MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **MAJID SHOUKAT KHAN**	**AE 033K** **RULING** **Defense Motion** for Pretrial Punishment Credit and Other Related Relief **4 June 2020**

1. BACKGROUND:

a. The Accused, through counsel, requests that the Military Judge grant the subject motion and order that he is entitled to meaningful relief for the illegal pretrial punishment he suffered in Government custody from March 2003 until his guilty plea in February 2012.[1] The Accused seeks "administrative credit equivalent to no less than half of his approved sentence as a comprehensive, prophylactic remedy" for the torture and other cruel, inhuman, and degrading treatment he suffered in Government custody for the offenses for which he was subsequently charged and pleaded guilty.[2] He requests this relief in addition to the day-for-day confinement credit to which he is entitled from the date of his guilty plea on 29 February 2012, and notwithstanding any clemency determination by the Convening Authority.[3] The Accused also requests that the Military Judge schedule an evidentiary hearing to receive evidence in support of this motion, including the testimony of the Accused, experts, and other witnesses.[4] On 10 July 2019, the Defense made a supplemental filing in support, drawing the Commission's attention to the D.C. Circuit's decision in *Qassim v. Trump*.[5]

[1] AE 033, Defense Motion for Pretrial Punishment Credit and Other Related Relief, filed 1 May 2019, at 1.
[2] AE 033 at 1.
[3] *Id*.
[4] AE 033 at 2; *see* AE 030, Defense Motion to Compel Witnesses, filed 1 March 2019..
[5] AE 033 (SUP), filed 10 July 2019; *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir. 2019).

b. The Commission has received briefs from three *amici curiae*. On 1 May 2019, an amicus brief was filed by S. Scott Roehm on behalf of the Center for Victims of Torture, Sondra Crosby, Claire Finkelstein, Mark Fallon, Juan Mendez, Alberto Mora, Ron Stief, and Stephen Xenakis.[6] Also on 1 May 2019, another amicus brief was filed by Dru Benner-Beck and Rachel VanLandinham on behalf of the National Institute of Military Justice.[7] On 3 May 2019, the third amicus brief was filed by James G. Connell, III, and Major Ann Marie Bush on behalf of Ammar al Baluchi; amicus requested oral argument.[8]

c. On 8 May 2019, the Commission accepted the three briefs from *amici curiae* for consideration.[9]

d. On 15 May 2019, the Government filed its response to the subject motion.[10] The Government recognizes the Accused's right to request relief, but argues he is not entitled to receive it. In the Government's view, the proper mechanism for seeking such relief is presenting the evidence to the panel as extenuation and mitigation and/or the Convening Authority in clemency. The Government also argues the Accused waived his right to assert a claim for sentencing credit. Ultimately, the Government takes the position that the Military Judge lacks authority to grant any such credit. The Government also opposed the amicus request for oral argument.[11]

e. The Defense filed its reply on 22 May 2019,[12] noting the Government's accession to its points that there is a right to be free from unlawful pretrial punishment; the Accused was

[6] AE 033A, Amicus Brief, filed 1 May 2019.
[7] AE 033B, Amicus Brief, filed 1 May 2019.
[8] AE 033C, Amicus Brief at 28, filed 3 May 2019.
[9] AE 033F, Ruling on Amicus (Connell/Bush) Request for Oral Argument, dated 19 June 2019.
[10] AE 033D, Government Response to Defense Motion for Pretrial Punishment Credit and Other Related Relief, filed 15 May 2019.
[11] *Id*. at 35.
[12] AE 033E, Defense Reply to Motion for Pretrial Punishment Credit and Other Related Relief, filed 22 May 2019.

mistreated; and that there was no legitimate purpose for that mistreatment. The Defense also points out that confinement credit and pretrial punishment credit are not interchangeable. The Defense also challenges the Government's assertion that the Accused is not entitled to the relief sought because he is a law of war detainee; although that much is true, that fact in no way precludes him from being concurrently held for trial by military commission. The Defense adds that the Accused did not waive the subject motion because paragraph 11 of the PTA only prohibits him from suing the United States.[13]

f. The Commission found that oral argument from amicus was not necessary to consideration of the issues presented in the subject motion. The Commission denied the motion for oral argument on 19 June 2019.[14]

g. On 3 July 2019, the Defense moved for leave to file supplemental filings with respect to the subject motion in order to provide the Military Judge with new legal authority.[15] On 5 July 2019, the Commission granted that motion.[16] Thereafter, the Defense filed AE 033 (SUP) highlighting the D.C. Circuit's opinion in *Qassim v. Trump*.[17]

h. On 24 July 2019, the Government responded to the supplemental Defense filing by again requesting the Commission deny the motion.[18] The Government stated its position that *Qassim* neither confirms the Accused's entitlement to pretrial punishment credit nor recognizes rights pursuant to the Fifth Amendment of the U.S. Constitution.

[13] AE 033E at 17.
[14] AE 033F.
[15] AE 033G, Motion for Leave to File Supplemental Filings with Respect to AE 033, Motion for Pretrial Punishment Credit and Other Related Relief, filed 3 July 2019.
[16] AE 033H, Ruling on Motion for Leave to File Supplemental Filings with Respect to AE 033, dated 5 July 2019.
[17] *See* note 5, *supra*.
[18] AE 033I, Government Response to Defense's Supplemental Filing in Support of Defense Motion for Pretrial Punishment Credit and Other Related Relief, filed 24 July 2019.

i. On 31 July 2019, the Defense replied,[19] once more relying heavily on *Qassim v. Trump*, 927 F.3d 522 (D.C. Cir. 2019). The Defense takes the position that *Qassim* "leaves open and unresolved the question of what constitutional protections apply" to the military commissions. The Government agrees with that much.[20] *See Al-Qosi v. United States*, No. CMCR 17-001, slip op. at 8–9 (U.S.C.M.C.R. May 21, 2020) (concluding that in *Qassim*, "the D.C. Circuit said that whether Guantanamo detainees have any procedural due process rights is an open question.").

j. On 21 November 2019, the Commission held an R.M.C. 803 motions hearing session which was closed pursuant to R.M.C. 806(b)(2) at U.S. Naval Station Guantanamo Bay, Cuba.[21] The Commission heard oral argument on the question of the Military Judge's legal authority to grant the requested relief.

2. RELEVANT FACTS:

a. As attachments to the subject motion, the Defense submitted a detailed proffer of how the Accused and other witnesses would testify.[22] For the purpose of this ruling, the Commission assumes, without deciding, that the facts as presented by the Defense are true.[23] *See* AE 033 at

[19] AE 033J, Defense Reply to Supplemental Filing in Support of Defense Motion for Pretrial Punishment Credit and Other Related Relief, filed 31 July 2019.

[20] AE 033J at 1; AE 033I at 1. The D.C. Circuit stated, in relevant part, "The district court's denial [was] predicated on that court's conclusion that *Kiyemba* firmly closed the door on procedural due process claims for Guantanamo Bay detainees. That was error. *Kiyemba* neither presented nor decided the question of whether Guantanamo detainees enjoy procedural due process protections under the Fifth Amendment (or any other constitutional source, *see, e.g.*, Suspension Clause, U.S. Const. Art. I, § 9, cl. 2) in adjudicating their habeas petitions. … Circuit precedent leaves open and unresolved the question of what constitutional procedural protections apply to the adjudication of detainee habeas corpus petitions, and where those rights are housed in the Constitution (the Fifth Amendment's Due Process Clause, the Suspension Clause, both, or elsewhere). … [T]he district court's judgment [] is reversed and the case is remanded." *Qassim v. Trump*, 927 F.3d at 528, 530, 532.

[21] *Unofficial/Unauthenticated Transcript* of motions hearing dated 21 November 2019, pp. 535–565.

[22] *See* AE 033 at 2–3; Att. C, D, E, F, G.

[23] "At this stage, we may not question [the defendant's] rendition of the horrors he suffered. In reviewing [the] motion … we must accept all of [his] allegations in the complaint as true." *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1176 n.1 (D.C. Cir. 1994); *see Moore v. Agency for Int'l Dev't,* 994 F.2d 874, 875 (D.C. Cir. 1993).

11–16. "For there is no serious dispute that Mr. Khan was tortured and suffered other illegal pretrial punishment both in CIA detention and at Guantanamo before his guilty plea."[24]

b. The Accused entered the United States in 1996. In July 1998, he was granted derivative asylee status as an unmarried minor child when his mother's petition for asylum was granted. He remained present in the United States until January 2002.[25]

c. The Accused was captured in Karachi, Pakistan, in March 2003 and taken into CIA custody. On 6 September 2006, President Bush gave a speech in which he mentioned the Accused by name, along with several of his co-conspirators, and indicated the U.S. Government's intent to try them by military commission.[26] Also in September 2006, the Accused was transferred to U.S. Naval Station Guantanamo Bay, where he remains to this day.[27] On 21 May 2009, President Obama gave a speech in which he described five distinct categories of detainees being held at Guantanamo; the second category was comprised of those being held for trial by military commission.[28]

d. On 13 February 2012, five charges were referred against the Accused under the Military Commissions Act (MCA) of 2009, to wit: Charge I: Violation of 10 U.S.C. § 950t(29), Conspiracy; Charge II: Violation of 10 U.S.C. § 950t(15), Murder in Violation of the Law of War; Charge III: Violation of 10 U.S.C. § 950t(28), Attempted Murder in Violation of the Law of War; Charge IV, Violation of 10 U.S.C. § 950t(25), Providing Material Support for Terrorism;

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[24] AE 033 at 7.

[25] AE 033D at 3.

[26] President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sep. 6, 2006), *available at* https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html, (last visited June 3, 2020).

