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Litigating How We Fight

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I. Introduction

It is well-documented that the way the Bush administration chose to conduct its conflict against al Qaeda caused a significant rift between the United States and European States. US policies that authorized the use of renditions, secret detention facilities and harsh interrogation techniques created diplomatic tension between the United States and many of its European allies, making it harder to focus on other bilateral and multilateral issues and at times diminishing law enforcement and intelligence cooperation.¹ Many of these European reactions and decisions were discretionary, taken by the political branches of European countries in response to pressure from their electorates and human rights groups. One might reasonably think, therefore, that some of the changes introduced by the Obama administration related to the conflict with al Qaeda—the three January 2009 executive orders, for instance—would have started to close that rift.²

But something remarkable—and surprisingly unremarked upon—has been happening since 2001 that is both widening and securing the permanence of this transatlantic divide. Courts on both sides of the Atlantic are deciding cases brought by individuals who are contesting the way States have been fighting armed conflicts with non-State actors (such as the Taliban and al Qaeda, as well as

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armed groups in Iraq). With the exception of individual claims related to the lawfulness of detention at Guantanamo, the US government has won the vast majority of its cases, with the courts often declining even to reach the merits of the claim.³ In contrast, European States (with the United Kingdom leading the way) have lost virtually every case on these issues that has come before their courts or before the European Court of Human Rights (ECtHR). These cases are having a systematic effect on States' decisions about how to conduct themselves in armed conflict. It therefore is in the interests of policymakers and warfighters to understand this trend.

Part II of this article examines the wide spectrum of cases in which States or State officials have been sued for their alleged conduct related to non-international armed conflicts. Part III assesses the real-world implications for the judicial decisions in each area, not only for the specific litigants but also for government policy and operations more generally. Part IV considers possible explanations for the divergent outcomes of these cases and offers some thoughts about how States might try to manage these developments in the future.

II. Suing States over How They Fight

Virtually every aspect of the way in which the United States and European States are fighting conflicts against non-State actors—including detention, the use of force during occupation, the transfer of detainees from one State to another and the use of intelligence and intelligence agencies—has been challenged in court.⁴ These cases stem primarily from the conflicts in Iraq and Afghanistan, though some flow from the US conflict with al Qaeda outside of those theaters and allegations about US activities, such as renditions, in the course of that latter conflict. This Part examines four categories of claims asserting unlawful actions by States: unlawful detention, unlawful treatment, unlawful transfers and illegality in intelligence activities. Each section focuses first on US cases and then turns to other States' cases, most often cases brought in the United Kingdom.

Claims of Unlawful Detention

US Cases

It is useful to sort into three general categories claims brought by detainees against the United States alleging that they are being unlawfully detained. First, detainees have challenged the executive branch's general authority to detain al Qaeda and Taliban fighters under the laws of war. US courts have upheld the executive's authority in this area. In *Hamdi v. Rumsfeld*, the Supreme Court upheld the legality of

detention of individuals engaged in hostilities against the United States in Afghanistan, while requiring the US government to provide the individual detainee in question with a process by which to contest the factual basis for his detention.⁵ Likewise, in *Hamdan v. Rumsfeld*, the Supreme Court affirmed that the United States was in an armed conflict with al Qaeda and did not question the legality of Hamdan's detention as a member of al Qaeda (though it concluded that the military commission before which the United States planned to try him was unlawful).⁶

Second, detainees have sought to have federal courts, not just the executive branch, review the legality of their detentions. The United States, which has argued against the extension of review to courts, has lost these cases. The chain of cases that resulted in the Supreme Court's holding that constitutional habeas corpus applies to detainees held at Guantanamo includes *Rasul v. Bush* and *Boumediene v. Bush*.⁷

The *Boumediene* decision resulted in a third category of cases: detainees at Guantanamo have brought habeas petitions challenging the specific factual bases for their detentions. The United States is defending almost two hundred habeas cases brought by those who remain at Guantanamo, and has lost a number of cases, even as the courts continue to uphold the basic scope of the government's claimed detention authority.⁸ Much ink has been spilled about the unprecedented nature of judicial review of the propriety of a person's detention during an armed conflict. Indeed, the fact that the federal district courts hearing these cases are struggling with what rules to apply to this review illustrates the novel nature of the courts' role in this type of decision making and the non-traditional nature of the armed conflict.⁹ The outcomes of these cases have been mixed: the courts (to date) have denied detainees the writ of habeas in about sixteen cases, and have granted it in thirty-seven cases.¹⁰ As a result, the United States has transferred a number of detainees to their countries of nationality or other locations, and in other cases continues to seek homes for those ordered released.

In *Boumediene*, the Supreme Court evaluated three factors to determine the reach of the writ of habeas in the wartime detention context: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."¹¹

One question left unresolved by *Boumediene* was whether the right of habeas corpus might extend to detainees held in US custody in locations other than Guantanamo.

