

# THE SHAPE OF MODERN TORTURE: EXTRAORDINARY RENDITION AND GHOST DETAINEES

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*[This commentary considers the current international debate over torture through a framework of modern state power. Most pointedly, the commentary suggests that several aspects of torture and related abuse practised by the United States and other countries, such as its hidden quality, its status as an exception, and its total domination of the victim, reflect the workings of the modern state. This commentary suggests that international and US law on torture and coercion enable rather than prevent the modern practice of state torture. Finally, this commentary considers the ways in which the use of extraordinary rendition and the creation of a class of people known as 'ghost detainees' exemplify the characteristics of modern torture, and asks whether these examples have more general application.]*

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'Before I draw nearer to that stone to which you point', said Scrooge, 'answer me one question. Are these the shadows of the things that Will be, or are they shadows of things that May be, only?'<sup>1</sup>

## I INTRODUCTION

My goal in this commentary is to combine two ways of thinking about torture and related forms of coercive treatment and interrogation. The first of these ways is a legal analysis of some of the issues surrounding torture, with particular reference to the practice of extraordinary rendition (the use of force, rather than legal process, to take suspected 'terrorists' from one country to another for purposes of detention and interrogation), and the existence of 'ghost detainees' (people who are secretly held and interrogated by the United States or its allies in

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<sup>1</sup> Charles Dickens, *A Christmas Carol* (first published 1843, 1897 ed) 89.

undisclosed locations and who are outside the protections of domestic or international law in any practical sense). Although some of my arguments and conclusions on these issues may be surprising or at least debatable, they will be set largely within a familiar context of legal argument and analysis.

The second is an effort to think more conceptually or theoretically, albeit briefly, about what torture is and how it operates within and as a part of modern societies. By 'modern' I mean simply societies governed as centralised, most commonly democratic nation-states and their accompanying social and psychological dynamics; such things as 'bureaucracies and corporations, the nuclear family with its bourgeois mores, human and social sciences and the institutions supported by them'.<sup>2</sup> Although we often ascribe a positive value to these dynamics, seeing them as reflecting the progress of enlightenment values, the experience of modernity also generates concerns about the ways in which these structures can 'ingrain destructive patterns of thinking and acting'<sup>3</sup> that result in a level of dehumanisation or subjection of people that is different in degree and kind from what is arguably inherent in the relationship between individual and society.<sup>4</sup>

My point in undertaking this second type of analysis is to gain a broader perspective on the reasons why torture and its close equivalents are practised by countries such as the US, and how they are practised, including the ways in which law makes room for these practices. As I hope will become clear, one of the most important aspects of modern torture is the creation of doubt as to whether torture has happened at all — extraordinary rendition and the creation of ghost detainees serve this function well.

## II DEFINING MODERN TORTURE

In 1993, Darius Rejali published *Torture and Modernity*, which considered the use of torture in Iran by the Pahlavi dynasty and the Islamic Republic that emerged from the revolt against the Shah. Rejali rejected the possibility that the practice of torture by both regimes was an historical hangover that would drop away as Iranian society became more progressive, enlightened, and humane in the eyes of Western observers; that is, as it became more 'modern' under one sense of that word. Instead, he insisted that Iran was already a modern society and that the ways in which the Pahlavi dynasty and the Islamic Republic used torture not only reflected the modernity of Iranian society but were also characteristic of modern states in general.<sup>5</sup>

The following year, in a review of Rejali's book, Daniel Chirot challenged the idea that the use of torture by Iran's recent governments was connected with their modernity. In what may have been intended as the clinching argument,

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<sup>2</sup> Eyal Chowers, *The Modern Self in the Labyrinth: Politics and the Entrapment Imagination* (2004) 3.

<sup>3</sup> *Ibid.*

<sup>4</sup> See *ibid.* 2–3. For the purposes of this commentary, I do not quarrel with the idea that the dehumanisation or subjection described by writers such as Chowers is normatively undesirable; nor do I seek to historicise the idea of an individual self (although it is worth noting that the concept of the self is in many ways a modern concept linked to the rise of modern societies).

<sup>5</sup> See Darius Rejali, *Torture and Modernity: Self, Society, and State in Modern Iran* (1993) 62–81.

Chiot asked rhetorically: '[i]f the growth of torture in twentieth-century Iran and its changing forms are caused by efforts to modernize, why do we not torture in the modern United States or Western Europe?'.<sup>6</sup>

Chiot's question was at best naïve when written. Consider the abusive treatment, including torture, of people variously defined as insurgents, terrorists, revolutionaries, or criminals by Great Britain in, among other places, Kenya and Northern Ireland,<sup>7</sup> by France in Vietnam and Algeria,<sup>8</sup> by Spain in the Basque country,<sup>9</sup> by Israel in the occupied territories,<sup>10</sup> and by the US in the Philippines, Vietnam and Central America (where it trained others in the use of coercion).<sup>11</sup> With the exception of the actions by the US in the Philippines, all of this abuse took place after World War II, in the midst of the humanitarian revolution in international law.

If asked today, Chiot's question might be dismissed, not just as naïve, but as inexcusably ignorant or aggressively partisan, because the names Bagram, Abu Ghraib, and Guantánamo have come to stand for state torture in a colloquial sense, and for coercive interrogation and punishment in a somewhat more precise sense. Few in the academy today would so easily deny that modern Western democracies use torture or its close equivalents.

How then should we interpret the statements of US President George W Bush? A year before the Abu Ghraib scandal broke, but after he had signed a document declaring that much of the law embodied in the *Geneva Conventions*<sup>12</sup> need not apply to the Taliban or al Qaeda, he stated that the US was leading the

<sup>6</sup> Daniel Chiot, 'Torture and Modernity: Self, Society, and State in Modern Iran', by Darius M Rejali' (1994) 23 *Contemporary Sociology* 678, 680.

<sup>7</sup> See Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (2005) 207–11, 244–59; John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* (2000) 4–8.

<sup>8</sup> See Douglas Porch, *The French Secret Services: From the Dreyfus Affair to the Gulf War* (1995) 302, 381–4; Rita Maran, *Torture: The Role of Ideology in the French–Algerian War* (1989).

<sup>9</sup> See Paddy Woodworth, *Dirty War, Clean Hands: ETA, the GAL and Spanish Democracy* (2001) 281. For further discussion of Britain, France and Spain respectively see Antonio Vercher, *Terrorism in Europe: An International Comparative Legal Analysis* (1992) 65–72, 240–1, 247–9; Joseba Zulaika and William Douglass, *Terror and Taboo: The Follies, Fables, and Faces of Terrorism* (1996) 198–212.

