

The Guantánamo detention camp and international humanitarian law

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Introduction

The War on Terror which followed the 9/11 attacks led to gross human rights violations (GHRV), including abduction and detention without trial. The term «war» opened the doors to the Authorization for Use of Military Force (AUMF)¹, a specific snap statutory authorization approved by the Congress a week after the attacks within the meaning of §5(b) of the *War Powers Resolution* of 1973². This act, passed during the Vietnam War (1955-1975), provides that the US president can deploy troops abroad only by a declaration of war by Congress («statutory authorization») or in case of «a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces». The term «war» is not a purely formal definition, but a conscious choice which led to a new doctrine: the application of the rules provided in time of war against non-state «enemy combatants» who are not nationals of countries at war with the United States.

President George W. Bush claimed power, as commander-in-chief of the Armed Forces, to determine that any person, including an American citizen who is suspected of being a member, agent or associate of al-Qaeda, the Taliban, or possibly any other terrorist organization, was a «unlawful enemy combatant» who could be detained in US military custody until hostilities end, pursuant to the law of war³. The designation of irregular opponents as «unlawful enemy combatants» or «unprivileged belligerents»

¹ *Authorization for Use of Military Force* (AUMF), Pub. L. 107-40, 115 Stat. 224 (50 USC § 1541 note).

² *War Powers Resolution*, 50 USC 1541-1548, Pub. L. 93-148.

³ Jennifer K. Elsea, *Presidential Authority to Detain Enemy Combatants*, in «Presidential Studies Quarterly», 2003, vol. 33, no. 3, pp. 568-601, <https://doi.org/10.1111/1741-5705.00007>.

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was contested by federal district courts and by the US Supreme Court (see, e.g., *Hamdi v. Rumsfeld*⁴; *Hamdan v. Rumsfeld*⁵; *Rasul v. Bush*⁶; *Boumediene v. Bush*⁷) and later abandoned⁸.

2002, George W. Bush opens Guantánamo

In February 2002, the White House determined that Taliban detainees were covered under the Geneva Conventions of 1949⁹ while al-Qaeda terrorists were not, but that none of the detainees qualified for the *status* of prisoner of war (POW) under Art. 4 of Geneva Convention (III) on prisoners of war¹⁰.

President Bush decided to place detainees¹¹ in the Guantánamo Bay Naval Base (GTMO), where they were interrogated and prosecuted for war crimes¹², outside the jurisdiction of *habeas corpus*¹³, a recourse in law through which a person can report an unlawful detention or imprisonment to a court and request that the court order the custodian of the person to bring the prisoner to court, to determine whether the detention is lawful.

The US government argued that the authority to detain individuals relied on 10 USC §956(5), which authorizes the use of funds for «expenses incident to the maintenance, pay, and allowance of prisoners of war» as well as «other persons in the custody of the Army, Navy, or Air Force whose *status* is determined by the secretary concerned to be similar to prisoners of war». Elsea argued that the US administration interpreted the phrase «similar to prisoners of war» to include «enemy combatants» who were not granted POW *status*¹⁴.

⁴ *Hamdi v. Rumsfeld* (03-6696), 542 US 507 (2004), decided on June 28, 2004.

⁵ *Hamdan v. Rumsfeld* (05-184), 548 US 557 (2006), decided on June 29, 2006.

⁶ *Rasul v. Bush* (03-334), 542 US 466; 124 S. Ct. 2686; 159 L. Ed. 2d 548; 2004 US LEXIS 4760; 72 USLW. 4596; 2004 Fla. L. Weekly Fed. S 457.

⁷ *Boumediene v. Bush* (06-1195); 553 US 723; 128 S. Ct. 2229; 2008 WL 2369628; 2008 US LEXIS 4887.

⁸ These definitions will be both abandoned and replaced in 2022 and clustered under the term «unprivileged enemy belligerents (UEBs)».

⁹ *Geneva Conventions of 1949*, 75 UNTS 970.

¹⁰ Lawrence Ari Fleischer, *White House Press Secretary announcement of President Bush's determination re legal status of Taliban and Al Qaeda detainees*, The White House Office of the Press Secretary, 7 February 2002, <https://2009-2017.state.gov/s/1/38727.htm>.

¹¹ In this context, the US government gives a specific legal meaning to the term «detainee» that is not synonymous with the word «prisoner» (of war).

¹² US Department of Defense, *DoD News Briefing-Secretary Rumsfeld and Gen. Pace*, 22 January 2002, <http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=2254>.

¹³ *Habeas Corpus Suspension Act of 1863*, 12 Stat. 755.

¹⁴ Elsea, *Op. cit.*, p. 597.

2004, the creation of the Combatant Status Review Tribunals and the question of their legality

The AUMF did not define the term «enemy combatant» (EC) until 7 July 2004, when Deputy Secretary of Defense Paul Wolfowitz issued the Order on creating the Combatant Status Review Tribunals (CSRTs) for confirming whether captives held in extrajudicial detention at GTMO were correctly designated as ECs¹⁵. The definition of EC provided in the Order is: «an individual who was part of or supporting Taliban or al-Qaeda forces, and associated forces that are engaged in hostilities against the United States or its coalition partners», including «any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces»¹⁶.

According to the Department of Defense (DoD) *Dictionary of Military and Associated Terms* an enemy combatant is «in general, a person engaged in hostilities against the United States or its coalition partners during an armed conflict»¹⁷. Active participation in hostilities is also defined in DoD Dictionaries¹⁸. The US definition of «unprivileged belligerent» was originally provided by the *Directive on the Detainee Program* approved by

¹⁵ US Department of Defense, Deputy Secretary of Defense, *Order Establishing Combatant Status Review Tribunals*, 7 July 2004, https://www.supremecourt.gov/opinions/URLs_Cited/OT2005/05-184/05-184.pdf. For the procedure of GITMO detainees' designation as enemy combatant, see the proceedings of the CSRT Review Board https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Detainee_Related/000300-000399.pdf.

¹⁶ Such authority to detain was reaffirmed in a memorandum drafted by the US Department of Justice on 13 March 2009 addressing the question of the scope of the government's detention authority under the 2001AUMF United States District Court of Colombia, «Respondents' Memorandum regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay», *In re Guantanamo Bay Detainee Litigation*, 13 March 2009, <https://www.justice.gov/sites/default/files/opa/legacy/2009/03/13/memo-re-det-auth.pdf>, and later the *National Defense Authorization Act for Fiscal Year 2012* (NDAA 2012), § 1021(b)(2), 125 Stat. at 1562.

¹⁷ US Joint Chief of Staff (ed.), *Department of Defense Dictionary of Military and Associated Terms*, JP 1-02 (as amended through 15 February 2016), Washington, D.C., DoD. For another definition of the term, see also: *Detention of Enemy Combatants Act*, a bill introduced in several sessions of the US Congress (H.R. 5684, 107th; H.R. 1029, 108th; H.R. 1076, 109th) but never enacted.

¹⁸ «Active participation in hostilities: a. Taking part in combat or military activities related to combat, including sabotage, and serving as a decoy, a courier, or at a military checkpoint; or b. Taking part in direct support functions related to combat, including transporting supplies or providing other services. c. Active participants in hostilities may include (non-exhaustive) - (1) Combatants; (2) Porters; (3) Spies or informants; (4) Couriers; (5) Human mine detectors; or (6) Executioners». In: Joint Chief of Staff (ed.), *United States Government Compendium of Interagency and Associated Terms*, Washington D.C., November 2019, https://www.jcs.mil/Portals/36/Documents/Doctrine/dictionary/repository/usg_compendium.pdf?ver=2019-11-04-174229-423.

