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The Counterterrorism War Paradigm versus International Humanitarian Law: The Legal Contradictions and Global Consequences of the US "War on Terror"

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Since 2001, we have witnessed the development of a counterterrorism war paradigm built to advance claims about the post-9/11 scope and discretion of US executive power and to articulate specific interpretations of national security interests and strategic objectives in the "war on terror." What makes this a paradigm rather than merely a conglomeration of evolving policies is the cohesiveness and mutual reinforcement of its underlying rationales about the rights of the US government to prosecute a territorially unbounded war against an evolving cast of enemies. Drawing on Bourdieu's concept of a juridical field, the article focuses on how officials who constructed a legal framework for this paradigm, rather than disregarding international law wholesale, have engaged in interpretations and crafted rationales to evade some international humanitarian law (IHL) rules and norms while rejecting the underlying logic or applicability of others. This article traces the counterterrorism war paradigm's development and explains how it now competes with and threatens to supersede the customary law principles enshrined in IHL.

INTRODUCTION

The US "war on terror" was initiated in response to the terrorist attacks of September 11, 2001, and continues under a third administration with no end in sight. The Authorization for Use of Military Force (AUMF), a sixty-word piece of legislation passed by Congress on September 14, 2001, and signed into law by President George W. Bush four days later, serves as the green light for what has turned into a multicontinental "perma-war" (Timm 2017; see also Filkins 2008; Gregory 2011; Scahill 2013; Koh 2017).

Over the years since 9/11, we have witnessed the development of a counterterrorism war *paradigm* built to advance claims about the scope and discretion of US executive power and to articulate specific national security interests, strategic objectives, and operational practices in this long-running unconventional war. What makes this a paradigm rather than merely a conglomeration of evolving policies to counter terrorism (Rineheart 2010) is the cohesiveness and mutual reinforcement of its underlying rationales about the rights of the US government to pursue national security through violent means against an evolving cast of enemies. While these elements might

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sound like the standard fare of any Schmittian conception of sovereign prerogatives, the paradigmatic novelty is in the details. As Joseph Masco (2014, 1) explains:

> By amplifying official terror and public anxiety, the US security apparatus powerfully remade itself in the early twenty-first century, proliferating experts, technological infrastructures, and global capacities in the name of existential defense. . . . The resulting security state apparatus no longer recognizes national boundaries or citizenship as the defining coordinates of its governance. . . . The motivating force behind this radical renewal and expansion of the national security state in the twenty-first century is a vision of a world without borders, generating threats without limit.

To this I would add four elaborating elements to elucidate the counterterrorism war paradigm *as paradigm*: first, the executive branch has authorized forms of violence intended to achieve strategic goals and operational results that violate international law (Sands 2008; Luban 2014). These policies run contrary to developments in international humanitarian law (IHL) over the last decades of the twentieth century (Hagan and Levi 2005; Sands 2005; Mayerfeld 2007; Hajjar 2010). The most telling (but certainly not the only) examples of these policies—and the main foci of this article—are the official authorization of torture and forced disappearance (in 2001), and, shortly thereafter, targeted killing operations in countries where the United States was not officially at war (in 2002).

Second, it is not just that the executive branch authorized torture, forced disappearance, and extrajudicial execution of suspected enemies, for many governments engage in such practices, but rather that government officials and lawyers have gone to great lengths to assert that such policies are legally available options; Craig Jones (2015) describes this as the juridification of late modern war. In regard to official efforts to "legalize" torture and targeted killing, Israel preceded the United States on both, and Israeli legal rationales have provided an influential model for the United States in the "war on terror" (Hajjar 2006, 2017). Timing and context are important in understanding the erection of legal pillars to support the counterterrorism war paradigm. In the summer of 2002 when Justice Department lawyers formulated rationales to sanction violent and coercive interrogation tactics already authorized by the White House and being used by the CIA in secret overseas detention facilities (i.e., black sites), they borrowed from Israel's late 1980s reasoning that "moderate physical pressure" does not constitute "torture" and that its use (on Palestinians from the occupied territories) was necessary and therefore legitimate in the fight against "hostile terrorist activity," but they ignored that, in 1999, the Israeli High Court of Justice ruled that the routine use of such "pressure" was prohibited (*Public Committee against Torture in Israel v. Government of Israel* HCJ 5100/94 (1999) (Isr.)). And whereas Israel had long denied having a policy of extrajudicial execution because of its obvious illegality, in September 2000 there was a "shift in political and legal paradigms that took place in Israel following the outbreak of the second intifada. . . . As far as Israeli military lawyers were concerned, the intifada represented a radically new and exceptional situation" (Jones 2015, 680). In early 2001, US officials protested the asserted legality of targeted killing, but as Daniel Reisner, one of the chief legal architects of the Israeli paradigm

shift, explained, "It took four months and four planes to change the opinion of the United States, and had it not been for those four planes I am not sure we would have been able to develop the thesis of the war against terrorism on the present scale" (Feldman and Blau 2009).

Third, the intellectual authors of the counterterrorism war paradigm have not disregarded IHL; rather, they have engaged in an *interpretative project* to construct legal rationales to evade and deny the applicability of IHL rules and norms to counterterrorism warfare, and this interpretative labor has generated new propositions of what is legal in war.[1] Therefore, it is important not only to understand the development of these interpretations but also to consider how the US government resolutely defended the legality as well as the legitimately classified nature of "war on terror" policies when they were challenged, and to consider the fact that Congress and, to a slightly lesser extent, federal courts accepted and, thus, reinforced claims that what the executive branch was doing was legal/not illegal. This kind of law-minded interpretative project distinguishes US (Yoo 2006; Goldsmith 2007; Cole 2009) and Israeli (Weizman 2012; Perugini and Gordon 2015) IHL violations from similar or identical violations perpetrated by states that do not bother to rationalize them as legal.

Fourth, this interpretative project has global implications because the United States has enormous influence internationally. If practices authorized by the US government to wage the "war on terror" and their underlying justifications were to become accepted as legal by significant sectors of the international community, they could "ripen" into custom and thus become legal for all. This refers to the role of state practice—particularly the practices of powerful states—in determining what is or should be legal in the context of war and armed conflict (Anderson 2009; Heller 2017). Customary international law, according to the International Committee of the Red Cross (2010), "derives from 'a general practice accepted as law' ... [where] the international community believes that such practice is required as a matter of law."

Thus, the global power of the United States to influence international law is an essential element to understanding the counterterrorism war paradigm *as paradigm*. José Alvarez (2003, 873) writes: "The hegemon promotes, by word and deed, new rules of law, both treaty based and customary. It is generally averse to limiting its scope of action via treaty; avoids being constrained by those treaties to which it has adhered; and disregards, when inconvenient, customary international law, confident that its breach will be hailed as a new rule." According to Martti Koskenniemi (2004, 199), "hegemonic contestation" is "the process by which international actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents. ... To think of this struggle as *hegemonic* is to understand that the objective of the contestants is to make their partial view of that meaning appear as the total view, their preference seem like the *universal preference*" (emphasis in original). Rosa Brooks (2004, 724) warns: "If there is no place on earth where the US cannot legitimately use military force at any time, without warning, other states will claim the same rights,

1. The copious legal work that has gone into the construction of the counterterrorism war paradigm should discourage scholars from assuming or overstating that this constitutes a "state of exception" (Agamben 2005; see Gregory 2006; Stampnitzky 2016).

and we risk an escalating spiral of unconstrained violence—precisely what the creators of the UN Charter system sought to avoid."

With these four elements in mind, it is insufficient simply to observe or criticize that the ways in which the United States has waged counterterrorism war deviate from or contradict the rules and norms enshrined in IHL. Rather, this critique demands a robust, contextual, and empirical understanding of how the counterterrorism war paradigm developed (Campbell 2005, 322) and how, as a *paradigm*, it now competes with, menaces, and threatens to supersede the customary law principles enshrined in IHL.[2]

INTERNATIONAL HUMANITARIAN LAW AND ASYMMETRIC WARS

Admittedly, the main body of IHL, the Four Geneva Conventions of 1949, is ill suited to regulate the behavior of states engaged in asymmetric wars against nonstate groups. With the exception of Common Article 3, which pertains to the treatment of enemies in noninternational (i.e., noninterstatal) conflicts, the 1949 Geneva Conventions govern wars between and among states. A subsequent development, Additional Protocol 1 (1977), was promulgated to bring IHL rules and norms to bear on specific kinds of asymmetric wars, specifically those in which nonstate groups are fighting against colonial domination, foreign occupation, or racist regimes. Although the United States never became a state party to Additional Protocol I—and protested that the creation of such a right to fight extended law of war protections to "terrorists"—the government accepted that some articles, such as those elaborating the principles pertaining to civilian immunity (which excludes civilians who directly participate in hostilities) and proportionality, do constitute customary, and therefore binding, international law. This acknowledgment of both the binding nature of customary international law and specific humanitarian principles regulating the use of armed force and violence was rhetorical and abstract but also a real articulation of the US government's position on international law in the last decades of the twentieth century. For example, the US government, in its 1999 report to the UN Committee against Torture, stated:

> [T]orture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the Convention constitutes a criminal offense under the law of the United States. No official of the government, federal, state, or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification for torture. (US Department of State 1999)

2. In 2004, Brooks wrote: "The changing nature of conflict and threat—in particular the rise of global terrorism—has eroded the customary boundaries that separate war and peace, civilians and combatants, lawful and unlawful belligerents, national security issues and domestic issues. . . . The old categories have lost their analytical and moral underpinnings, but *we have not yet found alternative paradigms to replace them*" (744, emphasis added). This article argues that, in the years since, an alternative paradigm has acquired shape and force.

This recognition of the binding nature of the customary law prohibition of torture was, in effect, renounced by Bush administration officials after 9/11; in its place the intellectual authors of the counterterrorism war paradigm, who assumed the role of "legal entrepreneurs" (Dezalay and Madsen 2012, 444), devised alternative interpretations of the state's rights, which they self-consciously named "the new paradigm" (Smith and Eggen 2005). The three core, novel, and frankly radical arguments undergirding this new paradigm in its earliest iteration were: that the president's constitutional commander-in-chief authority to pursue national security is unfettered by law, whether federal or international; that international laws, even those to which the United States is party, do not constrain US conduct overseas in this "war on terror"; and that customary international law principles are not binding. As Jens David Ohlin (2017, 89) explains:

> The assault on international law is not an isolated, ad hoc, or random event. . . . It is, rather, a coordinated attempt to undermine and undervalue American commitment to international law, through legal arguments both abstract and concrete. The concrete arguments ensure that the United States remains estranged from international institutions; they also outline reasons for the United States to either ignore or downplay international obligations. The abstract arguments provide an intellectual foundation on which the more specific arguments rest. They transform international law from a real legal system that demands compliance to a voluntary legal system, composed of self-interested actors, that can and should be ignored at will. Both types of arguments are crucial to the devaluing of international law.

A "war on terror" is, by definition, asymmetric and unconventional because the enemy is not a foreign state's military, nor does the enemy that perpetrated the attacks of 9/11 even begin to approximate those kinds of territorialized armed groups that might assert a right to fight in accordance with the conditions delineated in Additional Protocol I. The 9/11 terrorist attacks perpetrated by al-Qaeda were a crime against humanity—deliberate acts targeting civilians or civilian infrastructure and causing large-scale human suffering. For these reasons, the contention that IHL might not apply would be plausible were it not for the fact that the Bush administration decided to characterize the 9/11 attacks as an act of war. The intellectual authors of the new paradigm engaged IHL by asserting that its applicability is contingent on reciprocity (i.e., that it only applies when fighting an enemy equally bound by its rules), ignoring the fact that the Geneva Conventions are binding on the US military regardless of the nature of the enemy because they are enshrined in the Uniform Code of Military Justice. Thus, one of the legal pillars of the new paradigm was the unfounded argument that the nature of the enemy determines the applicability or inapplicability of law.[3]

The Bush administration launched the war with the ambitious but vague goal of defeating terror, and the AUMF imposed no temporal or geographical limits. The US military as well as the civilian Central Intelligence Agency (CIA)[4] were authorized to wage this war—to capture, detain, interrogate, and kill suspected enemies. Within a

3. In the winter of 2001–2002, Secretary of State Colin Powell protested the errors of this reasoning, but his informed opinion was overridden by the White House (Greenberg and Dratel 2005, 122–25).