In May 2010, the D.C. Circuit answered this question in the negative in the *Maqaleh* case, at least with regard to certain detentions in Afghanistan.¹² The court

applied the three *Boumediene* factors to determine whether the writ would run to the detention in Afghanistan by the United States of three non-Afghan detainees who alleged that the United States apprehended them outside of Afghanistan. The *Maqaleh* court concluded that the writ did not run to those detainees, holding that “under both *Eisentrager* and *Boumediene*, the writ does not extend to the Bagram confinement in an active theater of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign.”¹³ In reaching this conclusion, the court expressed concern about an interpretation of the Suspension Clause that would “create the potential for the extraterritorial extension of the Suspension Clause to noncitizens held in any United States military facility in the world, and perhaps to an undeterminable number of other United States–leased facilities as well.”¹⁴ The court thus determined that it lacked jurisdiction to hear the detainees’ claims.¹⁵ This holding—in a case in which the detainees were not Afghan nationals and in which they alleged that they were not apprehended in Afghanistan—suggests that it is even more unlikely that US courts would conclude that habeas would extend to detainees such as Afghan nationals apprehended in Afghanistan during the current conflict.

While it is possible to imagine a future US detention facility that falls between Guantanamo and Bagram Air Base in Afghanistan on the spectrum of the *Boumediene* factors, for now it appears as though Guantanamo detainees are *sui generis* in being alien wartime detainees entitled to federal court review of their detentions. Courts thus have left it to the executive branch to determine whether, outside of Guantanamo, a particular individual’s detention during armed conflict is lawful.

UK Cases

The UK case of *al-Jedda*, another case about the legality of a detention during non-international armed conflict, stands in some contrast to *Maqaleh*.¹⁶ The ECtHR held a merits hearing on June 9, 2010, so its ultimate disposition remains uncertain. However, the UK House of Lords decision is worth considering both for its holding and because it illustrates the complicated expansion of the European Convention on Human Rights (ECHR)¹⁷ into warfighting for States parties to that Convention. The larger implications for that expansion are discussed in Part III.

The UK armed forces in Iraq detained Mr. al-Jedda, a dual British-Iraqi national, for several years as a “security internee.” Al-Jedda challenged his detention, claiming it violated ECHR Article 5, which defines the situations in which a State lawfully can deprive a person of his liberty, and which does not include security detention.¹⁸ The UK government pursued two main lines of argument. First, it argued that al-Jedda’s detention was attributable not to the United Kingdom but to

the UN, which had authorized a multinational force to take action in Iraq. Second, it argued that his detention was authorized by UN Security Council Resolution 1546 (UNSCR 1546), which contemplated detention “for imperative reasons of security,”¹⁹ and that the Resolution therefore qualified al-Jedda’s rights under ECHR Article 5 (and under the UK’s Human Rights Act (HRA), which implemented the ECHR in UK law).

The House of Lords rejected the UK’s first argument but accepted—in part—its second. The Law Lords determined that Article 103 of the UN Charter, which provides that a State’s obligations under the Charter prevail over any other of the State’s international obligations, qualified the UK’s obligations under ECHR Article 5.²⁰ However, the Lords made clear that UNSCR 1546 did not supplant Article 5 entirely. One lord’s opinion stated, “[T]he UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee’s rights under article 5 are not infringed to any greater extent than is inherent in such detention.”²¹ Another lord noted that the scope of UNSCR 1546 and the way the Resolution might interact with Article 5’s requirements were not clear and that the issue would remain for decision in future proceedings.²² Three of the five Lords expressed discomfort with security detention generally; one suggested that the United Kingdom bring al-Jedda back to the United Kingdom and another favored criminal proceedings, viewing security detention only as a fallback. (Both of these positions are in tension with the view under the law of war that security detention in the location in which the conflict is occurring is acceptable.)

The House of Lords thus considered that it had jurisdiction to review al-Jedda’s claims, in contrast to the D.C. Circuit in *Maqaleh*. Further, while it upheld al-Jedda’s detention as lawful, it held that UNSCR 1546 qualifies the applicability of ECHR Article 5, but only to the extent necessary to give effect to the obligations in UNSCR 1546. In other words, Article 5 continues to apply to the UK’s security detentions to the greatest extent possible consistent with the Resolution. It remains to be seen whether the ECtHR will take a similar or more expansive view of the extent to which the UK’s obligations under the ECHR must govern its treatment of its detainees during armed conflicts outside UK territory.²³

Claims of Unlawful Detainee Treatment

Another category of claims against States fighting non-international armed conflicts is claims that detainees in these States’ custody suffered mistreatment at the hands of State officials, either directly or as a result of policies approved by the officials.

US Cases

Individuals detained as suspected members of al Qaeda or the Taliban have brought a number of cases in US courts seeking declaratory relief and damages for their alleged abuse while in US custody. Some have tried to sue US government officials, while others have tried to sue US contractors.²⁴ None has succeeded to date; further, the courts have resolved the cases in a way that has avoided addressing the underlying substantive claims.

