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It's Dark and Hell is Hot: Third Party Complicity in Jus In Bello Detainee Abuse and Torture

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IT'S DARK AND HELL IS HOT: THIRD PARTY COMPLICITY IN *JUS IN BELLO* DETAINEE ABUSE AND TORTURE

Charles L. Deibel, II[*]

"'Do not try to do too much with your own hands.'"[1]

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[1] David H. Petraeus, *Learning Counterinsurgency: Observations from Soldiering in Iraq*, MILITARY REV., January–February 2006, at 1, 3 (quoting T.E. Lawrence, *Twenty-Seven Articles*, ARAB BULL. (20 August 1917)).

INTRODUCTION

Imagine you are standing in a shipping container. You cannot sit down or move because the container is packed to the brim with as many people as possible. You cannot see anything as the container is pitch black. The smell is a horrid mix of urine, fecal matter, sweat, and vomit. All you can hear are people screaming, crying, and praying. You do not know how long you have been in there or how long you will stay. Finally, the door is swung open and you are blinded by the rush of light. Armed men grab you, blindfold you, and take you away. Your captors lead you to a room where they mix questions with beatings. Following the beatings and unsatisfied with your answers, the captors tie you to a spit and roast you over a grill. You are removed from the spit and taken to a new room. Your blindfold is removed but your eyesight is blurry from the tears and beatings. You can see the guards who are asking you questions but you cannot focus. Yet, throughout this horrendous ordeal you notice something out of place. A person standing in the corner, arms folded, simply observing. What is even more odd is that your captors pay this person no attention. Who is this person and why are they there? The mysterious person clearly is not of the same nationality of your captors. But who could it be?

The situation described above is a hypothetical recounting of allegations raised in a June 2017 article by the Associated Press.[2] The article alleged that the United Arab Emirates (UAE), acting in concert with the Government of Yemen (Yemen), have been detaining, abusing, and torturing numerous people in detention black sites in Yemen.[3] The people being detained are suspected of being members of or having intelligence of Al-Qaeda in the Arabian Peninsula (AQAP) or the Islamic State in the Levant (ISIL) in the war-torn country of Yemen.[4] The detention sites, and the individuals detained

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[2] *See* Maggie Michael, *In Yemen's Secret Prisons, UAE tortures and US Interrogates*, ASSOCIATED PRESS (June 22, 2017), https://apnews.com/4925f7f0fa654853bd6f2f57174179fe.

[3] *Id.*

[4] *Id.*

there, are completely controlled by the UAE and Yemen.[5] Further, the Associated Press article raised allegations that United States (U.S.) officials were aware of the abuse and torture.[6] Specifically, the article alleged that U.S. officials were providing the UAE with questions, sitting in on torture sessions, interrogating detainees after torture sessions, and acting on intelligence gathered from the torture sessions.[7] However, the article explicitly states that U.S. officials never abused or tortured anyone, only that they were complicit in and had knowledge of the abuse and torture.[8] The U.S. quickly denounced the allegations, stating that while "American forces do participate in interrogations of detainees at locations in Yemen, provide questions for others to ask, and receive transcripts of interrogations from Emirati allies," there is no evidence to suggest that any of the alleged abuse or torture has occurred in the presence of U.S. forces.[9]

These allegations raise questions regarding international and domestic law. Torture is illegal and if the allegations are true, Yemen and the UAE would be in breach of international humanitarian and human rights law.[10] Moreover, the issues of rendition, extraordinary

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[5] HUMAN RIGHTS WATCH, *Yemen: UAE Backs Abusive Local Forces*, HUMAN RIGHTS WATCH (June 22, 2017, 1:25 AM), https://www.hrw.org/news/2017/06/22/yemen-uae-backs-abusive-local-forces.

[6] *See* Michael, *supra* note 2.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *See* Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention II]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Aug. 6, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-international Armed Conflicts, Aug. 6, 1977, 1125 U.N.T.S. 609 [hereinafter

rendition, and proxy detention in relation to detainee abuse and torture have been thoroughly examined by legal scholars.[11] However, this is not a case of proxy detention in relation to rendition. According to the article, the detention sites and the detainees in them are financed and run by Yemen and the UAE.[12] If the United States knew about the abuse and torture and did nothing, that would certainly make it complicit, but would it be in violation of international humanitarian law (IHL)? Would it be a violation of domestic law? In a *jus in bello*[13] custodial situation where abuse and torture have occurred, what degree of complicity or control would the United States need to exert over the situation to be found in violation of these different legal paradigms? This comment will argue that the United States' mere knowledge of another state's abuse or torture, with which it does not participate in or have any degree of control over, does not constitute a violation of international humanitarian law. Additionally, under the same circumstances, U.S. officials would also not be in violation of domestic statutes.

To fully understand the nature of the allegations and the applicable international law, a history of the Yemen Civil War is illustrative. Section I of this comment will explain the nature and history of this conflict, the relevant actors, and the role of the United States in Yemen and its Civil War. With the conflict established, Section II will provide an in-depth analysis of the applicable domestic and international laws in relation to the conflict and allegations. To fully understand the applicable law, *jus in bello* must be examined. Further, working definitions of torture, command and control, complicity, proxy detention, and joint venture will be established. With the conflict understood and the legal parameters set forth, Section III will then posit that, under the facts set forth, the United States could

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Additional Protocol II]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

[11] *See generally* David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585 (2006), for a discussion of extraordinary rendition and torture as it relates to detention.

[12] *See* Michael, *supra* note 2.

[13] *Jus in bello* translated means "right in war." Today, it is synonymous with the terms international humanitarian law, the law of armed conflict, and the law of war. *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 254 (6th ed. 2016).

not be found to be in violation of domestic or international law. Section IV will conclude this comment by addressing policy recommendations moving forward for the United States in its national security endeavors.

I. THE YEMEN CIVIL WAR

A. History

The current situation in Yemen is rife with conflict and complexity. The country is being torn apart by warring political factions, competing militias, foreign intervention, economic collapse, and a staggering humanitarian crisis. This conflict is deeply rooted and ultimately stems from the unification of Yemen in 1990.[14] Prior to 1990, the Nation of Yemen was divided by the northern government of Yemen Arab Republic (YAR) and the southern government of the People's Democratic Republic of Yemen (PDRY).[15] Ali Abdullah Saleh (Saleh), YAR's Secretary General, was working in concert with PDRY's Secretary General to unify the country.[16] Saleh then assumed leadership as Yemen's first president under the unification.[17] However, this new alliance between the northern and southern regions, which had stark sectarian and political differences, was more illusory than anything.[18] In 1992, an organization called the Believing Youth was

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[14] *See generally* G.A. Res. 45/193 (Dec. 21, 1990) (recognizing internationally the unified, sovereign state of Yemen). *See also* Noel Brehony, *Yemen and the Huthis: Genesis of the 2015 Crisis*, 46 ASIAN AFF. 232, 233 (2015); Adam Baron et al., *Mapping the Yemen Conflict,* EUROPEAN COUNCIL ON FOREIGN RELATIONS, http://www.ecfr.eu/mena/yemen (last visited Oct. 8, 2017).

[15] *See* Zachary Laub, *Yemen in Crisis*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/backgrounder/yemen-crisis (last updated Apr. 19, 2016).

[16] PDRY's General Secretary, Ali Salim al-Baydh, assumed the role of vice-president under the newly unified Yemeni government. *See* Mahjoob Zweiri, *Iran and Political Dynamism in the Arab World: The Case of Yemen*, *in* THE MIDDLE EAST: NEW WORLD ORDER OR DISORDER? 153, 163 (Mohammed M. Aman & Mary Jo Aman, MLIS eds., 2016).

[17] *Id.*

[18] *See id.*; The former PDRY was a communist led party with close ties to the USSR, while the former YAR was a republican government comprised of tribal representation. Gabriel Jonsson, TOWARDS KOREAN RECONCILIATION: SOCIO-CULTURAL EXCHANGES AND COOPERATION, 38-42 (Ashgate Publ'g 2006).

formed by Hussein Badr al-Din al-Houthi.[19] This organization evolved into the modern-day Houthi organization.[20]

The first decade of a unified Yemen was anything but peaceful; in 1994, Yemen endured its first Civil War after unification.[21] By quickly pacifying attempts by Southern Yemenis at secession, President Saleh established Northern hegemony over the entirety of the country.[22] In 2004, the Houthi movement began their insurgency against the Saleh regime.[23] The Houthi movement was far less violent than the movements led by other factions in Yemen at this time such as Al-Qaeda in the Arabian Peninsula (AQAP).[24] Nonetheless, Saleh's response was merciless and eventually led to the assassination of the Houthi's leader, Hussein Al-Houthi.[25] After his death, the Houthis fought on and off with the government until 2010.[26] In an effort to gain international support, specifically from Saudi Arabia and the United States, President Saleh began accusing Iran of supporting the Houthis.[27] While these claims were unsubstantiated, Saleh's tactic proved successful as Saudi Arabia took notice of the growing Houthi movement situated along the Yemeni-Saudi border.[28] Thereafter, in

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19 *See* Zweiri, *supra* note 16, at 161. Al-Houthi, a pragmatic and idealistic leader, established the organization as an Islamic Zaydi Shi'a religious response as to what he saw was the spread of the Saudi inspired Salafi sect of Islam in Northwest Yemen. *See also* Brehony, *supra* note 14, at 237.

20 *See* Zweiri, *supra* note 16.

21 *See* Farea Al-Muslimi, *The Southern Question: Yemen's War Inside the War,* CARNEGIE MIDDLE EAST CENTER (July 8, 2015), http://carnegie-mec.org/diwan/60627?lang=en. The conflict broke out due to the attempted secession of the former DPRY over political and economic grievances. *See id.*

22 *See id.*

23 *See Profile: Yemen's Houthi Fighters*, ALJAZEERA (Aug. 12, 2009), https://www.aljazeera.com/news/middleeast/2009/08/200981294214604934.html.

