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Assessment of United States National Security Policy Under International Human Rights Law and International Humanitarian Law

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Assessment of United States National Security Policy Under International Human Rights Law and International Humanitarian Law

by

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Report

Presented to the Faculty of the Graduate School of

the University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degrees of

Master of Global Policy Studies
and
Doctor of Jurisprudence

The University of Texas at Austin

May 2014

Assessment of United States National Security Policy Under International Human Rights Law and International Humanitarian Law

by

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This paper assesses U.S. national security policies in surveillance, detention, interrogation and torture, and targeted killing to determine whether they comport with international human rights law and international humanitarian law. The U.S. is responsible for adhering to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Geneva Conventions. These human rights law documents can be understood through court decisions, congressional statutes, and widely accepted interpretations from organizations such as the International Committee of the Red Cross, and the UN Human Rights Council. Further, this paper offers prescriptions on how international human rights law and international humanitarian law can be updated to better deal with the current war on terror.

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Literature Review

The application of human rights law to this war on terror has been debated by scholars across the legal spectrum. There is debate about which law, IHRL or IHL applies, and when, including what amounts to international armed conflict so that IHL may apply. Further, scholars debate who is actually the enemy, complicated by a lack of definition for terrorism. Many scholars also broadly address emergency powers and the need for different laws during a time of war and how those laws impact liberties and human rights. Articles attempting to describe or construct a proper balance between national security and human rights have reached different conclusions on where that line should be drawn. Other work has been written regarding gaps in the laws of war, how those laws apply to the war on terror, and how those gaps can be addressed to create a better framework for applying the laws of war that better protects human rights.

It is now well accepted that both IHRL and IHL can apply at the same time. IHRL applies at all times, while IHL applies in times of armed conflict.[1] In times when there is a conflict in applying both laws, the lex specialis is applied.[2] Laura Olson, a visiting scholar at the University of Notre Dame Law School, discusses some of the practical challenges of applying both IHRL and IHL to internment, and how differences in IHRL and IHL can give rise to complications when applying international law to internment.[3] Olson highlights the importance of the complementary applications of both bodies of law

[1] *See infra* note 64.
[2] U.N. Office of High Commissioner, *International Legal Protection of Human Rights in Armed Conflict*, 1, HR/PUB/11/01 (2011) [hereinafter UNHC Legal Protection].
[3] Laura M. Olson, *Practical Challenges of Implementing the Complementarity Between International Humanitarian and Human Rights Law – Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict*, 40 CASE W. RES. J. INT'L L. 437 (2009).

when pointing out that IHL alone lacks sufficient detail of the procedural regulations required for internment, while IHRL provides additional protections that creates greater procedural protection.[4] For example, IHL rules prohibit the arbitrary deprivation of liberty, which is very general, while IHRL rules prohibit arbitrary deprivation of liberty except for reasons previously established by law, which is more specific and protective.[5] However, she states that there are difficulties in applying both bodies of law when it is not clear how the lex specialis should be applied. For example, she questions the use of lex specialis "in an international legal system which lacks hierarchy and institutional structures."[6] Therefore, who should decide which is the most protective, inclusive law?

Other issues in applying bodies of law to the War on Terror are in deciding when an international conflict is taking place, and defining the enemy. If the level of a conflict doesn't rise to a level of armed conflict, it is governed by only international human rights law and law enforcement powers. David Turns discusses the first question, when a conflict is deemed international, and therefore requires the application of IHL. Turns mentions the ruling of the Israeli Supreme Court in declaring that conflict between Israelis and Palestinians was an international armed conflict, seeming to state that most rules in armed conflict are the same, regardless of the classification of the conflict, or the fact that the conflict occurs between states and terrorist organizations.[7] The Court held that the conflict between a state and terrorists was one of an international armed conflict because the armed conflict crossed borders of the State and took place within a context of

[4] *Id.* at 442.
[5] *Id.* at 451.
[6] *Id.* at 447.
[7] David Turns, *The "War on Terror" Through British and International Humanitarian Law Eyes: Comparative Perspectives on Selected Legal Issues*, 10 N.Y. CITY L. REV. 435, 469 (2007).

belligerent occupation, and because of the military capabilities of modern terrorist organizations.[8] Turns suggests that this opinion seems to have been intended to have a wider applicability outside of Israel and in other state-terrorist armed conflicts.[9] Scholar Sasha Radin mentions discomfort with the application of the rules of international armed conflict, as the War on Terror spans multiple states, which can lead to defining this conflict as a global conflict.[10] Part of the issue is defining the enemy, before one can determine that the actions of that enemy, in combination across various states, amounts to the level of intensity required for international armed conflict, and therefore LOAC to apply.

In 2001 when the AUMF was passed, our enemies were, broadly, those who could be tied to the groups directly responsible for the September 11 attacks. In 2001, it seemed clearer that the enemy was Al-Qaeda and its affiliated forces, and the Taliban. Today, as the core of Al-Qaeda has been deteriorated by U.S. operations, the Taliban is no longer in power, and many related, but un-affiliated terrorist factions are popping up in many countries, it is more difficult to assess who were are exactly fighting. The identity of Al-Qaeda was built in the idea that modern, western society was a threat to Islam, and the Islamic world needed to protect itself. Specifically, Lawrence Wright describes in *The Looming Tower* that angst against the West increased when Egyptians used torture against their Islamic prisoners, creating a thirst for revenge against a West seen as

[8] *Id.* at 470 (discussing the opinion in HCJ 769/02, Public Comm. Against Torture in Israel v. Gov't of Israel [2006] at 18).
[9] *Id.* at 472.
[10] Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts*, 89 INT'L L. STUD. 696, 670 (2013).

backing the Egyptian regime.[11] The protection of Islam against the West is the main basis for affiliated and non-affiliated factions of Al-Qaeda in various countries.

One problem in defining these groups is the fact that the definition of terrorism is unsettled. Nicholas Perry, an attorney in the Department of Homeland Security, writes that over 150 scholarly and legal definitions of terrorism exist, with no consensus.[12] He reviews the different scholarly definitions of terrorism, stating that twenty-two different elements exist in scholars' definitions, including the terms violence or force, political, fear, or terror, and a political purpose or motivation among the most common.[13] Perry states that one of the difficulties in creating one accepted definition of terrorism is the changing nature of terrorism, and not knowing what a prospective terrorist may do next.[14] Besides the unsuccessful attempts by scholars to create a single definition of terorrism, the U.S. federal government also has created nineteen different definitions or descriptions of terrorism, and three terms relating to the support of terrorism in federal law.[15]

Besides not being able to clearly identify the enemy, Wright mentions that Al-Qaeda further discredits the use of international human rights law because the values that America considered universally desirable, such as the rule of law and human rights, were Western, modern ideas that were a threat a Islam.[16] Therefore, one side of this armed conflict, terrorist groups, refuses to abide by international humanitarian law, making the conflict even more difficult to define and set any appropriate boundaries.

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[11] LAWRENCE WRIGHT, THE LOOMING TOWER 52 (Random House LLC 2006).
[12] Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails,* 30 J. LEGIS. 249 (2004).
[13] *Id.* at 251.
[14] *Id.* at 252.
[15] *Id.* at 255.
[16] WRIGHT, *supra* note 11, at 172.

What is clear, however, is that the United States finds itself at war, and rules need to be defined so as to balance national security concerns with civil liberties and human rights. Itzhak Zamir, professor of law at the Hebrew University of Jerusalem and former attorney general of Israel suggested that the judicial system gives greater preference to national security concerns over those of human rights when discussing the conflict between national security and human rights.[17] Zamir explains that is the reason security always wins out in the judicial system over issues of liberty and human rights.[18] Even in the late 80s, Zamir suggests taking a broad view of national interest that includes other rights besides security, and points out that in no other area of law can breaches be so grave by claiming that the task justifies the means, and by placing actions under the cloak of security until the term is used to an extreme to jeopardize law and human rights.[19] Although Zamir was writing 25 years ago, the importance of his discussion of the improper use of emergency war powers in a prolonged war are still true today.[20] it is the lawmakers, in his belief, that must restrain the authorities in order to protect human rights and limit unlimited power with security issues.[21] Similarly, Justice Dbe of the Court of Appeals of England and Wales believes that the legislature has the greatest opportunity to restrain the executive because even the courts must defer to the legislature's view that laws that infringe on an individual's liberties for the sake of national security were

[17] Itzhak Zamir, *Human Rights and National Security*, 23 ISR. L. REV. 375 (1989).
[18] *Id.* at 377.
[19] *Id.* at 378 – 380 ("[O]ne must not regard national security as the only national interest, though it may well be a crucial one.").
[20] *Id*. at 382-83.
[21] *Id.* at 384-92.

needed, and the court further respects the fact that the executive is also exercising his rights in using that legislation to protect his citizens.[22]

Even in the late 80s could Zamir forsee the security debate in the United States in 2014, writing that those authorities that are responsible for a country's security use their full power and benefits of security secrecy to provide maximum security without striking an appropriate balance to human rights or other interests.[23] However, in American war-time history, today's derogations from human rights are not unique. Jack Goldsmith in The Terror Presidency compares today's expansion of executive power to provide maximum security to the claims of power made by other war-time presidents, including Presidents Lincoln and Roosevelt.[24] In Lincoln's time, Goldsmith writes, Lincoln interpreted his duty to defend and preserve the constitution as including preserving the government by any means, including unconstitutional means that might become lawful if done to preserve the constitution, and therefore the nation.[25] Supreme Court Justice Sandra Day O'Connor made the same comparisons in 2008, mentioning President Lincoln's suspension of the writ of habeas corpus and the Judiciary's ruling in *ExParte Milligan*.[26] These comparisons to history are important because it shows how today's conflict isn't something new, and changing rules during war is both necessary and

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[22] Justice Arden Dbe, *Balancing Human Rights and National Security*, 124 S. AFRICAN L.J. 57, 60 (2007).
[23] Zamir, *supra* note 17, at 381.
[24] Jack Goldsmith, THE TERROR PRESIDENCY 8, 48, 83-84(W.W. Norton & Company, 2007) (describing the duties Roosevelt and Lincoln felt to protecting the nation and using extralegal means to do so under their Presidential emergency powers) [hereinafter TERROR PRESIDENCY].
[25] *Id.* at 83.
[26] Sandra Day O'Connor, *Balancing Security, Democracy, and Human Rights in an Age of Terrorism,* 47, COLUM. J. TRANSNAT'L L. 6, 6-7 (2008-09); Ex Parte Milligan, 71 U.S. 2 (holding that military tribunals cannot be used to try civilians suspected of aiding the Confederacy as long as traditional civilian courts were open and functioning.).

common. Of course, today's human rights regime is far more robust that it was during either Lincoln or Roosevelt's time, and the sense of emergency was clearer for the public then than it is today. A decision like Korematsu v. United States, would likely not happen today, nor would that decision be used today, for example.[27]

Rose Brooks, a Law Professor at the University of Virginia School of Law, writes that the reason human rights and the protection of liberties have been eroding in U.S. national security policy is due to the muddling of definitions in the laws of war.[28] She asserts that the definitions of what is a national security issues versus a domestic issue, or what is war and what is peace are no longer simple distinctions to make in the war on terror and these traditional legal categories are no longer tenable.[29] She argues that the breakdown of clear distinctions is what has allowed the United States to make domestic policy that infringes on international human rights and the laws of war by placing more and more decisions under the guise of national security to which the courts subject far less scrutiny on the government than in other issues.[30] Jack Goldsmith re-iterated the lack of scrutiny of the courts by pointing out that legal interpretation in national security doesn't equate to judicial interpretation.[31] In fact, the executive branch has far fewer institutional constraints, "where the President's superior information and quite different

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[27] Korematsu v United States, 323 U.S. 214 (1944) (holding that national security concerns demanded that American citizens of Japanese ancestry could be segregated and interned temporarily).
[28] Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004).
[29] *Id.* at 677 .
[30] *Id.* at 676-77, 682 ("As traditional categories lose their logical underpinnings, we are entering a new era: the era of War Everywhere. It is an era in which the legal rules that were designed to protect basic rights and vulnerable groups have lost much of their analytical force, and thus, too often, their practical force.").
[31] TERROR PRESIDENCY, *supra* note 24, at 35.

responsibilities foster a unique perspective" outside of the judicial system.[32] This power comes with concerns, however, as Goldsmith acknowledges that the President's control over the military and intelligence agencies, his ability to act in secret, and the work of his legal staff in defining his powers as the President sees fit create opportunities for abuse.[33] However, in a later book, Goldsmith describes the legal constraints that have built up since 9/11 on Presidential power and the legitimacy that congress and the courts have brought to executive actions in national security.[34] Goldsmith highlights these constraints in explaining that even in the days after 9/11, the Congress limited the president's power in passing the Authorization for the Use of Military Force (AUMF) in September 2001 because the President had asked for much wider leverage to go after groups who were not even associated with the attacks of 9/11.[35]

Brooks points out that in other contexts, human rights groups have called for flexible interpretations of international law, but in the national security context call for more rigid and strict interpretations when assessing U.S. policy in the war on terror.[36] These groups have asserted that the loosening of the definitions in the laws of war for national security purposes has eroded the protection of human rights. Brooks describes the blurring of definition as creating a slippery slope that undermines other legal practices, and gives the example of the Bush administration determining that Geneva Conventions cannot apply and concluding that therefore, there were no legal constraints

[32] *Id.*
[33] *Id.* at 183.
[34] Jack Goldsmith, POWER AND CONSTRAINT (W.W. Norton & Company, 2012) [hereinafter POWER AND CONSTRAINT]
[35] *Id.* at 183.
[36] Brooks, *supra* note 28, at 680.

on interrogation, when in fact other laws prohibit torture and other cruel, inhuman, or degrading treatment of detainees.[37] Although Brooks determines that the human rights framework is outdated, in her application of human rights laws to U.S. domestic national security laws such as the PATRIOT Act, Brooks determines that the United States seems to have run afoul of many norms of international law.[38] She sees a larger role for courts to intervene and apply human rights law when building a larger paradigm for dealing with the war on terror.[39] Brooks therefore determines that the old laws of war need to be replaced by a new, more protective system to deal with changes in the new conflict and threat of the 21st century.[40] I will provide such examples of possible changes later in this paper.

When applying the laws of war to the war on terror, many scholars agree that the law of armed conflict applies and is the best legal framework to place the war on terror.[41] William Taft, a legal advisor for the Department of State in 2003, agrees that the laws of war are most appropriate to regulate the war on terror, and although stresses have been placed on the laws of war, Taft believes that the basic framework of the laws of war have remained strong since 9/11 and do not need revision or amendment.[42] Professor Jordan Paust agrees, stating that there is no need to revise the Geneva Conventions because of the 9/11 attacks, and doing so in order to change the status of detained individuals or Al-

[37] *Id.* at 682-83.
[38] *Id*. at 749-50.
[39] *Id.* at 685-86.
[40] *Id.* at 684.
[41] Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325 (2003); John C. Yoo & James C. Ho, *International Law and the War on Terrorism*, 1-2, *available at* http://www.law.berkeley.edu/files/yoonyucombatants.pdf.
[42] William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319 (2003).

Qaeda members is not only legally inappropriate but would have "seriously harmful consequences."[43]

Many scholars, however, grapple with the gaps present in today's human rights regime, and how to amend international law to deal with today's war and address those gaps. James Stewart wrote in 2003 that the best way to deal with today's internationalized conflicts is to create one single law of armed conflict and remove the distinctions between international and internal conflicts.[44] He believes this leaves a gap in the law of armed conflict where different rules would apply in each situation.[45] Removing the distinctions applies the law to all conflicts, which is especially important in today's globalized world that increases incentives for foreign intervention in domestic conflicts.[46] Stewart writes that Common Article 3 to the Geneva Conventions became inapplicable in "armed conflicts not of an international character" and only applicable when the intensity of hostilities reaches "protracted armed violence", leaving governments to define for themselves what those terms mean.[47] The lack of definition in Common Article 3 leaves many gaps in protections that were never filled with the Additional Protocols.[48] The three-pronged test that exists today to determine whether hostilities are of an international

[43] Paust, *supra* note 41, at 328, 335 ("Acceptance of [claims to change the laws of war] would result in changing the status of war, modifying thresholds for application of the laws of war, redefining "combatant" status, as well as refusing to grant prisoner of war status to members of the armed forces of a party to an international armed conflict. Were such changes to be made, serious consequences could ensue for the United States, other countries, U.S. military personnel, military personnel of other countries, and the rest of humankind.").
[44] James G. Stewart, *Towards a Single Definition of Armed Conflict in International humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT'L REV. RED CROSS 313 (2003).
[45] *Id.*
[46] *Id.* at 316.
[47] *Id.* at 318.
[48] *Id.* at 319-21.

character is not applied consistently, and is confusing to apply in the midst of hostilities, so the solution is removing the distinction of internal and international all together.[49]

[49] *Id.* at 327-28, 333.

