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Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights

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LEGAL “BLACK HOLE”? EXTRATERRITORIAL STATE ACTION AND INTERNATIONAL TREATY LAW ON CIVIL AND POLITICAL RIGHTS†

Ralph Wilde*

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I. INTRODUCTION

The phenomenon of terrorism by non-state actors did not, of course, begin with the attacks on the United States on September 11, 2001. Equally, the extraterritorial actions taken by the United States and other States since then—from the invasion and occupation of Iraq to European proposals to detain asylum seekers outside the European Union—are in their nature not new. That said, just as the attacks have resulted in a global public policy focus on the threat posed by terrorists, so the wide range and scope of the extraterritorial state actions taken or proposed since the 2001 attacks has led to greater critical attention being focused on what States do outside their territory.

Extraterritorial state activities raise a number of important political and legal questions including, fundamentally, whether they are justified, both in terms of the activity itself and the manner in which it is conducted. One aspect of the latter justification concerns whether such actions conform to human rights standards, and this in turn raises its own question as to whether, and to what extent, human rights law applies to extraterritorial state actions, thereby potentially offering a normative framework by which conformity to human rights standards can be judged. A striking feature, however, of some of the commentary on certain post-9/11 extraterritorial activities—notably the U.S. detention of several hundred individuals at its Naval Base in Guantánamo Bay, Cuba—is the suggestion that these activities take place in a “legal black hole.”

This Article considers the significant role that extraterritorial activity is playing in the post-9/11 foreign policy of some States and the idea that this activity somehow takes place “outside” the law or, at least, outside an arena where legal norms apply as a matter of course rather than only when and to the extent that the State involved decides these norms will apply.¹ It begins in Section II by mapping out the extraterritorial state activities conducted since 9/11, covering activities with a personalized object—such as the military action taken in Afghanistan against Al Qaeda—and activities with a spatial (territorial) object—such as the occupation of Iraq. Greater information is given on extraterritorial activities involving the detention of terrorist suspects, asylum seekers,

1. Amnesty International states that “the detainees held in Guantánamo, Bagram and elsewhere are at the mercy of . . . the executive’s interpretation of what protections the Constitution demands and the USA’s international obligations require.”

Amnesty International, *United States of America: The Threat of a Bad Example: Undermining International Standards as “War on Terror” Detentions Continue*, AI Doc. No. AMR 51/114/2003 12 (Aug. 19, 2003), available at <http://web.amnesty.org/library/print/ENGAMR511142003> [hereinafter Amnesty International, Aug. 19, 2003].

and others as such activities (with the exception of the detentions in Guantánamo Bay and Iraq) have not been given much attention when compared to, say, the high-profile military campaigns in Afghanistan and Iraq.

The subject matter of this study having been set out, Section III then considers the relevance of human rights ideas to this subject matter. Salient features of the activity in this regard are identified, including the extraterritorial locus and the relative lack of third-party scrutiny. In the context of terrorist suspects detained extraterritorially, a key feature of post-9/11 discourse is highlighted: the idea that the terrorist threat means that methods of interrogation involving torture and/or inhuman and degrading treatment might be in order; and the allegation that such methods are in fact being practiced in some cases. These and other special features of post-9/11 extraterritorial activities are invoked to support a thesis that greater scrutiny is needed of the impact on individuals of States' activities beyond their borders.

Section IV considers the proposition that one means through which human rights scrutiny might operate—the application of human rights law—is lacking because of the "legal black hole" that prevails in the extraterritorial locus. Moreover, we see that some observers allege that in certain cases the reason for carrying out some initiatives *extraterritorially* is this supposed relative lack of legal regulation as it enables States to take action—specifically, prolonged detention and/or the conduct of interrogations that involve torture and/or inhuman or degrading treatment—that would not be lawful were it to be conducted in the State's own territory.

Section V then considers whether a key international law aspect of the "legal black hole" thesis holds water: are the main international treaties on civil and political rights inapplicable to these activities by reason of the "wartime" context in which some of them occur and/or the extraterritorial location in which they are conducted? We see that despite the suggestions made by some critics of the States engaged in the extraterritorial activities discussed, and by the States themselves, this area of law continues to apply in the extraterritorial context.

II. EXTRATERRITORIAL STATE ACTIVITIES

As far as their purposes are concerned, extraterritorial state activities can be categorized according to the object they are aimed at. On the one hand, they can be aimed at a *personalized* object: particular groups or individuals, for example activities taken to capture members of a terrorist organization. On the other hand, they can be aimed at a *spatial* object: a

particular territorial unit, for example territorial occupation conducted for general strategic purposes. Activities can affect one object when control is exercised over the other object. Focusing on what the activities are aimed at, however, is helpful in highlighting the purpose or purposes with which they are associated.

Beginning with extraterritorial activities with a personalized object, such activities are aimed at the government of the territory in which the action takes place and/or non-state groups and individuals (e.g. terrorists) in that territory. Activities within this category can be divided into two groups. The first covers *diplomatic and consular activity*; the State representing itself to those in the foreign territory, including its government and the State's own nationals, for example through operating embassy premises. The second group covers activities involving some kind of *coercive action* against governments or non-state actors. This includes what is usually termed the "use of force" in the lexicon of international law: military action conducted in foreign territory targeting governments or non-state actors in that territory. Examples would be the military action conducted by the United States and the United Kingdom in Afghanistan at the end of 2001, explained in terms of neutralizing Al Qaeda following the attacks on the United States on 9/11,² and the invasion of Iraq in 2003, explained in terms of enforcing Iraq's disarmament obligations.³ It also includes coercive action on a lesser scale, such as the

2. On the legal justification offered, see Letter Dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/947 (2001) and Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (2001), available at <http://www.un.org/terrorism/letters.htm>. For academic commentary, see, for example, Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT'L & COMP. L.Q. 401 (2002); Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993 (2001); Tom J. Farer, *Beyond the Charter Frame: Unilateralism or Condominium?*, 96 AM. J. INT'L L. 358 (2002); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida and Iraq*, 4 SAN DIEGO INT'L L. J. 7 (2003); Christopher Greenwood, *International Law and the War Against Terrorism*, 78 INT'L AFFAIRS 301 (2002); Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: the Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537 (1999) [hereinafter Lobel 1999]; Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L. J. 41 (2002); Sean D. Murphy, *Terrorist Attacks on World Trade Center and Pentagon*, 96 AM. J. INT'L L. 237 (2002); Steven R. Ratner, *Jus Ad Bellum and Jus In Bello After September 11*, 96 AM. J. INT'L L. 905 (2002); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559 (1999).

3. On the legal justification offered, see Letter Dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/538 (2003) [hereinafter UK-US Letter, May 8, 2003]. For academic commentary, see for example, the articles in 97 AM. J. INT'L L. 481-991 (2003); Michael Bothe,

alleged abduction of Kurdish leader Abdullah Öcalan by Turkish agents in Kenya in 1999.⁴

Extraterritorial activity with a spatial object is aimed at exercising control with respect to the territory in order that particular policy objectives can be promoted. States, either individually or collectively, assert plenary or partial administrative control over other States, such as the Coalition Provisional Administration (CPA) in Iraq between 2003—2004,⁵ or parts of other States, such as the U.S. base in Guantánamo Bay in Cuba, or non-state territories, such as the Israeli occupation of the West Bank and the Gaza Strip. The existence of what might be termed "foreign territorial administration" (administration by a State over territory in respect of which it does not enjoy title) can be explained in four ways.

The first explanation for foreign territorial administration relates to what might be called "colonial" arrangements: the State exercises administration as a consequence of an earlier decision to depart from the usual practice of decolonization, for example where the local population chooses to retain a relationship with the domestic government without being assimilated formally into the sovereign territory of that State. An example would be what are now called British Overseas Territories,⁶ such as the U.K. Falkland Islands.⁷

Terrorism and the Legality of Pre-Emptive Force, 14 EUR. J. INT'L L. 227 (2003); Christine Gray, *From Unity to Polarisation: International Law and the Use of Force Against Iraq*, 13 EUR. J. INT'L L. 1 (2002); Dino Kritsiotis, *Arguments of Mass Confusion*, 15 EUR. J. INT'L L. 233 (2004); Lobel, *supra* note 2; Vaughan Lowe, *The Iraq Crisis: What Now?*, 52 INT'L & COMP. L.Q. 859 (2003); Sean D. Murphy, *Use of Military Force to Disarm Iraq*, 97 AM. J. INT'L L. 419 (2003); Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT'L L. 209 (2003); Colin Warbrick, *Current Developments—Public International Law. The Use of Force against Iraq*, 52 INT'L & COMP. L.Q. 811 (2003).

4. See *Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. H.R., (Judgment on the Merits, Mar. 12, 2003), at <http://www.echr.coe.int> [hereinafter *Öcalan* (Merits)].

5. See UK-US Letter, May 8, 2003, *supra* note 3; S.C. Res. 1483 (2003); S.C. Res. 1511 (2003); S.C. Res. 1546 (2003).

6. On British Overseas Territories, see British Overseas Territories Act, 2002, c. 8 (Eng.), available at <http://www.hmso.gov.uk/acts/acts2002/20020008.htm> and U.K. Foreign and Commonwealth Office, *Overseas Territories*, at <http://www.fco.gov.uk>. The U.K. position on its continuing relationship to the BOTs is summarized as follows: "Self-determination does not necessarily mean independence. Britain has willingly granted independence where it has been requested, and will continue to do so where it is an option, while remaining committed to those of its Overseas Territories which choose to retain the British connection."

UK Foreign and Commonwealth Office, *Country Profiles—Falkland Islands*, at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394365&a=KCountryProfile&aid=1018965238550> [hereinafter UK FCO Falklands webpage].

7. On the Falkland Islands, see the U.K. FCO Falklands webpage, *supra* note 6 and the Falklands Government webpage, at <http://www.falklands.gov.fk> [hereinafter Falklands Government website].

The second category of foreign territorial administration covers the permanent or semi-permanent state administration of foreign territory for long-term military or strategic purposes, such as the U.S. Naval Support Facility on the Pacific island of Diego García, which forms part of the British Indian Ocean Territory, a U.K. dependent territory.⁸ The U.S. facility in Guantánamo Bay also falls into this category. In two 1903 agreements, Cuba leased two areas in its territory—in Bahia Honda in the northwest and Guantánamo Bay in the southeast—to the United States “for the time required for the purpose of coaling and naval stations.”⁹ Whereas Cuba continued to enjoy “ultimate sovereignty” over the two areas (i.e. title),¹⁰ the United States would exercise “complete jurisdiction and control” within them (i.e. the right of territorial administration), including the “right to acquire . . . any land or other property therein.”¹¹ In a 1934 treaty, the two States agreed that the stipulations in the 1903 agreements regarding the naval station in Guantánamo Bay would continue in effect until they agreed to modify or abrogate them.¹² Because no such agreement has yet been reached, the United States continues to exercise plenary administrative competences in “Naval Base Guantánamo Bay.”¹³

The third explanation for foreign territorial administration is based on military action conducted in the territory. Here, administration can be explained as a consequence of such action—as in Iraq—and/or in imme-

8. On the status of Diego García, see Mike O'Brien, *Written Answer: British Indian Ocean Territory*, HOUSE OF COMMONS HANSARD, Vol. 399, Part No. 348, Column 935W (Feb. 13, 2003), available at http://www.publications.parliament.uk/pa/cm200203/cmhansrd/v030213/text/30213w22.htm#30213w22.html_spnew11 [hereinafter O'Brien, Feb. 13, 2003]; Foreign and Commonwealth Office, *Country Profiles- British Indian Ocean Territory* (2004), at <http://www.fco.gov.uk>; *Island History*, at <http://www.dg.navy.mil>. On the U.S. Support Facility, see, for example, Agreement between the United States and the United Kingdom on Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966, U.S.-U.K., 18 U.S.T. 28, 603 U.N.T.S. 273; O'Brien, Feb. 13, 2003, *supra* note 8; *Island History*, *supra* note 8.

9. Agreement Between for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. I, U.S.T. 418, available at <http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba002.htm> [hereinafter US—Cuba Agreement #1 1903]. Agreement on the Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.—Cuba, U.S.T. 426, available at <http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba003.htm>, covers further aspects of the lease, including remuneration by the United States to Cuba.

10. US—Cuba Agreement #1 1903, *supra* note 9, art. I.

11. *Id.* art. III. See also *id.* art. II (on the use and occupation of the adjacent waters).

12. Treaty Between the United States of America and Cuba, May 29, 1934, U.S.—Cuba, art. III, T.S. No. 866, available at <http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba001.htm>.

13. See the website of the U.S. Naval Base at Guantánamo, at <http://www.nsgtmo.navy.mil>. On the legal status of Guantánamo Bay, see also the discussion in the Supreme Court decision in *Rasul v. Bush*, 124 S. Ct. 2686, 2690-91, 2696 (2004).

diate defensive (as opposed to long-term strategic) terms, or as part of a peace settlement following the end of armed hostilities—as with the military occupation of Bosnia and Herzegovina (by the NATO-led SFOR [formerly IFOR] and then the EU force EUFOR)¹⁴ and Kosovo (by KFOR).¹⁵

The fourth type of foreign territorial administration is distinctive for being aimed at furthering asylum policy. Certain foreign state representatives now operate in the airports of other States—U.K. immigration officials at Prague Airport, for example. Acting in conjunction with airport and airline officers, these representatives attempt to prevent individuals suspected of intending to make an unfounded asylum claim from traveling to their country.¹⁶

In addition to these partial asylum policy-related administrative activities, certain States set up camps located outside their territories to house individuals claiming asylum in their countries. This strategy was

14. See General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 89, at 91 (Annex 1A, Military Aspects of the Peace Settlement), 101 (Appendix A to Annex 1A, with maps), 102 (Appendix B to Annex 1A, Agreement Between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organisation (NATO) Concerning the Status of NATO and its Personnel), 104 (Appendix B to Annex 1A, Agreement Between the Republic of Croatia and the North Atlantic Treaty Organisation (NATO) Concerning the Status of NATO and its Personnel), 106 (Appendix B to Annex 1A, Agreement Between the Federal Republic of Yugoslavia and the North Atlantic Treaty Organisation (NATO) Concerning Transit Arrangements for Peace Plan Operations), 111 (Annex 2, Inter-Entity Boundary, and appendix thereto). See also S.C. Res. 1491, U.N. Doc. S/RES/1491 (2003); S.C. Res. 1423, U.N. Doc. S/RES/1423 (2002); S.C. Res. 1421, U.N. Doc. S/RES/1421 (2002); S.C. Res. 1420, U.N. Doc. S/RES/1420 (2002); S.C. Res. 1418, U.N. Doc. S/RES/1418 (2002); S.C. Res. 1357, U.N. Doc. S/RES/1357 (2001); S.C. Res. 1305, U.N. Doc. S/RES/1305 (2000); S.C. Res. 1247, U.N. Doc. S/RES/1247 (1999); S.C. Res. 1174, U.N. Doc. S/RES/1174 (1998); S.C. Res. 1144, U.N. Doc. S/RES/1144 (1997); S.C. Res. 1103, U.N. Doc. S/RES/1103 (1997); S.C. Res. 1088, U.N. Doc. S/RES/1088 (1996); S.C. Res. 1035, U.N. Doc. S/RES/1035 (1995); S.C. Res. 1031, U.N. Doc. S/RES/1031 (1995); and the NATO, IFOR, and SFOR websites, at <http://www.nato.int/ifor/for.htm> and <http://www.nato.int/sfor>. Under S.C. Res. 1575, U.N. Doc. S/Res/1575 (2004), EU Member States acting through or in cooperation with the EU were authorized to establish a multinational stabilisation force (EUFOR) as a legal successor to SFOR under unified command and control. See also EU Military Operation in Bosnia and Herzegovina, at <http://www.euforbih.org>.

15. See Agreement on the Principles (Peace Plan) to Move Towards a Resolution of the Kosovo Crisis, U.N. Doc. S/1999/649 (1999) (presented to the leadership of the Federal Republic of Yugoslavia by the President of Finland, Martti Ahtisaari, representing the European Union, and Viktor Chernomyrdin, Special Representative of the President of the Russian Federation, contained in Letter dated June 7, 1999 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council). See also S.C. Res. 1367, U.N. Doc. S/RES/1367 (2001); S.C. Res. 1345, U.N. Doc. S/RES/1345 (2001); S.C. Res. 1244, U.N. Doc. S/RES/1244 (1999); and the KFOR website, at <http://www.nato.int/kfor>.

16. On U.K. immigration officials at Prague Airport, see *R v. Immigration Officer at Prague Airport* and another (Respondents) ex parte European Roma Rights Centre and others (Appellants), Dec. 9, 2001, 2 W.L.R. 1 (H.L. 2005).

pioneered by Australia with its facilities in the island of Nauru. Within the European Union, States have considered creating "Transit Processing Centers" (TPCs) to which asylum-seekers in EU Member States would be transferred pending the determination of their asylum claims.¹⁷ Certain U.K. proposals in this regard would locate the centers outside the European Union itself, possibly in Croatia, Romania, or Albania, although the resistance to this on the part of other EU Member States led initially to suggestions that such centers may be set up in some of the more recent members of the EU, such as Poland.¹⁸ The current U.K. position is to focus on initiatives involving "third countries in the region of origin,"¹⁹ although it is uncertain whether such initiatives would involve the European Union or its Member States becoming directly involved in administrative activities.

In drawing up these classifications, particular features of the administrative setup are emphasized in order to identify the purpose for which territorial control is exercised as far as the administering State is concerned. Of course, many of these features exist in more than one type of project even if they are only significant for one. For example, territories in the second category (defensive) may have been created in the same

17. See Letter from Tony Blair, U.K. Prime Minister to Costas Simitis, Greek Prime Minister (Mar. 10, 2003), available at <http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf> [hereinafter Blair letter, Mar. 10, 2003]; Gregor Noll, *Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones*, 5 EUR. J. MIGRATION & L. 303 (2003); *The Albanian Solution*, ECONOMIST, Mar. 15, 2003, at 33; Martin Bright et al., *Secret Balkan Camp Built to Hold UK Asylum Seekers*, OBSERVER, June 15, 2003, available at <http://observer.guardian.co.uk/politics/story/0,6903,977842,00.html>; Rory Watson, *British Plan for Asylum Havens Rebuffed by European Union*, LONDON TIMES, June 20 2003, at 18 [hereinafter Watson]; Amnesty International, *UK/EU/UNHCR: Unlawful and Unworkable: Amnesty International's Views on Proposals for Extra-territorial Processing of Asylum Claims*, AI Doc. IOR 61/004/2003 (June 18, 2003), available at <http://web.amnesty.org/library/index/engior610042003> [hereinafter Amnesty International June 2003]; European Council on Refugees and Exiles, *Statement on the European Council Meeting, 21 and 22 March 2003*, AD2/03/2003/ext/AS (Mar. 17, 2003), available at <http://www.ecre.org/statements/Council%20March%202003.shtml> [hereinafter ECRE Statement].