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Deputy Secretary of Defense Robert O. Work on 19 August 2014: «an individual who is not entitled to the distinct privileges of combatant *status* (e.g., combatant immunity), but who by engaging in hostilities has incurred the corresponding liabilities of combatant *status*»¹⁹. In Directive 2310.01E, the term «unprivileged belligerent» is synonymous with the term «unlawful enemy combatant»²⁰. Examples of unprivileged belligerents are individuals who have forfeited the protections of civilian *status* by joining or substantially supporting a non-state enemy armed group in the conduct of hostilities; combatants who have forfeited the privileges of combatant *status* by engaging in spying, sabotage or other similar acts behind enemy lines.²¹ According to Geneva Convention (III) only spies and mercenaries do not have the right to be treated as combatants or prisoners of war²².

The question of military jurisdiction over enemy spies was addressed in some court cases²³, but the Congress, which made spying punishable by court-martial or military commission, rejected the idea of subjecting American citizens to military jurisdiction after being accused of associating with the enemy to commit hostile acts²⁴.

In World War II eight German saboteurs caught on US soil while wearing civilian clothes were deemed to be unlawful combatants and thus not entitled to POW *status*. Six of them were executed by electric chair as spies²⁵. In *Ex Parte Quirin* (1942) the US Supreme Court (SCOTUS) ruled:

The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the *status* of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals²⁶.

In this seminal decision (1942) the SCOTUS used terms with their historical meanings under international law (IL) within the definition in the

¹⁹ US Department of Defense, *Department of Defense Directive Number 2310.01E of 19 August 2014 on Department of Defense Detainee Program*, p. 14.

²⁰ *Ibidem*.

²¹ *Ibidem*.

²² Art. 46 and Art. 47 of Additional Protocol I.

²³ *Ex parte Milligan*, 71 US (4 Wall.) 2 (1866), 120–21, 18 L.Ed. 281 (1866); *Ex parte Gilroy*, 257 F. 110, 112–13 (S.D.N.Y. 1919); *United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y. 1920).

²⁴ Elsea, *Op. cit.*, p. 578.

²⁵ Federal Bureau of Investigation (FBI), *Nazi Saboteurs and George Dasch*, n.d., <https://www.fbi.gov/history/famous-cases/nazi-saboteurs-and-george-dasch>.

²⁶ *Ex parte Quirin*, 317 US 1 (1942), §31.

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Hague Convention (IV) of 1907²⁷ to distinguish between unlawful and lawful combatants: «Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful».

The case of the German saboteurs did not result in any military determinations that those charged were enemy combatants based on their association with the enemy or their hostile acts, and Elsea inferred that it is not clear what kind of ties with other enemy saboteurs would have authorized the military to detain them without trial as enemy combatants under the law of war²⁸. The *Directive on the Detainee Program* of 2014, which reissues an earlier directive passed by the Bush administration in 2006, updated the policy to ensure compliance with the laws of the United States and the laws of war, including the Geneva Conventions. The revised Directive (2014) did not reflect any substantive changes: it improved the process for handling detainees from point of capture or assumption of custody until final transfer, repatriation, or release of detainees, including applicable humane treatment. The Directive, valid for 10 years²⁹, said that treatment of all detainees should be consistent with the laws of war and with the standards established in Common Article 3 of the Geneva Conventions³⁰, and the principles enshrined in Art. 4, 5 and 6 of Additional Protocol II³¹, and in Art. 75 of Additional Protocol I³².

Additional Protocol II applied during non-international armed conflict. Article 4 provided that who did not take a direct part or who had ceased to take part in hostilities, should be treated humanely. Article 5 provided that persons deprived of their liberty for reasons related to the armed conflict, whether they were interned or detained, should be treated humanely in

²⁷ *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, entry into force 26 January 1910.

²⁸ Elsea, *Op. cit.*, p. 584.

²⁹ The Directive was amended and reissued by Deputy Secretary Kathleen H. Hicks, effective 15 March 2022, <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231001e.pdf>.

³⁰ Common Article 3 (or simply “Article 3”) says that just/lawful combatants are entitled to POW status. For a discussion on that just/lawful and unjust/unlawful combatants, see: Marco Marsili, *Morals and Ethics in Counterterrorism*, in «Conatus-Journal of Philosophy», 2023, vol. 8, no. 2 (Special Issue: Ethics of War), pp. 373–398.

³¹ *Protocol II (1977) Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts*, 1125 UNTS 609.

³² *Protocol I (1977) Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts*, 1125 UNTS 3.

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accordance with Art. 4. Art. 6 provided that no sentence should be passed, and no penalty should be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. The procedure should provide for an accused to be informed without delay of the particulars of the offence alleged against him and should afford the accused before and during his trial all necessary rights and means of defense (§a); anyone charged with an offence is presumed innocent until proved guilty according to law (§d); anyone charged with an offence should have the right to be tried in his presence (§e). Article 75 of Additional Protocol I applied during international armed conflict and occupation to «persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions».

The Directive 2310.01E provided the following definition for the law of war: «the part of international law that regulates the conduct of hostilities and the protection of victims of armed conflict in both international and non-international armed conflict and occupation, and that prescribes the rights and duties of neutral, non-belligerent, and belligerent states». The Directive was «specifically intended to address the circumstances of armed conflict» where «the law of war, including the Geneva Conventions» applies³³; it summarizes that the law of war «encompasses all international law applicable to the conduct of military operations in armed conflicts that is binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party [e.g., the Geneva Conventions of 1949], and applicable customary international law». An amended version of Directive 2310.01E issued by Deputy Secretary Kathleen H. Hicks on 15 March 2022, refers to the definition of the law of war as provided in specific DoD Directive 2311.01 of 2 July 2020 on the topic³⁴.

The operative provisions set up in §3(f) of Directive 2310.01E refer to three categories of military detainees in an armed conflict: prisoners of war, unprivileged belligerents, and civilian internees. The glossary provides the

³³ The law of war also known as the law of armed conflict, international humanitarian law, or simply IHL. The Geneva Conventions of 1949 and their Additional Protocols regulates the conduct of armed conflict and are the core of IHL.

³⁴ Office of the General Counsel of the Department of Defense, DOD Directive 2311.01 on *DoD Law of War Program*, 2 July 2020, <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231101p.pdf?ver=2020-07-02-143157-007>. Directive 2311.01 reissues Directive 2311.01E of 6 May 2006.

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definition for detainee: any individual captured by or transferred to the custody or control of DoD personnel pursuant to the law of war, excluding persons being held solely for law enforcement purposes, except where the US is the occupying power. These definitions maintained in the revised 2022 version with some nuances: POWs were rebranded «enemy prisoners of war (EPWs)», and «unprivileged belligerents» were worded as «unprivileged enemy belligerents (UEBs)»³⁵. The terms «unlawful enemy combatant» and «unprivileged belligerent» used in other DoD regulations were deemed synonymous with the term «UEB» contained in the fresher issuance of the Directive³⁶.

According to the definition set forth in the Directive glossary, a EPW is «an individual who is described by Articles 4 and 5 of the Geneva Conventions Relative to the Treatment of Prisoners of War as a prisoner of war and who is in the custody or control of the DoD»³⁷. A UEB is portrayed as: «an individual who by engaging in hostilities against the United States or its coalition partners has incurred one or more of the corresponding liabilities of combatant status (e.g., being made the object of attack and subject to detention), but who is not entitled to any of the distinct privileges of combatant status (e.g., combatant immunity or EPW status)»³⁸. Examples of UEBs are: «individuals who have forfeited the protections of civilian status by joining or substantially supporting an enemy non-state armed group in the conduct of hostilities; combatants who have forfeited the privileges of combatant status by engaging in spying, sabotage, or other similar acts behind enemy lines»³⁹.

Both EPWs and UEBs may be lawfully detained «until a competent authority determines that the conflict has ended or that active hostilities have ceased, and until a safe and orderly transfer or release is practicable»⁴⁰. The amended Directive 2310.01E also included civilians who may lawfully be detained until the reasons that necessitated their internment no longer exist and they can be released or transferred.

The Directive, as originally issued and then revised, calls for human treatment and respect for the dignity of all detainees consistent with applicable US law and policy and the law of war and during all military

³⁵ DoD Directive 2310.01E of 15 March 2022, §3.2.