<sup>10</sup> See generally John T Parry, 'Judicial Restraints on Illegal State Violence: Israel and the United States' (2002) 35 *Vanderbilt Journal of Transnational Law* 73.

<sup>11</sup> See Timothy Kepner, 'Torture 101: The Case against the United States for Atrocities Committed by School of Americas Alumni' (2001) 19 *Dickinson Journal of International Law* 475, 486–492. See generally Theodore Gonzalves, 'Apocalypse Now and Then', *AsianWeek* (San Francisco, US), 13 August 2004, 6; Walter Pincus, 'Iraq Tactics Have Long History with US Interrogators', *The Washington Post* (Washington DC, US), 13 June 2004, A08. See also the controversial Vietnam Veterans against the War, *Winter Soldier Investigations* (1971) available at <[http://lists.village.virginia.edu/sixties/HTML\\_docs/Resources/Primary/Winter\\_Soldier/WS\\_entry.html](http://lists.village.virginia.edu/sixties/HTML_docs/Resources/Primary/Winter_Soldier/WS_entry.html)> at 1 October 2005.

<sup>12</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, 'Geneva Conventions').

fight against torture ‘by example’.<sup>13</sup> Early in 2005, after numerous revelations of abuse by US forces, he insisted that ‘torture is never acceptable, nor do we hand over people to countries that do torture’.<sup>14</sup> Despite what I suggested above, I do not think President Bush was speaking simply out of naïveté, ignorance, or aggressive partisanship. Rather, I think he sincerely believes that the US does not torture in any meaningful sense. Whatever had been approved or was already being done at various locations was either not relevant to his statement or was properly defined as ‘not torture’. In both cases he may have been correct.

To understand why, we need to think about what torture is and how it functions in what the Bush Administration calls the ‘Global War on Terrorism’. The most obvious starting point is the legal definition of torture, and the most obvious source of a definition is the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>15</sup> The *Convention* defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>16</sup>

Torture, so defined, is banned absolutely: ‘[n]o exceptional circumstances ... may be invoked as a justification of torture’.<sup>17</sup> The *Convention against Torture* also takes account of an additional category of state violence — ‘other cruel, inhuman or degrading treatment or punishment’ — that States Parties must ‘undertake to prevent’.<sup>18</sup> Other international agreements, such as the *International Covenant on Civil and Political Rights*<sup>19</sup> and the *Geneva*

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<sup>13</sup> George W Bush, *Statement by the President: United Nations International Day in Support of Victims of Torture* (26 June 2003) <<http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html>> at 1 October 2005. See also Peter Slevin, ‘US Pledges to Avoid Torture’, *The Washington Post* (Washington DC, US), 27 June 2003, A11.

<sup>14</sup> See Jane Mayer, ‘Outsourcing Torture’ (2005) 81(1) *The New Yorker* 106, 106. See also Elisabeth Bumiller, David Sanger and Richard Stevenson, ‘The Conflict in Iraq: President Bush Says Iraqis Will Want GIs to Stay to Help’, *The New York Times* (New York, US), 28 January 2005, A1; George W Bush, ‘Memorandum: Humane Treatment of al Qaeda and Taliban Detainees’ (7 February 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 134, 134–5.

<sup>15</sup> Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (*‘Convention against Torture’*).

<sup>16</sup> *Ibid* art 1.

<sup>17</sup> *Ibid* art 2.

<sup>18</sup> *Ibid* art 16.

<sup>19</sup> Opened for signature 16 December 1966, 999 UNTS 171, art 7 (entered into force 23 March 1976) (*‘ICCPR’*).

*Conventions*,<sup>20</sup> ban similar conduct, as do the domestic laws of most countries. In the US, for example, torture is understood to be not just illegal but also unconstitutional in a variety of ways.<sup>21</sup>

From this definition and prohibition, three points seem obvious. Firstly, one characteristic of modern torture is the effort to define it rationally, with precision, and to conceptualise it against a background of individual rights. Thus, torture is defined as conduct so terrible that all individuals have an absolute right not to be subjected to it. Indeed, the prohibition against torture seeks to escape the familiar dynamic of rights and state power, in which the recognition of a right is also, and arguably more importantly, an acknowledgment of state power.<sup>22</sup>

Secondly, the attempt to define and prohibit torture means that states will do their best to argue that their conduct is ‘not torture’ — even if that involves admitting the conduct was cruel, inhuman or degrading. In this sense, the *Convention against Torture* normalises torture by placing it in the familiar framework of legal argument that surrounds the application of contract or criminal law. Embedding torture within law creates a tension with the absolute prohibition, a tension that is familiar to lawyers, judges, and legal academics from debates regarding the relative priority of rules and standards in legal interpretation. Put briefly, for anyone who believes there is an exception to every legal rule, creating a law of torture will almost inevitably lead to exceptions. Resolving this tension by prohibiting exceptions does no more than make definition rather than exception the central legal issue. Governments will interpret the legal definition of torture to permit specific forms of coercion because they are ‘not torture’, a move which allows formal adherence to an absolute ban on a shrinking category of conduct.

Thirdly, if we adopt a moderate reading of the *Convention against Torture*’s definition — not as expansive as human rights advocates would like, but not as narrow as many governments would prefer — it appears that torture is something that Western governments do. It may even be that the practice of torture in modern, developed, Western democracies is not aberrational, rather it is common

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<sup>20</sup> Above n 12. See also *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict*, opened for signature 12 December 1977, 1125 UNTS 609 (entered into force 12 December 1978). See Jordan Paust, ‘Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, The Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions’ (2004) 79 *Notre Dame Law Review* 1335, for discussion of how the *Geneva Conventions* apply to ‘a prisoner of war, unprivileged belligerent, terrorist, or noncombatant’: at 1351.

<sup>21</sup> See discussion below in Part III.