18. See Blair letter, Mar. 10, 2003, *supra* note 17; Watson, *supra* note 17; Amnesty International June 2003, *supra* note 17; ECRE Statement, *supra* note 17. Caroline Flint, the U.K. Parliamentary Under-Secretary of State for the Home Department, stated on April 21, 2004 that, following the negative reaction that was received in relation to its proposals for transit processing centers, the U.K. Government has "done no further work on transit processing, which is no longer on our agenda." *European Standing Committee B Debates: Asylum Systems*, House of Commons, Session 2003-04, Column No. 003 (2004), available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmstand/eurobst040421/40421s01.htm> [hereinafter Flint]. The proposals are covered in this Article because they might be picked up again in the future.

19. Flint, *supra* note 18, at Column No. 004. See also Alan Travis, *Shifting a Problem Back to its Source*, GUARDIAN, Feb. 5, 2003, available at http://www.guardian.co.uk/Refugees_in_Britain/Story/0,2763,889108,00.html.

circumstances, and have a similar legal basis, as those in the first category (colonial). Here, the U.S. administration in Guantánamo Bay might be contrasted with the U.K. administration of the Falkland Islands. In both cases, the reason why the foreign State is able to exercise administrative control is rooted in a long-standing "colonial" arrangement (treaties with Cuba and colonial occupation respectively);²⁰ the official reason why the administering States concerned wish it to continue, by contrast, is different; strategic and military purposes in the case of Guantánamo Bay, enabling self-determination for the local population in the case of the Falklands.²¹ In understanding how the States concerned explain reasons for their continued presence in each territory then, the two arrangements are placed in different categories. If one were engaged in analyzing different issues, for example establishing territorial status or self-determination entitlements, then different groupings, operating in a cross-cutting manner as far as our present grouping are concerned, would be in order.

Within the general category of foreign territorial administration, a particular activity is notable: the exercise of administrative powers over territory in order to operate detention facilities. Dana Priest and Barton Gellman point out that "[i]n the multifaceted global war on terrorism . . . one of the most opaque—yet vital—fronts is the detention and interrogation of terrorism suspects."²²

As part of this front, the United States, it is alleged, operates a number of "secret detention centers overseas."²³ Such facilities are designed

20. On Guantánamo, see sources cited *supra* note 9. On the Falklands, see the U.K. FCO Falklands webpage, *supra* note 6. The U.K. position is summarized as follows: "The British Government has no doubt about Britain's sovereignty over the Falkland Islands. With the exception of the two months of illegal occupation in 1982, the Falklands have been continuously, peacefully and effectively inhabited and administered by Britain since 1833." *Id.* at 3.

21. The U.K. position is as follows:

The people who live in the Falklands now are not a transitory population. Many can trace their origins in the Islands back to the early nineteenth century. Britain is committed to defend their right to choose their own future. The Islanders are fully entitled to enjoy the right of self-determination. It is a right which cannot be applied selectively or be open to negotiation . . . In exercise of their right of self-determination, the Falkland Islanders have repeatedly made known their wish to remain British.

UK FCO Falklands webpage, *supra* note 6, at 3. See also *The Falkland Islands are a United Kingdom Overseas Territory by Choice*, in FALKLAND ISLANDS—SECURING A FUTURE, IN FALKLAND ISLANDS BRIEFING, Falklands government website, *supra* note 7.

22. Dana Priest & Barton Gellman, "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities, WASH. POST, Dec. 26, 2002, at A1.

23. *Id.* See also Don Van Natta Jr., *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003.

to house individuals suspected of being soldiers of foreign States or members of terrorist organizations, in order to prevent such individuals from committing future terrorist acts (so-called "security detentions") or to obtain information from them on military operations or as a prelude to some kind of criminal prosecution. In the case of some of women detainees in Iraq, it is also alleged that detention is taking place:

not because of anything they have done, but merely because of who they are married to, and their potential intelligence value. U.S. officials have previously acknowledged detaining Iraqi women in the hope of convincing male relatives to provide information; when U.S. soldiers raid a house and fail to find a male suspect, they will frequently take away his wife or daughter instead.²⁴

Suspects are sometimes detained where they were apprehended, as in Iraq. Priest and Gellman allege that the CIA operates a "secret detention center" in a "cluster of metal shipping containers" in the "forbidden zone at the US-occupied Bagram air base in Afghanistan" for "captured al Qaeda operatives and Taliban commanders."²⁵ From Van Natta Jr.'s report in the *New York Times*, it would seem that there is a two-story detention center for lower-level suspects and then a further secret CIA center for high-level suspects.²⁶

One key aspect of the U.S. approach to the detention of terrorist suspects is to perform a further extraterritorial move, transferring U.S. nationals to the United States, and non-U.S. nationals to military bases or other CIA-operated detention facilities outside the United States. In this second category we have the detention facilities in Guantánamo Bay.²⁷ The numbers of detainees held in that facility have fluctuated; according to the U.S. Defense Department as of April 2004 it housed "approximately 595 detainees," 146 others having been released.²⁸ Priest and Gellman and Van Natta Jr. allege that detainees have also been trans-

24. Luke Harding, *The Other Prisoners*, GUARDIAN, May 20, 2004, available at <http://www.guardian.co.uk/g2/story/0%2C3604%2C1220509%2C00.html>.

25. Priest & Gellman, *supra* note 22. See also Van Natta Jr., *supra* note 23; Amnesty International, Aug. 19, 2003, *supra* note 1, 13–14.

26. Van Natta Jr., *supra* note 23.

27. For some information about these facilities, see, for example, Global Security Guantánamo Website at http://www.globalsecurity.org/military/facility/Guantánamo-bay_x-ray.htm.

28. Press Release No. 250-04, U.S. Department of Defense, Detainee Transfer Completed (Apr. 2, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040402-0505.html>.

ferred to the U.S. Navy Support Facility on the island of Diego García,²⁹ although the U.K. has denied this.³⁰

Professor Ruth Wedgwood, who sits on the U.S. Defense Policy Advisory Committee Board, explains the choice of the extraterritorial locus for the detention of terrorist suspects on the grounds that the alternative of detaining terrorist suspects within the State's own territory might create an increased risk of terrorist activity in that territory: "holding large numbers of Taliban and Qaeda members in the continental United States, or in the middle of London, poses a major 'NIMBY' problem—'not in my back yard.' Few localities would volunteer to be the center of Al Qaeda's possible future attentions."³¹

Scott Higham, Joe Stephens, and Margot Williams similarly report that one of the reasons behind the choice of Guantánamo was that it was deemed relatively "safe from attack" and "could be easily defended."³² This was not only valuable on its own terms; it was also deemed useful as far as the interrogations that were to take place there. The *Washington Post* journalists state that according to Mark R. Jacobson, a former Pentagon official who helped devise the detention operation, "[t]he remote location and the unlikelihood of escape or rescue could also put psychological pressure on the captives, adding to their 'desperation' and compelling them to talk."³³

29. Priest & Gellman, *supra* note 22; Van Natta Jr., *supra* note 23.

30. In a House of Lords debate on January 8, 2003, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Baroness Amos stated that "[t]he United States Government would need to ask our permission to bring suspects to Diego García and they have not done so. No suspected terrorists are being held on Diego García . . ."

Debate: Diego García, HOUSE OF LORDS HANSARD, Vol. 642, Part No. 24, Column No. 1020 (2003)(statement of Baroness Amos), available at <http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030108/index/30108-x.htm#contents>. Later in the debate, Baroness Amos stated, "I am not aware of any prisoners being held on Diego García." *Id.* at Column No. 1021. Later that year, Menzies Campbell MP asked the U.K. Foreign Secretary "whether prisoners have been held in (a) US vessels and (b) US merchant vessels chartered by the US Government moored in Diego García waters; what jurisdiction such prisoners would fall under; and if he will make a statement."

The Foreign Secretary replied "[t]he United States Government have explicitly assured us that there have never been any prisoners in detention on any US vessels moored in Diego García waters. The British Government are satisfied that this is correct."

Jack Straw, *Written Answer: Diego García*, HOUSE OF COMMONS HANSARD, Vol. 410, Part No. 435, Column No. 440W (2003), available at <http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo030911/text/30911w10.htm#30911w10.html>.

31. Ruth Wedgwood, *Let Military Rules Apply While the War Goes On*, INT'L HERALD TRIB., Dec. 2, 2003, at 8. It would seem, however, that this consideration has not prevented the transfer of U.S. national suspects back to U.S. soil.

32. Scott Higham et al., *Guantánamo: A Holding Cell in War on Terror*, WASH. POST, May 2, 2004, at A1.

33. *Id.*

In the refugee context, some of the official reasons for the extraterritorial initiatives conducted or proposed are also rooted in similar considerations about terrorist threats. In justifying the forced transfer of asylum seekers bound for Australia to Nauru, Peter Reith, the then Australian Defense Minister, argued in 2001 that:

[T]he New York act of terrorism just means that things are not going to be the same in the future as they've been in the past. And one of the things that we will need to be looking at is improving security more generally and part of security is to ensure that you can properly process and manage and know whose [sic] coming into the country and if we are just going to have an open door then the fact is that that is an invitation for trouble in the future.³⁴

In the case of the people transferred to Nauru, he stated:

[Y]ou've got to be able to manage people coming into your country, you've got to be able to control that otherwise it can be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities . . . if you can't control who comes into your country then that is a security issue. And that is one of the reasons why the Government is so determined to ensure that we can within the law manage the right of people to come into Australia.³⁵

As well as detaining terrorist suspects, it is also alleged that U.S. authorities interrogate such suspects extraterritorially. Sometimes this happens within the aforementioned army-run detention facilities such as in Guantánamo Bay and Iraq; in Diego García and Bagram, it is alleged that the CIA operates "interrogation centers."³⁶ It is also alleged that interrogation occurs in special CIA installations elsewhere, such as in Thailand³⁷ and that the basis for these extraterritorial installations is a secret presidential order issued to the CIA following the attacks of 9/11.³⁸

34. Radio Interview by Derryn Hinch with Peter Reith, Australian Defense Minister (Sept. 13, 2001), transcript available at <http://www.minister.defence.gov.au/2001/1309013.doc> [hereinafter Reith].

35. *Id.*

36. Van Natta Jr., *supra* note 23 (referring to CIA interrogation centers in Bagram and Diego García).

37. *Id.*

38. According to John Barry et al., *The Roots of Torture*, NEWSWEEK INT'L, May 24, 2004, available at <http://msnbc.msn.com/id/4989481>, President Bush "signed a secret order granting new powers to the CIA. According to knowledgeable sources, Bush's directive authorized the CIA to set up a series of secret detention facilities outside the United States."

As well as extraterritorial detentions operated by the United States directly, Priest and Gellman assert that "thousands" of "suspected al Qaeda members and their supporters" have been "arrested and held with U.S. assistance" in third States.³⁹ According to Van Natta Jr., such States have included Jordan, Syria, Egypt, and Morocco.⁴⁰ Usually the suspects have been transferred to the States concerned by the United States, a process referred to as "rendering."⁴¹ Sometimes interrogations are conducted by the foreign authorities;⁴² in other cases, "US intelligence agents remain closely involved in the interrogation."⁴³ One reason cited for this process of "rendering" to third States for interrogation in those States is the perceived "cultural affinity" operating between the captives and those in the countries to which they are transferred.⁴⁴ It is suggested that the United States looks:

to foreign allies more because their intelligence services can develop a culture of intimacy [with the captives] that Americans cannot. They may use interrogators who speak the captive's Arabic dialect and often use the prospects of shame and the reputation of the captive's family to goad the captive into talking.⁴⁵

U.S. officials also express the concern that when suspects are being transferred from what are regarded as moderate Muslim States (e.g. Indonesia), there would be a risk of a "backlash from fundamentalist Islamic groups" within those States if the transfer were to be made to the United States rather than another "Muslim state" (e.g. Egypt).⁴⁶ Moreover, Professor Wedgwood's general consideration about the security risk posed by detaining terrorist suspects in the United States is also invoked to justify interrogating such suspects in third countries.

Not only, then, can States' reasons for conducting an extraterritorial activity change over time (e.g. the U.K. administration of the Falkland Islands); States have also used an existing administrative arrangement to serve an additional purpose, operating concurrently with the original purpose. So while the United States continues to operate its military

39. Priest & Gellman, *supra* note 22. See also Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1; Van Natta Jr., *supra* note 23.

40. Van Natta Jr., *supra* note 23.

41. Priest & Gellman, *supra* note 22. See also Van Natta Jr., *supra* note 23; Amnesty International, Aug. 19, 2003, *supra* note 1, at 29-32.

42. Chandrasekaran & Finn, *supra* note 39; Priest & Gellman, *supra* note 22.

43. Chandrasekaran & Finn, *supra* note 39.

44. Priest & Gellman, *supra* note 22.

45. *Id.*

46. Chandrasekaran & Finn, *supra* note 39.

bases in Guantánamo Bay and Diego García for strategic purposes, it also (allegedly in the case of Diego García) uses this administrative presence to detain and interrogate terrorist suspects.

We also see overlaps between the spatial and the personal targets of the administrative presences. States in the position of the administrative authority for reasons that can be understood in terms of a spatial target—the strategic value of controlling Guantánamo Bay, for example—then use this position to perform particular administrative activities aimed at a personal target—detention and interrogation. Equally, States sometimes undertake extraterritorial action with a personalized target—e.g. the actions against Al Qaeda in Afghanistan and the government of Saddam Hussein in Iraq—which leads to extraterritorial action operating spatially—the belligerent occupation in parts of Afghanistan and Iraq—but which then involves, in part, particular initiatives against personalized targets—in Afghanistan, the continued pursuit of Al Qaeda and Bin Laden, and, in Iraq, the attempts to neutralize the remaining elements of the Baathist regime and the post-Saddam Hussein insurgency movement. This is in contrast to other activities, such as in Guantánamo Bay and Diego García, where there is no link between the more recent activities with a personal target—the detainees—and the original, continuing spatial explanation—the value of a strategic presence—for the existence of the administrative set-up.

These descriptions demonstrate that the site of some of the key international policy initiatives by the West, spearheaded by the United States with the strong support and active involvement of many other Western States, is outside the territory of these States. Because the two policies most of these initiatives are variously associated with—the “war against terror” and the desire in many Western States to increase regulations on the entry of asylum seekers—may well dominate the West’s foreign policy agenda for some time, one may reasonably speculate that the extraterritorial activities associated with them, having arguably increased since 9/11, are set to continue to at least the same degree as at present.

III. THE NEED FOR GREATER SCRUTINY

By their nature the extraterritorial initiatives outlined in the previous section have a direct or indirect impact on the treatment of individuals, whether through the exercise of control over the territory in which individuals are located, or through particular acts aimed at individuals directly: military action; detention; interrogation; forcible transfer; and preventing freedom of movement. This section considers the extent to

which this impact is and should be a focus of national and international attention.

A. Ignoring Extraterritorial Activity

In the Western tradition, the State has a duty to protect individual rights by virtue of a contract that the members of its community have entered.⁴⁷ One traditional basis on which the community has been understood is in terms of nationality. Contractual theories, by definition, do not address requirements of justice arising in the context of the interaction between the community (and its officials) and individuals who do not belong to it. When "belonging" is defined according to nationality, foreigners are left outside the frame. Thus Locke excludes foreigners from the social contract and the protection of citizenship rights: "foreigners, by living all their lives under another government, and enjoying the privileges and protection of it, though they are bound, even in conscience, to submit to its administration, as far forth as any denison; yet do not thereby come to be subjects or members of that commonwealth."⁴⁸

Although ideas of rights and their protection through law have shifted, notably with the introduction of international human rights law, so that most rights guarantees are not now understood as being tied to citizenship,⁴⁹ contemporary rights discourse is perhaps still focused predominantly on the nexus between the State and its *territory*. Rawls' "theory of justice," for example, concerns "the basic structure of society

47. See, e.g., THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., 1996)(1651); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed. 1988)(1690); JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

48. LOCKE, *supra* note 47, at 349.

49. In international human rights law, the shift away from nationality is affected through conceiving human rights obligations in relation to the State's "jurisdiction" rather than its own nationals. In the words of the UN Human Rights Committee, discussing the ICCPR, "each State party must ensure the rights in the Covenant to 'all individuals within its territory and subject to its jurisdiction' (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone . . . irrespective of his or her nationality or statelessness."

General Comment No. 15, Hum. Rts. Comm., 50th Sess., para. 1, *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 18, UN Doc. HR/GEN/1/Rev.1 (1994) [hereinafter UN HRC General Comment 15]. On this general applicability, see *id.*, *passim*. The preamble of the American Declaration of the Rights and Duties of Man states that "the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality." *American Declaration of the Rights and Duties of Man*, A.G. Res. 1591, preamble (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 17 (1992). On the rights of aliens in international human rights law, see, for example, UN HRC General Comment 15, *supra* note 49, *passim*.

conceived for the time being as a closed system isolated from other societies.”⁵⁰

A concern about human rights is often understood exclusively in terms of a concern about either what a State does in its own territory, or what other States do in their territories, or both. Equally, to be a “human rights lawyer” is often understood exclusively in terms of being professionally concerned with the application of the standards of domestic or international human rights law governing the relationship between the State and those within its territory.

This limited focus is illustrated in the scope of activities engaged in by the two leading human rights organizations in the United States and the United Kingdom: the American Civil Liberties Union (ACLU) and Liberty (formerly the National Council for Civil Liberties) respectively. In both cases, the organization in question is the leading non-governmental organization concerned with the conformity of the State to human rights standards. This concern, however, is usually limited to what that State does within its own territory. Thus “with offices in almost every [U.S.] state” the mission of the ACLU is “to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and the laws of the United States.”⁵¹

In a similar way, Liberty “identifies current issues it considers crucial to the protection of civil liberties and human rights in this country and campaigns-through litigation, media and lobbying-to influence government policy.”⁵² The organization opposes “any abuse of excessive use of power by the state against its people.”⁵³

However important the need to safeguard the treatment of individuals by a State within its own territory, clearly the existence of the activities outlined above suggests that this need should not be the exclusive focus of attention. Such a suggestion is bolstered by the fact that by their nature extraterritorial activities take place in circumstances where individuals are extremely vulnerable.

B. *Greater Risks of Rights Violations in the Extraterritorial Context*

In circumstances of plenary military occupation, power is centralized in the hands of the occupiers to a much greater extent compared with peacetime civilian administrations in States with general internal stability. Moreover, the general circumstances of insecurity and depriva-

50. RAWLS, *supra* note 47, at 7.

51. American Civil Liberties Union, *Freedom is Why We're Here*, at 1 (Fall 1999), at <http://www.aclu.org/Files/OpenFile.cfm?id=10740>.

