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# "During War, the Law is Silent," Or is it?: Examining the Legal Status of Guantanamo Bay

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# **“DURING WAR, THE LAW IS SILENT,” OR IS IT?: EXAMINING THE LEGAL STATUS OF GUANTANAMO BAY**

*Kate Frisch*

## **I. INTRODUCTION**

On the morning of September 11, 2001, nineteen men, equipped with box cutters and knives, hijacked four American commercial airplanes. At approximately 9:00 am, American Airlines Flight 11 and United Airlines Flight 175 were intentionally crashed into the north and south towers of the World Trade Center in lower Manhattan, leaving an immense hole in the 80th floor of the 110-story building.<sup>1</sup> Hundreds were instantly killed or trapped inside the burning structure. At 9:37 am, American Airlines Flight 77 dove into the Pentagon in Washington, D.C. Twenty-six minutes later, United Airlines Flight 93 crashed into a field in Shanksville, Pennsylvania.<sup>2</sup> 6,333 were initially declared missing, and ultimately an estimated 3,000 were declared dead.<sup>3</sup>

The attacks were orchestrated by members of an Islamic militant organization known as Al Qaeda, which had connections with the Taliban regime<sup>4</sup> in Afghanistan, and marked the deadliest attack on American soil by foreign hands that the country had ever experienced. The events of September 11, 2001 forced the world to reconsider the role of non-state actors and terrorism as a legitimate and imminent threat to the order and peace that the international sphere inherently craves. As Cofer Black, the then head of the CIA Counterterrorist Center stated, “there was a before 9/11, and there was an after 9/11.

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<sup>1</sup> COLLEEN E. HARDY, THE DETENTION OF UNLAWFUL ENEMY COMBATANTS DURING THE WAR ON TERROR 4 (Melvin I. Urofsky ed. 2009); *September 11th Fast Facts*, CNN, (Sept. 8, 2016), <http://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/>.

<sup>2</sup> See Hardy, *supra* note 1, at 4.

<sup>3</sup> VICTOR JELENIEWSKI SEIDLER, REMEMBERING 9/11 TERROR, TRAUMA, AND SOCIAL THEORY, 35 (2013).

<sup>4</sup> At the time of the attacks, the Taliban was considered to be the controlling government in Afghanistan, as it was governing the majority of the country. Only Saudi Arabia, the United Arab Emirates, and Pakistan ever officially recognized the Taliban as the lawful government of Afghanistan. Instead, Al Qaeda is a terrorist organization that spans numerous nationalities and countries. See Heather L. Rooney, *Parlaying Prisoner Protections: A Look at the International Law and Supreme Court Decisions that Should be Governing our Treatment of Guantanamo Detainees*, 54 DRAKE L. REV. 679, 696-97 (2006).

After 9/11 the gloves come off.”<sup>5</sup> As a consequence of the terrorist attacks, the United States, and many other members of the international community, categorized the attacks as an act of war, and President George W. Bush declared that America had begun its involvement in the infamous global war on terror.<sup>6</sup>

The introduction of terrorist attacks on American soil, combined with the unpredictable nature of terrorism and the shifting international focus, which now centered upon the very real threat of unpredictable non-state actors, reverberated throughout the global arena and was transferred into the regime of international public law. While this was not the first instance of terrorism by non-state actors against the United States in modern history,<sup>7</sup> it served as the contemporary proverbial shot heard ‘round the world. One of the strategies involved in the implementation of the war on terror was to send several hundred Taliban and Al Qaeda militants whom United States forces had captured to detention centers at Guantanamo Bay, a United States naval base in Cuba.<sup>8</sup>

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<sup>5</sup> Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, (Dec. 26, 2002), <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html>.

<sup>6</sup> EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* 56 (2010).

<sup>7</sup> Throughout the 1990’s, the United States faced attacks both on a domestic scale as well as abroad. The only attack carried out inside the borders of the United States was the 1993 World Trade Center bombing, which was engineered and carried out by Islamic fundamentalists who sought revenge for the Palestinian people who had suffered from the U.S. aiding of Israel. But, there were at least six other successful or planned attacks against the U.S. during this time period as well. Attacks included the bombing of a military base in Saudi Arabia in 1996, almost concurrent attacks on U.S. embassies in Kenya and Tanzania in 1998, the planned bombings of the Holland and Lincoln Tunnels and the U.N. building in NYC, and the 2000 U.S.S. Cole bombing. *See 1993 World Trade Center Bombing*, CNN, (Mar. 2, 2016), <http://www.cnn.com/2013/11/05/us/1993-world-trade-center-bombing-fast-facts/>; David Hodari, *Main suspect behind 1996 bombing of US military base residence in Saudi Arabia arrested*, TELEGRAPH, (Aug. 26, 2015), <http://www.telegraph.co.uk/news/worldnews/middleeast/saudi-arabia/11825664/Main-suspect-behind-1996-bombing-of-US-military-base-residence-in-Saudi-Arabia-arrested.html>; *1998 U.S. Embassies in Africa Fast Facts*, CNN, (Aug. 3, 2016), <http://www.cnn.com/2013/10/06/world/africa/africa-embassy-bombings-fast-facts/>; Joseph P. Fried, *The Terror Conspiracy: The Overview; Sheik and 9 Followers Guilty of a Conspiracy of Terrorism*, NY TIMES, (Oct. 2, 1995), <http://www.nytimes.com/1995/10/02/nyregion/terror-conspiracy-overview-sheik-9-followers-guilty-conspiracy-terrorism.html?pagewanted=all>; *USS Cole Bombing Fast Facts*, CNN, (Apr. 6, 2016), <http://www.cnn.com/2013/09/18/world/meast/uss-cole-bombing-fast-facts/>.

<sup>8</sup> Peter L. Bergen, *September 11 Attacks*, ENCYCLOPEDIA BRITANNICA (May 17, 2016), <https://www.britannica.com/event/September-11-attacks>.

The use of Guantanamo Bay as an extraterritorial detention center intended to house what the United States deems as “unlawful enemy combatants” has been problematic for several reasons. First, the United States government has argued that Guantanamo exists outside of its immediate territorial sovereignty, and therefore the detainees do not have to be afforded any significant procedural and substantive legal protections under the Constitution.<sup>9</sup> As Guantanamo Bay is not part of the United States’ immediate territory, despite the continued exercise of direct and exclusive control over the naval base, the government has been able to practically ensure that detainees cannot rely on the Constitution to protect their basic rights or liberties.<sup>10</sup>

Second, it is unclear how and to what extent United States activities in Guantanamo Bay conform to international human rights standards.<sup>11</sup> Significantly, it has been questioned whether or to what extent public international and human rights law even can be applied to Guantanamo Bay, as the detention center serves as a seemingly extraterritorial “extension” of the United States that technically falls outside of its sovereign grasp.<sup>12</sup> The use of seemingly jurisdictional no-man’s land in which there is a definitive exercise of control by a state, but without the requisite sovereignty piece, such as with Guantanamo Bay, has caused some to suggest that these extraterritorial state activities exist in a “legal black hole.”<sup>13</sup> Under this notion, the detainees at Guantanamo Bay can therefore be lawfully denied basic rights and protections under public international law because they have been deemed to superficially exist outside of the responsibility of any one state.<sup>14</sup>

Supreme Court decisions beginning in 2004 have limited the scope of the “legal black hole” on a domestic scale,<sup>15</sup> but the potency of the ambiguous nature of extraterritorial state activities has yet to be definitively resolved under international human rights law. If Guantanamo does actually exist in such a hole, it insinuates that such detainees do not have to be afforded procedural and substantive rights under public international law. This holds grave consequences in terms of the protection of the detainees’ basic human rights as well as the perceived strength and legitimacy of human rights law.

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<sup>9</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>10</sup> See Wilde, *infra*, note 11.

<sup>11</sup> Ralph Wilde, *Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT’L L. 739, 740 (2005).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See *id.*

<sup>15</sup> *Rasul v. Bush*, 542 U.S. 466, 474 (2004); *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (2004); *Boumediene v. Bush*, 128 S. Ct. 2229, 2242 (2008).