24 *See generally* Thomas Juneau, *Iran's Policy Towards the Houthis in Yemen: A Limited Return on a Modest Investment*, 92 INT'L AFF. 647 (2016).

25 *Id.* at 651. *See also* ALJAZEERA, *supra* note 23. Saleh had placed a $55,000 bounty on Al-Houthi prior to his death. *Id.*

26 *See* Juneau, *supra* note 24, at 652.

27 *Id.*

28 *Id.*

2009, Saudi Arabia began a military campaign aimed at Houthi targets amidst growing concern over the conflict in Yemen.[29]

In 2011, President Saleh's power began to wane.[30] Meanwhile, the Arab Spring movement gained momentum from which Yemen was not immune.[31] As the country's population began to protest the Saleh regime, it became clear that Saleh would have to step down from the Presidency.[32] The Gulf Cooperation Council (GCC) feared a de-stabilized Yemen and sought to secure a peaceful transfer of power.[33] Finally, in March 2012, in coordination with the United Nations and Saleh, the GCC secured the departure of Saleh and the installation of his replacement, then Vice-President Abd Rabbu Mansour Hadi (Hadi).[34]

Hadi is a southerner from the Abyan Governorate,[35] selected as Saleh's successor as an attempt to appease the regional differences in the country.[36] However, Hadi had sided with the Saleh government in 1994, so his appointment did little to appease the secessionists or the Houthis.[37] Saleh, after obtaining immunity from prosecution as

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29 *Id.* Saudi Arabia also established a naval blockade near Northeast Yemen in an attempt to stem the flow of material support the Houthis were receiving from Iran. *Id.*

30 *See id.*

31 *Id. See generally* Brian M. Perkins, *Yemen: Between Revolution and Regression*, 40 STUD. CONFLICT & TERRORISM, 300 (2016).

32 *See* William A. Rugh, *Problems in Yemen, Domestic and Foreign*, 22 MIDDLE EAST POL'Y 140, 145 (2015).

33 The Gulf Cooperation Council is a collection of Middle-Eastern States including the UAE, Qatar, Kuwait, Oman, and Bahrain. *See* Robert Forster, *The Southern Transitional Council: Implications for Yemen's Peace Process*, 24 MIDDLE EAST POL'Y 133, 134 (2017). It is led by Saudi Arabia, and supported by the United States. *Id. See generally* Agreement on the Implementation Mechanism for the Transition Process in Yemen in Accordance with the Initiative of the Gulf Cooperation Council (GCC), Yemen (May 12, 2011), http://peacemaker.un.org/sites/peacemaker.un.org/files/YE_111205_Agreement%20on%20the%20implementation%20mechanism%20for%20the%20transition.pdf.

34 *See* Rugh, *supra* note 32. *See also* Al-Muslimi, *supra* note 21.

35 *See* Al-Muslimi, *supra* note 21.

36 *Id.*

37 *Id.*

part of his step down from power, was not interested in going quiet into the night.[38] While not only securing immunity from prosecution, Saleh was also allowed to remain as the head of his political party.[39] In essence, this ensured that Saleh would remain a key player in Yemen's conflict as he retained a strong loyalty from a large portion of the military, security services, bureaucracy, and tribal militias.[40] In addition to the transition from Saleh to Hadi, the deal brokered by the GCC established a National Dialogue Conference (NDC) to construct a new constitution.[41]

Opportunistically, the Houthis capitalized on the political turmoil in the country and the Arab Spring. Taking part in many of the street protest, the Houthis began to consolidate their political and military power.[42] Additionally, the Houthis participated in the national dialogue, albeit, their participation was very limited as they were very suspicious of the country's political elite.[43] The initial breakdown of the transition process can be attributed to two reasons: first, the political discussion did little to radically alter the current institutions, it simply perpetuated old problems; and second, the proposed federalism plan would have divided the Houthi's areas of control.[44] With the growing frustration in the lack of progress in the NDC and a loss of patience with President Hadi, the Houthis tribal militias began to maneuver south.[45] Through intense fighting, the Houthis reached the capital city of Sanaa in 2014 where they secured large portions of the city.[46]

The Houthis did not make these gains alone. The Houthis were able to ally with former President Saleh, a catalyst to the advancement of their political and military goals.[47] Additionally, the Houthis received

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38 *See* Juneau, *supra* note 24, at 653.
39 *Id.*
40 *Id.*
41 *See* Rugh, *supra* note 32, at 145.
42 *See* Perkins, *supra* note 31, at 311.
43 *See* Rugh, *supra* note 32.
44 *Id.*
45 *Id.* at 146.
46 *Id.*
47 *Id.*

humanitarian aid and vocal support for their movement from Iran.[48] With Saleh's support (and possibly Iran's as well), the Houthis eventually took control of Sanaa, forcing Hadi to resign the presidency and flee to Aden.[49] However, once Hadi was safe in Aden, and with the full support of the UN Security Council, he declared that he was still President of Yemen.[50] With full international support of his legitimacy, Hadi called on the GCC to intervene in the conflict militarily.[51] On March 26, 2015, Saudi Arabia began conducting air strikes against Houthi targets in Yemen.[52] Additionally, the Saudi Government was able to obtain support from several other countries.[53] The Saudi-led coalition quickly realized the air strikes were not debilitating or even containing the Houthi advance.[54] In July 2015, Saudi and Emirati ground troops were deployed in Aden and reclaimed the city.[55] The Saudi coalition troops, however, were stalled against fierce fighting.[56] The conflict continues today, and as the fighting increases and losses are inflicted, both the Houthis and the Yemen Government, along with their respective allies, become even more entrenched in their views.

B. U.S. Role, Al-Qaeda, & ISIL

While the September 11, 2001 terror attacks are generally seen as the start of the United States' Global War on Terror, the attack against the USS *Cole* in October of 2000 was the start of the United States taking a more proactive approach in Yemen.[57] Al-Qaeda, the international terror group responsible for both attacks, quickly became

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48 *See id.* However, Iran's role in supporting the Houthi movement is not as overstated as Saudi Arabia believes. insert citation. *See* Juneau, *supra* note 24, at 655.

49 *See* Rugh, *supra* note 32, at 146.

50 *Id. See also* S.C. Res. 2216, ¶ 8 (Apr. 14, 2015).

51 *See* Rugh, *supra* note 32, at 147.

52 *Id.*

53 This included the GCC countries, U.S., France, Great Britain, Turkey, and Belgium. *Id.*

54 *Id.* at 148.

55 *Id.*

56 *Id.*

57 *See* CNN Library, *USS Cole Bombing Fast Facts*, CNN, http://www.cnn.com/2013/09/18/world/meast/uss-cole-bombing-fast-facts/index.html (last updated Jan. 7, 2019); *See also* Laub, *supra* note 15.

the United States' supreme enemy. Even though the United States' efforts in the region have predominantly been in Iraq and Afghanistan, Yemen has seen numerous U.S. counterterror operations ranging from commando raids to drone strikes.[58] Along with AQAP, the U.S. has struggled with the rise of the Islamic State in Iraq and the Levant (ISIL). Like Al-Qaeda, ISIL has spread beyond its traditional area of operation and established operational cells in Yemen.[59] Add these insurgent groups to the already volatile and delicate situation in Yemen, and the conflict becomes even more convoluted.

The terrorist group known as Al-Qaeda, formed as an offshoot of the Afghanistan Mujahideen shortly after the Russian-Afghanistan War.[60] During the 1990s, Al-Qaeda, translated as "the base," turned its focus towards global jihad and began conducting terror attacks across the globe.[61] Following 9/11 and the global recognition the attacks gave the group, subsidiary insurgencies became established in many countries, including Yemen.[62] Even though these offshoots, like Al-Qaeda in Iraq (AQI), received much of the media attention due to the Iraq and Afghan Wars, AQAP was no less lethal or active.[63] Due to the fact that the government of Yemen never had a security monopoly in its territory, AQAP has been able to take full advantage of the political and security vacuum in Yemen.[64] The current Civil War has permitted AQAP to consolidate and expand, gaining control of large swaths of territory in southern Yemen.[65] In addition to carrying out attacks in Yemen and Saudi Arabia, AQAP claimed responsibility for both the suicide bombing in 2008 against the U.S. embassy in Yemen and the

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58 *See* Richard Sisk, *US Troops on Ground in Yemen Against AQAP Terror Group*, MILITARY.COM, http://www.military.com/daily-news/2017/08/04/us-troops-ground-yemen-aqap-terror-group.html (last visited Mar. 6, 2019).

59 *See* Jeremy M. Sharp, *Yemen: Civil War and Regional Intervention,* CONG. RESEARCH SERV. 10, https://fas.org/sgp/crs/mideast/R43960.pdf (last updated Aug. 24, 2018).

60 *See* Ty McCormick, *Al Qaeda Core: A Short History*, FOREIGN POLICY (Mar. 17, 2014, 5:17 PM), http://foreignpolicy.com/2014/03/17/al-qaeda-core-a-short-history/.

61 *Id.*

62 *Id.*

63 *Id.*

64 *See* Perkins, *supra* note 31, at 313.

