *Standard Operating Procedure*[557]. She described how she joined the army to pay for her studies and ended up without training in handling prisoners in challenging circumstances, familiarity with the Geneva Convention, and being under the command of aggressive military leaders. She talked about violent nights, interactions between jailers, and delight among the officers when they killed and tortured Iraqis.

The Abu Ghraib photos, however, became a very useful weapon for terrorists and insurgents once they started to spread[558]. When those images were made public, America suffered a severe loss. These graphic images of the worst Arab world fears – that Americans are corrupt and power-crazed, seeking to humiliate Arabs and scorn their values – are now being sold in souks from Marrakesh to Jakarta. The actions they detail have fueled the insurgency in Iraq, eroding our authority there and increasing the dangers our forces face daily[559]. For what concerned Americans, as Sontag later wrote, the photos from Abu Ghraib were released to raise the public's tolerance for torture[560]. Her analysis was accurate, as the Government's measures led to an increase in tolerance. Torture must be justified to protect US national security, law, authority, and agency. The refusal to outlaw torture influenced how torture was portrayed in popular culture. It offered a pictorial illustration of the main point of the torture memos, which is that Government employees cannot be restrained by the law while preventing terrorism. After 9/11, there were significantly more images of torture on prime-time television, and the tormentor's identity was also altered. Often, torture was shown to be committed by heroes rather than villains[561]. Moral judgments inexorably followed from legal conclusions: once effectively decriminalized, torture became a virtue, or at the very least, a position that could be defended within a liberal democratic State under threat from terrorist organizations determined to bring it down. "A democratic State, with a commitment to human rights, should not institutionalize the disregard for the very same values that State officials accuse terrorists of violating"[562], says Rumney in his book *Torturing Terrorists*, summarizing his main points. However, polls indicated that after

[555] AGUIRRE (2009:125).
[556] VOLLE (2022).
[557] GOUREVITCH, MORRIS (2008).
[558] PEJIC, DROEGE (2013:536).
[559] *Ibid.*
[560] SONTAG (2004:26).
[561] MAYER (2007).
[562] RUMNEY (2015:203).

the initial revelations of the US torture program, the proportion of Americans who support torturing suspected terrorists rose[563]. After the SSCI Report's publication, most Americans continued to support the harsh interrogation techniques employed on 9/11 terror suspects, even though around half of them now recognize that they amounted to torture[564].

[563] MASSIMINO (2011).
[564] GOLDMAN, CRAIGHILL (2014).

CONCLUSION

The devastating threat that international terrorism poses to democratic society was brutally brought to light by the 9/11 attacks. Given this threat, liberal States that uphold the rule of law must consider their options and available resources to combat it. Nevertheless, it is essential to remember the core values that make up the civilization trying to protect itself. One of this society's most significant accomplishments is the outlawing of torture. Humanity has been tortured throughout history and returns when a democratic State becomes totalitarian. The idea of human dignity and, by extension, the idea of human rights itself are inseparably intertwined, and torture is consequently prohibited. The foundation of the society we defend is undermined if this principle is relativized. This understanding is the foundation for the outright ban of torture, especially in the wake of World War II. Nation-States have acted against terrorism that has eaten deeply into the foundation of our civilizations. Most of these counterterrorism measures have now been adopted and implemented, raising additional questions regarding IL's efficacy. The 9/11 tragedy altered the Western world, as terrorism and counterterrorism measures played a role in the change's orchestration. The investigation of terrorist offenses undoubtedly posed serious difficulties for state actors. These included the potential for abusing the defenseless. However, certain core principles of IL must always be upheld.

A decision must be made about international terrorism and human rights. The 9/11 tragedy raised many issues regarding the connection between the person and the State. Counterterrorism efforts after 9/11 have put the tension between these two areas to the test. Executive actions and court rulings have historically supported the impression that civil liberties must be sacrificed, and some rights must be disregarded to address national emergencies. Balancing personal liberties, rights, and national security is still debatable. Different nation-States face varying levels of security risks. Human rights are compromised, and illegal actions like detentions and torture are justified in the name of security. Violence may, nevertheless, be necessary to defeat terrorists. Coercion, dishonesty, secrecy, and the violation of human rights are also necessary. Therefore, it becomes puzzling how democracies will use these tactics without erasing the principles they stand for.