52. Liberty, *Issues*, at <http://www.liberty-human-rights.org.uk/issues/index.shtml>.

53. Liberty & The Civil Liberties Trust, *2002 Annual Review* (2002), at <http://www.liberty-human-rights.org.uk/about/pdf-docs/2002-annual-review.pdf>.

tion in which foreign State occupations occur, and the extraterritorial nature of the location for all the activities, means that there may be few, if any, third parties—journalists, civil society monitors, international organizations, and less-directly-interested States—on the ground monitoring the treatment of individuals. As far as occupied Iraq is concerned, the then acting UN High Commissioner of Human Rights remarked in 2004 that:

it is a stark reality that there was no international oversight and accountability in respect of the situation that has obtained in Iraq since the taking of control by Coalition Forces. At its fifty-ninth session in April 2003, the Commission on Human Rights decided to extend the mandate of the Special Rapporteur on the situation of human rights in Iraq, established in 1991, but to give him the mandate to inquire into past violations of human rights under the previous regime. The Special Rapporteur was not given a specific mandate to monitor the present situation. The mandate of the Special Rapporteur was discontinued altogether a year later at the sixtieth session of the Commission. The international community was thus left in a situation in which there was no international scrutiny of human rights in present-day Iraq.⁵⁴

In the context of detained terrorist suspects, the nature of the terrorist threat often leads to calls for greater secrecy about the circumstances of detention. In the words of Colonel Roger King, spokesman for the U.S.-led force in Afghanistan, "[e]very detail we give you about how we run the facility provides information to the enemy about how to be more successful in resisting if captured."⁵⁵ Thus, as Priest and Gellman report:

[i]n contrast to the detention center at Guantánamo Bay, where military lawyers, news reporters and the Red Cross received occasional access to monitor prisoner conditions and treatment, the CIA's overseas interrogation facilities are off-limits to outsiders, and often even to other government agencies . . .

Free from the scrutiny of military lawyers steeped in the international laws of war, the CIA and its intelligence service allies have the leeway to exert physically and psychologically aggressive techniques . . .

54. See *Report on The Present Situation of Human Rights in Iraq, Report of the United Nations High Commissioner for Human Rights, U.N. High Comm. On Hum. Rgts.*, 61st Sess., Agenda Item 4, para. 144, U.N. Doc. E/CN.4/2005/4 (2004), available at <http://www.unhchr.ch/html/hchr/docs/iraq1.pdf> [hereinafter UNHCHR/Ramcharan].

55. Van Natta Jr., *supra* note 23.

... the prisoners are denied access to lawyers or organizations, such as the Red Cross, that could independently assess their treatment. Even their names are secret.⁵⁶

Van Natta Jr. reports that the facilities in the Bagram air base are “off limits, even to most military personnel. The only descriptions of life inside have come from released detainees.”⁵⁷ When compared with the Guantánamo and Bagram detainees, “far less is known” about the terrorist suspects who have been “rendered” to third States, including those transferred for interrogation with some kind of CIA involvement.⁵⁸ According to Van Natta Jr., “even the numbers and locations are a mystery.”⁵⁹ The *Economist* reports: “American officials claim to have detained thousands of suspects, including some senior al-Qaeda leaders, but will not say where, and under what conditions, they are being held.”⁶⁰ The alleged means through which detainees are transferred to these detention facilities underlines their secret nature; *Newsweek* journalists Barry, Hirsh and Isikoff report that “[b]y 2004, the United States was running a covert charter airline moving CIA prisoners from one secret facility to another, sources say. The reason? It was judged impolitic (and too traceable) to use the U.S. Air Force.”⁶¹

Taking these various special factors together, we might say that, all other things being equal, the risk of human rights violations committed by the States involved may well be higher in these extraterritorial contexts than in the States’ own territories.

C. Extreme Measures Taken Against Individuals

The extraterritorial context is not the only factor creating a greater risk of human rights violations. Those extraterritorial actions concerned with preventing terrorist threats and/or regulating the movement of asylum seekers are by their nature aimed at taking extreme, extraordinary measures against individuals. The consequences for the individuals involved if any such actions are unjustified are far more serious when compared with most other state actions.

Of course, not only do some of these extraterritorial actions serve purposes that may warrant extraordinary measures; it is also clear that such extraordinary measures are in fact being taken. In the first place, we have the detention of individuals. One key link between the 9/11-related

56. Priest & Gellman, *supra* note 22.

57. Van Natta Jr., *supra* note 23.

58. *Id.*

59. *Id.*

60. *The Pledge*, *ECONOMIST*, July 5, 2003, at 47.

61. Barry et al., *supra* note 38.

activities and those concerning asylum seekers is an increased recourse to detention. As Amnesty International points out in relation to the asylum-related activities, "detention appears to be a necessary element" of the U.K. TPC proposals.⁶² Not only is detention itself a serious curtailment of rights for the individuals involved; by its nature it, like the extraterritorial locus, creates greater opportunities for other rights abuses to occur.

The April 2004 publication of photographs depicting the abuse of detainees in the U.S.-operated Abu Ghraib prison in Baghdad provides a graphic illustration of the fact that such opportunities have clearly been taken. Before considering the nature of the abuses taking place, it is in order to consider the backdrop to them. A striking feature of post-9/11 discourse has been the suggestion by some mainstream commentators that the use of practices previously considered beyond the pale even in extreme situations—specifically, the use of torture and inhuman and degrading treatment—should perhaps be considered.⁶³ In an article entitled *Time to Think About Torture* in November 2001, *Newsweek* columnist Jonathan Alter wrote:

[i]n this autumn of anger, even a liberal can find his thoughts turning to . . . torture.

[. . .]

We can't legalize *physical* torture; it's contrary to American values. But even as we continue to speak out against human-rights abuses around the world, we need to keep an open mind about certain measures to fight terrorism, like court-sanctioned psychological interrogation. And we'll have to think about transferring some suspects to our less squeamish allies, even if that's hypocritical. Nobody said this was going to be pretty.⁶⁴

Professor Alan Dershowitz has stated that he has "no doubt" that in an extreme "ticking bomb" situation, U.S. authorities would torture.⁶⁵ In consequence, for him "[t]he real debate is whether such torture should take place outside of our legal system or within it. The answer to this seems clear: if we are to have torture, it should be authorized by law."⁶⁶

62. Amnesty International, June 2003, *supra* note 17, introduction.

63. See the discussion in Jonathan Alter, *Time to Think About Torture*, *NEWSWEEK*, Nov. 5, 2001, at 45; Peter Maass, *Torture, Tough or Lite: If a Terror Suspect Won't Talk, Should He Be Made To?*, *N.Y. TIMES*, Mar. 9, 2003, § 4, at 4; Jim Rutenberg, *Torture Seeps Into Discussion By News Media*, *N.Y. TIMES*, Nov. 5, 2001, at C1; Van Natta Jr., *supra* note 23.

64. Alter, *supra* note 63 (emphasis added).

65. Alan M. Dershowitz, *Is There a Torturous Road to Justice?*, *L.A. TIMES*, Nov. 8, 2001, at 19.

66. *Id.*

The apparent shift in public debate over the use of torture⁶⁷ has been matched by the suggestion that government practice in this area has changed since 9/11. Priest and Gellman report the remark made by then head of the CIA Counterterrorism Center at a joint hearing of the House and Senate intelligence committees on September 26, 2002 that, in dealing with suspected terrorists, “[there was a before 9/11, and there was an after 9/11. . . . After 9/11 the gloves come off.”⁶⁸

Alan Dershowitz reports “I hear from former agents that it [torture] was done and that it is done.”⁶⁹ John Barry, Michael Hirsh, and Michael Isikoff in *Newsweek* allege that President Bush authorized a secret order granting new powers to the CIA in relation to the detention of suspects, including the entitlement to question them “with unprecedented harshness.”⁷⁰ As far as interrogations operating extraterritorially, Priest and Gellman reported in 2002 that “what are known as ‘stress and duress’ techniques” are used by the United States on suspects it is detaining at secret overseas facilities.⁷¹ In the Bagram airbase facility, “[t]hose who refuse to cooperate. . . . are sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles At times they are held in awkward, painful positions and deprived of sleep with a 24-hour bombardment of lights.”⁷²

According to one unnamed official, “If you don’t violate someone’s human rights some of the time, you probably aren’t doing your job. . . . I don’t think we want to be promoting a view of zero tolerance on this. That was the whole problem for a long time with the CIA.”⁷³ Priest and Gellman report that:

[a]fter apprehending suspects, U.S. take-down teams—a mix of military special forces, FBI agents, CIA case officers and local allies—aim to disorient and intimidate them on the way to detention facilities.

According to Americans with direct knowledge and others who have witnessed the treatment, captives are often “softened up” by MPs [military police officers] and U.S. Army Special Forces

67. Of course, the proposals have been robustly challenged by other commentators. See, e.g., *Ends, Means and Barbarity*, *ECONOMIST*, Jan. 11, 2003, at 21; *Is Torture Ever Justified?*, *ECONOMIST*, Jan. 9, 2003, at 11.

68. Priest & Gellman, *supra* note 22 (quoting Cofer Black).

69. Duncan Campbell, *US interrogators turn to “torture lite”*, *GUARDIAN*, Jan. 25, 2003, available at <http://www.guardian.co.uk/usa/story/0,12271,882002,00.html>.

70. Barry et al., *supra* note 38.

71. Priest & Gellman, *supra* note 22. See also Campbell, *supra* note 69; Van Natta Jr., *supra* note 23; Amnesty International, Aug. 19, 2003, *supra* note 1, at 10.

72. Priest & Gellman, *supra* note 22. See also Van Natta Jr., *supra* note 23.

73. Priest & Gellman, *supra* note 22.

troops who beat them up and confine them in tiny rooms. The alleged terrorists are commonly blindfolded and thrown into walls, bound in painful positions, subjected to loud noises and deprived of sleep. The tone of intimidation and fear is the beginning, they said, of a process of piercing a prisoner's resistance.

The take-down teams often "package" prisoners for transport, fitting them with hoods and gags, and binding them to stretchers with duct tape.⁷⁴

Van Natta Jr. reports that there have been "isolated, if persistent, reports of beatings in some American-operated centers."⁷⁵ Some of the detainees released from Guantánamo Bay, notably those returned to the United Kingdom, have made allegations of abuse conducted during their detention, including punishment beatings.⁷⁶

The publication of the Abu Ghraib abuse photographs led to the admission by U.S. authorities that abuses which had been alleged previously had taken place at the prison. An official Army report by Antonio M. Taguba that was originally secret but widely disseminated at the start of May 2004 following the publication of the photographs, made the following findings of fact:

I find that the intentional abuse of detainees by military police personnel included the following acts:

- Punching, slapping, and kicking detainees; jumping on their naked feet;
- Videotaping and photographing naked male and female detainees;
- Forcibly arranging detainees in various sexually explicit positions for photographing;
- Forcing detainees to remove their clothing and keeping them naked for several days at a time;
- Forcing naked male detainees to wear women's underwear;
- Forcing groups of male detainees to masturbate themselves while being photographed and videotaped;

74. Priest & Gellman, *supra* note 22.

75. Van Natta Jr., *supra* note 23.

76. See, e.g., Tania Branigan, *Briton Accuses American Captors*, GUARDIAN, Mar. 13, 2004, available at <http://www.guardian.co.uk/print/0,3858,4879136-103690,00.html>; Tania Branigan & Rosia Cowan, *Freed Briton Tells of Beatings*, GUARDIAN, Mar. 12, 2004, available at <http://www.guardian.co.uk/print/0,3858,4878264-111575,00.html>; David Rose, *How We Survived Jail Hell*, OBSERVER, Mar. 14, 2004, at 5, available at http://observer.guardian.co.uk/uk_news/story/0,,1168937,00.html.

- Arranging naked male detainees in a pile and then jumping on them;
- Positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture;
- Writing "I am a Rapest" (sic) on the leg of a detainee alleged to have forcibly raped a 15-year old fellow detainee, and then photographing him naked;
- Placing a dog chain or strap around a naked detainee's neck and having a female Soldier pose for a picture;
- A male MP guard having sex with a female detainee;
- Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee;
- Taking photographs of dead Iraqi detainees.⁷⁷

A confidential report by the International Committee of the Red Cross (ICRC) of February 2004, which was subsequently leaked, concluded that the following violations had taken place:

- Brutality against protected persons upon capture and initial custody, sometimes causing death or serious injury;
- Absence of notification of arrest of persons deprived of their liberty to their families causing distress among persons deprived of their liberty and their families;
- Physical or psychological coercion during interrogation to secure information;
- Prolonged solitary confinement in cells devoid of daylight
- Excessive and disproportionate use of force against persons deprived of their liberty resulting in death or injury during their period of internment.⁷⁸

It also found that alleged violations of detainees were not limited to the Abu Ghraib prison:

77. Maj. Gen. Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, at 16-7 (2004), available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf. See also Int'l Comm. of the Red Cross, *Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*, at para. 25 (Feb. 1, 2004), available at <http://www.cbsnews.com/htdocs/pdf/redcrossabuse.pdf> [hereinafter ICRC Report, Feb. 1, 2004].

78. ICRC Report, Feb. 1, 2004, *supra* note 77, Executive Summary.

[t]he main places of internment where mistreatment allegedly took place included battle group unit stations; the military intelligence sections of Camp Cropper and Abu Ghraib Correctional Facility; Al-Baghdadi; Heat Base and Habbania Camp in Ramadi governorate; Tikrit holding area (former Saddam Hussein Islamic School); a former train station in Al-Khaïm, near the Syrian border, turned into a military base; the Ministry of Defense and Presidential Palace in Baghdad; the former *mukhabarat* office in Basrah, as well as several Iraqi police stations in Baghdad.⁷⁹

Although the U.S. administration position on these abuses is that they were isolated incidents conducted by low-level soldiers or Military Police [MPs] not acting as part of a coordinated system sanctioned within the military, this "few bad apples" explanation was placed into question by both the ICRC and mainstream U.S. journalists. In discussing these allegations, Pierre Krähenbühl, ICRC Director of Operations, stated that "[w]e were dealing here with a broad pattern, not individual acts. There was a pattern and a system."⁸⁰

The aforementioned ICRC report concluded that:

persons deprived of their liberty face the risk of being subjected to a process of physical and psychological coercion, in some cases tantamount to torture, in the early stages of the internment process.

[. . .]

During internment, persons deprived of their liberty also risk being victims of disproportionate and excessive use of force on the part of detaining authorities attempting to restore order in the event of unrest or to prevent escapes.⁸¹

One typical report alleging a coordinated strategy is by *Newsweek* journalists John Barry, Michael Hirsh, and Michael Isikoff:

the single most iconic image to come out of the abuse scandal—that of a hooded man standing naked on a box, arms outspread, with wires dangling from his fingers, toes and penis—may do a lot to undercut the administration's case that this was the work of a few criminal MPs. That's because the practice shown in that photo is an arcane torture method known only to veterans of the

79. *Id.*, para 3.

80. BBC News, *Red Cross Saw "Widespread Abuse"* (May 8, 2004), at <http://news.bbc.co.uk/1/hi/world/americas/3694521.stm>.

81. ICRC Report, Feb. 1, 2004, *supra* note 77, paras. 59, 61.

interrogation trade. "Was that something that [an MP] dreamed up by herself? Think again," says Darius Rejali, an expert on the use of torture by democracies. "That's a standard torture. It's called 'the Vietnam.' But it's not common knowledge. Ordinary American soldiers did this, but someone taught them."

Who might have taught them? Almost certainly it was their superiors up the line. Some of the images from Abu Ghraib, like those of naked prisoners terrified by attack dogs or humiliated before grinning female guards, actually portray "stress and duress" techniques officially approved at the highest levels of the government for use against terrorist suspects.⁸²

The journalists allege that "as a means of pre-empting a repeat of 9/11, Bush, along with Defense Secretary Rumsfeld and Attorney General John Ashcroft, signed off on a secret system of detention and interrogation that opened the door to such methods."⁸³

There have also been allegations of mistreatment by U.K. soldiers in Iraq, which have led to cases currently pending in the English Courts.⁸⁴ According to the solicitor for the complainants in one of these cases, the allegations include "a man beaten to death in custody, another beaten in custody and made to swim a river and drowned because of his injuries, a woman shot in the head while eating her supper in her home with her family, [and] another man shot dead while he prepared for morning prayers."⁸⁵

These allegations, which are not limited to the treatment of detainees, echo the broader observations of the then acting UN High Commissioner of Human Rights in 2004 concerning negative impact on human rights generally of the Coalition presence in Iraq.⁸⁶

As far as the "renderings" to third States, many of the third States involved have a well-documented history of using interrogation methods that fail to conform to international human rights law standards.⁸⁷ Jordan and Morocco, for example, have been criticized by the U.S. State De-

82. Barry et al., *supra* note 38. See also, e.g., Sidney Blumenthal, *The Bush Orthodoxy is in Shreds*, GUARDIAN, May 27, 2004, available at <http://www.guardian.co.uk/comment/story/0,3604,1225600,00.html>.

83. Barry et al., *supra* note 38.

84. See Richard Norton-Taylor & Steven Morris, *Court Battle Over Iraqi Deaths*, GUARDIAN, May 5, 2004, available at <http://www.guardian.co.uk/Iraq/Story/0,2763,1209704,00.html>; Richard Norton-Taylor, *High Court to Hear Claims of Unlawful Killing by Soldiers*, GUARDIAN, May 6, 2004, available at <http://www.guardian.co.uk/international/story/0,3604,1210421,00.html>. See also *R (on the application of Al-Skeini and others) v. Secretary of State for Defence*, [2004] All E.R. 197 (Q.B. Div'1 Ct. 2004).

85. Norton-Taylor, *supra* note 84 (quoting Phil Shiner, of Public Interest Lawyers).

86. See UNHCHR/Ramcharan, *supra* note 54.

87. Priest & Gellman, *supra* note 22; Van Natta Jr., *supra* note 23.

partment for the practice of arbitrary and unlawful detentions and abuse (in the case of Jordan) and outright torture (in the case of Morocco).⁸⁸ Moreover, there have been specific allegations made of torture committed against such "rendered" suspects:

[i]n one case in Morocco, lawyers for three Saudis and seven Moroccans accused of plotting to blow up American and British ships in the Strait of Gibraltar last summer said their clients were tortured. Moroccan officials denied that physical torture was used but acknowledged using sleep and light deprivation and serial teams of interrogators until the suspects broke.⁸⁹

These allegations might lead some to conclude that the relative lack of scrutiny operating with respect to extraterritorial detention and interrogation, rather than being merely an unintended consequence of choosing an extraterritorial locus, was in fact one of the reasons for this choice (whether in transferring individuals to this locus, or retaining them in this locus once captured there). Detaining terrorist suspects extraterritorially would enable certain forms of treatment of such suspects—from prolonged detention without judicial review to interrogation techniques that involve the infliction of physical harm—that would lead to greater general public objection were they to take place domestically. Rajiv Chandrasekaran and Peter Finn in the *Washington Post* quote an unnamed U.S. diplomat stating that after 9/11, the movement of terrorist suspects to extraterritorial locations "allows us to get information from terrorists in a way we can't do on U.S. soil."⁹⁰ According to *Newsweek* journalists Barry, Hirsh and Isikoff:

[a]t a classified briefing for senators not long after 9/11, CIA Director George Tenet was asked whether Washington was going to get governments known for their brutality to turn over Qaeda suspects to the United States. Congressional sources told NEWSWEEK that Tenet suggested it might be better sometimes for such suspects to remain in the hands of foreign authorities, who might be able to use more aggressive interrogation methods.⁹¹

88. U.S. Department of State, *Country Reports on Human Rights Practices: Jordan* (2003), at <http://www.state.gov/g/drl/rls/hrrpt/2003/27930.htm>; U.S. Department of State, *Country Reports on Human Rights Practices: Morocco* (2003), at <http://www.state.gov/g/drl/rls/hrrpt/2003/27934.htm>.

