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Abstract

One phrase from a memorandum issued by President George W. Bush early in the War on Terror offers an effective summary of a radically transformed military doctrine. "As a matter of policy," Bush wrote, "the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." The statement offered a sense of assurance of continuity of U.S. military doctrine, which many generations viewed as being at or near the vanguard in assuring high standards for the treatment of military prisoners. This was a false assurance. We have learned that the phrases "as a matter of policy"; "humanely"; "to the extent . . . consistent with military necessity"; and "consistent with the principles of Geneva" each acted as a dramatic limitation on or reversal of prior policy. "As a matter of policy," meant that the Executive did not feel it was bound by law with respect to either the Geneva Conventions themselves or, perhaps more surprisingly, by the legislation enacted by Congress to implement them– including the Uniform Code of Military Justice ("UCMJ"), the War Crimes Act, the Anti-Torture Act, and similar statutes. Policy was viewed as entirely a matter of Executive Branch discretion. Hence, "policy" may be held out to the public, but ignored whenever it suits the Executive to do so. "Humanely" did not mean either the definition provided in Common Article 3 of the Geneva Conventions of 1949, nor the term as used by U.S. Presidents since the famous injunction of George Washington to "[t]reat them with humanity" given in the wake of the Battle of Trenton. "Humanely," as used by President Bush and his Administration, implies only a responsibility to provide food, medical attention, and a sanitary place to sleep. It in no way suggested an intention to treat a prisoner with basic decency, respect for his religious values, respect for the physical integrity of the person, or even a commitment not to use cruelty. Moreover, as we later learned from an investigative report by Lieutenant General Randall Mark Schmidt, interrogators and prison guards were consciously authorized to use treatment which was both "cruel" and "degrading" because the Administration had determined that the prohibition on cruel, inhuman, and degrading treatment contained in the Convention Against Torture was not applicable. Finally, we come to what may be the single most disturbing and far-reaching of all these exercises in legerdemain–the suggestion that the principles of the Geneva Conventions might be applied subject to the doctrine of "military necessity." Investigations of events throughout the conflict, from Afghanistan to Iraq and Guantánamo, show that the term "military necessity" is being invoked to justify far-ranging deviations from the law of armed conflict. As this Article discusses, these uses are in fact inconsistent with the doctrine of military necessity as it was developed in the United States and is now almost uniformly accepted

in the law of armed conflict. Instead, they constitute an attempt to resurrect a different concept, developed in nineteenth century Germany, called Kriegsraison. This change is nothing less than an effort to overturn 140 years of U.S. military doctrine and to substitute in its place conduct that the United States has historically branded as “criminal” and has in fact prosecuted.

KRIEGSRAISON OR MILITARY NECESSITY? THE BUSH ADMINISTRATION'S WILHELMINE ATTITUDE TOWARDS THE CONDUCT OF WAR

*Scott Horton**

One phrase from a memorandum issued by President George W. Bush early in the War on Terror offers an effective summary of a radically transformed military doctrine. "As a matter of policy," Bush wrote, "the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."[1] The statement offered a sense of assurance of continuity of U.S. military doctrine, which for many generations was viewed as being at or near the vanguard in assuring high standards for the treatment of military prisoners. This was a false assurance. In the course of the last four years it has become clear that President Bush's undertaking is far less than meets the eye. In essence, we have learned that the phrases "as a matter of policy"; "humanely"; "to the extent . . . consistent with military necessity"; and "consistent with the *principles* of Geneva" each acted as a dramatic limitation on or reversal of prior policy.

"As a matter of policy," meant that the Executive did *not* feel it was *bound by law* with respect to either the Geneva Conventions themselves or, perhaps more surprisingly, by the legislation enacted by Congress to implement them—including the Uniform Code of Military Justice ("UCMJ"),[2] the War Crimes Act,[3] the Anti-Torture Act,[4] and similar statutes. Policy was viewed as en-

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1. Memorandum from George W. Bush, President, to the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff, Concerning Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *in* MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 105-06 (2004).

2. *See* 10 U.S.C. §§ 801-946 (2007).

3. *See* War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104 (1996) (codified as amended at 18 U.S.C. § 2441 (2006)).

4. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No.

tirely a matter of Executive Branch discretion. Hence, "policy" may be held out to the public, but ignored whenever it suits the Executive to do so. "Humanely" did not mean either the definition provided in Common Article 3 of the Geneva Conventions of 1949,[5] nor the term as used by U.S. Presidents since the famous injunction of George Washington to "[t]reat them with humanity" given in the wake of the Battle of Trenton.[6] "Humanely," as used by President Bush and his Administration, implies only a responsibility to provide food, medical attention, and a sanitary place to sleep. It in no way suggested an intention to treat a prisoner with basic decency, respect for his religious values, respect for the physical integrity of the person, or even a commitment not to use cruelty.[7] Moreover, as we later learned from an investigative report by Lieutenant General Randall Mark Schmidt, interrogators and prison guards were consciously authorized to use treatment which was both "cruel" and "degrading" because the Administration had determined that the prohibition on cruel, inhuman, and degrading treatment contained in the Convention Against Torture was not applicable.[8] Finally, we come to what may be the single most disturbing and far-reaching of all these exercises in legerdemain—the suggestion that the *principles* of the Geneva Conventions *might* be applied subject to the doctrine of "military necessity." Investigations of events throughout the conflict, from Afghanistan to Iraq and Guantánamo, show that the term "military necessity" is being in-

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103-236, § 506(a), 108 Stat. 382, 463-64 (1994) (codified as amended at 18 U.S.C. §§ 2340-2340B (2006)).

5. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention on Prisoners of War].

6. Order Issued at Morristown, New Jersey, Jan. 8, 1777, *reprinted in* 8 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 16 (W.W. Abbot ed., 1985).

7. In his responses to the supplementary written questions of U.S. Senator Patrick Leahy (D-Vt.) directly during his confirmation to be U.S. Attorney General, Alberto Gonzales wrote that "the term 'humanely' has no precise legal definition." *See* Letter from Alberto Gonzales, Counsel to the President, to Arlen Spector, Chairman of Judiciary Committee, United States Senate (Jan. 25, 2005) (on file with author) (responding to the written questions of Senator Patrick Leahy). Gonzales continued by noting that, "[a]s a policy matter, I would define humane treatment as a basic level of decent treatment that includes such things as food, shelter, clothing, and medical care." *See id.* Clothing, as the public later learned, was not in the Administration's final list.