Instead, I argue that international human rights law precludes the existence of any “legal black hole.” Human rights law protects the rights and liberties of individuals purely based on their status as human beings, regardless of their location.<sup>16</sup> Therefore, an individual’s rights cannot be suspended. As a result, it must be the responsibility of the entity that holds custody and control over the individual to protect those rights. In order to enforce the protection of human rights, international responsibilities stemming from treaties that have solidified the individual nature of the rights must be used as an instrument for enforcement to protect the legitimacy of human rights. Specifically, in the case of Guantanamo Bay, the United States is formally obligated to uphold such individual protections due to its commitments stemming from the Third Geneva Convention of 1949, the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture (CAT).<sup>17</sup>

This argument will be explored throughout the rest of the paper, as Part II discusses the history of the detention centers; Part III outlines the human rights violations that have occurred at Guantanamo, and; Part IV analyzes the legal obligations set forth in the treaties to which the United States is a party,<sup>18</sup> and fleshes out the arguments surrounding the existence of a “legal black hole.”

On a theoretical level, the ability of states to suspend human rights based on where certain individuals may be located at a certain point in time devolves the stability, legitimacy, and ultimate underpinnings of human rights law. As Eleanor Roosevelt posited:

Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet, they are the world of the individual person. . . Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen

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<sup>16</sup> *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 4, <http://www.ohchr.org/documents/publications/training9chapter1en.pdf>.

<sup>17</sup> See generally Convention (III) relative to the Treatment of Prisoners of War, Geneva, Aug. 12, 1949, 75 U.N.T.S.135; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, 171, <http://www.refworld.org/docid/3ae6b3aa0.html>; UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, United Nations, Treaty Series, vol. 1465, 85.

<sup>18</sup> Specifically, the Third Geneva Convention, the ICCPR, and the CAT.

action to uphold them close to home, we shall look in vain for progress in the larger world<sup>19</sup>

To say that human rights attach based on a person's location ignores the fact that rights are triggered purely by the person being a person, and to say otherwise dissolves the underlying premise of human rights. The right to equal justice, opportunity, and dignity without discrimination cannot be diminished because of an individual's territorial movement in the world and to assert such a notion would inject chaos into an already vulnerable system. To argue that such freedoms can be suspended purely based on location diminishes the progress of the international community and ignores the ultimate purpose of human rights law in the first place.

Human rights under public international law was established to fill the inherent gap seen between state protections and the malleable and ambiguous international system due to a global policy movement following the atrocities seen during World War II.<sup>20</sup> The global movement that sparked the solidification of human rights was premised upon the idea that such rights attach and are triggered at birth and are not dependent upon the individual's territorial status.<sup>21</sup> In the most simplified terms, human rights are derived from being human and cannot be awarded or withheld by any particular government or single legal system. Therefore, it is the responsibility of the international system as a whole to recognize the individual status of these rights, and that the United States' treatment of detainees at Guantanamo Bay violates its international legal obligations set forth in the human rights instruments to which it is a party.

But in its current use, the law is not protecting against the violation of human rights despite clear obligations established in various treaties. Instead, it is being twisted to allow such violations to be initiated while avoiding the consequences of law.<sup>22</sup> For example, the definition of torture has been redefined to allow for its proliferation at Guantanamo against "unlawful enemy combatants", which is a term created by the Bush Administration in order to avoid the reach of the applicable law.<sup>23</sup> The alleged distinction between "unlawful enemy combatants" and "lawful enemy combatants" has allowed the United

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<sup>19</sup> Eleanor Roosevelt, On the Adoption of the Universal Declaration of Human Rights, Address at the United Nations in New York (Mar. 27, 1958).

<sup>20</sup> See *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, *supra* note 16, at 2,3.

<sup>21</sup> "All human beings are born free and equal in dignity and rights." Universal Declaration of Human Rights, art.1; Larry Cox & John Yoo, *Are Human Rights Universal*, 16 BROWN J. WORLD AFF. 9, 13 (2009).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

States to exempt some human beings from having human rights. The term “enemy combatants” refers to individuals who are able to be legally detained during an armed conflict under the laws of war.<sup>24</sup> “Lawful enemy combatants” and “unlawful enemy combatants” have been treated differently under international law.<sup>25</sup>

If the United States defined the detainees as “lawful,” they would be granted prisoner of war status, and thus protections stemming from the Third Geneva Convention.<sup>26</sup> But by defining the detainees at Guantanamo as “unlawful enemy combatants,” they did not receive such protections. The Bush Administration instituted the hybrid term of “unlawful enemy combatants” as it proliferated the argument that the detainees were exempt from the typical protections of war.<sup>27</sup> As this was coupled with the fact that technically Guantanamo exists outside of the direct sovereign territory of the United States, the government was able to effectively allege that the detainees exist in a “legal black hole.” Yet, the consequences of the notion that individuals can be located beyond the reach of law ignores the fact that human rights are dependent upon the person, not the place or a superficial status. Such rights are secured to the individual, and are inalienable and cannot be diminished. To do so would devolve the status of human rights law, and would initiate the type of chaos which the regime sought to protect against in the first place.

While this paper will focus specifically on Guantanamo Bay, it serves as a case study for the legality of the use of extraterritorial state activities to detain, interrogate, and torture individuals who are deemed a national security concern, and the manner in which such activities are performed. The abuses that have occurred at Guantanamo Bay are not only an unintended consequence of the detention centers in Cuba, but also describe a systematic global reality and concern.

Responsibility for the abuse of human rights at Guantanamo Bay, Cuba, lies also with the foreign governments that participated in and allowed the United States to operate the secret prisons.<sup>28</sup> The concerns surrounding the human rights abuses at extraterritorial deten-

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<sup>24</sup> William Haynes, *Enemy Combatants*, COUNCIL FOR FOREIGN RELATIONS (Dec. 12, 2002), <http://www.cfr.org/international-law/enemy-combatants/p5312>.

<sup>25</sup> *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942).

<sup>26</sup> *See* Convention Relative to the Treatment of Prisoners of War art. 4, (Aug. 12, 1949), 6 U.S.T. 3316, 75 U.N.T.S. 135.

<sup>27</sup> Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 TEX. INT'L L.J. 1 (2007), <http://www.tilj.org/content/journal/43/num1/Danner1.pdf>.

<sup>28</sup> *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*, Human Rights Watch (July 12, 2011) <https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees>.

tion centers not only resonate with the policies of the United States, but also must be analyzed as a truly global problem in the international community's response to terrorism.<sup>29</sup> If such actions are permitted due to the notion that they exist in a "legal black hole" because the torture, interrogations, and detentions are occur outside the technical sovereignty of the state actors, it is a slippery slope for the legitimacy associated with human rights law. In such a reality, the instituted protections associated with a persons' basic human rights quickly and efficiently devolves.

It is critical there be a shift in the literature to discuss how extraterritorial state activities are considered under public international law. The conversation concerning the mechanism for the protection of human rights has mainly been concerned with the relationship between the state and its activities within its own territory, and the obligation to uphold basic human rights within those set boundaries. Yet, this has proven to not be comprehensive enough in the current international community. The laws surrounding armed conflict and the multilateral treaties that have been created to set the parameters for the rules of war were intended to handle conflicts between sovereign nations. Yet, terrorism and terrorist organizations operate in multiple countries simultaneously, and it is inherently ambiguous in nature. The emergence of extraterritorial state activities used to control and respond to the threat of terrorism insinuates that the current discourse is not expansive enough, thus leaving individuals who become subject to such "legal black holes" to become susceptible to having their most basic rights openly violated.<sup>30</sup>

Therefore, although the discourse has suggested that because Guantanamo Bay suffers from an assumed technicality in which it is supposedly not under United States sovereignty and therefore exists outside of the realm of legal consequences, public international and human rights must be seen as expansive enough to cover extraterritorial state activities to provide for the maintenance of basic human rights. Further, the conversation must focus upon the fact that human rights attaches to the person, and therefore the legal obligations set out through the treaties must be used as an enforcement mechanism to protect the legitimacy of human rights law.