<sup>22</sup> For theoretical claims to this effect about rights in general, see Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, 1979 ed) 222 [trans of: *Surveiller et punir: Naissance de la prison* (first published 1975)]; Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, 1998 ed) 121–2 [trans of: *Homo sacer: Il potere sovrano e la nuda vita* (first published 1995)]; Roberto Buonomano, ‘Humanity and Inhumanity: State Power and the Force of Law in the Prescription of Juridical Norms’ in John T Parry (ed), *Evil, Law, and the State: Perspectives on State Power and Violence* (forthcoming 2005).

enough to be characteristic, particularly if we take account of ‘domestic’ violence inflicted by police and prison officials.<sup>23</sup>

#### A Modern Torture as a Hidden Practice

Briefly moving away from the legal definition of torture, I will now consider the characteristics of torture in its modern form. Firstly, modern torture as a practice is hidden. Sometimes this hidden quality is more official than actual because rarely does torture remain secret from all. Yet it stays hidden, in the sense that it remains outside or at the margins of prevailing political discourse. One reason for the ability of modern torture to be hidden while in plain sight may be its frequently nationalist and colonial character. Torture often happens offstage, overseas, during military and intelligence operations, and the victims are not members of the community; they are others, foreign; they are enemies, not friends.<sup>24</sup>

Also worth noting, particularly for the US, is the coercive conduct — rising at least to the level of cruel, inhuman and degrading treatment or punishment under international law — practised by domestic law enforcement officials. This violence is often also hidden, although stories surface with regularity of acts of brutality, sometimes isolated, sometimes part of a larger pattern.<sup>25</sup> Just as with the overseas or external conduct that we are more used to thinking of as torture, police and prison violence is hidden in the US and other countries because it is often practised against racial, ethnic, religious, and other minorities; against those whose voices frequently go unheard or are not believed, and for whom the general public has at best only intermittent sympathy.<sup>26</sup>

So long as torture and other coercion is hidden, it is also deniable. When officials declare that they have not approved illegal or inappropriate treatment, their denials tend to be accepted because we are likely to overlook or discount the seriousness of the treatment that has been permitted or inflicted. The victims, speaking weeks, months, or years after the fact, and alleging treatment that may not have left lasting physical marks, and who may be already defined as suspect or untrustworthy because of their race or ethnicity, or because they were detained

<sup>23</sup> See, eg, Parry, ‘Judicial Restraints’, above n 10, 77–9.

<sup>24</sup> Consider Ascherson’s description of the British public’s knowledge of torture and other abuses committed in Kenya: Neal Ascherson ‘The Breaking of the Mau Mau’, *The New York Review of Books* (New York, US), 7 April 2005, 26:

It is fair to say that even now, fifty years later, the British public is not really aware of what went on. ... British ignorance about Mau Mau is of a peculiar, resilient kind. It is breached every so often, but then heals over again. ... [T]here was a period in the later 1950s when everyone knew, or could know, what was going on. ... All that seems to have been forgotten. The British need to believe that their Empire was run and eventually dismantled with restraint and humanity — as opposed to the disgusting brutality of the French, Dutch, Belgian, Portuguese, Spanish, and German colonial empires.

My only serious dispute with Ascherson is over his suggestion that the ignorance he describes is peculiar. I would argue that it is pervasive.

<sup>25</sup> See generally Parry, ‘Judicial Restraints’, above n 10.

<sup>26</sup> For legal perspectives on police violence in the US, see *ibid.* For the claim that racism — broadly defined — is a critical element in the legitimization of modern state violence, see Michel Foucault, ‘Society Must Be Defended’: *Lectures at the Collège de France, 1975–76* (David Macey trans, 2003 ed) 254–63 [trans of: *Il faut défendre la société* (first published 1996)].

in the first place, often cannot prove their claims. We are also willing to believe the official characterisation of conduct. That is, when torture is hidden, particularly when it is hidden in the colonial or imperial sense, part of what makes it hidden is also our willingness to call it something else, or to ascribe responsibility for the conduct to those on whom it is being inflicted.

As a result of these processes, the hidden quality of torture and related forms of state violence is a central part of our relationship with our governments. We often look the other way while our government does what it must. Torture is hidden, or at most an open secret, because we push it down and out of sight. Going further, when abuses are not hidden, their public quality may be the result of dissent over government action; when they remain hidden it is likely to be because we approve of or are grateful for the government's violent protection.

Finally, the hidden quality of modern torture means that instead of spectacles of violence, we have violence behind closed doors as part of a rational, bureaucratic structure (albeit a part that is often formally illegitimate). Yet even as they are hidden, torture and other forms of coercion are also carefully circumscribed by rules. In Israel, for example, the Landau Commission prescribed the forms of coercion that would be permissible.<sup>27</sup> In the US, officials have drawn up and frequently revised lists of specific conduct that is permitted.<sup>28</sup> At Guantánamo Bay, military physicians and behavioural scientists have participated in interrogations or advised on strategies.<sup>29</sup> In short, and as Talal Asad has argued, the fact that torture is so often a secret while also being a highly regulated and specialised practice — as well as the fact that a crucial part of the legal definition focuses on psychological suffering — marks it as a form of 'disciplinary knowledge' and thus as 'modern'.<sup>30</sup>

### B *Modern Torture as an Exception*

A second aspect of modern torture is its status as exceptional conduct. This exceptionality exists in two forms. Firstly, torture is about the exception because, as a matter of criminal law, an official prosecuted for using torture may be able to invoke the necessity defence to claim his or her conduct was justified under the circumstances. That doctrine appears to be the law in Israel, after the Supreme Court of Israel ruled in *Public Committee against Torture in Israel v*

<sup>27</sup> For the unclassified portions of the *Landau Commission Report*, see 'Commission of Inquiry into the Methods of Investigation of the General Security Service regarding Hostile Terrorist Activity' (1989) 23 *Israel Law Review* 146. For a discussion of this report see Talal Asad, 'On Torture, or Cruel, Inhuman, and Degrading Treatment' in Arthur Kleinman, Veena Das and Margaret Lock (eds), *Social Suffering* (1997) 285, 296; Parry, 'Judicial Restraints', above n 10, 88–90.

<sup>28</sup> See 'Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations' (4 April 2003) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 286, 346–59 ('Working Group Report'); Donald Rumsfeld, 'Memorandum for Commander, US Southern Command: Counter-Resistance Techniques in the War on Terrorism' (16 April 2003) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 360. At the time of writing, official documents on practices approved for use by the CIA remain classified.

<sup>29</sup> For participation of physicians and behavioural scientists, see generally Jane Mayer, 'The Experiment: The Military Trains People to Withstand Interrogation — Are Those Methods being Misused at Guantánamo?' (2005) 81(20) *The New Yorker* 60.

<sup>30</sup> Asad, above n 27, 288–9.

Israel that interrogators prosecuted for using coercion are entitled to raise the necessity defence.<sup>31</sup> The necessity defence is also available in the US, at least conceptually, under the *Model Penal Code*<sup>32</sup> and common law theories of justification. Memoranda prepared by Bush Administration officials explicitly embraced the necessity defence for interrogators prosecuted for going too far.<sup>33</sup> Even in the aftermath of Abu Ghraib, we remain unlikely to see many cases on the issue, because executive discretion and the intricacies of the military justice system will divert the cases in which justification is most likely to be a plausible claim. Nonetheless, the category of necessity creates rhetorical as well as legal space to justify coercion in individual cases.<sup>34</sup>

Secondly, as a practice, torture by modern states is exceptional because it is linked to states of exception or emergency. Over the past few years, scholars have increasingly recognised the importance of exceptions and emergency power and have sought to explore their qualities and limits.<sup>35</sup> For purposes of this commentary, I would simply like to note that we do not associate torture with normal practices — that is, with the legal and constitutional forms that we expect to constrain everyday government conduct. Rather, torture is something the modern state uses as a matter of necessity, in an emergency, when ordinary legal constraints are arguably inapplicable.