Introduction

Following the terrorist attacks on September 11, 2001, the United States entered into a flurry of law and policy decisions to set in place a system to prevent further attacks and stop the spread of terrorism. During this process, the United States has had obligations under international law that required it to follow principles of international human rights law (IHRL) and international humanitarian law (IHL). These obligations also extend to persons held at the detention facility at Guantanamo Bay Naval Base.[50] Most notably, the United States is a signatory to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (CAT), the Universal Declaration of Human Rights (UDHR), and the Geneva Conventions. These treaties and conventions can be understood through various binding and non-binding sources, such as the United Nations Human Rights Council general comments, secondary sources such as Amnesty International, International Court decisions, United Nations working group resolutions, Human Rights Committee comments, and the International Committee of the Red Cross (ICRC). Through these interpretations, we can determine whether U.S. policy in the realm of national security comports with U.S. obligations under IHRL and IHL.

[50] The Human Rights Committee, the body in charge of implementing the ICCPR, has stated that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party." Economic and Social Council, *Situation of Detainees at Guantanamo Bay: Report of the Chairperson Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manji-ed Nowak; the Special Rapporteur on Feedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt,* U.N. Doc *E/CN.4/2006/120,* (Feb. 27, 2006), para. 11, *quoting* Human Rights Committee, general comment No. 31 (2004), CCPR/C/21/Rev.1/Add.13, para. 10 [hereinafter Situation of Detainees].

The purpose of this paper is to examine four areas of U.S. national security policy, namely surveillance, detention, interrogation, and targeted killings, and determine the legality of U.S. operations in these areas under IHRL and IHL. First, I will briefly discuss the differences between the two bodies of law, and when each applies as I will be applying them throughout the paper. Then, for each section I will identify the domestic and international law that governs the legality of those operations, and will analyze the legality of the operations under IHRL and IHL. I will conclude the paper with discussion of how IHRL and IHL impacted the creation of U.S. national security policy in these areas, if at all. I will then briefly assess compliance between administrations to determine whether the United States is moving toward or away from compliance with international law. Finally, I will offer some prescriptions on amending international human rights and humanitarian laws to better deal with the War on Terror. I will offer clearer and more restrictive guidelines to increase protections, as this type of war was not imagined at the time of writing of these international laws, making coverage of this war by international laws questionable and sparse in many areas.

Human Rights Law v. Humanitarian Law

International human rights law creates obligations that states must refrain from interfering with human rights, and protect individuals and groups against human rights abuses.[51] The foundation for IHRL is found in the Universal Declaration of Human Rights drafted in 1948, and is supplemented by a series of international human rights treaties and other instruments.[52]

Also known as the law of armed conflict, international humanitarian law seeks to limit the means and methods of warfare for humanitarian reasons.[53] Specifically, IHL protects those who are not, or are no longer participating in the fighting, and places restrictions on weapons and military tactics.[54] A major part of IHL is contained the Geneva Conventions, and supplemented by further agreements.[55]

When each law applies

As described by the International Court of Justice, the relationship between IHRL and IHL in terms of armed conflict is that some things fall just under IHRL, and some fall

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[51] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) [hereinafter UDHR]; INTERNATIONAL HUMAN RIGHTS LAW, UNITED NATIONS HUMAN RIGHTS, http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx.

[52] INTERNATIONAL HUMAN RIGHTS LAW, UNITED NATIONS HUMAN RIGHTS, http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx; Int'l Comm. for the Red Cross, *IHL and Human Rights Law* (Oct. 29, 2010), http://www.icrc.org/eng/war-and-law/ihl-other-legal-regmies/ihl-human-rights/overview-ihl-and-human-rights.htm [hereinafter ICRC IHL, IHRL]

[53] Int'l Comm. for the Red Cross, *What is International Humanitarian Law?* (2004), http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf [hereinafter ICRC IHL]; UNHC Legal Protection, *supra* note 2, at 1.

[54] ICRC IHL, *supra* note 53.

[55] The Geneva Conventions are supplemented by the Additional Protocols of 1977 relating to the protection of victims of armed conflicts, and other agreements that prohibit the use of certain weapons and military tactics and that protect people and goods. *Id.*; ICRC IHL, IHRL, *supra* note 52.

just under IHL, and some matters fall under both sets of laws.[56] Both IHRL and IHL bind state and non-state actors.[57]

IHRL applies at all times as customary international law, and always prevails during peacetime and during public emergencies that fall short of armed conflict.[58] IHRL allows for some derogations, while IHL can never be derogated from.[59]

IHL applies only to armed conflict once it has begun, and does not cover internal, isolated acts of violence.[60] IHL binds all actors to an armed conflict, whether they are state or non-state actors, and includes individuals.[61] It binds governments, and groups fighting against or among themselves.[62]

Can they apply concurrently?

The U.S. has wrongly indicated in some situations during armed conflict, such as in the detention of enemy combatants, that only humanitarian law would apply.[63] In fact, the UN High Commissioner, the International Committee for the Red Cross, the General Assembly, the Commission on Human Rights, and the Human Rights Council have all acknowledged that both IHRL and IHL do apply concurrently, during times of armed

[56] Palestinian Wall, Advisory Op., 2004 I.C.J. 136, ¶ 106.
[57] UNHC Legal Protection, *supra* note 2, at 24.
[58] Int'l Comm. Red Cross, *International Humanitarian Law and International Human Rights Law: Similarities and Differences*, Advisory Service (Jan 2003) [hereinafter ICRC Advisory]
[59] ICRC IHL, IHRL, *supra* note 52.
[60] ICRC IHL, *supra* note 53; ICRC Advisory, *supra* note 58.
[61] ICRC Advisory, *supra* note 58.
[62] *Id.*
[63] Response of the United States to Request for Precautionary Measures--Detainees in Guantanamo Bay, Cuba, 41 I.L.M. 1015, 1019 (2002) ("It is humanitarian law, and not human rights law, that governs the capture and detention of enemy combatants in armed conflict.").

conflict.[64] That is because IHRL also applies to acts of a state acting in the exercise of its jurisdiction outside its territory.[65] In the times when both laws apply, the IHL specific norm prevails when there is a more general IHRL norm.[66] If there is an absence of standard in IHL, then the IHRL provision would govern in those situations.

IHL does not always prevail over IHRL, however. If an IHRL norm sets a higher bar, then that standard is adopted instead of the IHL standard.[67] For example, Article 72 of the Geneva Protocol I states that its provisions of IHL are additional to IHRL, and Article 75 makes it clear that if IHRL offers more protection, then the convention should only act as a minimum protection, and is never meant to limit any international law that offers greater protection.[68] Therefore, in times of armed conflict when IHL applies, a person would be entitled to benefit from a more favorable provision in IHRL, if one exists. The two laws act simultaneously. This is especially necessary in a conflict with

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[64] UNHC Legal Protection, *supra* note 2, at 5-6; ICRC IHL, IHRL, *supra* note 52; Annual Report of the U.N. High Commissioner for Human Rights For Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, 11th session, para. 5, A/HRC/11/31 (June 4, 2009) ("The High Commissioner recalled that, over the years, the General Assembly, the Commission on Human Rights and, more recently, the Human Rights Council had expressed the view that, in situations of armed conflict, parties to the conflict had legally binding obligations concerning the rights of persons affected by the conflict…. the Council also acknowledged that human rights law and international humanitarian law were complimentary and mutually reinforcing."); G.A. Res. 10/2013, para. 28, U.N. Doc. A/HRC/WGAD/2013/10 (June 12, 2013) (Opinion concerning Mr. Obaidullah); Additionally, the UN Working Group on Arbitrary Detention stated in an opinion that it "would like to stress as a matter of principle that the application of international humanitarian law to an international or non-international armed conflict does not exclude application of human rights law. The two bodies of law are complimentary and not mutually exclusive." UN Working Group on Arbitrary Detention, Opinion No. 3/2009 (United States of America), A/HRC/13/30/Add.1 at 259(2010), para. 30.

[65] UNHC Legal Protection, *supra* note 2, at 43.

[66] *Id.* at 58; UN Working Group on Arbitrary Detention, Opinion No. 3/2009 (United States of America), A/HRC/13/30/Add.1 at 259(2010), para. 30 ("In the case of a conflict between the provisions of the two legal regimes with regard to a specific situation, the *lex specialis* will have to be identified and applied.").

[67] Douglass Cassel, *Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law*, 98 J. CRIM. L. & CRIMINOLOGY 811, 820 (2008).

[68] Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, U.N. Doc. A/32/144 arts. 72, 75.1, 75.8, reprinted in 16 I.L.M. 1391 (1977) [hereinafter Additional Protocol I].

non-state actors in which IHL binds both state and non-state actors, while IHRL traditionally only binds state actors.

In various general comments, the Human Rights Committee, as well as the International Court of Justice, have stated that the International Covenant on Civil and Political Rights (ICCPR) has applied during armed conflicts while IHL was applicable.[69] The Human Rights Council has also acknowledged that IHL and IHRL are complimentary and mutually reinforcing in resolution 9/9.[70] Additionally, in IHRL treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, derogations from certain human rights, subject to limitations, are permitted during times of armed conflict.[71] If both laws were not meant to apply at the same time, there would be no need for these express provisions allowing for derogation. The Convention Against Torture is also meant to apply simultaneously with IHL, since it prohibits torture even in a "state of war".[72] An example of a treaty that has explicit provisions applicable to both peace and war situations is the Convention on the Rights of the Child, an IHRL treaty.[73]

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[69] *See* general comments No. 29 (2001) on states of emergency (Art. 4), para. 3, and 31 (2004) on the nature of the general legal obligation imposed on States Parties to the Covenant, para. 11; UNHC Legal Protection, *supra* note 2, at 55 ("[T]he protection of the [ICCPR] does not cease in times of war").
[70] Human Rights Council, *Resolution 9/9 Protection of the Human Rights of Civilians in Armed Conflict*, 1, A-HRC-RES-9-9, http://www2.ohchr.org/english/events/HR_civilians_aconflict/docs/A-HRC-RES-9-9.pdf.
[71] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 232, art. 15.1; American Convention on Human Rights Organization of American States Treaty, Nov. 22, 1969, B-32, O.A.S.T.S. 36, art. 27(1).
[72] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment Art. 2.2, Dec. 10, 1984, S. Treaty Doc. No. 100.20, 1465 U.N.T.S. 85 ("No exceptional circumstances whatsoever, whether a state of war or a threat of war...may be invoked as a justification of torture.") [hereinafter UN CAT]
[73] UNHC Legal Protection, *supra* note 2, at 56 ("States Parties undertake to respect and to ensure respect for rules of international humanitarian law").

Surveillance

The rights to privacy, freedom of expression, and association are fundamental human rights recognized under international law. Programs that surveil individuals and collect their communications data threaten these rights. With the dramatic increase in communications content and internet traffic in recent years, the opportunity for intelligence collection is enormous, and U.S. policy has been intent on reducing barriers to that information, at the cost of individual privacy, all in the name of national security.

Main Surveillance Programs & Domestic Surveillance Authority

Call Records Program

One of the main data collection programs run by the National Security Agency is the collection of daily phone business records from major phone service companies. These business records contain metadata from named individuals, including the numbers dialed, and the call's time and duration.[74] The information being collected does not include content. However, metadata is still extremely revealing of the details of an individual's personal life. Putting details from metadata together from prolonged surveillance creates a clear picture of an individual's private life, and can show patterns of their daily activities and associations. In the 2012 Supreme Court decision *U.S. v. Jones*, the Court recognized that continuous electronic surveillance for an extended period of time implicates the Fourth Amendment.[75] Five justices even acknowledged that

[74] *Verizon Forced to Hand Over Telephone Data – Full Court Ruling*, GUARDIAN, June 5, 2013, http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order.
[75] United States v. Jones, 132 S.Ct. 945 (2012).

this type of continuous surveillance intrudes into reasonable expectations of privacy.[76] Further, the International Principles on the Application of Human Rights to Communications Surveillance considers metadata collection to be extremely intrusive, stating that the systematic collection and storage of information about identities, interactions, and location creates a full picture of everything a person does, and reveals a lot about their private life.[77]

However, the government bases its legal justification for the collection of 'telephony metadata' on the 1979 case, *Smith v. Maryland*.[78] In *Smith,* the Supreme Court held that Americans have no expectation of privacy if they give their information to a third party and the information is held as business records.[79] The case draws a distinction between call 'metadata' and content. But with the advances in technology today, it is questionable whether a 1979 precedent can still be used as legal justification for such expanded surveillance that did not exist at the time of *Smith v. Maryland*.

PRISM Program

Leaked documents also show the existence of a program aptly named PRISM that collects digital data in bulk from the nation's largest internet companies, including Google, Microsoft, and Yahoo among others.[80] The program collects records directly

[76] *Jones,* 132 S.Ct. at 954-64 (See concurring opinions of Justice Sotomayor and Justice Alito with whom Justices Ginsburg, Breyer, and Kagan joined).
[77] International Principles on the Application of Human Rights to Communications Surveillance (July 2013) *available at* https://en.necessaryandproportionate.org/text#_edn3.
[78] Smith v. Maryland, 442 U.S. 735 (1979).
[79] *Id.* at 744.
[80] Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST, June 6, 2013, http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html.

from the central servers of these companies and is focused on foreign internet traffic. This information includes contact lists, buddy lists, and geolocation information of hundreds of thousands of people daily.[81] Much like 'telephony metadata', this data would allow the NSA to develop patterns of a person's personal life and associations. The government is then able to look through information two hops out from the initial target of the query, without acquiring any additional warrant for those additional individuals. It is reported that the NSA relies on the PRISM collection program as its main source for raw information, "accounting for nearly 1 in 7 intelligence reports".[82] The government finds its legal basis for this program in the Foreign Intelligence Surveillance Act (FISA) Amendments of 2008. Before enactment of the Amendments, FISA required the government to obtain an individualized order that identified or described the target of the surveillance, contained "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power", explained the government's basis for believing that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power", listed the minimization procedures the government had in place to reduce the collection of information of U.S. persons,

[81]Barton Gellman & Ashkan Soltani, *NSA Collects Millions of E-mail Address Books Globally*, WASH. POST, Oct. 14, 2013, http://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f_story.html.; Barton Gellman & Ashkan Soltani, *NSA Tracking Cellphone Locations Worldwide, Snowden Documents Show*, WASH. POST, Dec. 4, 2013, http://www.washingtonpost.com/world/national-security/nsa-tracking-cellphone-locations-worldwide-snowden-documents-show/2013/12/04/5492873a-5cf2-11e3-bc56-c6ca94801fac_story.html?hpid=z1(According to the government, the reasoning behind the geolocation data collection program is to "look for unknown associated of known intelligence targets by tracking people whose movements intersect").

[82] *NSA Tracking*, *supra* note 81.

specified the nature of the foreign intelligence information sought and the types of communications that would be subject to surveillance, and certified that a "significant purpose" of the surveillance was to obtain "foreign intelligence information."[83] The 2008 Amendments do not require the government to specify a particular target at all, or whether or not they are a foreign power or an agent of a foreign power. The government is further no longer required to list what types of communications will be subject to surveillance, which allows for a broad order that allows surveillance of various types of communications, like emails and phone lines, without getting a new order each time.[84] Most importantly, the 2008 Amendments change the "significant purpose" requirement to attach to entire surveillance programs instead of any individual target.[85]

The FISA Court

The Foreign Intelligence Surveillance Court (FISC) was established under the FISA in 1978 as a special court of seven federal district court judges to review government applications for warrants related to national security investigations.[86] The act also created the Foreign Intelligence Surveillance Court of Review (FISCR) to review the decisions of the FISC at the request of the government.[87] The court only hears argument from the government ex parte, so there is no adversary party that is a part of the proceedings.[88] Surveillance requests submitted by the government are granted 99.97 percent of the

[83] 50 U.S.C. § 1804(a) (2010).
[84] 50 U.S.C. § 1881.
[85] 50 U.S.C. § 1881a(g)(2)(A)(v).
[86] 50 U.S.C. § 1803; Federal judicial Center, History of the Federal Judiciary, *available at* http://www.fjc.gov/history/home.nsf/page/courts_special_fisc.html.
[87] History of the Federal Judiciary, *supra* note 86.
[88] Legislation has been put forward to include an adversarial process in the FISC proceedings. H.R. Res. 3159, 113th Cong. (2013) (as referred to committee on Sep. 20, 2013) *available at* https://www.govtrack.us/congress/bills/113/hr3159.

time.[89] Some dub the court a 'rubber stamp', but the court and its supporters in the government have pushed back on this claim. In March 2009, the court took the unusual step of ordering the government to seek approval to query the database on a case-by-case basis "except where necessary to protect against an imminent threat to human life."[90] Further, in an Oct 3, 2011 opinion, the FISA court struck down an NSA program that gathered tens of thousands of internet communications between Americans. The court held that the "upstream collection" of communication was "deficient on statutory and constitutional grounds" because some of the data is "wholly unrelated to the tasked selector".[91] The opinion states that based on NSA estimates, the government was gathering approximately 2,000-10,000 solely domestic communications every year.[92] However, the Court did find that the vast majority of the collection conducted by the NSA complied with targeting and minimization procedures.[93] The opinion was declassified in August 2013.