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<sup>29</sup> Such can be seen by British soldiers mistreating Iraqi's, or Jordan and Morocco instituting practices of detention and torture during interrogations similar to that seen in Guantanamo, and the Australian detention centers, which use Guantanamo as a justification for their mechanisms.

<sup>30</sup> Wilde, *supra* note 11, at 754.



## II. HISTORY

In the months following the 9/11 attacks, Congress authorized President Bush to begin implementing the use of missile and air strikes against the Taliban regime in Afghanistan.<sup>31</sup> Soon after, the United States initiated a ground invasion as well, and by 2003 the war on terror had extended beyond the territorial boundaries of Afghanistan, and expanded to include Iraq as well.<sup>32</sup> The United States, in conjunction with its allies, has since captured thousands of members of both Al Qaeda and the Taliban throughout the war on terror.<sup>33</sup> While some were released or detained in the countries in which they were captured<sup>34</sup>, more than 750 individuals have been designated as “unlawful enemy combatants” and sent to be detained at Guantanamo Bay, a United States naval base in Cuba.<sup>35</sup>

Guantanamo Bay has been leased by the United States since 1903, following the conclusion of the Spanish-American War which established the independent Republic of Cuba<sup>36</sup>, and serves as the oldest American naval base outside of the continental United States.<sup>37</sup> The lease was then reaffirmed under a subsequent 1934 treaty, which further provided the two methods under which the lease could be terminated: if both Cuba and the United States agree to discontinue the agreement, or if the United States completely abandons the property.<sup>38</sup> Therefore, the duration of the lease was not specified and instead is seemingly perpetual in nature. Article III of the lease defines the extent of the control with the United States can exercise over Guantanamo Bay:

While on the one hand, the United States recognizes the *continuance of the ultimate sovereignty of the Republic of Cuba* over the above described areas of land and water, and on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement, *the United States shall exercise complete jurisdiction and control* over and within said areas with the right to ac-

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<sup>31</sup> Hardy, *supra* note 1, at 151.

<sup>32</sup> Crawford, *supra* note 6, at 57.

<sup>33</sup> Hardy, *supra* note 1, at 151.

<sup>34</sup> Hardy, *supra* note 1, at 151.

<sup>35</sup> MARK P. DENBEAUX & JONATHAN HAFETZ, *Introduction to THE GUANTANAMO LAWYERS INSIDE A PRISON OUTSIDE THE LAW* 1 (Mark P. Denbeaux et al. eds., 2009).

<sup>36</sup> Hardy, *supra* note 1, at 152.

<sup>37</sup> Alfred De Zayas, *The Status of Guantánamo Bay and the Status of the Detainees*, 37 U.B.C. L. REV. 277, 288 (2004).

<sup>38</sup> See *id.* at 290.

quire for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.<sup>39</sup>

Despite the century-long presence, the detention facilities did not open for their current purpose until 2001, following the American intervention in Afghanistan<sup>40</sup> and the first group of detainees' arrival on January 11, 2002.<sup>41</sup> Since 2002, Guantanamo Bay detention centers have been established as prisons with the primary purpose of detaining suspected Taliban and Al Qaeda fighters who were captured during the war on terror. The decision to utilize Guantanamo Bay as a prison was strategic, and directly linked to its interesting and relatively undefined legal status under both domestic and international law. As a consequence of the terms underlying both the lease and the subsequent treaty between Cuba and the United States, Guantanamo Bay is considered to be under the full control of the United States, but is significantly still subject to Cuban sovereignty. Therefore, Guantanamo Bay, and the 61 current detainees of the prison<sup>42</sup>, are not entitled to the same legal protections that are afforded to citizens or those within the technical territorial bounds of the United States stemming from the Constitution and legislation, which has sparked sharp legal and political debates.

The debate focuses on how to categorize the detainees, and is underlined by the shattered notion of traditional security threats stemming from the 9/11 terrorist attacks. Typically, the international regime and the law of armed conflict focused upon state initiated attacks. With the introduction of non-state actors playing a significant role in the national security discourse following 9/11, it was unclear how international law would or could respond.

President Bush initially posited that these detainees would not be covered under the Third Geneva Convention<sup>43</sup>, which established the rules surrounding the treatment of prisoners of war. This held significant consequences for the enumeration of rights and privileges that

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<sup>39</sup> *Agreement between Cuba and the United States for the Lease of Lands for Coal-ing and Naval Stations*, art. III, Feb. 16–Feb. 23, 1903, 6 U.S.T.I.A 1113 (1968) [hereinafter *Lease*].

<sup>40</sup> Samantha Pearlman, Note, *Human Rights Violations at Guantanamo Bay: How the United States Has Avoided Enforcement of International Norms*, 38 SEATTLE U.L. REV. 1109, 1110 (2015).

<sup>41</sup> Berta Esperanza Hernández-Truyol, *Globalized Citizenship: Sovereignty, Security, and Soul*, 50 VILL L. REV. 1009, 1037 (2005).

<sup>42</sup> GUANTANAMO BY THE NUMBERS, <https://www.aclu.org/infographic/guantanamo-numbers> (last visited Sep. 16, 2016).

<sup>43</sup> Andrew Cohen, *The Torture Memos, 10 Years Later*, THE ATLANTIC (Feb. 6, 2012).

the Guantanamo Bay detainees could expect from international and human rights law. In 2002, President Bush then changed his position and instead posited that only the Taliban regime would be covered under the Third Geneva Convention, but not the Al Qaeda fighters.<sup>44</sup> This argument was based on the fact that Afghanistan was a formal signatory to the set of treaties, but Al Qaeda independently was not.<sup>45</sup> Yet, the shift in President Bush's position held no material effect on the rights, protections, or treatments afforded to the detainees at Guantanamo Bay.

Instead, the most significant denial of rights and privileges stemmed from the administration's categorization of the detainees as "unlawful enemy combatants" rather than prisoners of war. To categorize the Taliban and Al Qaeda as prisoners of war would have forced the United States to afford to the detainees a certain number of protected substantive and procedural rights, as required under the Third Geneva Convention as well as other numerous human rights treaties to which the United States is a party.<sup>46</sup> Instead, the detainees were deemed to be "unlawful enemy combatants."<sup>47</sup> As the detaining authority ultimately decides the status of the prisoners, the failure to grant the detainees the prisoner of war status has both allowed the United States to not afford the detainees significant legal, or even basic human rights, and has opened the country up to significant criticisms from the international community.<sup>48</sup>

In defense of this position, the United States argued that the Taliban and Al Qaeda militants do not qualify as 'prisoners of war' under Article 4 of the Geneva Conventions, which comes with a set of legally afforded protections.<sup>49</sup> As a consequence, the United States therefore did not have to afford the prisoners such rights as health-care, or follow a set of standards in their interrogation and detention methods, as would be required if the detainees were labeled as prisoners of war.<sup>50</sup>

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<sup>44</sup> John Mintz & Mike Allen, *Bush Shifts Position on Detainees*, WASH. POST, (Feb. 8, 2002), <https://www.washingtonpost.com/archive/politics/2002/02/08/bush-shifts-position-on-detainees/ae3e49c6-0db0-4b5b-a646-afb34c1dd0f1/>.

<sup>45</sup> *Id.*

<sup>46</sup> See Kelly Wallace & Andrea Koppel, *Bush advisers debate detainees status*, CNN, (Jan. 26, 2002), <http://edition.cnn.com/2002/US/01/26/ret.powell.detainees/index.html>.

<sup>47</sup> See *id.*

<sup>48</sup> See Jerica M. Morris-Frazier, *Missing In Action: Prisoners of War At Guantanamo Bay*, 13 D.C. L. REV. 155, 160, 176 (2010).

<sup>49</sup> CCR, *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantanamo Bay, Cuba* 13-14 (July, 2006), [http://ccrjustice.org/sites/default/files/assets/Report\\_ReportOnTorture.pdf](http://ccrjustice.org/sites/default/files/assets/Report_ReportOnTorture.pdf).