4. On September 17, 2001, President Bush signed a Memorandum of Notification authorizing the CIA to engage in kill-or-capture operations.

month of the 9/11 attacks, US special forces and the CIA were operating on the ground in Afghanistan and an international coalition composed of twenty-nine states plus NATO forces had formed to militarily invade the country, with the sanction of the UN Security Council that this was a legitimate war of self-defense. A year later, the Bush administration decided to extend the "war on terror" to Iraq. The March 2003 invasion by a US-led "coalition of the willing," which did not have UN Security Council sanction, succeeded in toppling the regime of Saddam Hussein. But the military occupation, and especially the decision to de-Ba'athify the country by dissolving the public sector including the large Iraqi army (Sissons and Al-Saiedi 2013), generated a violent resistance that created and attracted new enemies, who were interpretatively brought within the scope of the AUMF as "associated forces" of the original enemies.[5] The asymmetric violence in Iraq was compounded by sectarian bloodletting (Rosen 2010).

The Obama administration, which inherited the "war on terror" eight years later, instituted some policy changes, such as canceling the CIA's prerogative to interrogate and detain people, but maintained and further developed the paradigm to rationalize the expanded geographical scope of kill operations against an expanding roster of enemies (Scahill 2013; Revkin 2018) and added the claimed right to extrajudicially execute unindicted citizens abroad (Jaffer 2016). The Obama administration also inherited the overseas detention and military commission systems established by the Bush administration, which the new administration maintained for political reasons. Consequently, the Obama administration defended and solidified the position that US interpretations of the laws of war to detain, prosecute, and kill enemies are legitimate (Koh 2010), even if they deviate significantly from international consensus. The Trump administration has expanded the geography of war even further while loosening some Obama-era limits on drone strikes and commando operations (Savage and Schmitt 2017; see also Koh 2017).

CONCEPTUALIZING COUNTERTERRORISM WAR AS A JURIDICAL FIELD

"Warfare has become a modern legal institution" (Kennedy 2006, 6). Jones argues that the war on terror "serves as a useful starting point to think about more general questions concerning the entwined histories of war and law, their changing character and their complex geographies. Indeed, these post-9/11 years have witnessed an intensification of the relationship between war and law" (2015, 584). While I concur about the significance of the post-9/11 years, the term "intensification" does not capture what is distinctive, internally cohesive, and increasingly autonomous (from IHL) about US warfare in the twenty-first century. Pierre Bourdieu's conception of the "juridical field"

5. The invasions and occupations of Afghanistan and Iraq, rather than achieving the strategic goal of defeating al-Qaeda and "affiliated organizations," contributed to the spread and transmutation of the franchise. Yemen became the hub for al-Qaeda in the Arabian Peninsula. Somalia became the hub for the al-Qaeda-affiliated al-Shabab, Nigeria for Boko Haram, and regions of the Sahara and Sahel for al-Qaeda in the Islamic Maghreb. In occupied Iraq, previously nonexistent links were forged through the establishment of al-Qaeda in Iraq; elements of this group—which included former officers of the Iraqi military—later formed the Islamic State in Iraq and Syria (ISIS), which asserted its independence from al-Qaeda in 2013.

provides a useful heuristic to understand how developments in legal interpretation and warfare have come to constitute a counterterrorism war paradigm.

> The juridical field is the site of a competition for monopoly of the right to determine the law. Within this field there occurs a confrontation among actors possessing a technical competence which ... consists essentially in the socially recognized capacity to *interpret* a corpus of texts sanctifying a correct or legitimized vision of the social world. It is essential to recognize this in order to take account both of the relative autonomy of the law and of the properly symbolic effect of "miscognition" that results from the illusion of the law's absolute autonomy in relation to external pressures. (1987, 817, emphasis in original)

The practice and the function of interpretation—in this context interpreting various bodies of US federal and international treaty-based laws—aim not only to legitimize and "legalize" specific state practices and policies but also to establish that these preferential interpretations become, as Koskenniemi (2004, 199) argues, "the *universal preference*." The need to engage in legal interpretations is reflective of the US state's self-identity as law-minded, and the practical effects that result from interpretations "can be distinguished from naked exercises of power only to the extent that they can be presented as the necessary result of a principled interpretation of unanimously accepted texts" (Bourdieu 1987, 818).

The intellectual authors of the "new paradigm" were animated, in part, by the alleged "quaintness" (Greenberg and Dratel 2005, 81) of the Geneva Conventions. Their interpretative starting point was the assertion that the "old" rules do not apply to this new kind of war, and they set in motion an interpretative process to rethink the legal rights of the state at war against terror. As Bourdieu writes:

> Interpretation causes a *historicization of the norm* by adapting sources to new circumstances, by discovering new possibilities within them, and by eliminating what has been superseded or become obsolete. Given the extraordinary elasticity of texts, which can go as far as complete indeterminacy or ambiguity, the hermeneutic operation of the *declaratio* (judgment) benefits from considerable freedom. It is not rare for the law, as a docile, adaptable, supple instrument, to be obliged to the ex post facto rationalization of decisions in which it had no part. To varying degrees, jurists and judges have at their disposal the power to exploit the polysemy or the ambiguity of legal formulas by appealing to such rhetorical devices as *restrictio* (narrowing), a procedure necessary to avoid applying a law which, literally understood, ought to be applied; *extensio* (broadening), a procedure which allows application of a law which, taken literally, ought not to be applied; and a whole series of techniques like analogy and the distinction of letter and spirit, which tend to maximize the law's elasticity, and even its contradictions, ambiguities, and lacunae. (1987, 826)

The practical effects of this post-9/11 interpretative process included forging new categories of being—specifically, "unlawful enemy combatants" as neither combatants nor

civilians; assigning new meanings to old practices—for example, waterboarding as "not torture" when done by US state agents and contractors; asserting new rationales for violence—such as rebranding extrajudicial execution as a legitimate option in defense of national security and just another warfare tactic that does not abridge the laws of war; and formulating new war crimes by construing acts of terror as violations of military law. These conceptual innovations (and others elaborated in detail below) were done not against but rather *through* law (Perugini and Gordon 2015; Prabhat 2016). "Law is the quintessential form of the symbolic power of naming that creates the things named. . . . It confers upon the reality which arises from its classificatory operations the maximum permanence that any social entity has the power to confer upon another, the permanence which we attribute to objects" (Bourdieu 1987, 838).

I contend that the accumulation of these interpretative innovations and their transnational influence have come to constitute the counterterrorism war paradigm as a juridical field, which has bearing on how scholars might engage with developments in the relationship between law and war. Yves Dezalay and Mikael Madsen suggest that such a "Bourdieusian turn to reflexive sociology basically implies a double historicization (i.e., a historicization of both the object and the academic construction of that object)" (2012, 437). This involves both empirical investigation and analysis of legal constructs and their real-world effects and a critical distancing from law's (and law's official interpreters') pretentions to neutrality, autonomy, and universality. Dezalay and Madsen persuasively argue that

> [t]he concept of "the field" developed by Bourdieu offers a number of heuristic advantages for the study of new and open objects such as those encountered in the context of the globalization of law. The relatively open-ended definition of a field as a network of objective relations provides a broad conceptual ground for analyzing both the social continuities and the construction of new practices. Moreover, this approach emphasizes what is often downplayed in the context of weakly institutionalized international legal practices, namely, social interests and class. The field approach also underscores the generally adversarial nature of social practices and the political and institutional effects of sociolegal struggles over domination. (2012, 439)

Adapting Dezalay and Madsen's argument to the counterterrorism war paradigm as a juridical field, we would substitute military, security, and strategic interests for "social interests" and replace "class" with a more expressly globalized conception of hegemonic and hierarchical political power. The construction of this—like any new—juridical field (Dezalay and Garth 2001; Hagan and Levi 2005; Prabhat 2016) "is historically contingent and, thus, a social product that needs to be analyzed in light of its historical process of construction" (Dezalay and Madsen 2012, 443). Beyond the obvious significance of 9/11, the historical contingency that informs the development of the counterterrorism war paradigm is the elevation of "operational law"—that is, actual military and security operations coupled with and supported by advice and justifications provided by lawyers.

> The raison d'être of operational law is to specify that which cannot be articulated by international law. Operational law transforms international law

> from the abstract and general to the specifics of what is militarily "necessary." The move from international law to operational law is not a neutral or purely technical exercise of rescaling, but rather is a transformation in the form and content of law itself. Therefore, it is important to note that operational law and international law are not the same thing, although operational law is partly informed by international law and both can apply in the same space at the same time. (Jones 2015, 690)

Michael Smith (2014, 152) writes: "Operational legality is fundamentally shaped by strategic considerations; in other words, the mission objectives dictate to a substantial degree what is authorized." According to Jones (2015, 690), operational law—understood as interpretations of law to comport with and support operational/strategic needs and militarized processes—has come to dominate military doctrine in the United States and Israel as well as in the United Kingdom, Canada, and Australia. Paradigmatically, the elevation of operational law "represents the tip of the international law spear, a space far away from the sites and institutes commonly associated with the treaty making of international law—the UN, ICC, or the International Committee of the Red Cross—but nonetheless working on the same project of defining and rewriting the power and purpose of law in war, albeit from a radically different direction" (Jones 2015, 690).

Finally, to support the claim that the construction of a counterterrorism war paradigm has involved not the wholesale disregard for IHL but rather interpretative processes that produce alternative understandings and assertions of what is lawful, we should consider how these interpretative strategies work. Monica Hakimi (2018) identifies four strategies used by lawyers and policy makers. First, *try to settle the law's substantive content*.

> This strategy can work well at a granular level. . . . Many international lawyers try to employ the same strategy at higher levels of abstraction; they try to clarify the law for entire categories of cases. . . . [But n]o one actor or institution has the authority to settle the law, so as long as key participants have fundamentally incompatible positions on the law, the discordance and instability are likely to persist.

Second, *pretend that the law is clear by ignoring conflicting interpretations*, or, more precisely, pretend "that the law is what the person who invokes it wants it to be."

> The United States and its critics have both used this strategy in the context of US lethal operations against suspected terrorists. The United States has consistently claimed that it is in a borderless armed conflict against various jihadi groups and that IHL governs its drone strikes against members of these groups. There is little doubt that IHL applies to US strikes in hot warzones. But recall that there are heated debates about which situations qualify as warzones and the extent to which IHL applies outside of them. As such, the US claim that IHL necessarily governs all of these operations does not accurately reflect the law. The law is more contingent, qualified, and unsettled than that claim admits.

Third, *try to identify common principles* "that cut across the existing international rules on an issue and then to use those principles to inform decisions when none of the rules is directly on point." A fourth strategy, common among those who wish to advance a position critical of official interpretations and/or practices, is to *demand disclosure of information about security operations and their legal rationales*.

> This strategy is often a precursor to . . . holding the state accountable. If we don't know what the state is doing, we can't quite analyze or even argue about whether it is acting lawfully. The strategy is also valuable for something like its own sake. . . . If nothing else, that dynamic invites people to engage critically with and participate in the governance decisions that affect them.

The remainder of this article traces US counterterrorism war policies and their legal justifications in somewhat chronological order because there is an incrementalism to interpretative processes of paradigmatic thinking, policy outcomes, and trajectories of legal/interpretative defense and resistance. The juridical field of the counterterrorism war paradigm was forged through these processes.

THE FIRST PHASE OF COUNTERTERRORISM WAR PARADIGMATIC THINKING

The counterterrorism war paradigm was not cut from whole cloth. Rather, it was built and assembled in a piecemeal manner as the strategic and operational objectives and the policies authorized to achieve those objectives evolved.[6] At the outset of the "war on terror," the original enemies were al-Qaeda, which bore responsibility for the 9/11 attacks, and the Taliban of Afghanistan, which harbored the al-Qaeda leadership and were regarded as complicit in that organization's ability to attack the United States. Although the war in Afghanistan involved a great deal of killing, capture was the original strategic preference because interrogation would serve as the means to elicit actionable intelligence about elusive, unconventional enemies.

Before the armed conflict in Afghanistan had even started and well before any suspects had been captured, Vice President Dick Cheney (who assumed control of the national security portfolio) and other top officials in the Bush administration convinced themselves that the only way to get information from *these* enemies would be through coercive means (Mayer 2008; Khalili 2012). Policymaking was driven by presumptions that conventional interrogation methods were unsuited to this unconventional enemy; that coercive interrogation methods were necessary and that this necessity made them, therefore, legitimate; and that terrorists were essentially rightless and thus could be subjected to any form of violence, whether custodial or lethal, that the executive deemed necessary.