³⁶ *Idem*, p. 17.

³⁷ *Ibidem*.

³⁸ *Ibidem*.

³⁹ *Ibidem*.

⁴⁰ *Idem* (§3.2).

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operations but authorizes segregation for security reasons or law enforcement investigations. It says that access to detainees «will be permitted in limited circumstances».

In 2002, when President Bush determined that detainees at Guantánamo would «not be treated legally as prisoners of war» under Geneva Convention (III), the US government guaranteed that they would be treated well under the same principles, as the US usually do, and not because they were given legal POW *status*⁴¹. At the time the Directive was drafted (2014), the Department of Justice claimed that individuals were detained at Guantánamo under the AUMF «as informed by the law of war, and consistent with applicable domestic and international law»⁴².

The Geneva Conventions prohibit torture and provide that those who are out of action, such as surrendering combatants, the wounded, sick, prisoners of war and other captives and detainees, must be identified as such and treated humanely. McColgin concluded that prisoners were interrogated at GTMO using cruel, inhumane treatment considered illegal under the US Constitution⁴³. In a memorandum drafted in July 2004 for the Inspector General of Department of the Navy, General Counsel Alberto J. Mora argued that the treatment of detainees was unlawful. The International Committee of the Red Cross (ICRC)⁴⁴ has consistently expressed grave concern over the humanitarian consequences and legal implications of holding persons in undisclosed detention in the context of the US counter-terrorism strategy.

In a strictly confidential *Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody* of February 2007, the ICRC found that individuals, who were transferred from the Central Intelligence Agency (CIA) detention program to the custody of the Department of Defense in the Guantánamo facility after 2006, were subjected to systematic physical and/or psychological ill-treatment, and that transfers to places of detention

⁴¹ Fleischer, *Op. cit.*.

⁴² US Attorney General, *Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014*, ap.

⁴³ David L. McColgin, «The Theotorture of Guantánamo», in Nathan C. Walker and Edwin J. Greenlee (eds.), *Whose God Rules? Is the United States a Secular Nation or a Theolegal Democracy?*, New York, Palgrave MacMillan, 2011, pp. 202-203, https://doi.org/10.1057/9781137002242_13.

⁴⁴ International Committee of the Red Cross (ICRC), *ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody*, WAS 07/76, Washington, D.C., ICRC Regional Delegation for United States and Canada, 14 February 2007, p. 3, https://nsarchive2.gwu.edu/torture_archive/docs/Document%2008.pdf.

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in unknown locations and continuous solitary confinement and incommunicado detention was itself a form of ill-treatment.

The Red Cross denounced these measures as an arbitrary deprivation of liberty and enforced disappearance and believed that the US could achieve its security goals while respecting its obligations and historical commitment to abide by international law⁴⁵. The ICRC gathered that this detention regime «was clearly designed to undermine human dignity and to create a sense of futility by inducing, in many cases, severe physical and mental pain and suffering [...] resulting in exhaustion, depersonalization and dehumanization», and therefore amounted to torture⁴⁶. The report found also that the interrogation process and the infliction of ill-treatment constituted a gross breach of medical ethics and, in some cases, amounted to participation in torture⁴⁷. The Red Cross urged the US to put an end to abuse and to treat prisoners consistent with IHL and internationally recognized standards⁴⁸.

In a report on the *Human Rights Situation of Detainees in Guantánamo* released in November 2015⁴⁹, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) identified gross human rights violations, including torture of prisoners. In January 2017, on the 15th anniversary of the opening of the detention camp, ODIHR director Michael Georg Link, reiterated the need to close the facility without further delay: «indefinite detention without charge or trial and a lack of accountability for abuses, including acts of torture and other ill-treatment at the Guantánamo detention facility and as part of the CIA rendition program, run directly counter to the United States commitments as an OSCE participating State and to other international human rights obligations»⁵⁰. Link concluded: «detention without effective recourse to justice and protection against abuse has no place in a democratic society based on the rule of law, human rights and fundamental freedoms».

Reportedly, prisoners died of torture in «black sites», secret prisons operated by the CIA outside US territory and jurisdiction, like Asadabad,

⁴⁵ *Idem*, pp. 4, 26.

⁴⁶ *Idem*, p. 26.

⁴⁷ *Idem*, pp. 26-27.

⁴⁸ *Idem*, pp. 3, 27-28.

⁴⁹ OSCE/ODIHR, *Report on the Human Rights Situation of Detainees at Guantánamo*, Warsaw, OSCE, 2015, <http://www.osce.org/odihr/198721>.

⁵⁰ OSCE/ODIHR Public Affairs Unit, *OSCE/ODIHR Director reiterates need for swift closure of Guantanamo Bay detention facility*, 11 January 2017, <http://www.osce.org/odihr/293381>.

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Bagram and Gardez in Afghanistan, Abu Ghraib, Camp Whitehorse, Basra, Mosul, Tikrit, Bucca, and Qaim in Iraq⁵¹. Steven H. Miles, an American doctor, author, and professor of medicine who has published on ethically topics relating to medicine and the use of torture, concluded that several DoD practices helped to obstruct medical evaluation of these deaths. Eight men died in the GTMO prison camp waiting for a trial. Six of them were suicides, while others unsuccessfully attempted suicide. US military claimed the suicides were a conspiracy as part of «asymmetrical warfare» against the nation⁵², but the report of the Naval Criminal Investigative Service (NCIS) said the government's conclusion of suicide by hanging in their cells was not proven⁵³.

A full report by the European Parliament found that the «black sites» were part of the US «extraordinary renditions program»⁵⁴. According to a memorandum of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE), about 100 persons – the figure does not include 100 US-detained ghost prisoners – were kidnapped by the CIA on European soil and subsequently taken to countries where they could have been tortured⁵⁵.

The Parliamentary Assembly of the Council of Europe concluded that in countering terrorism, «the American Administration has inappropriately and unilaterally disregarded certain key human rights and humanitarian legal norms»⁵⁶. PACE Resolution 1539 (2007) found that Washington held detainees unlawfully «in flagrant breach of its international obligations» under the International Covenant on Civil and Political Rights (ICCPR)⁵⁷, the Convention Against Torture and Other Forms of Cruel and Inhuman or

⁵¹ Steven H. Miles (2005), *Medical Investigations of Homicides of Prisoners of War in Iraq and Afghanistan*, in «Medscape General Medicine», 2005, vol. 7, no. 3, p. 4; ICRC, *Op. cit.*

⁵² Mark Denbeaux et al., *Death in Camp Delta*, Seton Hall Law School Legal Studies Research Paper no. 2010- 37 (12 December 2009), pp. 3, 9, 37, <http://dx.doi.org/10.2139/ssrn.1582658>.

⁵³ *Idem*, pp. 41-44.

⁵⁴ European Parliament, Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, rapporteur Giovanni Claudio Fava, *Report of the European Parliament on the Alleged Use of European Countries by the CIA for the Transport, and the Illegal Detention of Prisoners*, (2006/2200(INI)), Final A6-0020/2007, RR\382246EN.doc, PE 382.246v02-00, §178, 232

⁵⁵ Parliamentary Assembly of the Council of Europe (PACE), *Resolution 1539 (2007)*.

⁵⁶ *Idem*. See also: Parliamentary Assembly of the Council of Europe (PACE), rapporteur Tony Lloyd, *Report of the Committee on Legal Affairs and Human Rights*, Doc. 11181 of 8 February 2007.

⁵⁷ *International Covenant on Civil and Political Rights (ICCPR)* adopted by UN General Assembly *Resolution 2200A (XXI)* on 16 December 1966, entered into force 23 March 1976.

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Degrading Treatment or Punishment⁵⁸, the Geneva Conventions, and other principles of international humanitarian law⁵⁹. The Parliamentary Assembly denounced the US secret detention centers and unlawful inter-state transfer routes, often in collaboration with countries notorious for using torture⁶⁰.