<sup>50</sup> Morris-Frazier, *supra* note 48, at 160.

The debate over what exactly to do with Guantanamo has shifted from the Bush Administration, into a central theme of the discourse under the Obama Administration.<sup>51</sup> Within his presidential campaign, then Senator Obama pledged to close the detention centers at Guantanamo Bay, and to ensure that the United States upheld its obligations under the Geneva Conventions.<sup>52</sup> Yet, it is nine years later, and the facility still continues to operate. Despite the promises of the presidential hopeful in 2007, Congress has since made it difficult for President Obama to fulfill his vow to close the detention center. Congress has instigated strict procedures for the repatriation of detainees to countries that they have determined to have a vulnerable security environment.<sup>53</sup> Inside the detention centers, reprehensible conditions have been exposed as prisoners have come forward with the details of their abuse<sup>54</sup>. Detainees have also engaged in protests.<sup>55</sup> Despite the efforts and attempts of President Obama to improve and close the detention centers at Guantanamo Bay, fifteen years after it opened for its current purpose, both the status of the facilities and the detainees are still caught in a state of uncertainty and those that complied with and instigated the torture are still shrouded in the protections of this fake immunity.

### III. HUMAN RIGHTS VIOLATIONS

Due to the malleable legal status of both the detention centers and the detainees, there is a great risk for human rights violations, which in the case of Guantanamo Bay have been admitted to exist.<sup>56</sup> This section will detail the myriad human rights violations that have occurred at the detention centers. The type of treatment described in this section further reiterates the need for human rights to be understood as belonging purely to the individual, regardless of location or superficial status.

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<sup>51</sup> See Senator Barack Obama, Speech at Woodrow Wilson International Center (Aug. 1, 2007), <http://www.cfr.org/elections/obamas-speech-woodrow-wilson-center/p13974>.

<sup>52</sup> See *id.*

<sup>53</sup> See David Nakamura, *Obama Administration to Transfer Two Guantanamo Bay Detainees*, WASH. POST (July 26, 2013), [https://www.washingtonpost.com/world/national-security/obama-administration-to-transfer-two-guantanamo-bay-detainees/2013/07/26/86a671a6-f62b-11e2-aa2e-4088616498b4\\_story.html](https://www.washingtonpost.com/world/national-security/obama-administration-to-transfer-two-guantanamo-bay-detainees/2013/07/26/86a671a6-f62b-11e2-aa2e-4088616498b4_story.html).

<sup>54</sup> Human Rights Watch, *infra* note 58 at 30.

<sup>55</sup> Both in 2005 and in 2013, detainees have staged a mass hunger strike in protest of the worsening conditions. As a result, the military ultimately force-fed the detainees. See *Hunger Strike at Guantanamo*, N.Y. TIMES (Apr. 5, 2013).

<sup>56</sup> William J. Aceves, *United States v. George Tenet: A Federal Indictment for Torture*, 48 N.Y.U. J. INT'L L. & POL. 1, 34 (2015).

The United States has argued that the techniques used on the detainees and the activities at Guantanamo Bay are justifiable due to the possibility that the extraterritorial nature of the detention centers precludes the applicability of human rights law.<sup>57</sup> While the primary responsibility for the respecting, protection, and proliferation of such rights are dependent upon states, the rights are individual in nature.<sup>58</sup> Regardless of where an individual may be, or their status under the law of armed conflict, the ban on torture has become so valued within the international community that it cannot be derogated from.<sup>59</sup> The United States in its present activities at Guantanamo has ultimately ignored this requirement.<sup>60</sup>

Following the end of World War II, the prohibition against torture as well as the solidification of the notion of a standard of human rights became universally accepted, and serves as a pillar in international law. It first appeared in the Universal Declaration of Human Rights in 1948 and signaled the need "to eliminate the medieval methods of torture and cruel punishment which were practiced in the recent past by the Nazis and fascists."<sup>61</sup> Article 1 of the Declaration stated that 'All human beings are born free and equal in dignity and rights', and further Article 5 of the Declaration stated that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'<sup>62</sup>

Significantly, the Universal Declaration of Human Rights identifies rights that belong to every human being and protects every human being from any violation of these rights.<sup>63</sup> As Eleanor Roosevelt, a key drafter of the Declaration, stated, "human rights exist to the degree that they are respected by people in relations with each other and by governments in relations with their citizens."<sup>64</sup> The Declaration has served as the keystone for the human rights instruments that followed, and each echoed the notion that human rights must be understood as belonging to the individual alone and cannot depend on

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<sup>57</sup> *Amnesty Int'l Report 2015/2016, The State of the World's Human Rights*, Amnesty Int'l, 1, 388 (2016) <https://www.amnesty.org/en/countries/americas/united-states-of-america/report-united-states-of-america/>.

<sup>58</sup> *Torture in Int'l Law: A Guide to Jurisprudence*, CEJIL & APT, 2 (2008) [http://www.aptr.ch/content/files\\_res/jurisprudenceguide.pdf](http://www.aptr.ch/content/files_res/jurisprudenceguide.pdf).

<sup>59</sup> *Id.*

<sup>60</sup> *Torture and Prison Abuse*, Global Policy Forum (2005) <https://www.globalpolicy.org/us-un-and-international-law-8-24/torture-and-prison-abuse.html>.

<sup>61</sup> Nigel Rodley & Matt Pollard, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 18 (3d ed. 2009).

<sup>62</sup> *Id.*

<sup>63</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A / RES/ 217 (III) (Dec. 10, 1948).

<sup>64</sup> See Eleanor Roosevelt Address, *supra* note 19.

the location or status of the individual. If the United States continues to disrespect the fact that human rights exist independent of any other circumstance, the legitimacy of human rights law, as it was codified in the Declaration, will dissolve. Despite the fact that the United States is a party to several key binding instruments which have established set human rights obligations and should have enforced the responsibility to protect such rights, there have been a myriad of reports which detail the torture that has occurred at Guantanamo Bay at the hands of American forces.

Several weeks following the initial invasion into Afghanistan, the United Nations' Working Group on Arbitrary Detention called for the Bush Administration to allow for inspection of the centers, provide information about the interrogation techniques, and to ensure that prisoners would be afforded a fair trial.<sup>65</sup> Although it was clear that the prisoners were being held indefinitely, without trial, without having been officially charged or their guilt declared, the Bush Administration did not respond to the United Nations' Working Group's request.<sup>66</sup> Instead, information was slowly leaked to the public over the course of the war, which made it explicitly clear that the detainees were being subjected to torture and abuse, and their basic human rights were being violated.

In 2002, photos were released that depicted the detainees as "hooded, goggled, and shackled men in bright orange jumpsuits kneeling before a wire mesh fence, their postures a grotesque parody of common Muslim prayer positions."<sup>67</sup> In 2003, the International Committee of the Red Cross presented more than 200 reported accounts of abuse to the United States government.<sup>68</sup> As detainees have been released from the prison, they have publicly commented on the abuse and torture.<sup>69</sup> Further, several detainees have died as a result of the interro-

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<sup>65</sup> Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 321 (2004).

<sup>66</sup> *See id.*

<sup>67</sup> Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantanamo Bay, Cuba, *supra* note 49, at 3.

<sup>68</sup> Human Rights Watch, *The Road to Abu Ghraib* 1, 30 (2004), <http://www.hrw.org/sites/default/files/reports/usa0604.pdf>.