[27] AE 033D at 3; *see* Exec. Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

[28] President Barack Obama, Remarks by the President on National Security (May 21, 2009), *available at* https://obamawhitehouse.archives.gov/the-press-office/remarks-president-national-security-5-21-09, (last visited June 3, 2020).

and Charge V: Violation of 10 U.S.C. § 950t(27), Spying. The Convening Authority for Military Commissions referred these charges and their underlying specifications to a non-capital military commission on 15 February 2012.

e. On 13 February 2012, the Accused and his counsel submitted an offer for a pretrial agreement (PTA) with the Convening Authority. *See* AE 012.[29] The Accused offered to plead guilty to Charges I through V, agreeing to a number of conditions in exchange for certain actions and considerations by the Convening Authority.[30] On 29 February 2012, pursuant to the PTA, the Accused pled guilty to five charges, one of which was later dismissed.[31] AE 012.

f. In the PTA, the Accused agreed not to "initiate any legal claims against the United States Government and United States Government Agency or official, or any civilian or civilian agency regarding [his] capture, detention, or confinement conditions" before his pleas. AE 012 at 3. In addition, in the Appendix to the PTA, the Accused stated he "waived any right to assert a claim for any day-for-day credit against his sentence to confinement based on any capture, detention or confinement prior to the date the Military Judge accepts [his] plea." AE 013 at 1.

g. During the 29 February 2012 guilty-plea hearing, the Military Judge discussed, and agreed, with the Accused and the Parties that the waiver in paragraph 11 of AE 012 and paragraph 4 of AE 013 referred to a waiver of the Accused's right to sue the United States Government or United States Government officials for damages due to his treatment while in the custody of the United States Government. It was also agreed that the Accused was free to bring suit against foreign governments for the same purpose.[32]

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[29] AE 012, Offer for Pretrial Agreement, dated 13, 15 February 2012.
[30] AE 013, Appendix A to Offer for Pretrial Agreement, dated 13 and 15 February 2012.
[31] Pursuant to *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014), the original Charge IV, 10 U.S.C. § 950t(25), Providing Material Support for Terrorism, was dismissed.
[32] *See* Transcript dated 29 February 2012 at pp. 79–81, 83–85, and 99–100.

3. LAW:

a. For purposes of the subject motion, the Commission will bifurcate its ruling. This, the first ruling, contemplates only, as a matter of law, the Military Judge's legal authority to grant the requested relief. A second ruling on the merits of the subject motion, based on mixed questions of law and fact, would, if necessary, come at a later date.

b. As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)–(2).

c. *The universal right to be free of torture is a* jus cogens *norm of international law.*

1. "Any court addressing torture does not write on a clean slate." *Ali v. Rumsfeld*, 649 F.3d 762, 783 (D.C. Cir. 2011) (Edwards, S.J., dissenting). Torture "violates definable, universal and obligatory norms." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), (Edwards, J., concurring); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988). Of those violations of human dignity that exist, torture is enumerated as an "evil of most immediate concern." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (citing *Filartiga v. Pena*, 630 F.2d 876, 890 (2d Cir. 1980)). Every circuit to address the issue has concluded that official torture violates customary international law (CIL).[33]

2. Torture is now, and has always been, abhorrent to the law of our nation and the laws of all nations. *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) ("Thus the Clause forbidding

[33] *See*, *e.g.*, *Kiobel v. Royal Dutch Petroleum Co*., 621 F.3d 111, 120 (2d Cir. 2010); *id.* at 155 (Leval, J., concurring in the judgment); *Aldana v. Del Monte Fresh Produce*, *N.A., Inc.*, 416 F.3d 1242, 1250–53 (11th Cir. 2005) (per curiam); *Kadic v. Karadzi*, 70 F.3d 232, 243–44 (2d Cir. 1995); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 788 (D.C. Cir. 1984) (Edwards, J., concurring); *id.* at 819–20 (Bork, J., concurring).

'cruel and unusual' punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'") (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)). The universal prohibition against torture requires that our courts treat it with the utmost attention as a grave violation of national interest, particularly when that torture is committed under the "color of official authority" of the U.S. Government. *See Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 133 (2013) (Breyer, J., concurring).

3. Torture is:[34]

> 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 her or a third person information or a confession, punishing him or her for an act he or she or a third person as committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind....

8 C.F.R. § 1208.18(a)(1). The U.S. ratified the Convention Against Torture (CAT) in 1988. *Omar v. McHugh*, 646 F.3d 13, 17 (D.C. Cir. 2011); 8 C.F.R. § 1208.18(a)(3).[35] Although there is no universal agreement as to the precise meaning of the "human rights and fundamental freedoms" guaranteed to all by the United Nations Charter, "there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture."

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[34] This definition "borrows extensively from" that in Article 1 of the 1984 Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, a treaty to which the United States is a party. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002); *see also* S. Rep. No. 249, 102d Cong., 1st Sess., at 3 (1991). The Torture Victim Protection Act of 1991 operates as U.S. implementing legislation with respect to certain aspects of the Convention. *See United States v. Belfast*, 611 F.3d 783, 807–09 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 1511 (2011).

[35] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85 (CAT); *see* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171. Congress has limited judicial review under the Convention to claims raised in a challenge to a final order of removal. 8 U.S.C. § 1252(a)(4) ("Notwithstanding any other provision of law ... including section 2241 of Title 28, or any other habeas corpus provision, ... a petition for review [of an order of removal] shall be the sole and exclusive means for judicial review of any cause or claim" arising under the Convention). *Kiyemba v. Obama*, 561 F.3d 509, 514–15 (D.C. Cir. 2009). Accordingly, the CAT itself is not self-executing and serves only to provide a definition. *But see* 18 U.S.C. §§ 2340–2340A; 18 U.S.C. § 2441; 10 U.S.C. § 950t(11)–(14).

Filartiga, 630 F.2d at 882–83. As the Universal Declaration of Human Rights (UDHR) plainly states, "no one shall be subjected to torture."[36] Torture is prohibited at all times and in all circumstances without exception; this prohibition is a *jus cogens* peremptory norm of international law. *Sosa*, 542 U.S. at 732; *Filartiga*, 630 F.2d at 890.

4. The principles of the UDHR "constitute basic principles of international law."[37] "Where it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation, in accordance with national law."[38] The UDHR is an authoritative statement of the international community[39] and binding CIL.[40] "[I]nternational law confers fundamental rights upon all people …. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them." *Filartiga*, 630 F.2d at 884–85. "Official torture is clearly and unambiguously prohibited by the law of nations." *Id*.

5. International human rights law (IHRL) focuses on a State's obligation to protect the inherent dignity and inalienable rights of individual human beings.[41] IHRL exists in

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[36] General Assembly Resolution (G.A.Res.) 217 (III)(A) (Dec. 10, 1948), art. 5.

[37] G.A.Res. 2625 (XXV) (Oct. 24, 1970). The Declaration expressly prohibits any state from permitting torture. Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc. A/1034 (1975). *See also* Nayar, "*Human Rights: The United Nations and United States Foreign Policy*," 19 HARV. INT'L L.J. 813, 816 n.18 (1978).

[38] *Id*.; *see also* CAT Art. 14.

[39] E. Schwelb, *Human Rights and the International Community* 70 (1964).

[40] Nayar, *supra* note 37, at 816–17; Waldlock, "*Human Rights in Contemporary International Law and the Significance of the European Convention*," INT'L & COMP. L.Q., Supp. Publ. No. 11 at 15 (1965). *See, e.g.*, American Convention on Human Rights, Art. 5, OAS Treaty Series No. 36 at 1, OAS Off. Rec. OEA/Ser 4 v/II 23, doc. 21, rev. 2 (English ed., 1975) ("No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment"); International Covenant on Civil and Political Rights, U.N. General Assembly Res. 2200 (XXI)A, U.N.Doc. A/6316 (Dec. 16, 1966) (identical language); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 211 (semble).

[41] Universal Declaration of Human Rights, G.A.Res. 217A (III), U.N. GAOR, 3d Sess., U.N.Doc. A/810 (Dec. 10, 1948), pmbl.

two forms: treaty law and CIL.[42] The field of IHRL developed after World War II in response to the systematic abuse and genocide of the twentieth century, beginning with the formation of the United Nations. The UN Charter and one of its earliest resolutions, the UDHR, are considered foundational to IHRL. There is virtually unanimous agreement[43] that torture is prohibited by international law:

> In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. … Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis,* an enemy of all mankind.

Filartiga, 630 F.2d at 890.

6. IHRL and the Law of Armed Conflict (LOAC) are widely viewed as complementary; accordingly, the LOAC does not displace IHRL during armed conflict. Instead, IHRL serves to regulate state conduct towards individuals during armed conflict if its rules are a better fit than LOAC in a given situation. LOAC is accepted as the *lex specialis* in armed conflict, particularly international armed conflict. However, in non-international armed conflict, where there are fewer codified LOAC protections, IHRL may apply. A variety of sources determine what constitutes customary IHRL, including, but not limited to, the Restatement

[42] LCDR David H. Lee, JAGC, USN, Editor, *Operational Law Handbook*, International and Operational Law Department, The Judge Advocate General's Legal Center & School, U.S. Army, Chapter 3, *International Human Rights Law* (2015). *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1987).

[43] Ian Hurd, *How to Do Things with International Law* 17 (2017).

(Third) of U.S. Foreign Relations Law, Common Article 3 of the Geneva Conventions, and authoritative pronouncements of U.S. policy by ranking government officials.

7. The Geneva Conventions[44] have been signed and ratified by every country in the world, including the United States, meaning they have the force of U.S. law.[45] U.S. Const. art. VI, cl. 2; *United States v. Hamidullin*, 888 F.3d 62, 66 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 1165 (2019). The text and drafting history of the 1949 Geneva Conventions demonstrate specific intent to afford judicially-enforceable individual rights to detainees in military custody.[46] The 1949 drafters included these rights to remedy the egregious failure of diplomatic mechanisms to impose compliance with the protections of the 1929 Geneva Conventions during World War II. The Geneva Convention of 1949, art. 3 ("Common Article 3"), prohibits torture "at any time and in any place" in an "armed conflict not of an international character." Ever since the Vietnam War—the first war in which the U.S. had to apply the Geneva Conventions to insurgents—U.S. military policy has been to apply Common Article 3 to all detainees upon capture.[47] *Ali*, 649 F.3d at 783 (Edwards, J., dissenting).