65 *Id.*

2015 *Charlie Hedbo* attacks.[66] U.S. forces have been conducting military operations in the form of drone strikes and intelligence operations against AQAP since Congress passed an Authorization for Use of Military Force (AUMF) shortly after 9/11.[67] While the use of drone strikes in Yemen has been a contentious topic, both from a human rights and legal standpoint, the United States has seen some success against AQAP.[68]

Similar to AQAP, ISIL in Yemen (ISIL-Y), has taken advantage of the power vacuum in Yemen.[69] ISIL, primarily based out of Syria, debuted on the international terrorism stage in 2014 when the group posted a video online showing the beheading of an American journalist.[70] In a short time, ISIL took territory in Iraq and Syria, surprising the international community with how easily they defeated the Iraqi military.[71] As the group continued to gain territory and publicity, their human rights violations and violent tactics became more widespread.[72] Similar to Al-Qaeda, as ISIL gained international notoriety, the group began to establish offshoot organizations in Middle-Eastern countries, including Yemen.[73] Although ISIL-Y does not have as significant a presence in Yemen and does not control large amounts of territory there, the group is just as active and is arguably more violent than AQAP.[74] Although, in 2016, ISIL-Y "publicly

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66 *See* Rugh, *supra* note 32, at 144.

67 *Id.*

68 *See generally* Tony Nasser, *Modern War Crimes by the United States: Do Drone Strikes Violate International Law? Questioning the Legality of U.S. Drone Strikes and Analyzing the United States' Response to International Reproach Based on the Realism Theory of International Relations,* 24. S. CAL. INTERDISC. L.J. 289 (2014) (discussing the legality of the U.S. use of drone strikes).

69 *See e.g.*, U.S. DEPT. OF STATE, COUNTRY REPORTS ON TERRORISM 2016 MIDDLE EAST AND NORTH AFRICA (2016), https://www.state.gov/j/ct/rls/crt/2016/272232.htm.

70 *See* ENCYCLOPEDIA BRITTANICA, ISLAMIC STATE IN IRAQ AND THE LEVANT, https://www.britannica.com/topic/Islamic-State-in-Iraq-and-the-Levant (last visited Oct. 28, 2017).

71 *See id.*

72 *See id.*

73 *See* U.S. DEPT. OF STATE, *supra* note 69.

74 *Id.*

disagree[d] with the group's leadership regarding its tactics . . . indicating a large rift within the group."[75]

The United States policy concerning Yemen, while nuanced, is essentially two-fold: 1) support the recognized government of Yemen and President Hadi by assisting the Saudi-led coalition; and 2) conduct counterterror operations against AQAP and ISIL.[76] These policy goals are not mutually exclusive and often overlap. During the early 2000's, the Bush administration worked with Saleh to combat AQAP fighters in Yemen.[77] This support came in the form of economic and military aid as well intelligence assistance.[78] Saleh allowed the United States to conduct air strikes in Yemen against AQAP.[79] However, the United States government did not completely trust Saleh because it thought that he was feeding it targets that were his political opponents as well as suspected AQAP members.[80] This manipulation frustrated the U.S. because a number of subsequent U.S. drone strikes inadvertently killed civilians.[81] In these days, the policy of supporting the government and combating terrorists essentially were one in the same.[82] However, after the Arab Spring and the onset of Yemen's current civil war, the policies have become bifurcated.[83] While these policies are distinct from one another, they are not contradictory and indeed reinforce each other. Combatting AQAP and ISIL-Y in the region supports the Saudi led coalition by helping to restore the authority of the government. On the

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75 *Id.*

76 *See* Sharp, *supra* note 59, at 21, 23.

77 *See* Rugh, *supra* note 32, at 144.

78 *See Data: U.S. Security Aid to Yemen*, SECURITY ASSISTANCE MONITOR, https://www.securityassistance.org/data/program/military/Yemen/2000/2018/all/Middle%20East// (last visited Oct. 28, 2017) [hereinafter "*Data*, SECURITY ASSISTANCE MONITOR"]; *Yemen Foreign Assistance*, FOREIGNASSISTANCE.GOV, https://foreignassistance.gov/explore/country/Yemen (last visited Oct. 28, 2017); Rugh, *supra* note 32, at 144.

79 *See* Rugh, *supra* note 32, at 144.

80 *Id.*

81 *Id.*

82 *See* Bruce Riedel, *A Brief History of America's Troubled Relationship with Yemen*, LAWFARE (Oct. 30, 2018, 7:52 AM), https://www.lawfareblog.com/brief-history-americas-troubled-relationship-yemen.

83 *Id.*

other hand, supporting the coalition in reestablishing control over the country will only help in the fight against AQAP and ISIL-Y.

The United States has not ceased counterterror operations in Yemen since the U.S. began such operations shortly after 9/11.[84] Additionally, the amount and type of support the United States has given Yemen since the breakdown of the government and the onset of the conflict has fluctuated.[85] Since 2015, the United States has not given Yemen any security aid and has even closed its embassy due to the fighting.[86] The assistance the U.S. lends to the Saudi-led coalition comes in the form of financial support, weapons sales, and coordination on intelligence matters.[87] By coordinating on intelligence matters with the Saudi-led forces in Yemen, the U.S. can more effectively fight AQAP and ISIL-Y.[88] Additionally, continuing the fight against AQAP and ISIL-Y only helps facilitate the Saudi-led coalition in its efforts to re-establish the government in Yemen.[89] While the U.S. military operations in and around Yemen focus on AQAP and ISIL, the U.S. has employed force against the Houthis as a measure of self-defense.[90]

C. Detainee Abuse & Torture

A recently published article alleges that Yemeni and UAE troops had established numerous secret detention facilities, or black sites, in Southern Yemen.[91] The article alleges that in these black sites, UAE and Yemeni forces are holding people suspected of being AQAP

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[84] *See Yemen: Reported U.S. Covert Actions 2001-2011*, THE BUREAU OF INVESTIGATIVE JOURNALISM, https://www.thebureauinvestigates.com/drone-war/data/yemen-reported-us-covert-actions-2001-2011 (last visited Oct. 28, 2017).

[85] *See Data*, SECURITY ASSISTANCE MONITOR, *supra* note 78.

[86] *See* Rugh, *supra* note 32, at 150.

[87] Daniel Brown, *U.S. Maintains Support of Saudi-led Coalition in Yemen War Even as NATO Allies Stop Selling Weapons*, BUSINESS INSIDER (Jan. 25, 2018, 3:26 PM), https://www.msn.com/en-us/news/world/us-maintains-support-of-saudi-led-coalition-in-yemen-war-even-as-nato-allies-stop-selling-weapons/ar-AAvaRyK.

[88] *See* Clare Duncan, *The Conflict in Yemen: A Primer*, LAWFARE (Nov. 28, 2017, 7:00 AM), https://www.lawfareblog.com/conflict-yemen-primer.

[89] *Id.*

[90] *See* Sharp, *supra* note 59, at 11-14.

[91] *See* Michael, *supra* note 2.

or ISIL-Y members.[92] Further, the captors are subjecting the black site's detainees to abuse and even torture.[93] The author interviewed a number of people who claimed they were subjected to such abuse and torture.[94] Additionally, the article contains allegations that U.S. officials knew about the abuse and torture.[95] According to the article, not only did the United States know about the abuse and torture, but the United States also gave questions to UAE and Yemeni officials, sat in on torture sessions, interrogated suspects after they had been tortured, and acted upon intelligence gathered during torture sessions.[96] U.S. officials acknowledged their coordination and participation with UAE and detention officials, but denied that any abuse or torture had taken place.[97] U.S. officials stated they were aware of the allegations, looked into them, and were satisfied that no human rights violations took place.[98] Chief Defense Department spokeswoman Dana White stated that, "[w]e always adhere to the highest standards of personal and professional conduct. . . . We would not turn a blind eye, because we are obligated to report any violations of human rights."[99] It is worthy to note that the article does not allege that U.S. officials were in control or command of the detention sites or detainees.

After the flurry of news reports that arose from these allegations, there have been no follow up reports. The United States Senate called for an investigation into the matter.[100] The Yemeni Government also started an investigation.[101] However, there has been no news on whether any of these investigations have been followed

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92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 Desmond Butler & Maggie Michael, *Senators Ask Military to Clarify U.S. Role in Yemen Torture Sites*, CHICAGO TRIBUNE (June 23, 2017, 6:08 PM), http://www.chicagotribune.com/news/nationworld/ct-senate-yemen-torture-reports-20170623-story.html.

101 *Yemen Orders Probe into Alleged Torture by UAE*, ALJAZEERA (June 24, 2017), http://www.aljazeera.com/news/2017/06/yemen-orders-probe-alleged-torture-uae-170624160933567.html.

through with. UAE government officials stated that the witnesses interviewed for the report fabricated the stories as a public relations tactic paid for by the Houthis, AQAP, or ISIL-Y against the UAE and the U.S.[102]

II. DOMESTIC AND INTERNATIONAL DETENTION, ABUSE, AND TORTURE LAWS

A. United States' Legal Authority

"Security against foreign danger is one of the primitive objects of civil society."[103] Yet, the power of administering America's security against foreign danger is not monopolized in the federal government.[104] Through the constitutionally delegated authorities, checks, and balances, the triumvirate branches of the federal government each play a unique role in America's security. The United States Constitution delegates authority to Congress to "declare war . . . and make Rules concerning Captures on Land and Water."[105] Additionally, Congress has the authority to "raise and support Armies,"[106] "provide and maintain a Navy,"[107] and "make Rules for the Government and Regulation of the land and naval Forces."[108] Congressional "war powers," apart from the power to declare war, are rarely considered in isolation.[109] In sum, when it comes to military capture and detention, Congress promulgates such rules as it deems

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[102] *Id.*

[103] THE FEDERALIST NO. 41 (James Madison), THE AVALON PROJECT, YALE LAW SCHOOL, http://avalon.law.yale.edu/18th_century/fed41.asp (last visited Mar. 6, 2019).

[104] *See generally* U.S. CONST. art. I; *id.* art. II.

[105] U.S. CONST. art I, § 8, cl. 11.

[106] *Id.* cl. 12.

[107] *Id.*cl. 13.

[108] *Id.*cl. 14.