<sup>69</sup> *Id.*

gation techniques.<sup>70</sup> Four detainees committed suicide in 2007, and attempted suicides were all but rare at Guantanamo.<sup>71</sup>

In 2014, the interrogation methods detailed in the Committee Study of the Central Intelligence Agency's Detention and Interrogation Program,<sup>72</sup> commonly known as the Torture Report, exemplified the harsh conditions and torture to which the CIA subjected detainees. Such examples of the torture and abuse the detainees experienced included: (1) mock executions; (2) slaps and "wallings"<sup>73</sup>; (3) sleep deprivation<sup>74</sup>; (4) nudity<sup>75</sup>; (5) waterboarding<sup>76</sup>; (6) sleep deprivation<sup>77</sup>; (7) 'rectal rehydration' or rectal feeding<sup>78</sup>; (8) placing detainees in ice water "baths"<sup>79</sup>; (9) threatening detainees that "they would never be allowed to leave CIA custody alive," or "suggesting to one detainee that he would only leave in a coffin-shaped box"<sup>80</sup>; (10) threatening detainees with harm to their families.<sup>81</sup> Further, throughout the actual interrogations, the CIA consistently listed the interrogation as a higher priority than the detainee's medical needs.<sup>82</sup>

<sup>70</sup> See Duncan Campbell & Suzanne Goldenberg, *They Said This is America . . . If a Soldier Orders You to Take Off Your Clothes, You Must Obey*, GUARDIAN, (June 22, 2004), <http://www.guardian.co.uk/world/2004/jun/23/usa.afghanistan>; Jeanine Bell, *"Behind This Mortal Bone": The (In)Effectiveness of Torture*, 83 IND. L.J. 339, 347 (2008), <http://www.repository.law.indiana.edu/ilj/vol83/iss1/8>.

<sup>71</sup> Brian Foley, *Criminal Law: Guantanamo and Beyond: Dangers of Rigging the Rules*, 97 CRIM L. & CRIMINOLOGY 1009, 1054 (2007); Peter Jan Honigsberg, *Inside Guantanamo*, 10 NEV. L.J. 82, 96 (2010).

<sup>72</sup> STAFF OF S. COMM. ON INTELLIGENCE, 112TH CONG., REP. ON. CENT. INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM 3-4, (Comm. Print 2012).

<sup>73</sup> *Id.* (describing "wallings" as "slamming detainees against a wall").

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (describing how waterboarding would become physically harmful, and would cause convulsions, vomiting, one detainee to "become completely unresponsive, with bubbles rising through his open, full mouth," and further explained as a "series of near drownings").

<sup>77</sup> *Id.* (describing the technique as forcing detainees to remain awake "for up to 180 hours, usually standing or in stress positions with their hands shackled above their heads," which caused at least five of the detainees to hallucinate).

<sup>78</sup> Eric Bradner, *CIA report's most shocking passages*, CNN (Dec. 10, 2014), <http://www.cnn.com/2014/12/09/politics/cia-reports-shocking-passages/>.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 4. (including threatening "harm the children of a detainee, threats to sexually abuse the mother of a detainee, and a threat to 'cut [a detainee's] mother's throat)."

<sup>82</sup> *Id.* at 3. (describing how the CIA continued "its enhanced interrogation techniques despite warnings from CIA medical personnel that the techniques could exacerbate physical injuries," and how in at least one case, "the CIA instructed

In addition, the Torture Report outlines the poor conditions at the detention centers—the chief of interrogations went so far as to describe the center as a “dungeon.”<sup>83</sup> The Report details how detainees were subject to being “kept in complete darkness and constantly shackled in isolated cells with loud noise or music and only a bucket to use for human waste.”<sup>84</sup> The combination of the inhumane interrogation tactics and substandard facilities caused numerous detainees to demonstrate a myriad of different psychological and behavior issues, such as hallucinations, paranoia, insomnia, and attempted self-harm and mutilation.<sup>85</sup>

The numerous reports of torture and abuse that have occurred at the Guantanamo Bay detention centers have reiterated the need for the discourse surrounding the extraterritorial application of state activities to analyze how, and in what context, the detainees and the facility itself should be categorized. Throughout the war on terror, the United States has faced criticism concerning the accusations of torture inflicted upon the detainees. Nevertheless, the international community has not been able to adequately enforce the prohibitions against torture to protect the detainee’s rights, which has created grave consequences for both the detainees and the continued legitimacy of human rights law. Despite the seemingly “legal black hole” under which Guantanamo Bay exists, international treaties do cover the activities that occur at the detention centers, and must be enforced to maintain the legitimacy surrounding the recognition and protection of human rights.

#### IV. THE RELATIONSHIP BETWEEN INTERNATIONAL OBLIGATIONS AND THE “LEGAL BLACK HOLE”

In response to the global war on terror, the current discourse has debated whether it is possible to combat an inherently ambiguous and amorphous concept such as terrorism under the established laws of war. Following the initial 9/11 attacks, a White House memorandum from early 2002 highlighted this debate by postulating that the war on terror “required new thinking in the law of war.”<sup>86</sup> Yet, in 2001, at the time of the initiation of the global war on terror, the United

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personnel that the interrogation [sic] would take “precedence” over his medical care”).

<sup>83</sup> *Id.* at 4.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Memorandum from President George W. Bush to the Vice President, The Sec’y of State, The Sec’y of Def., The Att’y. Gen., & Other Officials 2 (Feb. 7, 2002), <http://www2.gwu.edu/nsarchiv/torturingdemocracy/documents/20020207-2.pdf> [hereinafter Bush Memo].



States was a signatory, and therefore bound to, a number of international legal instruments dictate the standards for treatment and protection of all parties involved in a conflict. These international legal instruments have triggered a series of duties which the United States must abide by in terms of the treatment of detainees at Guantanamo Bay, and include: 1) The Geneva Convention; 2) The International Covenant on Civil and Political Rights and; 3) the Convention Against Torture.

Because the United States has signed and ratified these treaties, the United States is obliged to uphold basic human rights. In response, the Bush Administration argued that derogation from such treaties was acceptable under domestic law in the interest of national security concerns.<sup>87</sup> A treaty acts as a binding contract which establishes the rights and obligations of the contracting parties.<sup>88</sup> The war on terrorism was used as a scapegoat by many lawyers in the Bush Administration to undermine the well-established rules of international law and to justify the derogation from the treaty-created obligations. Initially following the attacks, the senior legal advisors to the President argued that because the United States was experiencing an unparalleled clear and present danger, international law was irrelevant, as it must allow for states to prioritize national security over all else. The argument relied on the idea that all necessary means to preserve national security could be instituted into the war on terrorism, thereby implicitly allowing the torture that occurred at Guantanamo Bay.<sup>89</sup> Yet, international law is clear in that torture or other cruel, inhuman or degrading treatment or punishment is prohibited. Such a bar has been explicitly stated and reiterated in the Geneva Conventions, ICCPR, and the CAT.<sup>90</sup>

In addition, the arguments promulgated by the Bush Administration fail because human rights cannot be suspended based upon an individual's territorial location or status at a certain place in time.<sup>91</sup> Instead, human rights are naturally afforded to the individual, and

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<sup>87</sup> Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 112 (2004).

<sup>88</sup> Sean Murphy, *PRINCIPLES OF INTERNATIONAL LAW* 78 (2nd ed. 2012).

<sup>89</sup> Peter J. Honigsberg, *Chasing "Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT'L. L. & FOR. AFF. 1, 8 (2007).

<sup>90</sup> *Id.* at 11; See generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; International Covenant on Civil and Political Rights art. 2, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>91</sup> Geneva Convention III, *supra* note 17.

cannot be stripped away through the use of seemingly extraterritorial and legally ambiguous circumstances.<sup>92</sup> Despite the fact that the United States government argues that these international obligations cannot be applied to the detention centers or the detainees at Guantanamo Bay as it does not technically fall under American sovereignty, the rights which each proliferates belongs to the individuals themselves, regardless of their placement. Therefore, the argument that Guantanamo Bay and the detainees exist in a “legal black hole” is inherently fruitless, and must be understood as illegitimate to preserve human rights.