Despite the minor checks on government surveillance, the FISC has repeatedly approved the government's bulk data collection programs. In a declassified August 29, 2013 order, The FISC found the collection of business records, or telephone metadata, to

[89]Kennedy Elliot & Terri Rupar, *Six Months of Revelations on NSA*, WASH. POST, Dec. 23, 2013, http://www.washingtonpost.com/wp-srv/special/national/nsa-timeline/.
[90] Ellen Nakashima et al., *Declassified Court Documents Highlight NSA Violations in Data Collection for Surveillance*, WASH. POST, Sept. 10, 2013, http://www.washingtonpost.com/world/national-security/declassified-court-documents-highlight-nsa-violations/2013/09/10/60b5822c-1a4b-11e3-a628-7e6dde8f889d_story.html.
[91] FISA Court Ruling on Illegal NSA E-mail Collection Program, at 2-5, http://apps.washingtonpost.com/g/page/national/fisa-court-documents-on-illegal-nsa-e-mail-collection-program/409/.
[92] *Id.* at 33.
[93] Office of the Director of National Intelligence, DNI Clapper Section 702 Declassification Cover Letter, *available at* http://www.dni.gov/files/documents/DNI%20Clapper%20Section%20702%20Declassification%20Cover%20Letter.pdf.

be constitutional under both the fourth amendment of the U.S. Constitution and under section 215 of the USA PARTIOT Act.[94] The FISC relied on Smith v Maryland to uphold the program's constitutionality under the fourth amendment, stating the third party doctrine.[95] The order requires that the process to query the data include a reasonable, articulable suspicion that the phone number being searched is associated with one of the identified international terrorist organizations.[96] The Court also requires adequate minimization procedures, and a statement of facts showing reasonable grounds to believe that tangible things sought are relevant to the investigation.[97] The court also limited the government's use of the collected data by prohibiting the government from accessing the data for any other intelligence or investigative purpose.[98] However, although the material does have to be relevant, the government asserts that it is impossible to know where exactly the relevant information will be found. The government defended its broad use of the relevancy requirement in a white paper release in August of 2013, asserting that relevance "is a broad standard that permits the discovery of large volumes of data. . . because there are reasonable grounds to believe that this category of data . . . will produce information pertinent to FBI investigations of international terrorism . . .".[99]

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[94] United States Foreign Intelligence Surveillance Court, Docket Number BR 13-109, *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf [hereinafter FISC opinion].
[95] *Id.* at 6-7; The third party doctrine: once a person has transmitted their numerical information to a third party, such as the phone company, then the person no longer has a "legitimate expectation of privacy in [the] information". *Smith*, 442 U.S. at 743.
[96] United States Foreign Intelligence Surveillance Court, Docket Number BR 13-109, at 5, *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary.
[97] *Id.* at 10.
[98] *Id.* at 4.
[99] Administration White Paper, Bulk Collection of Telephony Metadata Under Section 215 of the USA PATRIOT Act, at 2 (Aug. 9, 2013), *available at* http://i2.cdn.turner.com/cnn/2013/images/08/09/administration.white.paper.section.215.pdf.

Although the FISA Court has continuously held that the phone metadata collection program is legal, Federal District Court Judge Richard Leon ruled in December of 2013 that the daily collection of almost all phone records of Americans is unconstitutional. He based his decision upon the fourth amendment right to privacy, and the query and analysis of information without prior judicial approval.[100] It remains to be seen how far in the judicial process this ruling will go, and if the Supreme Court will rule on the legality of the phone collection program.

Legality of Surveillance under IHRL & IHL

During opening remarks at the 24th annual Human Rights Council meeting in Geneva, UN Human Rights Chief Navi Pillay articulated a widespread concern across human rights scholars "over the broad scope of security surveillance regimes in countries including the United States . . . and the potential for intrusion on individuals' privacy which have been made possible by modern communications technology".[101] The right to privacy is protected under various human rights documents, including Article 12 of the Universal Declaration of Human Rights (UDHR),[102] and Article 17 of the International Covenant on Civil and Political Rights (ICCPR).[103] The United States ratified the ICCPR

[100] Klayman v. Obama, D.D.C. No.13-0881 (Dec. 16, 2013), http://sensenbrenner.house.gov/uploadedfiles/klayman_v._obama.pdf.
[101] Navi Pillay, United Nations High Commissioner for Human Rights, Opening Statement at the Human Rights Council 24th Session (Sep. 9, 2013), *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13687&LangID=E.
[102] UDHR, *supra* note 51, Art. 12 ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.").
[103] International Covenant on Civil and Political Rights Art. 17(1-2), March 23, 1976, 999 U.N.T.S. 171 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or

in 1992, and is therefore required to abide by all of its provisions, including Article 17, the right to privacy. Even the rights of privacy of children are specifically protected by Article 16 of the UN Convention on the Rights of the Child.[104] Further, violations of the right to privacy create a chilling effect on the rights of association and expression that amount to violations when the government collects mass communications data that can provide a window into an individual's life through their daily interactions. Although there is no UN Special Mandate protecting the right to privacy, Frank LaRue, the UN Special Rapporteur on the right to freedom of opinion and expression, affirms that "privacy and freedom of expression are interlinked and mutually dependent; an infringement upon one can be both the cause and consequence of an infringement upon the other."[105] These rights are also protected by the UDHR by Articles 19 and 20,[106] and in the ICCPR by Articles 19 and 22.[107] In a July 2012 resolution, the Human Rights Council affirmed that human rights should also be protected in the digital world, because the same rights people have offline must also be protected online.[108]

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correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.") [hereinafter ICCPR].

[104] United Nations Convention on the Rights of the Child, Art. 16(1), Sept. 2, 1990, GA Res. 44/25 ("No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.").

[105] United Nations Human Rights, The Right to Privacy in the Digital Age, (Nov. 1, 2013), http://www.ohchr.org/EN/NewsEvents/Pages/Therighttoprivacyinthedigitalage.aspx.

[106] UDHR, *supra* note 51, Art. 19 ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."); *Id.* at Art. 20(1) ("Everyone has the right to freedom of peaceful assembly and association.").

[107] ICCPR, *supra* note 103, Art. 19(2) ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."); *Id.* at Art. 22(1) ("Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.").

[108] UN General Assembly, A/HRC/RES/20/8, July 16, 2012, 20th session, 31st meeting, Human Rights Council resolution, 20/8, The promotion, protection and enjoyment of human rights on the Internet,

The scope of the ICCPR Article 17 right to privacy can be interpreted through UN reports, comments, and international principles, such as the International Principles on the Application of Human Rights to Communications Surveillance, more commonly known as the Necessary and Proportionate Principles. According to the Necessary and Proportionate Principles relied on as a guide by hundreds of organizations, privacy is a fundamental human right and surveillance can only be justified when it is "prescribed by law, they are necessary to achieve a legitimate aim, and are proportionate to the aim pursued."[109] Further, although the FISA has given the government almost complete free reign to collect foreign communications, the Necessary and Proportionate Principles recognizes that the United States has obligations to uphold the privacy rights of foreign individuals as well.[110] In the case of U.S. surveillance policy, the programs are prescribed by law and found constitutional by a court (although, it is questionable whether a secret court provides proper judicial oversight), and work toward combating terrorism, a legitimate aim. However, the broad scope of the respective surveillance programs and their intrusion upon the Fourth Amendment of U.S. citizens are cause to question whether the policy is proportionate to the aim of combating terrorism. Human Rights Committee 1994 General Comments specify that the right to privacy is guaranteed whether it emanates from a State or a person, and is intended to prevent both unlawful and arbitrary

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available at http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/153/25/PDF/G1215325.pdf?OpenElement.

[109] International Principles on the Application of Human Rights to Communications Surveillance (July 2013) available at https://en.necessaryandproportionate.org/text#_edn3 (list of supporting organizations from all over the world can be seen in the text of the principles).

[110] *Id.*

interference.[111] Therefore, even if the United States Congress, the FISA Court, and the regular U.S. Court system uphold the surveillance laws as legal and constitutional, and those laws are legal under international human rights standards, there still remains an inquiry as to whether the interference is arbitrary. "Arbitrary intrusion" can extend to interference that is provided by law, and the only information that can be collected of an individual's private life is "knowledge of which is essential in the interests of society".[112] Various human rights documents and opinions, as described below, consider information relating to national security and combating terrorism as information that is of essential interest.

Further, the Committee requires that information be made available by the State on its conformity to the surveillance laws of actual practice and that there be means for individuals to make complaints if their rights under Article 17 of the Covenant have been violated.[113] The United States is in violation of both of these requirements. Even after a large amount of declassification of classified documents in the summer of 2013, the public is still not aware of the full extent of the law's application and the State's conformity to the law. Much of that information remains classified for national security purposes. Further, when the government collects information under a FISA, it remains secret and is impossible to defend against in a court of law. Therefore, there is no available means to contest or complain to the State of a rights violation. The same general comments also prohibits electronic surveillance, interceptions of telephonic

[111] Human Rights Committee General Comment 16, Compilation of General Comments and General Recommendations Adopted by Human Rights Bodies, 23rd Sess., 1988, U.N. Doc HRI/GEN/1/Rev.1, at paras. 1-2 (1994), *available at* http://www1.umn.edu/humanrts/gencomm/hrcom16.htm.
[112] *Id.* at paras. 4, 7.
[113] *Id.* at para. 6.

communication, wire-tapping, and recording of conversations.[114] However, I believe this is where the exceptions outlined in the ICCPR for restrictions of liberties for a legitimate national security aim would take precedence. Although the general comments mentions prohibiting electronic surveillance, there is more than enough documentation countering this that would allow surveillance as long as it is proportionate to the aim of countering terrorism or other national security aims. The General Comments adopted in 1994 are outdated in this regard. Another concern mentioned in the general comments understanding of Article 17 is the holding of personal information, and making sure it is not accessed by unauthorized persons.[115] Violations of this provision have been uncovered, as a February 2009 report of NSA operations found that over 200 analysts at various agencies had access to query results that did not properly mask the identities of U.S. persons.[116] In Escher v. Brazil, the Court also determined that the accessing of personal, private information outside of a lawful criminal investigation, and sharing of that information with unauthorized parties is a violation of the right to Privacy.[117]

The scope of the United States' obligation under international law to protect the right to privacy has also been outlined in reports released by Special Rapporteur LaRue in 2011 and 2013. In the 2011 Human Rights Council report, LaRue defines the scope of

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[114] *Id.* at para. 9.
[115] *Id.* at para. 10.
[116] Ellen Nakashima, *Declassified Court Documents Highlight NSA Violations in Data Collection for Surveillance*, WASH. POST, Sept. 10, 2013, http://www.washingtonpost.com/world/national-security/declassified-court-documents-highlight-nsa-violations/2013/09/10/60b5822c-1a4b-11e3-a628-7e6dde8f889d_story.html.
[117] Escher v. Brazil, Inter-Am. Ct. H.R., paras. 118, 162, 164 (July 6, 2009) (holding that information obtained of members of various social organizations by the state through interception and monitoring of their calls, and then release to the media, was in violation of the Article 11 right to privacy).

Article 17 of the ICCPR by defining the word correspondence in the Article to include all forms of communication, including internet communication, and therefore concludes that communication should be protected from any interference or inspection by state agencies or third parties.[118] The report also stresses the necessity to create data protection laws that stipulate who is allowed to access personal data, what it can be used for, how it should be stored, and for how long.[119] The United States does have some of these regulations in place. A subsequent report was released in 2013 that reiterated concerns with mass surveillance, and highlighted the need to consider technological advances in communications when developing or revising surveillance laws so that they better comport with human rights laws.[120] This concern is legitimate when considering the programs run by the United States that have their legal basis in Supreme Court cases and legislation from the late 1970s. The third party doctrine was created at a time when facebook, google, yahoo, and smartphones were far from development, yet this doctrine, solidified by *Smith v. Maryland*,[121] still holds today. An individual's expectation of privacy under the third party doctrine has changed with new developments in technology

[118] Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, para. 57, Human Rights Council, A/HRC/17/27 (May 16, 2011) (by Frank La Rue), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27_en.pdf [hereinafter LaRue 2011 report].
[119] *Id.* at paras. 56, 58.
[120] Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Human Rights Council, A/HRC/23/40 (April 17, 2013) (by Frank La Rue), *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf [hereinafter LaRue 2013 report].
[121] *Smith*, 442 U.S. at 744.

as Justice Sotomayor suggested in her concurrence in *U.S. v. Jones*, and the surveillance laws should be amended to reflect those changes.

The National Security exceptions

Written into the ICCPR are exceptions to barring infringement on certain liberties if there is a legitimate national security aim. The rights to freedom of expression and freedom of association are restricted in this way, but the right to privacy is not. Under the ICCPR, these rights can be restricted "for the protection of national security" under Article 19, or if "necessary in a democratic society in the interests of national security or public safety" under Article 22.[122] The Convention on the Rights of the Child even recognizes exceptions to the same rights under Articles 13 and 15.[123]

The 2011 Special Rapporteur report released by the Human Rights Council also notes that some human rights can be subject to some limitations under exceptional circumstances. In fact, the report further mentions "State surveillance measures for the purpose[] of . . . combating terrorism" as an appropriate exception.[124] However, to be legal under human rights laws, there must be a law that clearly outlines the restriction on the right to privacy, there must be a specific decision, preferably by a court, that allows the law to encroach on the right to privacy, and must respect the principle of proportionality.[125] The FISA laws and the USA PATRIOT Act do outline the restrictions on the right to privacy, although it is questionable how clearly the laws were understood by the American people at the time of their passage. Those laws have been interpreted by

[122] ICCPR, *supra* note 103, Arts. 19, 22.
[123]United Nations Convention on the Rights of the Child, Arts. 13,15 Sept. 2, 1990, GA Res. 44/25.
[124]LaRue 2011 report, *supra* note 118, at para. 59.
[125] *Id.*

the Government to restrict rights to privacy immensely, and the FISC has approved these laws and found them to be constitutional, including the administration's interpretation of the scope of the surveillance.[126] However, these definitions and opinions are not all public, and data on the success of the programs is not fully known to properly assess their proportionality to the threat. A 2013 report by the Special Rapporteur on the right to freedom of opinion and expression also recognizes that "concerns about national security […] may justify the exceptional use of communications surveillance technologies", however inadequate laws regulating what surveillance is necessary create the opportunity for unlawful infringements on the right to privacy, and also "threaten the protection of the right to freedom of opinion and expression".[127] Navi Pillay, UN High Commissioner for Human Rights, has also recognized that national security concerns justify the exceptional use of surveillance, but that adequate safeguards should be put into pace to protect government overreach and to protect human rights.[128]

Therefore, State surveillance for the purpose of national security in itself is legal under human rights law, but the proportionality of the programs to the threat is questionable. For example, when State surveillance efforts, justified under the scope of national security, are used to collect evidence of non-national security related crimes, and introduced as evidence in court, ex parte, this is a violation of both international and domestic laws. Additionally, when the government can pinpoint only one situation in

[126] United States Foreign Intelligence Surveillance Court, Docket Number BR 13-109, *available at* http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary.
[127] LaRue 2013 report, *supra* note 120 at para. 3.
[128] Navi Pillay, United Nations High Commissioner for Human Rights, Opening Statement at the Human Rights Council 24th Session (Sep. 9, 2013), available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13687&LangID=E.

which the surveillance programs were a major cause of disruption, but not a but-for cause to stopping an attack on the homeland, it further stretches the government's claim of necessity for this amount of mass surveillance.[129] Other programs working in tandem with the mass data collection programs did just as much work in disrupting plots on the homeland.[130] The mass surveillance programs leaked in the summer of 2013 have yet to receive a full review of legality by the Human Rights Commission.[131]

Surveillance of U.S. Citizens

United States citizens have protections beyond international law from State surveillance activity. The U.S. Constitution under the Fourth Amendment protects the right to privacy, and protects citizens from unreasonable searches and seizures, including searching of communications data, and storing the data for many years. A search occurs when the government infringes on an individual's expectation of privacy.[132] In her concurring opinion in *U.S. v Jones*, Justice Sotomayor agreed that even the metadata information being collected by the surveillance programs should fall under Fourth Amendment protection by writing, "[p]eople disclose the phone numbers that they dial or text to their cellular providers, the URLS that they visit and the e-mail addresses with which they correspond to their Internet service providers, and the books, groceries and

[129] Testimony by John Inglis, Deputy Director, NSA, Hearing of the Senate Judiciary Committee on Strengthening Privacy Rights and National Security: Oversight of FISA Programs, July 31, 2013, "There is an example amongst those 13 that comes close to a but-for example and that's the case of Basaaly Moalin." *available at* http://icontherecord.tumblr.com/post/57811913209/hearing-of-the-senate-judiciary-committee-on.
[130] *Id.*
[131] Surveillance is expected to be addressed during the Human Rights Commission's 25th regular session.
[132] Katz v. United States, 389 U.S. 347, 360 (1967).

medications they purchase to online retailers . . . I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."[133] The Director of National Intelligence, James Clapper, has acknowledged in a letter to Senator Wyden in 2014 that the NSA has searched its large amount of data specifically for the communications of Americans without warrants.[134] Clapper did not mention how many Americans were searched without a warrant.