The PACE complained that the United States had tainted its reputation as supporter of civil liberties and human rights through the systematic exclusion of all forms of judicial protection and by depriving hundreds of suspects of their basic rights, including the right to a fair trial⁶¹. Resolution 1539 concluded that the US had paid a high price in terms of loss of international credibility for its conduct in black sites and in Guantánamo.

The *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, a report released by the US Senate Select Committee on Intelligence⁶², unveiled various forms of torture on prisoners between 2001 and 2006 («enhanced interrogation techniques», in the language of the US government). The PACE Committee on Legal Affairs and Human Rights argued that «reinforced interrogation techniques» was a euphemism for torture⁶³.

When President George Bush declared the War on Terror in 2001, his administration did not apply IHL to overseas interrogations. Human rights violations in overseas detention centers, including Iraq, Afghanistan, and Guantánamo, were «legalized» by President Bush⁶⁴. Guantánamo became the symbol of human rights violations in the War on Terror.

In *Hamdi v. Rumsfeld* (2004) the Supreme Court recognized the power of US government to detain enemy combatants, including US citizens, but ruled that prisoners who were US citizens had the right to due process and

⁵⁸ *Convention against torture and other cruel, inhuman, or degrading treatment or punishment*, adopted on 10 December 1984, by UN General Assembly *Resolution 39/46*, 39 UN GAOR, Supp. no. 51; A/39/51 (1984); UNTS, vol. 1465, 1-24841, p. 113.

⁵⁹ *Idem*, §3.1.

⁶⁰ *Idem*, §3.2.

⁶¹ Parliamentary Assembly of the Council of Europe (PACE), *Resolution 1507 (2006)*, §8.

⁶² US Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, approved 13 December 2012, updated for release 3 April 2014, declassification revisions 3 December 2014, <http://www.intelligence.senate.gov/press/committee-releases-study-cias-detention-and-interrogation-program>.

⁶³ Parliamentary Assembly of the Council of Europe (PACE), rapporteur Dick Marty, *Legal remedies for human rights violations in the North-Caucasus Region*, Doc. 12276 of 4 June 2010, §51.

⁶⁴ Federal Bureau of Investigation (FBI), *Message MSG014 of 22 May 2004, Memo 4940-4941, Detainees 1640-1641*, https://www.aclu.org/sites/default/files/torturefoia/released/FBI.121504.4940_4941.pdf.

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the ability to challenge their enemy combatant *status* before an impartial authority. The Court rejected the request of the executive to hold an individual indefinitely for interrogation purposes. The Defense Department considered that the AUMF provided authority to detain those individuals until the end of hostilities⁶⁵. Elsea argued that it was difficult to imagine that Congress would have meant to give the president authority to detain indefinitely US citizens, as enemy combatants, without trial⁶⁶.

In *Rasul v. Bush* (2004), the SCOTUS decided that the court system had the authority to determine whether foreign nationals (non-US citizens) were wrongfully imprisoned at Guantánamo. The Sixth Amendment to the Constitution, part of the *Bill of Rights*⁶⁷, affirms the right to a fair trial. *In re Winship*⁶⁸, the Supreme Court upheld that the presumption of innocence should apply already in the adjudicatory stage and that delinquent *status* should be proved beyond a reasonable doubt⁶⁹.

As a result of the SCOTUS decision in *Rasul*, eleven detainees held as enemy combatants at GTMO pursuant to the AUMF, and accused of ties with al-Qaeda or other terrorist organizations, called the District Court of Columbia (D.D.C.), complaining that their detention and conditions at Guantánamo violated, *inter alia*, the Fifth Amendment – the right not to be deprived of liberty without due process of law – and Geneva Convention III and IV⁷⁰. Some of the petitioners were taken into custody *incommunicado* for as long as three years in distant locations, including Afghanistan, Gambia, Zambia, Bosnia and Herzegovina, and Thailand, without the opportunity to challenge their «enemy combatant» *status*.

The Court ruled that the homeland legal framework applies also to Guantánamo and recognized the detainees' fundamental constitutional rights under the Due Process Clause of the Fifth Amendment also to alien citizens. The DDC gathered that the procedures provided by CSRTs did not satisfy constitutional due process guarantees. The District Court decided that GTMO prisoners have the right to challenge the basis of their detention and the government must distinguish between POWs, civilians, and enemy

⁶⁵ US Attorney General, *Op. cit.*.

⁶⁶ Elsea, *Op. cit.*, p. 596.

⁶⁷ *Bill of Rights*, joint resolution passed by the US Congress on Sept. 25, 1789.

⁶⁸ *In re Winship*, 397 US 358 (1970).

⁶⁹ See also: *In re Gault*, 387 US 1, 387 US 13 (1967).

⁷⁰ *In re Guantánamo Detainees Cases*, Case No. 02-299, decided on Jan. 31, 2005, Memorandum Opinion by Judge Joyce Hens Green, 355 F.Supp.2d 443 (D.D.C. 2005).

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combatants. Detainees cannot be tried by military commissions until has been determined if they are enemy combatants⁷¹.

In December 2005, the Congress passed the Detainee Treatment Act (DTA)⁷², part of the Department of Defense Appropriations Act of 2006⁷³ and the National Defense Authorization Act for Fiscal Year 2006 (NDAA 2006)⁷⁴, which prohibited the «cruel, inhuman, or degrading treatment or punishment of persons under the detention, custody, or control» of the US government and provided «uniform standards» for interrogation.

The DTA regulated the treatment of enemy combatants and suspected terrorists detained in the custody or control of the US, regardless of their nationality or physical location. The Act required the DoD, intelligence, and law enforcement agencies to fulfill US statutes and treaties such as the Fifth, Eighth, and Fourteenth Amendments, the UN Convention against Torture, and the Geneva Conventions. While the Constitution applies to US citizens abroad and non- citizens on American soil⁷⁵, the Detainee Treatment Act granted broad protection to all prisoners, regardless of their geographic location or nationality. These provisions do not appear to prohibit US agencies from transferring persons to other countries where those persons would face cruel, inhuman, or degrading treatment or punishment⁷⁶. Garcia argued that «it is not clear that these and similar treatments may never be deemed constitutionally impermissible outside the criminal context, including when such treatments are used upon enemy combatants or terrorist suspects who have not been charged with a criminal offence»⁷⁷.

The DTA contains regulations⁷⁸ that require DoD personnel to follow the guidelines set forth in the *Army Field Manual on Intelligence*

⁷¹ 10 USC 950, current through the *Veterans Entrepreneurship Act of 2015*, provides crimes triable by military commission.

⁷² *Detainee Treatment Act of 2005* § 1001-1006 [Title X of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006], PL109-148, approved 30 December 2005 and amended through PL 111-84 enacted 28 October 2009. Certain portions of the DTA of 2005 were enacted as 42 USC § 2000dd.

⁷³ *Department of Defense Appropriations Act of 2006*, Pub. L. 109-148, 119 Stat. 2680.

⁷⁴ *National Defense Authorization Act for Fiscal Year 2006* (NDAA 2006), Pub. L. 109-163, 119 Stat. 3136.

⁷⁵ See, e.g., *United States v. Verdugo-Urquidez*, 494 US 259 (1990) and *Rasul v. Bush*.

⁷⁶ Michael John Garcia, *Interrogation of Detainees: Overview of the McCain Amendment*, CRS Report for Congress RL33655, Washington, D.C., CRS, 2006, p. 3, 7.

⁷⁷ *Idem*, p. 6.

⁷⁸ DTA §1002; NDAA 2006, §1402.

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Interrogation (FM 34-52) – the manual was updated after the *Hamdan* ruling⁷⁹. An early version (1992) of the *Field Manual* provided for compliance with the Geneva Conventions. The updated version of FM 34-52 requires treating prisoners consistently with the Geneva law, and prohibits the use of torture or cruel, inhuman, or degrading treatment in any circumstances. Garcia noted that an exception applies to individuals detained pursuant to US criminal or immigration laws⁸⁰.