#### A. *Geneva Convention*

The Geneva Conventions are a series of four treaties and two additional protocols which establish a series of standard rules for states to follow in terms of the treatment of civilians, soldiers who have been rendered *hors de combat*, and combatants during periods of war and armed conflict.<sup>93</sup> Significantly, the Third Geneva Convention governs the status and rights to be afforded to prisoners of war (POWs) and detainees. Under Article 4 of the Convention, protections associated with POW status are granted to members of a regular armed force, and other individuals such as militias and volunteer corps that serve as a part of the regular militia.<sup>94</sup> Further, even if a party is not a member of the regular armed forces but instead is part of a separate militia, volunteer corps, or an organized resistance movement that is not affiliated with the regular armed services, they too are to be granted the protections associated with POW status.<sup>95</sup> Such status and protections will only be afforded if (a) the organization has a hierarchical command structure, (b) displays a unique and distinctive sign that is recognizable at a distance, (c) carries arms openly, and (d) follows the prescribed laws of war.<sup>96</sup> Further, individuals who reside in the invaded territory, and took up arms against the invading force, shall be granted prisoner of war status.<sup>97</sup>

When the first detainees arrived at Guantanamo Bay, it was unclear which laws would regulate the detention or treatment of detainees, as their status as prisoners of war had yet to be determined. By 2002, the position of the United States and Secretary of Defense Donald Rumsfeld was that, “. . . technically unlawful combatants do

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* art. 4(A)(6).

not have any rights under the Geneva Conventions.”<sup>98</sup> The term “unlawful combatants,” rather than “prisoner of war” was bestowed upon the detainees because it was argued that the detainees did not wear identifiable uniforms, observe a hierarchical command structure, or follow the rules of war.<sup>99</sup> Yet this was strategically done to deny the detainees the well-established privileges, protections, and rights guaranteed under international law to prisoners of war. While the traditional laws of war encompass state engaged wars, Al Qaeda was not involved in any one particular state, but rather was an amorphous transnational organization. The United States then reiterated that the Taliban would not be covered by the Geneva Conventions, as they did not follow the traditional laws of war.<sup>100</sup> Yet, the attempt by the United States to classify the detainees under a new name as an “unlawful enemy combatant” does not eliminate the rights of a prisoner of war.

Domestically, the Bush Administration attempted to justify the detention through the introduction of the term “unlawful enemy combatants.”<sup>101</sup> While American law typically precludes detention without a criminal trial,<sup>102</sup> the use of the term “unlawful enemy combatant” allowed for the Bush Administration to argue that at least under domestic law, the detentions were lawful.<sup>103</sup> The United States has insinuated that this “unlawful enemy combatant” status is a new phenomenon in international law, and therefore the detainees themselves seemingly exist in their own “legal black hole.” As senior legal advisor to the State Department, John Bellinger stipulated the Geneva Conventions “were designed in 1949 for different sorts of circumstances, and they don’t provide easy answers in all cases to how to deal with international terrorists.”<sup>104</sup> Yet, this position is too narrow and does not allow for the Geneva Conventions to provide the individual protections that underline the Conventions original creation.

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<sup>98</sup> Monica Whitlock, *Legal Limbo of Guantanamo's Prisoners*, BBC News (May 16, 2003), <http://news.bbc.co.uk/2/hi/americas/3034697.stm>.

<sup>99</sup> See Bush Memo, *supra* note 86.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *United States v. Salerno*, 481 U.S. 739, 749 (1987) (stating that “a general rule of substantive due process [is] that the government may not detain a person prior to a judgment of guilt a criminal trial”).

<sup>103</sup> In this way, the detainees at Guantanamo were likened to the thousands of German and Italian prisoners of war that the United States detained during World War II, without any significant contention. See generally *In re Territo*, 156 F.2d 142, 145-46 (9th Cir. 1946).

<sup>104</sup> *The Legal Basis of U.S. Detention Policies*, THE HERITAGE FOUNDATION (2016), <http://www.heritage.org/research/projects/enemy-detention/detention-policy>.

In 2006, the Bush Administration defined an 'unlawful enemy combatant' as:

A person who has engaged in hostilities or who has purposefully and materially supported hostilities against the US or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, Al-Qaeda, or associated forces); or a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.<sup>105</sup>

By creating such a definition, the administration attempted to circumvent the protections that should and would have been afforded to the detainees had they been granted prisoner of war status under the Geneva Conventions. Instead, the administration sought to create a new class which it argued held an indeterminate legal status and therefore protections could be withheld. But the definition still applies to an individual, and an individual alone, as do the protections afforded by the Geneva Convention. Despite the attempt by the administration to cloak the detainees in a new sort of legally ambiguous nature, the Convention and its protections attach to individuals, regardless of their location and therefore could not be withheld, even with this new definition.

Instead, the Third Geneva Convention defined prisoners of war as:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside of their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

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<sup>105</sup> Military Commissions Act § 43, 10 U.S.C. § 948 (2006).

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots, and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.<sup>106</sup>

And further, it includes civilians who are captured along with the combatants, but are not considered to be members of the organization and individuals who reside in the invaded territory and took up arms against the invading force.<sup>107</sup>

The United States has tried to argue that due to the fact that members of the Taliban and Al Qaeda forces reputedly failed part of the four-prong test, under Article 4(2), that they do not qualify as prisoners of war. Yet, even without meeting all four requirements, the detainees would still qualify under the prisoner of war status as "inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arm to resist the invading forces."<sup>108</sup> Based on this definition, American, Al Qaeda and Taliban forces are still guaranteed the protections associated with prisoner of war status.

While terrorism is a relatively new phenomenon in the global arena, and it may be difficult to group all the detainees under one umbrella definition, the Geneva Conventions can be seen as encompass-

<sup>106</sup> Geneva Convention III, *supra* note 17, art. 4(A).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

ing the ambiguity and providing a solution to these unchartered laws of war. Geneva Convention III Article 5 holds that:

The present Convention shall apply to the person referred to in article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having falling into the hands of the enemy, belong to any of the categories enumerated in article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>109</sup>

Article 5 explicitly calls for all persons to be granted the protections associated with prisoner of war status, even if there is doubt.<sup>110</sup> Therefore, the argument that “unlawful enemy combatant” is a new phenomenon, inherently fails. Despite the fact that Article 5 does not define what constitutes doubt,<sup>111</sup> there is a presumption that detainees will qualify as prisoners of war until proven otherwise. Even with the creation of a thinly veiled new definition, Article 5 allows for the ambiguity associated with what sorts of protections should be afforded to terrorists to be encompassed by the Conventions.<sup>112</sup>

The United States argued that because there was not an Article 5 question of doubt, there was therefore no need for a fact finding tribunal — Al Qaeda did not qualify for the Geneva protections, so neither could the individual detainees.<sup>113</sup> In terms of the Taliban, the denial of prisoner of war status rights was justified on the basis that the President had the ability to decide the status of the detainees, absent a determination from a competent and neutral tribunal.<sup>114</sup> Although this position has been reiterated throughout the international community, the United States remains an outlier in this respect as it consistently questions the extraterritorial application of human rights treaties. Internationally, there is a strong consensus that human

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<sup>109</sup> *Id.* art. 5.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Major Dana M. Hollywood, *Redemption Deferred: Military Commissions in the War on Terror and the Charge of Providing Material Support for Terrorism*, 36 HASTINGS INT'L & COMP. L. REV. 1, 48 (2013).

<sup>114</sup> Memorandum from Jay S. Bybee, Assistant Att'y Gen., U.S. Dep't of Just., to Alberto Gonzales, Counsel to the President, and William J. Haynes II, Gen. Couns. of the Dep't of Def., (Jan. 22, 2002), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf>.

rights treaties do apply if the government exercises control and jurisdiction over the territory.<sup>115</sup> Notably, it has been argued that:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or a medical professional of the military who is covered by the First Convention, but there is no intermediate status; nobody in enemy hands can be outside the law. Twisting the labels “belligerent” and “combatant” with adjectives cannot evade the laws of war because all categories have rights. . . .<sup>116</sup>

The argument demonstrates the fact that international law and the rights associated with the regime attach to the person and cannot be dissolved based on a new situation, definition, or the use of an extra-territorial detention center. The limited legal loophole found by the United States reiterates the need for the international community to adapt the current standards of war to the changing regime.