6. According to former NCIS Special Agent Mark Fallon (2017, 20), "[T]he series of legal decisions that would ultimately be used to justify torture unfolded more like an avalanche seen in extra-slow motion: a boulder comes loose at the top of the mountain and begins rolling downhill, leisurely picking up more rocks and stones and boulders as it goes along until the whole mass—which in slow motion looked so much like a geological ballet when it began—suddenly ends up crashing into the valley below in a deafening roar."

The first major building block of the interpretative edifice that would gradually develop into the counterterrorism war paradigm was President Bush's November 13, 2001 military order titled "Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism." The novel legal reasoning that went into this order includes the declaration that any noncitizen detained by the US government in the "war on terror" could be prosecuted under military law in a military commission, and that these individuals would have no right "to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal" (Bush 2001). The first claim, that nonsoldier enemies accused of terrorist acts could be prosecuted in military commissions, was contradicted by the second claim that the laws of war would afford them no rights or remedies. The underlying strategic objective was clear: the government wanted to detain people incommunicado without offering them any avenue to challenge their detention (Hafetz 2011). This claimed right to disappear people was tied to an assumption of infallible security knowledge, namely, that anyone who was detained *was* a terrorist, and this was coupled with an interpretative classification of terrorists as neither prisoners of war nor civilians, who, by this designation, were "outside" the bounds of IHL (Dörmann 2003). Moreover, by asserting that acts of terror are war crimes and by granting military tribunals "exclusive jurisdiction" over these individuals, the president took the first step in US attempts to rewrite the laws of war. The grant of jurisdiction to military commissions was motivated by the desire to eliminate the option to prosecute terrorist crimes in federal courts, with all their due process protections.

In December 2001, the naval base at Guantánamo Bay was designated as the primary facility for long-term military detention and interrogation. In January 2002, the first prisoners began arriving; many of them had been detained in Afghanistan but some had been captured in other countries and turned over to the United States. In February, on the advice of White House and Justice Department lawyers, President Bush "declared" that the Geneva Conventions are inapplicable to "war on terror." The forward-looking objective of this declaration was to immunize officials or other state agents from the possibility of future war crimes prosecutions (relying on the idea of no crime without law). Over the following year, the military commission system authorized by the president in his November 2001 order began to take shape. Military lawyers were selected to serve as defense counsel before any detainees were slated for prosecution.

The CIA's rendition, detention, and interrogation (RDI) program benefited from the territorially unbounded AUMF and the president's order about the rightlessness of enemies, but it ran on a track separate from that of the military. The CIA targeted "high value" people assumed to be top leaders of terrorist organizations and/or to have valuable intelligence about terrorist plans and operations (Soufan and Freedman 2011; Kiriakou and Ruby 2012; Mitchell and Harlow 2016). The first suspected high value detainee (HVD), Abu Zubaydah, was taken into CIA custody in March 2002, and the agency was authorized to begin using the harsh methods that Cheney and others had envisioned in the aftermath of 9/11. The CIA's anxiety about the legality of these methods and the possibility of future prosecutions was the trigger for lawyers in the

Justice Department's Office of Legal Counsel (OLC) to reinterpret federal law to characterize the authorized methods as *not* "torture." Over the following years an estimated 136 people were held by the CIA in total incommunicado detention as "ghost detainees" in overseas black sites. Others who were kidnapped by or turned over to the CIA were "extraordinarily rendered" (i.e., extralegally transferred) to the security services of foreign countries for interrogation (Singh 2013).

LEGAL CHALLENGES TO THE NEW PARADIGM

The paradigmatic aspirations of the president's order to deprive detainees of any rights, including habeas corpus, and to apply military law to prosecute nonmilitary offenses triggered legal challenges by some American attorneys (Greenberg and Dratel 2008; Resnick 2010).[7] Three key cases, which ultimately were decided by the Supreme Court, repudiated some core elements of the president's order. The first, *Rasul v. Bush*, challenged the president's authority to deprive Guantánamo detainees of any right to challenge their detention (Margulies 2006). The *Rasul* decision, issued by the Supreme Court in June 2004, recognized that people in military detention could not be held incommunicado indefinitely, and this cracked open the doors of Guantánamo for lawyers who signed on to serve as habeas counsel (Hafetz and Denbeaux 2011).

The second case, *Hamdan v. Rumsfeld*, was mounted by Lt. Cmdr. Charles Swift, who had been assigned as military defense counsel for one of the first detainees to be charged, Salim Hamdan,[8] and was joined by a team of civilian lawyers who challenged the constitutionality of the military commission system. When the Supreme Court decided *Hamdan* in June 2006, not only did it rule that the commission system was unconstitutional because it had been created by presidential fiat, it also ruled that Common Article 3 of the Geneva Conventions applies to all people detained by the United States—whether in custody of the military or the CIA.

In the third case, *Boumediene v. Bush*, the Supreme Court ruled in June 2008 that because the United States maintains de facto sovereignty over Guantánamo, the constitutional right to habeas corpus extends there (Hafetz 2011). However, *Boumediene* was limited—interpretatively and practically—to detainees held at Guantánamo, not at Bagram (in Afghanistan) or other overseas US detention facilities.

Had the Court's rulings in these three cases stood uncontested, the new paradigm may have come undone. However, that is not what transpired. Following *Rasul*, the Bush administration established Combatant Status Review Tribunals (CSRTs) in an attempt to prevent habeas cases from moving into federal courts. Lawyers representing detainees were barred from participating in or assisting their clients in the CSRTs,

7. Legal challenges to state security policies have been termed "lawfare," a neologism combining "law" and "warfare" (Horton 2010; Gordon 2014; Jones 2016; Hajjar 2017, 2018b).

8. Hamdan, a Yemeni who had gone to Afghanistan to find work and had been employed as al-Qaeda leader Osama bin Laden's driver, was one of the first Guantánamo detainees to be charged by the military commissions because he had agreed to a plea bargain and the Pentagon was seeking a quick conviction to boost the image of the commissions as an effective venue.

which were manned by panels of soldiers.[9] To provide some context for subsequent developments, two months prior to the *Rasul* decision, on April 28, 2004, shocking photos from the Abu Ghraib prison in Iraq were published along with a leaked investigative report by Gen. Antonio Taguba concluding that "wanton" and "systematic" abusive practices authorized for Afghanistan and Guantánamo had migrated to Iraq (Hersh 2004). Over the following months, some of the legal and policy documents produced by government lawyers and officials to authorize incommunicado detention and coercive interrogations became public. These "torture memos" exposed the legal interpretations undergirding the new paradigm and validated the conclusions of Taguba's scathing report that abuses were systemic (Jaffer and Singh 2007).

Yet the torture scandal of 2004 did not trigger a reversal of policy. On the contrary, the Bush administration doubled down, blaming the abuses depicted in the photos at Abu Ghraib on "bad apples" to deflect chain-of-command responsibility while defending the authorization of custodial violence as effective and necessary in the quest for actionable intelligence. As more information about US torture flowed into the public domain through journalistic exposés and human rights reporting, the government's denial strategies (Cohen 2001) shifted from "literal denial"—we don't torture—to "euphemistic denial"—what we do is not "torture." Official denials were fortified by the refusal to authorize a thorough top-down investigation of the interrogation and detention policies and the portrayal of critics as "soft on terror."

At this pivotal juncture, we see the juridical field taking shape as "the site of a competition for monopoly of the right to determine the law" (Bourdieu 1987, 817). In the summer of 2005, Senator John McCain, a torture survivor from the Vietnam War and a member of the Senate Armed Services Committee, became concerned that the authorization of interrogation and detention practices that violate military law was creating disorder and confusion among the ranks and would leave soldiers vulnerable to court-martial. He introduced legislation, known as the McCain Amendment, that would ban all "cruel, inhumane and degrading" treatment of detainees. The amendment set the US Army Field Manual as the standard for any US interrogators. However, Cheney lobbied the Republican-controlled Congress to at least insert a "CIA exception," which it did. The McCain Amendment passed by an overwhelming majority of 90 to 9. At the same time, however, McCain supported legislation introduced by Senator Lindsey Graham, the Detainee Treatment Act (DTA) of 2005, which incorporated language to deny "non-citizen terrorists" in US custody any access to US courts. This legislation was designed to circumscribe the habeas protections of the *Rasul* decision as well as to foreclose any avenue for judicial enforcement of the ban on cruel treatment.

In terms of paradigmatic significance, these developments between 2004 and early 2006 reined in the military's prerogatives to hold prisoners incommunicado and to

9. The CSRTs were authorized to assess the government's evidence against detainees (including statements elicited through coercive means) to decide whether they could continue to be imprisoned without trial or could be deemed "no longer" unlawful combatants and released. Out of nearly six hundred CSRT hearings conducted between August 2004 and January 2005, 95 percent of prisoners were found to be properly classified as enemy combatants. In stark contrast, when the habeas cases finally began making their way before federal judges, the courts found in the vast majority of the cases that there was no justification for the detention.

engage in interrogation and detention practices that violated the Army Field Manual. However, legislative pushback against cruel and inhumane treatment was compromised by the DTA's jurisdiction stripping to deprive detainees of any remedies for gross violations of international law. Moreover, the political compromise preserving the CIA's prerogative to continue its own torture program reinforced at least part of the underlying logic of the new paradigm, namely, the inapplicability of law to the treatment of people in CIA custody and the continuation of their status as disappeared in black sites. It should be noted that one of the first substantive setbacks for the CIA's program was the result of a November 2005 report by the *Washington Post* that the agency was running black sites in European countries (Priest 2005), subsequently revealed by Human Rights Watch to be Poland, Lithuania, and Romania. These revelations forced the CIA to move ghost detainees off the continent. A 2006 investigative report by the Council of Europe proved that the CIA had engaged in one hundred kidnappings in Europe, and a 2007 European Parliament report exposed collusion by some European countries' security services with the agency's torture program.

THE PARADIGM SHIFTS

The 2006 *Hamdan* decision limited the government's interrogation and detention prerogatives, which led to a broader shift in strategic objectives and operations from capture to kill. The Supreme Court's *recognition* that Common Article 3 is binding, customary law that extends to all detainees in US custody and that violations are war crimes forced the Bush administration to stop the CIA's black site operations. At a press conference on September 6, 2006, Bush publicly acknowledged the existence of black sites and his authorization of "alternative" and "enhanced" interrogation tactics, which—nodding to the interpretative labor of government lawyers—he characterized as "tough," "safe," "lawful," and "necessary." He announced that fourteen HVDs, including the alleged 9/11 planner Khalid Sheik Mohammad, who had been in CIA custody since 2003, were being transferred from black sites to Guantánamo.

The other major elements of the *Hamdan* decision produced a decidedly different outcome. To counter the Supreme Court's ruling that the presidentially created military commissions were unconstitutional, in October 2006 Congress passed the Military Commissions Act (MCA), which reconstituted the commissions and gave legislative sanction for the use of hearsay and of evidence elicited through coercive means. The MCA also provided ex post facto immunity (back to 1997) for any US officials and state agents who violated the Geneva Conventions to block future accountability under the federal War Crimes Act. Finally, the MCA reinforced the jurisdiction stripping of the DTA.

The MCA's legislative entrenchment of a "right to torture"—a right to rely on tortured statements for prosecutions and continued detentions and to immunize state agents who engaged in, authorized, or abetted torture from accountability—was never undone, and this, more than the previous authorization of torture itself, was paradigmatically significant because it sanctioned legal impunity for torture, which is a flagrant violation of IHL, and it deprived victims of any recourse. Moreover, the combination of continuing secrecy about interrogation and detention past and present, and political

defenses of the efficacy and necessity of "enhanced interrogation methods," the preferred euphemism for torture, contributed to a shift in public opinion toward greater support or acceptance for the use of custodial violence (Greenberg 2006; Gronke et al. 2010; Parry 2016).

THE PARADIGMATIC SIGNIFIGANCE OF REWRITING THE LAWS OF WAR

Some of the interpretative moves that constituted the first phase (2001–2006) of the counterterrorism war paradigm—foremost, the prerogative to torture and the wholesale inapplicability of IHL—did not survive the *Hamdan* ruling. What did survive, thanks to the MCA, was the assertion that foreigners accused of terrorist acts could be prosecuted in military commissions (Bravin 2013). To these ends, the MCA reinterpreted the laws of war to codify material support for terrorism and conspiracy as punishable offenses in military commissions to provide a patina of legitimacy for the cases the government planned to prosecute. Thus, the second phase of counterterrorism war paradigmatic thinking involved the interpretative fabrication of new military law offenses whose novelty was captured by the oxymoronic label "domestic humanitarian law" (Deeks 2013).