8. *See generally* U.S. DEP'T OF DEF., INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY (June 5, 2005), *available at* http://www.defenselink.mil/news/Jul2005/d20050714report.pdf.

voked to justify far-ranging deviations from the law of armed conflict. As this Article discusses, these uses are in fact inconsistent with the doctrine of military necessity as it was developed in the United States and is now almost uniformly accepted in the law of armed conflict.[9] Instead, they constitute an attempt to resurrect a different concept, developed in nineteenth century Germany, called *Kriegsraison*.[10] This change is nothing less than an effort to overturn 140 years of U.S. military doctrine and to substitute in its place conduct that the United States has historically branded as "criminal" and has in fact prosecuted.

I. *THE ORIGINS OF MILITARY NECESSITY: KANT, CLAUSEWITZ, AND LIEBER*

The term "military necessity" came into heavy usage in U.S. military parlance during the Civil War. On May 9, 1862, Major General David Hunter, Commander of the Union forces on the Georgia and Carolina coasts, issued an order freeing all slaves in Georgia, Florida, and South Carolina.[11] Ten days later, President Abraham Lincoln revoked this order saying it was not within the power of Hunter to have issued the emancipation.[12] In so doing, Lincoln said his military commander in the field had a right to issue orders on all matters where it was a "necessity indispensable to the maintenance of the government."[13] It seems fairly clear that this language was crafted by Lincoln's law of armed conflict advisor, Professor Francis Lieber of Columbia University, and that in so doing Lieber was drawing upon concepts that were already well developed in the German-speaking world. The concept of military necessity proper emerges for the first time in General Orders No. 100, the "Lieber Code," ("Code") promulgated by President Lincoln on April 23, 1863—the seminal document of international humanitarian law.[14]

Lieber was the foremost Kant scholar in the United States in the mid-nineteenth century.[15] The Lieber Code represents a de-

9. *See infra* notes 11-20, 23-46 and accompanying text.

10. *See infra* notes 21-22, 47-57 and accompanying text.

11. *See* 1 CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 561 (1939).

12. *See id.* at 562.

13. ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859-65, at 318-19 (1989).

14. *See* U.S. War Department, General Orders No. 100, Apr. 24, 1863 [hereinafter Lieber Code].

15. *See* BERNARD EDWARD BROWN, AMERICAN CONSERVATIVES: THE POLITICAL

velopment and application of Kantian principles relating to the law of armed conflict. In the Kantian system, States and armies are expected continuously to compare the expected gain to be derived from the use of any military tactic against the costs or wrongs unleashed by this tactic.[16] A given tactic should only be employed if this analysis suggests that its benefits exceed the harm it would introduce.[17] Obviously, Kant presents these considerations at a highly abstract level. He provides little useful insight into the process by which such a comparison is to be undertaken. But a contemporary Kantian would certainly turn to a rights-based analysis, and Kantians increasingly view universal human rights as a powerful "good" for purposes of this calculus, if not in fact the ultimate "good":

> [T]rue politics can never take a step without rendering homage to morality. Though politics by itself is a difficult art, its union with morality is no art at all, for this union cuts the knot which politics could not untie when they were in conflict. The rights of men must be held sacred, however much sacrifice it may cost the ruling power. One cannot compromise here and seek the middle course of a pragmatic conditional law between the morally right and the expedient. All politics must bend its knee before the right. But by this it can hope slowly to reach the stage where it will shine with immortal glory.[18]

While the claim of civilians to security arises from a sense of right, in the Kantian sense, it is not an absolute right.[19] It remains subject to the belligerent's ability to pursue its legitimate object. There can be no doubt that Lieber's fellow Prussian and near contemporary, Carl von Clausewitz, is the key source for this concept as it was introduced in the Lieber Code.[20]

THOUGHT OF FRANCIS LIEBER AND JOHN W. BURGESS 88 (1951); Mike Robert Horenstein, *Contributions: The Virtues of Interpretation in a Jural Society*, 16 CARDOZO L. REV. 2273 (1995).

16. *See* BRIAN OREND, WAR AND INTERNATIONAL JUSTICE: A KANTIAN PERSPECTIVE 49-50 (2000).

17. *See id.*

18. IMMANUEL KANT, PERPETUAL PEACE 46 (Lewis White Beck & Oskar Piest eds., Liberal Arts Press 1957) (1795).

19. *See* OREND, *supra* note 16, at 21 (reviewing Kant's theory of justice, which states that everyone has a right to security that is "equal to, and consistent with" the security of others).

20. *See generally* CARL VON CLAUSEWITZ, ON WAR (Anatol Rapoport ed., J.J. Graham trans., Penguin Books 1968) (1832).

The thrust of Clausewitz's conceptualization of military necessity is that as long as battlefield conduct bears a reasonable relationship to a politico-military objective, it is legitimate.[21] The key sentence of *Vom Kriege* certainly is this: "War is nothing but a continuation of political intercourse, with a mixture of other means."[22] Consequently, Clausewitzian military necessity—*Kriegsraison*—will justify any militarily expedient measure, including a contravention of otherwise defined laws of armed conflict.

While recognizing the value of Clausewitz's work and appreciating its essentially descriptive character, Lieber the moral philosopher was greatly concerned by the prospect that *Kriegsraison* could emerge as a rule, or rather a rule-swallowing exception, in the law of armed conflict. Consequently, in introducing the concept of military necessity in the Code, Lieber's focus is directed at its limitation.[23] Indeed, this limitation has correctly been called his "greatest theoretical contribution to the modern law of war."[24]

Article 14 of the Lieber Code states: "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war."[25]

Lieber's first limitation is that military necessity includes not all measures, but only those that are *indispensable* to achieve a military end. Clausewitz's wording is quite different; he is concerned only with whether the tactic is actually suited to an ends, not whether no alternative appears to its use.[26] This single word ("indispensable"), therefore, already introduces a dramatic softening of the Clausewitz approach. Equally powerful is the second limitation: that military necessity is not an exception to the law of armed conflict, but rather *subject to* explicit restrictions contained in the law of armed conflict. Of course, Clausewitz's approach was never to author a moral philosophy of war, or even

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21. *See id.* at 22.