State surveillance is legal under international law, and the domestic surveillance laws do require that a warrant be sought for any query into a target's information. However, one query allows the government to search 2 hops away from the target, which can catch millions of Americans under one warrant.[135] The Fourth Amendment is meant to prevent dragnet surveillance by requiring law enforcement to go to courts and show probable cause.[136] Generalized warrants of this type are illegal, and in violation of a citizen's fourth amendment rights.[137] Under the surveillance laws, individualized

[133] *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring).
[134] Ellen Nakashima, *NSA Searched Americans' Communications Without a Warrant, Intelligence Director Says*, WASH. POST, Apr. 1, 2014, http://www.washingtonpost.com/world/national-security/nsa-searched-americans-communications-without-a-warrant-intelligence-director-says/2014/04/01/2fdb5b6e-b9c3-11e3-a397-6debf9e66e65_story.html.
[135] President Obama reformed the NSA programs to allow for 2 hops, as the programs previously allowed for 3 hops away from a target. Ellen Nakashima, White House pushes Congress to quickly pass changes to NSA Data Collection Program, WASH. POST, Mar. 27, 2014, http://www.washingtonpost.com/world/national-security/white-house-pushes-congress-to-quickly-pass-changes-to-nsa-surveillance-program/2014/03/27/1a2c4052-b5b9-11e3-8cb6-284052554d74_story.html.
[136] U.S. Const. amend. IV.
[137] *Id.* (". . . and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

warrants are not necessary if the target is reasonably believed to be a non-U.S. person.[138] However, the way the government decides who is a foreign person is not very reassuring. The United States bases its analysis on a "totality of the circumstances" approach, looking at information about the target such as the location of the facilities they use to communicate or other information that identifies the target, looking at any information in their databases about the target's location, and by looking at IP addresses and telephone codes.[139] These procedures can create false identification as a foreign person, especially when the government only has to have 51% confidence that the target is a foreign person before they are treated as such.[140] There are other targeting procedures in place as well, including matching the target to a database of electronic accounts that are believed to be used by U.S. persons, but without specific information suggesting the target is a U.S. person, they are treated as foreign.[141]

To minimize the incidental collection of American data, the government also has to abide by certain minimization procedures under Section 702 of the FISA. The NSA is required under Section 702 to not keep or disseminate any information that it was not allowed to collect in the first place.[142] The communications must be deleted as early as

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[138] Testimony by Robert Litt, General Counsel, Office of Director of National Intelligence, House Judiciary Committee Hearing, July 17, 2013, http://www.c-span.org/video/?314032-1/house-judiciary-cmte-holds-hearing-fisa-authorities.
[139] Lawfare blog, The Minimization and Targeting Procedures: An Analysis, Benjamin Wittes, June 23, 2013, http://www.lawfareblog.com/2013/06/the-minimization-and-targeting-procedures-an-analysis/.
[140] *NSA Slides explain the PRISM data-collection program*, WASH. POST, June 6, 2013, http://www.washingtonpost.com/wp-srv/special/politics/prism-collection-documents/ ("The supervisor must endorse the analyst's "reasonable belief," defined as a 51 percent confidence that the specified target is a foreign national who is overseas at the time of collection.").
[141] 50 U.S.C. §1881a; Lawfare blog, The Minimization and Targeting Procedures: An Analysis, Benjamin Wittes, June 23, 2013, http://www.lawfareblog.com/2013/06/the-minimization-and-targeting-procedures-an-analysis/.
[142] 50 U.S.C. § 1881 (b)(e); 50 U.S.C. §1801 (h).

practically possible if it does not contain foreign intelligence information or evidence of any crime.[143] However, the information of a U.S. person that does not qualify for immediate destruction may be kept for up to 5 years.[144] The targeting and minimization procedures are approved by the FISA Court.[145] Possible reforms may change this rule, as it has been discussed that new reforms will require phone companies to keep information only for as long as they normally would.[146] In March 2014, the President announced that the government will only receive records with a FISC order approving the use of specific phone numbers for queries, will limit the query results to 2 hops instead of the 3 that were previously allowed, and a suggested host of other reforms for congress to consider.[147]

However, incidental collection of evidence of non-national security crimes, which is also outside of the warrant authority to collect only foreign intelligence information, is being turned over to law enforcement agencies.[148] FISA cannot be used to collect evidence on non-national security crimes and for prosecution of those crimes. Some FISA information is also being used for 'parallel construction' in which a search or arrest is based on a tip from the FISA-collected information but law enforcement disguises that

[143] 50 U.S.C. §1806.
[144] *Id.*
[145] Director of National Intelligence, Facts on the Collection of Intelligence Pursuant to Section 702 of the Foreign Intelligence Surveillance Act, June 8, 2013, *available at* http://www.lawfareblog.com/wp-content/uploads/2013/10/Facts-on-the-Collection-of-Intelligence-Pursuant-to-Section-702.pdf.
[146] Ellen Nakashima, *White House pushes Congress to quickly pass changes to NSA Data Collection Program*, WASH. POST, Mar. 27, 2014, http://www.washingtonpost.com/world/national-security/white-house-pushes-congress-to-quickly-pass-changes-to-nsa-surveillance-program/2014/03/27/1a2c4052-b5b9-11e3-8cb6-284052554d74_story.html.
[147] *Id.*
[148] *See* Robert Litt, General Counsel Director of National Intelligence, testimony in front of the House Judiciary Committee on July 17, 2013 (stating that the metadata information collected can only be used for national security investigations and cannot be used in other criminal investigations).

fact, and uses the tip as a basis to establish probable cause for a search or arrest.[149] These actions are illegal, and those crimes require a regular warrant process for collection of evidence, searches or seizures.

[149] John Shiffman & Kristina Cooke, *Exclusive: U.S. Directs Agents to Cover Up Program Used to Investigate Americans*, REUTERS, Aug. 5, 2013, http://www.reuters.com/article/2013/08/05/us-dea-sod-idUSBRE97409R20130805; John Shiffman & David Ingram, *Exclusive: IRS Manual Detailed DEA's Use of Hidden Intel Evidence*, REUTERS, Aug. 7, 2013, http://www.reuters.com/article/2013/08/07/us-dea-irs-idUSBRE9761AZ20130807; Brian Fung, *The NSA is Giving Your Phone Records to the DEA. And the DEA is Covering It Up*, WASH. POST, Aug. 5, 2013, http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/05/the-nsa-is-giving-your-phone-records-to-the-dea-and-the-dea-is-covering-it-up/.

Detention

Domestic Detention Authority

The U.S. government asserts its detention power to come from the Authorization for the Use of Military Force (AUMF).[150] This congressional declaration authorized all necessary and appropriate force, including detention. Based on the AUMF, the United States can detain those involved in the 9/11 attacks and "those who were part of Taliban or Al-Qaeda forces, or associated forces engaged in hostilities against the United States or its coalition partners, and those who substantially supported Taliban or Al-Qaeda forces, or associated forces . . ."[151] Additionally, this authority does not extend to only those captured in Afghanistan, as "[i]ndividuals who provide support in other parts of the world may be properly deemed part of al-Qaida itself."[152] However, with newer groups emerging with more distant ties to Al-Qaeda, this statutory authority may be running out, leaving the United States without domestic authority for detention.[153] It is important to note that the President does not claim authority to detain from his Article II power, but from a congressional statute, which has limits on when its force continues to be valid (assuming until the end of conflict), while the President's Article II power does not

[150] *See generally* Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay In Re: Guantanamo Bay Detainee Litigation 1 (Mar. 2009). ("[U]nder the AUMF, the President has authority to detain persons who he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for the September 11 attacks. The President also has the authority under the AUMF to detain in this armed conflict those persons whose relationship to al-Qaeda or the Taliban would . . . render them detainable.").
[151] Faiza Patel, *Who Can Be Detained in 'The War on Terror?',* AMERICAN SOCIETY OF INTERNATIONAL LAW, Oct. 20, 2009, http://www.asil.org/files/insight091020pdf.pdf.
[152] Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay In Re: Guantanamo Bay Detainee Litigation 7 (Mar. 2009).
[153] Chesney et al., *A Statutory Framework for Next-Generation Terrorist Threats,* HOOVER INSTITUTION (2013).

expire, and, I believe, would allow for indefinite detention. However, Chesney et al. state that the use of only Article II powers for long-term detention is more difficult than with statutory authority, and would actually make targeted killings a more attractive option.[154] It should be noted that the UN Working Group on Arbitrary Detention in a 2013 Opinion declared that the AUMF does not specifically authorize arrest or detention.[155]

The court system has also weighed in on detention authority around the world through *Gherebi v. Obama*, which allows detention of individuals fighting on behalf of enemy organizations and not just enemy states.[156] Finally, the USA PATRIOT ACT permits detention, and not just of terrorists.[157]

Legality of Detention under IHRL & IHL

Under IHRL and IHL, detention is allowed, but only for security purposes.[158] The United States has claimed that for purposes of capture and detention, both IHRL and IHL do not apply concurrently, but only IHL would apply.[159] Detention is authorized under the ICCPR in Article 9.[160] Some argue that the U.S. does not have authority to detain

[154] *Id.* at 6, 9.
[155] G.A. Res. 10/2013, para. 34, U.N. Doc. A/HRC/WGAD/2013/10 (June 12, 2013) (Opinion concerning Mr. Obaidullah).
[156] Gherebi v. Obama, 609 F.Supp. 2d 43 (2011) (holding that the Supreme Court in *Hamdi* authorized the detention of enemy fighters as a fundamental incident of waging war allowed under the AUMF. Since the AUMF authorized the same use of force against enemy organizations, it means the President has the authority to detain enemies of organizations just like he can detain individuals of enemy nations.).
[157] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT)18 USC §1, §412 (2001).
[158] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, arts. 42, 78 Aug. 12 1949, 75 U.N.T.S. 287 [hereinafter GC IV].
[159] Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba, 41 I.L.M. 1015, 1019 (2002) ("It is humanitarian law, and not human rights law, that governs the capture and detention of enemy combatants in armed conflict.").
[160] ICCPR, *supra* note 103, Art. 9.

individuals under Additional Protocols I and II of the Geneva Convention, because they state that civilians enjoy protections until they are "directly participating in hostilities."[161] This means, unless an individual is "directly participating in hostilities", the U.S. cannot detain them, as it has continuously done in this war on terror. However, this argument does not extend to the United States, as the U.S. is not limited by these protocols because it has not ratified them. Additionally, using this standard to restrict U.S. authority would allow for individuals to avoid capture if they violate the laws of war by camouflaging as civilians. Amending the Geneva Conventions in this way designates those non-state actors who violate the Geneva with combatant status anyway, going against traditional use of the Conventions.

Additionally, the UN Human Rights Committee has stated that detention is legal in its analysis of Article 9 of the ICCPR. The Committee stated that if preventive detention is being used for a public emergency, it must be controlled by specific provisions, like it must not be arbitrary, it must be based on grounds and procedures established by law, information for the reasons of detention must be given, court control of the detention has to be available, and there should be compensation available in case of a breach.[162] These rules apply in both administrative and criminal detention.

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[161] Additional Protocol I, *supra* note 68, Art. 51(3) ("Civilians shall enjoy the protection afforded by this Section unless and for such time as they take a direct part in hostilities."); Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), Art. 13(3), 1125 U.N.T.S. 609.

[162] Human Rights Committee, *General Comment No. 8: Article 9: Right to Liberty and Security of Persons* (1982), paras. 1-5, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument.

When Detention is Arbitrary

Article 9 of the UDHR states that no one shall be subjected to arbitrary arrest, detention, or exile. Similarly, the ICCPR provides in Article 9 (1) that no person shall be subjected to arbitrary detention. Indefinite detention of prisoners is also inconsistent with the Third and Fourth Geneva Conventions.[163]

What is considered 'arbitrary' is defined by the UN Working Group on Arbitrary Detention by five categories. Category 1 is when "it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence…)."[164] The U.S. is not violating this, as there is a clear legal basis for its detention. Category 2 is "[w]hen the deprivation of liberty results from the exercise of rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 10, and 21 of [UDHR] and Articles 12, 18, 19, 21, 22, 25 and 17 of the [ICCPR]".[165] The U.S. has also not violated this category. Category 3 is when "the total or partial non-observance of the right to a fair trial . . . is of such gravity as to give the deprivation of liberty an arbitrary character."[166] This is the basis for the most individual complaints filed with this working group. The Working Group has released several opinions regarding detainees at Guantanamo Bay stating that the United States has violated this category, and therefore those detainees are being held in arbitrary, and therefore illegal, detention. This is because the Working Group has stated that the procedure developed by the United States

[163] Geneva Convention (III) Relative to the Treatment of Prisoners of War, Art. 17(3), Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III]; GC IV, *supra* note 158, Art. 31.
[164] Report of the Working Group on Arbitrary Detention, Human Rights Council, A/HRC/16/47 (19 Jan. 2011) para. 8, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/102/76/PDF/G1110276.pdf?OpenElement.
[165] *Id.*
[166] *Id.*

to try Guantanamo detainees does not fulfill their due process rights. Category 4 is when individuals "are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy."[167] The United States is also not a violator of this provision. Finally, category 5 is "[w]hen the deprivation of liberty constitutes a violation . . . for reasons of discrimination . . . and which aims towards or can result in ignoring the equality of human rights."[168] The United States does seem to be violating this statute, as all detainees in Guantanamo Bay are only held in that detention facility due to their status as a non-U.S. citizen.

The United Nations has consistently argued that the detention of prisoners in Guantanamo Bay without charge or trial violates international law and is arbitrary.[169] The UN Working Group on Arbitrary detention, in a 2013 opinion, stated that when

> "the indefinite detention of individuals . . goes beyond a minimally reasonable period of time, this constitutes a flagrant violation of international human rights law and in itself constitutes a form of cruel, inhuman, and degrading treatment."[170]

The Working Group held that the detainee in question was in fact being held in arbitrary detention in Guantanamo Bay in clear violation of international law, called on the United States to expedite the process for transfer of detainees and close the detention center at Guantanamo Bay, Further, In the Human Rights Committee's report on concluding observations of the United States in 2014, the Committee calls on the United States to

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[167] *Id.*
[168] *Id.*
[169] G.A. Res. 10/2013, paras. 24, 44, U.N. Doc. A/HRC/WGAD/2013/10 (June 12, 2013) (Opinion concerning Mr. Obaidullah).
[170] *Id.*

deal with detainees in the criminal justice system, and to clarify when detainees will be afforded the right to legal representation.[171]

Additionally, detention may become arbitrary if it is unduly prolonged, or is not subject to periodic review.[172] If the detainee is a minor, special "measures of protection are required" that a state needs to follow under ICCPR Article 24 for the detention to remain legal.[173] Further, coverage of an individual by the ICCPR cannot be trumped by transferring a detainee outside the borders of the State because the covenant applies to anyone that is within the power or effective control of the State party. This means the United States cannot avoid compliance by transferring its detainees to Guantanamo Bay and attempting to avoid U.S. jurisdiction.

Detention of U.S. Citizens

The detention of U.S. citizens is even allowed, as the President can detain any individuals that he deems to be dangerous. U.S. citizens benefit from protection under the U.S. Constitution as well, especially the Fourth and Fifth amendments when it comes to the question of detention. The Fourth Amendment protects against arbitrary arrest and detention, while the Fifth Amendment protects against detainment before conviction.[174]

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[171] Human Rights Committee, List of Issues in Relation to the Fourth Periodic Report of the United States of America, 4, CCPR/C/USA/4 and Corr. 1 (Mar. 2013).
[172] Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 Int'l Rev. Red Cross, 15, 15 (2005); G. Alfredsson *et al*. (eds), *International Human Rights Monitoring Mechanisms*, Martinus Nijhof Publishers, The Hague, 2001, 67-121 ("The examination of individual complaints by the United Nations Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights.").
[173] ICCPR, *supra* note 103, Art. 24, para. 1.
[174] U.S. Const. amends. IV & V.