[109] *United States v. Robel*, 389 U.S. 258, 263–64 (1967) (explaining that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit").

necessary.[110] Finally, the Senate has the authority to ratify treaties that are established by the President.[111]

The Constitution vests the President with the power of the "Commander in Chief" over the nation's armed services; however, this power has its limits.[112] The framer's intended that the Commander in Chief "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral. . . ."[113] Where Congress has not promulgated legislation in regard to military detention, the President is presumed to have Constitutional authority as Commander in Chief to determine the conduct of the military and intelligence community.[114]

Congress has enacted a number of statutes that authorize and regulate military detention. The most notable statute in relation to military detention today is the Authorization for Use of Military Force.[115] Since shortly after 9/11 and the advent of the Global War on Terror, the President has relied on the AUMF as the basis for U.S.

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110 "'[A]dministrative detention' or 'preventative detention,'" are used to denote the term "[s]ecurity detention," which is a form of military detention that will be defined in this article as "the deprivation of liberty, without criminal charges, of a protected person, ordered by the executive branch, for security reasons during international or noninternational armed conflicts, or other situations of violence." GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 818, 820 (Cambridge Univ. Press 2d ed. 2016) (2010) (citing Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87/858 INT'L REV. OF THE RED CROSS (June 2005), 375).

111 *See* U.S. CONST. art II, § 2.

112 *Id.* cl. 1-2.

113 THE FEDERALIST NO. 69 (Alexander Hamilton), THE AVALON PROJECT, YALE LAW SCHOOL, http://avalon.law.yale.edu/18th_century/fed41.asp (last visited Mar. 6, 2019).

114 *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (stating that "in absence of either a congressional grant or denial of authority," the President may "only rely upon on his own independent powers . . . ").

115 Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. (2001) (enacted) [hereinafter *AUMF*].

domestic legal authority regarding military operations, including detention.[116] It states:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[117]

It should be noted that there is a lack of any geographic scope mentioned in the joint resolution. Even though the AUMF does not explicitly mention a group or person by name, the AUMF generally implicates Al-Qaeda, the Taliban, and any 9/11 conspirators.[118] Also, the AUMF lacks a temporal limit, which implicitly gives the President Congressional authorization to use force against these groups so long as Congress does not revoke the authority. Additionally, the language "all necessary and appropriate force" gives the President considerable discretion in carrying out military operations.[119]

While the AUMF is silent in regard to detention, the authority to carry out military operations incorporates the authority to detain in relation to those operations.[120] In interpreting the President's military detention authority, federal courts have relied on the AUMF as the statutory grounds for individuals who were detained as a result of military operations conducted under the AUMF.[121] However, the

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116 *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

117 *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 § 2(a) (2001).

118 *See Hamdi*, 542 U.S. at 507, 518.

119 *Id.* at 518.

120 *See Ex Parte Quirin*, 317 U.S. 1, 28–29 (1942) ("An important incident to the conduct of war is the adoption of measures by the military command . . . to seize and subject to disciplinary measures those enemies who . . . have violated the law of war."). *See also Hamdi*, 542 U.S. at 518.

121 Justice O'Connor stated for the Court that "detention of individuals . . . for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary

AUMF is not the only piece of legislation that covers military detention regulations and procedures.

Following the United Nations adoption of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Other Cruel and Inhuman Punishment ("Convention Against Torture" or "CAT"), the U.S. became a party to the CAT only after the Senate gave advice and consent subject to the reservations, declarations, and understandings.[122] An important section of the reservations put forth by Congress was Section II(b), which states that "the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control."[123] Entering into the CAT was not intended to be "self-executing."[124] Therefore, Congress passed the Torture Convention Implementation Act (Torture Act) to implement Articles 4 and 5 of the CAT in American domestic law.[125]

The Torture Act defines torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . . upon another person within his custody or physical control. . . ."[126] Likewise, the Torture Act defines "severe mental pain or suffering" as:

> [T]he prolonged mental harm caused by or resulting from-- (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt

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and appropriate force' Congress has authorized the President to use." *Hamdi v. Rumsfeld*, 542 U.S. at 518.

122 *See U.S. v. Emmanuel*, No. 06-20758-CR, 2007 WL 2002452, at *1–*2 (S.D. Fla. 2007).

123 U.S. RESERVATIONS, DECLARATIONS, AND UNDERSTANDINGS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, § II(b), CONG. REC. S17486-01 (daily ed., Oct. 27, 1990).

124 *Emmanuel*, 2007 WL 2002452, at *2 n.2.

125 *Id.* at *3.

126 18 U.S.C. § 2340(1).

> profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.[127]

The Torture Act includes a specific intent requirement that is not found in the CAT's definition of torture.[128] Additionally, the Torture Act does not include criminal sanctions for cruel, inhuman, or degrading treatment or punishment.[129]

In addition to the Torture Act, Congress passed the War Crimes Act (WCA), the purpose of which is to provide criminal sanctions for members of the Armed Forces or nationals of the United States who commit "war crimes" that constitute a "grave breach" of the Geneva Conventions.[130] Utilizing the "grave breach" definition supplied by the Geneva Conventions, the WCA makes it illegal for U.S. military personnel or officials to engage in torture, cruel treatment, and outrages upon personal dignity.[131] The definition of torture in the WCA is the exact same as the one provided in the Torture Act except that it adds the language, "for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind."[132] The WCA also defines cruel or inhuman treatment as "[t]he act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering . . . including serious physical abuse, upon another within his custody or control."[133]

In 2005, Congress passed the Detainee Treatment Act (DTA) which prohibits the "cruel, inhuman, or degrading treatment or

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127 *Id.* at § 2340(2).
128 *Id.* at § 2340(2)(A).
129 *See id.*
130 War Crimes Act, 18 U.S.C. § 2441(a)–(c).
131 *Id.*
132 *Id.* at § (d)(1)(A).
133 *Id.* at § (d)(1)(B).

punishment" of persons under "the custody or under the physical control of the United States Government. . . ."[134] The DTA states that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."[135] This language is clear in that it is irrelevant where the detainee is held or what extension of the government is executing that detention. While there is serious debate over what type of acts constitutes "cruel, inhuman, or degrading treatment or punishment," Congress defined it as acts "prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States. . . ."[136] Also, the DTA forbids U.S. personnel from engaging in interrogation techniques that are not stated in the U.S. Army's Field Manual.[137]

Congress provided guidance as to what class of persons may be lawfully subject to military commissions, including detainment, under the AUMF when it passed the Military Commissions Act of 2006 (MCA).[138] Furthermore, the MCA amended the WCA in a number of ways relating to detention, abuse, and torture: first, the MCA narrowed the offense from a "violation" to "a grave breach" of the Geneva Conventions.[139] Next, the definition of torture and "cruel or inhuman treatment" were amended to the language noted above.[140]

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134 Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd(a).

135 *Id.*

136 *Id.* at § 2000dd(d).

137 *See* Pub. L. No. 109-148, 119 Stat. 2680, 2739 § 1002(a).

138 Military Commissions Act of 2006, Pub L. No. 109–366, 120 Stat. 2600, 2601. (defining "'unlawful enemy combatant'" as "(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)" and "'lawful enemy combatant'" as "(A) a member of the regular forces of a State party engaged in hostilities against the United States; "(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or "(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.").

139 *Id.* § 6(a)–(b), 120 Stat. 2632–33.

140 *Id.* at § 6(b), 120 Stat. 2633.

Additionally, as a result of the Supreme Court's ruling in *Hamdan v. Rumsfeld,* the MCA amended the DTA by striping federal courts of their ability to hear habeas petitions filed by detained aliens.[141]

Another source of detention law originates from the Executive Branch. In 2009, President Barack Obama signed Executive Order (E.O.) 13,491, which revoked Executive Order 13,340.[142] E.O. 13,491 set minimum standards and practices for individuals in the custody of the U.S. that went above and beyond the Torture Act, WCA, and DTA.[143] The E.O. reiterated that interrogation techniques and detention practices only applied to individuals in "the custody or under the effective control" of the U.S. or detained in a "facility owned, operated, or controlled" by the U.S.[144] A significant effect of the E.O. was that all U.S. personnel were now bound by law to only use the interrogation techniques set forth in Army Field Manual 2-22.3.[145]

In addition to the aforementioned authorities, Congress has enacted a number of federal civil causes of action in regard to torture. These include the Alien Tort Statute (ATS), the Torture Victims Protection Act (TVPA), and the Federal Tort Claims Act (FTCA). The Alien Tort Statute (ATS) codifies aspects of customary international law against aliens, and provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[146] Originally enacted by the first Congress in 1789, the Supreme Court has been careful about how it interprets international norms and how to implement international norms into federal common law.[147] In *Sosa v. Alvarez-Machain*, the Supreme Court held that

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141 *Id.* at § 7(a), 120 stat. 2635–36 (codified at 28 U.S.C. § 2241(e)(1)) ("No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.").

142 *See* DYCUS, *supra* note 13, at 1041.

143 Exec. Order No. 13,491, *Ensuring Lawful Interrogations*, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009).

144 *Id.*

145 *See id.*

146 Alien Tort Statute, 28 U.S.C. § 1350.

147 *See* DYCUS, *supra* note 13, at 205.