Despite the condemnation of torture and inhumane tactics, people in many nations support the strict enforcement of security measures in response to domestic terrorism concerns. Even in cases when the underlying standards are categorical, such as the ban on torture, opposition to accountability during political transition can make rights contingent. The right to be spared from torture has frequently been violated throughout the GWOT. It is well known that the US stated that IL would not hinder US activities if its national interests were at risk. In the US, resistance effectively created an exception to this rule.

Torture was approved through various legal theories that sought to undermine the definition of torture and place a broadly defined armed conflict outside even the most basic IHL restrictions. However, it is essential to note that most domestic laws or international treaties that forbid torture were passed or adopted before the 9/11 attacks when contemplating the absolute ban on torture. For instance, the UNCAT came into force in 1987. The mechanisms of 9/11 placed the globe into a historical dilemma even if the incident did not introduce terrorism into the world.

The current argument assumes that outlawing torture altogether is morally and practically impractical. Torture may be acceptable, a valid choice, or the lesser of two evils in dire situations if we feel a suspect has important information and there is a clear and immediate risk to be averted. We know that many people in positions of political authority still needed to be fully used to the anti-torture standard, in any case. This does not imply that they "support" torture per se. They will, however, consider the anti-torture norm to be part of a consequentialist analysis that considers both the value they place on the anti-torture norm itself and the possibility of external punishment should their derogation be discovered. In situations like this, where the anti-torture norm is regularly socialized, there are irrelevant factors at play.

This inconsistency served as the starting point for a protracted debate. Because the Bush Administration believed torture was the best way to protect the country, officials refused to accept responsibility. Even yet, it is now "indisputable that the US practiced torture". It is also undeniable that the US might resume this behavior. Both domestically and internationally, torture is prohibited by the Rome Statute and the UNCAT. These measures serve as a reminder that torture is terrible and inhumane on a global scale. However, using EITs on prisoners in the GWOT goes against this prohibition. Torture has become just another hypothetical policy choice "on the table". The terrifying detainee testimonies show why this choice was appropriately prohibited. Torture has too high a price. The number of kidnappings and death of innocent people measures it. Any attempts to prosecute the tortured have failed in the rare instances where torture was used on suspects of terrorist activity because torture is a fear-based, self-defeating practice. Bush presented torture as a choice between security and values, yet all it delivers is the appearance of security at the expense of values. The UNCAT and the Rome Statute have recognized pieces of IL, and the US should reaffirm its adherence to them. Torture should continue to be illegal. The US should never again use it as a tool for foreign policy that it can use whenever it sees fit.

No credible participant in the current discussion supports the idea that government agents should routinely torture or treat people under their authority cruelly, inhumanely, or degradingly. The only true point of contention is whether there are any instances in which such behavior might ever be justified or pardoned, in which case it should be given legal standing

and what should be done with people who engage in it. Despite the abundance of literature, there is still no agreement on the best course of action. This is possibly because, in the end, there appears to be an intuitive moral choice between two incompatible sets of values. International human rights law must establish a framework with requirements that nation-States must abide by through the joint means of State accountability and the rule of law. To increase its effectiveness, IL must get immediate attention in the areas of rule implementation and enforcement.

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SUMMARY – The Prohibition of Torture in International Law: The Case of Post-9/11 Interrogations of Al-Qaeda Suspects

The necessity and legality of the outright ban on torture are being called into question by tragic occurrences even in firm rule-of-law governments, for instance, the terrorist attacks of 11 September 2001. Since torture was a recognized legal aspect of legal practice from antiquity to the modern era, its complete outlaw on both the international and national levels represent a significant advancement in modern human rights protection and is seen as the pinnacle of rule-of-law governance. Nevertheless, more than any other human right, torture is subject to actual state practice despite being illegal under International Law (IL).

The ban on torture and other cruel, inhumane, and degrading treatment is absolute, according to a fundamental principle of international human rights law, meaning that an exception can be recognized, justified, or permitted under no circumstances. However, this is highly problematic for many reasons. First, rather than being an intrinsic legal need, as the doctrine maintains, absoluteness is not an express, inherent, self-evident, or necessary aspect of the rules in question. Instead, it is a matter of attribution. It is possible, but numerous renowned national human rights agreements explicitly support similar bans with other non-absolute meanings.