Preventive detention for the purpose of interrogation would violate both the Fourth and Fifth Amendments.

There have been several cases that have set the boundaries of U.S. citizen detention. In *Hamdi v. Rumsfeld*, Hamdi was a U.S. citizen held in detention in South Carolina. The Supreme Court ruled that his detention was allowed, but that he was entitled to counsel and to challenge his detention.[175] In the case of Jose Padilla, a U.S. citizen, his Fifth Amendment constitutional right was circumvented because he was labeled as an enemy combatant, even though he was captured in the United States. He was charged with conspiring to kill people in an overseas Jihad, and conspiring to support overseas terrorism five years after his initial detention.[176] This case shows that U.S. citizens may fall under the AUMF if they are deemed enemies in this current war, and may be detained regardless of where they were captured. As previously mentioned in this paper, U.S. citizens would not be tried in military commissions however, as shown in both the *Hamdi* and *Padilla* cases.

Detention for Purposes of Interrogation

In peacetime, IHRL does not explicitly forbid detention for the purpose of intelligence collection, but does state that detention may be for security purposes only, and therefore not for the purposes of interrogation. The United States is admittedly detaining individuals suspected of terrorism for long periods of time for the purpose of intelligence collection through interrogation. Under IHRL, interrogation is not a viable

[175] *See generally* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
[176] Padilla v. Rumsfeld, 542, U.S. 426 (2004).

reason for prolonged administrative detention. However, prisoners of war may be held until the end of conflict, which is discussed later in this paper.

Under the Fourth Geneva Convention, detention may be allowed if "the security of the Detaining Power makes it absolutely necessary".[177] Article 78 of the Convention allows an Occupying Power to detain persons if it "considers it necessary, for imperative reasons of security".[178] The International Committee for the Red Cross (ICRC) has also written in its procedural principles that detention of an individual must end when that individual is no longer a threat to State security.[179] This means that there cannot be prolonged detention for interrogation unless the detainee is a security threat,[180] and once the threat ceases, the reason for the detention ceases as well.[181] Additionally, according to the UN Working Group on Arbitrary Detention, a detention is arbitrary if a detainee is held for an indefinite time for the purpose of continued interrogation.[182] That type of detention is unlawful and also inconsistent with the Geneva Conventions. Finally, in *Hamdi*, the Supreme Court held that "indefinite detention for the purpose of interrogation is not authorized."[183]

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[177] GC IV, *supra* note 158, Art. 42.
[178] *Id.* at Art. 78.
[179] Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 Int'l Rev. Red Cross 375, 380-82 (2005) ("[I]nternment or administrative detention for the sole purpose of intelligence gathering, without the person involved otherwise presenting a real threat to State security, cannot be justified.").
[180] *Id.*
[181] Additional Protocol 1, *supra* note 68, Arts. 132, 75.3; Zadvydas v. Davis, 533 U.S. 678, 690-92 (2001) (holding that when an individual no longer poses the threat for which he was detained, the detention no longer bears a reasonable relation to its original purpose).
[182] Situation of Detainees, *supra* note 50, at paras. 23-24 ("[T]he objective of the ongoing detention is not primarily to prevent combatants from taking up arms . . . but to obtain information and gather intelligence on the Al-Qaida network…. the ongoing detention of Guantanamo Bay detainees as 'enemy combatants' does in fact constitute an arbitrary deprivation of the right to personal liberty.").
[183] *Hamdi,* 542 U.S. 507.

Detention Conditions

Detention condition requirements are covered mainly by IHL through the Third Geneva Convention. Article 13 requires that "prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited . . ."[184] Harsh interrogation procedures that are against IHRL and IHL are unlawful, and can in some cases endanger the health of a prisoner. Those interrogation procedures used against an individual in custody are violations of this provision. Additionally, Article 12 of the Third Geneva Convention states that "[i]rrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them"[185], and Article 22 requires giving detainees "every guarantee of hygiene and healthfulness."[186] It is vague as to what treatment is encompassed under these Articles, and can easily lead to a violation, depending on the judge of the act. In 2010, during remarks regarding detainee detention and treatment, Harold Koh guaranteed his devotion to ensuring humane treatment for all individuals in U.S. custody that are being held as a result of armed conflict.[187]

The indefinite detention that is being carried out by the United States has been catalogued to have many psychological effects on detainees.[188] These effects may cause violations of the UN Convention Against Torture and Other Cruel, Inhuman or

[184] GC III, *supra* note 163, Art. 13.
[185] *Id.* at Art.12.
[186] *Id.* at Art. 22.
[187] Harold Koh, Legal Advisor to the U.S. Dept of State, remarks at annual meeting of the American Society of International Law (March 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.
[188] Zayas, *supra* note 172, at 16.

Degrading Treatment or Punishment.[189] Additionally, arguments about the illegality of the conditions of Guantanamo Bay facilities typically include arguments that detainees have very limited contact with anyone except for the jail staff, are regularly deprived of the ability to eat or exercise communally, lack access to their family, and have almost no access to sunlight or fresh air.[190]

Detention Until the End of Conflict

One of the fundamental war powers that the government claims comes from the AUMF passed by congress after September 11 is the authority to detain until the end of hostilities, assuming that the detention is legal in the first place. The UN Working Group on Arbitrary Detention believes that measures adopted in states of emergency, like the AUMF, should be in line with the extent of the danger, and an arrest based on this type of emergency cannot last indefinitely.[191] However, the AUMF authorizes detention that is necessary to prevent "future attacks of international terrorism against the United States"[192] and there have been reported cases of released detainees returning to the battlefield.[193] The federal government has affirmed on various occasions that it claims detention authority to come from the AUMF and not the President's Article II power,

[189] UN CAT, *supra* note 72, at 195.
[190] *Guantanamo, Bagram and Illegal U.S. Detentions*, AMNESTY INTERNATIONAL, Nov. 30, 2009, http://www.amnestyusa.org/our-work/issues/security-and-human-rights/guantanamo.
[191] UN Committee on Human Rights, *Report of the Working Group on Arbitrary Detention*, UN Doc E/CN 4/2003/8 (16 December 2002), at 64.
[192] Authorization for Use of Military Force, Pub. L. No.1 07-40, 115 Stat. 224 (2001), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-107pubI40/pdfIPLA W-l 07pubI40.pdf.
[193] Elizabeth Bumiller, *Cheney Defends Guantanamo as Essential to War/VP Says that if Freed, Prisoners Would Return to Battlefield,* N.Y. TIMES, June 14, 2005, http://www.sfgate.com/politics/article/Cheney-defends-Guantanamo-as-essential-to-war-2628669.php.

which lasts indefinitely. The Supreme Court in *Hamdi* noted that the authority to detain in wartime is grounded in preventing detained individuals from returning to the battlefield.[194] However, the district court in *Qassim v. Bush* stated that the government lacked the authority to indefinitely detain non-U.S. citizens that were being held at Guantanamo Bay several months after they had been determined to no longer be enemy combatants.[195] The USA PATRIOT Act does permit indefinite detention, with no requirement that those being detained indefinitely be removable as terrorists.[196]

Under IHL, the Geneva Convention allows for detention until the end of hostilities. The Third Geneva Convention Article 2 (1) provides that in armed conflict, a captured person may be detained as a prisoner of war until the end of hostilities.[197] However, the Third Geneva Convention also states in Article 118 that prisoners of war cannot be detained indefinitely.[198] The Fourth Geneva Convention states the same principle in Article 133.[199] Therefore, detainees should be released or charged once the international conflict is over. The United States cannot hold detainees until the end of the conflict if they were not captured on the battlefield or there was no armed conflict going

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[194] *Hamdi*, 542 U.S. at 518-21; *See also* Nuremburg Military Tribunal, 41 Am. J. Int'l L. 172, 229 (1947) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war").
[195] Qassim v. Bush, 407 F. Supp. 2d 198 (D.D.C. 2005).
[196] PATRIOT Act of 2001, Pub.L. 107-56, § 412(a)(2), (a)(6) (§ 412 (a)(2) in particular states that the attorney general shall maintain custody until the alien is removed from the United States, and that custody is maintained irrespective of any relief from removal the alien may be granted, until the Attorney General decides the alien is no longer a security threat. Although §(a)(6) does state a limitation on indefinite detention, in reality, this is no limitation as an alien may be detained for 6 month periods if the alien will threaten the national security of the United States or the safety of the community or any person, which is very broad.).
[197] GC III, *supra* note 163, Art. 2(1).
[198] *Id.* at Art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities").
[199] GC IV, *supra* note 158, Art. 133 ("Internment shall cease as soon as possible after the close of hostilities").

on. There are several documented cases of this type of detainee being held at Guantanamo Bay.[200] In these cases, international humanitarian law does not apply since they were not captured on a battlefield, but international human rights law still applies.

Indefinite detention is also a violation of IHRL, as Article 9 of the ICCPR prohibits arbitrary detention, and Article 14 guarantees prompt trial before a competent and impartial tribunal.[201] Additionally, IHRL norms require "that the conditions for deprivation of liberty under domestic and/or international law be clearly defined."[202] There are opportunities for derogations from IHRL and IHL in certain circumstances, but they cannot be open-ended, and have to be limited in scope and duration.[203] Indefinite detention is neither limited in scope nor duration.

Many that are being held in Guantanamo Bay have been cleared by the U.S. Government for transfer or release, but the United States continues to detain them because a safe haven has not been found for them, or the United States refuses to return them to their country of origin.[204] However, the Third Geneva Convention states that

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[200] Six men of Algerian origin detained in Bosnia and Herzegovina on October 2001. For the circumstances of the arrest and transfer to Guantánamo Bay of the six men, *see* Human Rights Chamber for Bosnia and Herzegovina, case No. CH/02/8679 et al., *Boudellaa & Others v. Bosnia and Herzegovina and Federation of Bosnia and Herzegovina*, Oct. 11, 2002, *available at* www.hrc.ba.

[201] ICCPR, *supra* note 103, Arts. 9, 14.

[202] Human Rights Committee, *Concluding Observations: Trinidad and Tobago,* U.N. Doc. *CCPR/C0I70/TTO* (2000) at para. 16 (criticizing a law that allows arrests without warrants because it is too vague" and "gives too generous an opportunity" to exercise power and recommending that the state brings this law into conformity with ICCPR Art. 9(1)); European Court of Human Rights, *Medvedyev and others* 1 *France,* No. 3394/03 (2010) para. 80 (stressing that where deprivation of liberty is concerned, in order to satisfy the principle of legality a law must be "sufficiently precise to avoid all risk of arbitrariness").

[203] Zayas, *supra* note 172, at 16.

[204] There are over 20 Yemeni citizens currently being held in Guantanamo Bay who have been cleared for release, but remain in detention because the United States refuses to allow them to return to Yemen. *The Guantanamo Docket, Citizens of Yemen,* N.Y. TIMES, http://projects.nytimes.com/guantanamo/country/yemen/page/1; *Guantanamo, Bagram and Illegal U.S.*

prisoners of war may only be transferred by the United States to a country that is a party to the Geneva Convention, only after the United States is satisfied of the ability of the receiving country to apply the convention.[205] This means the United States does not have to transfer prisoners of war if they are not satisfied that the country receiving the prisoners have the ability to follow the Convention, or will actually do so while the prisoner is in its custody. Additionally, Article 46 states that the prisoner of war should not be transferred to any conditions less favourable than the detaining power conditions.[206] If the United States feels conditions are lower in other countries, it may decide to hold the detainees rather than transfer them, for the detainee's safety and health. So far, the United States has transferred over 600 detainees.[207]

The Executive Order 13567 in 2011 mandating Periodic Review states that those who have been designated for transfer who have not been transferred will have an annual review of "sufficiency and efficacy of transfer efforts" by the review committee.[208] This Order, while mandating additional protections for status review like the right to have counsel, will not make much difference from the current review system if it does not provide for the release or actual transfer of those it deems to no longer be a threat. If this

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Detentions, AMNESTY INTERNATIONAL, http://www.amnestyusa.org/our-work/issues/security-and-human-rights/guantanamo.

[205] GC III, *supra* note 163, Art. 12.

[206] *Id.* at Art. 46.

[207] At its peak occupancy, Guantanamo held 779 detainees. *Guantanamo By the Numbers*, HUMAN RIGHTS FIRST, April 9, 2013, http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Gitmo-Numbers.pdf.

[208] The White House, *Executive Order 13567--Periodic Review of individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization/or Use o/Military Force,* (Mar. 7, 2011), Section 5, *available at* http://www.whitehouse.gov/the-press-office/2011 *103/07* lexecutive-order-13 567 -periodic-reviewindividuals-detained-guant-namo-ba [hereinafter Periodic Review EO].

is not carried out, then those who pass through the review will end up in the same arbitrary category of being cleared for transfer, but still held in Guantanamo.

It is difficult to point to when the end of hostilities will be in a 'war on terror' and many feel that this war on an ideology does not have a defining end point, so detainees can be held forever. Many groups consider the withdrawal of U.S. troops from the region as the end of hostilities. If withdrawal of U.S. troops signals the end of the conflict, does this mean detainees will be released? It is unlikely to think that there will be that kind of automatic end to this war, and to the detention.

The Right to Challenge Detention

The question of review of an individual's detention is an important one in human rights law. As the ICRC has noted, "even initially lawful detention becomes arbitrary and contrary to law if it is not subject to periodic review."[209] The right to challenge the legality of the detention before a court is recognized in the ICCPR Article 9 (4).[210]

Further, the Body of Principles set by the UN General Assembly provides that "a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority."[211] What can be considered 'prompt' review was determined by the UN Working Group on Arbitrary Detention to be 72

[209] Zayas, *supra* note 172, at 15.
[210] ICCPR, *supra* note 103, Art. 9(4).
[211] Human Rights Committee, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,* Principle 9, UN Doc. *AlRES/43/173* (1988) [hereinafter Body of Principles].

hours[212], or up to 14 days for detentions based on terrorism.[213]

Who does the habeas right extend to?

The writ of habeas corpus under U.S. statute does extend to prisoners if they are in U.S. custody.[214] However, the same statute to grant this right to prisoners, prohibits any court, justice, or judge from having the "jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the [U.S.] who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."[215] Since 2006, however, the Supreme Court has stated that detainees held at Guantanamo Bay do fall under the Geneva Convention, and therefore are not considered enemy combatants.[216] The reason that combatants were first held outside the United States in Guantanamo Bay was because it was thought at that time that those detained outside of the United States had fewer rights.[217]

Under IHRL, the ICCPR Article 9 (4) has been widely interpreted to guarantee the right to habeas corpus to every detainee.[218] Most have agreed that this broad language is too encompassing and this interpretation of article 9 is too broadly drawn to stretch the purpose of that Article beyond its intention to provide only the right to an effective court

[212] Working Group on Arbitrary Detention Opinion No. 26/1999 para. 9. ("A 72-hour time limit is . . . within the bounds of what can be considered 'prompt'" with respect to an opportunity to be heard by a judicial or other authority).
[213] Working Group on Arbitrary Detention Opinion No. 24/2001 para. 12 ("14 days is still far in excess of what can be considered consistent with the term 'promptly'").
[214] 28 U.S.C.A. § 2241 (c)(1), power to grant writ, (Jan. 28, 2008).
[215] *Id.* at (e)(1).
[216] Hamdan v. Rumsfeld, 548 U.S. 577 (2006).
[217] Jay M. Zitter, Righs of Alien Detainees Held Outside the United States as to Their Treatment and Conditions of Detainment, 6 A.L.R. Fed. 2d 185 (2005).
[218] Audiovisual Library of International Law, ICCPR Introduction, "Well-balanced guarantees of *habeas corpus* are set forth in article 9 ... " *available at* http://untreaty.un.org/co(Vavllha/iccpr/iccpr.html.

proceeding to provide meaningful review of the lawfulness of one's detention.[219] Prior to the shift in U.S. law in 2008, the UN Working Group on Arbitrary Detention concluded in various opinions that the denial of habeas corpus rights to Guantanamo detainees by the United States constituted a violation of ICCPR Article 9.[220]

The right of a detainee to habeas corpus has changed many times during the current war on terror. After the war began, the first signs of a right to habeas came in *Rasul v. Bush* in 2004.[221] The Supreme Court ruled that federal courts did have jurisdiction over detainees held in Guantanamo Bay, which allowed the detainees to file petitions seeking habeas corpus to challenge their detention.[222] In 2006, however, in a response to the Supreme Court decision in *Hamdan v. Rumsfeld*[223], Congress passed the Military Commissions Act (MCA), which took away the right of any federal court to hear habeas petitions that were brought by, or on behalf of, any Guantanamo detainee.[224] Finally, in 2008 the Supreme Court released their opinion in *Boumediene v. Bush,* which held that detainees that were held at Guantanamo Bay were entitled to habeas corpus.[225] This precedent has not yet been overruled. The right of the writ of habeas corpus was solidified again by the President in 2011 in an Executive Order for periodic review of

[219] The language of ICCPR Art. 9(4) only states that detainees are entitled to "take proceedings before a court". ICCPR, *supra* note 103, Art. 9(4).
[220] *See* Working Group on Arbitrary Detention Opinion No. *2/2009* para. 33; Working Group on Arbitrary Detention Opinion No. *3/2009* (United States of America), A/HRC/13/30/Add.1, para. 36; Situation of Detainees, *supra* note 50, at paras. 26-27.
[221] *See generally* Rasul v. Bush, 542 U.S. 466 (2004) (holding that the D.C. District Court has jurisdiction to hear challenges of aliens held at Guantanamo Bay).
[222] *Rasul*, 542 U.S. at 466.
[223] *Hamdan*, 548 U.S. at 620 (ruling that the combatant status review tribunals set up by the Department of Defense were procedurally flawed and unconstitutional, and it did not comport with the Geneva Convention since it prevented detainees from using habeas petitions.).
[224] Military Commissions Act of 2006, 10 U.S.C. 948 (2006).
[225] Boumediene v. Bush, 553 U.S. 723 (2008) (holding that detainees who don't face charges have a right to challenge their detention).

detainees.[226]

What did Boumediene change in practice?