Congress originally "intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."[148] This "modest set" of claims included "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[149] The Court, however, did not suggest that it would not recognize new claims for torts in violation of the international law; it held that any such claim would have to "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms. . . ."[150]

The TVPA was enacted by Congress in response to the ratification of the CAT.[151] This civil cause of action provides a remedy for the victims of torture, but only torture or "extrajudicial killing[s]" under the "actual or apparent authority, or color of law, of any foreign nation."[152] Congress passed the TVPA "in part to fulfill the Convention's mandate that ratifying nations take action to ensure that torturers are held legally accountable for their actions."[153] In *Arar v. Ashcroft*, respondent brought a TVPA claim against several U.S. officials for his alleged rendition to Syria where he was interrogated under torture by Syrian authorities.[154] The Second Circuit Court of Appeals held that the respondent failed to state a claim under the TVPA against various U.S. officials because the respondent alleged that the officials were acting under the color of federal law, and not foreign law.[155] Additionally, the court held that the U.S. officials would have to be acting, or "possessed power under Syrian law, and that the offending actions . . . derived from an exercise of that power. . . ."[156]

"Courts may not entertain suits against the United States without [the] consent of the United States in the form of an express

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148 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004).

149 *Id.* at 720, 724.

150 *Id.* at 725.

151 *See* DYCUS, *supra* note 13, at 198.

152 Torture Victim Protection Act, Pub. L. No. 102-256, § (2)(a), 106 Stat. 73 (1992).

153 *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002).

154 *See generally Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

155 *Id.* at 563, 568.

156 *Id.* at 568.

waiver of sovereign immunity."[157] Therefore, "[t]he United States is liable only to the extent it waives sovereign immunity. . . ."[158] The FTCA sets the limitations and procedures for causes of actions against the United States government and its officials for civil liability.[159] However, the U.S. does not waive its immunity if the tort arises from the exercise of discretionary functions, combatant activities of the military during time of war, activity incident to military service, intentional torts, or for any claims arising in a foreign country.[160] If a person were to bring an FTCA claim against the U.S. government or its personnel for torture while being detained by the U.S., that person would have to exhaust all administrative remedies available to them before doing so.[161] Furthermore, it would be difficult for a claimant to have a colorable FTCA claim because of the difficulty of proving that a U.S. official, either military or civilian, was acting outside the scope of their employment during an interrogation session(s) that included abuse or torture.[162]

Another set of statutes that deserves to be mentioned are the Leahy amendments. The Leahy amendments are located in two different places in the U.S. Code: the first is a recurring provision in Department of Defense (DoD) appropriations bill,[163] and the second is in the Foreign Assistance Act of 1961 (FAA).[164] Although similar, the provisions are not identical. The Leahy amendments prohibits the DoD from providing "training, equipment, or other assistance for a unit of a foreign security force" if the DoD has "credible information that [such] unit [is] committ[ing] a gross violation of human rights."[165] Additionally, the Secretary of Defense is required to consult with the

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157 *Jayvee Brand, Inc. v. U.S.*, 721 F.2d 385, 388 (D.C. Cir. 1983).

158 *Owen v. U.S.*, 935 F.2d 734, 736 (5th Cir. 1991).

159 *See* Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (2012).

160 *Id.* at § 2680.

161 *See id.* at § 2675(a).

162 *See generally In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007), *aff'd sub nom*, *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011).

163 10 U.S.C. § 362 (on the "[p]rohibition on use of funds for assistance to units of foreign security forces that have committed a gross violation of human rights").

164 22 U.S.C. § 2378d (on the "Limitation on assistance to security forces").

165 10 U.S.C. § 362(a)(1).

Secretary of State prior the decision to assist a foreign security unit.[166] However, the statute contains certain exceptions to the prohibition including that the "government of such country has taken all necessary corrective steps" or disaster or humanitarian relief.[167] Furthermore, the Secretary of Defense may waive the prohibition if "extraordinary circumstances" permit.[168] If the Secretary of Defense does apply the exception or waive the prohibition, the Secretary is required to report such exceptions or waivers to the appropriate Congressional Committees not later than fifteen days from application of the exception.[169]

The FAA Leahy amendment pertains to the prohibition of assistance under the FAA or the Arms Export Control Act to "any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights."[170] Similar to the DoD version, the Secretary of State may make an exception if the government of the country takes "effective steps to bring the responsible members of the security forces unit to justice."[171] The Secretary of State also has a duty to inform the country from which funds are being withheld and assist that country in bringing responsible members of that country to justice.[172]

Another piece of jurisprudence which applies to overseas confessions of a detained individual is the joint venture doctrine: "[t]he 'joint venture' doctrine provides that 'statements elicited during overseas interrogation by foreign police in the absence of *Miranda* warnings must be suppressed whenever United States law enforcement agents actively participate in questioning conducted by foreign authorities.'"[173] In *United States v. Abu Ali*, the defendant, an American citizen, was detained and interrogated in Saudi Arabia by that

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166 *Id.* at § 362(a)(2).
167 *Id.* at § 362(b).
168 *Id.* at § 362(c).
169 *Id.* at § 362(e).
170 22 U.S.C. § 2378d(a).
171 *Id.* § 2378d(b).
172 *Id.* § 2378d(c).
173 *United States v. Abu Ali*, 528 F.3d 210, 228 (4th Cir. 2008) (quoting *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003)).

government's law enforcement in connection with Al-Qaeda activity.[174] When the Saudi authorities learned that the defendant was an American citizen who was planning terror attacks in the U.S., the FBI was alerted[175] but was denied access to the defendant.[176] However, Saudi officials allowed the FBI to watch the interrogation of defendant through a one-way mirror.[177] During the interrogation, Saudi officials asked the defendant six questions (among others) from a list of questions supplied by the FBI.[178] Eventually, the defendant was turned over to U.S. authorities and was flown back to the United States to face criminal charges.[179] In his appeal, defendant claimed that his statements made to Saudi authorities should be suppressed because he did not receive *Miranda* warnings, that his "interrogation constituted a 'joint venture' between his Saudi interrogators and United States law enforcement officers, and his Saudi interrogators acted as the agents of United States law enforcement. . . ."[180] The court held that the interrogation could not be considered a "joint venture" because U.S. law enforcement officials must have an "active" or "substantial" role of participation.[181] The court stated that "mere presence at an interrogation does not constitute the 'active' or 'substantial' participation necessary for a 'joint venture,' . . . but coordination and direction of an investigation or interrogation does. . . ."[182]

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174 *Abu Ali*, 528 F.3d at 224.

175 *Id.* at 225.

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.* at 228.

181 *Id.* at 229–30 (citing *Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980)). Dissenting Judge Motz believed that the interrogation constituted a joint venture, reasoning that supplying questions which are to be posed to a detainee actually directs the underlying investigation. *Abu Ali*, 528 F.3d at 230 n.6. Further, Judge Motz asserted that exempting the supplying of questions to foreign law enforcement officers creates an unconstitutional loop hole where U.S. citizens abroad do not have to be apprised of their rights. *Id.*

182 *Id.* at 229 (citing *Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980)).

B. International Legal Authority

When it comes to detention and interrogation, there are two separate international legal paradigms: *jus in bello* and international human rights law (IHRL). *Jus in bello*, or international humanitarian law (IHL), are the international laws, rules, customs, and norms that govern the conduct of parties (state and non-state actors) in armed conflicts of an international or non-international character.[183] IHRL are the rules, norms, and customs that govern how parties are supposed to treat individual persons within their jurisdiction or territory.[184]

Before IHL may be applied to a situation, an armed conflict must be determined to exist.[185] "[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[186] Once an armed conflict exists, IHL becomes the applicable legal paradigm that governs the conduct of the conflicting parties.[187] The four Geneva Conventions and the two Additional Protocols are the main treaties that deal with the law applicable to situations of armed conflict.[188] The four Geneva Conventions, developed shortly after World War II, established a network of laws governing the conduct of international and non-international armed conflict.[189] These treaties were established in an effort to "limit the suffering of combatants and

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183 *See* DYCUS, *supra* note 13, at 277.

184 *Id.* at 278.

185 *Id.* at 279.

186 Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

187 *See* Dycus, *supra* note 13, at 278–79.

188 Geneva Convention I, *supra* note 10; Geneva Convention II, *supra* note 10; Geneva Convention III, *supra* note 10; Geneva Convention IV, *supra* note 10; Additional Protocol I, *supra* note 10; Additional Protocol II, *supra* note 10. The United States is not a party to Additional Protocol I or II. *See* Dycus, supra note 13, at 278. However, the United States does recognize significant portions of both Protocols as customary international law. *See* DYCUS, *supra* note 13, at 278.

189 *See* DYCUS, *supra* note 13, at 278.

noncombatants alike. . . ."[190] All four Geneva Conventions contain two articles that are the same throughout: Common Article 2 and Common Article 3.[191] Under these two Common Articles, every armed conflict is either international or non-international.[192] Common Article 2 defines when a conflict is international in character.[193] It states that:

> [T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.[194]

Common Article 3 defines when a conflict is not of an international character.[195] When a State and non-state actor enter into an armed conflict with one another, Common Article 3 applies.[196] Under the Geneva Conventions, when a conflict is of a non-international character, only the rules prescribed in Common Article 3 apply.[197]

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190 *Id.* at 277.

191 Geneva Convention I, *supra* note 10, art. 2, 3; Geneva Convention II, *supra* note 10, art 2, 3; Geneva Convention III, *supra* note 10, art. 2, 3; Geneva Convention IV, *supra* note 10, art 2, 3.

192 *Id.*

193 Geneva Convention I, *supra* note 10, art. 2; Geneva Convention II, *supra* note 10, art 2; Geneva Convention III, *supra* note 10, art. 2; Geneva Convention IV, *supra* note 10, art 2.

194 *Id.*

195 *See* Geneva Convention I, *supra* note 10, art. 3; Geneva Convention II, *supra* note 10, art 3; Geneva Convention III, *supra* note 10, art. 3; Geneva Convention IV, *supra* note 10, art 3.

196 *See id. See generally* Int'l Comm. of the Red Cross, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (Oscar M. Uhler et al. eds., 1958).