Indeed, the Detainee Treatment Act does not require non-DoD agencies, such as non-military intelligence and law enforcement agencies, to follow the *Field Manual* guidelines while interrogating detainees. The DTA also removed the federal courts' jurisdiction over prisoners who seek to challenge the legality of their detention⁸¹. The Act says that no court, justice, or judge have jurisdiction to hear or consider applications on behalf of Guantánamo detainees and gives the D.C. Court of Appeals exclusive jurisdiction to review CSRTs decisions. In *Hamdan v. Rumsfeld*, the SCOTUS overruled the Congress's attempt to deprive the Court of its jurisdiction.

In *re Guantánamo Detainee Cases*, judge Joyce Hens Green, who coordinated the many *habeas corpus* cases, concluded that the US government would be indefinitely holding the detainees, possibly for life, without charging them of a crime, solely because of their contacts with individuals or organizations tied to terrorism and not because of any terrorist activity that the detainees aided, abetted, or undertook themselves. Justice Green recalled that the US president did not have the authority to detain individuals indefinitely⁸². In her memorandum opinion, justice Green stressed that Murad Kurnaz, a Turkish citizen who was arrested by Pakistani police and turned over to the US, was held from 2001 until 2006 in extrajudicial detention in the military base at Kandahar, Afghanistan, and at Guantánamo, without any evidence whatsoever that he had any ties to terrorism⁸³. Judge Joyce determined that the petitioners did enjoy constitutional rights resulting from international treaties cognizable in a US

⁷⁹ US Department of the Army (ed.), *Human Intelligence Collector Operations*, Field Manual No. 2-22.3 (FM 34- 52), Washington, D.C., Department of the Army, 2006. https://armypubs.army.mil/ProductMaps/PubForm/Details.aspx?PUB_ID=82535.

⁸⁰ Garcia, *Interrogation of Detainees*, cit., p. 2.

⁸¹ DTA, § 1005(e) amending 28 USC §2241.

⁸² *Rasul v. Bush*, at 2641, cited in *In re Guantánamo Detainees Cases*, p. 60.

⁸³ See: *Kurnaz v. Bush*, Civil Nos. 04-1135 (ESH), 05-0392 (ESH) (D.D.C. 12 April 2005).

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court and that the Geneva Conventions – in particular with respect to Art. 4 and Art. 5 of Convention III – was self-executing⁸⁴.

Later SCOTUS decisions, including the *Hamdan* ruling, overturned the policy of the Bush administration and ruled that the Geneva Conventions apply to all detainees in the War on Terror. In *Hamdan v. Rumsfeld*, the Supreme Court decided that the CSRTs violated domestic and international law and did not provide for protection under the Conventions. *Hamdan*, not a US military, would be tried before a military «commission» which was not a court-martial. The CSRTs were set up in 2004, after the *Rasul* case, which ruled that GTMO prisoners have the right to challenge the basis of their detention, and that government needs to distinguish between POWs, civilians, and enemy combatants.

The SCOTUS argued that CSRTs did not qualify as «competent tribunals» under the provision of Art. 5 and 202 of Geneva Convention (III), and Art. 21 of the Uniform Code of Military Justice (UCMJ)⁸⁵, and therefore violated the laws of war. The CSRTs were considered unconstitutional because they did not fulfill the UCMJ, which allows the creation of military commissions consistently with the laws of war. The Supreme Court found that President Bush did not have the authority to set up war crimes tribunals and found the special military commissions illegal under both military justice law and Geneva Conventions. The SCOTUS concluded that the president could not unilaterally set up such tribunals and that the Congress needed to authorize a means by which detainees could confront their accusers and challenge their detention.

The Supreme Court accepted the Administration's argument that the US was engaged in a «non- international armed conflict with al-Qaeda» and concluded that Common Article 3 covers even that purported conflict but does not conclude that the US is in a worldwide-armed conflict with al-Qaeda. After the *Hamdan* ruling, the executive was forced to apply Art. 3 and grant the right to defense to GTMO detainees⁸⁶.

The Military Commissions Act of 2006 (MCA)⁸⁷, drafted after the *Hamdan* decision, established procedures to try unlawful alien enemy

⁸⁴ See also: *Hamdan v. Rumsfeld*.

⁸⁵ *Uniform Code of Military Justice* (UCMJ), 64 Stat. 109, 10 USC §§801-946.

⁸⁶ Article 3(1)(c) says: «the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples».

⁸⁷ *Military Commissions Act of 2006*, Pub. L. 109-366, 120 Stat. 2006.

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combatants for violations of the law of war and other offences and determined that the Geneva Conventions cannot be invoked as a source of rights⁸⁸.

The MCA amended provisions of the War Crimes Act of 1996⁸⁹, which did make it a criminal offence to commit any violation of Art. 3, so that only specified violations would have been punishable. Garcia deduced that the MCA criminalized torture and certain less severe forms of cruel treatment against persons protected by Art. 3⁹⁰, but it does not criminalize all conducts that violate DTA provisions (i.e., cruel, inhuman, or degrading treatment of the kind prohibited under the Fifth, Eighth, and Fourteenth Amendment)⁹¹. He inferred that the MCA amended the War Crimes Act in a way that US personnel would only be guilty of severe violations of Article 3⁹².

The MCA was drafted with the declared purpose «to authorize trial by military commission for violations of the law of war». It can be considered an amnesty law for crimes committed in the War on Terror by retroactively rewriting the War Crimes Act. Under the MCA, a military commission shall have jurisdiction to try any offence made punishable by «the law of war when committed by an unlawful alien enemy combatant before, on, or after September 11, 2001» – including death penalty –, but shall not have jurisdiction over lawful enemy combatants. Art. 6(1c) of Additional Protocol II says that «no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed».

According to the War Crimes Act, a grave breach of the Geneva Conventions constitutes war crime. The definition of «grave breach» in the Geneva law is: «willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health». The provisions of the War Crimes Act apply if either the victim or the perpetrator is a US national. The penalty may be life

⁸⁸ MCA, §948b(g).

⁸⁹ *War Crimes Act of 1996*, Pub. L. 104-192, 110 Stat. 2104. 18 USC §2441.

⁹⁰ Garcia, *Interrogation of Detainees*, cit., p. 9. See also: Michael John Garcia, *UN Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, CRS Report RL32438, Washington, D.C., CRS, 2009, pp. 2, 17-18.

⁹¹ Michael John Garcia, *The War Crimes Act: Current Issues*, CRS Report for Congress RL33662, Washington, D.C., CRS, 2009.

⁹² Garcia, *Interrogation of Detainees*, cit., p. 9.

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imprisonment or death if the conduct result in the death of one or more victims.

2006, the Military Commissions are established

The Military Commissions *Act* prohibits prisoners who are classified as unlawful enemy combatants or are awaiting hearings on their *status* from using *habeas corpus* to petition federal courts in challenges to their detention. This norm violates the provisions of Art. 6 of Additional Protocol II. Elsea gathered that the detention of POWs and civilians considered «enemy aliens» under the Enemy Alien Act, which applies only to US residents, is administrative rather than punitive, and thus no criminal trial is required⁹³. The Enemy Alien Act is part of four laws known as the Alien and Sedition Acts⁹⁴ that enacted increasing restrictions against aliens. It was used as the basis for incarcerating enemy aliens and confiscating their property during World War II. After the end of the war, individuals arrested and interned were deported to their nations of origins.

In *Boumediene v. Bush*, the SCOTUS ruled that GTMO inmates and other foreign nationals do have the constitutional right to direct access to federal courts to challenge their detentions, and that the MCA is an unconstitutional suspension of that right. In its decision, the Supreme Court recalled the Suspension Clause of the Constitution (Clause 2) located in Art. 1§9, which provides that «the Privilege of the Writ of *habeas corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it». Justice Anthony Kennedy wrote in the majority opinion that «the laws, and Constitution are designed to survive, and remain in force, in extraordinary times». The Court concluded that, even if *habeas corpus* was suspended, an adequate and effective substitute should be provided. In *Ex parte Milligan* (1866) the SCOTUS had already ruled that the «suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself».