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[44] *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 87, Aug. 12, 1949, [1955] 6 U.S.T. 3316 ("[C]ourts or authorities of the Detaining Power . . . shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed."); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3516 (same involving non-POWs).

[45] The Geneva Convention of August 12, 1949, as identified in section 6(f) of the War Claims Act of 1948, as amended, is the "Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949" which is included under the "Geneva Convention of August 12, 1949, for the Protection of War Victims," entered into by the United States and other governments, including the former government in North Vietnam which acceded to it on June 28, 1957. AUTHORITY: Sec. 2, Pub.L. 896, 80th Cong., as amended (50 U.S.C. App. 2001). 45 C.F.R § 506.15. *See* 18 U.S.C.A. § 2441 (Added Pub.L. 104-192, § 2(a), Aug. 21, 1996, 110 Stat. 2104, § 2401; renumbered § 2441, Pub.L. 104-294, Title VI, § 605(p)(1), Oct. 11, 1996, 110 Stat. 3510; amended Pub.L. 105-118, Title V, § 583, Nov. 26, 1997, 111 Stat. 2436; Pub.L. 107-273, Div. B, Title IV, § 4002(e)(7), Nov. 2, 2002, 116 Stat. 1810; Pub.L. 109-366, § 6(b)(1), Oct. 17, 2006, 120 Stat. 2633.).

[46] *See Hamdan v. Rumsfeld*, 2006 WL 53982 (U.S., 2006) (Brief of Amici Curiae International Human Rights Organizations); Adriana Sinclair, *Geneva Conventions*, in 1 *The Oxford Encyclopedia of American Military and Diplomatic History* 414 (Timothy J. Lynch ed., 2013).

[47] James F. Gebhardt, *The Road to Abu Ghraib: US Army Detainee Doctrine and Experience* 120 (2005); *see also* William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 321

8. Common Article 3 provides that in an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions, including the processes of "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[48] *Hamidullin*, 888 F.3d at 67–68 (citing art 3); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 629–30 (2006); *Al-Qosi*, No. CMCR 17-001, slip op. at 10 (citing R.M.C. 102(a)) ("These guarantees are incorporated into the 'procedural and evidentiary rules' that govern military commission cases … to provide for the just determination of every proceeding relating to trial by military commission."). Common Article 3 is widely regarded as establishing the most fundamental guarantees of humane treatment for all persons in all conflicts. It prohibits murder, summary execution, torture, and humiliating and degrading treatment. The Third Geneva Convention also guarantees the right to humane treatment including protection from torture and coercive interrogation tactics, and requires due process and fair trial rights.[49]

(2003) ("Terrorists forfeit any claim to POW status under the laws of armed conflict, but they do not forfeit their right to humane treatment—a right that belongs to all humankind, in war and in peace.").

[48] Army Regulation 190-8 confirms that persons taken into custody by U.S. forces will be provided Geneva Convention protections.

[49] *See* Third Geneva Convention, art. 99 (stating that "[n]o moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused."); Protocol I, art. 75 (forbidding "torture of all kinds, whether physical or mental."). *See also Hamdan v. Rumsfeld*, 548 U.S. 557, 628–29 (2006) (discussing the conflict in Afghanistan between the U.S. and al-Qaeda and applying Article 3); ICRC, *Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949* 1350–51 (1987) (discussing the Conventions' distinction between international and non-international conflicts and explaining that "in a non-international armed conflict the legal status of the parties involved in the struggle is fundamentally unequal. Insurgents (usually part of the population), fight against the government in power").

9. The CAT,[50] to which the United States is a signatory party, was implemented by the Torture Victim Protection Act of 1991.[51] The CAT applies to U.S. activities worldwide, including military operations. Article 2(1) requires each state party "to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Article 2(2) expressly applies the CAT to situations of armed conflict, and requires that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Under the CAT, each State Party must "ensure that all acts of torture are offences under its criminal law," including attempts, complicity, and participation.[52] Furthermore, "[e]ach State Party shall ensure in its legal system that the victim of any act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."[53]

10. The Restatement (Third) of U.S. Foreign Relations Law defines CIL as the "general and consistent practice of states followed by them from a sense of legal obligation." *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1180 (D.C. Cir. 1994) (Wald, J., dissenting) (citing 1 Restatement (Third) § 102(2)). To ascertain CIL, judges resort to "the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators."

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[50] "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105-277, 112 Stat. 2681, 2681–821). *See* 8 C.F.R. § 208.16.

[51] Torture Victim Protection Act ("TVPA") of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), reprinted in 28 U.S.C. § 1350 (2000). 28 U.S.C. § 1350 (Notes), Pub. L. No. 102-256, Mar. 12, 1992, 106 Stat. 73, the Torture Victim Protection Act of 1991. "An Act … [t]o carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing," available at https://www.congress.gov/bill/102nd-congress/house-bill/2092/text,(last visited June 3, 2020).

[52] Article 4.

[53] Article 14.

The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, … where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations,"); *see also* RESTATEMENT, § 111. To crystallize into a rule of CIL, there must be consistent state practice done out of a sense of legal obligation (*opinio juris*). State practice is evidence of how governments understand the context of their obligations, and thus what they consider to be lawful and unlawful. To determine what is lawful for a state, one must first know what rules it has accepted, and what reservations[54] or understandings it has imposed.[55]

11. These same tools are used to determine whether a norm of CIL has attained the special status of *jus cogens*. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir.1992), *cert. denied*, 507 U.S. 1017 (1993). A *jus cogens* norm exists when the international community recognizes the norm as so fundamental that it is "nonderogable." *Princz*, 26 F.3d at 1180; *Nicaragua*, 859 F.2d at 940 (quoting Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N.Doc. A/Conf. 39/27, 8 I.L.M. 679). Derogation is the legal right to suspend certain treaty provisions in time of war or in cases of national emergencies. Certain rights, however, may not be derogated from, including the prohibition on torture. Unlike general rules of CIL (*jus dispositivum*), whereas states are not constricted by CIL norms to which they persistently object, *jus cogens* norms are binding upon all nations. *Princz*, 26 F.3d at 1181.

[54] In its ratification of the CAT, the United States interposed a reservation as "the cruel, unusual, and inhuman treatment or punishment *prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States*." (emphasis added); *see* 136 Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990), *available at* http://www1.umn.edu/humanrts/usdocs/tortres.html,(last visited June 3, 2020). "Because states cannot make treaties to contract around *jus cogens* norms, US obligation under the norm against torture should be unaltered by its RUDs. One can put this issue aside, however, because the abuse of detainees consisted of torture even under the restrictive US definition." Joshua A. Decker, *Is the United States Bound by the Customary International Law of Torture? A Proposal for ATS Litigation in the War on Terror*, 6 CHI. J. INT'L L. 803, 822 (2006).

[55] Hurd, *supra* note 43, at 44.

12. The establishment of the concept of *jus cogens* norms (peremptory norms) in international law has occurred through the 1969 Vienna Convention on the Law of Treaties (VCLT). 138 Article 53 of the VCLT provides, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[56] The prohibitions against genocide, slavery, murder, disappearance, torture and cruel, inhuman, and degrading treatment, prolonged arbitrary detention, and systematic racial discrimination are considered to be *jus cogens*. *Princz*, 26 F.3d at 1173.

13. The prohibition against torture is not only *jus cogens*, but it also holds an even higher rank than CIL or treaty law.[57] No international action could ever legitimize the use of torture. *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).[58] Because CIL has the force of U.S. law, *jus cogens* norms of fundamental human rights are binding on U.S. forces during all overseas operations.[59] According to the Restatement, the United States accepts the position that a state violates *jus cogens* when, as a matter of policy, it practices, encourages, or condones, *inter alia*,

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[56] Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, 11: 4 HUMAN RIGHTS LAW REVIEW 609, 610 (2011).

[57] *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Chamber Judgment, P 59, 153 (Dec.10, 1998); *see Tibi v. Ecuador*, Preliminary Objections Merits, Reparations, and Costs, Judgment, InterAm. Ct. H.R. (ser. C) No. 114, ¶ 143 (Sept. 7, 2004).

[58] Hurd, *supra* note 43, at 108–09; *see* Questions relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Judgment, I.C.J. Reports 2012, p. 422, 457 ("[T]he prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*). That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims …), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.").

[59] MAJ Keith E. Puls, Editor, *Law of War Handbook*, International & Operational Law Department, The Judge Advocate General's School, U.S. Army (2005). Chapter 10, *Human Rights*.

torture or other cruel, inhumane, or degrading treatment or punishment.[60] *Princz*, 26 F.3d at 1173–74 (Wald, J., dissenting).

14. Domestically, torture has been prohibited since the nineteenth century. *Ali*, 649 F.3d at 781 (Edwards, J., dissenting) (citing *Estelle*, 429 U.S. at 102; *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879)); *Ingraham v. Wright*, 430 U.S. 651, 665–66 (1977) (citing *Weems*, 217 U.S. at 371–373). U.S. law has always encompassed the freedom from bodily punishment. *See Rochin v. California*, 342 U.S. 165 (1952). Congress has also prohibited torture abroad. 18 U.S.C. § 2340A.[61] Within armed conflict, Congress has declared, in the 2005 Detainee Treatment Act[62] and the 2006 and 2009 versions of the Military Commissions Act, that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment,"[63] and has further prohibited any "treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on

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[60] *Id*.