197 *Id.*

In an armed conflict, an individual can be classified in only one of two ways: either combatant or non-combatant.[198] In regard to detention laws today, in an international armed conflict between two states, the Third Geneva Convention on Prisoners of War (Third Geneva Convention) applies.[199] In this type of conflict, if a High Contracting Party captures a member of the opposing High Contracting Party's military, a combatant, that individual will be classified as Prisoner of War (POW).[200] Additionally, if the detainee is a member of a non-military armed force that has a responsible command structure, wears a distinctive sign or uniform, openly carries arms, and operates within the laws and customs of war, that individual will be considered a lawful combatant and will be classified as a POW.[201] Thus, the main difference between the combatant and non-combatant classification is that upon capture, lawful combatants are afforded POW protections.[202] If there is a question as to whether an individual will be classified as a POW, an Article 5 tribunal will be formed to determine the status of the detained individual.[203] Once a detainee is classified as a POW, that individual entertains an array of rights afforded under the Third Geneva Convention, such as conditions of confinement and treatment.[204]

If an individual is not classified as a combatant, then that person is deemed to be a non-combatant.[205] The non-combatant classification largely refers to civilians in an international armed

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198 *See* SOLIS, *supra* note 110, at 222–23.

199 *See generally* Geneva Convention III, *supra* note 10.

200 *Id.* art. 4.

201 *Id.*

202 *See* Geneva Convention IV, *supra* note 10, art. 5. While a member of a state military or militia that meets the requirements set out above are the most routine examples of individuals who receive POW status upon capture, there are other situations in which a non-combatant would receive POW statues, such as persons who accompany the armed forces without being members thereof; merchant marine and civilian aircraft crews; *levee en masse*; and demobilized military personnel and military internees in neutral countries. Geneva Convention III, *supra* note 10, at art. 4.

203 *See* Geneva Convention III, *supra* note 10, art. 5.

204 *Id.*

205 *See* SOLIS, *supra* note 110, at 223.

conflict.[206] However, armed conflicts today are more than likely to be of a Common Article 3 non-international character and carried out between states and armed opposition groups.[207] In this case, an "[a]rmed opposition group" can be defined as an "identifiable entit[y], with political objectives, that [it] pursue[s] by violent means, possessing an organized military force and an authority responsible for its acts."[208] Members of an armed opposition group who are detained during a Common Article 3 non-international armed conflict are not afforded POW protections because no such protection exists under Common Article 3.[209] However, Common Article 3 does give minimum standards of humane treatment afforded to individuals detained in non-international armed conflict.[210]

In the Geneva Conventions and its Additional Protocols, torture is prohibited in Common Articles 3, 50, 51, 130, and 147; Article 75.2(ii) of Additional Protocol I; and Article 4.2(a) of Additional Protocol 2.[211] Likewise, the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Statute of the International Tribunal for Rwanda (ICTR) also prohibit

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206 *See id.*

207 *See Upsala Conflict Data Program*, DEPT. OF PEACE AND CONFLICT RESEARCH, https://ucdp.uu.se/#/ (last visited Mar. 31, 2019).

208 SOLIS, *supra* note 110, at 220.

209 *See id.*

210 Geneva Convention I, *supra* note 10, art. 3; Geneva Convention II, *supra* note 10, art. 3; Geneva Convention III, *supra* note 10, art. 3; Geneva Convention IV, *supra* note 10, art. 3
("[T]he following acts are and shall remain prohibited at any time and in any place . . . a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; b) taking of hostages; c) outrages upon personal dignity, in particular, humiliating and degrading treatment; d) 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. . . .").

211 *See* Geneva Convention I, *supra* note 10, art. 3, 50, 51, 130, and 147; Geneva Convention II, *supra* note 10, art 3, 50, 51, 130, and 147; Geneva Convention III, *supra* note 10, art. 3, 50, 51, 130, and 147; Geneva Convention IV, *supra* note 10, art 3, 50, 51, 130, and 147; Additional Protocol I, *supra* note 10, art. 75.2(ii); Additional Protocol II, *supra* note 10, art. 4.2(a).

torture.[212] Therefore, these provisions, along with state practice, signify a prohibition against torture as customary international law whether in international or non-international armed conflict.

In addition to the Geneva Conventions, its Additional Protocols, and the ICTY and ICTR Statutes, the United Nations Convention against Torture (CAT) and the Universal Declaration of Human Rights (UDHR) correspondingly prohibit torture.[213] However, the CAT and the UDHR are human rights conventions, not IHL treaties. Yet, torture is considered a *jus cogens* offense and states engaged in armed conflict are prohibited from subjecting detainees to torture.[214]

Related to detainee torture and abuse in armed conflicts are extraordinary rendition and proxy detention. Black's Law Dictionary defines extraordinary rendition as the "transfer, without formal charges, trial, or court approval, of a person suspected of being a terrorist or supporter of a terrorist group to a foreign country for imprisonment and interrogation on behalf of the transferring country."[215] In addition to there being no judicial process attended to the rendition, there is generally no extradition treaty between the states as well. Essentially, extraordinary rendition is seen as a tool in which countries can outsource torture and abusive interrogation techniques.[216]

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[212] S.C. Res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); S.C. Res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc S/Res/955 (1994).

[213] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984); Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), art. 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

[214] *See* DYCUS, *supra* note 13, at 1011. *Jus cogens* is a preemptory norm of in international law in which states cannot opt out of the criminality of an offense. *See* RESTATEMENT (THIRD) OF FOREIGN RELATION LAW OF THE UNITED STATES § 702 (AM. LAW INST. 1986.).

[215] *Extraordinary Rendition*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[216] *See generally* David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585 (2006) (discussing extraordinary rendition as a violation of the Convention against Torture).

Proxy detention, on the other hand, may or may not involve extraordinary rendition.[217] There is no agreed upon definition of proxy definition. However, proxy detention loosely refers to the detention of individuals by a state in which another state is in fact in control of said detention.[218] However, proxy detention is not a "binary" situation; it is actually a spectrum of certain degrees of control, "influence," and access.[219] Extraordinary rendition can also be a form of proxy detention, but not always. Proxy detention refers to the effective control of one government's detainees by another government, whereas extraordinary rendition refers to the transfer of a government's detainees to the jurisdiction of another government.[220]

Leading up to 9/11 and expanded afterwards, the Central Intelligence Agency (CIA) operated extraordinary rendition programs.[221] In these programs, the CIA would send detained terror suspects to countries such as Syria, Jordan, Morocco, Egypt, and Uzbekistan, each of which have less than stellar track records when it comes to the abuse and torture of detainees.[222] As one U.S. official stated after 9/11, "'[w]e don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.'"[223] The U.S. defended its actions stating that it received assurances from the receiving government that transferred detainees would not be tortured or abused.[224]

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217 *See* Robert Chesney, *Proxy Detention of a U.S. Citizen in Iraq? A Glimpse into a Murky but Important Category of Detention*, Lawfare (Mar. 15, 2017, 10:56 AM), https://www.lawfareblog.com/proxy-detention-us-citizen-iraq-glimpse-murky-important-category-detention.

218 *Id.*

219 *Id.*

220 *Id; Extraordinary Rendition*, *supra* note 215.

221 *See* Michael Scheuer, *A Fine Rendition*, N.Y. TIMES (Mar. 11, 2005), http://www.nytimes.com/2005/03/11/opinion/a-fine-rendition.html.

222 *See* DYCUS, *supra* note 13, at 1048.

223 Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASHINGTON POST (Dec. 26, 2002), http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html (select page 2 of article).

224 A U.S. official stated that CIA personnel "'check on those assurances, and we double-check.'" *Torture by Proxy*, Editorial, N.Y. TIMES (Mar. 8, 2005), http://www.nytimes.com/2005/03/08/opinion/torture-by-proxy.html.

While the term complicity does not "exist in the current terminology of the law of international responsibility," there are corollaries in customary international law.[225] The Articles on Responsibility of States for Internationally Wrongful Acts was created by the United Nation's International Law Commission and adopted in 2001 by resolution 53/86.[226] The Articles state that in international law, either in an armed conflict or otherwise, for the actions of a state or entity to be attributable to another state, the latter state must exercise a certain degree of control over the former state or entity.[227] However, under Article 16, a state could be held responsible if it is connected with a wrongful act of another state.[228] While Article 16 does not use the term complicity, it says that a "[s]tate which aids or assists another [s]tate in the commission of an international wrongful act by the latter is internationally responsible" if two conditions are met.[229] First, the state must have "knowledge of the circumstances of the internationally wrongful act."[230] Second, the "act would be internationally wrongful if committed by the state."[231] In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* the Court recognized that this provision reflects customary international law.[232] Additionally, two different, but similar tests have been proffered by international courts: the effective control test set out in *Nicaragua v. United States of America*, and the overall control test set out in *Prosecutor v. Tadic.*[233]

In the *Nicaragua* case, Nicaragua alleged that the United States was engaged in aggression via giving aid and support to the Contras,

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225 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 2007 I.C.J. 43, 217 ¶ 419 (Feb. 26) [hereinafter *Application*].

226 *See Responsibility of States for Internationally Wrongful Acts,* Comm. on Chapter II, Y.B. Int'l L. Comm'n, annexed to U.N. Doc. A/RES/56/83 (2001).

227 *Id.*

228 *See id.* at art. 16.

229 *Id.*

230 *Id.* at art. 16(a).

231 *Id.* at art. 16(b).

232 *See Application*, *supra* note 225 at 217 ¶ 419.