Although the Supreme Court precedent in *Boumediene v. Bush* is still good law today, many have argued that in practice, the habeas right of detainees is still not upheld. The Supreme Court's defense of the habeas right in *Boumediene* has been called a fool's errand because of its subsequent denials of certiorari in Guantanamo habeas cases, which uphold the D.C. Circuit decisions to deny those petitions, and make it very difficult for a detainee to ever win a habeas case in the trial courts.[227] The interest in the *Boumediene* decision seems to be to preserve jurisdiction, and not to actually expand the rights of Guantanamo detainees. Over half of the men that are still held at Guantanamo have been cleared for release, but have been denied a Supreme Court hearing.[228] Denying these cases means the court has not put into practice the ruling in *Boumediene* that guarantees detainees a constitutional right to have their detention reviewed.

Combatant Status Review Tribunals

Combatant Status Review Tribunals, or CSRTs, were created in 2004 by the Department of Defense[229], soon after the *Hamdi v. Rumsfeld* and *Rasul v. Bush*

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[226] Periodic Review EO, *supra* note 208, at Section 1(b) ("Detainees at Guantanamo have the constitutional privilege of the writ of habeas corpus . . . ") available at http://www.whitehouse.gov/the-press-office/2011 *103/07* lexecutive-order-13 567 -periodic-reviewindividuals-detained-guant-namo-ba.

[227] Rulings by the D.C. Circuit allow for unfair procedures in Guantanamo detainee habeas proceedings, including a low burden of proof, a rebuttable presumption of accuracy for government evidence, admission of unreliable hearsay evidence, reliance on classified information not available to the detainee, reliance on a detainee's coerced statements through harsh interrogation, and the use of the "mosaic theory" of evaluating evidence. *See generally* AI-Bihani v. Obama*,* 590 F.3d 866 (2010); *See generally* Latif v. Obama*,* 666 F.3d 746, 755 (2011).

[228] Common Dreams, *Supreme Court Refuses to Hear Guantanamo Cases*, June 12, 2012, https://www.commondreams.org/headline/2012/06/12-4.

[229] Deputy Secretary of Defense, Order Establishing Combatant Status Review Tribunal, July 7, 2004, http://www.defense.gov/news/Jul2004/d20040707review.pdf [hereinafter CSRT order].

decisions,[230] which reaffirmed the right of Guantanamo detainees to have their detention status reviewed. These tribunals are set up to review a detainee's status as an enemy combatant.[231] The CSRTs do not satisfy the rulings in *Hamdi* and *Rasul*, and therefore do not comply with national law, and fall short of compliance with IHRL and IHL.

In a 2009 opinion, the UN Working Group on Arbitrary Detention stressed that the CSRTs do not meet the minimum standards set by the ICCPR, of which the United States is a party, nor the UDHR.[232] The ICCPR Article 14 (1) states that "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[233] The UDHR also states this as a basic human right in its Article 10.[234] The right to a fair trial is also provided for in all four Geneva Conventions.[235] Denying a protected person from a fair and regular trial is a breach of the Third and Fourth Geneva Conventions, and is listed as a war crime in the Statutes of the International Criminal Court, of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone.[236] Additionally,

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[230] *Hamdi*, 542 U.S. at 508 (holding that a detainee should be given meaningful opportunity to contest the factual basis of his detention).
[231] CSRT Order, *supra* note 229.
[232] WGAD Opinion 3/2009, *supra* note 220, at para. 8.
[233] ICCPR, *supra* note 103, Art. 14(1).
[234] UDHR, *supra* note 51, Art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.").
[235] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 49, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Art. 50, Aug. 12, 1949, 75 U.N.T.S. 85; GC III, *supra* note 163, Arts. 102–108; GC IV, *supra* note 158, Arts. 5, 66–75.
[236] Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, Article 8(2)(a)(vi) and (c)(iv), http://untreaty.un.org/cod/icc/statute/romefra.htm; Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 2(f), *available at*

the CSRT hearings must allow for a detained person to have access to counsel pursuant to the Body of Principles.[237]

The administrative CSRT hearings do not satisfy the due process and fair trial requirements set out in IHRL and IHL. These hearings are "closed to the public; detainees are prohibited from rebutting evidence; they are denied legal counsel[238]; they are required to disprove their guilt; and are compelled to self-incriminate."[239] Detainees are also prohibited from introducing exculpatory information, and the hearings can consider unreliable hearsay evidence[240] and evidence allegedly procured through torture and other forms of coercion.[241] The detainee additionally does have the right to see any classified evidence presented against him[242], and a majority of the panel decisions are based on classified evidence.[243] The CSRTs also require that the court presume in favor of the Government's evidence of "enemy combatant status", that the evidence is "genuine and accurate".[244] Additionally, IHL in the Third Geneva Conventions requires that trials be held by an independent and impartial tribunal.[245] CSRTs are not independent and impartial as the panel is comprised of three military officers of the U.S. Armed Forces,

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http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; Statute of the International Criminal Tribunal for Rwanda, Article 4(g), *available at* http://www.unictr.org/Legal/StatuteoftheTribunal/tabid/94/Default.aspx; Statute of the Special Court for Sierra Leone, Article 3(g), http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&.

[237] Body of Principles, *supra* note 211 at Principle 17(1).

[238] The Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures, (July 29, 2004), § F(5) (stating that the detainee does receive assistance from a "personal representative" but that person is not an advocate for the detainee in any sense), *available at* http://www.defense.gov/news/jul2004/d20040730comb.pdf [hereinafter CSRT Procedures].

[239] WGAD Opinion 2/2009, *supra* note 220, at para. 8.

[240] CSRT Order, *supra* note 229, at para. 9.

[241] WGAD Opinion 2/2009 *supra* note 220, at paras. 7-10.

[242] CSRT Order, *supra* note 229; CSRT Procedures, *supra* note 238, at § F(3).

[243] CSRT Procedures, *supra* note 238.

[244] *Id.* at § G(11).

[245] GC III, *supra* note 163, Art. 84.

and therefore there exists a bias against the detainees.[246] CSRTs therefore violate human rights of due process and a fair and public hearing in front of an independent and impartial tribunal.

Annual Review Boards

The tribunals convened once a year to determine the need for continued detention after a CSRT decision has been made are called Annual Review Boards (ARBs). The Review Boards were created to annually review whether a detainee is still a threat to the United States.[247] If an individual is found to no longer be a threat, he could be returned to his home country and either face further detention or be released there.[248] In making a decision, the Review Boards look at whether or not the detainee pose any danger to the United States, whether the detainee continues to have intelligence value, and whether there is any other reason to detain.[249]

These tribunals need to comply with the same international human rights and humanitarian principles that the CSRTs are required to follow. Namely, the appropriate provisions in the ICCPR, the UDHR, and the Geneva Conventions.[250] The Annual Review Boards fail to meet human rights law standards for many of the same reasons that CSRTs do not comply. ARBs do not allow for the ability to review or confront

[246] CSRT Order, *supra* note 229, at para. e.
[247] Kathleen T. Rhem, *Annual Reviews of Detainee Cases to Begin at Guantanamo*, U.S. DEPARTMENT OF DEFENSE, Oct. 1, 2004, http://www.defense.gov/News/NewsArticle.aspx?ID=25164.
[248] *Id.*
[249] WGAD Opinion 3/2009, *supra* note 220 at para. 25.
[250] *See supra* notes 233-35.

government evidence, do not allow for the assistance of counsel, and consider unreliable evidence and coerced statements.[251]

Periodic Review After 2011

In March of 2011, President Obama issued executive order number 13567, entitled "Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization of Use of Military Force".[252] The objective of the Executive Order is to "ensure that military detention of individuals now held . . . continues to be carefully evaluated."[253] The inter-agency task force will review prior detention determinations to identify whether additional detainees can be set for transfer.[254] Among other things, each detainee receives an initial review[255], must be represented by counsel[256], are permitted to present oral and written testimony, can introduce relevant information and written declarations, can answer any questions from the Periodic Review Board, and can call witnesses.[257] Additionally, the Order requires that a prompt decision be made by consensus and provided in writing within 30 days.[258] The process calls for an in-person review once every 3 years, and a file-based review every 6 months.[259] Further, if a determination is made that a detainee should no longer be

[251] WGAD Opinion 3/2009, *supra* note 220 at para. 35.
[252] Periodic Review EO, *supra* note 208.
[253] *Id.*
[254] News Release, U.S. Department of Defense, Periodic Review Board Process Underway (Oct. 09, 2013), http://www.defense.gov/releases/release.aspx?releaseid=16302.
[255] Periodic Review EO, *supra* note 208, at Sec. 3(a).
[256] *Id.* at Sec. 3(a)(2).
[257] *Id.* at Sec. 3(a)(3).
[258] *Id.* at Sec. 3 (a)(7) – (b).
[259] News Release, U.S. Department of Defense, Periodic Review Board Process Underway (Oct. 09, 2013), http://www.defense.gov/releases/release.aspx?releaseid=16302.

detained, "vigorous efforts" must be made to find a suitable transfer location.[260] Although is it undefined what entails vigorous effort, it is clear the United States is moving toward including more protections for detainees that better mirror protections in human rights law and humanitarian law.

Although the Executive Order states that "[f]or each detainee, an initial review shall commence as soon as possible but no later than 1 year from the date of this order"[261], the United States government did not begin the Periodic Review Board (PRB) process until October 2013. In late 2013, the Department of Defense announced that the review for detainee Mahmud Al Aziz Al Mujahid was complete. The PRB determined for this detainee that law of war detention was no longer necessary to protect against a continuing significant threat, and he is eligible for transfer. However, the conditions for his transfer are the same as those for the detainees currently in the "conditional detention" category, "specifically, that the security situation improves in Yemen, that an appropriate rehabilitation program becomes available, or that an appropriate third country resettlement option becomes available."[262] While a few detainees have been released in late 2013 through early 2014, the process remains slow. Only 71 detainees have been determined eligible for Periodic Review Board hearings out of the over 150 still detained at Guantanamo Bay.[263] A website by the Periodic Review Secretariat containing information on when detainees will have their PRB hearing, and documents regarding

[260] Periodic Review EO, *supra* note 208, at 4(a).
[261] *Id.* at Sec. 3(a).
[262] News Release, U.S. Department of Defense, Completion of First Guantanamo Periodic Review Board (Jan. 09, 2014), http://www.defense.gov/releases/release.aspx?releaseid=16473.
[263] Jason Leopold, *Identities of 71 Gitmo Prisoners Eligible for Hearings Released by U.S.*, ALJAZEERA AM., Feb. 20, 2014, http://america.aljazeera.com/articles/2014/2/19/71-guantanamo-prisonerseligibleforparolehearings.html.

past detainee hearings is now available for the public.[264] The review information tab will post unclassified documents summarizing the sessions, and an unclassified summary will be provided for final determinations.

This is an important step toward the closure of Guantanamo Bay. However, the only way to really know whether this new policy will comply with the rules of IHRL and IHL is to monitor the implementation of this Executive Order. If the Order does not create a system for actual transfer of cleared detainees, then it will serve much of the same purpose than the current system of "conditional detention". Those who are cleared through periodic review would just be entered into the same category of detainees who are currently cleared for transfer, but are still held in Guantanamo Bay. Further, moving detainees to a different location for continued indefinite detention also does not solve the issues of improper detention, continued harsh interrogation, and a lack of judicial review. Not until this process leads to a fair trial or actual removal of the detainee from the conditions of Guantanamo Bay will it be a success.

[264] U.S. Department of Defense, Periodic Review Secretariat, http://www.prs.mil/.

Interrogation and Torture

Domestic Interrogation Authority

The United States government asserts its authority to collect intelligence to come from the AUMF, which authorized all necessary and appropriate force, including intelligence collection. The executive, as commander in chief, has a war power authority to decide whether detainees can be interrogated. Case law has further determined that aliens held outside the United States could be interrogated. The district court in *O.K. v. Bush* rejected a motion by a detainee to enjoin the use of interrogations on him.[265] The court held that the detainee did not provide any law stating that courts have the power to intrude on the Executive's war power to forbid the interrogation of individuals that are held in the course of ongoing military conflict.[266]

United States statutes prohibit certain treatment, however. The Torture Act in the United States makes torture criminal if it is committed or attempted outside the United States if the offender is a U.S. citizen or the offender is in the United States.[267] However, it only outlaws "severe" physical or mental pain, and defines "severe" as "prolonged harm".[268] These definitions are vague, leave loopholes for dangerous interrogation, and created more uncertainty about the legal limits of torture. The legal memos on torture written by the Office of Legal Counsel under Yoo also lacked a workable definition of

[265] O.K. v Bush, 377 F. Supp. 2d 102 (D.D.C. 2005) (rejecting a motion of an alien detainee to enjoin the use of interrogation against him.).
[266] *Id.*
[267] Torture Act 18 U.S.C. § 2340A (a).
[268] Torture Act 18 U.S.C. § 2340.

"severe pain" for use in a terrorism context.[269] Further, the Detainee Treatment Act of 2005 prohibits cruel, inhumane, or degrading treatment and punishment of any person if they are in custody or otherwise under the physical control of the United States.[270]

Limits on Interrogation Methods in IHRL and IHL

Certain interrogation procedures are outlawed by IHRL and IHL, even during war. Under Common Article 3 of the Geneva Convention, cruel, inhumane and degrading treatment, as well as outrages against human dignity of prisoners of war is prohibited.[271] This covers a wide spectrum from mere coercion to torture. The Third Geneva Convention states that "prisoners must at all times be humanely treated," and prohibits "acts of violence or intimidation."[272] It is questionable what can be considered unlawful coercion, or what is outside the scope of 'humane' treatment. The question of who the Geneva Convention applies to for purposes of interrogation was settled in *Hamdan*. The Court ruled that even if a person would not fall under the Third Geneva Convention, consensus is growing that they would fall under the Fourth Geneva Convention, and said there is no gap between the Third and Fourth Geneva Conventions, and if an individual is not entitled to protection of the Third Convention he or she falls within the Fourth Convention.[273]

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[269] Memorandum for Alberto R. Gonzales Counsel to the President, Office of Legal Counsel, U.S. Department of Justice (August 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.
[270] Consideration of Reports Submitted By States Parties Under Article 19 of the Convention, Committee Against Torture, CAT/C/USA/CO/2, para. 9(b) (25 July 2006).
[271] GC III, *supra* note 163, at Common Article 3.
[272] *Id.* at Art. 13.
[273] *See generally Hamdan*, 548 U.S. 557.

According to Article 17 in the Third Geneva Convention, "every prisoner of war . . . is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or . . . equivalent information."[274] It seems, however, that asking more than for this basic information would not be prohibited under the Geneva Convention, unless further information is sought through any "physical or mental torture, or any other form of coercion".[275] Further, any "[p]risoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."[276] This final requirement seems to encompass far too many activities that can easily be construed as "unpleasant", and it is very broad and makes it difficult to assess whether U.S. policy follows this provision. Opinions will always differ regionally, culturally, and personally whether a prisoner was exposed to "unpleasant" or "disadvantageous" treatment.