[61] Added Pub. L. 103-236, title V, § 506(a), Apr. 30, 1994, 108 Stat. 463; amended Pub. L. 103-322, title VI, § 60020, Sept. 13, 1994, 108 Stat. 1979; Pub. L. 107-56, title VIII, § 811(g), Oct. 26, 2001, 115 Stat. 381. "Section 2340A of Title 18, United States Code, prohibits torture committed by public officials under color of law against persons within the public official's custody or control. Torture is defined to include acts specifically intended to inflict severe physical or mental pain or suffering. (It does not include such pain or suffering incidental to lawful sanctions.) The statute applies only to acts of torture committed outside the United States. There is Federal extraterritorial jurisdiction over such acts whenever the perpetrator is a national of the United States, irrespective of the nationality of the victim." https://www.justice.gov/jm/criminal-resource-manual-20-torture-18-usc-2340a, (last visited June 3, 2020).

[62] "The McCain Amendment soon became an example of vertical, transnational human rights enforcement. Against the vigorous objections and lobbying efforts of the Bush Administration, a transnational network arose, consisting of private citizens and some twenty-eight retired generals, led by former Secretary of State Colin Powell, who came forward to speak in favor of the Amendment. At the same time, numerous human rights NGOs, such as Human Rights First, and Human Rights Watch vigorously pressed the case for the Amendment. The federal courts also weighed into the general debate…Thus, a transnational network against torture provoked an interaction, which led to an interpretation of law, which promoted the internalization of a norm against torture and cruel, inhuman, or degrading treatment into U.S. law." Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1154 (2006).

[63] DTA, Pub. L. No. 109-148, div. A, title X, § 1003(a), 119 Stat. 2680, 2739 (codified at 42 U.S.C. § 2000dd(a)); 2006 MCA, Pub. L. No. 109-366, § 6(c)(1), 120 Stat. 2600, 2635 (codified at 42 U.S.C. § 2000dd-0(1) (current through Pub.L. 116-140, Apr. 28, 2020, 134 Stat. 631).

Intelligence Interrogation."[64] [65]

15. In light of the universal *jus cogens* prohibition, "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations." *Filartiga*, 630 F.2d at 880 (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820); *Lopes v. Schroder*, 225 F. Supp. 292, 295 (E.D. Pa. 1963)). The prohibition does not distinguish between treatment of aliens and citizens and applies to everyone, everywhere, and at all times, both in peace and in war. *See Filartiga*, 630 F.2d at 884–85; *see also*, CAT art. 2 ("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 of torture.").[66]

16. *Jus cogens* norms may well restrain the U.S. government in the same way the Constitution does. *Nicaragua*, 859 F.2d at 941–42. The *jus cogens* norm against torture binds the

[64] DTA, Pub. L. No. 109-148, div. A, title X, § 1002(a), 119 Stat. at 2739 (codified at 10 U.S.C. § 801 (note)). Individuals in U.S. custody "shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in the Army Field Manual 2-22.3." 42 U.S.C. § 2000dd-2 (2015). *See also* 18 U.S.C. § 2441 (making war crimes committed by or against a member of the U.S. Armed Forces or a U.S. national punishable by fine, imprisonment, and/or death, regardless of where the crime occurred). As stated in the U.S. Army Field Manual: "U.S. policy expressly prohibits acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation. ... Such illegal acts are not authorized and will not be condoned by the U.S. Army." U.S. DEP'T OF ARMY, FIELD MANUAL 34-52, at 1–8 (1992), *available at* http://www.fas.org/irp/doddir/army/fm34-52.pdf, (last visited June 3, 2020). This manual describes the legal standards governing interrogations by U.S. military personnel and specifically defines "physical torture" to include "infliction of pain through chemicals or bondage," "forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time," "food deprivation," and "any form of beating." *Id*.

[65] "Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. … It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult. … the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information." *See* Art. 16, 56–57, 75–76, 80, *Instructions for the Government of Armies of the United States in the Field*, Adjutant General's Office, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863. Washington 1898: Government Printing Office.

[66] *See Hamdan v. Rumsfeld*, 548 U.S. at 630 (explaining that the phrase "conflict not of an international character" was used in contradistinction to Geneva Convention Common Article 2's application to conflicts between nations, such that Common Article 3 applies to the United States' conflict with al Qaeda).

United States, but its domestic law controls how this binding force is expressed. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (quoting *Murphy v. Ramsey*, 114 U.S. 15 (1885)). Remedies may lie from shocking acts of violence, torture or custodial interrogation perpetrated by or at the direction of United States officials. *United States v. Abdalla*, 317 F. Supp. 3d 786, 792 n.2 (S.D.N.Y. 2018); *see United States v. Noorzai*, 545 F. Supp. 2d 346, 352 (S.D.N.Y 2008); *United States v. Reed*, 639 F.2d 896, 901 (2d Cir. 1981).

d. *The D.C. Circuit has left an opening for remedies in egregious cases of torture.*

1. An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction. *United States v. Crews*, 445 U.S. 463, 474 (1980) (citing *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886)). This principle is generally referred to as the *Ker-Frisbie* doctrine. However, in *United States v. Toscanino*, 500 F.2d 267, 269 (2d Cir. 1974),[67] the Second Circuit created an exception to this doctrine where the U.S. government engages in "misconduct 'of the most shocking and outrageous kind.'" *See United States v. Matta-Ballesteros*, 71 F.3d 754, 762–64 (9th Cir. 1995) (quoting *United States v. Valot*, 625 F.2d

[67] Toscanino was kidnapped by U.S. agents, surveilled, tortured, and taken to the U.S. for prosecution. He was "violently kidnapped," "brutally tortured," "deprived [] of food and sleep, and interrogated [] for seventeen days." *U.S. ex rel. Lujan v. Gengler*, 510 F.2d 62, 64–65 (2d Cir. 1975). "[H]e was denied sleep and nourishment, forced to walk up and down a hallway for seven or eight hours at a time, kicked and beaten, jolted with electricity through electrodes attached to his body, and flushed with alcohol into his eyes and nose." *United States v. al Liby*, 23 F. Supp. 3d 194, 198 (S.D.N.Y. 2014). He alleged that he was "pistol-whipped, bound, blindfolded, brutally tortured, and interrogated him for seventeen days, and finally drugged and brought him to the United States by airplane, all with the knowledge of an Assistant United States Attorney." *United States v. Matta-Ballesteros*, 71 F.3d 754, 763 (9th Cir. 1995), *opinion amended on denial of reh'g*, 98 F.3d 1100 (9th Cir. 1996). Toscanino further alleged "that a gun blow knocked him unconscious when he was first taken into captivity[;] … that drugs were administered to subdue him for the flight to the United States[;] … [and] that the United States Attorney was aware of his abduction [and] interrogation." *Lujan*, 510 F.2d at 66. The appeals court remanded the case and ordered the government to respond to his allegations in an affidavit. The indictment was ultimately void because Toscanino's presence was illegally obtained. *United States v. Toscanino*, 500 F.2d 267, 269 (2d Cir. 1974).

308, 310 (9th Cir. 1980)); *see also United States v. Anderson*, 68 M.J. 378, 383 (C.A.A.F. 2010) (citing *United States v. Russell*, 411 U.S. 423, 431–32 (1973)). Faced with a conflict between the *Ker-Frisbie* doctrine and an "expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court … to the extent that the two are in conflict, the *Ker-Frisbie* version must yield." *Toscanino*, 500 F.2d at 275. U.S. courts no longer disregard the behavior of agents outside U.S. borders.

2. In the D.C. Circuit, outrageous government conduct claims are governed by the Supreme Court's holding in *Sosa* that the means used to bring a defendant before the court do not affect jurisdiction. *United States v. Mejia*, 448 F.3d 436, 442 (D.C. Cir. 2006); *see Sosa*, 542 U.S. 692. However, the court "ha[s] suggested that there may be a 'very limited' exception for certain cases of 'torture, brutality, and similar outrageous conduct.'" *United States v. Rezaq*, 134 F.3d 1121, 1130 (D.C. Cir. 1998) (citing *United States v. Yunis*, 924 F.2d 1086, 1092–93 (D.C. Cir. 1991) (quoting *U. S. ex rel. Lujan v. Gengler*, 510 F.2d 62, 65 (2d Cir. 1975))). "The *Toscanino* issue exemplifies the case in which the district court exercises discretion because there is no law to apply." *Nalls v. Rolls-Royce Ltd.*, 702 F.2d 255, 259 (D.C. Cir. 1983).

3. Sufficiently outrageous conduct was found in *Rochin*, wherein "an emetic solution was forced through a tube into a defendant's stomach to recover two morphine capsules which he had swallowed; the capsules were later introduced at his trial." *Lujan*, 510 F.2d at 65–66. Justice Frankfurter reversed the conviction because the misconduct "offend[ed] those canons of decency and fairness which express the notions of justice." *Rochin*, 342 U.S. at 169.

> This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation. It has long since ceased to be true that due process of law is

> heedless of the means by which otherwise relevant and credible evidence is obtained. … [C]onvictions cannot be brought about by methods that offend 'a sense of justice.'

Id. at 172–73. "The rack and torture chamber may not be substituted for the witness stand." *Brown v. State of Mississippi*, 297 U.S. 278, 285–86 (1936). "[T]o sanction the brutal conduct … would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." *Rochin*, 342 U.S. at 173–74; *see Russell*, 411 U.S. at 431–32 ("we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"). Cruel, inhuman, and outrageous treatment demands a remedy. *Lujan*, 510 F.2d at 65–66.

4. The traditional remedy for government pretrial misconduct is the exclusionary rule, which serves to deny "the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part." *United States v. Fernandez*, 500 F. Supp. 2d 661, 665 (W.D. Tex. 2006) (quoting *Toscanino*, 500 F.2d at 275, 279 (exclusionary rule insufficient)); *see Wong Sun v. United States*, 371 U.S. 471, 488 (1963) ("Where suppression of evidence will not suffice, however, we must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct."). In *Sullivan*, which involved anti-war protests in Washington, D.C., on May Day, 1971, "the police did not govern themselves by their ordinary procedures." *Sullivan v. Murphy*, 478 F.2d 938, 965–67 (D.C. Cir. 1973).