89. Van Natta Jr., *supra* note 23.

90. Chandrasekaran & Finn, *supra* note 39.

91. Barry et al., *supra* note 38.

D. Official Responses to Abuse Allegations

The apparent shift in the public debate on the use of torture and the allegations about “stress and duress” techniques reported in the *Washington Post* in 2002 led the Legal Counsel of the U.S. Defense Department, William J. Haynes II, in response to a letter by Senator Patrick Leahy to National Security Adviser Condoleezza Rice, to take the remarkable step of publicly stating that “United States policy is to treat all detainees and conduct all interrogations, wherever they may occur, in a manner consistent with its commitments to prevent cruel, inhuman or degrading treatment or punishment in domestic law and under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.”⁹² On the United States’ obligations in domestic law and under the Convention Against Torture (CAT) with respect to torture, Haynes stated that the United States “does not permit, tolerate or condone any such torture by its employees under any circumstances.”⁹³ He insisted that “credible allegations of illegal conduct by U.S. personnel will be investigated and, as appropriate, reported to the proper authorities. . . . Should any investigation indicate that illegal conduct has occurred, the appropriate authorities would have a duty to take action to ensure that any individuals responsible are held accountable in accordance with the law.”⁹⁴

President George W. Bush stated on June 26, 2003, on the occasion of the International Day in Support of Victims of Torture, that “[t]he United States is committed to the worldwide elimination of torture and we are leading this fight by example.”⁹⁵

When the photographs from Abu Ghraib prison were released in 2004, the Bush Administration initiated various official enquiries and investigations. Commentators are concerned, however, that these are inadequate because they are not independent of the Administration.⁹⁶ As Steven Lee Myers and Eric Schmitt in the *New York Times* report, “[n]o

92. Letter from William J. Haynes II, General Counsel, U.S. Department of Defense, to Senator Patrick J. Leahy 1 (June 25, 2003), at <http://hrw.org/press/2003/06/letter-to-leahy.pdf> [hereinafter Haynes.] See also Letter from William J. Haynes II, General Counsel, U.S. Department of Defense, to Kenneth Roth, Executive Director, Human Rights Watch (Apr. 2, 2003), at <http://www.hrw.org/press/2003/04/dodltr040203.pdf>; Letter from Senator Patrick Leahy, to Condoleezza Rice, U.S. National Security Advisor 2 (June 2, 2003) (text mistakenly states 2004), at <http://hrw.org/press/2003/06/letter-to-rice.pdf> [hereinafter Leahy].

93. Haynes, *supra* note 92.

94. *Id.* at 2. Haynes also gave undertakings with respect to transferring individuals to third States, *see id.*

95. President George W. Bush, Statement at the United Nations International Day in Support of Victims of Torture (June 26, 2003), available at <http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html>.

96. See Steven Lee Myers & Eric Schmitt, *Wide Gaps Seen in U.S. Inquiries on Prison Abuse*, N.Y. TIMES, June 6, 2004, at A1.

investigation completely independent of the Pentagon exists to determine what led to the abuses at Abu Ghraib prison, and so far there has been no groundswell in Congress or elsewhere to create one."⁹⁷

Official statements about the non-use of torture and inhuman and degrading treatment⁹⁸ (if this is indeed what the Haynes letter amounts to) and the "few bad apples" explanation for the atrocities in Abu Ghraib prison may be true; equally, benign reasons given for the use of the extraterritorial locus (e.g. Professor Wedgwood's security concerns) and involvement of foreign authorities (e.g. the cultural affinity argument) for the detention and interrogation of terrorist suspects may indeed be the only motivation for this use and involvement. The problem, of course, is that at present one has no means of knowing. One is expected, rather, to take the reassurances on trust. As Amnesty International stated, "[t]he detainees held in Guantánamo, Bagram and elsewhere are at the mercy of the executive."⁹⁹

This particular move, of governments seemingly asking for blind faith as far as their extraterritorial treatment of detainees is concerned, reflects the broader rhetoric associated with the "war on terror," illustrated in the following remark by the U.K. Prime Minister:

the threat is there and demands our attention. That is the struggle which engages us. It is a new type of war. It will rest on intelligence to a greater degree than ever before. It demands a difference [sic] attitude to our own interests. It forces us to act even when so many comforts seem unaffected, and the threat so far off, if not illusory. In the end, believe your political leaders or not, as you will. But do so, at least having understood their minds.¹⁰⁰

The value of external scrutiny is sometimes acknowledged when States point out that in relation to certain extraterritorial actions possibilities exist for the ICRC to visit prisoners. The ICRC has repeatedly visited detainees in Guantánamo, Bagram, and Iraq.¹⁰¹ The ICRC, however, usually operates on the basis of confidentiality in this regard. As a Trial

97. *Id.*

98. For other such statements, see the officials quoted in Van Natta Jr., *supra* note 23.

99. Amnesty International, Aug. 19, 2003, *supra* note 1, at 12.

100. Prime Minister Tony Blair, Speech on the Threat of Global Terrorism (Mar. 5, 2004), available at <http://www.number-10.gov.uk/output/Page5461.asp> [hereinafter Blair statement, Mar. 5, 2004].

101. For an overview of the ICRC activities in relation to detainees held by the United States in Bagram and Guantánamo see Int'l Comm. of the Red Cross, *US Detention Related to the Events of 11 September 2001 and its Aftermath—The Role of the ICRC* (May 14, 2004), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/73596F146DAB1A08C1256E9400469F48> [hereinafter ICRC Statement, May 14, 2004].

Chamber of the UN International Criminal Tribunal for the Former Yugoslavia reported in the *Simić* case in connection with ICRC testimony before the Tribunal, the ICRC:

places particular emphasis on the importance of respecting the principles of . . . impartiality and neutrality, as well as the need for confidentiality in the performance of its functions. The ICRC notes that, by adhering to these principles, it has been able to win the trust of warring parties to armed conflicts and bodies engaged in hostilities, in the absence of which it would not be able to perform the tasks assigned to it under international humanitarian law. Further, the ICRC asserts that in carrying out its mandate it undertakes a duty of confidentiality towards the warring parties. An essential feature of that duty is that ICRC officials and employees do not testify about matters which come to their attention in the course of performing their functions. The ICRC position is based on its assessment that, if it were perceived that there was any likelihood or possibility that ICRC staff would testify, the warring parties would deny the ICRC access to their facilities.¹⁰²

As Lavoyer states, when ICRC representatives identify violations of humanitarian law:

the ICRC intervenes with the party concerned, explains the violation, and tries to obtain a change in its behavior. The ICRC does not act as a judge, but rather endeavors to initiate a constructive dialogue with the parties to a conflict. This is only possible if its interventions are kept discreet and confidential.¹⁰³

It follows, then, that as the ICRC has stated in the context of detainees held extraterritorially by the United States in the context of the "war on terror," "[t]he ICRC's lack of public comment on detention issues must . . . not be interpreted to mean that it has no concerns."¹⁰⁴

There are two circumstances where the confidentiality rule might not be complied with. In the first place, when the ICRC's confidential representations are leaked, the organization sometimes comments publicly on the substantive content of the leaked information. For example, when the report concerning detainees in Iraq extracted above was leaked and

102. Prosecutor v. *Simić* Case IT-95-9, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, ICTY, Trial Chamber, para. 14 (July 27, 1999), available at <http://www.un.org/icty/simic/trialc3/decision-e/90727EV59549.htm>.

103. Jean-Philippe Lavoyer, *The International Committee of the Red Cross—How Does it Protect Victims of Armed Conflict?*, 9 PACE INT'L L. REV. 287, 289 (1997).

104. ICRC Statement, May 14, 2004, *supra* note 101.

quoted in the *Wall Street Journal* in May 2004, Pierre Krähenbühl, the ICRC's Director of Operations, spoke to journalists to clarify certain factual details relating to the report and to confirm that, as stated in the report, some of the activities identified by the ICRC in Iraq "were tantamount to torture I think you will have different definitions of what torture amounts to; what we feel, and I think what you see from the photographs . . . is that there were clearly instances of degrading and inhumane treatment."¹⁰⁵

This situation is, of course, consistent with the confidentiality rule in that the ICRC is only speaking publicly to clarify details of a report that has already entered the public domain. It is notable that in the same press encounter Krähenbühl stated that in the light of the confidentiality rule the ICRC was "unhappy" that the report had been made public.¹⁰⁶

The second instance where the ICRC might make a public statement is outlined by Lavoyer thus: "[i]f serious violations of humanitarian law continue to occur even after the ICRC has made representations, the ICRC reserves the right to speak out and denounce such violations, though this must be in the interest of the victims themselves."¹⁰⁷

The ICRC has expressed concerns relating to the detainees in Guantánamo and Bagram in two areas: in the first place, it regrets that the detentions are not operating under a legal framework; in the second place, it has stated that its "observations regarding certain aspects of the conditions of detention and treatment of detainees in Bagram and Guantánamo have not yet been adequately addressed."¹⁰⁸

So we have a statement of non-compliance in relation to detention and treatment but no detail of the factual occurrences giving rise to this and no explanation of how the law is being violated. As a process for subjecting detention and treatment to rigorous scrutiny involving detailed public disclosure of both factual circumstances and conformity to the law, it is necessarily limited. Moreover, it only operates when access to detainees is provided, yet in fact the ICRC has complained that this has not happened in the case of secret extraterritorial detention facilities. The ICRC stated that it:

Has . . . repeatedly appealed to the American authorities for access to people detained in undisclosed locations Beyond Bagram and Guantánamo Bay, the ICRC is increasingly concerned about

105. Pierre Krähenbühl, Iraq: ICRC Explains Position Over Detention Report and Treatment of Prisoners, Statement at Press Conference at International Committee of the Red Cross' Headquarters (May 7, 2004), at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/SYRMYC?OpenDocument> [hereinafter Krähenbühl].

106. *Id.*

107. Lavoyer, *supra* note 103, at 290.

108. ICRC Statement, May 14, 2004, *supra* note 101.

the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations. For the ICRC, obtaining information on these detainees and access to them is an important humanitarian priority.¹⁰⁹

One ideal of the democratic tradition in whose name many of the States engaged in the extraterritorial activities discussed operate is that a State should not be taken on its word in such matters, nor given the benefit of the doubt. In a now classic statement of this idea, James Madison wrote:

[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to controul the governed; and in the next place oblige it to controul itself. A dependence on the people is no doubt the primary controul on the government; but experience has taught mankind the necessity of auxiliary precautions.¹¹⁰

Given that the extraterritorial locus often creates greater opportunities for States to avoid scrutiny of their treatment of individuals, one should not have to rely exclusively on assurances given by the governments of those States and the possibility in extreme circumstances of attenuated intimations of inappropriate treatment from the ICRC, to be sure that the States involved are not taking what they perceive to be advantages from such opportunities. In a joint letter issued in response to the torture statement by President Bush, the leading U.S. human rights NGOs and torture victim treatment centers remarked that “[t]he welcome message that the Bush Administration has sent today would be reinforced if it granted full access to independent human rights monitors to assure the world that this pledge is being fully redeemed in practice.”¹¹¹

109. *Id.*

110. James Madison, *The Federalist No. 51*, in *THE FEDERALIST* 347, 349 (Jacob E. Cooke ed., 1961) (1788).

111. William Schulz et al., Human Rights Watch, *Bush Administration Rules Out Using Cruel Treatment to Fight Terrorism: A Joint Statement Concerning UN Torture Victims Recognition Day by Human Rights Organizations and Torture Victim Treatment Centers* (June 26, 2003), at http://hrw.org/english/docs/2003/06/23/usint9379_txt.htm.

E. The "threat of a bad example"

Current and recent extraterritorial actions are also especially significant because they are being led by the most powerful States. The "war on terror," the basis on which many of the key post-9/11 activities are being conducted, is of course a U.S.-led initiative involving most of the other major world powers.¹¹² The invasion and occupation of Iraq was conducted by the world's most powerful State and the United Kingdom, with some limited assistance by other somewhat less powerful States. The refugee policy initiatives are being promoted within the European Union (in particular by the United Kingdom) and by Australia.

Because of the power enjoyed by the States prosecuting them, these activities constitute key components of the mainstream international political agenda since 9/11. As such, their significance extends to potentially influencing the actions of other States. In relation to the situation in Guantánamo Bay, Johan Steyn, a member of the Judicial Committee of the House of Lords, the most senior court in the United Kingdom, asks "what must authoritarian regimes, or countries with dubious human rights records, make of the example set by the most powerful of all democracies?"¹¹³ Professor Harold Koh reports that "[i]n Indonesia, the army has cited America's use of Guantánamo to propose building an offshore prison camp on Nasi Island to hold suspected terrorists from Aceh."¹¹⁴ This forms part of the broader consequences of the precedent-setting significance of certain aspects of U.S.-led policies under the "war on terror" which have been described by Amnesty International as the "threat of a bad example."¹¹⁵

112. The phrase "war on terror" was used by President George W. Bush in his statement responding to the attacks on September 11, 2001. President George W. Bush, Statement by the President in his Address to the Nation on September 11, 2001 (Sept. 11, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/print/20010911-16.html>. See also President George W. Bush, Address on the State of the Union (Jan. 29, 2002), <http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html>. For an outline of the various activities involved in the war on terror, see President George W. Bush, President Bush Reaffirms Resolve to War on Terror, Iraq and Afghanistan (Mar. 19, 2004), at <http://www.whitehouse.gov/news/releases/2004/03/20040319-3.html>. For commentary on the phrase, see, for example, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1032-37 (2004), Frédéric Mégret, "War"? *Legal Semantics and the Move to Violence*, 13 EUR. J. INT'L L. 361 (2002).

113. Johan Steyn, *Guantánamo Bay: the Legal Black Hole*, 27th F.A. Mann Lecture (Nov. 27, 2003), in 53 INT'L & COMP. L.Q. 1, 14 (2004).

114. Harold Hongju Koh, *Rights to Remember*, ECONOMIST, Oct. 30, 2003, at 24, available at http://economist.com/opinion/PrinterFriendly.cfm?Story_ID=2173160 (an edited version of The United States and Human Rights After September 11, John Galway Foster Lecture, London, 2003).

115. Amnesty International, Aug. 19, 2003, *supra* note 1.

F. *The Need for Greater Scrutiny*

What we see, then, is a series of important extraterritorial activities conducted by States operating at the vanguard of international public policy since 9/11. Not only do these activities by their nature impact on individuals, they do so in circumstances where greater intrusions on individuals are often considered necessary and in contexts where individuals may be particularly vulnerable and third parties prevented from monitoring the behavior of the States involved. Any one of these aggravating factors would be important enough to warrant greater scrutiny of the activities of States overseas; taken together, this case is surely compelling.

Just as in recent years greater attention in the West has focused on *individuals*, from pedophiles to tax dodgers and money launderers, who travel overseas to engage in activities that would be more difficult to perform at home, it is also necessary to give greater attention to what *States* are up to abroad given the relative lack of scrutiny and greater opportunity for abuse that often prevails in the extraterritorial context. Greater commitment is needed to the complex and broad-ranging business of transforming the political culture both nationally and internationally in order to create greater transparency and accountability in relation to state actions overseas.

Those surveying a State's adherence to human rights standards should not stop at the frontiers of that State. The ACLU has taken a public position on the U.S. treatment of detainees held extraterritorially, notably in Guantánamo Bay, Iraq, and Afghanistan.¹¹⁶ This focus outside U.S. territorial boundaries should be further extended both territorially and in terms of subject-matter, beyond high profile destinations and clear cases of extreme rights violations to the everyday circumstances of foreign territorial administration throughout the world and its impact on all human rights, including economic, social, and cultural rights and civil and political rights other than the right to be free from torture and inhuman and degrading treatment.

G. *Human Rights Law as a Scrutiny Mechanism*

One limited method offering the potential for scrutinizing the impact of States' activities with respect to individuals is the framework of law regulating the relationship between the individual and the State, classified in various ways in municipal legal systems (e.g. "civil liberties,"

116. See, e.g., Letter from American Civil Liberties Union, to President George W. Bush Regarding the Abuse of Prisoners at Abu Ghraib (May 11, 2004), at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15677&c=206>.

"due process," "human rights") and as "human rights law" in international law. So the letter by Senator Leahy that prompted Counsel Haynes' letter asked *inter alia* about U.S. conformity to the law prohibiting torture and inhuman and degrading treatment.¹¹⁷

Significantly, Haynes' reply is limited to answering this particular question about conformity to the law. The only issue covered is whether interrogations are consistent with U.S. obligations in federal and international law with respect to inhuman and degrading treatment; it is only "such torture"—torture prohibited by applicable federal and international law—that the U.S. does not permit, tolerate, or condone. Similarly, only allegations of *illegal* activity will be investigated and, if appropriate, lead to further action. Haynes limits his comments on the applicable law to the general question of which areas of federal and international law concerning torture and inhuman and degrading treatment are generally applicable to government officials.

Crucially, Haynes fails to clarify a further issue: is this law in play when the United States acts overseas? The reference to "all interrogations, wherever they may occur" may be an empty one if Haynes does not regard the relevant areas of law operating in a similarly expansive fashion. The pledge to investigate allegations of illegal conduct is followed by a remark that "[i]n this connection" an investigation about deaths in Bagram is "still in progress."¹¹⁸ The ambiguous nature of "illegal"—specifically, whether it covers only infringements of internal military law applicable to U.S. soldiers, or also the other obligations applicable to the United States in federal and international law—means, however, that we cannot draw from this remark a conclusion either way about whether Haynes regards these broader obligations to be in play.