As Bourdieu suggests, "the practice of interpretation of legal texts is theoretically not an end in itself. It is instead directly aimed at a practical object and is designed to determine practical effects . . . " (1987, 818). The first case involving these congressionally invented war crimes involved an Australian citizen named David Hicks who had been captured in Afghanistan. Hicks agreed to a politically negotiated plea bargain in 2007 that was pushed through by Cheney to support Australia's Prime Minister John Howard, who was running for reelection and needed to demonstrate to his citizens that he was doing something to get Hicks out of Guantánamo.

When Hamdan was charged, his lawyers again tried to fight the commissions, but the Supreme Court declined to hear challenges to the MCA. Because Hamdan did not accept a plea bargain, his case went to trial. When the pretrial hearings commenced in February 2008, his lawyers moved to have the case dismissed on the grounds that the activities for which he was charged were not crimes under military law *at the time of his capture*, and thus violated the ex post facto clause of the Constitution. That challenge failed. At Hamdan's trial, which was the first to be litigated in the commissions, torture, inevitably, was an issue. Former chief prosecutor Col. Morris Davis—who had quit to protest political interference in the commissions, testified for the defense; he criticized the government for pursuing cases using tortured and other unreliable forms of evidence. In his ruling on defense motions to suppress Hamdan's self-incriminating statements, the judge, Capt. Keith Allred, agreed to exclude those from the Bagram prison in Afghanistan but not those from Guantánamo, despite the fact that at the latter Hamdan's abusive treatment included fifty days of sleep deprivation. Hamdan was found guilty of providing material support for terrorism but was acquitted of conspiracy charges. His five-and-a-half-year sentence included time served (he was captured in 2001), and five months later he was repatriated to Yemen. In reprisal for this sentencing outcome, Congress subsequently eliminated time served as an option for individuals

found guilty in military commissions. Thus, we can see this case from start to aftermath as "a paradigmatic staging of the symbolic struggle . . . in which differing, indeed antagonistic world-views confront each other" (Bourdieu 1987, 837).

The third and final military commission case during the Bush years was that of Ali al-Bahlul, an unrepentant al-Qaeda propagandist who had made recruitment videos glorifying jihad and urging attacks on US targets. He was charged with conspiracy, providing material support for terrorism, and solicitation of murder (another fabricated war crime). Al-Bahlul boycotted his trial, was found guilty, and was given a life sentence; he remains incarcerated at Guantánamo.

The MCA mandated that every guilty verdict would automatically go through an appeal process at the Court of Military Commission Review, following which either party could further appeal to the US Court of Appeals for the District of Columbia Circuit (DC Circuit Court). The *Hamdan* and *al-Bahlul* cases—the first to reach the appeals phase—generated a muddle of conflicting federal court rulings, evincing interpretative disputes that constitute a juridical field in the making. In October 2012, the DC Circuit Court vacated Hamdan's conviction for providing material support for terrorism, ruling that "consistent with Congress's stated intent and so as to avoid a serious ex post facto clause issue, we interpret the Military Commissions Act of 2006 not to authorize retroactive prosecution of crimes that were not prohibited as war crimes triable by military commission under U.S. law at the time the conduct occurred." In July 2014, the DC Circuit Court also struck down al-Bahlul's convictions for providing material support and solicitation of murder for the same reason, while remanding the conspiracy conviction to the Court of Military Commission Review, which upheld it. Upon appeal, the DC Circuit Court ruled that al-Bahlul could not be convicted of conspiracy for activities that took place prior to the 2006 MCA. The three-judge panel challenged Congress's "constitutional authority to add conspiracy to the internationally recognized war crimes list that may be tried by military commission" (Eachambadi 2017). That decision was appealed by the government and overturned in a split decision by an en banc panel whose majority concluded that "the 2006 MCA is unambiguous in its intent to authorize retroactive prosecution for the crimes enumerated in the statute—regardless of their pre-existing law-of-war status" (Belczyk 2014). In October 2017, the Supreme Court denied certiorari, thus preserving the decision that the fabrication of war crimes is a legitimate legislative prerogative.

THE OBAMA ADMINISTRATION'S CONTRIBUTIONS TO THE PARADIGM

As a senator, Barack Obama was a vocal critic of Guantánamo and he voted against the 2006 MCA. The day after he was sworn in as president in January 2009, he issued three executive orders, one requiring that all interrogations must adhere to the 2006 (revised) *Army Field Manual for Human Intelligence Collector Operations* and canceling the CIA's authority to engage in interrogation and detention operations, a second promising to close Guantánamo within one year, and a third suspending the military commissions. Over the following months, however, he made a sharp about-face on the matter of the commissions.

On May 21, 2009, Obama delivered a major speech on security and legal issues at the National Archives. He used the occasion to rebut partisan criticisms of his cancellation of the torture program,[10] as well as to explain to the nation the "legal mess" he had inherited from the previous administration and the challenges of dealing with detainees who remained at Guantánamo.[11] He announced that those charged with acts of terrorism that are proscribed by federal law would be prosecuted in federal courts, while others accused of war crimes would be prosecuted in the military commissions, thereby rescinding his January suspension. But he promised to reform the commissions to exclude evidence elicited through torture or cruel, inhumane, and degrading treatment, and indeed, a revised MCA was passed by Congress and signed into law in October 2009; however, the 2009 MCA did not eliminate the ex post facto immunity for war crimes in the 2006 version. The toughest problem, according to Obama, was what to do with detainees who cannot be prosecuted (for lack of court-worthy evidence) but who also cannot be released because they might continue to pose a security threat. He suggested that some arrangement for permanent detention without trial was being considered. Several months later, his administration decided not to propose new legislation but rather to follow its predecessor in claiming that in passing the AUMF Congress had endorsed indefinite detention; this was further confirmed in the 2010 National Security Strategy.

The Obama administration's plan to prosecute five Guantánamo detainees for the 9/11 attacks in federal court crashed on the shoals of domestic politics by the end of 2009 (Mayer 2010),[12] leaving the military commissions as the only option and derailing plans to close Guantánamo. Obama came to own the legal mess he had inherited, and his administration advanced the interpretative project of rewriting of the laws of war.

The first person to be prosecuted in the military commissions under the Obama administration was Omar Khadr, a Canadian citizen who was fifteen years old when he was captured in Afghanistan in July 2002 and sixteen when he was transferred to Guantánamo. The paradigmatic significance of the Khadr case cannot be overstated. The three most significant issues were: the legitimacy of prosecuting a person for war crimes who was a child at the time of arrest; the validity of government evidence that the defense contended was derived from torture; and the acceptability of fabricated war crimes. Khadr was charged with murder in violation of the laws of war for allegedly throwing the grenade that killed Special Forces Sgt. Christopher Speer during a firefight in Afghanistan. He was also charged with attempted murder for allegedly making improvised explosive devices that might have been planted along Afghan roads to

10. On the same day, former Vice President Cheney (2009) gave a speech at the American Enterprise Institute in which he reiterated his criticism of the Obama administration's cancellation of the torture program and his claims that the use of "enhanced interrogation methods" had "prevented the violent death of thousands, if not hundreds of thousands, of innocent people."

11. At its peak, Guantánamo had held 780 detainees. By the end of the Bush administration, 532 had been transferred out.

12. The only person transferred from Guantánamo for prosecution in federal court was Ahmed Khalfan Ghailani, who was charged for his role in the 1998 East Africa embassy bombings. Although Ghailani was convicted and given a life sentence, the fact that the judge excluded tortured evidence elicited by the CIA and that he was acquitted of 284 of the 285 charges against him exorcised opponents of federal trials for terror suspects and reinforced demands that the military commissions be the only venue for such trials.

attack US and allied forces. However, even if Khadr did throw the grenade that killed Sgt. Speer, a soldier is not a "protected person" in the context of battle under IHL and therefore such killing is not an internationally recognized war crime. If Khadr was prosecutable for this killing because he was an "unprivileged belligerent" (the Obama administration's semantic alteration of "unlawful enemy combatant"), by the same measure CIA agents, who are nonmilitary and thus unprivileged, could be charged by a foreign government with murder in violation of the laws of war for operating killer drones. As the case against Khadr was being developed, the State and Defense Departments disagreed over this issue. State argued in favor of restoring the US position to the pre-9/11 interpretation of IHL to rectify the contradictions and bring the US position back into line with international consensus. Had State prevailed, the Pentagon would not have had grounds for pressing charges against Khadr in the military commissions. Thus, the Obama administration contributed to rewriting the laws of war, in part, to prosecute Khadr (Glazier 2010).

During the pretrial phase of Khadr's trial, the judge, Col. Patrick Parrish, refused to exclude any of the statements Khadr had made at either Bagram or Guantánamo, despite the presentation of abundant evidence of torture. The broader implication of this decision in the "posttorture" era is that the responsibility to determine whether someone was tortured, what constitutes torture, and whether, if torture occurred, it would invalidate government evidence now falls squarely on the shoulders of military commission judges. In October 2010, Khadr pled guilty to all the charges in a complex deal that involved continued imprisonment at Guantánamo for part of his sentence and then repatriation and further imprisonment in Canada.

THE PARADIGMATIC SIGNIFICANCE OF UNACCOUNTABILITY FOR TORTURE

While President Obama is justly credited for ending the torture program, his decision not to prosecute those responsible for this gross crime—essentially, to immunize them through inaction (Human Rights Watch 2011)—was another contribution to the development of the counterterrorism war paradigm. Obama justified this refusal to pursue justice with the facile mantra that it was time for the nation to "look forward, not backward." Critical to his decision were the torture memos produced by government lawyers of the previous administration because, he maintained, those who had authorized or engaged in torture had thought or been told that what they were doing was "legal" and therefore they had "acted in good faith." Thus, Obama gave these memos the very "golden shield" power their authors had intended. Moreover, the Obama administration, like its predecessor, utilized diplomatic pressure to thwart the pursuit of justice and accountability for US torture in other venues, mainly in Europe (Hajjar 2010, 2012b), thus imposing the counterterrorism war paradigm on countries that did not subscribe to its logic and would have wanted to enforce the law and fulfill their commitments to IHL. This is the kind of "hegemonic international law" behavior that Alvarez (2003) and Koskenniemi (2004) describe.

The cancellation of the CIA's torture program did not negate its existence, for the past cannot be expunged. However, that past was kept hidden from the public through

the Obama administration's resolute defense of the classified nature of the now-defunct program. This secrecy has contributed to the misconceptions or ignorance of both American politicians and the public about the illegality, ineffectiveness, and strategic costs of torture (Johnson, Mora, and Schmidt 2016). This preservation of secrecy also has severely retarded progress in military commission cases against people previously held and tortured by the CIA. These individuals are literally the embodiment of classified crimes of state because their own memories of what was done to them are treated as state secrets by the government (Hawkins 2013). They cannot communicate their truths to anyone who does not have top security clearance and some direct, authorized relation to the military commissions. And even those who do, notably their defense teams, are gagged from ever speaking about it publicly or from telling their clients anything that is classified, including about themselves.

The military commission case against Khalid Sheikh Mohammad and four other individuals accused of responsibility for the 9/11 attacks as well as the now-stalled case against 'Abd al-Rahim al-Nashiri, who is accused of orchestrating the 2000 bombing of the USS Cole off the coast of Yemen, have dragged on for years in the pretrial phase (on Nashiri, see Vladek 2018). This drag is largely due to the government's prioritized commitment to keep the CIA's secrets secret (Hajjar 2014, 2018a). Consequently, every witness and every piece of evidence pertinent to the capture, interrogation, and conditions of detention of those on trial must be litigated, putting the government's determination to preserve secrecy in direct conflict with due process.

The most comprehensive investigation of the CIA's RDI program was launched in March 2009 by the Senate Select Committee on Intelligence (SSCI). The committee reviewed over six million pages of the agency's own documents about what had been done to people in black sites and what kinds of intelligence the program produced. The report, which was completed in December 2012, delivered four general and significant findings: (1) the CIA's "enhanced interrogation techniques" were ineffective in producing accurate intelligence; (2) the CIA provided extensive inaccurate information about the operation of the program and its effectiveness to policy makers and the public; (3) the CIA's management of the program was inadequate and deeply flawed; and (4) the program was far more brutal than the CIA represented to the legislators charged with oversight. Because these findings were so condemnatory, the CIA opposed release of the SSCI report. Over the next two years, a battle between Congress and the CIA over the fate of the SSCI report ensued (Ackerman 2016a, 2016b, 2016c), during which the White House de facto sided with the agency by resisting calls to make it public. Finally, in December 2014, a heavily redacted 525-page executive summary was released, while the body of the six-thousand-plus-page report remains classified.