22. *Id.* at 402.

23. *See* Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 213 (1998).

24. *See id.*

25. Lieber Code, *supra* note 14, art. 14.

26. *See* CLAUSEWITZ, *supra* note 20, at 13 ("[S]trategy and tactics ought to be directed toward just one end, namely towards victory.").

to describe the legal norms historically evolved to govern it. The essential characteristic of his work is that it is descriptive of the actual practice of rational warring States.[27] Lieber, codifying the law of armed conflict, cannot accept this view of military necessity as a transcendent rule—he must incorporate it in his system and subordinate it to other rules. This point is fundamental and powerful.

Lieber's third limitation, found in Article 15 of the Code, is the general concept that military necessity may never be invoked to breach an agreement or undertaking properly given.[28] His fourth limitation is to list a series of specific rules which may never be overcome by arguments of military necessity introduced with a more general restriction found in Article 16 of the Code: "Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions."[29]

The approach that Lieber has taken is essentially the same that drives the modern dialogue about military necessity. He is arguing that military necessity must be tempered by two concepts: *humanity* and *proportionality*. The first stems plainly from the Kantian injunction against the treatment of humanity as a means;[30] it cautions that the human cost must be weighed carefully in any consideration involving military necessity. It rejects a range of practices as fundamentally inhumane and unacceptable, whether they would serve the interests of military necessity or not. The second concern asks for a weighing of the costs of the tactic against the benefit gained through its use. This is demonstrated both in the notion of it being "indispensable" and in Lieber's admonition against acts which "make[ ] the return to peace unnecessarily difficult."[31] Both this approach and even much of Lieber's language is lifted directly from Kant's *Zum ewigen Frieden*.[32] If a tactic fails the test on grounds either of hu-

27. *See id.* ("Clausewitz says what war *is*.").

28. *See* Lieber Code, *supra* note 14, art. 15.

29. *Id.* art. 16.

30. *See generally* IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS (Thomas K. Abbott trans., 1949).

31. Lieber Code, *supra* note 14, art. 16.

32. *Compare id.* (enumerating acts of hostility, such as the use of poison, that would undermine a return to peace), *with* KANT, *supra* note 18, at 7 (same).

manity or proportionality, it must be discarded even if it would be efficacious from a pure test of *Kriegsraison.*

A. *Intrinsically Unacceptable Means as a Restraint*

While the weighing process discussed above would lead to the exclusion of many tactics, efficiency is gained by the outright exclusion of certain tactics so as to avoid the need for a battlefield calculus. This is a distinction Kant draws between *mala in se,* or intrinsic evils, and ordinary wrong.[33] In the *Rechtslehre,* Kant argues that certain means of warfare would, if reached to, render an actor unfit in the eyes of international justice to function in relation to other States and to share equal rights with them.[34] In *Zum ewigen Frieden,* he states:

> No State Shall, during War, Permit Such Acts of Hostility Which Would Make Mutual Confidence in the Subsequent Peace Impossible: Such Are the Employment of Assassins (percussores), Poisoners (venefici), Breach of Capitulation, and Incitement to Treason (perduellio) in the Opposing State. . . .[35]

Article 16 of the Lieber Code is essentially an edited translation of this passage.[36]

The editing that Lieber has undertaken is interesting. What has he added? The first addition is a prohibition on torture.[37] There can be no question of Kant's exclusion of torture; it was an example he used in demonstration of his basic notion that "man and generally any rational being exists as an end in himself, not merely as a means to be arbitrarily used by this or that will, but in all his actions, whether they concern himself or other rational beings, must be always regarded at the same time as an end."[38] Since the object of torture, used as a tool in a military context, is to subvert human will and assault the basic dignity of the object, it constitutes a use of humans as a means rather than an end, and is therefore beyond the pale. In adding torture

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33. *See* KANT, *supra* note 18, at 7-9.

34. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS § 57 (Mary Gregor trans., 1991).

35. KANT, *supra* note 18, at 7.

36. *Compare* Lieber Code, *supra* note 14, art. 16, *with* KANT, *supra* note 18, at 7.

37. *See* Lieber Code, *supra* note 14, art. 16.

38. 5 IMMANUEL KANT, SÄMTLICHE WERKE (Grossherzog Wilhelm Ernst ed., 1920) (author's translation).

back to the list, Lieber is being a better Kantian than Kant was himself.

Kant's oversight of torture should not be given too much significance here; it seems likely that Kant himself was referencing a classical text, almost certainly a Stoic text on warfare, as the parenthetical use of Latin phrases suggests. Moreover, Kant's concept at this point is not to attempt a humanitarian law of war, but to suggest the necessity of it.

Lieber removed one item from Kant's list—targeted killings. But this is only a matter of editorial reorganization, since Lieber made this the subject of a special chapter of the Code.[39]

Article 148 states:

> The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.[40]

A year earlier, Lieber had ended his monograph on partisans on a similar note: "So much is certain, that no army, no society, engaged in war, any more than a society at peace, can allow unpunished assassination, robbery, and devastation, without the deepest injury to itself and disastrous consequences, which might change the very issue of the war."[41]

From the historical context, it is clear that this was a burning issue. A project of assassination was being advocated in certain folds of the Republican Party, and Lieber had emerged from the outset as a very stern opponent.[42] The so-called Dahlgren Affair involved allegations of a plot to assassinate Confederate leaders in a raid on Richmond, Virginia.[43] Secretary of War Stanton assigned Lieber the task of investigating this affair, but it

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39. *See* Lieber Code, *supra* note 14, art. 148.

40. *Id.*

41. FRANCIS LIEBER, GUERILLA PARTIES CONSIDERED WITH REFERENCE TO THE LAWS AND USAGES OF WAR 22 (Joseph Perkovich ed., Lawbook Exch. 2005) (1862).

42. *See* DUANA P. SCHULTZ, THE DAHLGREN AFFAIR 152-60 (1998).

43. *See id.*

ended mysteriously.[44]

In any event, however, Lieber's views on this point were fixed and followed Kant's closely. Kant opposed assassination not only out of purely moral reasoning, but also on the basis of an examination of Renaissance Italian history, where the practice of assassination had flourished.[45] In his view, assassination had to be discarded because it destroyed the environment necessary for diplomatic discussion and made peace incalculably more difficult to obtain.[46] It was, therefore, in the language of the *Rechtslehre*, a disqualifying act.