233 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. 14, 64–65 ¶ 115 (June 27) [hereinafter *Nicaragua*]; Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement, ¶ 120 (Int'l Crim. Trib. For the Former Yugoslavia Jul. 15, 1999) [hereinafter *Prosecutor*].

an armed opposition group in Nicaragua.[234] The U.S. was, in fact, giving aid and support to the Contras; first covertly, but then publicly acknowledged by the Reagan Administration.[235] The question before the International Court of Justice was:

> [w]hether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. . . .[236]

The Court stated that there was no evidence that the U.S. "'created' the *contra* force" or that the U.S. gave "'direct and critical combat support[,]'" even though the U.S. did fund, train, equip, and organize the Contras.[237] The Court held that even though the U.S. did exert general control over the contras, which formed a high degree of dependency, it did not suffice to show that the contras were "directed or enforced" by the U.S. to the perpetration of acts conducted by the contras.[238] In articulation of the effective control test, the court stated that for the "conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[239]

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234 Specifically, Nicaragua alleged that the U.S. had recruited, trained, armed, equipped, financed, and directed paramilitary actions in and against Nicaragua by the Contras. *See* DYCUS, *supra* note 13, at 261.

235 *Id.*

236 *See Nicaragua*, 1986 I.C.J. Rep. 14, at 62 ¶ 109.

237 *Id.* at 61–62 ¶ 108.

238 *Id.* at 64–65 ¶ 115.

239 *Id.* The effective control test established in *Nicaragua* was later codified in the International Law Commission of the United Nation's Responsibility of States for Internationally Wrongful Acts. However, these articles are not international law, but have been developed over the course of over 50 years. *Responsibility of States for Internationally Wrongful Acts*, *supra* note 226, at ch. 2, art. 8. In 2001, the General Assembly commended the articles to state members. GA Res. 56/83, UN Doc. A/RES/56/83 (Dec. 12, 2001). Since then, the articles and the accompanying

Similar applications of the effective control test were applied in Armed Activities on the Territory of the Congo and in Application of the Convention on the Prevention and Punishment of the Crime of Genocide.[240] In Armed Activities, the Court held that for a state to be held legally responsible for the acts of another state or entity the conduct of the latter was "'on the instructions of, or under the direction or control of'" the former.[241] The Court in Application articulated the rule a bit differently, albeit principally the same, stating that a finding of state responsibility must be based on those individuals committing such violation to be in a "relationship of such complete dependence on the State that they cannot be considered otherwise than as organs of the State, so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility."[242] Both of these cases rely on the effective control test established in Nicaragua.

In applying the effective control test, the Court in *Armed Activity* and *Application* both relied on similar language to determine whether or not the organization that perpetrated the violations could be considered an "organ" of another state.[243] Moreover, the effective control test applies not only to actions of governments or organizations which could be imputable to another state, but also to the actions of individuals.[244] To rise to that level of legal responsibility, the effective control test sets a high bar for a state to be attributable for the actions of another state or organization.[245]

While the effective control test is one way to attribute legal responsibility, the Court in *Prosecutor v. Tadić*, provided a slightly

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commentary have been cited to over 100 times by courts, tribunals, and other bodies. United Nations Materials on the Responsibility of States for Wrongful Acts, UN Doc. ST/LEG/SER B/25 (2012).

240 Armed Activities on the Territory of the Congo *(Dem. Rep. Congo v. Uganda*), 2005 I.C.J. 168 (Dec. 19) [hereinafter *Armed Activities*]; *Application*, *supra* note 225.

241 *Armed Activities*, 2005 I.C.J. 168, at 226 ¶ 160.

242 *Application*, 2007 I.C.J. 43, at 207 ¶ 397.

243 *See Armed Activities*, 2005 I.C.J. 168, at ¶ 160; *Application*, 2007 I.C.J. 43, ¶ 392.

244 *See Application,* 2007 I.C.J. 43, at ¶ 398.

245 *See Nicaragua*, at ¶ 115.

different standard by applying the "overall control" test.[246] There, the Court stated that "[i]n order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity."[247] The Court in *Tadić* did recognize the effective control test established in *Nicaragua*, however, only as applied to private individuals acting on behalf.[248] Additionally, a showing that a state directed another state or entity to commit specific illegals acts is not required in order to meet the overall control test.[249]

As shown, there are some marked differences between the effective control test established in *Nicaragua* and the overall control test established in *Tadić*.[250] In *Application*, the court considered the overall control test that the *Tadić* court established.[251] It rejected the overall control test on two grounds: first, the ICTY "addressed an issue which was not indispensable for the exercise of its jurisdiction," and second, that the overall control test was "unpersuasive" in determining the legal responsibility attributable to a state.[252] In determining that the test was unpersuasive, the court stated that factual issues of the level of a state's involvement in an armed conflict and their degree of control over a party to that conflict may differ.[253] Additionally, the court noted that the overall control test is overly broad in determining when a state is legally responsible for the acts of another state or organization.[254] The court reasoned that the overall control test "stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility."[255]

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246 *See Prosecutor*, Case No. IT-94-1-A, at ¶ 120.

247 *Id.* at ¶ 131.

248 *See id.* at ¶ 131–36. *See also id.* n. 159–67.

249 *Id.* at ¶ 131.

250 *See generally* Antonio Cassese, *The* Nicaragua *and* Tadić *Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649 (2007).

251 *Application*, 2007 I.C.J. 43, at 210 ¶ 404–05.

252 *Id.* at 209–11 ¶ 403–07.

253 *Id.* at 210 ¶ 405.

254 *Id.* at ¶ 406.

255 *Id.*

III. LIABILITY OF THE UNITED STATES

A. Domestic Liability

Could a U.S. official or officials, who knew of or witnessed such abuse or torture; presented the interrogators with questions to ask; interrogated detainees after torture or abuse sessions; or acted on intelligence derived from such torture sessions; be found criminally or civilly liable under U.S. federal law; if a detainee or group of detainees; being held and controlled by a foreign government or entity; is subjected to abuse or torture? In short, the answer is no. In assessing whether a U.S. official could be found criminally liable under U.S. federal law, there are two key factors to consider: the actions of U.S. officials and the relationship of the U.S. officials to the detainee or detainees. The first factor, the actions of U.S. officials, contain a *mens rea* and *actus reus* element in order to fulfill statutory requirements.

Application of these factors to the case at hand reveals that there has been no violation of U.S. law. In the first instance, there were no allegations that U.S. officials engaged in abuse or torture of detainees, thus, not satisfying the *actus reus* element. At most, U.S. officials either were present during torture or abuse, interrogated detainees after torture was conducted, or both. In this regard, U.S. officials have not violated any domestic law regarding detention, abuse, or torture. Because U.S. officials have not engaged in any acts of torture or abuse, there can be no violation of a torture statute. Secondly, and arguably most important, the detainees are under complete and total control of a foreign government. E.O. 13,491 states explicitly that interrogation techniques and detention practices only apply to individuals in "the custody or under the effective control" of the U.S. or detained in a "facility owned, operated, or controlled" by the U.S.[256] The E.O. reiterates what is stated in the DTA, WCA, and Torture Act. Clearly, neither torture nor abuse or the custody and control of the detainees has been satisfied. Lacking these two elements, U.S. officials could not be federally indicted for the torture and abuse of detainees in black sites in Southern Yemen.

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[256] Exec. Order No. 13,491, *supra* note 143.

If the U.S. were to attempt to extradite an individual from these facilities to the U.S. to face criminal charges, the U.S. would have to make certain that any information used against that individual at trial would be gathered under lawful U.S. jurisprudential means. Admitting statements made to U.S. officials during a post-torture interrogation would be very difficult to have submitted as evidence at trial.

Even though the "joint venture" doctrine is used to suppress statements given by a defendant when not properly mirandized, the doctrine could be used to establish culpability of U.S. officials in the torture and abuse of detainees at the hands of foreign officials. The "joint venture" doctrine states that "mere presence at an interrogation does not constitute the 'active' or 'substantial' participation necessary for a 'joint venture,' . . . but coordination and direction of an investigation and interrogation does."[257] Therefore, if the facts show that U.S. officials coordinated and directed the torture and abuse of detainees, even if the facilities and detainees were under the exclusive control of a foreign government, the relationship could be considered a "joint venture." But what then constitutes coordination and direction? At what point has a U.S. official met the threshold of coordinating and directing torture and abuse? If providing questions and being present at such sessions, as was the case in *Abu Ali*, does not meet that threshold then what does? Would giving UAE and Yemini military a list of names of people to be detained count as coordination and direction? Case law has yet to address these issues.

Even if the "joint venture" doctrine was a viable legal alternative, there are numerous issues to consider when establishing a prosecutable case against U.S. officials. For one, fact finding would be extremely difficult. To prove probable cause to a grand jury that the abuse and torture of detainees abroad by another government could be considered a "joint venture" with U.S. officials would be tenuous. Additionally, if the Department of Justice indicted U.S. officials on "joint venture" torture and abuse charges, it would be an implicit statement that the U.S is complicit in abuse and torture. In the case at hand, there are not sufficient amount of facts to consider the

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[257] *United States v. Abu Ali*, 528 F.3d 210, 229 (4th Cir. 2008) (citing *Pfeifer v. U.S. Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir. 1980)).

relationship between the U.S. and the UAE and Yemeni interrogators as a "joint venture."

Even if U.S. officials were in violation of a torture law in the U.S., it is extremely unlikely that any individuals would even be brought up on charges. Following 9/11 but shortly before the invasion of Iraq, the Department of Justice, Office of Legal Counsel produced a memorandum outlining the standards of conduct required by U.S. law enforcement personnel under the CAT.[258] Infamously known as the "Bybee memo,"[259] it defined torture so narrowly that, in effect, no U.S. law enforcement personnel could ever be convicted of torture in the U.S.[260] The Bybee memo, however, did not apply to military personnel.[261] Two years later, the memo was withdrawn.[262]

Shortly thereafter in March of 2003, John Yoo authored another memo outlining the limits of interrogations carried out against unlawful combatants by the military.[263] In sum, the memo proclaimed "that federal laws prohibiting assault, maiming and other crimes did not apply to military interrogators who questioned al-Qaeda captives because the president's ultimate authority as commander in chief overrode such statutes."[264] This memo did not last long either; "[n]ine

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[258] *See* Memorandum for Alberto Gonzales; from Department of Justice, Office of Legal Counsel; *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) [hereinafter *Standards of Conduct*].