The danger is that the state of exception will become the norm. The Weimar Republic, for example, proclaimed a state of exception more than 250 times over approximately 13 years.<sup>36</sup> Most developed Western democracies are of course far more stable than Weimar Germany, but exception claims operate at a rhetorical and political level as well as at a legal level. After World War II, the US entered almost immediately into the Cold War with the Soviet Union that continued until 1989 and involved numerous sub-wars and proxy wars in Korea, Vietnam, Africa, the Middle East, and Central America. The Gulf War against

<sup>31</sup> As reproduced in 38 ILM 1471, 1485 (1999).

<sup>32</sup> *Model Penal Code* § 3.02(1)(a) (American Law Institute 1962).

<sup>33</sup> See Jay Bybee, 'Memorandum to Alberto Gonzales, Counsel to the President: Standards of Conduct for Interrogation under 18 USC §§ 2340–2340A' (1 August 2002) in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005) 172, 207–9; 'Working Group Report', above n 28, 307–9.

<sup>34</sup> See *Public Committee against Torture in Israel v Israel*, as reproduced in 38 ILM 1471 (1999). For a discussion of torture and the necessity defence, see generally John T Parry and Welsh White, 'Interrogating Suspected Terrorists: Should Torture Be an Option?' (2001–02) 63 *University of Pittsburgh Law Review* 743.

<sup>35</sup> See, eg, Agamben, *Homo Sacer*, above n 22; Giorgio Agamben, *State of Exception* (Kevin Attell trans, 2005 ed) [trans of: *Stato di eccezione* (first published 2003)]. See generally Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112 *Yale Law Journal* 1011; Sanford Levinson, 'Torture in Iraq and the Rule of Law in America' (2004) 133(3) *Daedalus* 5; Kim Scheppele, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11' (2004) 6 *University of Pennsylvania Journal of Constitutional Law* 1001. For a slightly earlier example, see Jules Lobel, 'Emergency Power and the Decline of Liberalism' (1989) 98 *Yale Law Journal* 1385. The effort to come to grips with ideas of emergency and exception also helps explain the revival of interest in the writings of Carl Schmitt, who famously declared, '[s]overeign is he who decides on the exception': Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans, 1985 ed) 5 [trans of: *Politische Theologie* (first published 1922)]. For examples of the Schmitt revival, see generally Symposium, 'Carl Schmitt: Legacy and Prospects' (2000) 21 *Cardozo Law Review* 1469.

<sup>36</sup> See Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (1948) 33.

Iraq followed as soon as the Cold War ended, and the US remained on a military footing with respect to the Middle East. This culminated in the invasion of Afghanistan and the second war against Iraq, both of which can also be classified as part of the arguably separate war on terror.

The idea of war has also been a core component of domestic policy. At least since the 1970s, the US has been embroiled in a war on crime that gave birth to a war on drugs and also overlaps with the new war on terror. At each point, officials and commentators have suggested that interests of the state may require temporary suspension or rolling back of liberties that were improvidently granted. The rhetoric leads to pressure on legislatures and courts to revise legal rules or create exceptions to them. As a result, individuals become more vulnerable legally and physically to state violence, including coercive interrogation.

To the extent that it is true that the exception tends to become the norm, practices such as torture are simultaneously normal and aberrational. When they are used, that fact functions to confirm that they are employed only as an exception and in an emergency. The more frequent their use — that is, the more normal they become — the more intense the emergency. Under this reasoning, rather than condemn torture we should direct our concern to the emergencies that make torture necessary and that require its continuation. This has been precisely the response made by some defenders of the Bush Administration, who insist that the focus on interrogation abuses detracts energy from the war on terror.<sup>37</sup> Nor is it unequivocally clear that they are wrong — although the manufacturing of near-permanent emergencies cannot be denied.

Lastly, claims of exception have real consequences. Elections turn on them, law enforcement activity takes cues from them, and people's status as members of the political community depends on them. One's bodily integrity is also at stake. So, after September 11, when officials of the Bush Administration declared that 'the gloves [have] come off',<sup>38</sup> there was no mistaking what they meant. Lawyers in the White House and Justice Department also knew, and they crafted legal arguments to explain why ordinary, normal rules of international, constitutional and criminal law did not apply to military and intelligence actions

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<sup>37</sup> See Jennifer Loven, 'Bush Open to Possibly Closing Gitmo Camp', *Associated Press*, 8 June 2005 for President Bush's own comments on the issue of closing the Guantánamo detention centre in response to documented abuses:

It's in our nation's interest that we learn a lot about those people that are still in detention, because we're still trying to find out how to better protect our country. What we don't want to do is let somebody out that comes back and harms us.

See CNN, *Cheney: Guantanamo Policy 'Is the Correct One'* (13 June 2005) <<http://www.cnn.com/2005/POLITICS/06/13/gitmo.cheney>> at 1 October 2005 for US Vice-President Dick Cheney's comments on the same issue:

Given the nature of the conflict that we're involved in, there would need to be some kind of facility that would allow you to detain people who are enemy combatants, in effect, who if you put them back on the street will do their level best to return back to the battlefield and complete their mission of trying to kill Americans.

<sup>38</sup> See Evidence to US Joint Intelligence Committee Hearing, *Joint Investigation into September 11<sup>th</sup>: Fifth Public Hearing*, 107<sup>th</sup> Congress, Washington DC, US, 26 September 2002, 2 (Cofer Black, Former Director of the CIA Counterterrorist Center) available at <[http://www.fas.org/irp/congress/2002\\_hr/092602black.html](http://www.fas.org/irp/congress/2002_hr/092602black.html)> at 1 October 2005.

in the war on terror. Much of that analysis had the precise goal of taking off the legal gloves when it came to interrogations.<sup>39</sup>

### C *Beyond Interrogation and Punishment: Torture as Total Domination*

I want to suggest one final aspect of modern torture. Torture is no longer — assuming it once was — simply a method of interrogation or a form of punishment. Certainly, torture continues to be used in those ways, but it also functions as a form of domination. One way this domination plays out is in the way it inverts our notions of agency, consent, and responsibility. Once torture begins, the result is always a product of the victim's 'choice'. If the victim chooses to provide information, she becomes a betrayer, someone who chose self-preservation over solidarity and is thus responsible for the consequences. If the victim resists, there will be more torture, and again the victim is responsible; she chose to resist and thus provoked the torture.