IL is a crucial tool required for an interdependent world's functioning. IL makes it possible for the global community we all rely on to function. Both US law and IL forbid torture. Almost every Government today publicly condemns its use because it is regarded as one of the most terrible acts in human history. However, it is also regarded as an efficient technique for acquiring intelligence, and as a result, these same nations frequently use it "under the radar screen" in desperate circumstances. Could it be stated that IL is efficient in preventing the use of torture in the war against terror, though, considering the flagrant use in the Global War On Terror (GWOT) by the very States that have ratified international treaties and conventions like the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT) and the European Convention on Human Rights (ECHR)?

Since the devastating attacks of 11 September 2001, several eminent academics and politicians have supported torture in extreme circumstances. Others have expressed concern that legalizing torture might pave the way for morally repugnant state activities. Remarkably, there has been a substantial debate about using torture to get information from terrorists aware of future strikes. The mistreatment of detainees is prohibited under national, international, and European laws. Indeed, detainees' behavior has no bearing

on their ability to exercise their right not to be tortured, so suspected terrorists have the same freedom from cruel treatment as other citizens have. Nevertheless, could the torturing of 9/11 bombers and other terror suspects (assuming they were in prison before they perished) be justifiable for intelligence purposes? To collect information from them to stop the atrocity? In the case of the 9/11 attacks, to learn the numbers of the flights that were going to be targeted?

Additionally, the phrase "cruel, inhuman, or degrading treatment", frequently used in the same sentences that forbid torture, does not imply that any of these incredibly distinct forms of damaging behavior must necessarily have the same legal standing. The often-repeated argument that the prohibition is absolute in theory but only applies to certain situations, is equally unpersuasive. The ability of any two competing examples of an "absolute" right to be equally "absolute" in any meaningful sense is illogical, not just from a moral or legal standpoint but also from a logical standpoint. Therefore, correctly applying international human rights law, the rule on torture and other cruel, inhuman, and degrading treatment can only be "virtually" absolute. In other words, it holds in all except the most exceptional cases, but not, as is generally believed, to the exclusion of all possible justification, exoneration, excuse, or mitigation.

The first chapter analyses the international conventions prohibiting torture and cruel, inhuman, and degrading treatment. Notably, it is almost impossible for country States to handle issues such as torture on their own when they arise because of the complexity of the world's problems and, in some situations, their interconnectedness. Therefore, IL becomes "a potential remedy for problems outside the realm of individual nation states". The chapter starts with the birth of the legal rules against torture, underlining that this practice has been used since Ancient Greece. Torture has become brutal and meticulous in achieving its goals until several international conventions banned it in the 20th century. The legal system clarified that harsh interrogation techniques and punishment were unacceptable. The Geneva Convention on Prisoners of War of 1929, the fourth Geneva Conventions of 1949, and the two Additional Protocols to the Geneva Conventions of 1977 all established it as a war crime under customary International Humanitarian Law (IHL). Thanks to the creation of national and international laws, it can no longer be used to get information, punish people, or for any other purpose. From the late 1940s onward, human rights-related legal documents, which were made stronger by the establishment of the United Nations (UN), established the standards for what actions were judged to be acceptable or repugnant, legal, or criminal. The US has been at the forefront of efforts to have torture outlawed by IL for more than 50 years. The US played a significant role in creating and adopting the Universal Declaration of Human Rights in 1948, which forbids "cruel, inhuman, or degrading treatment or punishment".

The UN adopted the International Covenant on Civil and Political Rights under the leadership of the US in 1966. All those actions deemed torture and other cruel treatments were specified by the UNCAT. The US was a staunch advocate for UNCAT, which the UN approved in 1984. The current framework follows this in the international sphere. Only totalitarian governments in the middle of the 20th century and some liberal democracies in the post-9/11 GWOT reopened the discussion on torture on a massive scale. Throughout reality, torture has never stopped occurring in the world. The techniques have been substantially improved. As Nowak, former UN Special Rapporteur on Torture, observes that torture is practiced in more than 90 per cent of all countries.