It is perhaps notable that whereas some of the questions put by Senator Leahy in the original letter did indeed ask for clarification of conformity to the law, others were concerned simply with whether particular practices—not defined in a legal sense—were taking place. In this regard, Leahy observed the following:

[I]n its annual Country Reports on Human Rights Practices, the State Department has repeatedly condemned many of the "stress and duress" interrogation techniques that U.S. personnel are alleged to have used in Afghanistan. Can you confirm that the United States is not employing the specific methods of

117. Leahy, *supra* note 92.

118. Haynes, *supra* note 92, at 2.

interrogation that the State Department has condemned in countries such as Egypt, Iran, Eritrea, Libya, Jordan and Burma?¹¹⁹

Haynes responded that because "it would not be appropriate to catalogue the interrogation techniques used by U.S. personnel in fighting international terrorism . . . we cannot comment on specific cases or practices."¹²⁰

If Haynes had made any free-standing (i.e. non-legal) comments about extraterritorial practices, we might have been able to infer from his other comments about conformity to federal and international law concerning the prohibition on torture and inhuman or degrading treatment or punishment that there was a nexus between this law and the practices concerned—specifically, that particular practices were or were not being conducted because they were or were not permitted by these areas of law (although even this inference would involve according the benefit of the doubt). Absent such remarks, or indeed an explicit remark that these areas of law apply extraterritorially, the statement leaves things unclear not only in terms of whether the alleged practices are taking place but also in terms of whether the government regards the areas of law discussed to be applicable, thereby operating to regulate any such practices.

Haynes' reassurances, then, only have purchase if a prior issue—left unexamined in the letter—is clarified. Does the legal framework regulating the treatment of individuals by States operate when States act outside their territory? The U.S. government regards itself bound by federal and international law when it comes to the practice of torture and inhuman and degrading treatment and punishment, but does it regard these areas of law applicable to its activities overseas and is it correct in its position in this regard?

IV. THE LEGAL BLACK HOLE

A. Legal Vacuum Concerns

A striking feature of the public discussion about some of the extra-territorial activities covered above, particularly the detention and interrogation of the terrorist suspects in Guantánamo Bay, is the suggestion that they somehow occur in a legal vacuum as far as legal standards governing their effect on individuals are concerned. Professor Harold Koh has referred to Guantánamo Bay as an "extra legal zone."¹²¹ Priest and Gellman describe the secret overseas detention centers as being

119. Leahy, *supra* note 92, at 2.

120. Haynes, *supra* note 92, at 2.

121. Koh, *supra* note 114.

places "where U.S. due process does not apply;"¹²² Van Natta Jr. describes them as "isolated locations outside the jurisdiction of American law."¹²³ Johan Steyn stated that the detainees in Guantánamo Bay were "beyond the rule of law, beyond the protection of any courts,"¹²⁴ and that the situation there constituted a "legal black hole."¹²⁵ In the *Abbasi* case concerning the U.K. government's efforts in relation to Feroz Abbasi, one of its nationals held in Guantánamo, the English Court of Appeal stated that "[w]hat appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal."¹²⁶

In the context of camps housing asylum seekers, Amnesty International has argued that, in the refugee status determinations that would occur in the TPCs proposed by the United Kingdom, the individuals affected "would be exposed to a procedure which would accord them lesser rights in off-territory processing, not least of which would be the practical difficulties in pursuing appeal rights Such difficulties can render appeal rights meaningless."¹²⁷

Thus arguments are made to the effect that few—or even no—legal standards exist by which to judge whether the restrictions placed on rights in these extraterritorial situations are justified, and/or, in the refugee context, to challenge refugee status decisions made in the extraterritorial locus.

Despite the absolutist nature of some of the designations discussed (e.g. "black hole"), one might speculate that at least in some cases commentators are concerned with the non-application of certain areas of law rather than *all* law. In the case of Guantánamo Bay, for example, the general designations are often used to speak to one or more narrower contentions: (1) that guarantees under the U.S. Constitution, notably relating to *habeas corpus*, do not apply outside U.S. territory;¹²⁸ (2) that the

122. Priest & Gellman, *supra* note 22.

123. Van Natta Jr., *supra* note 23.

124. Steyn, *supra* note 113, at 8.

125. *Id.* (This is the title of the lecture given by Johan Steyn at the 27th F.A. Mann Lecture).

126. *Abbasi & Anor. v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department*, [2002] EWCA Civ. 159, para. 66 (C.A. 2002).

127. Amnesty International, June 2003, *supra* note 17, §§ 3.2, 6.2.2.6.

128. In *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003), the U.S. Court of Appeals for the Ninth Circuit rejected the U.S. Government's contention that habeas jurisdiction was precluded in a case relating to the indefinite detention of uncharged foreign nationals captured in Afghanistan by U.S. forces and transferred to the U.S. Naval Base in Guantánamo, Cuba, without rights to challenge their detention in any court of the United States or any other tribunal. The Court held that "territorial jurisdiction" was sufficient in this case and that in any case for the purposes of habeas jurisdiction Guantánamo is a part of the sovereign territory of the

U.S. qualification of Al Qaeda members as “unlawful combatants,” and thereby supposedly not entitled to the protections accorded to prisoners of war in international humanitarian law (IHL), removes most of the protections such individuals would enjoy under IHL;¹²⁹ and (3) that the procedures adopted for determining the status of detainees, the remedies available for challenging these determinations, and the military tribunals created to try certain detainees are conceived in a manner that does not conform to appropriate standards of justice.¹³⁰ In June 2004, the U.S. Su-

United States. This contradicted the earlier decision of the Court of Appeals for the District of Columbia in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), which held that Cuba—not the United States—had sovereignty over Guantánamo, and that the petitioners could not invoke the jurisdiction of U.S. courts to test the constitutionality or the legality of restraints on their liberty. Whilst the latter decision was overturned by the U.S. Supreme Court in *Rasul v. Bush*, 124 S. Ct. 2686 (2004)—which held that the U.S. courts do have jurisdiction to consider the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo Bay—two recent decisions by different federal judges in Washington D.C. have interpreted the decision of the Supreme Court in *Rasul v. Bush* differently and again have given divergent answers to the question of whether foreign citizens who have been imprisoned in Guantánamo, most of whom have been without access to lawyers or the courts, are entitled to due process of law. In *Khalid v. Bush*, 355 F. Supp.2d 311 (D.D.C. 2005), District Judge Leon interpreted *Rasul* narrowly to mean that detainees may file papers in court, not that they have any rights courts can enforce; whereas, in *In re Guantánamo Detainee Cases*, 2005 U.S. Dist. LEXIS 1236 (D.D.C. Jan. 31, 2005), District Judge Green reasoned that it would make no sense for the Supreme Court to have gone to such lengths in *Rasul* merely to require a pointless exercise of jurisdiction under the ancient writ of habeas corpus if the Guantánamo prisoners had no rights.

129. For the Administration's position as to the inapplicability to persons captured in Afghanistan of the prisoner of war protections of the Geneva Conventions, see George W. Bush, Memorandum on Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), at http://pegc.no-ip.info/archive/White_House/bush_memo_20020207_ed.pdf. See also Ari Fleischer, White House Press Secretary Announcement of President Bush's Determination re: Legal Status of Taliban and Al Qaeda Detainees (Feb. 7 2002), at <http://www.state.gov/s/l/38727.htm>; Memorandum from Alberto Gonzales to President George W. Bush, Decision Re Application of the Geneva Convention on Prisoner of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), at http://pegc.no-ip.info/archive/White_House/gonzales_memo_20020125.pdf; White House, *Fact Sheet: Status of Detainees at Guantánamo* (Feb. 7 2002), at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> [hereinafter White House Fact Sheet]. In July 2004, the U.S. Administration established a procedure envisaged to determine the status of each individual detainee under international humanitarian law. See Deputy Secretary of Defense, *Order Establishing Combatant Status Review Tribunal* (July 7, 2004), at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>; Secretary of the Navy, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantánamo Bay Naval Base* (July 29, 2004), at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>. Note however that U.S. courts have found that the Status Review Tribunals do not satisfy the right of any captured combatant under Art. 5, Geneva Convention III 1949 to have his status determined by a competent tribunal. See, e.g., *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004); *In re Guantánamo Detainee Cases*, 2005 U.S. Dist. LEXIS 1236 (D.D.C. Jan.31, 2005).

130. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57833 (Nov. 16, 2001), issued by President Bush provides that non-U.S. nationals designated by the President under the Order will be tried by Military Commissions. This Order has been implemented by the Department

preme Court determined that U.S. courts can assert jurisdiction with respect to the detainees in Guantánamo Bay, and U.S. nationals designated as "enemy combatants" are entitled to challenge the factual basis for their detention before a neutral decision maker.¹³¹

The "legal black hole" designations are, therefore, often invoked in relation to particular areas of law and have, to a certain extent, turned out to be unfounded given the 2004 decisions of the Supreme Court. The designations retain purchase, however, in reflecting a general concern that in some way, and to varying degrees, the applicability of those legal norms considered necessary in order to provide guarantees in relation to the treatment of individuals is somehow limited, either partially or in full, in the extraterritorial context. Equally, there is concern that the operation of judicial and political mechanisms existing to scrutinize States' conformity to these standards is also somehow limited in this context, for example through the bounded jurisdictional competence of domestic courts. The "legal black hole" idea speaks to a fear that, when States move away from their own territories, they somehow also affect a partial or complete move away from the arena of necessary legal regulation as far as the treatment of individuals is concerned.

B. *The International Legal Black Hole Assertion*

As far as international law is concerned, the debate about the applicability of human rights standards to the coalition presence in Iraq, and

of Defense. See Department of Defense, *Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism* (Mar. 21, 2002), at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>. The rules of procedure applicable before the Military Commissions have subsequently been given more detail by a series of Instructions issued by the Department of Defense. See Department of Defense, *Military Commission Instructions No. 1, 2, 5, 7* (Apr. 30, 2003); *Military Commission Instructions No. 3, 6* (Apr. 15, 2004); *Military Commission Instructions No. 4, 8* (Aug. 31, 2004); *Military Commission Instruction No. 9* (Dec. 26, 2003); at http://www.defenselink.mil/news/Aug2004/commissions_instructions.html. On the procedures created to determine the status of individual detainees see *Order Establishing Combatant Status Review Tribunal*, *supra* note 129.

131. *Rasul v. Bush*, 124 S. Ct. 2686 (2004) concerns the jurisdictional issue (see the discussion of this and other relevant cases, *supra* note 128); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) concerns the entitlements of "enemy combatants." In *Hamdan v. Rumsfeld*, 344 F. Supp.2d 152, 168 (D.D.C. 2004) criticism was made of the fairness of the military commissions in relation to the power of the appointing authority or the presiding officer to exclude the accused from hearings and deny him access to evidence presented against him. The judge held, however, that the military commissions were in any case illegal in this regard insofar as they deviated from the procedure applicable to normal courts martial under the Uniform Code of Military Justice. *Id.* at 168-72. The court also held that the provisions for review were not open to criticism as a matter of domestic law. *Id.* at 167. The court did not feel it necessary to rule at that time on other questions relating to the fairness of the military commissions. *Id.* at 172-73.

the U.S. detention of terrorist suspects in Guantánamo, has been dominated by discussions about the applicability of humanitarian law to so-called "enemy combatants."¹³² The only instance where international human rights law has been discussed in relation to these activities has been in the question of the definition of torture and inhuman and degrading treatment, following the leaked U.S. Justice Department memos challenging the established wisdom on this issue and potentially broadening the range of practices that could be considered lawful here.

The meaning and scope of application of these two areas of international law relating to individual rights is of course vitally important, but an exclusive focus on them ignores the way in which other rights in international human rights law, for example the rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)—are potentially relevant to the activities of States in other countries.¹³³ The right to food in Article 11 of the ICESCR, for example, is clearly relevant to the conduct of the occupation of Iraq;¹³⁴ equally, the right to a fair trial in Article 9 of the ICCPR is key as far as the prosecution of alleged terrorists.¹³⁵

Moreover, within this broader corpus of law, there is a third argument of inapplicability being put forward by the United States and the United Kingdom which has just as serious a potential impact in attenuating the legal protections accorded to individuals in all of the extraterritorial activities engaged in by these two states, but which has unfortunately not been given the attention it deserves. Although both the United Kingdom and the United States are parties to the ICCPR, neither State appears to have entered a derogation to the Covenant with respect to its occupation and administration of Iraq, and the United States has not done so in relation to its facilities in Guantánamo Bay. Moreover, the United Kingdom has not entered a derogation to the European Convention of Human Rights (ECHR) in relation to its presence in Iraq. If the ICCPR

132. On the status and the rights of Al Qaeda detainees, who have been designated "unlawful combatants" rather than "prisoners of war" by the United States, see *supra* note 129 and, for commentary, George H. Aldrich, Editorial Comment, *The Taliban, Al-Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2003); Knut Dörmann, *The Legal Situation of Unlawful/Unprivileged Combatants*, 85 INT'L REV. RED CROSS 45 (2003); Ruth Wedgwood, *Al Qaeda, Terrorism and Military Commissions*, 96 AM. J. INT'L L. 328 (2002); White House Fact Sheet, *supra* note 129.

133. For a discussion of the extraterritorial application of the main international human rights instruments, see, for example, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (Fons Coomans & Menno T. Kamminga eds., 2004).

134. See International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, art. 11, 993 U.N.T.S. 3.

135. See International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

and the ECHR are applicable to these States in Iraq and to the United States in Guantánamo, one would imagine that the United States and the United Kingdom would regard the entering of some kind of derogation as required in order for them to carry out some of the activities they considered necessary in either place, for example prolonged detention without trial. Why, then, do the United States and the United Kingdom seem not to consider their obligations in these treaties applicable?

According to a secret memo prepared for the Department of Defense in March 2003 and leaked in June 2004, "[t]he United States has maintained consistently that the [ICCPR] does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict."¹³⁶ Here, then, applicability is rejected on two alternative bases; in reverse order, these are: (1) *subject matter*—the Covenant does not apply to operations of the military during international armed conflict; and (2) *territorial*—the Covenant does not apply to the United States outside its territory.

The United Kingdom position appears to be different. As far as Iraq is concerned, Adam Ingram, the U.K. Armed Forces Minister, wrote to Adam Price, a UK Member of Parliament, on April 7, 2004 in the following terms:

The European Convention on Human Rights is intended to apply in a regional context in the legal space of the Contracting States. It was not designed to be applied throughout the world and was not intended to cover the activities of a signatory in a country which is not signatory to the Convention. The ECHR can have no application to the activities of the UK in Iraq because the citizens of Iraq had no rights under the ECHR prior to the military action by the Coalition Forces. Further, although the UK Armed Forces are an occupying power for the purposes of the Geneva Convention, it does not follow that the UK exercises the degree of control that is necessary to bring those parts of Iraq within the UK's jurisdiction for the purposes of article 1 of the Convention.¹³⁷

Presumably the Minister is using the term "signatory" to refer to a State that has signed *and ratified* the Convention. A similar position also

136. U.S. Department of Defense, *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* 6 (Mar. 6, 2003), at <http://www.ccr-ny.org/v2/reports/docs/PentagonReportMarch.pdf>.

137. Letter from the Rt. Hon. Adam Ingram, MP, U.K. Minister of State for the Armed Forces, to Adam Price MP (Apr. 7, 2004) [hereinafter Ingram Letter, Apr. 7, 2004].

seems to have been taken by the U.K. Foreign Secretary, Jack Straw.¹³⁸ Here, then, we again have two alternative bases for non-applicability, but of a different character. The first basis is a variant on the territorial argument put forward by the United States: that the ECHR only applies in the territory of contracting States. This does not necessarily rule out applicability to a contracting State acting outside *its* territory (as the United States argument does), so long as that State is acting in the territory of another contracting State. The second basis focuses on the degree of control exercised: Ingram seems to assume that a certain degree of control, apparently over territory ("those parts of Iraq"), is always required for the Convention to apply to the United Kingdom extraterritorially and argues that this is not the case in Iraq.

We can see, then, that parallel to assertions and fears about the inapplicability of certain areas of domestic law extraterritorially, but given relatively less mainstream coverage, are assertions by the United States and the United Kingdom as to such inapplicability in relation to the main international human rights treaties on civil and political rights.

C. *Suggestions that the Avoidance of Law is Intentional*

Earlier we saw how some commentators question whether the use of certain methods of interrogation once considered beyond the pale should be revisited. Professor Alan Dershowitz, it will be recalled, argues that if such methods are to be used, then this use should be legally sanctioned so that it can operate under some kind of legal framework.¹³⁹ Such com-

138. The Foreign Secretary made the following statement in a Parliamentary Written Answer to Sir Menzies Campbell MP on May 17, 2004: "[a]s the Government have said in relation to the current High Court cases brought by the families of 13 Iraqi civilians, the Government's position is that ECHR rights have no application in Iraq." HOUSE OF COMMONS HANSARD, Vol. 421, Part No. 87, Columns 674W-675W (2004) (written answer of Jack Straw MP, Secretary of State for Foreign and Commonwealth Affairs to Sir Menzies Campbell, MP), available at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040517/text/40517w06.htm#40517w06.html_sbhd3. In a later written answer to Sir Menzies, the Foreign Secretary made the following statement in relation to the applicability of the ECHR to the United Kingdom in Iraq, invoking by contrast the situation in Turkish-occupied northern Cyprus: "[t]he citizens of Iraq had no rights at all under the ECHR prior to military action by the coalition forces; furthermore, the UK does not exercise the same degree of control over Iraq as existed in relation to the Turkish occupation of northern Cyprus." *European Convention on Human Rights*, HOUSE OF COMMONS HANSARD, Vol. 421, Part No. 89, Column No. 1083W (2004) (written answer from Jack Straw, Secretary of State for Foreign and Commonwealth Affairs to Sir Menzies Campbell, MP), available at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040519/text/40519w29.htm#40519w29.html_sbhd5 [hereinafter Straw May 19, 2004]. The northern Cyprus situation and the European Court of Human Rights cases arising out of it are discussed below in the text from note 182.

139. In a parallel development, there have been calls by President Bush and Prime Minister Blair for those areas of international law regulating the basis for carrying out one particular extraterritorial activity (as opposed to regulating what States can do when extraterri-

ments, of course, presuppose that the law has not changed. As far as the constraints of international human rights law are concerned, the prohibitions on torture and inhuman and degrading treatment and punishment remain as they were pre-9/11. Under the UN Torture Convention, which in this respect reflects the position under the ICCPR and the ECHR, "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."¹⁴⁰

This legal situation, coupled with assertions about the non-applicability of the law discussed above, has led some commentators to speculate, or even assert, that the reason for the choice of the extraterritorial locus is bound up in the "extra-legal" character of this locus. Just as it is speculated that States chose the extraterritorial location in part to avoid public scrutiny, so too it is suggested that this choice was motivated by a desire to avoid those areas of law that supposedly need reforming but have not yet been changed, or at any rate to avoid legal regulation. Johan Steyn asserts that "[t]he purpose of holding the prisoners at Guantánamo Bay was and is to put them beyond the rule of

torial activities are underway), the use of military force, to be interpreted differently and/or altered to give States a broader entitlement to act. The National Security Strategy paper issued by President Bush in 2002 states that:

[f]or centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means.

President George W. Bush, *The National Security Strategy of the United States of America* 15 (Sept. 17, 2002), at <http://www.whitehouse.gov/nsc/nss.pdf>. Discussing the use of such force for humanitarian reasons without a UN Security Council mandate, U.K. Prime Minister Blair argued in 2004 that:

[it] may well be that under international law as presently constituted, a regime can systematically brutalise and oppress its people and there is nothing anyone can do, when dialogue, diplomacy and even sanctions fail, unless it comes within the definition of a humanitarian catastrophe (though the 300,000 remains in mass graves already found in Iraq might be thought by some to be something of a catastrophe). This may be the law, but should it be?