[259] The memorandum, written largely by John Yoo, was signed by then Assistant Attorney General Jay S. Bybee. *See* Andrew Cohen, *The Torture Memos, 10 Years Later*, THE ATLANTIC (Feb. 6, 2012), https://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439/.

[260] *See Standards of Conduct*, *supra* note 258.

[261] *See* SOLIS, *supra* note 110, at 624.

[262] *Id.*

[263] *See* Memorandum for William J. Haynes II, General Counsel of the Department of Defense; from Department of Justice, Office of Legal Counsel; *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (Mar. 14, 2003).

[264] Dan Eggan & Josh White, *Memo: Laws Didn't Apply to Interrogators*, WASHINGTON POST (Apr. 2, 2008).

months later . . . th[e] memo was withdrawn by a new head of the OLC. . . ."[265]

In hindsight, there is no question that the United States engaged in abuse, torture, and extraordinary rendition of detainees during the Bush Administration's prosecution of the Global War on Terror.[266] President Obama admitted to it when he stated that "'[w]e tortured some folks,'. . . . 'We did some things that were contrary to our values.'"[267] The abuses at the Abu Ghraib prison in Iraq, the CIA's black site detention facilities, and the use of extraordinary rendition as a means of proxy detention have all been well chronicled and reported on.[268] What is clear is that the abuse and torture of detainees held by the U.S. were not isolated incidents; rather, the U.S. embarked on an official policy that was inconsistent with domestic and international law.[269] This begs the question: how many individuals have been federally indicted under the various U.S. torture laws from the abuses and torture at Abu Ghraib, the CIA black site detention facilities, and the extraordinary rendition program?

In regard to the CIA's treatment of detainees, only one civilian, David Passaro, has been charged after 9/11.[270] Passaro, a CIA contractor at the time, was not even convicted under U.S. anti-torture laws, but felony assault.[271] Eleven U.S. soldiers faced Uniform Code of Military Justice (UCMJ) actions related to the Abu Ghraib prison

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265 SOLIS, *supra* note 110, at 624.

266 *See Obama: "We Tortured Some Folks" after 9/11*, CBS NEWS (Aug. 1, 2014, 4:15 PM), https://www.cbsnews.com/news/obama-we-tortured-some-folks-after-911/. *See generally* Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares Form the War on Terror,* 75 GEO. WASH. L. REV. 1200 (2007).

267 CBS NEWS, *supra* note 266.

268 *See* SOLIS, *supra* note 110, at 652. *See generally* SENATE SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM (2012).

269 *See generally* Sadat, *supra* note 266.

270 Warren Strobel & Lawrence Hurley, *Prosecutions for CIA Torture Still Seem Unlikely after Senate Report*, REUTERS (Dec. 9, 2014, 5:27 PM), https://www.reuters.com/article/us-usa-cia-torture-accountability/prosecutions-for-cia-torture-still-seem-unlikely-after-senate-report-idUSKBN0JN2JQ20141209.

271 *Id.*

abuses.[272] However, these were UCMJ actions and not federal charges. [273] Of important note, no high-ranking commanders of the Abu Ghraib prison faced formal charges.[274] This gap shows that there is a huge discrepancy in accountability of individuals who carried out abuse and torture against detainees.

B. International Liability

Before the liability of the U.S. can be determined, the type of armed conflict it is participating in must be clarified. Currently, the U.S. is engaged in an armed conflict with against ISIS-Y and AQAP in Yemen.[275] Since ISIS-Y and AQAP are armed opposition groups operating in Yemen, this is a non-international armed conflict. Therefore, IHL legal principles apply to the U.S. in its conduct against ISIS-Y and AQAP. Further, there is a non-international armed conflict between the states that make up the Saudi-led coalition and the Houthis in Yemen.[276]

The U.S. cannot be held liable for the *jus in bello* violations of other nations. Nor can the U.S. be held liable for every *jus in bello* violation of its allies. There is no doubt that, if the allegations of torture and abuse by the UAE and Yemen are true, both countries would be in violation of Common Article 3 of the Geneva Conventions and the numerous other prohibitions on abuse and torture. Yet, the question remains; at what point is the U.S. liable for the *jus in bello* violations of a third party? Issues such as proxy detention and extraordinary rendition are not black and white. Rather, they exist on a spectrum.

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[272] Noah Bierman, *Few have Faced Consequences for Abuses at Abu Ghraib Prison in Iraq*, LOS ANGELES TIMES (Mar. 17, 2015, 4:00 AM), http://www.latimes.com/nation/la-na-abu-ghraib-lawsuit-20150317-story.html.

[273] Jackie Northam, *Officers Untouched by Abu Ghraib Prosecutions*, NATIONAL PUBLIC RADIO (Apr. 6, 2006, 6:00 AM), https://www.npr.org/templates/story/story.php?storyId=5327137.

[274] *Id.*

[275] *See* Oona Hathaway, et al. *Is the United States a Party to the Conflict between the Saudi-led Coalition and the Houthis?*, JUST SECURITY (April 12, 2018), https://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439/.

[276] *Id.*

So, where does the U.S. in relation to UAE and Yemen fall on this spectrum? In the light of this question, one must turn to the "effective control" test established in *Nicaragua*. Was the relationship between the UAE and Yemeni interrogators and the U.S. one of effective control? Can the actions of UAE and Yemen be attributable to the U.S.? The role of each country in Yemen is not mutually exclusive. Yemen, UAE, and the U.S. are all in non-international armed conflicts with Al-Qaeda and ISIL-Y.[277] However, Yemen and the UAE are also in a non-international armed conflict with the Houthis, which the U.S. supports through the Saudi-led coalition by the sale of arms to coalition countries and limited intelligence sharing.[278] Additionally, the detention facilities in Southern Yemen are financed and ran by the UAE and Yemen.[279] Moreover, this is not a case of extraordinary rendition or proxy detention. At no point has the U.S. been in control of the detainees in Southern Yemen.

Under the "effective control" test, it would "have to be proved that [the U.S.] had effective control of the military . . . operations in the course of which the alleged violations were committed."[280] Effective control goes beyond arming, financing, and sharing intelligence.[281] The degree of control required would be that of being able to equate the actions of UAE and Yemeni interrogators as organs of the U.S. government. In this case, there are not sufficient facts to show that the UAE and Yemen, which are members of the Saudi-led coalition, are in fact under effective control of the U.S. government. Even under the more broad "overall control" test used in *Tadić*, it would still be difficult to argue that UAE and Yemeni interrogators were under the overall control of the U.S. Therefore, in considering applicable *jus in bello* principles, the U.S. government would not be found liable for the torture and abuse perpetrated by UAE and Yemen because those countries' facilities, detainees, and interrogators were not under the effective or overall control of the U.S. government. Further, there are no allegations that the U.S. aided or assisted UAE in their black site detention program. If it could be proven that the U.S.

277 *Id.*
278 *Id.*
279 *See* Michael, *supra* note 2.
280 *See Nicaragua*, *supra* note 233, at 55 ¶ 115.
281 *Id.*

did aid or assist the UAE, then it might open itself up to liability. However, it is far from unlikely that will occur.

What if the U.S. executed a drone strike against an Al-Qaeda operative based on intelligence gathered from an individual who was abused or tortured by the UAE or Yemen? This situation is largely contextual. If the U.S. based its justification for the strike purely from intelligence gathered from an abused or tortured individual, then the U.S. is likely in violation Geneva Conventions Additional Protocol I, Article 57(2)(a), precaution in attack.[282] While the U.S. has not ratified Additional Protocol I, it does regard Article 57(2)(a) as customary international law.[283]

IV. CONCLUSION

Indeed, the issues raised by the Associated Press article are troubling. Given the U.S.'s history of torture and abuse during the Global War on Terror, the last thing the U.S. should be doing is associating itself with such behavior. Even if the allegations raised in the article are untrue, the U.S. would benefit greatly from a formalized policy that addresses the issues of U.S. allies engaging in gross violations of international law. The benefits of an explicit, formalized policy would be immense. Not only should the U.S. clarify its stance regarding torture and abuse by allies, it should be an active participant in the prevention and termination of battlefield torture and abuse.

Actions, however, speak much louder than words. Therefore, U.S. action that attempts to end torture would go much farther than official statements. To start, the U.S. needs to hold its own citizens accountable for their actions in violation of the law. The lack of

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[282] Additional Protocol I, *supra* note 10, at art. 57(2)(a) states:

2. With respect to attacks, the following precautions shall be taken:

a. Those who plan or decide upon an attack shall:

i. Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects . . .

ii. Take all feasible precautions in the choice of means and methods of attack . . .

iii. Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life . . . .

[283] U.S. Dep't of Defense, Law of War Manual, § 5.11, 237 (2015).

accountability that the U.S. has imposed on its own citizens for the torture and abuse committed during the Global War on Terror is troubling in the least and appalling at best. As more time passes, these incidents will only fall deeper into the recesses of the public conscience.

The challenges posed by national security in the present day cannot be understated. Threats against America continue to evolve as their complexities increase. Non-state actors and terror groups pose a great threat against the U.S. The federal government and policymakers are under continuous pressure, both internally and externally, to prevent a large-scale terror attack on U.S. soil. This pressure makes it more likely that policymakers and those who execute the policy will continue to push the boundaries of international and domestic law. Finding the balance between national security and the law is no easy feat. Yet, citizens should constantly demand that policymakers and legislators act in accordance with the country's highest moral and ethical values.