The conceptual framework that Kant sets down, and Lieber expands, lives with us today. It requires a testing of means of war against utilitarian and humanitarian concerns. It was a logical extension of these concepts, following the use of chemical agents and poisonous gases in World War I, to proceed to limit such horrific tools. Similarly, it was a logical expansion to preclude bullets that expand on impact, or which contain glass shards, booby-traps of certain sorts, and landmines. And the logic of this prohibition of inherently unacceptable weaponry leads without a doubt to a questioning of the unholy trinity of modern weaponry: nuclear, biological, and chemical weapons. Successively more devastating generations of weaponry raise the stakes in humankind's struggle for survival, making issues of containment and control ever more vital. All of this lies, in a germinal state, in both Kant and in Lieber's transposition of Kantian theory into rules of armed conflict laid out in 1863.

B. *The Bismarckian Response*

"What leader," said Chancellor von Bismarck, "would ever allow his country to be destroyed for the sake of international law?"[47] While Germany emerged as an important *Rechtsstaat* under Bismarck, and a parliamentary democracy took root and grew on the strength of a vigorous legal tradition, Bismarck viewed the world of international affairs as something fundamentally different. States were sovereign, and the rules of inter-

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44. *See id.* at 241.

45. For a discussion on the use of assassination in Renaissance Italy, see GUIDO RUGGIERO, VIOLENCE IN EARLY RENAISSANCE VENICE 87-88 (1980).

46. *See* KANT, *surpa* note 18, at 7.

47. *See* Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 63-64 (1994).

national law tied them only as a matter of convenience and consent.[48] This was certainly the case for the laws of armed conflict.

Still, Lieber's Code found almost immediate reverberation in Europe, and was picked up and advocated by important scholars, such as Johann Caspar Bluntschli.[49] By 1870, Prussia issued a code that closely followed Lieber's Code.[50] But Prussia's embrace of the work of its émigré son was heavily qualified, and the doctrine of military necessity was the focus of contention. Prussia, and then Germany, embraced an unrestrained *Clausewitzian* view of the doctrine, as exemplified in the maxims "*Kriegsraison geht vor Kriegsmanier*" ("*Kriegsraison* takes precedence before the laws of war") and "*Not kennt kein Gebot*" ("Necessity knows of no legal limitation").[51] Under this view, a battlefield commander is entitled to dispense with the rules of warfare if he determines that the military situation requires that he do so. In the words of the principal expositor of this unrestrained view, Carl Lüder, "any departure from the laws of war can be justified when circumstances arise which mean that the achievement of the war-aim, or the escape from extreme danger, would be hindered by adhering to it."[52] In this case, the only limitation on the commander's conduct is that it be reasonably tied to the accomplishment of a military objective. As one commentator put it:

> The doctrine [of *Kriegsraison*] practically is that if a belligerent deems it necessary for the success of its military operations to violate a rule of international law, the violation is permissible. As the belligerent is to be the sole judge of the necessity, the doctrine is really that a belligerent may violate the law or repudiate it or ignore it whenever that is deemed to be for its military advantage.[53]

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48. *See id.* at 63.

49. *See* Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM. J. TRANSNAT'L L. 185, 206 (2005).

50. *See* Nicole Barrett, Note, *Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos*, 32 COLUM. HUM. RTS. L. REV. 429, 445 n.68 (2001).

51. *See* Chandler P. Anderson et al., Editorial Comment, *The War in Europe*, 8 AM. J. INT'L L. 853, 880 (1914).

52. Carl Lüder, Kriegsraison, *in* 4 HANDBUCH DES VÖLKERRECHTS [MANUAL OF INTERNATIONAL LAW] 253, 254 (Franz von Holtzendorff ed., 1885). Lüder was known to late nineteenth century law scholars as "Lieber without limitations."

53. William G. Downey, Jr., *The Law of War and Military Necessity*, 47 AM. J. INT'L L. 251, 253 (1953).

The Bismarckian response had a specific *Realpolitik* context. Germany achieved unification after the Franco-Prussian War.[54] Economic prosperity came in the *Gründerjahre*[55] and a German military machine rose with hegemonistic pretensions in Central Europe, and a dream of a belated empire overseas.[56] Germany resented political machinations that appeared designed to stunt efforts to realize the advantages that went with its new-found wealth and power.[57] As Bismarckian *Realpolitik* faded and the *Weltpolitik* of Bismarck's successors came in its place, military necessity and *Kriegsraison* became a significant geopolitical fault line.

C. *The Hague Process*

The Lieber Code's recasting of the military necessity concept had an immediate effect on the law of armed conflict dialogue in Europe. For example, the St. Petersburg Declaration of December 11, 1868 banned the use of small-caliber explosive bullets, and cited the Lieber Code for its principal justification that explosive bullets caused unnecessary suffering without concomitant military advantage.[58] This was an important precursor to the Brussels and Hague Processes launched by an appeal from the Russian Tsar Alexander II.

When the U.S. and German delegations discussed the concept in the preparatory works for the Hague Convention on Land Warfare,[59] they had a fundamental problem in terminology. The U.S. said "military necessity" and the Germans "*Kriegsraison.*" Did these terms mean the same thing? Clearly not. As previously discussed, Lieber took the notion of *Kriegsraison* and put it inside of Kantian collars, whereas the Germans used a

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54. *See* WOLFGANG J. MOMMSEN, IMPERIAL GERMANY 1867-1918: POLITICS, CULTURE, AND SOCIETY IN AN AUTHORITARIAN STATE 58-59 (Richard Deveson trans., Arnold 1995) (1990); HAGEN SCHULZE, GERMANY: A NEW HISTORY 144-45 (Deborah Lucas Schneider trans., Harvard Univ. Press 1998) (1996).

55. *See* MOMMSEN, *supra* note 54, at 67 (describing the *Gründerjahre* as a period of "unparalleled economic growth" that came to an end in 1873).

56. *See id.* at 191-92.

57. *See id.* at 177.

58. *See* Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297; *see also* Barrett, *supra* note 50, at 445.