During the Civil War (1861-1865), the Congress authorized President Lincoln to suspend the privilege of the writ of *habeas corpus* and provided for the release of political prisoners. The Habeas Corpus Suspension Act of 1863⁹⁵ authorized to «hold persons in their custody either as prisoners of war, spies, or aiders and abettors of the enemy, [...] or otherwise amenable to military law, or the rules and articles of war, or the rules or

⁹³ Elsea, *Op. cit.*, p. 571.

⁹⁴ *Alien and Sedition Acts*, 50 USC §21-24.

⁹⁵ *Habeas Corpus Suspension Act of 1863*, 12 Stat. 755.

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regulations prescribed for the military or naval services, by authority of the President, [...] or for any other offence against the military or naval service». This emergency law was challenged before the Supreme Court, which sanctioned as unconstitutional the suspension of certain fundamental rights in wartime. In *Ex parte Milligan*, the SCOTUS decided that a dangerous civilian – the petitioner was considered an unlawful belligerent because was suspected to be member of a paramilitary organization associated with the Confederate Army – could not constitutionally be held as a prisoner of war and tried by a military commission, nor can one be detained without trial: «the usages of war could not, under the Constitution, afford any sanction for the trial there of a citizen in civil life not connected with the military or naval service, by a military tribunal, for any offence whatever». The Court ruled that «a citizen not connected with the military service and a resident in a State where the courts are open and in the proper exercise of their jurisdiction cannot, even when the privilege of the writ of *habeas corpus* is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law». The Supreme Court denied the request of the government to hold a prisoner of war, a belligerent taken in action with arms in his hands, until the end of the conflict and excluded from the privileges of the POW *status* requiring courts to free individuals detained without charge, then handed over by the military to civilian authorities, to be tried for his crimes⁹⁶.

Meisels commented that the Bush administration invoked the term «terrorism» to give the accused the unprotected *status* of «lawless combatant» and to associate the term with a list of prosecutable crimes attributed to the status of irregular combatants, based on the assumption that they are not entitled either to the law of war immunities or the rights granted by the criminal code⁹⁷. She argued that the lawless *status* of terrorists as unprotected «unlawful combatants» makes them subject to summary trial for the crime of terrorism. These individuals are denied due process of law, and they are tried with fewer procedural guarantees. Gill and van Sliedregt concluded that the Bush administration considered Geneva Conventions and US constitutional safeguards to be obstacles in the War on Terror⁹⁸.

⁹⁶ Cited in Elsea, *Op. cit.*, p. 573.

⁹⁷ Tamar Meisels, *Combatants-Lawful and Unlawful*, in «Law and Philosophy», 2007, vol. 26, no. 1, pp. 53-54, doi: 10.1007/s10982-005-5917-2.

⁹⁸ Terry D. Gill T.-Elies van Sliedregt, *Guantánamo Bay: A Reflection on the Legal Status and Rights of «Unlawful Enemy Combatants»*, in «Utrecht Law Review», 2005, vol. 1, no. 1, p. 54.

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In 2010, Colonel Lawrence Wilkerson, a former aide to Secretary of State Colin Powell, declared in an affidavit in *Hamad v. Bush*, that top US officials, including President Bush, Vice President Dick Cheney, and Defense Secretary Donald Rumsfeld, were aware that most of the prisoners sent to Guantánamo were innocent and held at GTMO for political expediency⁹⁹.

As widely invoked by the SCOTUS in its rulings on Guantánamo, the judiciary's role is to prevent abuse of power by the executive and legislative which are «political branches». In his 2012 opinion, Chief Judge Royce C. Lamberth found that the executive had no right to deny counsel access to detainees, and that the federal government confused «the roles of the jailer and the judiciary» in the constitutional separation-of-powers scheme¹⁰⁰. Lamberth further noted: «If the separation-of-powers means anything, it is that this country is not one ruled by Executive fiat».

In the plurality opinion in *Hamdi*, justice Sandra Day O'Connor commented that the judicial branch played «a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions». O'Connor concluded that «safeguarding essential liberties [...] remain vibrant even in times of security concern».

In *Boumediene*, justice Anthony Kennedy, who wrote the majority opinion, quoted Alexander Hamilton in the «Federalist»: «The practice of arbitrary imprisonments has been, in all ages, the favorite and most formidable instrument of tyranny»¹⁰¹. The quote in full is a sentence from *Ex Parte Milligan* on the suspension of *habeas corpus* during wartime:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is

⁹⁹ Lawrence B. Wilkerson, *Declaration of Colonel Lawrence B. Wilkerson (Ret.)*, 24 March 2010, in *Hamad v. Bush*, CV 05-1009 JDB in D.D.C.

¹⁰⁰ *In re: Guantanamo Detainee Continued access to counsel*, D.D.C., miscellaneous No. 12-398 (RCL), Case Nos. 04-1254 (RCL), 05-1638 (CKK) 05-2185 (RCL), 05-2186 (ESH) 05-2380 (CKK), memorandum opinion of 6 September 2012 of chief judge Royce C. Lamberth, § 5.

¹⁰¹ Federalist Paper No. 84 of 28 May 1788, is an essay titled *Certain General and Miscellaneous Objections to the Constitution Considered and Answered*, written by Alexander Hamilton to discuss his views on adding a Bill of Rights to the US Constitution.

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based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

In 2009, following the SCOTUS decision in *Boumediene*, the Obama administration abandoned the definition of «enemy combatant» in favor of a new policy that relied on international laws of war for individuals captured in armed conflicts or counter-terrorism operations¹⁰². At the same time, the US claimed authority, under the AUMF, to hold persons who supported al-Qaeda or the Taliban¹⁰³. The Military Commissions Act of 2009 amended some provisions of the 2006 version to improve protections for defendants¹⁰⁴. The new policy on the treatment of Guantánamo prisoners was drafted in E.O. 13567 of 7 March 2011¹⁰⁵. The executive order established a policy and a process to review, on a periodic basis, the continued discretionary exercise of existing detention authority over detainees held at GTMO pursuant to the AUMF and NDAA 2012¹⁰⁶. The periodic review applied to detainees designated by the interagency review¹⁰⁷ established by E.O. 13492 of 22 January 2009, for a continued law of war detention, or to those who have been referred for prosecution, except for those detainees against whom charges were pending or a judgment of conviction were been entered.

2012, the Periodic Review Secretariat is set

A *memorandum* of the Secretary of Defense Leon Panetta dated 12 April 2012 set up the Periodic Review Secretariat (PRS) and the discontinuation of the Office for the Administrative Review of the Detention of Enemy Combatants¹⁰⁸. The PRS was established to develop

¹⁰² US Department of Justice, *Department of Justice Withdraws Enemy Combatant Definition for Guantanamo Detainees*, press release 09-232, 13 March 2009, <https://www.justice.gov/opa/pr/departement-justice-withdraws-enemy-combatant-definition-guantanamo-detainees>.

¹⁰³ *Ibidem*.

¹⁰⁴ *National Defense Authorization Act for Fiscal Year 2010* (NDAA 2010), Pub. L. 111-84, 123 Stat. 2190.

¹⁰⁵ Barak Obama, *Executive Order 13567 of Mar. 7, 2011 [Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force]*, 3 CFR 13567.

¹⁰⁶ NDAA 2012, §1023.

¹⁰⁷ The interagency review is carried out by senior officials from the Departments of Defense, Homeland Security, Justice, and State, the Joint Staff, and the Office of the Director of National Intelligence.

¹⁰⁸ Leon Panetta, *Secretary of Defense, Memorandum, Establishment of the Periodic Review Secretariat and Discontinuation of the Office for the Administrative Review of the Detention of Enemy Combatants*, 12 April 2012, OSD003504-12.