Furthermore, what is internationally accepted as torture or cruel, inhuman, or degrading treatment is then defined in the precise articles in the conventions mentioned above. The effectiveness of the law is influenced by how much it affects State behavior, whether a State complies with its obligations under international conventions and treaties. Moreover, some argue that the definitions of torture and other forms of cruel treatment are overly broad and difficult to define and can create challenges of interpretation. Their effectiveness is later analyzed through the absoluteness of their ban, its positive nature, the liability and jurisdiction over these acts, the enactment of criminal sanctions to alleged offenders and its non-refoulment obligation. The need to prosecute and punish is separate from the obligation to prevent torture. However, it is closely related and one of the best strategies to stop torture wherever it occurs. The state parties' obligations under the international conventions are to make these happen, together with the international enforcement mechanisms. Several international institutions are in place to ensure the torture ban is followed. Another focus of this chapter is the usefulness of torture through the ticking bomb dilemma and the unreliability and unusability of information obtained through it as main points. Some contend that torture is the sole approach for obtaining information from the most committed and radicalized terrorists, some of whom have been taught to resist conventional, non-coercive interrogation techniques. Theoretically, ticking bomb intelligence, which pertains to an impending attack, should be obtained by interrogational torture. The hypocrisy of torturing terrorist detainees has the power to radicalize individuals who would not often be associated with terrorism or acts of terrorism. This disregards the overwhelming evidence showing that many terrorists do not divulge trustworthy information while being tortured. Information about torture could be inaccurate for various reasons. Moreover, one negative effect of overzealous torture programs to uncover suspects is torturing innocent persons.

The second chapter concerns the American interpretation and the change in adherence to IL. IL has been seriously questioned, considering the American military response to the al-Qaeda threat. Following 9/11, the US's national

security interests underwent a significant change. President Bush issued an Executive Order that circumvented Congress and unilaterally established a new parallel system of justice to deal with terrorists, all of which contributed to the institutionalization of torture. The implicit institutionalization of torture, which was openly referred to in several legal documents as an acceptable interrogation method – a euphemism for torture – has been the sole exception. Sadly, many others have disregarded the situation, turned a blind eye, and broken their oath by complying with the political demands of the Bush Administration. The Bush Administration was fundamental in this process due to its composition and the role of Vice President Cheney, and the Secretary of Defense Rumsfeld is addressed in this chapter. Even if many international agreements that forbid the use of torture bind the US, but also regional ones. It is important to remember that the first worldwide human rights document of the modern age was the American Declaration of the Rights and Duties of Man. The Declaration of Independence lists civil and political rights such as the right to life, liberty, and personal security, the right to freedom of religion and worship, the right to a family and its protection, and the right to freedom of speech.

According to Cheney, EITs provided positive results; without them, the US would not have been able to find Osama bin Laden. Bush agreed that harsh interrogation methods and CIA renditions were required to stop another 9/11. The Vice President and Secretary of Defense were essentially aggressive and ruthless realists. The religiously minded President fell prey to the seductive promise of achieving American greatness through militantly executing God's work. The Al-Qaeda attacks served as the ideal justification for Cheney's campaign for unrestricted presidential power and Rumsfeld's campaign for a modernized military. Another critical factor was the Office of Legal Counsel's role in creating a unitary executive power. The OLC, housed under the Department of Justice, was established by Rumsfeld as a group of officials and consultants on security and legal matters. These figures included Alberto Gonzales, a former US Attorney General and Advisor to the White House, John Yoo, a Lawyer, and Lieutenant General Boykin. This legal team played a crucial part in redefining the way the US battled terrorism, blurring the lines between coercive interrogation and torture, bolstering the executive branch, attempting to redefine US compliance with the Geneva Convention, encouraging active complicity of allies, and legitimizing the restriction of civil liberties in the US. The attempt to increase the President's power and his cabinet because the Head of State should make all crucial decisions during times of war has been related to the legitimization of torture. Applying this reasoning suggests that the President should have discretion and that Congress should not have any influence over his ability to declare war, handle foreign policy, or enact domestic and international legislation. It has been painfully shown that the US has broken several critical legal frameworks, including its Constitution. The institutionalization of the crime of torture began when the civilian leadership of the DoD ignored the Judge Advocates General of the

various branches of the military and senior non-lawyer military officers. Their knowledge of the law and sense of honor caused them to oppose such practices by the US military. The chapter continues by analyzing the enactment of certain new acts aimed at deterring and punishing terrorism. One act is the USA PATRIOT Act, enacted to improve law enforcement investigative tools and deter and punish terrorist crimes in the US and abroad, among other things. It should be noted that the USA PATRIOT Act broadened the US's maritime and territorial jurisdiction to include "any structures, portions of buildings, and land attached to, ancillary to, or utilized by any diplomatic, consular, military, or other US Government missions or agencies in foreign States, regardless of ownership". Complicitly with the withdrawal from the Rome Statute.