59. *See* Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Convention on Laws and Customs of War].

purely *Clausewitzian* approach.[60] The result, as the negotiating teams quickly discovered in Brussels and the Hague, was that the U.S. and Germans realized that "military necessity" and "*Kriegsraison*" were distinctly different concepts.

The negotiations that culminated in the Hague Convention on Land Warfare of 1907 had, to be fair, highlighted but never fully resolved these differences. The clash between the United States and Germany is found in three provisions. First, the Preamble to the 1907 Convention states that: "These provisions, the wording of which has been inspired by the desire to diminish the evils of war, *as far as military requirements permit,* are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants."[61] This language was viewed by the German delegation as subjecting all the agreements to the doctrine of *Kriegsraison,* an interpretation that the United States vehemently rejected and other European great powers were prepared to leave ambiguous. Second is Article 22, which states that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited."[62] But Article 22 itself is to be read in conjunction with the third provision, Article 23, which enumerates eight specifically prohibited means, saying they are "especially forbidden."[63] Article 23, in turn, includes in subpart (g), which addresses destruction or seizure of the enemy's property, an exclusion based on military necessity.[64]

D. *The World Wars and Their Aftermath*

A few years later, German troops swept across neutral Belgium on their way to the French front, providing a graphic demonstration. For the Germans, this maneuver was permitted by *Kriegsraison,* whereas for the Western powers, it showed German contempt for basic norms of the law of armed conflict—and specifically, a violation of the rights of Belgium as a neutral

60. *See supra* notes 11-57 and accompanying text.

61. Convention on Laws and Customs of War, *supra* note 59, pmbl. (emphasis added).

62. Convention on Laws and Customs of War, *supra* note 59, art. 22.

63. *Id.* art. 23.

64. *See id.* art. 23(g).

state.[65]

At the conclusion of World War I, Germans used *Kriegsraison* as a legal justification for more dubious practices, including vicious submarine warfare and the employment of doubtful means of chemical warfare.[66] No effort was taken to hold German leaders individually liable for these positions, in part certainly because Allied leaders had themselves authorized military measures which might only have been justified under the same doctrinal view.[67]

During World War II, German leaders again used *Kriegsraison* to justify a number of highly doubtful practices focusing on merchant shipping, civilian populations, and *hors de combat* detainees. This time, however, the Allies decided to bring criminal prosecutions, with the result that the doctrine of *Kriegsraison* figured directly in trials at Nuremberg and Tokyo. Some of the more significant cases included *United States v. List* (the "*Hostage* Case")[68] and *United States v. Altstoetter* (the "*Justice* Case").[69] The former case involved Colonel-General Rendulic's devastation of the Norwegian Finmark in October 1944, in which the defense of *Kriegsraison* was sustained on some points and rejected on others;[70] the latter involved the *Kommandobefehl* and the *Nacht- und Nebelerlass* in which this defense was denied.[71] In both cases, the Tribunal adopted a very skeptical attitude towards *Kriegsraison* and insisted on strong evidence to sustain it. The Tribunal made clear that it considered the traditional German approach to *Kriegsraison* fundamentally at odds with evolving law of armed conflict:

> It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification for their acts. We do not con-

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65. *See* Treaty of London art. 7, Apr. 19, 1839, 88 Consol. T.S. 445 ("Belgium . . . shall form an Independent and perpetually Neutral State.").

66. *See* Gary Solis, Military Necessity, Kriegsraison and the "War on Terror" 7-8 (unpublished manuscript), *available at* http://www.law.columbia.edu/jurisprudence.

67. *Id.* at 8.

68. *See* United States v. List (The Hostage Case), *reprinted in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1230 (1950) [hereinafter NUREMBERG TRIALS].

69. *See United States v. Altstoetter* (The Justice Case), *reprinted in* 3 NUREMBERG TRIALS, *supra* note 68, at 954.

70. *See* Hostage Case, *reprinted in* 11 NUREMBERG TRIALS, *supra* note 68, at 1113.

71. *See* Justice Case, *reprinted in* 3 NUREMBERG TRIALS, *supra* note 68, at 1031.

> cur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency does *not* justify a violation of the positive rules. International law is prohibitive law.[72]

The Tribunal could not have been more emphatic in its rejection of the basic premise of *Kriegsraison,* but to make the point unmistakable, it added: "[T]he rules of international law must be followed even if it results in the loss of a battle or even a war."[73]

A second Tribunal, dealing with the charges against members of the German General Staff, concluded that:

> It has been the viewpoint of many German writers and to a certain extent has been contended in this case that military necessity includes the right to do anything that contributes to the winning of a war. We content ourselves on this subject with stating that such a view would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations.[74]

The Nuremberg and Tokyo Tribunals were generally viewed as the death knell of the doctrine of *Kriegsraison.*[75] What survived was a notion of military necessity close in spirit and letter to that originally articulated by Lieber. The Tribunals were reflecting U.N. doctrine incorporated into their governing statute. The same notions were being driven home in the recasting of the Geneva Conventions. Indeed, it is clear that one of the animating purposes of the 1949 reinstatement of the Geneva Conventions ("Conventions") was to put the last nails in the coffin of the doctrine of *Kriegsraison.*[76] Article 8 in each of the Conventions, with its language about "exceptional and temporary mea-

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72. Hostage Case, *reprinted in* 11 NUREMBERG TRIALS, *supra* note 68, at 1255-56 (emphasis added).

73. *Id.* at 1272.

74. *United States v. von Leeb* (The High Command Case), *reprinted in* 11 NUREMBERG TRIALS, *supra* note 68, at 541 (1950).

75. *See, e.g.*, International Committee of the Red Cross, Commentaries, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, ¶ 1386 [hereinafter Commentaries to Protocol I], http://www.icrc.org/ihl.nsf/WebCOMART?OpenView&Start=1&Count=30&Expand=5#5 (last visited Apr. 5, 2007) ("'Kriegsraison' was condemned at Nuremberg . . . . One can and should consider this theory discredited.").