> The premise of the legal system, that unlawful arrests can be avoided or remedied by holding individual policemen accountable, evaporated when field arrest procedures were suspended and when persons other than arresting officers were permitted to execute field arrest forms. This lack of accountability was heightened by the fact that officers appeared on duty without customary name tags or numbered badges, which likewise precluded complaints to departmental superiors. Since the disorderly conduct and other offenses charged did not involve

> tangible evidence, implements or fruits, the exclusionary rule evolved by the courts to restrain unlawful arrests had no meaningful pertinence or influence.

Sullivan, 478 F.2d at 967. When government activity violates a protected right, courts have oversight authority. *Hampton v. United States*, 425 U.S. 484, 489 (1976).

e. *Federal courts are empowered to fashion a remedy for the violation of a known right.*

1. The concept of fundamental fairness "derives from the Due Process Clause that 'guarantees the fundamental elements of fairness in a criminal trial.'" *Al-Qosi*, No. CMCR 17-001, slip op. at 8 (quoting *Spencer v. Texas*, 385 U.S. 554, 563–64 (1967)). Even in cases of conduct which offends "fundamental canons of decency and fairness," the due process clause applies only "when the bad behavior precipitates serious prejudice to some recognized legal right." *United States v. Payner*, 447 U.S. 727 (1980); *see United States v. Dyke*, 718 F.3d at 1282, 1285 (10th Cir. 2013) ("What authority the due process clause does give courts to oversee the execution of the laws 'come[s] into play only when the Government activity in question violates some protected right of the defendant.'") (quoting *Hampton*, 425 U.S. at 489). No federal court has defined the requirements of the outrageous government conduct doctrine with any degree of precision. However, that which is "shocking, outrageous, and clearly intolerable" to "'the universal sense of justice'" would seem satisfactory. *See Russell*, 411 U.S. at 432. This "is an extraordinary defense reserved for only the most egregious circumstances." *United States v. Mosley*, 965 F.2d 906, 910 (10th Cir. 1992).

2. Decades after *Sullivan*, U.S. citizen Jennifer Harbury alleged CIA officials tortured and murdered her husband, a Guatemalan citizen. *Harbury v. Deutch*, 233 F.3d 596, 598 (D.C. Cir. 2000).[68] The D.C. Circuit stated, "[n]o one doubts … interrogation by torture like that

[68] *As amended* (Dec. 12, 2000), *rev'd sub nom. Christopher v. Harbury*, 536 U.S. 403 (2002), *and vacated*, No. 99-5307, 2002 WL 1905342 (D.C. Cir. Aug. 19, 2002).

alleged by Harbury shocks the conscience." *Harbury*, 233 F.3d at 602. The question before the court, however, was which rules protected non-resident foreign nationals from torture abroad. *Id*. "[C]ourts have suggested that non-resident aliens abducted by the government for trial within the United States have basic due process rights." *Id*. at 603 (citing *Toscanino*, 500 F.2d 267); *see Cardenas v. Smith*, 733 F.2d 909, 915 (D.C. Cir. 1984).

3. An alien must first have both voluntary presence in U.S. territory and substantial U.S. connections. *Harbury*, 233 F.3d at 603 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)). In "adjudicating the application of constitutional rights to aliens, the Supreme Court has looked … to whether the aliens have "come within the territory of the United States and developed substantial connections with this country." *Harbury*, 233 F.3d at 603. The court, viewing the torture and abduction as part of the pretrial process, focused on the fact that such conduct threatens the integrity of the judicial process. *Id*. at 603–04; *see Toscanino*, 500 F.2d at 275–79. The proper inquiry is not whether the Constitution prohibits torture but "whether the rights the plaintiffs press … were clearly established at the time of the alleged violations." *Ali*, 649 F.3d at 770–71.

4. An accused who demonstrates a violation of a known right "and who at the same time ha[s] no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Davis v. Passman*, 442 U.S. 228, 242 (1979). "The very essence of civil liberty," wrote Mr. Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137, 163 (1803), "certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id*.

5. Once a right and a violation have been shown, the scope of a "court's broad and flexible equitable powers" to remedy past wrongs is extensive, for breadth and flexibility are inherent in equitable remedies. *Sullivan*, 478 F.2d at 971; *Milliken v. Bradley*, 433 U.S. 267, 281 (1977). "The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). The nature of the violation determines the scope of the remedy. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 392 (1971).

6. Assuming a violation, "it is undeniable that the Federal courts having subject-matter jurisdiction also have broad equitable power to remedy and obviate all traces of the constitutional wrong." *Sullivan*, 478 F.2d at 966. Chief Justice Burger, speaking for a unanimous Court, pointed out the "historic equitable remedial powers" of the courts to fashion "equitable remedies to repair the denial of a constitutional right." *Id*. (citing *Swann v. Board of Education*, 402 U.S. 1, 15 (1971)). "In this case we may rely simply upon our supervisory power over the administration of criminal justice in the district courts within our jurisdiction." *Toscanino*, 500 F.2d at 276 (citing *McNabb v. United States*, 318 U.S. 332 (1943)).

7. "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded … courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684–85 (1946). The federal courts' power to grant relief not expressly authorized by Congress is firmly established. *Bush v. Lucas*, 462 U.S. 367, 374 (1983). The courts possess the authority to choose among available judicial remedies in order to vindicate constitutional rights. *Id*.; *see Bivens*, 403

U.S. 388; *Davis*, 442 U.S. 228; *Carlson v. Green*, 446 U.S. 14 (1980). In the absence of a congressional directive providing a remedy, "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors." *Lucas*, 462 U.S. at 378.

8. Federal courts are "empowered to grant equitable relief [where] congressional action extend[s] jurisdiction over the subject matter of the suit." *Bivens*, 403 U.S. at 404 (Harlan, J., concurring). "The question then, is, as I see it, whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." *Id*. at 407. First, a court should ask whether any alternative remedial process exists. *Klay v. Panetta*, 758 F.3d 369, 373 (D.C. Cir. 2014). Second, the court should examine "any special factors counselling hesitation before authorizing a new kind of" remedy. *Id*. (quoting *Lucas*, 462 U.S. at 378). "Of course, every error does not demand the same degree of relief. Rather, our precedents indicate that this Court balances the error complained of, the harm suffered, and the surrounding circumstances to determine whether the accused received meaningful relief." *United States v. Zarbatany*, 70 M.J. 169, 178 (C.A.A.F. 2011) (Stucky, J., dissenting).

9. "[W]here no other remedy is appropriate, a military judge may, in the interest of justice, dismiss charges because of unlawful pretrial punishment." *United States v. Fulton*, 55 M.J. 88, 89 (C.A.A.F. 2001). The Supreme Court has "implicitly recognized the necessity for preserving society's interest in the administration of criminal justice [and] that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Id*. (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)). "[W]here established remedies are available … those remedies must be tried and exhausted before resorting to dismissal of the charges." *Fulton*, 55 M.J. at 90 (Crawford, C.J.,

concurring); *see United States v. Williams*, 504 U.S. 36, 46 (1992) (a court's supervisory power should not be used to prescribe nor enforce standards when other remedies are available). "It is axiomatic [] that a court with appropriate jurisdiction may remedy an ongoing Article 13, UCMJ (Uniform Code of Military Justice), violation" through "the only meaningful relief available." *Zarbatany*, 70 M.J. at 175, 177.

f. *Pretrial detention may not be any more rigorous than the circumstances required to ensure the accused's presence at trial.*

1. Pretrial detainees may "be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration.'" *Bell v. Wolfish*, 441 U.S. 520, 523–24 (1979). A detainee may not be punished prior to adjudication of guilt in accordance with due process of law. *Id*. at 535. Pretrial confinement may not be any more rigorous than the circumstances required to insure the accused's presence at trial. *United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003). The right implicated is the detainee's right to be free from punishment and his understandable desire to be as comfortable as possible during his confinement. *Wolfish*, 441 U.S. at 534. If conditions are not reasonably related to a legitimate goal—if arbitrary or purposeless—a court may infer the government's action constitutes punishment that may not be inflicted upon detainees *qua* detainees. *Id*. at 539. A court must account for the legitimate interests that stem from the government's need to manage the facility, appropriately deferring to those jail policies and practices necessary to preserve internal order, discipline, and security. *Id*. at 540.

2. "Courts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals." *See Wolfish*, 441 U.S. at 547–48. "For example, in times of war or insurrection, when society's

interest is at its peak, the Government may detain individuals whom the government believes to be dangerous." *United States v. Salerno*, 481 U.S. 739, 748 (1987); *see Ludecke v. Watkins*, 335 U.S. 160 (1948); *Moyer v. Peabody*, 212 U.S. 78, 84–85 (1909). Courts nevertheless must not shrink from their obligation to "enforce the constitutional rights of all 'persons,' including prisoners." *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (per curiam).

3. As William Blackstone observed more than two centuries ago, in the "dubious interval" between capture, detention and trial "a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only." 4 W. Blackstone, Commentaries. "Congress has decreed that, until convicted, one charged with a crime shall not be subjected to punishment, and we must enforce that edict." *United States v. Nelson*, 39 C.M.R. 177, 181 (1969). "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Taylor v. Kentucky*, 436 U.S. 478, 484 (1978) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty,[69] like the companion principle that guilt must be proved beyond a reasonable doubt, is "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

> Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves. Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous."

[69] *See* UDHR, art. 11.1 ("Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.").

Salerno, 481 U.S. 739, 767 (Marshall, J., dissenting). "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

4. "As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet … [p]risoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the [] prohibition against cruel and unusual punishment. … The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Brown v. Plata*, 563 U.S. 493, 510–11 (2011) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion))). Every individual, "even the vilest criminal remains a human being possessed of common human dignity." *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring) (discussing the Cruel and Unusual Punishments Clause). Pain is inflicted on a human being, and to allow cruelty is to "treat members of the human race as nonhumans, as objects to be toyed with and discarded." *Id*. at 272–273.