Note, too, how this perverse logic of choice also suggests another aspect of torture that the international law definition fails to capture explicitly: escalation. Part of the anguish facing a victim is the uncertainty about how far the process will go and when it will stop. Moreover, because escalation itself causes anguish, we should see torture as existing, even with relatively mild treatment, if the victim reasonably believes that more and greater harm will follow if she resists. Indeed, the ultimate modern torture might consist of taking a prisoner into custody, explaining to her what will transpire if she does not cooperate, and allowing her to torture herself mentally. A polite and thorough interrogation would then take place.

In sum, an appreciation of the qualities of modern torture suggests the need for a broader legal definition of torture. I would define it not merely as the

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<sup>39</sup> The importance in modern democracies of making torture both secret and exceptional also emerges from the reception of two recent proposals — one from the US and one from Australia — to establish more transparent legal frameworks for the use of torture. Alan Dershowitz proposes authorising federal judges in the US to issue 'torture warrants' when officials make a sufficient showing of a need to employ coercion: Alan Dershowitz, 'The Torture Warrant: A Response to Professor Strauss' (2003) 48 *New York Law School Law Review* 275, 275–7 (fn 14–16). Mirko Bagaric and Julie Clarke similarly urge adoption of a legal framework to regulate torture. They also go 'one step beyond' Dershowitz to argue that torture will sometimes be morally correct: Mirko Bagaric and Julie Clarke, 'Not Enough Official Torture in the World? The Circumstances in which Torture Is Morally Justifiable' (2005) 39 *University of San Francisco Law Review* 581. Both proposals contend that torture is already routinely practised and it would be better to talk openly about it and set up rules to govern it rather than do nothing. The idea of ex ante regulation of torture — instead of ex post regulation through such things as the necessity defence — is a perfectly reasonable view. It is also reasonable, of course, to object to such proposals altogether on the ground that torture should be banned without exception: see, eg, Marcy Strauss, 'Torture' (2003) 48 *New York Law School Law Review* 268. Yet many people, depending on time, place, and circumstance, would support coercion, if only as a last resort, and those views are not obviously wrong in some objective sense: cf Sanford Levinson, 'In Quest of a Common "Conscience": Reflections on the Current Debate about Torture' (forthcoming 2005) 1 *Journal of National Security Law and Policy* (suggesting the controversy over torture takes us back to 'Philosophy 101' debates between deontological and consequential approaches). It is difficult not to conclude, therefore, that some of the objections to the Dershowitz and Bagaric–Clarke proposals have a kind of 'emperor's new clothes' quality. Of course coercion or torture might take place, but we don't talk of such things. The same attitude extends to the systematic state violence that sustains our societies. One can be sure, however, that at least some of those who exercise state power speak of such things to each other and that our silence is entirely in their interests.

infliction of severe pain to gather information or punish, but also as the infliction of potentially escalating mental or physical pain for purposes that include dominating the victim and ascribing responsibility to the victim for the pain incurred. Whether such a definition would work in a legal context is however debatable.<sup>40</sup>

### III RULES FOR AN EXCEPTION: THE LAW OF MODERN TORTURE

The idea of the exception is reflected in the law of torture. Recall Israel's explicit acceptance of necessity as an after-the-fact justification, and the conceptual availability — and administrative embrace — of necessity in the US. Now consider the *Convention against Torture*, which bans torture absolutely and allows no exceptional circumstances to justify its use. A textualist reading of the *Convention* suggests however, that the 'no justification' clause does not apply to the ban on cruel, inhuman or degrading treatment.<sup>41</sup> This exclusion, if it means anything, must include the possibility that violent treatment of prisoners or others that does not rise to the level of torture can be justifiable under some circumstances. Under the definition of torture I proposed in the previous section, this exclusion would allow justification of conduct we ought to classify as torture. Put plainly, the *Convention against Torture*, which is arguably the critical, and certainly the most extensive, international law document addressing state torture and related abuse, seems deliberately crafted to leave room for states to engage in coercive treatment in compelling circumstances, so long as the conduct falls short of torture as defined in that document.<sup>42</sup>

In the process of consenting to the *Convention against Torture*, the US Senate narrowed the definition of torture to include a requirement of specific intent to inflict severe mental or physical suffering and to limit the kinds of mental harm that constitute torture.<sup>43</sup> These changes arguably reduce ambiguity, but even more so they create additional space for coercive practices by limiting the

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<sup>40</sup> For some elaboration of these points, see John T Parry, 'What Is Torture, Are We Doing It, and What If We Are?' (2003) 64 *University of Pittsburgh Law Review* 237, 246–9. In the commentary at hand I do not stress the ways in which torture as domination is about the relationship between torturer and victim. The ways in which this relationship plays out are also, I think, part of the definition of modern torture. Elaine Scarry explores aspects of this relationship: see generally Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985).

<sup>41</sup> *Convention against Torture*, above n 15, art 16. See also Nigel Rodley, *The Treatment of Prisoners under International Law* (2<sup>nd</sup> ed, 1999) 50; Committee on Human Rights Association of the Bar of the City of New York, 'The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*' (1987) 42 *Record of the Association of the Bar of the City of New York* 235, 240 (noting 'most of the obligations imposed by the *Convention* apply only to acts of torture').

<sup>42</sup> This argument ignores customary international law as well as the prohibitions on torture contained in the *Geneva Conventions*, above n 12, and the *ICCPR*, above n 19, not to mention their relevance to the interpretation of the *Convention against Torture*, above n 15 (particularly in light of art 16 of the *Convention against Torture*). See John T Parry, "'Just for Fun': Understanding Torture and Understanding Abu Ghraib" (forthcoming 2005) *Journal of National Security Law and Policy*, for a more detailed version of this argument and further analysis of US law on torture.