Under IHRL, torture is outlawed clearly by Article 7 of the ICCPR.[277] While some provisions of the ICCPR can be derogated from, this provision can never be derogated from for any reason. The UN Convention Against Torture further outlaws certain procedure. Article 1 of the UN CAT prohibits any act by which severe prolonged mental pain or suffering is intentionally inflicted (which has been narrowed by further congressional reservations).[278] Article 16 states that a state shall prevent cruel, inhumane, or degrading treatment in any territory under its jurisdiction.[279] The test under this

[274] GC III, *supra* note 163, Art. 17.
[275] *Id.*
[276] *Id.*
[277] ICCPR, *supra* note 103, Art. 7.
[278] UN CAT, *supra* note 72, Art. 1.
[279] *Id.* at Art. 16.

convention as to what is considered cruel, inhumane, or degrading treatment is whether the action is shocking to the conscience. It is a very subjective test. In 2014, the Human Rights Committee in its periodic observations report asked the United States to instigate investigations into cases of torture or CID treatment, and to clarify whether enhanced interrogation techniques that are now outlawed are in violation of article 7 of the ICCPR.[280]

Additionally, torture or other acts that can cause physical or mental harm are also prohibited by international criminal law, and in certain circumstances can even amount to crimes against humanity and war crimes.[281] These terms outlawing certain conduct are ambiguous, confusing, and even many lawyers and military officers are unclear as to what they encompass. Many supposed violations occurred just after the beginning of the war when the government agencies responsible for determining the scope and limitations of interrogation procedures did not produce internal regulations for their officers who were already actively engaged in capture and interrogation. The long time it took to establish those procedures produced much confusion as to what United States agents can and cannot do with detainees when it came to interrogation procedure.

[280] Human Rights Committee, List of Issues in Relation to the Fourth Periodic Report of the United States of America, 3, CCPR/C/USA/4 and Corr. 1 (Mar. 2013).
[281] Situation of Detainees, *supra* note 50, at para. 43, citing Articles 6 (b) and (c) of the 1945 Charter of the Nuremberg International Military Tribunal; Principle IV (b) and (c) of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal; Statute of the International Criminal Tribunal for the Former Yugoslavia Articles 2 (b), 5 (f) (1993); Rome Statute for the International Criminal Court, Arts. 7 (1) (f), 8 (2) (a) (ii) (1998).

Known Interrogation Methods before 2009

Before standards for interrogation procedures were updated in 2009, certain interrogation procedures were used, many of which have been criticized for being too harsh on detainees. These methods include sleep deprivation, slamming a person into a wall, forced grooming and removal of clothing, interrogation for up to 20 hours, using a detainee's individual phobias to induce stress, hitting a detainee with guns and other objects, forcing a detainee to listen to continuous loud music, and waterboarding.[282] Additional documented methods include shackling into painful stress positions for long periods while naked,[283] threats of deportation and rape,[284] solitary confinement,[285] and locking a detainee in a small box.[286] These methods, even when combined, were found by the Bush administration CIA legal counsel not to violate anti-torture statutes.[287] Under the UCMJ, however, they do violate the Geneva Convention's ban against cruel inhumane and degrading treatment. Depending on the individual, and cultural sensitivities, these methods can cause definite suffering.

The practice of rendition has also been reported, and is inconsistent with IHRL and IHL. Rendition consists of sending a detainee to a country where they are at serious

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[282] U.S. Dept. of Justice, Office of Legal Counsel, CIA Memo, Aug. 1, 2002, http://image.guardian.co.uk/sys-files/Guardian/documents/2009/04/16/bybee_to_rizzo_memo.pdf; Situation of Detainees, *supra* note 50, at paras. 49–52.
[283] *O.K. v Bush*, 377 F. Supp. 2d 102.
[284] *Id.*
[285] *See* Paracha v Bush, 374 F. Supp. 2d 118 (D.D.C. 2005) (denying a detainee's motion for a preliminary injunction ordering his removal from isolation and solitary confinement at Guantanamo, Bay. The court stated that there was not enough reliable information about the conditions of the detention, and the detainee had not sufficiently demonstrated that he would suffer irreparable harm unless the motion was granted.).
[286] GC III, *supra* note 163, Art. 21 (prohibiting holding prisoners "…in close confinement except where necessary to safeguard their health…").
[287] CIA Memo, *supra* note 282.

risk of torture.[288] This "practice of 'extraordinary rendition' constitutes a violation of Article 3 of the Convention Against Torture and Article 7 of the ICCPR."[289] However, the United States has stated that it "does not transfer persons to countries where it believes it is 'more likely than not' that they will be tortured."[290]

Interrogation Methods After 2009

The President issued an Executive Order 13491, Ensuring Lawful Interrogations, in 2009 in order to "promote the safe, lawful, and humane treatment of individuals in United States custody and of United States personnel who are in armed conflicts, to ensure compliance with treaty obligations of the United States, including the Geneva Conventions, . . ."[291] This Executive Order overturned Executive Order 13440, an Order by President Bush that limited the War Crimes Act[292] and requires compliance with the Army Field Manual and Common Article 3 of the Geneva Convention.[293] This order banned the use of torture and the President directed that executive officials could no longer rely on Justice Department OLC memos that permitted practices that he considers to be torture. This Executive Order further closes a previous loophole, and covers the CIA as well as the military. The President further mandated that CIA "black sites" be

[288] Situation of Detainees, *supra* note 50, at para. 55.
[289] *Id.*
[290] Consideration of Reports Submitted By States Parties Under Article 19 of the Convention, Committee Against Torture, CAT/C/USA/CO/2, para. 7 (25 July 2006).
[291] Executive Order 13491, Ensuring Lawful Interrogations, Jan. 22 2009, *available at* http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations.
[292] Executive Order 13440, Interpretation of the Geneva Conventions Common Article 3, July 20, 2007.
[293] Harold Koh, Legal Advisor to the U.S. Dept of State, remarks at annual meeting of the American Society of International Law (March 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm [hereinafter Koh Remarks].

closed down and ordered the Secretary of Defense to conduct reviews and visits to Guantanamo Bay to ensure the conditions at the prison were in accordance with Common Article 3 of the Geneva Conventions.[294]

The Obama administration has a more expansive conception of what is not allowed, and construed torture more broadly than the Bush administration, which construed torture narrowly to protect harsh interrogation procedures from falling outside of the protections of IHRL and IHL. Now that these protections have been articulated, the CIA seems unwilling to allow harsh interrogation procedures again, even if a future administration should return to a Bush era policy, for fear of leaving the CIA interrogators exposed to violations.

[294] *Id.*

Targeted Killing

Domestic authority

According to a Department of Justice White paper released in early 2013, the President has the authority to use lethal targeting "arising from his constitutional responsibility to protect the country, the inherent right to life of the United States to national self defense under international law, Congress's authorization of the use of all necessary and appropriate military force against this enemy, and the existence of an armed conflict with al-Qa'ida under international law"[295] The domestic legal authority comes mainly from the 2001 AUMF, which allows killings as part of "all necessary and appropriate force" to go after persons that took part in the September 11 terrorist attacks.[296] There has been recent talk in Congress to push the Executive branch to refine who are considered "associated forces" for targeting purposes, as currently, the AUMF allows targeting for individuals with cursory ties to Al Qaeda, as much as it allows for targeting of Al Qaeda members.[297] As with detention authority, if Congress decides to pass a new AUMF, it should limit the President's power in accordance with international law. Chesney et al. argue for distinguishing congressional authority for detention and targeting when creating new statutory authority.[298]

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[295] Department of Justice White Paper, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operation Leader of Al-Qa'ida or An Associated Force, 1, *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [hereinafter DOJ White Paper].

[296] Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN RELATIONS, May 23, 2013, *available at* http://www.cfr.org/counterterrorism/targeted-killings/p9627.

[297] Carlos Munoz, *Defense Lawmakers Consider Changing Rules of Terror War*, THE HILL DEFENSE BLOG, May 31, 2013, http://thehill.com/blogs/defcon-hill/policy-and-strategy/302655-defense-lawmakers-may-change-rules-of-terror-war#ixzz2V7ZyfYsK.

[298] Chesney at al., *A Statutory Framework for Next-Generation Terrorist Threats*, HOOVER INSTITUTION, 13 (2013).

Right to Life

International law prohibits arbitrary killings in Article 6 of the ICCPR.[299] Lethal force can only be used if it is a last resort against a concrete, specific, and imminent threat of 'grave' harm[300] In order for a targeted killing operation to be legal, there must be a domestic foundation for the state to use lethal force, there must be a proper purpose, there must be an imminent threat, and the killing must have necessity. A proper purpose is when the state uses lethal force when trying to protect the lives of others, and necessity requires the analysis of whether there is a lesser violent means to achieve the same ends. While the ICCPR allows for derogations from Articles 9, 14, and 24 for example, there is no derogation allowed from Article 6. In war, however, if an individual is directly participating in hostilities, it is legal under IHRL and IHL to use lethal force.

To understand the requirements in the ICCPR Article 6, *McCann v. UK* and the Israel High Court of Justice further defined some of these terms. In *McCann v. UK*, three individuals were killed on suspicion of being about to detonate a bomb. The court in this case ruled that the imminence and necessity threats were not satisfied, lethal force was not necessary, and the killing constituted a breach of Article 6 (or Article 2 of the European Convention on Human Rights).[301] The European Court of Human Rights developed from this case a stricter necessity requirement that requires an operation to first be planned without the need kill suspects, and appropriate safeguards should be put

[299] ICCPR, *supra* note 103, Art. 6 ("Every human being has the inherent right to life. . . No one shall be arbitrarily deprived of his life.").
[300] American Civil Liberties Union, *Targeted Killings*, http://www.aclu.org/national-security/targeted-killings.
[301] McCann v. The United Kingdom, A 324 EUR. CT. H.R. (1995).

into place to prevent any killing.[302] The Israel High Court of Justice further held that it is permissible to attack civilians if they are directly participating in hostilities.[303] The test of when a killing is appropriate includes assessment of the timing of the act, whether it is indirect or direct, and not attacking if a less harmful means is feasible.[304] The Israeli court also requires that a proportionality analysis be made where collateral damage is possible.[305]

The right to life is also protected in Article 1 of the American Declaration of the Rights and Duties of Man, Article 4 of the American Convention on Human Rights, and Article 3 of the Universal Declaration of Human Rights.[306] These Articles prohibit the arbitrary deprivation of life.

When Targeted Killing is Appropriate

Targeted killings are appropriate during war, as an act of self-defense of the nation,[307] as long as the target has a 'continuous combat function' and is therefore a

[302] *See* European Court of Human Rights, Rights to Life Fact Sheet, May 2013, *available at* http://echr.coe.int/Documents/FS_Life_ENG.pdf.
[303] HCJ 769/02 Pub. Comm. Against Torture v. Israel 6, [2005] (Isr.) *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf.
[304] *Id.*
[305] *Id.*
[306] American Declaration of the Rights and Duties of Man, Inter-American Commission on Human Rights, Art.1 (1948) ("Every human being has the right to life…"), *available at* http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm; American Convention on Human Rights, Organization of American States, Art. 4, (July 1978) ("Every person has the right to have his life respected…"), *available at* http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf; UDHR, *supra* note 51, Art. 3 ("Everyone has the right to life. . .").
[307] DOJ White Paper, *supra* note 295.

combatant.[308] This means there is no legal authority to kill any civilian unless they are directly participating in hostilities. The individual cannot be targeted if they are out of combat, can be captured instead, if they manifest a clear intention to stop combat, if they are wounded, sick, or rendered defenseless, or are shipwrecked.[309] The 'direct' temporal element here is difficult to define, and can be interpreted many ways, depending on the motivations of the party doing the interpretation. In 2010, legal advisor to the State Department, Harold Koh, stated that "whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability for those states to suppress the threat the target poses."[310] He also mentioned that the United States targeting operations would be consistent with law of war principles, including distinction and proportionality.[311]

However, it has been argued by U.S. officials that the imminence standard when it comes to terrorism is different than with other targeted killing operations, and the killings are deemed necessary by U.S. officials to prevent terrorist attacks on American citizens. In a 2011 memo, and re-iterated in a 2013 Department of Justice White Paper, John Brennan makes it clear that for a threat to be "imminent", it "does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take

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[308] Nils Melzer, Legal adviser, ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities Under International Humanitarian Law,* May 2009, *available at* http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (The purpose of this interpretive guidance is to provide recommendations for the implementation of IHL).
[309] *Id.*
[310] Koh Remarks, *supra* note 293.
[311] *Id.* (Principle of distinction "requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack, . . . the principle of proportionality prohibits [collateral damage] that would be excessive in relation to the . . . military advantage . . . .").

place in the immediate future."[312] This is because the threat is constant and secret, and waiting to act until just before an attack is going to occur "would not allow the United States sufficient time to defend itself".[313] It seems that in the war on terror, the requirements for targeted killing operations to be carried out are satisfied for limited circumstances.

Targeted killings are also legal against citizens, as long as Fourth and Fifth Amendment rights are not violated. However, despite a citizen's Fourth and Fifth Amendment due process rights, citizens do not have immunity from targeted killings, and it is not considered a war crime or an assassination under Executive Order 12333. In a white paper release by the Department of Justice, the government concluded that use of lethal force against a U.S. citizen in a foreign country was legal when three conditions are met: the individual is determined to be an imminent threat, capture is infeasible, and the operation is conducted according to law of war principles.[314] Further, in a speech by President Obama on U.S. counterterrorism policy in May 2013, he stated that "[w]hen a citizen goes abroad to wage war against America-and is actively plotting to kill U.S. citizens; and [capture is not feasible] his citizenship should no more serve as a shield than a sniper shooting down an innocent crowd should be protected from a SWAT team."[315]

[312] DOJ White Paper, *supra* note 295.
[313] *Id.*
[314] *Id.*
[315] President Obama, Remarks by the President at the National Defense University, May 23, 2013, *available at* http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university [hereinafter Defense University Remarks].

Targeted killings are not appropriate for assassinations, as set in Executive Order 12333.[316] It is legal, however, to carry out targeted killing operations in foreign countries under international laws of sovereignty and neutrality if the country in which the strikes are taking place consented to the strikes within their borders, or the host nation was unable or unwilling to suppress the threat posed by the individual target.[317] In some cases, the U.S. Government is within its rights to use lethal force on foreign soil without consent if the use of self-defense is necessary.[318] Peacetime assassinations should not be confused with targeted killings, as they have been banned since 1976.[319]

Legality of targeted killing by drone program under IHRL/IHL

Article 4 of the American Convention on Human Rights and Article 1 of the American Declaration of the Rights and Duties of Man govern the use of lethal force by states and prohibit the arbitrary deprivation of life.[320] However, if the state is threatened by violence, the state has a right, and even an obligation, to protect its citizens by the use of lethal force.[321]

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[316] Executive Order 12333, United States Intelligence Activities, Dec. 4, 1981, http://www.archives.gov/federal-register/codification/executive-order/12333.html.
[317] DOJ White Paper, *supra* note 295.
[318] Matthew Waxman, Council on Foreign Relations, *in* Jonathan Masters, *Targeted Killings*, Council on Foreign Relations, May 23, 2013, *available at* http://www.cfr.org/counterterrorism/targeted-killings/p9627.
[319] Executive Order 12333, United States Intelligence Activities, Dec. 4, 1981, http://www.archives.gov/federal-register/codification/executive-order/12333.html; Jonathan Masters, *Targeted Killings*, Council on Foreign Relations, May 23, 2013, *available at* http://www.cfr.org/counterterrorism/targeted-killings/p9627.
[320] Norms and Principles of International Human Rights and International Law Applicable in Terrorist Situations, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.116, para. 86 (Oct. 22, 2002), https://www.cidh.oas.org/Terrorism/Eng/part.c.htm.
[321] *Id.* at para. 87.