5. Punishments rise to the level of cruel and unusual when they "are incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the unnecessary and wanton infliction of pain." *United States v. Lovett*, 63 M.J. 211, 214 (C.A.A.F. 2006) (quoting *Estelle*, 429 U.S. at 102–03). "This reflects a societal judgment that there are some punishments that are so barbaric and inhumane that we will not permit them to be imposed on anyone, no matter how opprobrious the offense." *Ingraham*, 430 U.S. at 684–85 (White, J., dissenting); *see Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring). Under Article 55, UCMJ, inhumane detention is not permitted. *Lovett*, 63 M.J. at

215; *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *see Hudson v. McMillan*, 503 U.S. 1 (1992); *United States v. Brennan*, 58 M.J. 351, 353–54 (C.A.A.F. 2003).[70]

6. "If there are some punishments that are so barbaric that they may not be imposed for the commission of crimes, designated by our social system as the most thoroughly reprehensible acts an individual can commit, then, a fortiori, similar punishments may not be imposed on persons" in pretrial detention. *Ingraham*, 430 U.S. at 684 (White, J., dissenting). "We are fortunate that in our society punishments that are severe enough to raise a doubt as to their constitutional validity are ordinarily not imposed without first affording the accused the full panoply of procedural safeguards provided by the criminal process." *Id*. at 686.

7. A prison's failure to treat detainees properly "may actually produce physical 'torture or a lingering death.'" *Estelle*, 429 U.S. at 103 (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)). Deprivation of basic sustenance, "including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society. If government fails to fulfill this obligation, the courts have a responsibility to remedy" it. *See Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978). A prisoner is entitled to a remedy when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law permits. *Miller v. Overholser*, 206 F.2d 415, 420 (D.C. Cir. 1953) (citing *Logan v. United States*, 144 U.S. 263 (1892)).

[70] Where prison official used graphic language and brutally threatened inmate with anal sodomy; isolated her in a locked room; trapped her in a corner; and physically assaulted her, this "raw exercise of power over a prisoner transformed her lawful period of confinement into a different form of punishment by imposing repeated physical and verbal abuse," constituting harm sufficiently injurious to establish punishment in violation of Article 55.

g. *Military judges have the authority to fashion remedies for illegal pretrial punishment.*

1. "The military judge is the presiding authority in a [military commission] and is responsible for ensuring that a fair trial is conducted." *United States v. Quintanilla*, 56 M.J. 37, 41 (C.A.A.F. 2001) (citing Art. 26, UCMJ, 10 USC § 826); R.M.C. 801(a), *Discussion* ("The military judge is responsible for ensuring that military commission proceedings are conducted in a fair and orderly manner."). "It is elementary that 'a fair trial in a fair tribunal is a basic requirement of due process.'" *Weiss v. United States*, 510 U.S. 163, 178 (1994) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept. It is fairness with reference to particular conditions or particular results." *Al-Qosi*, No. CMCR 17-001, slip op. at 11 (quoting *Snyder*, 291 U.S. at 116). "[J]udicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the criminal proceeding." *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006) (citing *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998); *United States v. Sullivan*, 26 M.J. 442, 444 (C.A.A.F. 1988)). Military judges have the "*sua sponte* duty to insure [] that an accused receives a fair trial." *United States v. Andrews*, 77 M.J. 393, 403 (C.A.A.F.), *reconsideration denied*, 78 M.J. 34 (C.A.A.F. 2018), and *cert. denied*, 139 S. Ct. 434 (2018) (citing *United States v. Watt*, 50 M.J. 102, 105 (C.A.A.F. 1999) (internal quotation marks omitted) (citation omitted)).

2. Military judges exercise "broad discretion" in carrying out "notions of fundamental fairness." *United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008) (citing *Quintanilla*, 56 M.J. at 41); *United States v. Cassity*, 36 M.J. 759, 762 (N-M. C.M.R. 1992); *see United States v. Green*, 1 M.J. 453, 456 (C.M.A. 1976) ("trial judges must share the responsibility … to insure … adherence to basic notions of fundamental fairness."); *United*

States v. Partin, 7 M.J. 409, 412 (C.M.A. 1979); *see also Hamdan v. Gates*, 565 F. Supp. 2d 130, 137 (D.D.C. 2008) ("The eyes of the world are on Guantanamo Bay. Justice must be done there, and must be seen to be done there, fairly and impartially.").

3. In 1775, the Articles of War provided:

> To the end that offenders may be brought to justice; whenever any officer or soldier shall commit a crime deserving punishment, he shall, by his commanding officer, if an officer, be put in arrest; if a non-commissioned officer or soldier, be imprisoned till he shall be either tried by a court-martial, or shall be lawfully discharged by proper authority.

United States v. Bayhand, 21 C.M.R. 84, 87–88 (1956). There was no substantial change until 1920, when Article 69 of the Articles of War of that date, 41 Stat 802, was enacted, "favoring a more intelligent and humane treatment of persons whose guilt had not been determined." *Id*. at 88. It provided, "[a]ny person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require." Paragraph 19 of the 1949 Manual for Courts-Martial, U. S. Army, took another step toward relaxing restraints, stating "[t]he character and duration of the restraint imposed before and during trial, and pending final action upon the case, will be the minimum necessary under the circumstances." The 1951 Manual for Courts-Martial stated that ". . . Confinement will not be imposed pending trial unless deemed necessary to insure the presence of the accused at the trial or because of the seriousness of the offense charged." [Paragraph 20c.] In *Bayhand*, the Court of Military Review reasoned:

> the earlier Articles of War and Manual provisions failed to take cognizance of the fact that confinement itself was a form of penal servitude, and that if the restraint imposed was more than that needed to retain safe custody, the unnecessary restrictions were in the nature of punishment. Present-day enactments in this field seem to show a Congressional and Executive recognition of that principle, and an intent to change the old order by softening the injustice which is inherent in a system not permitting freedom on bail. If, therefore, Congress directed some

> preferment for an unsentenced person in one area, it could be expected to do the same in other areas if they, too, created unnecessary injustices.

21 C.M.R. at 88 (charges dismissed for illegal pretrial punishment).

4. The applicability of Article 13 principles is a question of law that must be answered by the military judge. *United States v. Spaustat*, 57 M.J. 256, 260 (C.A.A.F. 2002). The military judge is in the best position to make this evaluation. *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997). Article 13, UCMJ, 10 U.S.C. § 813, provides:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence [at trial].

See Inong, 58 M.J. at 463. In 1956,[71] Article 13 was enacted by Congress as an amendment to Article of War 16 in order to clarify and confirm the long-standing rule of military custom and practice that detainees may not be subject to punishment prior to conviction. *See* W. Winthrop, *Military Law and Precedents* 124 (2d ed. 1920) ("A prisoner is to be presumed to be innocent till [] duly convicted and till [] thus convicted, he cannot legally be punished as if he were guilty or probably so.").[72]

5. An accused is presumed innocent until proved guilty; therefore, punishment for an alleged offense is prohibited before trial. "Any rule to the contrary would be to deny an accused due process of the law." *United States v. Heard*, 3 M.J. 14, 20 (C.M.A. 1977).

> Conditions of restraint which have impacted upon a service member in a manner indistinguishable from those serving sentences for adjudicated criminal offenses may of course, be improper and "punitive," regardless of the administrative characterization of such persons. Status categories such as "legal hold", "pending investigation," and "awaiting disciplinary action" do not shield government officials from judicial determinations of illegal, punitive treatment.

[71] 10 U.S.C. § 813 (Aug. 10, 1956, c. 1041, 70A Stat. 41; Pub.L. 97-81, § 3, Nov. 20, 1981, 95 Stat. 1087.).
[72] *See*, *e.g.*, *Winthrop* (citing G. 106 Dept. of Dakota 1871) ("In one of the Orders last cited Gen. Hancock condemns as unlawful the treatment of a soldier thus confined who was compelled to carry a heavy log for long periods, and, because of such treatment, remits the sentence subsequently imposed by the court.").

United States v. Southers, 12 M.J. 924, 926 (N-M. C.M.R. 1982).

6. Article 13 prohibits: (1) intentional imposition of punishment on an accused before his or her guilt is established at trial; and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial. *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005); *Inong*, 58 M.J. at 463; *United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000). If an accused, or appellant, can demonstrate that either existed, he is entitled to sentence relief. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002) ("burden is on appellant to establish ... violation of Article 13").

7. A military judge has broad authority to order administrative credit against adjudged confinement as a remedy for Article 13 violations. *United States v. Stringer*, 55 M.J. 92, 94 (C.A.A.F. 2001); *see United States v. Suzuki*, 14 M.J. 491, 493 (C.M.A. 1983); *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006) (citations omitted); *see Fulton*, 55 M.J. at 89–90 ("[W]here no other remedy is appropriate, a military judge may, in the interest of justice, dismiss charges because of unlawful pretrial punishment," but "[d]ismissal of charges is an extraordinary remedy" that is rarely appropriate.) (internal quotations omitted).[73]

8. Illegal pretrial punishment does not create a per se right to sentencing credit. *United States v. Adcock*, 65 M.J. 18, 23 (C.A.A.F. 2007). Likewise, a military judge's discretion to award credit for pretrial punishment does not create an enforceable per se right to additional

[73] Timothy Riley, *Protecting Servicemembers from Illegal Pretrial Punishment: A Survey of Article 13, Uniform Code of Military Justice, Caselaw*, ARMY LAW., December 2006, 36, 47 ("Ultimately, there is no defining formula for military courts to use when granting relief from illegal pretrial punishment. When relief is granted, the military judge generally grants administrative credit to the accused's sentence or takes judicial notice of the illegal punishment when drafting a sentence upon a finding of guilt … As each Article 13 issue is unique, military courts have substantial judicial latitude to craft individualized remedies to appropriately respond to illegal acts of confinement or command influenced pretrial punishment."). *See also* Major M. Patrick Gordon, *Sentencing Credit: How to Set the Conditions for Success*, ARMY LAW., October 2011, at 7, 11 ("The amount of credit awarded is left to the discretion of the military judge.").

sentence credit. *Adcock*, 65 M.J. at 24. Article 13 does not provide explicit authority for military judges to grant relief for illegal pretrial punishment—Article 13 is silent on the issue. Rather, like federal district courts, military courts have routinely invoked their "inherent authority" to fashion appropriate relief for violations of Article 13 and other pretrial punishment violations. *United States v. Gregory*, 21 M.J. 952, 958 n.15 (C.M.R. 1986); *Suzuki*, 14 M.J. at 493.