<sup>43</sup> See 136 *Congressional Record* S17491 (daily ed, 27 October 1990) (Resolution of Advice and Consent to Ratification of the *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment: Reservations, Declarations, and Understandings*) pt II(1)(a) ('Resolution of Advice and Consent to Ratification').

applicability of international law. The Senate also sought to define the phrase 'cruel, inhuman or degrading treatment or punishment' as equivalent to 'the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the *Constitution* of the United States'.<sup>44</sup> In other words, 'cruel, inhuman or degrading conduct' is unconstitutional conduct (and torture is unconstitutional a fortiori). The Senate thus modified the *Convention against Torture* to ban only conduct that was already illegal under US law.<sup>45</sup>

The question then is exactly what the *US Constitution* has to say about torture. The Fourth Amendment protects against excessive force in the context of a search or seizure and would appear to ban a wide variety of practices that inflict pain. The Supreme Court has said, however, that application of this standard turns on the reasonableness of the force used and also — critically — on the reasonableness of the official's belief about the need to use force.<sup>46</sup> The Eighth Amendment bans 'cruel and unusual punishments', and the Supreme Court has interpreted that language to prohibit the 'unnecessary and wanton infliction of pain'.<sup>47</sup> The Court has also held however, that officials are not liable in damages if 'force was applied in a good faith effort to maintain or restore discipline',<sup>48</sup> as opposed to 'maliciously and sadistically for the very purpose of causing harm'.<sup>49</sup> Under both Amendments therefore, officials are afforded a great deal of latitude when their decisions to use force are reviewed.

The self-incrimination clause of the Fifth Amendment may originally have been intended to protect against torture.<sup>50</sup> The Supreme Court has ruled, however, that the privilege against self-incrimination is almost entirely a trial right, with the result that it applies only to efforts to introduce coerced testimony in a legal proceeding, and not to conduct outside the court.<sup>51</sup> Perhaps a case of indisputable torture would lead to a different result, but even that is not clear.

The final constitutional avenue for a prohibition on torture is the substantive due process doctrine of the Fifth and Fourteenth Amendments. The doctrine takes two forms. Firstly, it renders unconstitutional conduct that 'shocks the conscience'. The ostensible protection this provides is, however, diminished by

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<sup>44</sup> *Ibid* pt I(1).

<sup>45</sup> See *ibid*. In addition, according to the US Department of Justice, because the Fifth Amendment to the *US Constitution* 'does not apply to aliens in US custody overseas', this definition 'strongly suggest[s] that [the prohibition against cruel, inhuman and degrading treatment] does not apply to alien detainees held abroad': Letter from William Moschella, Assistant Attorney-General to the Honourable Patrick Leahy, 4 April 2005 (copy on file with author). I am sidestepping in this commentary the debate over the Senate's practice of including reservations, understandings, and declarations in its consent to treaties. For a defence of the constitutionality of this practice, see Curtis Bradley and Jack Goldsmith, 'Treaties, Human Rights, and Conditional Consent' (2000) 149 *University of Pennsylvania Law Review* 404, 404–10. For a description and analysis of the UN's response to such practices, see Elena Baylis, 'General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties' (1999) 17 *Berkeley Journal of International Law* 277.

<sup>46</sup> *Saucier v Katz*, 533 US 194, 204–5 (2001).

<sup>47</sup> *Hudson v McMillian*, 503 US 1, 6–9 (1992).

<sup>48</sup> *Whitley v Albers*, 475 US 312, 320–1 (1986).

<sup>49</sup> *Ibid* 321.

<sup>50</sup> See Albert Alschuler, 'A Peculiar Privilege in Historical Perspective: The Right to Remain Silent' (1995–96) 94 *Michigan Law Review* 2625, 2651.

<sup>51</sup> *Chavez v Martinez*, 538 US 760, 766–7 (plurality opinion) (2003); 778 (Souter J, concurring).

the Supreme Court's assertion that conduct only 'shocks the conscience' if it is 'unjustifiable by any government interest'.<sup>52</sup> If we take seriously the possibility that 'any government interest' will justify otherwise conscience-shocking behaviour, we have not said much more than that the state must have a purpose when it tortures; it cannot do so arbitrarily.

The second way in which conduct can offend substantive due process principles is by violating a fundamental right. Although this doctrine provides stronger protection than the 'shocks the conscience' test, it too makes ample room for exceptions. Conduct that is narrowly tailored to serve a compelling state interest is constitutional even if it violates an individual's fundamental rights. Add the sometimes-enforced requirement that the claimed right be described with particularity, and the doctrine becomes malleable enough to allow at least some degree of coercive interrogation.<sup>53</sup>

In short, finding an absolute constitutional right not to be tortured is difficult. Courts are of course not bound to follow doctrines to their logical conclusions, and the Justices have often asserted that 'torture' is unconstitutional.<sup>54</sup> My goal however, is not to argue for a correct interpretation of US constitutional doctrine. Rather, my point is that constitutional law, and sometimes international law, is constructed to leave room for government action in cases of perceived necessity. In the case of torture and related forms of coercion, this structure means that the idea of state necessity becomes part of the legal definition of what conduct is permitted and prohibited.

#### IV PRACTISING MODERN TORTURE: EXTRAORDINARY RENDITION AND GHOST DETAINEES

Soon after the revelation of abusive treatment of detainees at Abu Ghraib, stories about a variety of other US interrogation and detention practices began to appear. Among them are the practice of extraordinary rendition and the claim that the Central Intelligence Agency is holding numerous ghost detainees for interrogation in undisclosed locations outside the US.<sup>55</sup>

At the most basic level, the term 'rendition' refers to the practice of seizing a person in one country and delivering her to another country, usually for the purpose of criminal prosecution.<sup>56</sup> Rendition stands in contrast to legal processes that can accomplish the same result. Ordinarily a country wishing to obtain custody of a person found in another country would employ that country's extradition process. Similarly, a country wishing to dispatch a person to another country would employ its own extradition or deportation and removal processes.

<sup>52</sup> *County of Sacramento v Lewis*, 523 US 833, 849 (1998).

<sup>53</sup> *Washington v Glucksberg*, 521 US 702, 721 (1997) (describing the fundamental rights doctrine). For application of both tests to licence coercive interrogation, see *Chavez v Martinez*, 538 US 760, 774–6 (Thomas J) (2003).

<sup>54</sup> See, eg, *Chavez v Martinez*, 538 US 760, 773 (stating that the due process doctrine will 'provide relief in appropriate circumstances' for 'police torture or other abuse that results in a confession'); 783–4 (Stevens J, concurring in part and dissenting in part); 789 (Kennedy J, concurring in part and dissenting in part). See also *McKune v Lile*, 536 US 24, 41 (2002) referring to 'the physical torture against which the *Constitution* clearly protects'.

<sup>55</sup> See, eg, Mayer, 'Outsourcing Torture', above n 14, 106.

<sup>56</sup> See generally Ethan Nadelmann, 'The Evolution of United States Involvement in the International Rendition of Fugitive Criminals' (1993) 25 *New York University Journal of International Law and Policy* 813, 857–82.