Although the SSCI investigation enjoyed bipartisan support when it began, by the time the report was completed, many Republican senators, including Richard Burr, who took over as chair of the SSCI in 2010, had become opponents of it, thus turning this authoritative account of a grim chapter of US history into a partisan issue. As Obama's second term was nearing its end, Republican leaders announced their plan to have every copy of the SSCI report destroyed. They succeeded in their request to have most copies that had been sent to executive branch departments returned to the committee unopened. During his last days in office, Obama ordered that his copy be preserved in the presidential archives, but he ordered that it should remain classified and access

to it restricted for the maximum time allowed by law: twelve years. Meanwhile, access to the report for the defense lawyers in the 9/11 cases in the military commissions continues to be litigated.

These accumulated events and developments operating to deny and obstruct accountability for the crime of torture and to prevent public access to information about its illegality and adverse effects on national security serve, functionally, to preserve the *legitimacy* of torture within the United States, thus fortifying the counterterrorism war paradigm. This legitimacy was vividly demonstrated during the 2016 election season when Republican candidate Donald Trump ran for president and won on a platform that included a pledge to resurrect the torture program. Beyond the domestic implications of this legitimization of torture, the record of governmentally enforced unaccountability has adverse paradigmatic significance for antitorture norms and the enforceability of international law on a global scale.

THE PARADIGMATIC SIGNIFICANCE OF TARGETED KILLING

The arming of unmanned aerial vehicles (i.e., drones) in 2001 coincided with the start of the "war on terror." While the CIA had been operating surveillance drones over Afghanistan since 2000, on September 18, 2001, the day after President Bush authorized the agency's new kill-or-capture mission, they sent an armed Predator, launched from Uzbekistan, into Afghan airspace in search of al-Qaeda leader Osama bin Laden and other 9/11 plotters. The first drone strike in Afghanistan occurred in February 2002, targeting a group of people whose identities were unknown but that included a "tall man" who was thought to be, possibly, Osama bin Laden; he was not (Sifton 2012).

The first targeted killing operation outside of Afghanistan occurred on November 3, 2002, when a CIA-operated Predator launched from a base in Djibouti shot a Hellfire missile into a car carrying six people in a rural area of Yemen. This domestic self-licensing of the claimed right to execute individuals outside of the context of combat and not on any battlefield in a literal sense, not to mention in a country where the United States is not officially at war, signaled another new policy option for this counterterrorism war. The target of that operation was Qa'id Salim Sinan al-Harithi, alleged to have been involved in the 2000 bombing of the USS Cole (Hersh 2002). One of the other dead passengers, Kamal Darwish, was a US citizen whose killing was deemed collateral damage because he was not the target. Afterward, officials justified the operation as a legal military option under the AUMF because al-Harithi was a suspected member of al-Qaeda and because his arrest was not possible. However, the UN Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions (2003, para. 37) concluded that the Yemen strike was illegal because it "constitutes a clear case of extrajudicial killing."

To put the policy of targeted killing into broader context of the developing counterterrorism war paradigm, one must consider interpretative moves that have led to a vanishing battlefield. Frédéric Mégret (2012, 135) argues that it is necessary to appreciate "just how radical the War on Terror's impact on the structuring concepts of the laws of war is. The War on Terror essentially combines all the deconstructing effects that have taken their toll on the idea of the battlefield in the 20th Century,

to the point of making it barely recognizable." Further, "there is no doubt that a deliberate attempt [by the US government] to manipulate what constitutes the battlefield and to transcend it in ways that liberate rather than constrain violence has been at the heart of the response to the terror attacks of 9/11."

Throughout Bush's two terms in office, he approved approximately fifty drone strikes, most in Pakistan and conducted by the CIA (Mayer 2009, 38). Until mid-2006, capture for interrogation and detention remained the primary strategic objective. The *Hamdan* decision decisively limited interrogation options, and this diminished the strategic appeal of capture and detention. Following the transfer of the fourteen HVDs from CIA custody to Guantánamo in September 2006, only one other person was sent to that facility, in 2008. After *Hamdan*, targeted killing supplanted detention to become the primary strategic and operational preference for the "war on terror." In Bush's last year in office, there was a 94 percent increase in drone strikes over the year before (Shachtman 2009). After Obama took office, targeted killing by the CIA and the military's Joint Special Operations Command (JSOC), each running on separate tracks and pursuing its own list of targets, escalated dramatically in terms of the number of strikes per month and the geographic scope that soon extended to countries in East and North Africa and the Pacific (Alston 2011; McKelvey 2011; Cline 2013).

On January 27, 2010, the *Washington Post* reported that at least three citizens had been designated for extrajudicial execution (Priest 2010). One name on the list was Anwar al-Awlaki, an American-born Muslim cleric who had moved to Yemen and was described by the government as a leader of al-Qaeda in the Arabian Peninsula (Johnsen 2013). The revelation that US citizens were on a government kill list raised new questions and criticisms about this highly secretive program. Obama administration officials were dispatched to make public statements about the legality and efficacy of targeted killing in general terms while maintaining that the planning and conduct of such operations are classified (Anderson 2012). For example, State Department Legal Advisor Harold Koh, who had criticized drone strikes as extrajudicial killings prior to joining the Obama administration (McKelvey 2012), extolled their legality during his time in office. In a speech to the American Society of International Law, Koh (2010) stated: "[I]n this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks."

The most celebrated targeted killing operation occurred on May 1, 2011. In a joint CIA-JSOC operation, a team of Navy Seals raided the compound in the outskirts of the central Pakistan town of Abbottabad where Osama bin Laden was hiding and killed him. Most law of war experts endorsed the legality of this operation because bin Laden was regarded as a legitimate military target (Hajjar 2012a). Five days later, the United States launched a drone strike targeting al-Awlaki in Yemen, which failed to kill him. However, on September 30, a joint CIA-JSOC drone strike killed al-Awlaki and another US citizen, Samir Khan, along with two others. As Obama had done after the killing of bin Laden, he made a public address declaring that this lethal attack had dealt a "major blow" to al-Qaeda. Two weeks later, another drone attack in Yemen killed al-Awlaki's sixteen-year-old son 'Abd al-Rahman, his son's teenage cousin, and five others while they were dining in an open-air restaurant.

On October 8—between the killings of the two al-Awlakis—the *New York Times* published an exposé (Savage 2011) about the contents of a secret OLC memo to the Defense Department that had been authored in 2010. The *Times* reported that the legal analysis "concluded that Mr. Awlaki could be legally killed, if it was not feasible to capture him, because intelligence agencies said he was taking part in the war between the United States and Al Qaeda and posed a significant threat to Americans, as well as because Yemeni authorities were unable or unwilling to stop him." Critics pointed out that reliance on the forward-looking principle of imminence, which was key to the justification for killing al-Awlaki, was contradicted by the fact that the OLC's 2010 memo appeared to be a standing order of execution.

Although targeted killing became the strategic and operational centerpiece of the Obama administration's counterterrorism war and was politically popular domestically, the legality of the drone program was by no means settled (Strawser 2014; Chamayou 2015). Attorney General Eric Holder delivered a national security speech (2012) in which he addressed critics of the targeted killing policy and the execution of al-Awlaki:

> Some have called such operations "assassinations." They are not, and the use of that loaded term is misplaced. Assassinations are unlawful killings. . . . [T]he US government's use of lethal force in self defense against a leader of al Qaeda or an associated force who presents an imminent threat of violent attack would not be unlawful. . . . Some have argued that the president is required to get permission from a federal court before taking action [against a citizen]. . . . This is simply not accurate. "Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.

The *New York Times* (Becker and Shane 2012) and the *Daily Beast* (Klaidman 2012) published exposés revealing details about this ostensible "due process." According to the *Times*, "Mr. Obama has placed himself at the helm of a top secret 'nominations' process to designate terrorists for kill or capture, of which the capture part has become largely theoretical." Both articles describe "personality strikes," which target specific individuals, and "signature strikes," which target "groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren't known." Both articles also explain the administration's method for deflecting criticism of civilian casualties by counting all military-age males in a strike zone as combatants "unless there is explicit intelligence posthumously proving them innocent" (Becker and Shane 2012). This assertion or assumption that anyone killed *is* a terrorist or militant (unless posthumously cleared) and that the killing itself, even if done remotely, *is* a military "engagement"[13] is clearly reflected in the term used to describe casualties: "enemy killed in action" (Devereaux 2015; see also Junod 2012; Heller 2013). This kind of executive assurance and unchecked power to execute people and claim each killing a "war on terror" victory is a paradigmatic continuation from the early Bush years when

13. According to a Justice Department white paper dated November 8, 2011, "*Any* US operation against al-Qaeda or its affiliates . . . would be part of an armed conflict, even if it were to take place away from the zone of active hostilities" (cited in Jaffer 2016, 171).

anyone detained *was* a terrorist or militant who, the government claimed, had been "taken off the battlefield."[14]

Part of the paradigmatic significance of the targeted killing policy as it developed during the Obama administration is the asserted right to engage in extrajudicial executions as a matter of law, to insist that the program is legitimately classified and that drone strikes are "surgical" and "precise" despite evidence of significant civilian casualties (Cavallaro, Sonnenberg, and Knuckey 2012; Human Rights Watch 2013; Ackerman 2014a; Serle 2014; Kahn and Gopal 2017). The official line about targeted killing has tended to emphasize a common set of points: these operations constitute a legitimate form of national self-defense and therefore comport with the laws of war; using drones for remote killing operations is just another way of waging war; the AUMF permits the waging of this geographically unbounded war; the intelligence upon which targeting decisions are based, while entirely secret, is reliable;[15] and national security is enhanced through these operations. The grounding justification is that drones are a technological asset used judiciously to thwart *imminent threats*. Indeed, every government has a right to defend itself and its citizens against an imminent threat. In this context, however, official assessments of both the imminence and the detailed nature of a threat are classified. According to a Justice Department white paper about the drone program that was leaked to NBC News (Isikoff 2013), the government reinterpreted the meaning of imminence to liberate itself from the requirement that lethality be a last option: "The condition that an operational leader present an 'imminent' threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future." Even by this expanded definition, the escalating number and geographical widening of strikes would suggest that if the government's justification for each strike is accurate, threats of an imminent nature are on the rise, thus begging the question of how effective drone warfare is in achieving the stated strategic objective of degrading and destroying terrorist organizations.

In a second major national security speech on May 23, 2013, at the National Defense University, Obama addressed the policy of targeted killing. He announced that his administration was institutionalizing clearer standards and procedures, although the details would remain classified (Savage and Baker 2013). One such standard was the "near certainty" requirement that no civilian bystanders would be killed, and another was that targets should pose a "continuing and imminent threat." He also announced the plan to shift control of most drone strikes from the CIA to the military to serve his

14. This taken-off-the-battlefield claim was a gross exaggeration; according to a study conducted by professors and students at Seton Hall Law School (Denbeaux et al. 2006) and using Department of Defense records, only 5 percent of people detained at Guantánamo had been captured by US forces, whereas 86 percent were arrested by either Pakistan or the Northern Alliance (Afghanistan) and turned over to the United States. See also Worthington (2007).

15. The National Security Agency (NSA) global metadata surveillance program feeds the practice of targeted killing by providing information about the cell phones of JSOC and CIA targets. "[T]he NSA 'geolocates' the SIM card or handset of a suspected terrorist's mobile phone, enabling the CIA and US military to conduct night raids and drone strikes to kill or capture the individual in possession of the device" (Scahill and Greenwald 2014). Such targeting of phones rather than people amounts to "death by metadata" and has contributed to civilian casualties.

administration's goal of deparamilitarizing the civilian agency. That shift, however, was opposed by the CIA and blocked by Congress (Miller 2014).