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and administer the periodic review process pursuant to E.O. 13567 and Directive-Type Memorandum (DTM) 12-005 issued by DoD Secretary Ash Carter on 9 May 2012¹⁰⁹ – the DTM was a temporary DoD Issuance to be replaced by a DoD Instruction (DoDI). A new DoDI approved on 26 October 2012, extended DTM 12-005 and introduced changes¹¹⁰.

DTM 12-005 laid down the guidelines to treat GMTO detainees. Such treatment must be consistent with applicable law, including the Convention Against Torture, Common Article 3, and other laws relating to the transfer, treatment, and interrogation of individuals detained in armed conflict. The guidelines did not address the legality of the detention under the AUMF, but introduced discretionary determinations about whether a prisoner represented a continuing significant threat to the security of the United States¹¹¹. The PRB, which could be considered the successors of the CSRTs, could recommend continued detention or the transfer of an individual under the law of war, and could establish the conditions for such transfer.

The DoD Detainee Program Directive of 2014 prohibited the transfer of a prisoner to the custody of another country except according with applicable law, regulations, and policy. The transfer could take place when a competent authority had assessed that «it is more likely than not» that the detainee would be subjected to torture or persecuted on account of race, religion, nationality, membership in a particular social group, or the expression of a particular political opinion¹¹², or that a death sentence would be pronounced without fundamental guarantees of a fair trial as provided by the Geneva Conventions.

Under the MCA, the US president may enact an executive order to interpret more restrictively the meaning and application of the Geneva Conventions, and to pass administrative regulations implementing this interpretation. Garcia argued that the president is not allowed to interpret the Conventions to allow grave breaches¹¹³. He concluded that prisoners should be treated in all circumstances in a manner consistent with DTA standards, even if the president interprets the *Geneva Conventions* as not requiring such treatment¹¹⁴.

¹⁰⁹ Ashton B. Carter, *Directive-Type Memorandum 12-005*, 9 May 2012.

¹¹⁰ William E. Brazis, *Extension Approval for DTM 12-005*, 26 October 2012, https://www.prs.mil/Portals/60/Documents/DTM%2012-005%20Extension%20Approval%20Memo_05NOV13.pdf.

¹¹¹ DTM 12-005, §4(a) Attachment 3, p. 8.

¹¹² See: principles enshrined in the ICCPR.

¹¹³ Garcia, *Interrogation of Detainees*, cit., p. 16.

¹¹⁴ *Idem*, p. 10.

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Executive Order 13491 issued by President Obama on 22 January 2009¹¹⁵, provided that the Secretary of State should evaluate humane treatment assurances in all cases, consistently with the recommendations of the Special Task Force on Interrogation and Transfer Policies, and in compliance with §1242(a) of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA)¹¹⁶.

The prohibition on transferring Guantánamo inmates to countries which do not meet human rights was not mandatory; individuals released from GTMO were repatriated or transferred to other destination where they were likely to be persecuted or tortured. In 2006, the UN Committee Against Torture (CAT) recommended that the United States stopped the practice of sending prisoners to countries where they were likely to be tortured.¹¹⁷ The PACE stressed that GITMO detainees were unlawfully transferred, often in collaboration with countries notorious for the use of torture¹¹⁸.

In *Elmi v. Australia* (1998), the CAT ruled that a state had an obligation to refrain from forcibly returning a refugee to his country or to any other country where one runpt a risk of being expelled or returned to his country¹¹⁹. Sadiq Shek Elmi, a Somali national residing in Australia, where he applied for asylum and was at risk of expulsion, appealed to the CAT, claiming that his expulsion would be a violation of Art. 3 of the Convention against Torture. The Committee, considering that substantial grounds existed for believing that the claimant would be at risk of torture if returned to Somalia, concluded that Australia had an obligation to refrain from forcibly returning Mr Elmi to Somalia or to any other country where he could be at risk of being expelled or repatriated.

Under the two Leahy laws – one for the State Department¹²⁰ and one for the DoD¹²¹ – assistance was prohibited to any unit of the security forces

¹¹⁵ Barak Obama, *Executive Order 13491 of Jan. 21, 2009 [Ensuring Lawful Interrogations]*, 74 FR 4893 of 27 Jan. 2009.

¹¹⁶ *Foreign Affairs Reform and Restructuring Act of 1998 (FARRA)* §1242(a) says: «It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States».

¹¹⁷ Committee Against Torture (CAT), *Conclusions and Recommendations, United States of America*, 25 July 2006, CAT/C/USA/CO/2.

¹¹⁸ PACE, *Resolution 1539 (2007)*, §3.2.

¹¹⁹ Committee Against Torture (CAT), *Sadiq Shek Elmi v. Australia*, 25 May 1999, CAT/C/22/D/120/1998.

¹²⁰ *Foreign Assistance Act of 1961*, §620M.

¹²¹ USC §362.

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of a foreign country if the Secretary of State had credible information that the unit committed GHRV. The US government included torture, extrajudicial killing, enforced disappearance and rape under color of law as GHRV when implementing the Leahy law. DoD-appropriated funds may not be used for any training, equipment, or other assistance for a foreign security force unit if the Secretary of Defense has credible information that such unit committed a serious violation of human rights.

Still in 2021, the annual *Country Reports on Human Rights Practices* released by the Bureau of Democracy, Human Rights, and Labor (DRL) of the Department of State denounced that the military, paramilitary organizations, police, and security forces of nations where GTMO detainees were transferred – Afghanistan, Albania, Algeria, Bosnia and Herzegovina, El Salvador, Georgia, Ghana, Kazakhstan, Kuwait, Mauritania, Montenegro, Morocco, Oman, Pakistan, Saudi Arabia, Senegal, the United Arab Emirates and Uruguay – were responsible for serious human rights abuses by the government or its agents, including: forced disappearances; unlawful or arbitrary killings (and extrajudicial killings); arbitrary arrest and detention (in conjunction with incommunicado detention); physical or psychological abuse during arrest and interrogation; torture or cruel, inhuman, or degrading treatment or punishment of prisoners and detainee; harsh and life-threatening prison conditions¹²².

2016, Barak H. Obama tries closing Guantánamo

As a result of court rulings, in February 2016 President Obama presented the plan to close the prison facility in Guantánamo¹²³. The plan included the transfer of detainees in other countries once the US had obtained from the destination countries the assurance about humane treatment according to standard requirements. Notwithstanding, the federal law did not provide for judicial review of the United States' compliance with its *non-refoulement* obligations pursuant to the Convention against Torture¹²⁴. Accordingly, the US started transferring prisoners to countries

¹²² Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices*, Washington, D.C., Department of State, 2021, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/>.

¹²³ US Department of Defense, *Plan for Closing the Guantanamo Bay Detention Facility*, 23 February 2016, http://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf.

¹²⁴ US Attorney General, *Op. cit.*, p. 5.

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notorious for human rights violations where they were «more likely than not» to be tortured. Despite assurances from the government, inmates were deported to countries that do not trigger the protection of the Convention against Torture.

The plan also addressed the possible relocation of detainees on national soil. In a report submitted by the Department of Justice to Congress in May 2014, the Attorney General¹²⁵ highlighted that the relocation of a detainee from Guantánamo on national soil should be subject to assessment if such relocation could result in eligibility for: relief from removal from the United States, including pursuant to the Convention against Torture; any required release from immigration detention, including pursuant to the decision of the Supreme Court in *Zadvydas v. Davis* (2001)¹²⁶; asylum or withholding of removal; any additional constitutional right. The report emphasized that a Guantánamo detainee relocated to national soil enjoyed constitutional rights, including criminal trial rights, and the right to maintain actions challenging his detention through writs of *habeas corpus*, and considered that Congress could expressly preclude those forms of relief by statute to avoid them to be tried in federal courts. When GITMO detainees appealed for the constitutional right to *habeas corpus*, and challenging the lawfulness of their detention, the Supreme Court vacated the judgment and remanded the cases because the petitioners had been transferred to other nations, and cases have become moot¹²⁷.