The US participated in the negotiations that led to the creation of the Rome Statute, and US President Bill Clinton signed the Rome Statute in 2000. In May 2002, the Bush Administration withdrew the Rome Statute. According to commentators, the US was concerned that the ICC would have jurisdiction over its nationals; nevertheless, the departure coincided with US plans to use EITs for interrogation. Rumsfeld stated that the ICC's "flaws" are worrying when a war against terror was being fought because they raised the possibility that the ICC could attempt to assert jurisdiction over US servicemembers involved in counterterrorism operations. In response to mounting public outrage over allegations of detainee mistreatment, Congress later passed the Detainees Treatment Act (DTA) of 2005, which forbids torture and other cruel, inhuman, and degrading treatment against anybody in US custody. However, a clause in the 5th and 14th Amendments applies to preventive interrogations. The Supreme Court's test for assessing when harsh treatment infringes on that clause. This clause includes DoD and law enforcement activities (e.g., CIA) that occur inside and outside the US. Bush Administration then pressured Congress to pass the MCA of 2006. Since they could not risk facing charges because they were carrying out their duties, according to the President, the MCA had the effect of not criminalizing individuals who had broken the old law. According to the Bush Administration, detainees classified as enemy combatants are not covered by the US Constitution and are not subject to the jurisdiction of federal courts.

The third chapter goes into depth in the GWOT by explaining the extraordinary rendition program and how other governments participated in the CIA program of secret detention because of extraordinary rendition. The President declared the fight against terrorism the top national security priority just days after the assaults on the Pentagon and World Trade Center. The legal debates surrounding the al-Qaeda and Taliban individuals held by the US Government at the start of the GWOT in October 2001 focus on interrogations. From the fall of 2001 to late 2008, when Supreme Court cases, legislation, and policy developments restored specific law of war standards to the US military's treatment and interrogation of detainees, the discussion was

driven by the need to gather timely and accurate intelligence from terrorists who had been captured. All suspected terrorists associated with Al-Qaeda in the GWOT are classified as High-Value Detainees (HVDs). HVD are subject to abduction, transfer to secret prisons in secret locations around the world with incommunicado detention, and exposure to various combinations of EITs during interrogation, according to US Government policy, particularly under the Bush Administration. The extent and scale of collaboration between national secret agencies have dramatically increased worldwide since the attacks on the Twin Towers, increasingly with "improbable partners". The methods by which this cooperation takes place are typically shrouded in mystery. The Open Society Justice Initiative Report more exhaustedly reveals that the foreign Governments that took part were up to 54.

The second part of the chapter goes through the tortures perpetrated on al-Qaeda suspects beginning with the CIA's Enhanced Interrogation Techniques (EITs) inspired by the Survival, Evasion, Resistance, and Escape (SERE) techniques. A week later, a group of Guantanamo behavioral scientists who recently received SERE training at Fort Bragg military base put together a list of novel questioning strategies. Conditioning, corrective, and coercive techniques are the three categories into which the EITs can be divided and adopted in an escalating manner. The inmate was brought down to a baseline, dependent State via conditioning techniques, showing the HVD that he had little control over his fundamental demands. The methods included naturopathy, sleep deprivation ranging from 48 to 180 hours, and dietary manipulation. The primary purposes of the corrective approaches were to correct or startle the inmate. While the HVD was subjected to the conditioning approaches, the techniques were frequently used. The interrogation techniques were Attention Grab, Facial Hold, and Abdominal or Facial Slap. In the latter, the interrogator used the back of his open palm to strike the detainee in the face or the abdomen. Instead of causing bodily harm, the intention was to shock, startle, or degrade the target. The Facial Hold was applied to keep the interrogator's head immovable. The Attention Grasp involved controlling and quickly grabbing the person with both hands, one on each side of the collar opening. The most successful methods of questioning were thought to put the subject under the most physical and psychological strain – the techniques comprised of Walling, Water Dousing, Stress Positions, Cramped Confinement and Waterboarding. Moreover, those techniques became more precisely targeted at al-Qaeda suspects, in a way that could be even more personally for Arab suspects. Examples of what was deemed acceptable and what was done include: making a father watch his son's mock execution; putting a lit cigarette in a detainee's ear to burst his eardrum; dousing someone's hand in alcohol and setting it ablaze; and gagged people to simulate intoxication. Beatings with bare hands and sharp instruments result in broken bones and lacerations; banging heads against walls; knee and boot strikes to body parts that produce excruciating pain, depriving the afflicted of medical attention.