Sometimes, for reasons more or less defensible, officials will determine that these legal processes are not appropriate and will choose rendition instead.<sup>57</sup>

In the US, where constitutional limits on executive power prohibit the seizure and transportation out of the country of a person without due process, rendition has generally been employed in two ways. Firstly, it is a method for obtaining suspects from other countries to stand trial in the US. This process, which commonly takes the form of kidnapping, has been found to be constitutional, because a trial court ‘need not inquire as to how [the defendant] came before it’.<sup>58</sup>

The second form of rendition involves US officials arranging the transfer of a person from one country to another country (a practice not covered by extradition and immigration statutes), sometimes for criminal process but increasingly for interrogation. According to numerous reports, allegations, and off-the-record statements, the US has arranged the transfer of suspected terrorists from a variety of countries to countries in which interrogators are willing to use coercive tactics, sometimes rising to the level of torture, to obtain information that is then provided to the US. Officials usually receive ‘diplomatic assurances’ from the receiving country that ‘torture’ will not be used, but the value of these assurances has been sharply criticised.<sup>59</sup> The practice, which appears to have begun in the Clinton Administration and has expanded significantly after September 11, has come to be known as extraordinary rendition.<sup>60</sup>

Closely related to rendition is the issue of ghost detainees. According to several news reports, the CIA and other intelligence agencies have custody of up to 100 ‘high value’ detainees held ‘off the books’ in unknown locations.<sup>61</sup> These detainees are reportedly subjected to coercive interrogation practices such as ‘water boarding’, ‘in which a prisoner is strapped down, forcibly pushed under

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<sup>57</sup> The US extradition and deportation processes are not summary and immediate; if time is of the essence, they will frustrate official goals: see, eg, *Immigration and Naturalization Service v St Cyr*, 533 US 289 (2001) (holding that aliens may seek habeas corpus relief from removal proceedings); M Cherif Bassiouni, *International Extradition: United States Law and Practice* (4<sup>th</sup> ed, 2002) (describing and discussing the extradition process and alternatives to it). US immigration law also creates a framework for determining the country to which an alien may be removed, which may not always accord with the country to which officials would like to send that person: see 8 USC § 1231(b) (2004) for ordinary removal and 8 USC § 1537(b)(2) (2004) for removal of ‘alien terrorists’.

<sup>58</sup> *United States v Alvarez-Machain*, 504 US 655, 662 (1992). For discussion of the constraints on executive power to extradite from the US, see generally John T Parry, ‘The Lost History of International Extradition Litigation’ (2002) 43 *Virginia Journal of International Law* 93, 119–24.

<sup>59</sup> See generally Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard against Torture* (2005).

<sup>60</sup> See Rajiv Chandrasekaran and Peter Finn, ‘US Behind Secret Transfer of Terror Suspects’, *The Washington Post* (Washington DC, US), 11 March 2002, AO1; Mayer, ‘Outsourcing Torture’, above n 14, 107 (referring to estimates that approximately 150 people have been subjected to extraordinary rendition since 2001); Michael Scheuer, ‘A Fine Rendition’, *The New York Times* (New York, US), 11 March 2005, A23; Scott Shane, Stephen Grey and Margot Williams, ‘CIA Expanding Terror Battle under Guise of Charter Flights’, *The New York Times* (New York, US), 31 May 2005, A1. For a general discussion of these allegations and of the legal issues they raise, see Committee on International Human Rights of the Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to ‘Extraordinary Renditions’* (2004).

<sup>61</sup> See Mayer, ‘Outsourcing Torture’, above n 14, 108.

water, and made to believe he might drown'.<sup>62</sup> The CIA has obtained these people from US military forces as well as through rendition from other countries.

Under a straightforward reading of international law, these practices are suspect. With respect to rendition, the *Convention against Torture* provides: '[n]o State party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.<sup>63</sup> The language of the *Convention* does not specify whether it is limited to transfers of a person from the signing state's territory to the territory of another, or whether it includes transfers entirely outside the territory of the signing state. To the extent that there is ambiguity, the US Congress adopted a broad understanding of this obligation:

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.<sup>64</sup>

Note, however, that both the *Convention against Torture* and the US statute refer only to 'torture', not to lesser forms of coercion and violence. For the purposes of extradition and immigration, both the US Department of State and the Department of Homeland Security have stressed that torture is 'an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment'.<sup>65</sup> These regulations imply that the US may extradite or remove people to countries in which they will face cruel, inhuman or degrading treatment, providing it does not rise to the level of torture; and that conclusion is arguably consistent with the *Convention against Torture*. Just as it does not rule out the invocation of exceptional circumstances as a justification for cruel, inhuman or degrading treatment falling short of torture,

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<sup>62</sup> James Risen, David Johnston and Neil Lewis, 'Harsh CIA Methods Cited in Top Qaeda Interrogations', *The New York Times* (New York, US), 13 May 2004, A1. See generally Douglas Jehl, 'Some Iraqis Held outside Purview of US Command', *The New York Times* (New York, US), 17 May 2004, A1; Yossi Melman, 'CIA: No Comment on Report 11 Qaida Suspects Held in Jordan', *Ha'aretz* (Jerusalem, Israel), 13 October 2004; Josh White, 'Army Documents Shed Light on CIA "Ghosting"', *The Washington Post* (Washington DC, US), 24 March 2005, A15.

<sup>63</sup> Above n 15, art 3.

<sup>64</sup> *Foreign Affairs Reform and Restructuring Act of 1998*, Pub L No 105-277, § 2242, 112 Stat 2681, 2681–822 (1998). The extent to which constitutional due process protections might apply to the treatment of people not technically in the territory or custody of the US is highly contested: see, eg, Moschella, above n 45. Although one can make a plausible due process argument that extraordinary rendition violates constitutional rights of those sent from one country to another, it is unlikely to be successful in court (or even to be litigated), and this commentary does not make the attempt. Nor is it likely that separation of powers arguments designed to limit executive power will gain much traction by themselves against executive branch use of rendition in the context of foreign affairs and military action — although the existence of a federal statute that directly regulates rendition takes the sting out of most pro-executive separation of powers claims.

<sup>65</sup> See 22 CFR § 95.1(b)(7) (2005); 8 CFR § 208.18(a)(2) (2005) respectively (note that the immigration regulation adds the phrase 'that do not amount to torture' at the end of the sentence quoted in the text).

nor does the *Convention* rule out sending a person to a country where she will face such treatment.<sup>66</sup> As a result, the definition of torture again becomes critical.