The new standards and procedures put forward in the Presidential Policy Guidance (White House 2013) exemplify the interpretative labor that goes into trying to present targeted killing—as carried out by the United States—as legal. When Donald Trump took office in 2017, he inherited the counterterrorism war paradigm in which targeted killing is the strategic and operational centerpiece. In a security policy speech on August 21, 2017, Trump stated: "The killers need to know they have nowhere to hide, that no place is beyond the reach of American might and American arms. Retribution will be fast and powerful" (Davis and Landler 2017). The *New York Times* reported that the Trump administration would institute changes "primarily aimed at making much of the 'bureaucracy' created by Mr. Obama's 2013 rules . . . 'disappear'" (Savage and Schmitt 2017). Specifically, the Trump administration relaxed the rule limiting targeting to high-level militants who are deemed to pose a continuing and imminent threat and eliminated the high-level vetting process in order to give JSOC and the CIA a freer rein. This "disappearing" of rules and restrictions could be regarded as an assertion that the rules themselves are not legal—or at least not legally binding, or, depending on whether the Trump administration even bothers to engage in interpretative labor, that it is unnecessary to cultivate the appearance of the legality of the program at all (Koh 2017).

LEGAL CHALLENGES TO TARGETED KILLING

The unsettled and contentious legality of US targeting policies even as the practice continues to escalate and geographically expand exemplifies the interpretative disputes that transpire in a juridical field (Haque 2018a). These disputes include litigation; targeted killing has been the focus of a handful of cases to challenge the state's right to engage in what opponents regard as extrajudicial executions. Unlike the Bush-era cases pertaining to interrogation and detention in which landmark Supreme Court rulings clipped some of the government's asserted prerogatives, US courts thus far have avoided rendering authoritative rulings that address the question of whether targeted killing is legal—but also have not ruled that it is illegal.

The first legal challenge followed the *Washington Post* revelation that US citizens were on a kill list. The American Civil Liberties Union (ACLU) and the Center for Constitutional Rights (CCR) brought a case against the government on behalf of Nasser al-Awlaki to challenge the president's authority to extrajudicially execute a citizen—his son Anwar. On December 7, 2010, the court dismissed the case on grounds that the senior al-Awlaki lacked standing because the government was not trying to kill *him*, noting that the legality of the drone program is a "political question" that falls under the purview of the executive branch and Congress.

The following year, after Anwar al-Awlaki, his teenage son 'Abd al-Rahman, and Samir Khan were killed, the ACLU and CCR filed a civil suit on behalf of Nasser al-Awlaki and Sarah Khan (mother of Samir) against four officials who were atop the chain of command at the time of the strikes. The citizenship status of the three dead Americans provided the opening to seek judicial review for deprivation of life

without due process. This civil litigation marked the first attempt to adjudicate the meaning of "direct participation in hostilities" and "imminent threat" in relation to the policy of targeted killing. (In 2006, the Israeli High Court of Justice had issued a ruling in *Public Committee against Torture in Israel v. Government of Israel* (HCJ 769/02 (2006) (Isr.)) that raised similar questions, finding that Israel's policy was legal—or not per se illegal—as long as the practice comported with IHL principles of proportionality and distinction.) On April 4, 2014, the court, deferring to the government's national security arguments, dismissed the case, finding that the victims' constitutional rights were not violated but leaving the juridical questions unanswered. The petitioners decided not to appeal because they deemed the pursuit of justice in US courts to be futile.

A second avenue of litigation relating to targeted killing is Freedom of Information Act lawsuits to publicize information about the program—including the most basic yet classified aspect, targeting criteria—and intelligence reports produced prior to and following individual strikes. These cases demonstrate the fourth interpretative strategy identified by Hakimi (2018) to demand disclosure of information about security operations and their legal rationales. After the operations that killed the al-Awlakis and Khan, the ACLU sued the government for records and materials related to the listing or killing of citizens. That case was joined with a *New York Times* lawsuit seeking similar information. On January 3, 2013, the District Court for the Southern District of New York dismissed the case, albeit with some judicial hand-wringing:

> [T]his Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents . . . , and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. . . I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret. (*New York Times Co. v. U.S. Dep't of Justice*, 915 F. Supp. 2d 508, 515–516 (S.D.N.Y. 2013))

However, the following year, the Second Circuit Court of Appeals overturned the district court's decision to dismiss the case, reasoning that officials had made so many statements about the legality of the program that it amounted to a waiver of classification for the OLC memo that provided the legal rationale to kill Anwar al-Awlaki. In July 2014, when the memo was finally released, the eleven-page section laying out the intelligence community's assessment of al-Awlaki's role in relation to terrorism remained redacted in its entirety (Jaffer 2014). According to the editorial board of the *New York Times* (2014): "[T]he memo turns out to be a slapdash pastiche of legal theories—some based on obscure interpretations of British and Israeli law—that was clearly tailored to the desired result. Perhaps the administration held out so long to avoid exposing the thin foundation on which it based such a momentous decision" (see also Ackerman 2014b; Cole 2014; Junod 2014).

The publication of this OLC memo did nothing to abridge the continuing secrecy surrounding the targeted killing policy, nor did it inspire US courts or Congress to interject their own determination of the legality of the program. This inaction spurred several domestic initiatives designed to articulate the legal issues at stake. The New York City Bar Association Committee on International Law (2014) and the Stimson Center (2014) both published reports on targeted killing by drones. The former report is devoted to analyzing targeted killing in relation to international law. The executive summary notes that factors contributing to the complexity of these issues include the lack of "controlling authority for international law," the fact that there is no obvious international court to resolve or adjudicate the issues, and the secrecy surrounding drone warfare and the legal justifications for targeted killing. The Stimson Center report highlights the significance of lethal drone technology. According to its executive summary, the capacity to kill remotely and without any risk to US forces "has tempted the United States to engage in a largely covert campaign of targeted killing, creating, in effect, a 'secret war' governed by secret law . . . and [notes] the potential implications this has for domestic and international rule of law, especially if other states—including many not known for their human rights records—mimic US precedents" (Stimson Center 2014, 9–10). Among the concerns raised in the Stimson Center report are the "erosion of sovereignty norms" because the United States asserts the right to engage in military operations outside of "hot battlefields" and sometimes without the approval or knowledge of states where attacks are launched; "blowback" in the form of increasing anti-US sentiment that may serve as a recruitment tool for hostile organizations; and the continuing lack of governmental transparency, including in the criteria for determining who is targetable (Knuckey 2014a). Jameel Jaffer (2016, 20) elaborates on this critique:

> At this point even those who insist that drone strikes are the only effective means of averting terrorist attacks cannot deny that the United States is caught in a seemingly inescapable loop: the threat of terrorism supposedly necessitates drone strikes, but drone strikes inarguably fuel the terrorist threat. If drone strikes are the cure, they are also part of the disease. Many officials insist that the drone campaign is necessary, but none can plausibly say that it is working.

Three main factors illustrate and intensify the paradigmatic significance of US drone warfare and targeted killing. First, these types of lethal operations have become the mainstay of US counterterrorism policy, and there appears to be no effective domestic oversight—neither judicial nor congressional—to rein in executive branch discretion. Second, the unchecked right to kill anyone on the basis of secret criteria, intelligence, and law contravenes and menaces IHL rules and norms of distinction and civilian immunity, and this is compounded by the nature of the remote technology itself, which makes accountability for IHL violations difficult to determine and nearly impossible to pursue. Third, the international proliferation of drone technology and the prevalence of conflicts that many governments define as their own counterterrorism wars threaten to make US-style claims about the legality and necessity of targeted killing more broadly acceptable and to tempt other states to follow suit.

CONCLUSION: WHAT IS LEGAL IN WAR?

"The power of the law is special" (Bourdieu 1987, 843). The overarching purpose of IHL is to balance legitimate military objectives with humanitarian considerations in the context of armed conflict. At the turn of the twenty-first century, the rules and norms of IHL were universally accepted as customary international law—every government in the world had signed or acceded to the Geneva Conventions—notwithstanding disagreements over the extent of their applicability in asymmetric wars. But even in unconventional conflicts, *as a matter of law* the prohibition of torture and extrajudicial executions was undisputed (i.e., they were *jus cogens* norms), despite their prevalence in practice. Following the 9/11 terrorist attacks, US officials chose to disengage from IHL rules and norms to wage the "war on terror." This manifested not as outright rejection but rather as a reinterpretation of the state's rights in a self-serving and one-sided conversation to "legalize" policies of torture and targeted killing that the executive branch deemed strategically and operationally necessary (Frankenberg 2008; Kutz 2014).

The first step in this reinterpretative project was to override the core distinction between combatants (i.e., soldiers) and civilians. The Bush administration created a novel category, "unlawful enemy combatants," in order to assert their rightlessness and lack of standing under IHL. While the authorization of torture and other forms of deliberate custodial abuse as well as protracted incommunicado detention did not survive challenges, the contralegal notion of rightless enemies has endured, now into a third administration. This is evident in a number of policies that have not succumbed to challenges, including the continued indefinite detention without trial of twenty-six prisoners (as of September 2018) at Guantánamo (Rosenberg 2018); the court-accepted denial of the right of habeas corpus for prisoners held at Bagram and other offshore detention facilities; and the classification of all those killed by drones or other types of targeted killing operations as presumptive enemies killed in action, which further erodes the principles of distinction and civilian immunity.

This reinterpretative process, which developed over the years since 2001 into a full-fledged counterterrorism war paradigm, has been a bold deviation from international consensus about what is lawful in the conduct of war and armed conflict. The rationales undergirding the paradigm have been concretized domestically by the passage and application of laws inventing new war crimes and others that serve to immunize officials and state agents from accountability for IHL violations. The domestic entrenchment of this paradigm of rightless enemies and unaccountable officials has had direct implications overseas as well, most obviously in the ability of the US government to use its diplomatic power and political influence to thwart the pursuit of justice for victims of illegal policies and accountability for perpetrators in foreign legal systems.

These reinterpretations that have come to compose the legal framework for the counterterrorism war paradigm have not yet garnered international credibility, let alone ripened into custom. On the contrary, they have been criticized by leading experts of international law, and there have been some significant examples of international push-back. Together, these contestations to shape or subvert a juridical field invite the kind

of Bourdieusian approach that "allows for an analysis of the frontier of law, a frontier where the geneses of law are once again unfolding" (Dezalay and Madsen 2012, 439).

In an October 2012 speech at Harvard Law School, Ben Emmerson, then-UN Special Rapporteur on Counterterrorism and Human Rights, stated:

> [T]he global war paradigm has done immense damage to a previously shared international consensus on the legal framework underlying both international human rights law and international humanitarian law. It has also given a spurious justification to a range of serious human rights and humanitarian law violations... [This] war paradigm was always based on the flimsiest of reasoning, and was not supported even by close allies of the US. (Common Dreams 2012)

In January 2013, Emmerson and Christof Heyns, then-UN Special Rapporteur for Extra-judicial, Arbitrary or Summary Executions, launched an investigation into drone attacks and other forms of targeted killings in which civilian casualties were alleged to have occurred. This investigation, which drew on experts from several countries, produced a final report that was submitted to the UN Human Rights Council (Emmerson 2014). The report offered two main recommendations: "First, that the states which conducted any of the 30 strikes [examined in the study] publicly explain them and disclose the results of any fact-finding inquiries, and that states on whose territories the strikes took place 'provide as much information as possible' about them. Second, that the Human Rights Council should set-up a panel of experts to discuss and report on the legal issues raised by the use of drones for targeted killings" (Knuckey 2014b).

Around the same time, the European Parliament (2014) passed a resolution by a vote of 534 to forty-nine condemning US drone strikes and calling on European Union member states to "oppose and ban the practice of extrajudicial targeted killings [and] ensure that the member states, in conformity with their legal obligations, do not perpetrate unlawful targeted killings or facilitate such killings by other states."

On November 3, 2017, the Chief Prosecutor of the International Criminal Court (ICC), Fatou Bensouda, asked for authorization to commence an investigation into war crimes and crimes against humanity in Afghanistan that would focus on US military and CIA personnel, as well as Taliban and Afghan officials; the investigation would include torture, ill-treatment, and black sites. Bensouda's preliminary investigation, completed the previous year, found that the alleged crimes "were not the abuses of a few isolated individuals," but rather were "part of approved interrogation techniques in an attempt to extract 'actionable intelligence' from detainees," adding that there was "reason to believe" that crimes were "committed in the furtherance of a policy or policies ... which would support US objectives in the conflict of Afghanistan" (Cohn 2017).