Despite the shattering introduction of non-state actors and terrorism into the global mindset, the protection of human rights cannot be derogated from or ignored, as has been the case with the United States in Guantanamo Bay. It is clear that despite the clever attempt to mask prisoners of war under a new “unlawful enemy combatant” title, the United States continues to violate the obligations set out under the Geneva Convention. It is important to note that the definition and the Convention, as explicitly stated throughout the treaty’s articles, apply to the person, and the person alone regardless of their locality.<sup>117</sup> This notion is consistently seen in the language of the Geneva Convention—the individual rights must be understood as attaching to the person regardless of their locality and they cannot be diminished just because they are being held outside of United States’ technical sovereignty or because they’re cloaked in an arguably new class of “unlawful enemy combatants.”<sup>118</sup>

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<sup>115</sup> Recently, the Supreme Court of the United Kingdom and Canada have upheld this position, and numerous international bodies have echoed the same belief. See Inter-American Comm’n on Human Rights, Report on Terrorism and Human Rights, (5th rev. ed. 2002), <https://www.cidh.org/terrorism/eng/toc/htm>; see also Oona A. Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. ST. L. J. 389, 390-405 (2011).

<sup>116</sup> International Committee of the Red Cross, Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1958), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?documentId=18E3CCDE8BE7E2F8C12563CD0042A50B&action=openDocument>.

<sup>117</sup> See generally Geneva Convention III, *supra* note 17.

<sup>118</sup> *Id.*

*B. International Covenant on Civil and Political Rights*

Ratified by the United States in 1992, the International Covenant on Civil and Political Rights attempts to ensure that states protect the right to life, peaceful assembly, and basic human rights such as the freedom from torture, slavery, and retroactive criminal legislation.<sup>119</sup> Article 2, paragraph 1 of the Covenant articulates that “each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind.”<sup>120</sup>

Significantly, the treaty again explicitly states that the Covenant is bound to protect the rights of individuals based on their status as a human being, and by a state signing into these obligations, it contracts to protect the individual’s rights.<sup>121</sup> The ICCPR limits itself by only binding states to protect individual’s rights as they fall within the state’s jurisdiction or territorial sovereignty.<sup>122</sup> As the detainees are held outside of technical American sovereignty, it is then necessary to determine whether or not the detainees at Guantanamo can be deemed as falling under the jurisdiction of the United States.

The relevant case law establishes that state actors can and will be held responsible for violations of human rights, even if the activities occur under the jurisdiction or sovereignty of another state.<sup>123</sup> The United Nations Human Rights Committee – an agency created to supervise state compliance with the treaty – has explicitly declared that the ICCPR is intended to apply to any area within a state party’s jurisdiction and control.<sup>124</sup> The Committee, in its March 2004 General Comment No. 31, explained the scope of the Covenant by stating that a “State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”<sup>125</sup>

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<sup>119</sup> See generally ICCPR, *supra* note 17.

<sup>120</sup> *Id.* art. 2.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> The Human Rights Committee has explicitly stated that Article 2(1) of the ICCPR “does not imply that the state party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another state.” *Delia Saldias de Lopez v. Uruguay*, Comm. No. 52/1979 (29 July 1981), U.N. Doc. CCPR/C/OP/1 (1985) 88, 91, ¶ 12.3.

<sup>124</sup> See ICCPR, *supra* note 17 art. 2. (stipulating that each state party must “ensure to all individuals. . . subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind”).

<sup>125</sup> UN Hum. Rights Comm., General Comment No. 31 on Art. 2 of the Covenant: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, 10 UN Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).



This statement establishes a clear standard for the scope of the jurisdiction of the Covenant, and thereby asserts that jurisdiction is based solely upon the individual, regardless of the person's current location. Specifically, the Committee establishes that the jurisdictional standard is met when a person ("anyone") has a relationship with the State in which the State exercises "power or effective control."<sup>126</sup>

This was again reiterated in 2011, 2014, and 2015 by the Human Rights Committee, and can be summed up in the Committee's Concluding Observations on the Fourth Periodic Report on the United States of America:

"The Committee regrets that the State party continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the country of article 2, paragraph 1, supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice."<sup>127</sup>

Significantly, the Committee that is charged with determining the applicability of the treaty specifically noted that the treaty and thus the associated protections apply to the individuals without any other prerequisites besides jurisdiction. The United States signed and ratified the treaty without including a specific reservation that would have excluded Guantanamo from the covenant's jurisdiction.<sup>128</sup> As the United States exercises complete jurisdiction and control over Guantanamo by virtue of the lease and subsequent treaty with Cuba,, and further is a party to the ICCPR, it is clear that the detainees at Guantanamo are therefore fully entitled, without exception, to the protections the Covenant provides. This is due to the fact that rights attach individually and cannot be dissolved based on a thinly veiled argument of jurisdiction<sup>129</sup>. Guantanamo exists under American control, and this, coupled with the fact that human rights are triggered solely by an individual's status as a human being, means that the United States is in violation of its ICCPR duties. Further, it is important to note that the ICCPR applies during both peace times and periods of armed conflict<sup>130</sup>. Therefore, the ICCPR applies to the detainees at Guantanamo Bay, and the protections granted by the treaty must be provided to the detainees.

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<sup>126</sup> Wilde, *supra* note 11, at 804.

<sup>127</sup> UN Hum. Rights Comm., Concluding observations on the fourth periodic report of the United States of America, 10 UN Doc. CCPR/C/USA/CO/4 (April 23, 2014).

<sup>128</sup> Pearlman, *supra* note 40, at 1118; De Zayas, *supra* note 37, at 310.

<sup>129</sup> ICCPR, *supra* note 17, art 2.

<sup>130</sup> *Id.*

### C. *Convention Against Torture*

As stated previously, torture and other cruel treatment had been internationally condemned following the end of World War II. The 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) codified the general duties and instead established detailed parameters that were originally set out in the 1948 Universal Declaration of Human Rights, and then reiterated throughout numerous other treaties.<sup>131</sup> The CAT specifically prohibits the use of torture, or “other acts of cruel, inhuman or degrading treatment or punishment”<sup>132</sup> within the party’s territories.<sup>133</sup>

Article 1 then broadly outlines the prohibition by defining torture as:

any act which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>134</sup>

The Convention explicitly states that there is no acceptable derogation from the prohibition on torture as it declares that under “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.”<sup>135</sup> Such a strict level of responsibility attached to the ban on torture demonstrates the importance of the ban, and therefore the significance of the American argument for the limited scope of the treaty to apply extraterritoriality. The CAT is clear that no circumstances can eliminate the responsibility to not torture another individual, which demonstrates that the United States’ view that the seemingly extraterritorial nature of Guantanamo puts the prohibition on hold is invalid. For the prohibition to be truly effective in preventing the use of torture, it must be seen as being triggered purely by the individual’s status as a human being. While it is undeniable that the United States can only uphold

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<sup>131</sup> CAT, *supra* note 17.

<sup>132</sup> *Id.* art. 16.

<sup>133</sup> *Id.* art. 5.

<sup>134</sup> *Id.* art 1.

<sup>135</sup> *Id.* art 2.

the protections of the treaty in areas of which it has control, the right to not be subject to torture is not based upon that same area. Instead, this right is based upon the individual being a human being and to insinuate that there is a geographic gap in that status dissolves the entire purpose of human rights law.

Further, pursuant to Article 2, all states must enact effective legislative, administrative, and judicial measures in order to prevent torture within any territory under the party's jurisdiction.<sup>136</sup> Under Article 5, a state party is considered to have jurisdiction over an act of torture in four situations: "(a) when the offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) when the alleged offender is a national of that State; (c) when the victim is a national of that State if that State considers it appropriate; or (d) when the alleged guilty party is within any territory that falls under the jurisdiction of the state, and the state does not extradite the individual."<sup>137</sup> As stated within the initial lease as well as the subsequent treaty that established the United States right to occupy Guantanamo Bay, the detention centers fall under American control and jurisdiction.<sup>138</sup>

The United States has implemented a reservation to the treaty by stating that Article 16 only applies to the extent that the conduct is prohibited under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.<sup>139</sup> Notably, however, none of these amendments ban torture. The international community has accepted that there are no geographic gaps in terms of the bar on torture, and the prohibition applies to all individuals irrespective of their status as a possible alleged terrorist or state enemy, or the individual's location.<sup>140</sup> Still, the United States continues to argue that the extraterritorial nature of Guantanamo precludes the ability of the protections to apply. Yet, the international community has accepted the absolute nature of the bar on torture due to the fact that the protections apply to the individual regardless of any jurisdictional or territorial perquisites. The discourse has sought to ensure that every person, regardless of their criminal, terrorist, civilian, lawful or unlawful combatant status may not be tortured or subject to any other cruel, inhuman or degrading treatment based solely on the person being a human being.