Blair statement, Mar. 5, 2004, *supra* note 100, at 13. See also Tony Blair, Doctrine of the International Community, Speech at the Economic Club, Chicago (Apr. 24, 1999), at <http://www.number-10.gov.uk/output/Page1297.asp>.

140. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, *adopted* Dec. 10, 1984, art. 2.2, 1465 U.N.T.S. 85.

law, beyond the protection of any courts, and at the mercy of the victors.”¹⁴¹

In a similar vein, the *Economist* asserted that the Bush administration “has imprisoned some 680 people at Guantánamo Bay precisely because it believed that the naval base, held on a perpetual lease, is outside the reach of anyone’s courts, including America’s.”¹⁴²

In the *Washington Post*, Higham, Stephenson, and Williams assert that, in addition to being relatively quiet and safe from attack, Guantánamo Bay was chosen over alternatives in the United States (a military facility in Kansas and, incredibly, the former prison on Alcatraz Island in San Francisco) because it was “beyond the reach of U.S. courts.”¹⁴³ In the refugee context, it is also alleged that part of the motivation for choosing the extraterritorial locus is the perceived absence of a comparable level of legal regulation.¹⁴⁴

As with their fears about the alleged practices being conducted, commentators present a dual concern: the fear that the law is being avoided in order that certain practices be conducted that would not be lawful, and the worry that this sets a dangerous precedent in terms of the behavior of other States.

But why does the avoidance of law matter? What value is there to having extraterritorial action subject to legal regulation? Does the law prevent States from being able to take necessary action? Alternatively, does subjecting extraterritorial action to legal regulation merely provide greater legitimacy to extraterritorial action without actually placing such action under any meaningful constraint?

D. *The Value and the Limits of the Law*

One popular perception of human rights law obligations is that they are somehow a series of absolute rights that can never be limited to preserve public order. To invoke the phrase of Justice Jackson in the *Terminiello* case, when public order is threatened in such circumstances, this absolutist approach to rights renders the legal regime through which it is pursued (in the case of *Terminiello* the U.S. Constitution) a “suicide pact.”¹⁴⁵ As Justice Jackson stated in *Terminiello* however, “[t]he choice is not between order and liberty. It is between liberty with order and anarchy without either.”¹⁴⁶

141. Steyn, *supra* note 113, at 8.

142. *Unjust, Unwise, Un-American*, *ECONOMIST*, July 12, 2003, at 9.

143. Higham et al., *supra* note 32.

144. See Amnesty International, June 2003, *supra* note 17, introduction, para. 1.

145. See the end of Justice Jackson’s Dissenting Opinion in *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

146. *Id.*

If one aspires to "liberty with order," the question is how to strike the right balance between safeguarding human dignity on an individual level and preserving order generally. Far from avoiding this question, international human rights law actually seeks to provide a normative system, notably with its limitation and derogation provisions, through which it can be addressed. As the U.K. Lord Chief Justice, Lord Woolf, stated in relation to the United Kingdom and its bill of rights, the Human Rights Act:

There are pressures created by the need to protect this country from merciless acts of international terrorists. These pressures will test the [Human Rights Act]. But the Human Rights Act is not a suicide pact! It does not require this country to tie its hands behind its back in the face of aggression, terrorism or violent crime.¹⁴⁷

When the life of the nation is at risk, the main treaties on civil and political rights allow States to "derogate" from their obligations: to withdraw from being bound by certain substantive rights guarantees on a temporary basis to the extent that this is necessary to meet the exceptional threat.

Even in such circumstances, however, a valid derogation by a State is not the same as the non-applicability of that State's human rights obligations. In the first place, the State must make a formal declaration of derogation.¹⁴⁸ In the words of the UN Human Rights Committee, this "requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed."¹⁴⁹ Moreover, only those derogations necessary to meet the needs of the war or public emergency, and proportionate to that need, are permissible.¹⁵⁰ As the Human Rights Committee stated in relation to the obligations under the ICCPR, "even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation."¹⁵¹ Even if a broad series of derogations meet

147. Lord Chief Justice Woolf, *Human Rights: Have the Public Benefited?*, Speech at the British Academy (Oct. 15, 2002), at <http://www.britac.ac.uk/pubs/src/tob02/woolf.html>.

148. American Convention on Human Rights, Nov. 22, 1969, art. 27(3), OAS Treaty Series No. 36, [hereinafter ACHR]; ICCPR, *supra* note 135, art. 4(3); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 15(3), ETS No. 5 [hereinafter ECHR]. See also HUMAN RIGHTS COMMITTEE, GENERAL COMMENT 29, STATES OF EMERGENCY, art. 4, para. 2, U.N. Doc. CCPR/C/21/REV.1/ADD.11 (2001) [hereinafter UN HRC GENERAL COMMENT 29].

149. UN HRC General Comment 29, *supra* note 148, para. 2.

150. ACHR, *supra* note 148, art. 27(1); ICCPR, *supra* note 135, art. 4(1); ECHR, *supra* note 148, art. 15(1). See also UN HRC General Comment 29, *supra* note 148, paras. 3-6.

151. UN HRC General Comment 29, *supra* note 148, para. 3.

this test, certain obligations are incapable of any derogation. Notably for our purposes, these include the obligation not to commit torture and inhuman and degrading treatment and punishment, as reflected in the provision from the Convention Against Torture extracted above, which is echoed in the listing of torture as a non-derogable right in both the ICCPR and the ECHR.¹⁵² Moreover, the UN Human Rights Committee has stated that, “[t]he prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation,” and are “absolute . . . even in times of emergency.”¹⁵³

Operating outside the application of human rights law, by contrast, although allowing States to restrict rights, necessarily permits restrictions on an arbitrary basis. Even if some such restrictions might be justified, a legal basis for judging this matter is absent. As a consequence, States lose whatever legitimacy is associated with “lawfulness” in respect of these restrictions. Thus Lord Woolf states that the U.K. Human Rights Act reduces “the risk of our committing an ‘own goal’”. In defending democracy, we must not forget the need to observe the values which make democracy worth defending.”¹⁵⁴

The concern, then, is that States responding to threats by groups seeking to destroy the liberal, secular, rights-based political order that is the underpinning of human rights law and attempting to foster the adoption of such an order overseas—most notably in Iraq—might actually undermine this order and their own promotion of it if they act outside an arena of effective legal regulation. Johan Steyn remarks that “the type of justice meted out at Guantánamo Bay is likely to make martyrs of the prisoners in the moderate Muslim world with whom the West must work to ensure world peace and stability.”¹⁵⁵

As far as international human rights law is concerned, the significance and value of the application of this law should not be overstated. In the first place, this area of law is criticized for according too much latitude to States during “emergency” situations because of the generous interpretations of derogation provisions made by international review mechanisms, especially the ECHR Strasbourg machinery with its invocation of a broad “margin of appreciation” involving deference to States’ own decisions as to the existence of an “emergency” situation and the necessity and proportionality of restrictions introduced to respond to this

152. ACHR, *supra* note 148, art. 27(2); ICCPR, *supra* note 135, art. 4(2); ECHR, *supra* note 148, art. 15(2). *See also* UN HRC General Comment 29, *supra* note 148, para. 7.

153. UN HRC General Comment 29, *supra* note 148, para. 13(b).

154. Woolf, *supra* note 147.

155. Steyn, *supra* note 113, at 14.

threat.¹⁵⁶ One might ask, then, whether the inadequate nature of the test applied to state action renders this area of the law incapable of delivering what it promises, thereby serving ironically to legitimate state infringements on individual rights without having actually placed States under any meaningful constraint.

Alongside concerns relating to the substantive content of international human rights law are other worries relating to the value of this regime of law as an effective review mechanism, notably relating to enforcement. Whereas the European Court of Human Rights exercises jurisdiction to hear complaints from individuals against all Council of Europe States,¹⁵⁷ many of whom engaged in the extraterritorial activities discussed in this paper, the Human Rights Committee's (somewhat) equivalent jurisdiction of issuing Views on individual communications does not operate with respect to the United States or the United Kingdom.¹⁵⁸ And even when some form of enforcement mechanism does exist, for example the reporting procedure to the Human Rights Committee under the ICCPR,¹⁵⁹ the problems identified earlier concerning the limited remit of country-specific NGOs can mean that the crucial role that NGOs play in the operation of human rights mechanisms is lacking when it comes to extraterritorial activity. For example, one critic of the U.K.'s actions in Jersey, one of the Channel Islands, a U.K. Crown Dependency, complains that:

Typically, in Jersey there are no NGO groups and even though some individuals may be members of UK based NGO's (like Justice, Interights, Liberty) these organisations have no capacity or knowledge to assist with the Dependencies' reports or to

156. The following are some of the key cases under the European Convention system: *Aksoy v. Turkey*, App. No. 21987/93, 1996-VI Eur. Ct. H.R. 2260; *Brannigan & McBride v. United Kingdom*, App. Nos. 14553/89 and 14554/89, 258 Eur. Ct. H.R. (ser. A) at 29 (1993); *Brogan v. United Kingdom*, App. No. 11209/84, 145 Eur. Ct. H.R. (ser. A) at 11 (1988); *Ireland v. United Kingdom*, App. No. 5310/71, 25 Eur. Ct. H.R. (ser. A) at 1 (1978); *Cyprus v. Turkey*, App. Nos. 6780/74 and 6950/75, 4 Eur. H.R. Rep. 482 (Eur. Comm'n on H.R. 1976) [hereinafter *Cyprus v. Turkey* 1976]; *Denmark, Norway, Sweden and Netherlands v. Greece*, App. Nos. 3321/67; 3322/67; 3323/67; 3344/67, 12 Y.B. Eur. Conv. on H.R. 1 (Eur. Comm'n on H.R. 1969); *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) at 1 (1961). See also D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS*, ch. 16 (1995) [hereinafter HARRIS ET AL.]. For commentary on the nature of the latitude given to states under derogation provisions, see, for example, Rosalyn Higgins, *Derogations under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281 (1976-77); Susan Marks, *Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights*, 15 OXFORD J. LEG. STUD. 69 (1995).

157. See ECHR, *supra* note 148, art. 34

158. Because neither State has ratified the First Optional Protocol to the ICCPR allowing for this. See Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR First Optional Protocol].

159. See ICCPR, *supra* note 135, art. 40.

advise at length. Individuals in more distant and isolated places will experience even more difficulties. Thus the Reporting Process is rendered largely meaningless.¹⁶⁰

Beyond these and other problems with the law, it must also be recalled that the nature of the activities under evaluation means that many of them take place in conditions of near total secrecy. As the *Economist* newspaper asked: “[i]s the American government torturing terrorist suspects or not? . . . American officials claim to have detained thousands of suspects, including some senior al-Qaeda leaders, but will not say where, and under what conditions, they are being held.”¹⁶¹ The ICRC has stated that it:

has also repeatedly appealed to the American authorities for access to people detained in undisclosed locations.

[. . .]

Beyond Bagram and Guantánamo Bay, the ICRC is increasingly concerned about the fate of an unknown number of people captured as part of the so-called global war on terror and held in undisclosed locations. For the ICRC, obtaining information on these detainees and access to them is an important humanitarian priority.¹⁶²

Whatever the truth, then, of the “legal black hole” designations, it is certainly true that many of the extraterritorial activities conducted since 9/11 have taken place in circumstances where the opportunities for scrutiny by third parties are markedly constrained and sometimes virtually absent. Even allowing for their own limitations, then, initiatives to insist on the applicability of the law, from academic writing to the submission of amicus briefs before the courts, are no substitute for the more complex and broad-ranging business of transforming the political culture both nationally and internationally in order to create greater transparency and accountability in relation to state actions overseas.

In the light of these concerns, one should not be too sanguine as to the value of international human rights law to provide meaningful and effective review of extraterritorial state action. It does not necessarily follow, however, that one should assume that the applicability of international human rights law to such action would have no value. Even

160. United Kingdom House of Commons Foreign Affairs Committee, Fifth Report: Human Rights Report 2001, Appendix to the Minutes of Evidence, Memorandum from Michael Dun, The State of Human Rights in Jersey, HC589, para. 15 (2001), available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmfaaff/589/589ap02.htm>.

161. *The Pledge*, *supra* note 60, at 47.

162. ICRC Statement, May 14, 2004, *supra* note 101.

allowing for concerns about the derogation test, for example, at a bare minimum the law here still provides an absolute prohibition on breaches of non-derogable rights such as the right to be free from torture. It is also significant that, as mentioned earlier, the United States and the United Kingdom seek to deny the applicability of the main international treaties on civil and political rights: this would surely be unnecessary if the two States considered the substantive content of these instruments or their modes of enforcement to place them under no meaningful constraint. Because of this, a consideration of the applicability of international human rights law is a valid response to the need for greater scrutiny of extraterritorial action, provided, of course, that as such it is understood to be but one part of the broader initiative, discussed earlier, required to bring greater critical attention to and scrutiny of such activity.

V. THE APPLICABILITY OF THE ICCPR AND ECHR

A. Revisiting the U.S. and U.K. Claims

As previously mentioned, all areas of international human rights law are potentially relevant to extraterritorial action. A full consideration of this corpus of law, however, is beyond the scope of a piece of this length.¹⁶³ Instead, the focus here will be on the two treaties—the ICCPR and the ECHR—which the United Kingdom and, as far as the ICCPR is concerned, the United States have asserted to be inapplicable to some or all of their extraterritorial activities. Are the two States right in the assertions they make; are the activities discussed above conducted in a legal vacuum as far as these treaties are concerned?

The following answer to this question is divided into two parts based on the two U.S. reasons for rejecting the applicability of the ICCPR outlined earlier: (1) the "wartime" context in which some, but not all, of the extraterritorial activities take place; and (2) the extraterritorial location itself.¹⁶⁴ The analysis in the second part will require a consideration of the two U.K. arguments on extraterritorial applicability; the potential

163. See, e.g., Coomans & Kamminga, *supra* note 133.

164. There are other potential reasons why states might consider international human rights law not to apply extraterritorially. These include situations where the acts in question are not imputable to them but to a separate juridical entity, for example on the grounds that the entity performing the acts has been "placed at the disposal of" a third State for the purposes of the acts in question. On this, see, for example, *Drozd and Janousek v. France and Spain*, 240 Eur. Ct. H.R. (ser. A) at 1 (1992); *Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, Fifty-third Session (23 April-1 June and 20 July-10 August 2001)*, U.N. GAOR, 56th sess., Supp. No. 10, Art. 6, at 95-98, U.N. Doc. A/56/10 (2001).

limitation of the ECHR to actions taken within the territory of contracting states, and the meaning and relevance of the "effective control" test.

It was illustrated above that in the "war on terror" context allegations of extraterritorial detention and interrogation of terrorist suspects by U.S. authorities have been accompanied by allegations of rendering such suspects to third States. When the detention and interrogation in such circumstances is carried out without any U.S. involvement, we are not in the arena of an extraterritorial act committed by the State concerned, the focus of this Article. The act of rendering is regulated, in circumstances where due process guarantees are somehow defective or it is foreseeable that the individual will face human rights violations in the third State, by the area of international human rights law concerned with state action within the jurisdiction which has an effect on the enjoyment of rights outside this jurisdiction.

This separate area of law is beyond the scope of the present study;¹⁶⁵ the general approach to it in international human rights law is illustrated in the following passage in the *Soering* decision of the European Court of Human Rights in 1989, discussing the obligations under Article 3 of the ECHR:

165. See CAT, *supra* note 140, art. 3; T.I. v. United Kingdom, App. No. 43844/98, 2000-III Eur. Ct. H.R. 435; D. v. United Kingdom, App. No. 30240/96, 1997-III Eur. Ct. H.R. 777; H.L.R. v. France, App. No. 24573/94, 1997-III Eur. Ct. H.R. 745; M.A.R. v. United Kingdom, App. No. 28038/95, Eur. Comm'n H.R., Admissibility Decision of Jan. 16, 1997; Chahal v. United Kingdom, App. No. 22414/93, 1996-V Eur. Ct. H.R. 1831; Adegbe v. Austria, App. No. 26998/95, Eur. Comm'n H.R., Admissibility Decision, April 9, 1996; Aylor-Davis v. France, App. No. 22742/93, 76-B Eur. Comm'n H.R. Dec. & Rep. 164 (1994); Vilvarajah v. United Kingdom, App. Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 215 Eur. Ct. H.R. (ser. A) at 1 (1991); Cruz Varas and Others v. Sweden, App. No. 15576/89, 201 Eur. Ct. H.R. (ser. A) at 1 (1991); *Soering v. United Kingdom*, App. No. 14038/88, 161 Eur. Ct. H.R. (ser. A) at 1 (1989); Hadž Boudellaa, Boumediene Lakhdar, Mohamed Nechle and Saber Lahmar v. Bosnia and Herzegovina and the Republic of Bosnia and Herzegovina, Cases Nos. CH/20/8679, CH/02/8689, CH/02/8690 and CH/02/8691, Human Rights Chamber of Bosnia and Herzegovina, Decision on Admissibility and Merits, Nov. 11, 2002, *available at* <http://www.hrc.ba> (hereinafter Bosnia expulsion cases). See also General Comment on the Implementation of Article 3 of the Convention in the Context of Article 22, Committee Against Torture, 53d Sess., Annex IX, Supp. No. 44, at 52, U.N. Doc. A/53/44; General Comment No. 20(44), Hum. Rts. Comm., 44th Sess., art. 7, para. 9, U.N. Doc. CCPR/C/21/Rev.1/Add.3 (1992); General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Hum. Rts. Comm., 80th Sess., 2187th mtg., para. 12, U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (2004) [hereinafter HRC General Comment 31]; Richard Plender & Nuala Mole, *Beyond the Geneva Convention: Constructing a de facto Right of Asylum from International Human Rights Instruments*, in REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES 81 (Frances Nicholson & Patrick Twomey eds., 1999); Brian Gorlick, *The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees*, 11 INT'L J. REFUGEE L. 479 (1999).

It would hardly be compatible with the underlying values of the Convention . . . were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 . . . would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article . . . ¹⁶⁶

It is notable that a human rights body—the partly internationalized Human Rights Chamber in Bosnia and Herzegovina¹⁶⁷—determined in 2002 that the transfer from that country to Guantánamo Bay of four terrorist suspects breached Article 1 of Protocol 6 to the European Convention on Human Rights, the instrument prohibiting the use of the death penalty,¹⁶⁸ because of a failure to seek assurances from the United States prior to the handover that the death penalty would not be imposed on the individuals concerned.¹⁶⁹

B. *Do International Treaties on Civil and Political Rights Apply in Wartime?*

We begin our consideration of the extraterritorial applicability of the ICCPR and ECHR with the question of the relevance of the "wartime" situation in which some of the extraterritorial activities are carried out. It might be thought that humanitarian law on the one hand and human rights law on the other are mutually exclusive in terms of the situations in which they apply. When one area of law is in play, the other is not, and vice versa. Humanitarian law applies only in times of "war;" human rights law applies only in times of "peace." Whereas the first contention is correct, the second runs counter to a basic understanding of human

166. Soering, 161 Eur. Ct. H.R. (ser. A), para. 88.

167. Agreement on Human Rights, Dec. 14, 1995, Rep. Bosn. & Herz.-Fed. Bosn. & Herz.-Republika Srpska, Annex 6 and Appendix, 35 I.L.M. 75, 133 [hereinafter GFA Annex 6]. On international appointments to public institutions in Bosnia and Herzegovina, see, for example, Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT'L L. 583 (2001).