76. *See* Geneva Convention for the Amelioration of the Condition of the Wounded

sures" rendered necessary by "imperative necessities of security" clearly reflected a shift to a U.S.-style reading of military necessity. Similar shifts of language can be found throughout the Conventions.[77]

Protocol I Additional to the Geneva Conventions of 1977 ("Protocol I"), similarly embraces, in Article 35(1), a shift away from *Kriegsraison* and, particularly, its suggestion that it can supersede positive rules of international law, while retaining the essence of U.S.-style military necessity. As the Commentary to Protocol I states: "'*Kriegsraison*' was condemned at Nuremberg, and this condemnation has been confirmed by legal writings. One can and should consider this theory discredited. It is totally incompatible with the wording of Article 35, paragraph 1, and the very existence of the Protocol."[78]

One U.S. military writer summarizing development of the doctrine in the wake of the war put it in these terms:

> [M]ilitary necessity does not justify all actions that arguably enhance force protection. The customary international law prohibitions against state practiced murder; torture; cruel, inhumane, or degrading treatment; and prolonged arbitrary detention serve as limitations to what military necessity may justify . . . . To illustrate, the need to extract information from a local civilian for the military necessity of protecting the force does not justify subjecting that individual to torture as a means of obtaining the information. Thus, even without an "enemy" in the classic sense, the principle of military necessity remains relevant in the decision making process for the use of force.[79]

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and Sick in Armed Forces in the Field arts. 3, 8, Aug. 12, 1949, 6 U.S.T 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention for the Wounded].

77. *See, e.g.*, Geneva Convention for the Wounded, *supra* note 76, art. 34 ("in case of urgent necessity"); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 27, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 ("so far as operational requirements permit"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 5, 16, 30, 53, 57, 111, 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (using following language: "where absolute military security so requires," "as military considerations allow," "within the bounds set by military or security considerations," "rendered absolutely necessary by military operations," "in cases of urgent necessity," "should military operations prevent," "not justified by military necessity").

78. Commentaries to Protocol I, *supra* note 75, ¶ 1386.

79. Major Geoffrey S. Corn, International and Operational Law Note, *Principle 1: Military Necessity*, ARMY LAW., Jul. 1998, at 73.

II. *BUSH: MILITARY NECESSITY CORRUPTED INTO* KRIEGSRAISON

So it appeared quite clear that, as early as 1863, there were a series of areas in which military necessity differed from *Kriegsraison,* specifically with respect to the treatment of persons taken *hors de combat.* At the time of the promulgation of the Lieber Code, these limitations were fixed in customary international law, which the Lieber Code itself helped powerfully to shape and define.[80] In the following 140 years, most of these hitherto customary norms had become the subject of conventions and treaties. These rules were seen as fundamentally beyond the scope of military necessity; in other words, the doctrine of military necessity could not be invoked to justify measures that were otherwise "forbidden by international law."[81] A significant part of these rules relate to the treatment of persons taken *hors de combat.* In particular, these can be compartmentalized as follows: (1) the prohibition of torture, particularly in association with interrogation practice; (2) the prohibition of cruelty, later refined into a prohibition on cruel, inhuman, and degrading treatment; (3) the prohibition on prolonged arbitrary detentions; and (4) the prohibition on the "disappearing" of persons, which is to say their secret detention outside of the normal rules governing belligerents *hors de combat* under the law of armed conflict or the applicable rules of criminal justice administration.

Bush Administration practices have transgressed each of these "bright-line" prohibitions. This means, in turn, that the Bush Administration's use of the term "military necessity" cannot be reconciled with the historical U.S. practice associated with that word. Instead, it is an unadulterated application of the Wilhelmine notion of *Kriegsraison,* with a strong emphasis placed on the right of the military strategist to overturn otherwise applicable norms of international law.

In a memorandum issued to President Bush, then White House counsel (and present Attorney General) Alberto Gonzales argued that the limitations on interrogation procedure con-

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80. The same point (subordination of military necessity to international law norms) is made in the treatise prepared by Henry Halleck, the General in Chief of the Union Armies. *See* HENRY W. HALLECK, ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR 197-98 (1878).

81. U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 3(a) (July 18, 1956), *available at* http://www.afsc.army.mil/gc/files/FM27-10.pdf.

tained in the Geneva Conventions and other binding international law were rendered inapplicable by considerations of "military necessity."[82] The same view was then embraced by President Bush's memorandum cited at the outset of this Article, and is reflected in a memorandum issued by Judge Jay Bybee (the authorship of which is attributed to John Yoo), and orders issued by Secretary of Defense Donald Rumsfeld.[83] Each of these claims is completely irreconcilable with "military necessity" as the term had been understood and developed in U.S. military doctrine and law up to that point. Moreover, none of the authors appear to have even the most rudimentary understanding of the traditional use of the term "military necessity," or of its application in comparable circumstances.[84]

In a sense this turn should not come as surprising for two reasons. The first is that scholars trained in military law and doctrine appear to have played no role whatsoever in the articulation of the new Bush Administration policies in this area. When opinions were offered, those offering them were fired or circumvented.[85] The second is that the international law posture assumed by Bush Administration advocates and apologists, particu-

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82. Memorandum from Alberto R. Gonzales, Counsel to the President, to George W. Bush, President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002), *in* THE TORTURE PAPERS 121 (Karen Greenberg & Joshua Dratel eds., 2005).

83. *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002) (envisioning a "self-defense" exception to torture predicated on military necessity), *in* THE TORTURE PAPERS, *supra* note 82, at 173; *see also* Memorandum from William J. Haynes, II, Gen. Counsel, U.S. Dep't of Def., to Donald Rumsfeld, Sec'y of Def., U.S. Dep't of Def., Counter-Resistance Techniques (Nov. 27, 2002), *in* THE TORTURE PAPERS, *supra* note 82, at 237 [hereinafter Counter-Resistance Techniques Memo] (bearing approval signature of Secretary of Defense Donald Rumsfeld from December 2, 2002).

84. *See* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANS. L. 811, 834-37 (2005).

85. An excellent demonstration can be found in the account of Navy General Counsel Alberto Mora, who vigorously opposed efforts to modify established interrogation techniques through the inclusion of torture and highly coercive techniques. Mora was supported in this effort by the Judge Advocates General of each of the service branches. *See generally* Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER (Feb. 27, 2006) (discussing how Mora and the Bush Administration were at loggerheads over the Administration's interrogation policies toward terror suspects).

larly figures such as John Yoo,[86] Eric Posner, and Jack Goldsmith,[87] very closely echoes the Wilhelmine perspective: It treats international law as essentially rules adopted voluntarily by sovereign states, and dismisses *jus cogens* rules and customary-law practice, or considers international law not ultimately binding or enforceable on nations which choose not to apply it.