Although the United States is not a signatory to the Rome Statute that established the ICC,[16] Afghanistan is. The principle of complementarity enshrined in the Rome Statute aims to privilege the most suitable jurisdiction for the pursuit of justice for gross crimes (i.e., the legal system where the crimes took place and/or that of the

16. President Bill Clinton signed the treaty in the last hours of his presidency but said he did not recommend its ratification by the Senate, and President Bush unsigned the treaty early in his presidency.

perpetrators). If, however, those crimes are not investigated and prosecuted in a more suitable jurisdiction, the ICC serves as a venue of last resort to foreclose the possibility of impunity. Therefore, the ICC can assert jurisdiction over these alleged crimes because the Afghan legal system is unable or unwilling to pursue justice and the US government has failed to do so. In response to Bensouda's initiative, on September 18, 2018, National Security Advisor John Bolton delivered a speech in which he denounced the ICC as "fundamentally illegitimate" and the pending investigation as "an assault on the constitutional rights of the American people and the sovereignty of the United States." He laid out the Trump administration's plans to retaliate against the ICC. "We will ban its judges and prosecutors from entering the United States. We will sanction their funds in the US financial system, and we will prosecute them in the US criminal system. We will do the same for any company or state that assists an ICC investigation of Americans" (Bolton 2018).

While it is unlikely, for geopolitical reasons, that US officials or state agents will ever be brought to justice for gross crimes in the ICC, even the request for an investigation and the preliminary findings that crimes have occurred and have gone unpunished constitute an international law–based repudiation of the unaccountability dimension of the counterterrorism war paradigm. Moreover, this initiative may inspire other efforts to enforce international law and hold violators to account (Hajjar 2018b; Haque 2018b). For example, it might breathe new life into dormant cases against US officials in European courts that were derailed by diplomatic pressure. At minimum, the recognition that US violations of IHL are crimes and the illegitimacy and fragility of impunity may have a deterrent effect on the future behavior of other governments that would be tempted to contemplate a similar course.

Indeed, one of the lessons to be learned from the US record of torture and targeted killing in the "war on terror" is that the counterterrorism war paradigm is a menace to IHL. Most allied governments have refused to accept or condone the legitimacy of these policy options or the legal justifications assembled to legitimize the counterterrorism war paradigm. Recent developments to enforce the law and pursue accountability may have an emboldening effect on governments that are committed to defending the international law–based architecture of humanitarianism. In any case, the counterterrorism war paradigm as a juridical field remains the site of transnational contestations and it has not yet superseded or supplanted the humanitarian paradigm.

REFERENCES

Ackerman, Spencer. "41 Men Targeted but 1, 147 People Killed: US Drone Strikes – The Facts on the Ground." *Guardian*, November 24, 2014a.

——. "US Cited Controversial Law in Decision to Kill US Citizen by Drone." *Guardian*, June 23, 2014b.

——. "Inside the Fight to Reveal CIA's Torture Secret." *Guardian*, September 9, 2016a.

——. "'A Constitutional Crisis': The CIA Turns on the Senate." *Guardian*, September 10, 2016b.

——. "No Looking Back: The CIA Torture Report's Aftermath." *Guardian*, September 11, 2016c.

Agamben, Giorgio. *State of Exception*. Chicago: University of Chicago Press, 2005.

Alston, Philip. "The CIA and Targeted Killings beyond Borders." *Harvard National Security Journal* 2 (2011): 283–446.

Alvarez, José E. "Hegemonic International Law Revisited." *American Journal of International Law* 97, no. 4 (2003): 873–88.

Anderson, Kenneth. "Targeted Killing in U.S. Counterterrorism Strategy and Law." *Brookings Series on Counterterrorism and American Statutory Law* 14 (2009). https://www.brookings.edu/research/targeted-killing-in-u-s-counterterrorism-strategy-and-law/.

——. "Readings: The Canonical National Security Law Speeches of Obama Administration Officials and General Counsels." *Lawfareblog*, June 11, 2012. https://www.lawfareblog.com/readings-canonical-national-security-law-speeches-obama-administration-senior-officials-and-general.

Becker, Jo, and Scott Shane. "Secret 'Kill List' Proves a Test of Obama's Principles and Will." *New York Times*, May 29, 2012.

Belczyk, Jacklyn. "Federal Appeals Court Overturns Two Convictions of Former al Qaeda Media Director." *Jurist*, July 14, 2014. https://www.jurist.org/news/2014/07/federal-appeals-court-overturns-two-convictions-of-former-al-qaeda-media-director/.

Bolton, John. "Full Text of John Bolton's Speech to the Federalist Society." *Al Jazeera*, September 10, 2018. https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html.

Bourdieu, Pierre. "The Force of Law: Toward a Sociology of the Juridical Field." *Hastings Law Review* 38 (1987): 805–53.

Bravin, Jess. *The Terror Courts: Rough Justice at Guantánamo Bay*. New Haven, CT: Yale University Press, 2013.

Brooks, Rosa Ehrenreich. "War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror." *University of Pennsylvania Law Review* 153, no. 2 (2004): 675–761.

Bush, George W. Presidential Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism. *White House*, November 13, 2001.

Campbell, Colm. "'Wars on Terror' and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict." *International and Comparative Law Quarterly* 54, no. 2 (2005): 321–55.

Cavallaro, James, Stephan Sonnenberg, and Sarah Knuckey. *Living under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan*. Stanford, CA, and New York: Stanford Law School and New York University School of Law, 2012.

Chamayou, Grégoire. *A Theory of the Drone*. New York: The New Press, 2015.

Cheney, Richard B. "Remarks." *American Enterprise Institute*, May 21, 2009. http://www.aei.org/publication/remarks-by-richard-b-cheney/.

Cline, Donna. "An Analysis of the Legal Status of CIA Officers Involved in Drone Strikes." *San Diego International Law Journal* 15 (2013): 51–115.

Cohen, Stanley. *States of Denial: Knowing about Atrocities and Suffering*. New York: Polity Press, 2001.

Cohn, Marjorie. "US Military and CIA Leaders May Be Investigated for War Crimes." *TruthOut*, November 16, 2017.

Cole, David. *Torture Memos: Rationalizing the Unthinkable*. New York: New Press, 2009.

——. "The Drone Memo: Secrecy Made It Worse." *New York Review of Books*, June 24, 2014.

Common Dreams. "UN Official: Aspects of US Drone Program Clearly 'War Crimes.'" *Common Dreams*, October 26, 2012. https://www.commondreams.org/news/2012/10/26/un-official-aspects-us-drone-program-clearly-war-crimes.

Davis, Julie Hirschfeld, and Mark Landler. "Trump Outlines New Afghanistan War Policy with Few Details." *New York Times*, August 21, 2017.

Deeks, Ashley. "Domestic Humanitarian Law: Developing the Law of War in Domestic Courts." *Virginia Public Law and Legal Theory Research Paper No. 2013-39*, October 9, 2013. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2338033.

Denbeaux, Mark, Jonathan W. Denbeaux, and John Gregorek. *Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*. New York: Seton Hall University, 2006.

Devereaux, Ryan. "Manhunting in the Hindu Kush." *Intercept*, October 15, 2015.

Dezalay, Yves, and Bryant Garth. "Constructing Law Out of Power: Investing in Human Rights as an Alternative Political Strategy." In *Cause Lawyering and the State in Global Context*, edited by Austin Sarat and Stuart Scheingold, 354–80. New York: Oxford University Press, 2001.

Dezalay, Yves, and Mikael Rask Madsen. "The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law." *Annual Review of Law and Social Science* 8, no. 1 (2012): 433–52.

Dörmann, Knut. "The Legal Situation of 'Unlawful/Unprivileged Combatants.'" *International Review of the Red Cross* 85 (2003): 45–73.

Eachambadi, Ram. "Supreme Court Denies Review in Conviction of Bin Laden's Personal Assistant." *Jurist*, October 10, 2017. https://www.jurist.org/news/2017/10/supreme-court-denies-review-in-conviction-of-bin-ladens-personal-assistant/.

Emmerson, Ben. Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. *UN Doc. A/HRC/25/59*, February 28, 2014. https://www.securitycouncilreport.org/un-documents/document/ahrc2559.php.

European Parliament. Joint Motion for a Resolution on the Use of Armed Drones. February 25, 2014. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P7-RC-2014-0201+0+DOC+XML+V0//EN.

Fallon, Mark. *Unjustifiable Means: The Inside Story of How the CIA, the Pentagon, and the US Government Conspired to Torture*. New York: Regan Arts, 2017.

Feldman, Yotam, and Uri Blau. "Consent and Advise." *Ha'Aretz*, January 29, 2009.

Filkins, Dexter. *The Forever War*. New York: Knopf, 2008.

Frankenberg, Günter. "Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty." *American Journal of Comparative Law* 56, no. 2 (2008): 403–22.

Glazier, David W. "A Court without Jurisdiction: A Critical Assessment of the Military Commission Charges against Omar Khadr." *Loyola Law School, Legal Studies Paper No. 2010-37*, August 31, 2010. http://ssrn.com/abstract=1669946.

Goldsmith, Jack. *The Terror Presidency: Law and Judgment inside the Bush Administration*. New York: W. W. Norton & Co., 2007.

Gordon, Neve. "Human Rights as a Security Threat: Lawfare and the Campaign against Human Rights NGOs." *Law & Society Review* 48, no. 2 (2014): 311–44.

Greenberg, Karen J., ed. *The Torture Debate in America*. New York: Cambridge University Press, 2006.

Greenberg, Karen J., and Joshua L. Dratel, eds. *The Torture Papers: The Road to Abu Ghraib*. New York: Cambridge University Press, 2005.

Greenberg, Karen J., and Joshua L. Dratel. *The Enemy Combatant Papers: American Justice, the Courts, and the War on Terror*. New York: Cambridge University Press, 2008.

Gregory, Derek. "Vanishing Points." In *Violent Geographies: Fear, Terror, and Political Violence*, edited by Derek Gregory and Allan Pred, 205–36. New York: Routledge, 2006.

——. "The Everywhere War." *The Geographical Journal* 177, no. 3 (2011): 238–50.

Gronke, Paul, Darius Rejali, Dustin Drenguis, and James Hicks. "US Public Opinion on Torture: 2001–2009." *P.S.: Political Science & Politics* 43, no. 3 (2010): 437–44.

Hafetz, Jonathan. *Habeas Corpus after 9/11: Confronting America's New Global Detention System*. New York: New York University Press, 2011.

Hafetz, Jonathan, and Mark Denbeaux, eds. *The Guantánamo Lawyers: Inside a Prison outside the Law*. New York: New York University Press, 2011.

Hagan, John, and Ron Levi. "Crimes of War and the Force of Law," *Social Forces* 83, no. 4 (2005): 1499–1534.

Hajjar, Lisa. "International Humanitarian Law and 'Wars on Terror': A Comparative Analysis of Israeli and American Doctrines and Policies." *Journal of Palestine Studies* 36 (2006): 21–42.

——. "Universal Jurisdiction as Praxis: An Option to Pursue Legal Accountability for Superpower Torturers." In *When Governments Break the Law: The Rule of Law and the Prosecution of the Bush Administration*, edited by Austin Sarat and Nasser Hussein, 87–120. New York: New York University Press, 2010.

——. "Anatomy of the US Targeted Killing Policy." *Middle East Report* 264 (2012a): 10–17.

——. "Wikileaking the Truth about American Unaccountability for Torture." *Societies without Borders* 7 (2012b): 192–225.

——. "The Long Shadow of the CIA at Guantánamo." *Middle East Report* 273 (2014): 20–26.