9. Article 13 is neither an explicit or exclusive source of authority for, nor a limitation on, the authority of military judges to provide relief for unlawful pretrial punishment. Military judges have broad discretion to fashion remedies in order to ensure that relief is effective and meaningful, and sufficient to deter future violations. *See Zarbatany*, 70 M.J. at 175 ("if a court can dismiss a charge in response to violations of Article 13 … a court can" do something less); *United States v. Larner*, 1 M.J. 371 (C.M.A. 1976) (military judge may award administrative credit against an approved sentence where that is "the only legal and fully adequate remedy for" unlawful pretrial punishment). Such relief can range from dismissal of the charges, to confinement credit or to the setting aside of another part of the sentence. Where it is available, meaningful relief is required.[74] *Zarbatany*, 70 M.J. at 170.

4. ANALYSIS:

a. Contrary to Defense Counsel's repeated assertions throughout the pleadings, the authority of the military judge presiding over a military commission to order administrative credit against an approved sentence to confinement following a finding of pretrial punishment by U.S. Government officials is *not* obvious. This is the subject of serious and significant dispute. This dispute, in large part, is due to Congress, whether intentionally or by oversight, not

[74] *See generally* CAT art. 14; General Comment No. 3; UDHR, art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or law.").

including a provision similar to Article 13, UCMJ, or specifically indicating a lack of authority in the 2006 or 2009 Military Commission Acts. Furthermore, the Secretary of Defense has not included guidance one way or another in promulgating the Rules for Military Commission or amendments thereto, despite ample opportunity over the years.

b. Defense's reliance on Colonel Stephen Henley's 24 September 2008 ruling in the military commission case of *United States v. Mohammed Jawad* (D-008) is of little assistance to this military judge. Despite my upmost respect for Colonel Henley, he was seated as a trial judge just like myself. His rulings thus have little to no precedential value in this military commission. Additionally, Colonel Henley provided no serious analysis to support his conclusory decision.

c. The Commission assumes, without deciding, that the Defense allegations are true regarding the mistreatment the Accused suffered in U.S. custody. Taken as true, this mistreatment rises to the level of torture recognized in *Toscanino* and *Rochin*, and violated the *jus cogens* universal right to be free of torture under U.S. and international law. The Commission recognizes, for purposes of this legal ruling, the violation of a known right. Even with this finding of mistreatment for purposes of this ruling on the Commission's legal authority, the Commission declines to accept the assertion of amicus that it is this Commission's responsibility to hold others accountable for whatever their actions may have been in their treatment or mistreatment of this Accused. The acceptance of such a responsibility and any resulting requirement to fashion a remedy far exceeds the limited jurisdiction of this Commission as it impacts individuals who are not alien unprivileged enemy belligerents.[75]

d. The Government's argument that the Accused waived his right to claim pretrial punishment or pretrial confinement credit under the terms of the PTA and the Addendum to the

[75] 10 U.S.C. § 948d.

PTA is also misplaced. As noted earlier in this opinion, paragraph 11 of AE 012 (the PTA) and paragraph 4 of AE 013 (Addendum to the PTA) referred to a waiver of the Accused's right to sue the United States Government or United States Government officials for damages due to his treatment while in the custody of the United States Government. Presumably this lawsuit would be under the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350.

e. Finally, as explained above in the Law Section, how one labels the underlying factual basis for the relief requested in this instance has legal significance. Administrative credit for time spent in confinement or detention after a plea of guilty is accepted is different from administrative credit for the conditions of that same or any other confinement/detention prior to being sentenced. The Accused in this case did not bargain away or waive day-for-day credit for the time he spends in confinement or detention after he plead guilty and his plea was accepted. As noted above he did not bargain away or waive any credit for the conditions under which he has been detained at any point in time since his capture in 2003. It is this latter circumstance which is the subject of this Defense motion and, in part, the ruling which follows.

f. Under D.C. Circuit precedent, there exists a limited exception to the *Ker-Frisbie* doctrine in cases of torture. *Rezaq*, 134 F.3d at 1130; *Yunis*, 924 F.2d 1092–93. The traditional remedy is the exclusionary rule, but that is not applicable to the Accused, who pled guilty. Furthermore, in egregious cases, the exclusionary rule provides an insufficient remedy. *Wong Sun*, 371 U.S. at 488. The writ of habeas corpus is also unavailable to the Accused. Taking special factors into consideration, including the seriousness of the offenses to which the Accused pled guilty, as well as the shocking mistreatment to which the Commission has found he was subjected (for purposes of this initial ruling on this motion), the narrowly-tailored, meaningful, and available remedy of administrative sentencing credit seems necessary and appropriate.

Although by no means required to do so, where no other remedy is appropriate, military judges have broad authority to order administrative credit against the sentence. *Stringer,* 55 M.J. at 94; *Suzuki*, 14 M.J. at 493.

g. The Supreme Court has recognized an "ascending scale of rights" for individuals depending on their connections to the United States. *Rasul v. Bush*, 542 U.S. 466, 486 (2004) (Kennedy, J., concurring in the judgment). An alien's physical presence within the United States "[gives] the Judiciary power to act." *Id*. "The place of the detention [is] also important to the [] question …. Physical presence in the United States 'implied protection.'" *Id*. This is a distinction from *Eisentrager* where "th[e] prisoners at no relevant time were within any territory over which the United States is sovereign." *Id*. (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)); see *Harbury*, 233 F.3d at 604 ("The *Eisentrager* opinion acknowledged that in some cases constitutional provisions extend beyond the citizenry; 'the alien ... has been accorded a generous and ascending scale of rights as he increases his identity with our society.'").

h. "Guantanamo Bay is in every practical respect a United States territory." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring). "What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay."[76] *Id*. Guantanamo detainees are entitled to "the privilege of litigation in U.S. courts." *Aamer v. Obama*, 742 F.3d 1023, 1028 (D.C. Cir. 2014) (citing *Rasul*, 542 U.S. 466). Furthermore, the Accused is due some degree of protection beyond that which the Government recognizes, by virtue of having "come within the territory of the United States and developed substantial connections with this country." *Harbury*,

[76] This suggests the possibility of a stronger argument for application of the outrageous government conduct doctrine for abuse which occurred at Guantanamo Bay. In *Jawad*, the military judge assumed but did not decide that the accused was tortured, and recognized the availability of remedies including sentence credit. D-008 at 4–6, Judge Henley's Ruling on the Defense Motion to Dismiss for Torture in *United States v. Jawad*, available at https://www.mc.mil/Portals/0/pdfs/Jawad/Jawad%20(AE084%20-%20D008)%20MJ%20Ruling.pdf, (last visited June 3, 2020).

233 F.3d at 603 (citing *Verdugo-Urquidez*, 494 U.S. at 271); *see Rasul*, 542 U.S. at 486; *see also* note 25, *supra*.

i. It is the military judge's duty to ensure the trial is fundamentally fair. *Quintanilla*, 56 M.J. at 41. When government activity violates a protected right, courts have oversight authority. *Hampton*, 425 U.S. at 489; *see also Sullivan*, 478 F.2d at 965–67. An accused who can show the violation of a known right may invoke the court's authority in the absence of other remedies. *Davis*, 442 U.S. at 242. This is "[t]he very essence of civil liberty." *Marbury*, 5 U.S. at 163. When the violation of a known right has been demonstrated, the court enjoys broad and flexible powers to remedy past wrongs. *Sullivan*, 478 F.2d at 971; *Milliken*, 433 U.S. at 281. The nature of the violation determines the scope of the remedy. *See Bivens*, 403 U.S. at 392.

j. Through the MCA, Congress has granted the Commission subject matter jurisdiction. *See Bivens*, 403 U.S. at 404 (Harlan, J., concurring); *Zarbatany*, 70 M.J. at 175, 177. While the Rules for Military Commissions are based upon the procedures for trials by general courts-martial under chapter 47 of title 10, Article 13 of the UCMJ was not incorporated into the MCA and the rules promulgated thereunder. Nevertheless, while the Accused's detention "does not constitute pretrial confinement," R.M.C. 1001(g), and the Rules expressly prohibit the military judge from granting *confinement* credit, with regard to the UCMJ and MCA alike, "Congress has not acted to require credit for lawful pretrial confinement, nor has it constrained the authority of the President or the Secretary of Defense to grant credit." *United States v. Smith*, 56 M.J. 290, 293 (C.A.A.F. 2002); AE 033D at 11, 14 ("Congress itself made no effort to create rule restricting the availability of *pretrial punishment* credit") (emphasis added).[77]

[77] Confinement credit and pretrial punishment credit are not interchangeable. *See United States v. Allen*, 17 M.J. 126 (C.M.A. 1984) (confinement credit is that which is credited toward the service of the sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed); *cf. United States v. Adcock*, 65 M.J.

k. The principles underlying Article 13 were based upon the presumption of innocence, a fundamental necessity prerequisite to a fair trial. However, even theoretically, Article 13, by its terms, only applies to persons "held for trial." *United States v. Kreutzer*, 70 M.J. 444, 447 (C.A.A.F. 2012) (citing *Inong*, 58 M.J. at 463). An individual is held "in custody" of the United States when the U.S. official charged with his detention has "the power to produce" him. *Aamer*, 742 F.3d at 1036 (citing *Munaf v. Geren*, 553 U.S. 674, 693 (2008); *Wales v. Whitney*, 114 U.S. 564, 574 (1885)); *see also* 28 U.S.C. § 2243.