These scholars rely in the first instance upon a radical and novel constitutional theory under which the President as Commander in Chief is imbued with authority to act unfettered by international law (even where international law is enacted as law of the land through the ratification and implementation process) or domestic statute.[88] Moreover, they bolster this position with references to "military necessity" as a supposed manifestation of the Commander in Chief's authority to act beyond the restraint of the law. Indeed, they explicitly cite "military necessity" as a tool to overcome positive legal restraints in four separate areas discussed below.

1. Torture

Torture—for purposes of extracting intelligence or for any other purpose—was strictly forbidden and consciously excluded from the scope of military necessity. Indeed, as previously noted,[89] Abraham Lincoln and Francis Lieber were explicit about this in 1863 and the prohibition had been carried forward in each subsequent iteration of the doctrine through the current one, issued in 1992.[90] Moreover, *torture* clearly comprehended physical assault upon a detainee, as specified in the UCMJ. A specific practice of *torture* identified and punished by the United States as early as 1902, was a device known as "waterboarding" in which a detainee was through various means made to sense that he was drowning. An argument of military necessity was raised in the court martial of an officer who used this technique in a

86. *See generally* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005).

87. *See generally* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

88. *See* YOO, *supra* note 86, at 165-73.

89. *See supra* note 29 and accompanying text.

90. *See* U.S. DEP'T OF THE ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION 1-8 (Sept. 28, 1992) ("US policy expressly prohibit[s] acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation.").

counter-insurgency campaign in the Philippines.[91] The officer argued that imminent threats to the safety of his soldiers justified the measure.[92] The Judge Advocate General of the Army ruled, in upholding the conviction, that military necessity categorically excluded cruelty and torture.[93] Theodore Roosevelt favorably commented upon the case and the punishment of the soldier involved.[94] In 1968, the U.S. Army court-martialed a second soldier in connection with the use of waterboarding against a detainee in Vietnam.[95] Similarly, the use of military canines to terrorize detainees has consistently been held to constitute "torture" under both U.S. norms and international conventions, such as the Convention Against Torture and the Geneva Conventions.[96] Further, the use of "stress positions," which over a period of hours or days, can result in painful dislocation of joints and organ failure, has regularly been held to constitute "torture."[97] Each of these practices was authorized by the Secretary of Defense with Presidential knowledge and authority, and each was, in fact, applied.[98]

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91. *See* Court-Martial of Major Edwin F. Glenn, *reprinted in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 814 (Leon Friedman ed., 1972)

92. *See id.* at 817 ("The accused admitted the facts in connection with the administration of the water cure, but undertook to show, in defense, that his act was not unlawful; that is, it was justified by *military necessity* and was warranted as a legitimate exercise of force by the laws of war.") (emphasis added).

93. *See id.* at 818.

94. *See* Guinakl Mettraux, *US Courts-Martial and the Armed Conflict in the Phillippines (1899-1902): Their Contribution to National Case Law on War Crimes*, 1 J. INT'L CRIM. JUST. 135 (2003).

95. *See, e.g.*, Human Rights Watch, Vice President Endorses Torture Cheney Expresses Approval of the CIA's Use of Waterboarding (Oct. 26, 2006), http://hrw.org/english/docs/2006/10/26/usdom14465.htm (last visited Apr. 18, 2007).

96. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; Geneva Convention on Prisoners of War arts. 3(1), 13, *supra* note 5.

97. *See, e.g.*, Sean Kevin Thompson, Note, *The Legality of the Use of Psychiatric Neuroimaging in Intelligence Interrogation*, 90 CORNELL L. REV. 1601, 1625 (2005) (noting that international tribunals have determined that the use of "stress positions" constitutes torture).

98. *See* Counter-Resistance Techniques Memo, *in* THE TORTURE PAPERS, *supra* note 82, at 237; *see also* Memorandum from Donald Rumsfeld, Sec'y of Def., U.S. Dep't of Def., to William J. Haynes, II, Gen. Counsel, U.S. Dep't of Def., Detainee Interrogations (Jan. 15, 2003), *in* THE TORTURE PAPERS, *supra* note 82, at 238.

2. Cruel, Inhuman, and Degrading ("CID") Treatment

Since the ratification of the Convention Against Torture,[99] the prohibition on the use of military necessity has generally been considered to have been expanded to include a further prohibition of the use of cruel, inhuman, and degrading treatment ("CID"). The following tactics now employed by the United States with respect to War on Terror detainees, mostly associated with the technique known as "pride and ego: down" constitute or may constitute CID: enforced nudity; leaving detainees chained to the floor overnight or for prolonged periods so they are forced to wallow in their own urine and feces; enforced grooming for purposes of defying the religious values of a detainee; subjecting a detainee to extremes of hot and cold; use of loud music for prolonged periods of time; sexual humiliation practices; forcing a detainee to wear a leash and behave like a dog; forcing a male detainee to wear women's underwear; unauthorized touching or fondling of the detainee's sexual organs; ordering a detainee to engage in mock sexual conduct; having a "lap dance" performed on a detainee; and disparaging the detainee's religion, articles of worship, or religious practices.

3. Prolonged Arbitrary Detention

International humanitarian law protects the conditions of detainees and provides a process for insuring that those detained are held for proper cause; in sum, it contemplates two different systems for holding prisoners. In the first, a combatant taken into custody may be held simply because of his combatant status; conditions are specified and the combatant is to be released when the hostilities conclude. In the second, a person may be held under an applicable criminal justice system. In times of armed conflict, this detention may be by military forces, and the rules of the criminal justice system may be subject to some permutations dictated by the military administration, but essential procedural safeguards must nevertheless be obtained. With respect to belligerents *hors de combat,* the Third Geneva Convention establishes a process under which a combatant picked up during times of armed conflict is to be presumed to be a prisoner of war unless the detainee has been through a

99. *See* Convention Against Torture, *supra* note 96.