The drone program operates mostly under the executive branch with much secrecy on who is targeted, and how and when targeted killings take place. The CIA has traditionally managed most of the drone strike operations outside of recognized war zones, while the defense department has managed operations in theatres of war.[322] In 2013, the President moved more operations to the control of the defense department, some say to increase transparency and streamline the process.[323] Drone strikes were primarily occurring in Afghanistan and Pakistan but in recent years has expanded to include other countries like Yemen and Somalia.[324] The UN Human Rights Committee, in its 2014 concluding observations report of the United States, has asked the United States to clarify how targeted killings are conducted through drone attacks, to clarify whether the civilian casualties involved are in compliance with Covenant obligations, and whether the drone program fully complies with the obligation to protect life under Article 6.[325]

While IHRL and IHL do limit the types of weapons that can be used,[326] and in what situations, military technology and weaponry is so technical that it is something that's difficult to analyze under current conventions. In the *Nuclear Weapons Case* in the International Court of Justice, the Court affirmed that the prohibition of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary

[322] Masters, *supra* note 319.
[323] *Id.*
[324] *Id.*
[325] Human Rights Committee, List of Issues in Relation to the Fourth Periodic Report of the United States of America, 2, CCPR/C/USA/4 and Corr. 1 (Mar. 2013).
[326] Jean-Marie Henckaerts and Louise Doswald-Beck, INTERNATIONAL COMMITTEE OF THE RED CROSS, *Customary International Humanitarian Law Volume I: Rules*, (2005).

suffering as one of the "cardinal principles" of international humanitarian law.[327] These methods are defined by the ICJ as "a harm greater than that unavoidable to achieve legitimate military objectives".[328] The 2002 Report on Terrorism and Human Rights by the Inter-American Commission on Human Rights mentions restricted weapons that cause undue suffering as "poisonous gas" or "bacteriological weapons".[329] Some states have also included in military manuals that weapons that render death inevitable are prohibited.[330] Of course, those states just serve as guides, and are not binding on United States law or policy. However, under these regulations, drones may cause undue harm as death is inevitable of not only the target, but of nearby civilians, which goes against the principle of distinction that belligerents cannot target civilians. Further, the United States does not follow international standards set by the ICRC on the concept of direct participation in hostilities. Some drone strikes are carried out amongst individuals in their normal course of business in a day, rather than while they are directly participating in hostilities. The U.S. re-definition of the requirement by stating that all terrorists are always 'directly participating' goes against the ICRC guidelines and international convention and acceptance.

In 2010, the state department legal advisor remarked that the use of "unmanned aerial vehicles" for targeting operations are not prohibited, as "long as they are employed

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[327] International Court of Justice, *Nuclear Weapons case*, Advisory Opinion, § 238.
[328] *Id.*
[329] Norms and Principles of International Human Rights and International Law Applicable in Terrorist Situations, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.116, para. 100 (Oct. 22, 2002), https://www.cidh.oas.org/Terrorism/Eng/part.c.htm.
[330] Henckaerts & Doswald-Beck, *supra* note 326, citing e.g., the military manual of Belgium § 36, Ecuador § 52 & United States § 93 and the statements of Egypt § 135, India § 144, Russia §§ 171–172 & Solomon Islands § 178, statements of Australia § 121 & New Zealand § 164.

in conformity with applicable laws of war."[331] He further stated that drones do not cause undue harm, meet the principles of distinction and military necessity, and lethal force against specific individuals is OK if it is in the course of armed conflict or in self-defense.[332] The controversial use of drones was further defended by the President in a speech in May 2013 on United States counterterrorism policy. The President stated that individuals, including U.S. citizens, who are plotting terrorist attacks against Americans are proper targets for drone strikes, but the administration will seek to create stricter reviews for the use of drones in targeted killing operations.[333] The nomination of John Brennan to take over the CIA by the President shows that targeted killings by drone strikes will continue to be a prominent tactic, as Brennan played a large role in the expansion of targeted killings during the Obama administration.

Collateral Damage

Under international law, a killing is not allowed if there is a possibility that the strike will knowingly and unwillingly kill civilians while fulfilling a proper military objective. Civilians cannot be killed unless they are directly participating in hostilities.[334] The state has a responsibility to distinguish between civilians and those individuals that pose the threat necessitating lethal force.[335] Any use of force that is indiscriminate and reckless that causes collateral damage constitutes violations of Article 4 of the American

[331] Koh Remarks, *supra* note 293.
[332] *Id.*
[333] Defense University Remarks, *supra* note 315.
[334] *See infra* Targeting: Right to Life
[335] Norms and Principles of International Human Rights and International Law Applicable in Terrorist Situations, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.116, para. 90 (Oct. 22, 2002), https://www.cidh.oas.org/Terrorism/Eng/part.c.htm.

Convention on Human Rights and Article 1 of the American Declaration of the Rights and Duties of Man.[336]

Collateral damage has always been a consequence of war, and many would argue that the use of drones actually decreases the amount of civilian casualties, injuries, and other collateral damage, such as damage to civilian property.[337] Some claim that the civilian death toll from targeting operations is exaggerated for foreign and domestic political purposes. President Obama in May 2013 noted in a speech that "there is a wide gap between U.S. assessment of such casualties, and non-governmental reports."[338] In further defending the drone program, the President stated that "the terrorists we are after target civilians, and the death toll from their acts of terrorism against Muslims dwarfs any estimate of civilian casualties from drone strikes."[339]

[336] *Id.*
[337] Arguments for this include the fact that killings are carried out in a room with access to lawyers and other counsel instead of on the ground in the fog of war, drone strikes are further debated and therefore have increased oversight, and advanced drone technology allows for better target identification and GPS locating.
[338] Defense University Remarks, *supra* note 315.
[339] *Id.*

Conclusions

Effects of IHRL and IHL on U.S. national security policy-making

As Jack Goldsmith writes in his earlier book about his time as head of the Office of Legal Counsel, the Bush administration was making policy on the edges of legality.[340] The Geneva Conventions played a large role in deciding what the President could legally do when it came to the U.S. military and intelligence agencies. The administration was so concerned with preventing another 9/11 from happening that it was willing to create policy that allowed the President to do everything he could legally possibly do. While this allowed for an expansion of power in national security matters, it created policy based on constantly pushing legal limits and forgetting the aspects of smart policy making, which led to many blunders in the Bush administration, among them the policy concerning treatment and interrogation of detainees.

I also believe that the use of universal jurisdiction limited, and currently limits the executive office worried about the use of lawfare.[341] The hyper-legalization of warfare makes acting outside of legal limits or even at the edge of legal limits very dangerous. In order to protect top U.S. government officials and military members from later prosecution for their actions, lawyers should determine legal limitations according to international standards, and further align with definitions of the laws of war as determined by international consensus. Some human rights law provisions are general

[340] TERROR PRESIDENCY, *supra* note 24, at 99.

[341] Lawfare means using the legal system as a weapon of war to achieve certain political or strategic ends. Opponents of the west who do not have the capabilities to fight the U.S. military use abuse of the legal system to achieve their desired ends. This can be used by al-Qaeda, or even our European partners to counter to check American military power. *See* The Lawfare Project (2012), http://www.thelawfareproject.org/what-is-lawfare.html. Universal jurisdiction has been used to file legal claims against top officials in the U.S. government.

and create varied interpretations, so acknowledging the scope of the laws that are set by international consensus would better protect officials. Working at the far reaches of what may be considered legal and necessary at that moment can be seen differently in retrospect. There should be a better balance between creating policy in an emergency, and creating policy that fully supports the laws of war that also fulfill the U.S. government's duty to keep citizens safe. This would better insulate government officials from fighting lengthy and expensive legal battles for actions they took in good faith to fulfill their duty and protect their country.

The Executive does not go unchecked, however. The President remains accountable to various checks, including Congress and the courts on national security issues. The public is kept in the dark about much national security intelligence and policy making, and must trust the executive and other bodies to develop policy that comports with American values. Because of the amount of secrecy involved in this area, Congress, the courts, and especially the government's lawyers have a major responsibility to ensure that the executive power is checked, and actions of the United States government remain legal and humane. Several congressional committees review intelligence and confidential information to ensure that they are creating informed policy that doesn't harm the American people. These committees call executive officers to testify in public hearings in front of Congress to hold them accountable for their actions when necessary. Further, even the Supreme Court has weighed in on difficult national security questions that has transformed U.S. national security policy. It is the lawyers in various agencies and in the Justice Department that set the legal limits that guide U.S. policy. It is well known that

appointees to the Office of Legal Counsel responsible for setting legal guidelines to what the President can and cannot do, are appointed many times for political reasons.[342] Many lawyers have publicly written about their struggles with pushing back against an executive office intent on building Presidential power and expanding their capabilities in national security.

Have there been moves toward compliance in the new administration?

It seems under the Obama administration, U.S. counterterrorism policy has further complied with IHRL and IHL than in the Bush administration, but only slightly. There have been a few moves away from compliance, and some unfulfilled policy objectives that could increase compliance further. One of the largest changes between administrations is that the Obama administration has a more expansive conception of what is not allowed when it comes to harsh interrogation tactics. The current administration construes torture more broadly than the Bush administration, which construed torture narrowly to protect harsh interrogation procedures from falling outside of the protections of IHRL and IHL. This is most evident in President Obama signing Executive Order 13491, which overturned Bush's Executive Order 13440 that limited the War Crimes Act.

Further, under the Bush administration, detention authority was claimed from the President's Article II power, which could allow for indefinite detention. The current administration asserts its power to come from the AUMF, thereby limiting its authority to

[342] TERROR PRESIDENCY, *supra* note 24, at 34.

detain past the scope of the statute.[343] However, should a new AUMF be created to deal with emerging threats no longer directly affiliated with Al-Qaeda, it should further limit and constrain presidential power instead of creating wide latitude for endless war.[344] Limiting U.S. action by congressional statute increases the legitimacy of U.S. operations under international law and would increase ally support.[345] Additionally, the Obama administration has expressly acknowledged that international law informs the scope of U.S. detention authority.[346]

Much policy has remained the same, such as the similar narrow definition of habeas corpus rights for detainees. There have been some steps back as well under the current administration. Although the President has stated that he will close Guantanamo Bay detention facility to further comply with international law, the prison remains open, and detainees are being held at the prison without charge or trial, nor the opportunity to transfer, despite many of them having already been cleared for transfer. A majority of the transfers of cleared detainees that have been made were done by the Bush administration.[347] President Obama even acknowledged the continuation of Bush era policy of indefinite military detention, acknowledging that some detainees continue to pose a threat to the United States.[348] One small difference is the Bush administration claimed detention power for those who supported terrorism, while the Obama

[343] Koh Remarks, *supra* note 293.
[344] Chesney et al., *A Statutory Framework for Next-Generation Terrorist Threats,* HOOVER INSTITUTION, 7 (2013).
[345] *Id.* at 8.
[346] Koh Remarks, *supra* note 293.
[347] Charlie Keyes, *Obama administration defends transferring Gitmo detainees*, CNN, Apr. 13, 2011, http://www.cnn.com/2011/POLITICS/04/13/obama.gitmo.detainees/index.html.
[348] Remarks by the President on National Security, May 21, 2009, *available at* http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09.

administration claims detention power for those who "substantially support" terrorist groups. The Obama administration further continued the Bush-era surveillance policies and even enhanced the capabilities of the NSA, expanding the information being collected under secret programs. Protections of the right to unwarranted search of citizens as well as human rights of privacy and freedom of expression and association have decreased as government capabilities have increased with new technology.

Additionally, although targeted killings are legal under international law as long as certain principles are followed, an expansive interpretation of those principles, which are meant to limit the amount of targeted killings, may amount to a violation of international law. For example, international law requires that all targeted killings be necessary, and without alternative means for capture, which would limit the amount of individuals that the U.S. government could target. If the current administration is following similar minimization procedures, it is suspect therefore, that the number of drone strikes has increased enormously under the Obama administration. In just his first 2 years in office, President Obama authorized almost 4 times as many drone strikes in Pakistan as President Bush did in his entire 8 years in office.[349]

Are the moves toward compliance on paper or in practice?

The moves toward compliance in the right to habeas or proper review have been mostly formally asserted on paper, but not in practice. After the Boumediene ruling in 2008, detainees held in Guantanamo Bay were given the right to challenge their detention

[349] Masters, *supra* note 319.

in the U.S. court system. Since 2008, there have been many denials of certiorari in Guantanamo habeas cases. Additionally, the CSRT panels have not proven to be adequate procedures under international law. In 2011, President Obama signed an Executive Order mandating that all detainees be given Periodic Review. This procedure would make great strides in moving the U.S. policy for review closer to IHRL and IHL standards, as, among other things, these procedures provide for initial review, counsel representation, and trial procedure more similar to the U.S. civilian system. It is not known whether there will be a system for actual transfer of detainees. If the Periodic Review Board only clears a detainee for transfer, then puts them into the same category of "conditional detention" as current detainees who have been cleared for transfer but not released from Guantanamo Bay, then the Periodic Reviews will be far less meaningful than they appear to be.

Further, the detention facility at Guantanamo Bay is another source of international law violations, and the President's stated mandate to close the facility remain only on paper, and not in practice. The commitment to close the facility was first made in 2009,[350] and since then, no moves have been made to carry out the order. The detention facility bars detainees from effective review, allows a culture of enhanced interrogation that has amounted to torture in many cases, and bars detainees from receiving proper medical care.[351] Beyond the plight of the individual detainees, the

[350] Executive Order Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, January 22, 2009, *available at* http://www.whitehouse.gov/the-press-office/closure-guantanamo-detention-facilities.

[351] There is a basic medical facility on Guantanamo Bay that is not equipped to treat detainees with complex or advanced illnesses, and as a result military medical staff have to be flown in to Guantanamo, at high cost, to provide care since the detainees are barred from entering the U.S.

detention facility works as a recruiting tool for terrorists all over the world, and costs the United States millions of dollars per year that can be spent otherwise.

Amending IHRL and IHL to deal with the current war on terror

Some elements of today's war were probably never imagined at the time the Geneva Conventions were drafted. The drafters at the time couldn't have known that an entirely new enemy of non-state actors that hid among civilians and did not wear a uniform would be the main enemy in a major war. The United States' decision to treat the conflict with this enemy as a war and not as crimes has led to a redefinition of the Conventions in a way that creates gaps, and reduces protections that were meant to encompass all people in war. When the U.S. claimed it has complied by the laws of war, it is only because the U.S. redefined laws to apply to a new conflict that the laws were never intended to cover. So technically, the U.S. complied, because their definitions and applications ensured that it would.

Some of the ambiguities inherent in the Geneva Conventions are the prohibitions against certain interrogation procedure. The Conventions prohibit "outrages against human dignity"[352] which covers everything from coercion to torture, "acts of violence and intimidation",[353] and mandates that prisoners must be "humanely treated".[354]Article 17 also prohibits physical or mental torture or coercion and any "unpleasant or

[352] GC III, *supra* note 163, Common Article 3.
[353] *Id.* at Art. 13.
[354] *Id.*

disadvantageous" treatment.[355] All of these tests are subjective and open to wide interpretation. Narrowing the definitions of what is prohibited will not be more protective, but supplanting these Articles with more concrete boundaries of what is considered coercion, or what is outside the scope of 'humane' can be helpful, without narrowing the terms. Narrowing the terms may leave even bigger gaps. More comments on these definitions, however, would be helpful. A test to decide whether something is 'shocking to the conscience' will be interpreted as narrowly as possible by a country like the United Sates, worried about doing everything it can to protect its citizens.

Some general things about the Conventions would also be helpful to amend to deal with today's type of war. The laws should account for the fact that many of today's wars are not between states but between a state and a non-state actor, so a new law should apply to all armed conflicts, instead of narrowly applying during international conflicts between state actors. For example, it is hard to argue today under the laws of war that an attack on U.S. soil by organized non-state actors constitutes an act of war, while in today's world, this is now a norm. The definitions of what is a combatant should also be amended. It is not realistic today to expect that terrorists will wear "distinctive signs recognizable at a distance" or "carry arms openly".[356] Further, including a framework for deciding when military force is justified, and what types of weapons cause "undue harm" would be helpful. As military weapons technology has progressed so much, the laws of war should also progress to account for what is available today. For example, is a drone

[355] *Id.* at Art. 17.
[356] *Id.* at Art. 4.

missile a weapon that causes undue harm? What about the fact that those missiles have also arbitrarily killed civilians?

Finally, there is no international human rights tribunal to enforce the laws on the United States. Either international mechanisms ensuring compliance should be strengthened, or the U.S. Court system should adopt and enforce the laws of war to a fuller extent. While Bivens claims offer some remedy for violation, foreign persons have a much more difficult time finding any remedy or official body to bring their claims against the United States, and make sure their claims are answered, and their rights protected.

Concluding comments

President Obama's speech in May of 2013 indicates that he will recommit himself to shaping U.S. counterterrorism policy in accordance with IHRL and IHL. In light of past executive orders, Presidential mandates, speeches, and memos indicating a commitment to human rights while ignoring them in practice, it is difficult to tell what violations will actually be remedied, if any. The United States should adhere to its long-standing commitment to human rights, in all areas of law and policy, including national security. Never are civil liberties more important or more vulnerable than when there is a threat to the security of our country. These times of insecurity and emergency are the precise times that the United States needs to provide an example to all other nations that justice can be served, citizens can be protected from harm, and human rights will still never be derogated from.

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