168. See ECHR, *supra* note 148; Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 28, 1983, E.T.S. No. 114 [hereinafter ECHR Protocol 6]. The Convention and its Protocols are part of the law of Bosnia and Herzegovina and its two constituent entities by way of GFA Annex 6, *supra* note 167, art. I, item 14, Appendix.

169. Bosnia expulsion cases, *supra* note 65, para. 300

rights law.¹⁷⁰ In the *Coard* case of 1999, concerning the detention of an individual by U.S. military forces during the 1983 U.S. invasion of Grenada,¹⁷¹ the Inter-American Commission of Human Rights made the following statement about international human rights law generally, rather than the ICCPR in particular:

[W]hile international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity," and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of conflict . . . Both normative systems may thus be applicable to the situation under study.¹⁷²

The applicability of international treaty law on civil and political rights in times of war is assumed by the aforementioned derogation provisions of human rights instruments.¹⁷³ It follows, then, that in all

170. On the relationship between humanitarian law and international human rights law, see, for example, *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8) [hereinafter *Nuclear Weapons Advisory Opinion*]; *Coard v. United States of America*, Case 10.951, Inter-Am. C.H.R. 1283 OEA/ser.L/V/II.106, doc.3rev. (1999) [hereinafter *Coard*]; *Salas and Others v. United States of America*, Case 10.573, Inter-Am. C.H.R. 312, OEA/ser.L/V/II.85, doc.9rev. (1993), reprinted in 123 I.L.R. 1; RENE PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* (2002); *HUMAN RIGHTS AND HUMANITARIAN LAW—THE QUEST FOR UNIVERSALITY* (Daniel Warner ed., 1997). See also Louise Doswald-Beck & Sylvain Vite, *International Humanitarian Law and Human Rights Law*, 293 INT'L REV. RED CROSS 94 (1993); Jochen Abr. Frowein, *The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation*, 1998 ISR. Y.B. OF HUM. RTS. 1; Francoise Hampson, *Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts*, XXXI REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 119 (1992); 50th Anniversary of the Universal Declaration of Human Rights: *Human Rights and International Humanitarian Law*, 324 INT'L REV. RED CROSS 1 (1998).

171. For the background to the case, see *Coard*, *supra* note 170, paras. 1–4.

172. *Id.* para. 39 (footnotes omitted).

173. See ACHR, *supra* note 148, art. 27; ICCPR, *supra* note 135, art. 4; ECHR, *supra* note 148, art. 15. On this area of the law, see, for example, *Aksoy*, 1996-IV Eur. Ct. H.R.; *Brannigan*, 258 Eur. Ct. H.R. (ser. A); *Brogan*, 145 Eur. Ct. H.R. (ser. A); *Ireland Case*, 25 Eur. Ct. H.R. (ser. A); *Cyprus v. Turkey* 1976, 4 Eur. H.R. Rep.; *Greek Case*, 12 Y.B. Eur. Conv. on H.R.; *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25, and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-Am. C.H.R., Series A, No. 9 (1987); *Habeas Corpus in Emergency Situations* (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. C.H.R., Series A, No. 8 (1987); *Jorge Landinelli Silva v. Uruguay*, Communication No. 34/1978, Hum. Rts. Comm., U.N. Doc. CCPR/C/12/D/34/1978 (1981); UN HRC General Comment 29, *supra* note 148, art. 4; HARRIS ET AL., *supra* note 156; Higgins, *supra* note 156; Marks, *supra* note 156.

circumstances, both wartime and peacetime, there will always be a core set of human rights obligations in play, operating in tandem with the obligations under humanitarian law. As the International Court of Justice stated in the *Nuclear Weapons* Advisory Opinion in relation to the ICCPR, "the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."¹⁷⁴ Thus the UN Human Rights Committee stated:

[T]he Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.¹⁷⁵

It is notable that none of these statements make a distinction, as the U.S. memo extracted above does, between *international* and *non-international* armed conflict.

It might be asserted that human rights law has no place in a wartime situation. In such a situation, different considerations prevail and to consider the niceties of human rights one would respect in peacetime is to misunderstand the needs of the battlefield. In part, this is an argument for total war—that no standards should operate on the battlefield at all. Such an approach would do away with much of the laws of war. If, however, one accepts the premise of humanitarian law—that military necessity must sometimes be trumped by certain basic standards—then this particular objection to human rights law falls away. The question then becomes whether the restrictions placed on the State during wartime by human rights law strike the correct balance between the need to preserve order and the need to safeguard human dignity. If one examines the law in this area, as discussed above, one sees, if anything, a somewhat generous latitude accorded to States when the derogation provisions of human rights treaties are interpreted.

174. Nuclear Weapons Advisory Opinion, 1996 I.C.J., para. 25.

175. HRC General Comment 31, *supra* note 165, para 11. In its earlier General Comment 29, the Human Rights Committee made the following remark: "[d]uring armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers." HRC General Comment 29, *supra* note 148, para. 3.

*C. Do the ICCPR and the ECHR Apply to
Extraterritorial State Action?*

If the applicability of international treaties on civil and political rights is not somehow excluded by the wartime context in which some of the activities discussed in our study take place, is it excluded because these activities occur extraterritorially, as the U.S. memo suggests? I will now consider this second question in relation to the ICCPR and ECHR, beginning with comments from international human rights law scrutiny bodies interpreting these and other relevant legal instruments echoing some of the concerns raised by commentators earlier about the problem of extraterritorial activities operating “beyond the law.”¹⁷⁶

1. Justifying Extraterritorial Applicability

In the *Lopez Burgos* and *Celiberti de Casariego* communications concerning alleged abduction and detention by Uruguayan agents outside Uruguayan soil—in Brazil and Argentina respectively—and forced transportation to Uruguay, the UN Human Rights Committee stated that the “jurisdiction” test for the applicability of the ICCPR in Article 2 “does not imply that the State . . . cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.”¹⁷⁷ The reason for this is the provision in Article 5(1) of the Covenant, which states:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.¹⁷⁸

The Human Rights Committee concluded that “[i]n line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”¹⁷⁹

176. For other academic commentary on the extraterritorial applicability of the ICCPR and ECHR, see, for example, the relevant chapters of Coomans & Kamminga, *supra* note 133, and sources cited therein.

177. Sergio Ruben Lopez Burgos v Uruguay, Communication No. R.12/52, Hum. Rgts. Comm., Supp. No. 40, at 176, para. 12.3, U.N. Doc. A/36/40 (1981); Lilian Celiberti de Casariego v. Uruguay, Communication No. R.13/56, Hum. Rgts. Comm., Supp No. 40, at 185, para. 10.3, U.N. Doc. A/36/40 (1981).

178. *Id.* (quoting ICCPR, *supra* note 135, art. 5(1)).

179. *Id.*

Here, the Committee offers a principled basis for conceiving human rights obligations extraterritorially: it would be "unconscionable" if a double standard, whereby activities legally prohibited when committed within the State's territory but not legally prohibited if committed extraterritorially, subsisted merely by virtue of the extraterritorial locus. If this were the case, States would be able to evade legal responsibility simply by shifting their activities overseas, as is alleged to be the motivation for some of the extraterritorial acts discussed above.

In the *Coard* case mentioned earlier, when considering the extraterritorial applicability of human rights law, the Inter-American Commission of Human Rights stated that "[g]iven that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction."¹⁸⁰

In its General Comment 31, on Article 2 of the ICCPR, the UN Human Rights Committee invokes its earlier observations in General Comment 15 that Covenant obligations operate with respect to "all individuals, regardless of nationality or statelessness" when discussing the extraterritorial scope of the meaning of "jurisdiction" under Article 2.1.¹⁸¹

Clearly, these comments affirm that the general principle that human rights obligations are owed to all individuals, regardless of their nationality, applies not only to a State's action within its territory, but also to extraterritorial action. The context in which these comments are made—in passages concerned with the idea of extraterritorial application of human rights law itself—perhaps suggests, however, that they also speak to a general policy consideration that the non-nationality basis for conceiving human rights protection is relevant when considering whether human rights law should apply extraterritorially.

Given that the majority of individuals affected by territorial state action are a State's own nationals, and the majority of such individuals affected by extraterritorial state action are aliens, to conceive "jurisdiction" only territorially, even in circumstances where a State takes extraterritorial action, would, in effect, produce a distinction in protection as between nationals and aliens. Since this distinction is adopted on the basis of a consideration—the enjoyment or lack of territorial sovereignty—that, in terms of whether or not state action impacts on the rights of individuals, is irrelevant, the unequal treatment it produces as between nationals and foreigners is of an arbitrary nature. As such, it runs counter to the general concept of human rights based on humanity rather than nationality. It might be said, then, that this concept

180. Coard, Inter-Am. Comm. H.R., para. 37.

181. HRC General Comment 31, *supra* note 165, para. 10.

requires extraterritorial activities to be brought within the frame of human rights obligations to avoid an arbitrary distinction in the application of such obligations as between nationals and foreigners from subsisting.

Our next general principle comes from the *Cyprus v. Turkey* case¹⁸² concerning Turkey's responsibility for the situation in northern Cyprus, which Turkey invaded and occupied in 1984 following the proclamation of the Turkish Republic of Northern Cyprus (TRNC) in November 1983.¹⁸³ In its judgment the European Court of Human Rights made a statement on some of the matters of principle at stake in extraterritorial state actions of this kind:

[T]he Court must have regard to the special character of the Convention as an instrument of European public order . . . for the protection of individual human beings and its mission, as set out in Article 19 of the Convention, "to ensure the observance of the engagements undertaken by the High Contracting Parties". . . . Having regard to the applicant Government's continuing inability to exercise their Convention obligations in northern Cyprus, any other finding would result in a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court.¹⁸⁴

In the later *Banković* case, which concerned the bombing of one of the main buildings of Radio Televizije Srbije (RTS) in Belgrade by a NATO aircraft during the 1999 bombing campaign of the then Federal Republic of Yugoslavia (now Serbia and Montenegro), which at that time was not a party to the ECHR,¹⁸⁵ the Court made the following statement on the issues implicated by its earlier dictum in *Cyprus v. Turkey*:

It is true that, in its above-cited *Cyprus v. Turkey* judgment . . . the Court was conscious of the need to avoid "a regrettable vacuum in the system of human-rights protection" in northern Cyprus. However . . . that comment related to an entirely different situation to the present: the inhabitants of northern Cyprus

182. *Cyprus v. Turkey*, App. No. 25781/94, 2001-IV Eur. Ct. H.R. 1 (Judgment of the Grand Chamber) [hereinafter *Cyprus v. Turkey* 2001].

183. See the explanation of the facts in *id.*; *Loizidou v. Turkey*, App. No. 15318/89, 1995 Eur. Ct. H.R. (ser. A), at 310 (Judgment of the Grand Chamber, preliminary objections).

184. *Cyprus v. Turkey* 2001, 2001-IV Eur. Ct. H.R., para. 78.

185. *Banković v. Belgium*, App. No. 52207/99, 2001-XII Eur. Ct. H.R. 333, paras. 9–11 (Grand Chamber, admissibility decision). On the bombing campaign generally, see *id.* paras. 6–8.

would have found themselves excluded from the benefits of the Convention safeguards and system which they had previously enjoyed, by Turkey's "effective control" of the territory and by the accompanying inability of the Cypriot Government, as a Contracting State, to fulfil the obligations it had undertaken under the Convention.

... the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.¹⁸⁶

Whereas the final sentence is an accurate description of the particular type of vacuum in rights protection at issue in the *Cyprus v. Turkey* case, it must be asked whether the Court is suggesting here that these particular circumstances are the *only* type of vacuum in rights protection that would validly give rise to a need for extraterritorial obligations to subsist.

The suggestion would be as follows: the only type of vacuum in rights protection caused by extraterritorial state action that should be remedied through the application of rights obligations in a particular treaty to the State taking the action is action that: (1) occurs in the territory of another party to the same treaty; and (2) prevents the second State from fulfilling its obligations under that treaty. Put differently, the vacuum has to be caused by another State party to the treaty not being able to fulfill its obligations under the treaty, rather than the broader notion of any State (whether or not a party to that particular instrument) being prevented from implementing its legal human rights obligations (whether under that particular instrument, or under other areas of international law, and/or domestic law).

This suggestion would seem to depend on an assumption that the only valid concern within human rights instruments about a vacuum in rights protection created by extraterritorial state action relates to obligations owed by another state party. How might such an assumption be sustained? One basis is suggested by the Court's comments in *Banković*

186. *Id.* para 80.

relating to the “*espace juridique*.” It might be said that a broader approach also taking in action preventing non-parties from securing rights would contradict a separate policy proscription: that regional human rights treaties—and perhaps all human rights treaties—are only intended to secure rights to individuals within the territories of states parties. Put differently, not only is the treaty binding only on States party to it; also, only individuals residing within the territory of all these parties—the “legal space” of the treaty—can be rights holders under the instrument. Because the application of the treaty is limited to this “legal space,” it follows that the treaty can only be concerned with remedying a vacuum in rights protection if the vacuum relates to the obligations of a State whose territory forms part of this legal space.

This “legal space” idea is, of course, germane for our analysis not only because of its potential effect on the “vacuum” policy concern, but also because in a broader way it would serve as a block on the application of human rights treaties to extraterritorial state actions taking place outside the legal space of these treaties. If correct, this general idea would mean that a particular action taken by one State in the territory of another State would take place in a “legal black hole” as far as the human rights obligations owed by the first State under a treaty, if the second State was not also a party to that treaty. It is this potential that is being exploited by the United Kingdom in relation to the application of the ECHR in Iraq. It will be recalled that the U.K. Armed Forces Minister Ingram wrote in the following terms:

The European Convention on Human Rights is intended to apply in a regional context in the legal space of the Contracting States. It was not designed to be applied throughout the world and was not intended to cover the activities of a signatory [sic] in a country which is not signatory [sic] to the Convention. The ECHR can have no application to the activities of the UK in Iraq because the citizens of Iraq had no rights under the ECHR prior to the military action by the Coalition Forces.¹⁸⁷

Although the minister’s remark about the “design” of the ECHR echoes the phrase used by the Court in the *Banković* judgment, his remark that the ECHR was not “intended” to cover the activities of a state party in the territory of a non-state party finds no echo in that judgment. Rather, the Court states that the ECHR operates “essentially in a regional context”—the word “context” is hardly a clear reference to a territorial area (it could equally refer to a regional grouping of States, irrespective of where they act)—and “notably in the legal space (*espace juridique*) of

187. Ingram Letter, Apr. 7, 2004, *supra* note 137.

the Contracting states"—a clear reference to a territorial area, but not one, because of the word "notably," that necessarily means that the Convention applies *only* in this area. Despite Ingram's unequivocal assertion, neither of these remarks in *Banković* necessarily exclude the application of the ECHR to the activities of Member States outside the territory of the Council of Europe.

But what of the Court's comment in *Banković* that "[t]he Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States"? Even if the other remarks in that passage are not helpful either way, does this not suggest a general approach in favor of Ingram's assertion? Such a comment could indeed mean that, in all circumstances, the ECHR does not apply to the actions of convention parties outside the legal space of Council of Europe member states. The problem, however, is that this is contradicted by the case law of the Court. In the *Öcalan* case, the Court held that the actions of Turkish agents in relation to the alleged abduction of Abdullah Öcalan in Kenya—not a Convention State—took place within Turkish "jurisdiction."¹⁸⁸ Similarly, the Court declared admissible the *Issa* case brought against Turkey in relation to its actions in northern Iraq¹⁸⁹ and at the merits stage affirmed that had there been a sufficient factual basis for the Turkish presence in the area in question—something the court concluded there was not—then the alleged victims would have come within Turkey's "jurisdiction" for the purposes of the Convention.¹⁹⁰

How do we reconcile these cases with the Court's comment about the limited "design" of the ECHR in *Banković*? We might dismiss the *Banković* language as dicta—the Court had already reached a conclusion that rendered the case inadmissible, having determined that the nature of the air strikes by NATO states in the FRY did not render this territory under the jurisdiction of the States involved as far as the exercise of effective control was concerned.¹⁹¹ Furthermore, we might emphasise the fact that the Court's dictum refers to what the convention "was . . . designed" for. This could be understood as a reference to the original intent of the framers, without prejudice to the question of whether this original intent is determinative more than fifty years after the ECHR was signed. The contention that a subsequent position at odds with this original "design" might be possible is then reinforced by the consistent willingness

188. *Öcalan* (Merits), *supra* note 4. For discussion of the case, see *infra* text corresponding to notes 210–211.

189. *Issa and Others v. Turkey*, App. No. 31821/96, Eur. Ct. H.R., Chamber, Admissibility Decision (May 30, 2000).

190. *Issa and Others v. Turkey*, App. No. 31821/96, Eur. Ct. H.R., Merits Decision (Nov. 16, 2004).

191. *Banković*, 2001-XII Eur. Ct. H.R., para. 75. See also *id.* paras. 76–77.

of the Strasbourg institutions to interpret the convention as a "living instrument."¹⁹² If we then recall the other cases where the Court *has* found the convention applicable to Member States' actions outside the legal space of the Council of Europe, we must conclude that, contrary to the statement of Adam Ingram, the Convention *is* so applicable.

For the foregoing reasons, the Court's invocation of the "legal space" concept in *Banković* is best interpreted as a limited response to a concern about the particular type of vacuum in rights protection—preventing another state party from securing rights under the Convention—that it chose to emphasize, rather than a general statement of principle about the spatial application of the ECHR. Because it is so limited, it should not be taken as a suggestion that this is the only type of vacuum that should give rise to the extraterritorial application of human rights; rather, it is simply the type of vacuum that, in the words of the Court in *Banković*, "has so far been relied on by the Court" in this regard. The juridical significance of the Court's comments on the legal space, then, is limited to refuting a concern about a particular type of vacuum in rights protection, without prejudice to the broader questions of whether this is the *only* type of vacuum that might give rise to a need for the extraterritorial application of human rights treaties and whether individuals outside the legal space of these treaties can have rights under them with respect to states parties.