competent adjudicatory process that has determined otherwise.[100] Although the Geneva Conventions applied to the military engagements fought by the United States in Afghanistan and Iraq, detainees captured in the Afghanistan campaign have, without exception, been held in unlawful prolonged arbitrary detention, in violation of the fundamental rules of the Conventions, and particularly of Article 5 of the Third Convention. Similarly, although the hostilities in Afghanistan have been terminated and the Afghan Government and multinational forces have begun a process of paroling fighters captured in the conflict, the United States has wrongfully withheld detainees in its control from this process, including those held in Guantánamo, in U.S.-controlled facilities in Afghanistan, and in third countries. Throughout this process, U.S. officials have suggested the criminality of a large part of these detainees without bringing criminal charges of any kind against them.[101] But perhaps the most surprising breach by the Bush Administration has been in Iraq—surprising because in Iraq alone, the Administration has fully acknowledged the applicability of the Geneva Conventions and their rules. In a letter issued by Brigadier General Janis Karpinski to the International Committee of the Red Cross dated December 24, 2003, Karpinski claimed military necessity as a basis for the extended holding of Iraqi civilians taken in "sweeps," as well as for treatment of detainees in a highly secured cellblock that the Red Cross concluded was "tantamount to torture."[102] The letter stated: "While the armed conflict continues, and where 'absolute military security so requires,' security detainees will not obtain full [Geneva Convention] protection as recognized in [Article 5]."[103] General Karpinski subsequently

100. *See* Geneva Convention on Prisoners of War, *supra* note 5, art. 5.

101. *See* Human Rights Watch, Guantanamo Two Years On, http://hrw.org/english/doc/2004/01/09/usdom6917.htm (last visited Feb. 27, 2007); Human Rights Watch, Failure to Provide Justice for Afghan Victims, http://www.hrw.org/english/docs/2007/02/15/usint15351.htm (last visited Feb. 27, 2007).

102. Report of the International Committee of the Red Cross ("ICRC") on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation (Feb. 2004), *in* DANNER, *supra* note 1, at 253.

103. Letter from Brigadier General Janis Karpinski to the International Committee of the Red Cross (Dec. 24, 2003), *in* Douglas Jehl & Neil A. Lewis, *U.S. Military Disputed Protected Status of Prisoners Held in Iraq*, N.Y. TIMES, May 23, 2004, at A12.

disclosed that the letter was authored in the office of the Department of Defense's General Counsel in the Pentagon.

4. Disappearings

At the conclusion of World War II, the Allies discovered that the Nazi Government operated an enormous program to "disappear" persons in occupied countries whenever such persons presented an imperative threat to German military personnel.[104] This program was known as the *Nacht- und Nebelerlass*.[105] In wartime France, approximately 7000 Frenchmen disappeared into this system. At Nuremberg, the authors of this program were prosecuted, and the notion of "disappearing" adversaries was established as a *jus cogens* crime.[106] This principle was reinforced as a result of "disappeared" programs in Latin America, such as Operación Condor.[107] In the War on Terror, the Bush Administration has operated a similar, though smaller scale, program known as "Extraordinary Renditions."[108] The essence of this

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104. *See* U.N. Econ. & Soc. Council ("ECOSOC"), Comm'n on Human Rights, *Civil and Political Rights, Including Questions of: Disappearances and Summary Executions* ¶ 7, U.N. Doc. E/CN.4/2002/71 (Jan. 8, 2002) [hereinafter *Nowak Report*]; *see also* AN VRANCHX, A LONG ROAD TOWARDS UNIVERSAL PROTECTION AGAINST ENFORCED DISAPPEARANCE 3 (2007), *available at* http://www.ipisresearch.be/download.php?id=152.

105. *See Nowak Report*, *supra* note 104, ¶ 7 ("The human rights violation and crime of enforced or involuntary disappearance . . . seems to have been invented by Adolf Hilter in his *Nacht und Nebel Erlass* (Night and Fog Decree) of 7 December 1941. The purpose of this decree was to seize persons in occupied territories 'endangering German security' who were not immediately executed and to transport them secretly to Germany, where they disappeared without a trace."); *see also* VRANCHX, *supra* note 104, at 3.

106. *See, e.g.*, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 702 (1987).

107. *See* Katie Zoglin, *Paraguay's Archive of Terror: International Cooperation and Operation Condor*, 32 U. MIAMI INTER-AM. L. REV. 57, 59-60 (2001) (providing overview of Operation Condor); J. Patrice McSherry, *Operation Condor: Deciphering the U.S. Role*, CRIMES OF WAR PROJECT, July 6, 2001, http://www.crimesofwar.org/special/condor.html (last visited Feb. 20, 2007); *see also Nowak Report*, *supra* note 104, ¶ 8 (discussing the use of enforced disappearance in Latin America during the 1960s and 1970s); VRANCHX, *supra* note 104, at 3-5 (same).

108. *See* ALL PARTY PARLIAMENTARY GROUP ON EXTRAORDINARY RENDITION, TORTURE BY PROXY: INTERNATIONAL LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" 6 (2005) [hereinafter TORTURE BY PROXY], *available at* http://www.nyuhr.org/docs/APPG-NYU%20Briefing%20Paper.pdf (defining Extraordinary Renditions as "the transfer of an individual, with the involvement of the U.S. or its agents, to a foreign State in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading (CID) treatment."); *see also* Ian Fisher, *Reports of Secret U.S. Prisons in Europe Draw Ire and Otherwise Red Faces*, N.Y. TIMES, Dec. 1, 2005, at A14.

program involves the operation of "black site" prisons overseas in conjunction with powers known for their use of highly coercive interrogation techniques.[109] The system can be described as "torture by proxy."[110] This program also is beyond the limits of accepted military necessity, as the adjudications at Nuremberg established. Nevertheless, the program has been routinely justified since the commencement of the War on Terror as an exercise in military necessity, specifically as "battlefield preparation."

In sum, the term "military necessity" as it has been invoked and used by the Bush Administration in the War on Terror in fact has nothing to do with military necessity. It is a resurrection of consciously lawless military expediency, or *Kriegsraison.*

109. *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1 ("In late 2002 or early 2003, the CIA brokered deals with other countries to establish black-site prisons.").

110. *See* TORTURE BY PROXY, *supra* note 108, at 6; *see also* Editorial, *Torture by Proxy*, N.Y. TIMES, Mar. 8, 2005, at A22.