——. "Lawfare and Armed Conflict: A Comparative Analysis of Israeli and US Targeted Killing Policies and Legal Challenges against Them." In *Life in the Age of Drone Warfare*, edited by Lisa Parks and Caren Kaplan, 59–88. Durham, NC: Duke University Press, 2017.
——. "How Government Secrecy Stymied the 9/11 Terror Prosecution." *Nation*, July 19, 2018a.
——. "In Defense of Lawfare: The Value of Litigation in Challenging Torture." In *Confronting Torture: Essays on the Ethics, Legality, History, and Psychology of Torture Today*, edited by Scott A. Anderson and Martha C. Nussbaum, 294–319. Chicago: University of Chicago Press, 2018b.
Hakimi, Monica. "Navigating the Terrain at the Intersection of Human Rights and Humanitarian Law." *Just Security*, May 11, 2018. https://www.justsecurity.org/56145/navigating-terrain-intersection-human-rights-humanitarian-law/.
Haque, Adil Ahmad. "Ambiguity in the Conduct of Hostilities." *Just Security*, May 10, 2018a. https://www.justsecurity.org/56087/ambiguity-conduct-hostilities/.
——. "At a Crossroad: The International Criminal Court's Afghanistan Probe and the International Law Commission." *Just Security*, April 19, 2018b. https://www.justsecurity.org/55111/intl-criminal-courts-afghanistan-probe-international-law-commission/.
Hawkins, Katherine. "The Obama Administration." In *The Report of the Constitution Project's Task Force on Detainee Treatment* (April 16, 2013): 332–34.
Heller, Kevin Jon. "'One Hell of a Killing Machine': Signature Strikes and International Law." *Journal of International Criminal Justice* 11 (2013): 89–119.
——. "Specially-Affected States and the Formation of Custom." *Amsterdam Center for International Law Working Paper*, October 25, 2017. https://ssrn.com/abstract=3058617.
Hersh, Seymour. "Manhunt: The Bush Administration's New Strategy in the War against Terrorism." *New Yorker*, December 21, 2002.
——. "Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far Up Does Responsibility Go?" *New Yorker*, May 10, 2004.
Holder, Eric. "Attorney General Eric Holder Speaks at Northwestern University School of Law." *Department of Justice*, March 5, 2012. https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law.
Horton, Scott. "The Dangers of Lawfare." *Case Western Reserve University Journal of International Law* 43 (2010): 163–82.
Human Rights Watch. *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*. New York: HRW, 2011.
——. *"Between a Drone and Al-Qaeda": The Civilian Cost of US Targeted Killing in Yemen*. New York: HRW, 2013.
International Committee of the Red Cross. "Customary International Humanitarian Law." ICRC, October 29, 2010. https://www.icrc.org/en/document/customary-international-humanitarian-law-0.
Isikoff, Michael. "Justice Department Memo Reveals Legal Case for Drone Strikes on Americans." *NBC News*, February 4, 2013. http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans.
Jaffer, Jameel. "The Drone Memo Cometh." *Just Security*, June 21, 2014. https://www.justsecurity.org/11986/drone-memo-cometh/.
——. *The Drone Memos: Targeted Killing, Secrecy and the Law*. New York: The New Press, 2016.
Jaffer, Jameel, and Amrit Singh. *Administration of Torture: From Washington to Abu Ghraib and Beyond*. New York: Columbia University Press, 2007.
Johnsen, Gregory. *The Last Refuge: Yemen, Al-Qaeda and America's War in Arabia*. New York: W. W. Norton & Co., 2013.
Johnson, Douglas A., Alberto Mora, and Averell Schmidt. "The Strategic Costs of Torture: How 'Enhanced Interrogations' Hurt America." *Foreign Affairs* (September/October 2016): 121–32.
Jones, Craig A. "Frames of Law: Targeting Advice and Operational Law in the Israeli Military." *Environment and Planning D: Society and Space* 33 (2015): 676–96.
——. "Lawfare and the Juridification of Late Modern War." *Progress in Human Geography* 40, no. 2 (2016): 221–3.

Junod, Tom. "The Lethal Presidency of Barack Obama." *Esquire*, July 9, 2012.
——. "The Murderous Core of Obama's Drone Memo." *Esquire Blog*, June 24, 2014. https://www.esquire.com/news-politics/news/a29274/drone-memo-junod/.
Kahn, Azmat, and Anand Gopal. "The Uncounted." *New York Times Magazine*, November 16, 2017.
Kennedy, David. *Of War and Law*. Princeton, NJ: Princeton University Press, 2006.
Khalili, Laleh. *Time in the Shadows: Confinement in Counterinsurgencies*. Palo Alto, CA: Stanford University Press, 2012.
Kiriakou, John, with Michael Ruby. *Reluctant Spy: My Secret Life in the CIA's War on Terror*. New York: Skyhorse Publishing, 2012.
Klaidman, Daniel. "Drones: How Obama Learned to Kill." *Daily Beast*, May 28, 2012.
Knuckey, Sarah. "Analysis of the Stimson Drone Task Force Report." *Just Security*, June 27, 2014a. https://www.justsecurity.org/12357/stimson-drone-task-force-report-knuckey/.
——. "Key Findings in New UN Special Rapporteur Report on Drones." *Just Security*, March 4, 2014b. https://www.justsecurity.org/7819/key-findings-special-rapporteur-report-drones/.
Koh, Harold Hongju. "The Obama Administration and International Law, Speech to the American Society of International Law." *State Department*, March 25, 2010. https://www.state.gov/documents/organization/179305.pdf.
——. "The Trump Administration and International Law." *Washburn Law Journal* 56 (2017): 413–69.
Koskenniemi, Martti. "International Law and Hegemony: A Reconfiguration." *Cambridge Review of International Affairs* 17, no. 2 (2004): 197–218.
Kutz, Christopher. "How Norms Die: Torture and Assassination in American Security Policy." *Ethics and International Affairs* 28 (2014): 425–49.
Luban, David. *Torture, Power, and Law*. New York: Cambridge University Press, 2014.
Margulies, Joseph. *Guantánamo and the Abuse of Presidential Power*. New York: Simon & Schuster, 2006.
Masco, Joseph. *The Theater of Operations: National Security Affect from the Cold War to the War on Terror*. Durham, NC: Duke University Press, 2014.
Mayer, Jane. *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*. New York: Doubleday, 2008.
——. "The Predator War: What Are the Risks of the CIA's Covert Drone Program?" *New Yorker*, October 26, 2009.
——. "The Trial." *New Yorker*, February 15, 2010.
Mayerfeld, Jamie. "Playing by Our Own Rules: How US Marginalization of Human Rights Law Led to Torture." *Harvard Human Rights Journal* 20 (2007): 89–140.
McKelvey, Tara. "Inside the Killing Machine." *Newsweek*, February 13, 2011.
——. "Interview with Harold Koh, Obama's Defender of Drone Strikes." *The Daily Beast*, April 8, 2012.
Mégret, Frédéric. "War and the Vanishing Battlefield." *Loyola University Chicago International Law Review* 9, no. 1 (2012): 131–52.
Miller, Greg. "Lawmakers Seek to Stymie Plan to Shift Control of Drone Campaign from CIA to Pentagon." *Washington Post*, January 15, 2014.
Mitchell, James, with Bill Harlow. *Enhanced Interrogation: Inside the Minds and Motives of the Islamic Terrorists Trying to Destroy America*. New York: Crown Forum, 2016.
New York City Bar Association Committee on International Law. *The Legality under International Law of Targeted Killing by Drones Launched by the United States*. New York: NYCBA, 2014.
New York Times Editorial Board. "A Thin Rationale for Killing." *New York Times*, June 23, 2014.
Ohlin, Jens David. *The Assault on International Law*. New York: Oxford University Press, 2017.
Parry, John. "States of Torture: Debating the Future of Coercive Interrogation." *Tennessee Law Review* 84, no. 1 (2016): 1–32.
Perugini, Nicola, and Neve Gordon. *The Human Right to Dominate*. New York: Oxford University Press, 2015.
Prabhat, Devyani. *Unleashing the Force of Law: Legal Mobilization, National Security, and Basic Freedoms*. London: Palgrave Macmillan, 2016.
Priest, Dana. "CIA Holds Terror Suspects in Secret Prisons." *Washington Post*, November 2, 2005.

——. "US Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes." *Washington Post*, January 27, 2010.
Resnick, Judith. "Detention, the War on Terror, and the Federal Courts." *Columbia Law Review* 110 (2010): 579–686.
Revkin, Mara. "When Terrorists Govern: Why the Islamic State and Other State-Building Armed Groups Require a New Targeting Approach." *Harvard National Security Journal* 9 (2018): 100–45.
Rineheart, Jason. "Counterterrorism and Counterinsurgency." *Perspectives on Terrorism* 4 (2010). http://www.terrorismanalysts.com/pt/index.php/pot/article/view/122/html.
Rosen, Nir. *Aftermath: Following the Bloodshed of America's Wars in the Muslim World*. New York: Nation Books, 2010.
Rosenberg, Carol. "By the Numbers." *Miami Herald*, September 26, 2018.
Sands, Philippe. *Lawless World: America and the Making and Breaking of Global Rules from FDR's Atlantic Charter to George W. Bush's Illegal War*. London: Viking, 2005.
——. *Torture Team: Rumsfeld's Memo and the Betrayal of American Values*. Hampshire, UK: Palgrave Macmillan, 2008.
Savage, Charlie. "Secret US Memo Made Legal Case to Kill a Citizen." *New York Times*, October 8, 2011.
Savage, Charlie, and Peter Baker. "Obama, in a Shift, to Limit Targets of Drone Strikes." *New York Times*, May 22, 2013.
Savage, Charlie, and Eric Schmitt. "Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids." *New York Times*, September 21, 2017.
Scahill, Jeremy. *Dirty Wars: The World Is a Battlefield*. New York: Nation Books, 2013.
Scahill, Jeremy, and Glenn Greenwald. "The NSA's Secret Role in the US Assassination Program." *Intercept*, February 10, 2014.
Serle, Jack. "Naming the Dead Project Records the Names of over 700 Killed by Drones in Pakistan." *Bureau of Investigative Journalism*, July 31, 2014. https://www.thebureauinvestigates.com/stories/2014-07-31/naming-the-dead-project-records-the-names-of-over-700-killed-by-drones-in-pakistan.
Shachtman, Noah. "Drone 'Surge.'" *Wired*, February 5, 2009.
Sifton, John. "A Brief History of Drones." *Nation*, February 7, 2012.
Singh, Amrit. *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*. New York: Open Society Justice Initiative, 2013.
Sissons, Miranda, and Abdelrazzaq Al-Saiedi. *A Bitter Legacy: Lessons of De-Baathification in Iraq*. New York: International Center for Transitional Justice, 2013.
Smith, Michael. "States that Come and Go: Mapping the Geolegalities of the Afghanistan Intervention." In *The Expanding Spaces of Law: A Timely Legal Geography*, edited by Irus Braverman, Nicholas Blomley, David Delaney, and Alexander Kedar, 142–66. Palo Alto: Stanford Law Books, 2014.
Smith, R. Jeffrey, and Dan Eggen. "Gonzales Helped Set the Course for Detainees; Justice Nominee's Hearings Likely to Focus on Interrogation Policies." *Washington Post*, January 5, 2005.
Soufan, Ali, with Daniel Freedman. *Black Banners: The Inside Story of 9/11 and the War against Al-Qaeda*. New York: W. W. Norton & Co., 2011.
Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions. *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*. Commission on Human Rights, UN Doc. E/CN.4/2003/3, January 13, 2003.
Stampnitzky, Lisa. "The Lawyers' War: States and Human Rights in a Transnational Field." *The Sociological Review Monographs* 62, no. 1 (2016): 170–93.
Stimson Center. *Recommendations and Report of the Task Force on US Drone Policy*. Washington, DC: Stimson Center, 2014.
Strawser, Bradley Jay, ed. *Opposing Perspectives on the Drone Debate*. New York: Palgrave Macmillan, 2014.
Timm, Trevor. "Niger Is the Perfect Example of the US State of Perma-War." *Guardian*, October 27, 2017.

US Department of State. *Initial Report of the United States of America to the UN Committee against Torture*, October 15, 1999.

Vladek, Steve. "What the Heck Is Happening in al-Nashiri? The Ten-Layer Dip at the Heart of the Latest Guantánamo Mess." *Just Security*, May 11, 2018. https://www.justsecurity.org/56151/heck-happening-al-nashiri-ten-layer-dip-heart-latest-guantanamo-mess/.

Weizman, Eyal. *The Least of All Possible Evils: Humanitarian Violence from Arendt to Gaza*. New York: Verso, 2012.

White House. "Procedures for Approving Direct Action against Terrorist Targets Located outside the United States and Areas of Active Hostilities." *White House*, May 22, 2013 (declassified August 6, 2016). https://www.documentcloud.org/documents/3006440-Presidential-Policy-Guidance-May-2013-Targeted.html.

Worthington, Andy. *The Guantánamo Files: The Stories of the 774 Detainees in America's Illegal Prison*. New York: Pluto Press, 2007.

Yoo, John. *War by Other Means: An Insider's Account of the War on Terror*. New York: Atlantic Monthly Press, 2006.

CASES CITED

New York Times Co. v. U.S. Dep't of Justice, 915 F. Supp. 2d 508 (S.D.N.Y. 2013).

Public Committee against Torture in Israel v. Government of Israel HCJ 5100/94 (1999) (Isr.).

Public Committee against Torture in Israel v. Government of Israel HCJ 769/02 (2006) (Isr.).