Although the United States government has attempted to argue that the ban is inapplicable at Guantanamo due to the seemingly extraterritorial nature of the detention centers, the rights are not pre-

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* art 5.

<sup>138</sup> *See* Lease, *supra* note 39.

<sup>139</sup> *See generally* CAT, *supra* note 17.

<sup>140</sup> *Id.*

mised upon American sovereignty over the base. Instead, the rights exist independently as they attach to the individual, and such rights cannot be suspended based on an individual's location. To do so would diminish the legitimacy of human rights, and would hold severe consequences for the enforcement of human rights law. Such points were reiterated by the Committee Against Torture in 2006, when it stated that the United States "should rescind any interrogation technique, including methods involving sexual humiliation, 'water boarding,' 'short shackling', and using dogs to induce fear, that constitute torture, cruel, inhuman, or degrading treatment or punishment, in all places of detention under its *de facto* effective control, in order to comply with its obligations under the Convention."<sup>141</sup> The need for the United States to reevaluate its policies stems from the fact that the Convention and the ban on torture is inherent in every individual, regardless of their location. The government thinly veils this requirement by arguing that their effective control without the underpinnings of sovereignty does not require the same level of protections to be afforded to the detainees. But this position ignores the individual nature of the rights and therefore is in violation of the Convention.

## V. CONCLUSION

In conclusion, despite the seemingly "legal black hole" under which Guantanamo Bay exists, it is clear that international law does cover the detention facilities and the detainees. Therefore, the United States has consistently violated, and continues to do so, the obligations and duties to which it is contractually bound under The Geneva Convention, ICCPR, and the CAT. In order to ensure the continued legitimacy of human rights law, it must be understood and reiterated that rights attach based on personhood alone. In addition, treaty obligations that solidify such rights must be used as enforcement mechanisms. Despite President Obama's recent and substantial efforts to officially close the facilities,<sup>142</sup> the need for the current discourse surrounding state activities and their extraterritorial application is still incredibility relevant. As officials in Egypt, Zimbabwe, Russia, Iran and China have pointed to Guantanamo Bay in defense of their own human rights violations,<sup>143</sup> the need for the absolute association of the rights as individual becomes especially pertinent and necessary.

The age of terrorism and non-state actors as a significant and impending threat upon the global community and regime is upon us,

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<sup>141</sup> Rep. of the Comm. Against Torture, CAT/A/61/44 (May 19, 2006).

<sup>142</sup> Gregory Korte & Tom Vanden Brook, *Obama takes last chance to close Guantanamo Bay*, USA TODAY (Feb. 23, 2016), <http://www.usatoday.com/story/news/politics/2016/02/23/obama-releases-plan-close-guantanamo-bay/80792250/>.

<sup>143</sup> Yoo & Cox, *supra* note 21, at 14.

and has not lessened since the inception and operation of Guantanamo Bay. On Christmas Day in 2009, a Nigerian Islamist whom Al Qaeda had trained, Umar Farouk Abdulmutallab, attempted to blow up an American airplane bound for Detroit by concealing explosives hidden in his underwear.<sup>144</sup> Further, in May of 2010, Faisal Shahzad, a Pakistani born American citizen attempted to bomb Times Square.<sup>145</sup> British soldiers have been accused of abuse and torture of Iraqi prisoners,<sup>146</sup> including allegations of beating a prisoner to death, beating a prisoner and forcing him to swim across a river where the prisoner subsequently drowned, and shooting civilians.<sup>147</sup> London, Paris, and Brussels have recently been the target of terrorist plots.<sup>148</sup> As a result of the obvious limbo under which this aspect of law and order exists in the age of terrorism, the public international law sphere needs to set substantial parameters as to how countries can respond to such threats.

The legal “black hole” surrounding Guantanamo Bay leaves uncertainty for other signatories to such treaties and strips the enforcement mechanisms associated with the protection of the detainees of their teeth. In addition, the argument ignores the fact that human rights are individual in nature, and cannot be suspended or dissolved based upon a person’s location or arguable status. To do so would devolve the legitimacy and underlying purpose of human rights law as a whole, and would have severe consequences for the established order in the international community. Further, the legally ambiguous nature of the extraterritorial state activities creates a set of twin risks for state actors, which should serve as an incentive for the actors involved

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<sup>144</sup> David Ariosto & Deborah Feyerick, *Christmas Day bomber sentenced to life in prison*, CNN (Feb. 17, 2012), <http://www.cnn.com/2012/02/16/justice/michigan-underwear-bomber-sentencing/>.

<sup>145</sup> *Times Square Bomber Sentenced to Life in Prison*, FOX NEWS (Oct. 5, 2010), <http://www.foxnews.com/us/2010/10/05/times-square-bomber-faces-sentencing-nyc.html>.

<sup>146</sup> Andrew Williams, *British Soldiers Accused of Torture and Abuse During Iraq Occupation*, NEWSWEEK (Dec. 17, 2014), <http://www.newsweek.com/2014/12/26/british-soldiers-caught-further-torture-allegations-during-iraqi-occupation-292323.html>.

<sup>147</sup> *Id.*; Richard Norton-Taylor & Steven Morris, *Court Battle Over Iraqi Deaths*, THE GUARDIAN (May 5, 2004), <http://www.theguardian.com/politics/2004/may/05/politicsandthemedial.iraqandthemedial>.

<sup>148</sup> *7 July London bombings: What happened that day?*, BBC NEWS (July 3, 2015), <http://www.bbc.com/news/uk-33253598>; *Paris attacks: What happened on the night?*, BBC NEWS (Dec. 9, 2015), <http://www.bbc.com/news/world-europe-34818994> (May 6, 2016); *Brussels attacks: Zaventem and Maelbeek bombs kill many*, BBC NEWS (Mar. 22, 2016), <http://www.bbc.com/news/world-europe-35869254>.

in the public international and human rights law to want to close the gap.

First, states may underestimate the obligations of the treaties, which may lead to unintentional but significant human rights violations. On the other hand, if a state overestimates the obligations, it is entirely possible that the state may not employ strategically necessary tactics that may lead to serious national security concerns. This creates a huge potential for violations to occur, and if it is allowed to continue, human rights law as a whole will devolve and lose the legitimacy it has worked so hard to gain. In terms of Guantanamo Bay specifically, it is crucial that the international public law and human rights legal spheres use this as case study as to how extraterritorial state action will be considered in the future and further solidify the individual nature of the rights in the global arena.

States cannot be permitted to believe that explicit torture and abuse are permitted simply because their actions exist in what has been deemed a "legal black hole" due to the territorial uncertainty that underlines extraterritorial state activity. Human rights are individual in nature and are triggered solely by the person's status as a human being. Such an acceptance of the "legal black hole" would devolve the existence of the international human rights law, as well as the legitimacy associated with the notion that human rights are capable of being sufficiently protected in this modern era. As Eleanor Roosevelt stated,

The basic problem confronting the world today, as I said in the beginning, is the preservation of human freedom for the individual and consequently for the society of which he is a part. We are fighting this battle again today as it was fought at the time of the French Revolution and at the time of the American Revolution. The issue of human liberty is as decisive now as it was then.<sup>149</sup>

In order to maintain that progress, it is crucial that the discourse shift to speaking about the individual nature of human rights, and to illuminate the mistakes of Guantanamo Bay to ensure that history does not repeat itself.

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<sup>149</sup> Eleanor Roosevelt Speech, *supra* note 19.