Finally, the arbitrary detention and enforced disappearances. Although there are conceptual differences, both involved kidnapping and disappearing detainees, transporting them extralegally on secret flights to unidentified locations worldwide and then holding them incommunicado while subjecting them to interrogation, torture, and abuse. Several international declarations and treaties list forced disappearance as a crime against humanity.

Torture was used in various international settings, including the US military bases in Guantanamo Bay, Cuba; Bagram, Kandahar, and other locations in Afghanistan; Abu Ghraib, and other locations in Iraq; and through proxies in several countries, including Egypt, Syria, Pakistan, Romania, and Poland. The US Government was secretly holding unidentified accused terrorist enemy combatants in detention facilities around the globe as part of the GWOT, and the President publicly acknowledged it on 6 September 2006. The CIA started a secret detention program in which terrorism suspects were imprisoned in CIA prisons, and black sites, outside the US and subjected to abusive interrogation techniques like torture. Black sites, coined by the Bush Administration, are seen as just another term for clandestine prisons. The CIA was reportedly mandated to "create paramilitary teams to hunt, capture, detain, or kill designated terrorists almost anywhere in the world". Guantanamo Bay Detention Camp is a US prison on the Guantanamo Bay Naval Base situated on the southeast shores of Cuba. Early in 2002, the camp started taking in alleged al-Qaeda militants, Taliban combatants, and members of the Islamic fundamentalist group. Eventually, hundreds of detainees from many nations were detained at the camp without being given a reason for imprisonment and without access to legal defense. Another one is a large prison complex in the Iraqi province of Baghdad called Abu Ghraib, which gained notoriety for the use of torture. In 2004, reports – and photographs – detailing the abuse, torture, and deaths of its prisoners at the hands of members of the US Army surfaced, sparking an international backlash.

The fourth chapter regards the international reaction to the revelations of what was happening in the detention camps mentioned in the previous chapter. In 2001, human rights groups and journalists started criticizing the abuse in detention camps. The media released the first press article concentrating exclusively on the atrocities at the Abu Ghraib prison in November 2003. When the US television news program *60 Minutes* aired a report in April 2004 that featured multiple photographs of the detainees being abused, it eventually became a public controversy. The following week, information on Major General Taguba's Report from early 2004 was leaked, and its conclusions confirmed the terrible behaviors shown in the pictures to the public.

This last chapter starts with the international organization's condemnations, particularly the one by the International Committee of the Red Cross (ICRC). Since early 2002, ICRC personnel have visited detainees regularly at the US

detention facility at Guantanamo Bay to assess whether they are being treated in conformity with IL standards. Over 200 detainees in US custody are estimated to have died due to these interrogation practices, most likely due to torture. Several thousand people have likely also been tortured during interrogation at US-controlled detention facilities and at foreign detention facilities where officials acting for and on behalf of the US have engaged in torture. Establishing groups like Amnesty International and Human Rights Watch were crucial because they have called out and shamed governments who employ or permit torture. The US was at the forefront of worldwide efforts between 1948 and 1984 to end torture in nations where their governments still engaged in this barbaric practice.

Reports and eyewitness accounts of torture have been published by the media more frequently, and some have started calling for the Government to answer for its actions. Therefore, many legal cases were brought before international human rights courts. Some cases were particularly important for condemning the actions of the high ranks of the Administration. These cases are *United States v. Abu Zubaydah*, *Rasul v. Bush*, *Khaled el-Masri v. United States*, and *Hamdan v. Rumsfeld*. These concerned mostly the secrecy of national intelligence and the unlawfulness of the suspects' captivity. To conclude, the last chapter, the case of *United States v. Sabrina Harman*, regarding the scandal of photos which saw her as the main character. The photos in which she is portrayed reveal the misconduct of US soldiers in Abu Ghraib, which profoundly impacted people worldwide.

The devastating threat that international terrorism poses to democratic society was brutally brought to light by the 9/11 attacks. Given this devastating threat, liberal states that uphold the rule of law must consider their options and available resources to combat it. Nevertheless, it is essential to remember the core values that make up the civilization trying to protect itself. One of this society's most significant accomplishments is the outlawing of torture. Humanity has been tortured throughout history and returns when a democratic state becomes totalitarian. The idea of human dignity and, by extension, the idea of human rights itself are inseparably intertwined, and torture is consequently prohibited. The foundation of the society we defend is undermined if this principle is relativized. This understanding is the foundation for the outright ban of torture, especially in the wake of World War II's terrible experiences. Nation-States have acted against terrorism that has eaten deeply into the foundation of our civilizations. Most of these counterterrorism measures have now been adopted and implemented, raising additional questions regarding IL's efficacy. The 9/11 tragedy, according to some, altered the Western world. Terrorism and counterterrorism both played a role in the change's orchestration. The investigation of terrorist offenses undoubtedly poses severe difficulties for state actors. These include the potential for abusing the defenseless. However, certain core principles of IL must always be upheld.