1. At the time of the Accused's initial capture in 2003, President Bush had signed an Executive Order[78] providing that suspected members of Al Qaeda could be detained by the Secretary of Defense and tried before military commissions established by the Secretary of Defense.[79] The Executive Order also set forth broad standards for this detention. The Accused was transferred from Central Intelligence Agency custody to Department of Defense custody at U.S. Naval Station Guantanamo Bay, Cuba, in September 2006 to be tried by military commission. At the time of his transfer, the Supreme Court had recently invalidated the then-existing military commissions system as unlawful. *See Hamdan*, 548 U.S. 557. Consequently,

18, 23 (C.A.A.F. 2007); *United States v. Suzuki*, 14 M.J. 491, 492 (pretrial punishment credit is the authorization of additional credit for "unusually harsh circumstances" in pretrial confinement).

[78] Exec. Order, *supra* note 27.

[79] "In early November 2001, CIA Headquarters further determined that any future CIA detention facility would have to meet U.S. prison standards and that CIA detention and interrogation operations should be tailored to "meet the requirements of U.S. law and the federal rules of criminal procedure," adding that "[s]pecific methods of interrogation w[ould] be permissible so long as they generally comport with commonly accepted practices deemed lawful by U.S. courts. The CIA's search for detention site locations was then put on hold and an internal memorandum from senior CIA officials explained that detention at a U.S. military base outside of the United States was the 'best option.'" The memorandum thus urged the DCI to "[p]ress DOD and the US military, at highest levels, to have the US Military agree to host a long-term facility, and have them identify an agreeable location," specifically requesting that the DCI "[s]eek to have the US Naval Base at Guantanamo Bay designated as a long-term detention facility." U.S. Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, Executive Summary at 38 (2014) (citing Memorandum for DCI from J. Cofer Black, Director of Counterterrorism, via Deputy Director of Central Intelligence, General Counsel, Executive Director, Deputy Director for Operations and Associate Director of Central Intelligence/Military Support, entitled, "Approval to Establish a Detention Facility for Terrorists.").

Congress enacted the MCA to authorize trial by military commission. President Bush's remarks confirmed that the Accused and others were transferred to Guantanamo for trial.[80] President Bush stated:

> Some of these individuals are taken to the United States Naval Base at Guantanamo Bay, Cuba. It's important for Americans and others across the world to understand the kind of people held at Guantanamo. These aren't common criminals, or bystanders accidentally swept up on the battlefield—we have in place a rigorous process to ensure those held at Guantanamo Bay belong at Guantanamo. Those held at Guantanamo include suspected bomb makers, terrorist trainers, recruiters and facilitators, and potential suicide bombers. They are in our custody so they cannot murder our people… In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program[81] operated by the Central Intelligence Agency … *During questioning, KSM told us about another al Qaeda operative he knew was in CIA custody—a terrorist named Majid Khan. KSM revealed that Khan had been told to deliver $50,000 to individuals working for a suspected terrorist leader named Hambali, the leader of al Qaeda's Southeast Asian affiliate known as "J-I." CIA officers confronted Khan with this information. Khan confirmed that the money had been delivered to an operative named Zubair, and provided both a physical description and contact number for this operative*. … Soon after the war on terror began, *I authorized a system of military commissions to try foreign terrorists accused of war crimes*. Military commissions have been used by Presidents from George Washington to Franklin Roosevelt to prosecute war criminals … The Supreme Court determined that military commissions are an appropriate venue for trying terrorists, but ruled that military commissions needed to be explicitly authorized by the United States Congress. *So today, I'm sending Congress legislation to specifically authorize the creation of military commissions to try terrorists for war crimes*. … The procedures in the bill I am sending to Congress today reflect the reality that we are a nation at war, and that it's essential for us to use all reliable evidence to bring these people to justice. … I'm announcing today that Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and 11 other terrorists in CIA custody have been transferred to the United States Naval Base at Guantanamo Bay. (Applause.) *They are being held in the custody of the Department of Defense. As soon as Congress acts to authorize the military commissions I have proposed*, *the men* our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, *can face justice*. (Applause.)

[80] *See* President Bush, *supra* note 26.

[81] President Bush's statement connecting Guantanamo military commissions to the RDI program serves as a "legally significant connection between the alleged torture and any liberty deprivation resulting from the criminal prosecution." *See United States v. Ghailani*, 751 F. Supp. 2d 502, 504–05 (S.D.N.Y. 2010).

President George W. Bush (Sep. 6, 2006), available at https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html, (last visited June 3, 2020).

2. Then after taking office in 2009, President Barack Obama stated Guantanamo detainees "[fell] into five distinct categories."[82] First, those who would be tried in federal (Article III) court; second, those who, like the Accused, would be tried through military commissions. AE 033D, Att. B. "The third category … includes those who have been ordered released by the courts. … The fourth category … involves detainees who we have determined can be transferred safely to another country. … finally, there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people."[83]

3. It seems clear the Accused was being held for trial no later than the date of his transfer into the custody of the Department of Defense consistent with President Bush's November 13, 2001, Executive Order. At some point after being taken into CIA custody, the Accused went from being solely a law of war detainee to also being held for trial by military commission.[84] Ultimately, however, the question of whether one was held for trial is a question of fact relating to the treatment of the accused, rather than the date a criminal proceeding formally commences.[85]

l. The Government concedes "the Accused has a right to be free of cruel and unusual punishment under the MCA as it related to the charges before the military commission." AE 033D at 27. As discussed previously, a detainee—not even a law of war detainee—may be mistreated in a manner divinable only as punishment. No one who is detained may be punished absent an adjudication of guilt. *Id*.; *see* AE 033D at 26 ("The United States accepts that AUEBs

[82] President Obama, *supra* note 28.
[83] *Id*.
[84] Transcript at pp. 558–562.
[85] Riley, *supra* note 73 at 36, 37; (citing *United States v. Davis*, 30 M.J. 980, 981–82 (A.C.M.R. 1990)).

should not be criminally punished before trial.").[86] Contrary to the Government's argument, the fact the Accused's detention was lawful does not excuse the abuse he allegedly suffered. *See* AE 033D at 25 (arguing the Accused was not punished for these offenses but was instead "independently mistreated"). The Government reasons that the Accused was not being held in pretrial confinement because, "irrespective of his military commission case, he [was] *also* being held as a LOW detainee. As such, his detention status under the [law of war] is separate and apart from whatever happens in his military commission trial associated with his war crimes." AE 033D at 15. The Government contradicts its own argument here by acknowledging the Accused was both held for trial and held as a law of war detainee. The lawful basis for that law of war detention does not relieve the Government of its obligation to treat detainees humanely. "Prisoners retain the essence of human dignity inherent in all persons." *Plata*, 563 U.S. at 510. Deprivation of a known right entitles a detainee to a remedy. *Miller*, 206 F.2d at 420; *Logan*, 144 U.S. 263; *Mosby*, 56 M.J. at 310.

m. "While no [*Allen*] credit is given for pretrial detention, the defense may raise the nature and length of pretrial detention as a matter in mitigation." R.M.C. 1001(c), *Discussion*. Day-for-day *Allen* credit given as a remedy for pretrial confinement is not to be conflated with pretrial punishment credit given as a remedy for violations of Article 13 principles, including the presumption of innocence or the right to be free of punishment. The law does not prohibit an accused from presenting evidence of an Article 13-type violation to the military judge as well as to the panel, so long as that evidence is otherwise admissible pursuant to the relevant rules of evidence and procedure. *United States v. Carter*, 74 M.J. 204, 205–06 (C.A.A.F. 2015).

[86] Riley, *supra* note 73 at 36, 43 (citing *United States v. King*, 61 M.J. 225, 227–28 (2005); *United States v. Crawford*, 62 M.J. 411 (2006)); *see also* Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 368 (1990).

> Presenting Article 13, UCMJ, evidence in these two different contexts serves two distinct purposes. A military judge considers evidence of Article 13, UCMJ, violations to determine, as a matter of law, whether the accused is entitled to credit for the government's conduct. However, when a panel considers that same evidence properly admitted as mitigation on sentencing, it is doing so for the purpose of determining an appropriate sentence for an appellant's conduct."

Id.

n. The Commission concludes the Defense has met their burden in this Commission to show, by a preponderance of the evidence, that this Military Judge has the inherent authority to grant a remedy in the form of administrative sentencing credit for abusive treatment amounting to illegal pretrial punishment, especially when no other remedy is available. This Military Judge has an obligation to ensure this accused receives a fundamentally fair trial. The absence of Article 13 from the MCAs is not dispositive, as Article 13 codified the longstanding military practice of judicial remedies for violations of the presumption of innocence, a foundational principle of a fair trial. Despite the lack of an Article 13-like provision in the 2009 MCA, this Military Judge has broad discretion to fashion a remedy for illegal pretrial punishment—a violation of the universal right to be free of torture—by virtue of the *sua sponte* duty to ensure the fundamental fairness, as well as the appearance of fairness, of the tribunal.

5. RULING:

a. The Commission hereby rules that, as a matter of law, this Military Judge has legal authority to grant administrative credit as a remedy for illegal pretrial punishment.

b. The Commission **DEFERS** ruling on the mixed questions of law and fact underlying the merits of the subject motion and will concurrently consider the Defense's case in extenuation and mitigation at sentencing for the purpose of ruling on the merits of the subject motion.[87] If the

[87] The analysis above focuses on the right to be free from torture and potential remedies for violation of that right. This should not be construed as implying the Commission will not also consider evidence of other potentially unlawful pretrial punishment, such as degradation of the right to counsel as alleged by the Defense in AE 033.

Defense desires to present certain evidence on this motion outside of the presence of the members, it will be afforded an opportunity to do so during deliberations, after excusal of the members, or at some other opportune time during trial and before adjournment.

So **ORDERED** this 4th day of June, 2020.

//s//
DOUGLAS K. WATKINS
COL, JA, USA
Military Judge