In his remarks on the plan to close GTMO on 23 February 2016, President Obama underlined that 15 year after 9/11 not a single verdict was reached, and that the military commissions only resulted in years of litigation without a resolution¹²⁸. The OSCE/ODIHR highlighted that since

¹²⁵ *Ibidem*.

¹²⁶ In *Zadvydas v. Davis* the SCOTUS ruled that «a statute permitting indefinite detention of an alien would raise a serious constitutional problem». The Court specifically noted, however, that its decision did not preclude longer periods of detention in cases of «terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security». The US government has implemented this aspect of *Zadvydas* through the promulgation of regulations that interpret §241(a) of the *Immigration and Nationality Act* (INA) and provide for further detention with respect to aliens who pose a threat to national security. See: 8 C.F.R. §241.14.

¹²⁷ *Al-Najar v. Obama*, No. 12-5401 (CADC 2013) and *Amanatullah v. Obama*, 135 S. Ct. 1545, 575 US 908, 191 L. Ed. 2d 633, 83 USLW 3736 (2015). They do not seek review of the judgments in: *Al Maqaleh v. Hagel*, 738 F.3d 312 (D.C. Cir. 2014) or *Bakri v. Obama*, 660 F. Supp. 2d 1 (D.D.C. 2009).

¹²⁸ Barak Obama, *Remarks by the President on Plan to Close the Prison at Guantanamo Bay*, Office of the Press Secretary of The White House, 23 February 2016, <https://www.whitehouse.gov/the-press-office/2016/02/23/remarks-president-plan-close-prison-guantanamo-bay>.

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the opening of the detention facility, in January 2002, a total of 780 detainees were held there, the vast majority without charge or trial¹²⁹. Prisoners under the age of 18 were also detained in violation of international law which prohibited their imprisonment.

2017, Donald J. Trump keeps Guantánamo open indefinitely

The plan adopted by Obama was disowned by the Trump administration. In August 2017, State Secretary Rex Tillerson¹³⁰ and Defense Secretary Jim Mattis¹³¹ suggested to the Foreign Relations Committee of the Senate to consider the adoption of a new AUMF not «time-constrained» and not «geographically restricted». On 30 January 2018, President Trump signed Executive Order 13823 on Protecting America Through Lawful Detention of Terrorists¹³², directing Secretary Mattis to re-examine the military detention policy and to keep Guantánamo open¹³³. E.O. 13823 revoked the closing of the prison facility decided by President Obama and affirmed that the US maintained the option to detain additional enemy combatants at when necessary. On 30 April 2018, Mattis announced that the US government was going to transfer to GTMO over 400 ISIS fighters held by the Syrian Defence Forces (SDF)¹³⁴. At that time, five men who cleared by all relevant US national security agencies for release were still detained in the overseas facility¹³⁵. The OSCE/ODHIR accused the US authorities to seek to hold others indefinitely, although they were never charged or tried¹³⁶.

¹²⁹ Ingibjörg Sólrún Gísladóttir, *OSCE/ODIHR Director says ongoing operation of Guantanamo Bay detention facility contravenes international human rights standards, reiterates call for closure*, OSCE/ODHR, 11 January 2018, <http://www.osce.org/odihr/366051>.

¹³⁰ Rex W. Tillerson, *Secretary's Remarks: Opening Remarks Before the Senate Foreign Relations Committee on the Authorizations for the Use of Military Force: Administration Perspective*, Department of State, 30 October 2017, <https://www.state.gov/secretary/remarks/2017/10/275196.htm>.

¹³¹ Terri Moon Cronk, *Mattis: Military Force Authorizations Remain Sound*, DoD News, Defense Media Activity, 30 October 2017, <https://www.defense.gov/News/Article/Article/1358069/mattis-military-force-authorizations-remain-sound>.

¹³² Donald J. Trump, *Executive Order 13823 on Protecting America Through Lawful Detention of Terrorists*, 30 January 2018, 83 FR 4831 of 2 February 2018.

¹³³ Jim Garamone, *Trump Calls for Ending Sequester, Keeping Guantanamo Open*, DoD News, Defense Media Activity, 30 January 2018, <https://www.defense.gov/News/Article/Article/1428370/trump-calls-for-ending-sequester-keeping-guantanamo-open>.

¹³⁴ James N. Mattis, *Media Availability with Secretary Mattis at the Pentagon*, DoD Press Operations, 30 April 2018, <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1507795/media-availability-with-secretary-mattis-at-the-pentagon>.

¹³⁵ Gísladóttir, *Op. cit.*

¹³⁶ *Ibidem*.

MARCO MARSILI

2021, Joseph R. Biden: the never-ending shame

On 12 February 2021, the new administration declared his intention to shut down the notorious detention facility before President Joe Biden leaved office¹³⁷. Two years after, Guantánamo was still open, and Biden said it did not seem it could be shut down soon¹³⁸.

Despite court decisions, the US continued to deprive GTMO prisoners of their constitutional right to challenge the lawfulness of their detention. In June 2022, the DoD repatriated Asadullah Haroon al-Afghani a.k.a. «Gul» to Afghanistan, his native country, following the US District of Columbia's order granting his Writ of *habeas corpus*, ruling the United States no longer had a legal basis to justify his continued detention¹³⁹. In October 2022, Saifullah Paracha, a 75-year-old man from Pakistan who was held at Guantánamo without charge for 18 years, returned home¹⁴⁰. He was the oldest GTMO prisoner. As of May 2024, over twenty years after the inauguration of the overseas facility, 30 individuals remain detained; 16 are eligible for transfer; 3 are eligible for a PRB; 9 are involved in the military commissions process; only 2 detainees have been convicted in military commissions¹⁴¹.

Conclusions

Over twenty years after the inauguration, Guantánamo is still open despite the calls of international organizations and human rights advocates to close the detention facility. President Biden, like Obama before him, has

¹³⁷ Jen Psaki, *Press Briefing by Press Secretary Jen Psaki, Detroit Mayor Mike Duggan, and Miami Mayor Francis Suarez*, The White House, 12 February 2021, <https://www.whitehouse.gov/briefing-room/press-briefings/2021/02/12/press-briefing-by-press-secretary-jen-psaki-detroit-mayor-mike-duggan-and-miami-mayor-francis-suarez-february-12-2021/>.

¹³⁸ Joseph R. Biden Jr., *Statement by the President on H.R. 7776, the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023*, 23 December 2022, The White House, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/12/23/statement-by-the-president-on-h-r-7776-the-james-m-inhofe-national-defense-authorization-act-for-fiscal-year-2023/>.

¹³⁹ US Department of Defense, *Guantanamo Bay Detainee Transfer Announced*, 24 June 2022, <https://www.defense.gov/News/Releases/Release/Article/3073210/guantanamo-bay-detainee-transfer-announced/>.

¹⁴⁰ US Department of Defense, *Guantanamo Bay Detainee Transfer Announced*, 29 October 2022, <https://www.defense.gov/News/Releases/Release/Article/3204199/guantanamo-bay-detainee-transfer-announced/>.

¹⁴¹ US Department of Defense, *Guantanamo Bay Detainee Transfer Announced*, 20 April 2023, <https://www.defense.gov/News/Releases/Release/Article/3368848/guantanamo-bay-detainee-transfer-announced/>.

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promised to close it, but so far has failed to do so. Aliens are still detained in GITMO until a competent authority decides they can be released or transferred to another country. About three dozen of inmates still reside in indefinite military detention, most of them uncharged with any crime or un-convicted. Guantánamo is the iconic example of the abandonment of the rule of law and continued violation of human rights. It is also one of the most shameful episodes in American history, spanning four administrations, both Republican and Democratic; a stain on a nation that claims to be a human rights defender and a rule of law supporter.

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