At least one more step is necessary in the analysis of the international legal framework. The provisions of the *Convention against Torture* are ‘without prejudice to the provisions of any other international instrument ... which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion’.<sup>67</sup> The *ICCPR* also bans torture and cruel, inhuman or degrading treatment, with no possibility of justifying either category of conduct, and the United Nations Office of the High Commissioner for Human Rights has interpreted that language to include ‘expos[ing] individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or refoulement’.<sup>68</sup>

Conversely, according to the Bush Administration,

[t]he United States has maintained consistently that the [*ICCPR*] does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict.<sup>69</sup>

In other words, although the *ICCPR* might apply to the transfer of a person from the US to another country, it arguably does not apply to US involvement in

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<sup>66</sup> *Convention against Torture*, above n 15, art 3. When the US Senate consented to the *Convention* it included an understanding that ‘substantial grounds for believing that he would be in danger of being subjected to torture’, as used in art 3, should be interpreted to mean, ‘if it is more likely than not that he would be tortured’: see Resolution of Advice and Consent to Ratification, above n 43, pt II(2). For an illustration of how this standard has been narrowly applied in the immigration context, see *Auguste v Ridge*, 395 F 3d 123 (3<sup>rd</sup> Cir, 2005).

<sup>67</sup> *Convention against Torture*, above n 15, art 16.

<sup>68</sup> Office of the High Commissioner for Human Rights, *General Comment 20*, 44<sup>th</sup> sess, [9] (10 March 1992) as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 30, UN Doc HRI/GEN/1/Rev.1 (29 July 1994). See also J Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 150:

insofar as it might be possible to derive from other international ... legal instruments a prohibition against extradition ... where the extradited or expelled person might be exposed to cruel, inhuman or degrading treatment or punishment falling short of torture, the fact that article 3 of the present *Convention* only deals with torture should not be interpreted as limiting the prohibition against extradition ... which follows from such other instruments.

Once again, I am not addressing the relevance of customary international law to these issues.

<sup>69</sup> ‘Working Group Report’, above n 28, 290. Although there is no express reference, this position taken by the Bush Administration presumably relies on art 2 of the *ICCPR*, above n 19, which provides, ‘[e]ach 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*’, and on art 4, which allows derogation ‘in time of public emergency’. Importantly, however, the right to be free of torture and cruel, inhuman, or degrading treatment is non-derogable and is expressly excluded from the ‘public emergency’ exception: at art 4.

transfers that take place entirely outside the US.<sup>70</sup> This contention, which seeks to neutralise the broader reach of the *ICCPR*, does not alter the prohibitions of the *Convention against Torture*; these prohibitions, as well as those of the federal statute, would remain. Furthermore, the US claim about the limited reach of the *ICCPR* is controversial. Both the International Court of Justice and the Human Rights Committee assert that the *ICCPR* applies during periods of armed conflict and to some extraterritorial conduct, including arrests.<sup>71</sup>

In short, with respect to rendition, at the very least US and international law protect against transferring people to countries where they are likely to be tortured. In addition, many judges, lawyers, and scholars insist that the *ICCPR*, as interpreted by the ICJ and the Human Rights Committee, should apply as well. A debate about the precise scope of the law is, however, largely esoteric in light of the fact that many of the extraordinary renditions recently reported would plainly violate even the weakest interpretation of the prohibition.

With respect to ghost detainees, both the *Convention against Torture* and the *ICCPR* protect against mistreatment in the form of torture or cruel, inhuman and degrading treatment. Yet, as mentioned above, the Bush Administration has taken the position that the *ICCPR* does not apply outside the US or to military operations. The Administration has also suggested that the *Convention against Torture*'s prohibition against cruel, inhuman or degrading treatment 'does not apply to alien detainees held abroad'.<sup>72</sup> Even accepting the plausibility of both arguments for purposes of this commentary, the *Convention against Torture*'s non-derogable ban on torture remains — and one could certainly classify such things as the CIA's reported practice of 'water boarding' as torture.<sup>73</sup>

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<sup>70</sup> A small number of extraordinary renditions have begun in the US, for example with people detained while seeking to enter the US or while changing planes in a US airport. Because such people have not 'entered' or been legally admitted to the US, they are almost already ghosts, with few rights and no immediate residence: see Margaret Taylor, 'Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine' (1995) 22 *Hastings Constitutional Law Quarterly* 1087, 1128–33 (discussing the due process standards applicable in such circumstances).

<sup>71</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ [105]–[109] <<http://www.icj-cij.org>> at 1 October 2005; Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee (Israel)*, 78<sup>th</sup> sess., 2–3, UN Doc CCPR/CO/78/ISR (21 August 2003). For a critical discussion of the ICJ approach, see Michael Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 *American Journal of International Law* 119.

<sup>72</sup> See Moschella, above n 45.

<sup>73</sup> The *Declaration on the Protection of All Persons from Enforced Disappearance*, GA Res 133, UN GAOR, 47<sup>th</sup> sess., 92<sup>nd</sup> plen mtg, UN Doc A/RES/47/133 (12 February 1993) is also worth mentioning at this point. It states that an act of 'enforced disappearance' is 'a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the *Universal Declaration of Human Rights* and reaffirmed and developed in international instruments in this field': at art 1. It also requires each state to prevent enforced disappearances 'in any territory under its jurisdiction', and to avoid expelling, returning, or extraditing a person 'to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance': at arts 3, 8. For discussion of the declaration, including the meaning of 'enforced disappearance', see Rodley, above n 41, 243–76.

## V CONCLUSION

Extraordinary rendition and the holding of ghost detainees exemplify the qualities of modern torture described in Part II. Above all, they are hidden. So, too, they are exceptions to standard rules and procedures. Finally, they function to produce total domination of the person rendered and detained. When one is a ghost, held outside the protections of any applicable and enforceable legal regime, one is already separate from one's body, not to mention from one's family, community, and other support networks. The rendered and detained person — the ghost — is by definition hidden, exceptional, and dominated.<sup>74</sup>

These practices in turn highlight the role of law in the practice of torture. We are told that universal norms of human rights symbolise modern progress toward greater protection of individuals, but the practice of international human rights is far more complex. It relies on political will and remains vulnerable to state power. Also, and perhaps more importantly, it is not clear that human rights law functions chiefly to protect the bodies of people who stand in the way of state power. Instead, it creates the idea of an international rights-bearing citizen, and in so doing it embeds people deeper in the web of state interests and state power. Legal analysis of our rights, which is the same process as legal analysis of the extent and limits of state power over us, reflects but also enables and sustains the shape of modern torture as hidden, exceptional, and characterised by total domination. This analysis is not confined to the context of torture. Perhaps, then, the ghost detainee is not only exceptional but broadly representational, if not of our current condition, or even necessarily of what will be, at least of what may be.

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<sup>74</sup> Agamben develops similar ideas at greater length in *Homo Sacer*, above n 22, and *State of Exception*, above n 35, and I am indebted to his analysis.