The Court's comments in *Banković* do not exclude the notion that the language in the *Cyprus v. Turkey* case speaks to a more general policy objective, applicable to any human rights treaty, that action by a State outside its national territory (whether or not the sovereign in that territory is bound by the same human rights instrument) should not be allowed to create a "vacuum" in legal human rights protection generally by preventing the existing sovereign from safeguarding legal rights in the territory concerned, whether or not that second State is obliged to safeguard these legal rights under the particular human rights instrument at issue. The invocation of this concern in the context of one State's obligations under a particular human rights treaty in circumstances where the obligations are also owed by the other State involved under the same treaty should not be taken to suggest that this is the only context in which this concern is relevant.

In concluding this consideration of the general policy issues highlighted by these cases, the cases suggest that human rights law should apply to extraterritorial state action in order to prevent the following out-

192. Loizidou, 1995 Eur. Ct. H.R. (ser. A), para. 71; Soering, 161 Eur. Ct. H.R. (ser. A), para. 101; Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) at 4, para. 31 (1978). See also HARRIS ET AL., *supra* note 156, at 7-9.

comes from occurring in consequence of the extraterritorial nature of the action: (1) a double standard of legality operating as between the territorial and extraterritorial locus (*Lopez Burgos* and *Celiberti de Casariego*); (2) a disparity in human rights protection operating on grounds of nationality (*Coard* and General Comment 31); (3) a vacuum in rights protection being created through the act of preventing the existing sovereign from safeguarding rights (*Cyprus v. Turkey*).

The point is not that these three outcomes are necessarily unjustified in all circumstances (though they might be), but, rather, that they should not subsist merely because of the extraterritorial locus in which the acts take place. It is this situation which is avoided through the application of human rights obligations to extraterritorial state actions.

An alternative approach, seemingly adopted by the European Commission of Human Rights in the *Hess* case of 1975, concerning U.K. responsibility for the Allied detention of Rudolph Hess at Spandau Prison in Berlin, is to approach the issue not in terms of identifying reasons why human rights law *should* apply extraterritorially, but, rather, by considering whether there are any persuasive reasons *against* this position. The Commission concluded in the negative: "there is in principle, from a legal point of view, no reason why acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention."¹⁹³

Whether considering the issue from a default position of non-applicability or applicability, bodies representing three leading international judicial or quasi-judicial institutions monitoring the application of international legal instruments on civil and political rights—the Human Rights Committee, the Inter-American Commission, and the European Court and Commission of Human Rights—all conclude that as a matter of *principle* this area of international human rights law should apply extraterritorially. How, then, is this general principle realized in the relevant legal rules?¹⁹⁴

2. The Concept of "Jurisdiction"

The ICCPR and the ECHR do not conceive state responsibility simply in terms of the acts of parties, as is the case, for example, in Article 1 of the third Geneva Convention (on the treatment of prisoners of war), in which contracting parties undertake "to respect and to ensure respect for

193. *Ilse Hess v United Kingdom*, App. No. 6231/73, 2 Eur. Comm'n H.R. Dec. & Rep. 72, 73 (1975).

194. The remainder of this section is limited to the extraterritorial application of international *treaties* on civil and political rights. There is the separate question of the extraterritorial application of customary international law on civil and political rights, which may not be subject to a jurisdictional limitation.

the present Convention in all circumstances.”¹⁹⁵ Instead, responsibility is conceived in a particular context: the State’s *jurisdiction*. A State is obliged not merely to secure the rights contained in the treaty but to do so within its “jurisdiction.”¹⁹⁶ Thus a nexus to the State—termed jurisdiction—has to be established before the state act or omission can give rise to responsibility.

The consistent jurisprudence of the relevant international review mechanisms has been to interpret jurisdiction as operating extraterritorially in certain circumstances. The second basis for rejecting the application of the ICCPR offered by the U.S. Defense Department memorandum is, therefore, incorrect.¹⁹⁷ The key question is the precise *circumstances* in which jurisdiction operates extraterritorially. This question needs to be answered in order to know whether the United Kingdom’s second basis for rejecting the application of the ECHR to its actions in Iraq—that it doesn’t exercise the necessary degree of territorial control—is sustainable.

The term “jurisdiction” has been understood in the extraterritorial context in terms of the existence of a connection between the State, on the one hand, and either the territory in which the relevant acts took place—a *spatial* connection—or the individual affected by them—a *personal* connection. We shall consider each type of connection in turn.

3. “Jurisdiction” Conceived Spatially

Beginning with the approach that conceives the target of the relationship *spatially*, here exercising “jurisdiction” amounts to asserting control over a particular territorial space, within which the State is obliged to secure individual rights in a generalized sense. Such a generalized approach can be understood as an analogue to the approach taken to the State’s obligations in its own territory, and arguably reflects a general international law norm of liability based on the exercise of control over non-sovereign territory. This principle was articulated in the Inter-

195. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 1, 75 U.N.T.S. 135.

196. See, e.g., ICCPR, *supra* note 135, art. 2; ICCPR First Optional Protocol, *supra* note 158, Dec. 19, 1966, art. 1, 999 U.N.T.S. 171; ECHR, *supra* note 148, art. 1. Some obligations are limited to the State’s territory, see, for example, Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, art. 3, ETS No. 46.

197. Some human rights treaties include a special clause allowing for the application of the rights they contain to be extended to dependent territories. See, e.g., ECHR, *supra* note 148, art. 56. Whether such rights can *also* apply because of the extraterritorial exercise of “jurisdiction” by the State concerned is beyond the scope of this Article; this question is potentially mediated by the agency issue discussed *supra* note 164.

national Court of Justice's 1971 *Namibia* Advisory Opinion, in which the Court stated that South Africa was:

[A]ccountable for any violations . . . of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.¹⁹⁸

The *spatial* approach to the target involved in the jurisdiction concept was articulated in the *Loizidou*, *Cyprus v. Turkey*, and *Banković* cases before the European Court of Human Rights.

Like the *Cyprus v. Turkey* case discussed above, the *Loizidou* case concerned the question of Turkey's responsibility for certain aspects of the situation in northern Cyprus. In its 1995 judgment on preliminary objections in *Loizidou*, affirmed in its judgment on the merits, the European Court of Human Rights stated that:

[T]he responsibility of a Contracting Party may . . . arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control¹⁹⁹

In its judgment on the merits, the Court stated that:

It is not necessary to determine whether . . . Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus . . . that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC" . . . Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention . . . Her

198. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, para. 118.

199. *Loizidou v. Turkey*, App. No. 15318/89, 1996-VI Eur. Ct. H.R. 2216, para. 52 (Decision on the Merits, quoting *Loizidou*, 1995 Eur. Ct. H.R. (ser. A), para. 62).

obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.²⁰⁰

In general, then, the test is "effective control" over territory; the existence of this factual situation gives rise to a responsibility to secure the rights within the ECHR in the territory concerned. On the facts in Northern Cyprus, the Court emphasized that Turkey exercised effective control operating "overall;" in such circumstances, it was unnecessary to identify whether the exercise of control was detailed. Thus, if a State is in overall control of a territorial unit, everything within that unit falls within its "jurisdiction," even if at lesser levels power is exercised by other actors (e.g. if particular activities are devolved to other states or local actors). In the *Cyprus v. Turkey* judgment, the European Court of Human Rights stated:

Having effective overall control over northern Cyprus . . . [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's "jurisdiction" must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.²⁰¹

In the aforementioned *Banković* case, the Court made the following general statement on the issue of effective control:

[T]he case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad, as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory exercises all or some of the public powers normally to be exercised by that Government.²⁰²

If we recall the backdrop to the Northern Cyprus cases, we see the Court in *Banković* emphasizing a further feature of those cases which was not actually emphasized in the Court's consideration of the exercise

200. *Id.* para. 56. See also *Loizidou*, 1995 Eur. Ct. H.R. (ser. A), paras. 63–64.

201. *Cyprus v. Turkey* 2001, 2001-IV Eur. Ct. H.R., para. 77.

202. *Banković*, 2001-XII Eur. Ct. H.R., para. 71.

of jurisdiction in them. For the Court in *Banković*, the issue is control over territory that is not only "effective" but also involves the exercise of "some or all of the public powers normally to be exercised" by the local government. Whereas indeed such powers were exercised by Turkey in northern Cyprus, their exercise was not seen as a prerequisite to the exercise of jurisdiction by the Court in the northern Cyprus cases: the only issue was the exercise of "effective control." The statement in *Banković*, then, should be taken in a somewhat loose sense as a general description of the factual circumstances in which the Court had previously found the exercise of jurisdiction ("it has done so"), rather than as either an accurate statement of the *salient* facts in those previous cases, or, indeed, a statement of the key factual elements that must subsist in order for extra-territorial jurisdiction to subsist under the "effective control" heading. It is notable in this regard that in its application of the law to the facts of the case, the Court made no statement, either explicit or implicit, touching on the question of whether or not the relevant acts—the bombing—involved the exercise of powers normally to be exercised by the local government.²⁰³

The test, then, is "effective control" over territory. It will be recalled that the U.K. Defense Minister Ingram argued that "it does not follow that the UK exercises the degree of control that is necessary to bring those parts of Iraq within the UK's jurisdiction for the purposes of article 1 of the Convention."²⁰⁴ The U.K. Foreign Secretary stated that "the UK does not exercise the same degree of control over Iraq as existed in relation to the Turkish occupation of northern Cyprus."²⁰⁵

Neither of these remarks go as far as denying that the situation in Iraq does not meet our test, but given that they are made in the context of a statement which denies the applicability of the ECHR, they require us to ask whether or not the test is met and, if so, whether this renders the ECHR—and perhaps the ICCPR also—inapplicable.

It might be thought that, to adopt the words of the European Court of Human Rights discussing the Turkish occupation of Northern Cyprus, it is "obvious from the large numbers" of U.K. troops "on active duties" in the southern part of Iraq, that the U.K. army "exercises effective overall control over that part" of Iraq or, at least, an area within that part. Ultimately the answer to this question depends on a detailed factual analysis of the level of control asserted by U.K. forces in Iraq, something which is beyond the scope of this Article. Even so, however, we must also ask whether effective control over territory—an understanding of jurisdiction

203. *Id.* paras. 75-76.

204. Ingram Letter, Apr. 7, 2004, *supra* note 137.

205. Straw, May 19, 2004, *supra* note 138.

based on a *spatial* relationship—is the only basis on which jurisdiction can subsist extraterritorially.

4. "Jurisdiction" Conceived Individually

In fact, international human rights law review bodies have also understood extraterritorial jurisdiction in terms of some kind of connection operating between the State and an *individual*, rather than whether the area in which the control is exercised is itself under the State's control. This connection has been understood variously as *control* (like the spatial relationship discussed already), *power*, or *authority*.

In the aforementioned *Coard* case, seventeen petitioners complained to the Inter-American Commission of Human Rights about their treatment, including detention, by U.S. forces in the first days of its invasion of Grenada in 1983.²⁰⁶ In its decision, the Commission stated that "jurisdiction:"

... may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.²⁰⁷

This definition of "jurisdiction" is potentially wide enough to cover the exercise of control over individuals, regardless of whether the area within which such control is exercised is itself under the control of the State. In the first sentence, the Commission refers to the "person concerned" being "subject to the control" of the State, rather than the territory in which the person is located. Similarly, in the second sentence, the Commission underlines that "the inquiry turns not on the presumed victim's . . . presence within a particular geographic area,"²⁰⁸ but rather whether or not the "person" is "subject to its [the State's] authority and control." Of course, if a person is located within a territorial area controlled by the State, then that person would themselves be subject, indirectly, to the control of the State. The Commission's remarks are significant because they suggest that "jurisdiction" is not limited to such a scenario; instead, they offer a more general definition of the con-

206. See *Coard*, *supra* note 170 paras. 1–4.

207. *Id.* para 37.

208. This particular reference to "geographical area" might only be intended to underline that jurisdiction can be exercised outside the State's own territory, just as it can be exercised over non-nationals.

cept—"control" or "authority" exercised over an individual—within which that particular scenario is situated.

The *WM* case concerned the acts and omissions of Danish diplomatic officers committed within the Danish Embassy in East Berlin in 1988. The European Commission of Human Rights stated:

[A]uthorised agents of a State . . . bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.²⁰⁹

The Commission found that the acts took place within the jurisdiction of Denmark, without explaining whether this was because authority was being exercised over the embassy within which the acts complained of took place or because authority was being exercised over the applicants via the acts that were being complained of. That said, the suggestions that "persons" are brought within the jurisdiction of the State if authority is exercised over *them*, suggests a personal target for the relationship of authority.

The previously mentioned *Öcalan* case concerned Abdullah Öcalan, the leader of the Kurdish Workers Party (the PKK), who was arrested in Kenya, flown by Turkish agents to Turkey, and detained before being tried and convicted of activities aimed at bringing about the secession of a part of state territory and sentenced to death.²¹⁰ The court stated:

[T]he applicant was arrested by members of the Turkish security forces inside an aircraft in the international zone of Nairobi Airport. Directly after he had been handed over by the Kenyan officials to the Turkish officials the applicant was under effective Turkish authority and was therefore brought within the "jurisdiction" of that State . . . even though in this instance Turkey exercised its authority outside its territory.²¹¹

As in the *WM* case, here the Court fails to state explicitly on what basis "effective Turkish authority" was being exercised; specifically, we are not told whether it concerned the relationship between Turkey and the applicant or Turkey and the location where Turkey held the applicant. The Court's choice of pertinent facts, however, does perhaps suggest the former. No reference is made as to whether the aircraft or the

209. *M. v. Denmark*, App. No. 17392/90, 73 Eur. Comm'n H.R. Dec. & Rep. 193, 196 (1992) (quoting from section entitled *The Law*, para. 1.).

210. *See Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. H.R., Admissibility Decision, § 1 in *The Facts* (Dec. 14, 2000).

211. *Öcalan* (Merits), *supra* note 4, para 93.

“international zone” in which it was located were controlled by Turkey, and the only description given of the acts of Turkish officials concerns their behavior towards the applicant (e.g. physically forcing him back to Turkey) rather than their behavior in relation to the space in which the applicant was held.

In its General Comment 31, on Article 2 of the ICCPR, the UN Human Rights Committee stated that the jurisdictional test in Article 2.1 “means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”²¹²

Here, then, we have a clear statement affirming jurisdiction on the basis of a personal target—“anyone”—and relationship between the State and this target described in terms of “power or effective control.”

Taking these three cases and the General Comment together, we see that jurisdiction can amount to a relationship of power (General Comment 31), control/effective control (*Coard*/General Comment 31), or authority (*WM* and *Öcalan*) between the State and the individual, quite apart from a relationship of control operating with respect to the territory in which the acts take place. It is difficult to see how U.S. and U.K. troops in Iraq do not engage in this type of relationship in Iraq.

Section II utilized the taxonomy of *spatial* and *personal* targets for extraterritorial activity as a way of understanding the reason for such activity. We can see now that this taxonomy is also helpful in understanding how such activity is categorized as falling within a State’s “jurisdiction” under the ICCPR and ECHR. Whereas in Section II particular types of target were emphasized on the basis of the purposes served by the extraterritorial action (e.g. the personalized target of Al Qaeda in the military action in Afghanistan at the end of 2001), here purpose is irrelevant. As far as the application of human rights obligations is concerned, the question is only whether a factual relationship of “effective control” over territory—the *spatial* target—or power, control, or authority over an individual—the *personal* target—exists.

VI. CONCLUSION

Since 9/11, there has been an increased recourse to extraterritorial activities in the field of terrorism and asylum policy. The increased recourse to such activities has been matched by commentary suggesting that in some cases these activities take place in a “legal black hole.” As far as the two main international treaties on civil and political rights—

212. HRC General Comment 31, *supra* note 165, para. 10.

the ICCPR and the ECHR—are concerned, two States engaging in these activities, the United States and the United Kingdom, seem to consider, for differing reasons and to varying extents, that their obligations under these instruments (under the ICCPR as far as the United States is concerned) do not apply extraterritorially.

With the backdrop of a shift in public discourse on the use of torture and inhuman and degrading treatment in the context of terrorist interrogations, and the allegation that certain measures constituting such treatment are being used in these interrogations, some observers have speculated that the very choice of an extraterritorial locus for the activity has been motivated in part by the view that the activity is taken outside an arena where the State's human rights obligations are in play, enabling States to act in a manner that would not be permitted on their own soil.

Despite the "legal black hole" comments, and the suggestions made in the United States and the United Kingdom, this piece has illustrated that as far as the ICCPR and ECHR are concerned, the avoidance of such norms is not possible simply by choosing the extraterritorial locus (nor, indeed, does the shift to "war" render international human rights law inapplicable). So when the first group of detainees were transferred to Guantánamo Bay, the then High Commissioner for Human Rights, Mary Robinson, stated that "[a]ll persons detained in this context are entitled to the protection of international human rights law . . . in particular the relevant provisions of the International Covenant on Civil and Political Rights. . . ."²¹³

213. Mary Robinson, Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners in Guantánamo Bay, Cuba (Jan. 16, 2002), at <http://www.unhchr.ch>. Various amicus briefs in the joined Supreme Court cases of *Rasul* and *Al Odah* make this argument. The Human Rights Institute of the International Bar Association states that:

Under international human rights law, the U.S. is bound by treaty and customary international law to grant detainees access to judicial review concerning the lawfulness of their detention. This obligation arises in Petitioners' case as a result of the authority and control that the U.S. exercises over Guantánamo Bay, regardless of whether the U.S. retains ultimate sovereignty.

Brief of Amici Curiae Human Rights Institute of the International Bar Association at 7, *Rasul v. Bush*, 124 S.Ct. 2686 (2004)(Nos. 03-334, 03-343). See also Luigi Condorelli & Pasquale de Sena, *The Relevance of the Obligations Flowing from the UN Covenant on Civil and Political Rights to US Courts Dealing with Guantánamo Detainees*, 2 J.INT'L CRIM. JUST. 107 (2004). On Iraq, the June, 2004 report of the acting UN High Commissioner for Human Rights stresses the applicability of the "international human rights standards" prohibiting torture or other cruel, inhumane or degrading treatment to the U.S. and the U.K. actions in Iraq. UNHCHR/Ramcharan, *supra* note 54, para. 54. Comments by UN officials in relation to the abuses at Abu Ghraib prison have stressed the importance of compliance with the ICCPR, implying the applicability of this instrument. See, e.g., Press Release, Leïla Zerrougui, Chairperson-Rapporteur of the Working Group on Arbitrary Detention of the United Nations Commission on Human Rights, UN Human Rights Expert Calls on Coalition Authorities to

States taking the range of extraterritorial actions outlined above—whether setting up camps for asylum seekers outside their territory or detaining and interrogating terrorist suspects in other States—are bound by their ECHR and/or ICCPR obligations in their conduct of this activity insofar as it involves the exercise of either effective control over territory, or power, control, or authority over an individual or individuals.

Allow Iraqi Detainees to Challenge Lawfulness of Detention, HR/4742, IK/435 (May 5, 2004), at <http://www.un.org/News/Press/docs/2004/hr4742.doc.htm> concerning the right of access to a court to be able to challenge the lawfulness of their detention under Art. 9 of the ICCPR.