A decision must be made about international terrorism and human rights. The 9/11 tragedy raised many issues regarding the connection between the person and the State. Counterterrorism efforts after 9/11 have put the tension between these two areas to the test. Executive actions and court rulings have historically supported the impression that civil liberties must be sacrificed, and some rights must be disregarded to address national emergencies. Balancing personal liberties, rights, and national security is still debatable. Different nation-States face varying levels of security risks. Human rights are compromised, and illegal actions like detentions and torture are justified in the name of security. Violence may, nevertheless, be necessary to defeat terrorists. Coercion, dishonesty, secrecy, and the violation of human rights are also necessary. Therefore, it becomes puzzling how democracies will use these tactics without erasing the principles they stand for.

Despite the condemnation of torture and inhumane tactics, people in many nations support the strict enforcement of security measures in response to domestic terrorism concerns. Even in cases when the underlying standards are categorical, such as the ban on torture, opposition to accountability during political transition can make rights contingent. The right to be spared from torture has frequently been violated throughout the GWOT. It is well known that the US stated that IL would not hinder US activities if its national interests were at risk. In the US, resistance effectively created an exception to this rule. Torture was approved through various legal theories that sought to undermine the definition of torture and place a broadly defined armed conflict outside even the most basic IHL restrictions. However, it is essential to note that most domestic laws or international treaties that outright forbid torture were passed or adopted before the 9/11 attacks when contemplating the absolute ban on torture. For instance, the ECHR came into effect in 1953. The mechanisms of 9/11 placed the globe into a historical dilemma even if the incident did not introduce terrorism into the world.

The current argument assumes that outlawing torture altogether is morally and practically impractical. Torture may be acceptable, a valid choice, or the lesser of two evils in dire situations if we feel a suspect has essential information and there is a clear and immediate risk to be averted. We know that many people in positions of political authority still needed to be fully used to the anti-torture standard, in any case. This does not imply that they "support" torture per se. They will, however, consider the anti-torture norm to be part of a consequentialist analysis that considers both the value they place on the anti-torture norm itself and the possibility of external punishment should their derogation be discovered. In situations like this, where the anti-torture norm is regularly socialized, there are irrelevant factors at play.

This inconsistency served as the starting point for a protracted debate. Because the Bush Administration believed torture was the best way to protect the

country, officials refused to accept responsibility. Even yet, it is now "indisputable that the US practiced torture". It is also undeniable that the US might resume this behavior. Both domestically and internationally, torture is prohibited by the Rome Statute and the UNCAT. These measures serve as a reminder that torture is terrible and inhumane on a global scale. However, using SERE methods and EITs on prisoners in the GWOT goes against this prohibition. Torture has become just another hypothetical policy choice "on the table". The terrifying detainee testimonies show why this choice was appropriately prohibited. Torture has too high a price. The number of kidnappings and death of innocent people measures it. Any attempts to prosecute the tortured have failed in the rare instances where torture was used on suspects of terrorist activity because torture is a fear-based, self-defeating practice. Bush presented torture as a choice between security and values, yet all it delivers is the appearance of security at the expense of values. The UNCAT and the Rome Statute have recognized pieces of IL, and the US should reaffirm its adherence to them. Torture should continue to be illegal. The US should never again use it as a tool for foreign policy that it can use whenever it sees fit.

No credible participant in the current discussion supports the idea that government agents should routinely torture or treat people under their authority cruelly, inhumanely, or degradingly. The only true point of contention is whether there are any instances in which such behavior might ever be justified or pardoned, in which case it should be given legal standing and what should be done with people who engage in it. Despite the abundance of literature, there is still no agreement on the best course of action. This is likely because, in the end, there appears to be an intuitive moral choice between two incompatible sets of values. International human rights law must establish a framework with requirements that nation-States must abide by through the joint means of State accountability and the rule of law. IL must get immediate attention in rule implementation and enforcement to increase its effectiveness.