In *Rasul v. Rumsfeld*, four former Guantanamo detainees sued former Secretary of Defense Donald Rumsfeld and ten other senior military officials, seeking damages for their detention and alleged mistreatment while in that facility.²⁵ They claimed that they were subjected to beatings, sleep deprivation, extreme temperatures, forced nudity, death threats and interrogations at gunpoint. Their claims alleged violations of the US Constitution and international law, including the 1949 Geneva Conventions. In 2008, the D.C. Circuit dismissed the case; the Supreme Court granted certiorari, vacated and remanded for further consideration in light of *Boumediene*.²⁶ On remand, the D.C. Circuit again dismissed the case, holding that the defendants were entitled to qualified immunity.²⁷ In addition to holding that “[n]o reasonable government official would have been on notice that plaintiffs had any Fifth Amendment or Eighth Amendment rights,” the court also expressed its view that “the Court in *Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause.”²⁸ The Supreme Court denied certiorari in 2009.

Likewise, in *Arar v. Ashcroft*, Maher Arar sued the former Attorney General and other US officials, claiming that they had violated the Torture Victims Protection Act and Arar’s Fifth Amendment rights by authorizing his removal to Syria without appropriate process and with the knowledge that the Syrian government would detain and torture him.²⁹ The Second Circuit, sitting *en banc*, declined to create a new *Bivens* damages remedy against the government officials allegedly responsible for his transfer. The Second Circuit described the diplomatic, foreign policy, classified information and national security implications of allowing damage claims for harms suffered during renditions as among the “special factors” counseling against the extension of a *Bivens* action to this type of activity.³⁰ The court concluded,

[W]e decline to create, on our own, a new cause of action against officers and employees of the federal government. Rather, we conclude that, when a case presents the intractable “special factors” apparent here, . . . it is for the Executive in the first instance to decide how to implement extraordinary rendition, and for the elected members of Congress—and not for us as judges—to decide whether an individual may seek compensation from government officers and employees directly, or from the government, for a constitutional violation.³¹

The court thus deferred to the political branches in assessing whether and how to create such a remedy.

In this context, it is worth mentioning *Hamdan v. Rumsfeld*. While that case was about the legality of the military commissions created to try Mr. Hamdan, and not about his treatment in detention, the Supreme Court's decision that Common Article 3 of the Geneva Conventions applied to the US conflict with al Qaeda had a direct effect on the rules governing the US government's treatment and interrogation of al Qaeda (and Taliban) detainees. One might therefore view this case as an example that runs counter to the primary thesis of this article, because a US court waded into an issue that forced it to examine what rules the executive branch must apply to military operations during an armed conflict. However, it is possible to view the case as one whose core issues were squarely of the type that courts usually adjudicate: the interpretation of two US statutes (the Uniform Code of Military Justice and the Detainee Treatment Act) and the parameters of a fair trial, with the holding's implications for broader treatment issues an important second-order effect. Indeed, even though the US government asked the courts to abstain from considering the merits of the case, its primary argument was that the courts should abstain until the military justice process ran its course, not that the issue was a political question inappropriate for judicial review.³²

UK Cases

In contrast, the UK courts allowed a comparable case of alleged detainee abuse in Iraq by UK forces to proceed, with Her Majesty's Government (HMG) conceding that the ECHR applied to an Iraqi detainee who had been killed while in its custody. In *al-Skeini v. Secretary of State for Defence*, family members of six Iraqi civilians killed in Iraq brought cases against HMG.³³ In each case, a member of the UK armed forces had killed the individual at a time when the United Kingdom was an occupying power in Basra, Iraq. Five of the individuals were killed during UK patrols or raids on houses; the sixth, Baha Mousa, was detained and beaten to death in UK custody. The Iraqis' claims were based on the UK's HRA, a law that requires those bringing cases under the law to show that the UK government acted in a manner incompatible with an ECHR right of the claimant or deceased.³⁴ The individuals claimed that the UK's actions violated its procedural obligations under Articles 2 (right to life) and 3 (right not to be subjected to torture) of the ECHR (and the corresponding parts of the HRA) to investigate violations thereof.³⁵

The UK government argued that the HRA did not apply to UK government actions outside its borders.³⁶ With regard to Mr. Mousa, however, the UK government conceded that, while he was in UK detention, Mr. Mousa was within its jurisdiction for purposes of applicability of the ECHR.³⁷ Because the United Kingdom

conceded this, the *al-Skeini* court did not discuss the issue in any depth. Several scholars have noted the uncertainty as to the precise basis for the House of Lords' holding regarding Mousa; it "was apparently premised on some special jurisdiction that the United Kingdom was said to have over its military prisons abroad, not on the fact of direct physical control over Mr Baha Mousa."³⁸ In any event, this concession by the UK government suggests that the United Kingdom will treat future overseas detentions during armed conflict or peacekeeping operations as being covered by the ECHR unless there is a specific UN Security Council resolution in place that would "trump" the UK's ECHR obligations.³⁹ As with *al-Jedda*, the ECtHR is hearing the *al-Skeini* case, so the case's ultimate outcome remains unresolved.

Claims of Unlawful Detainee Transfers

In another series of suits filed in regard to conduct taking place during non-international armed conflicts, detainees have asked courts to enjoin their transfers from the custody of the State holding them to the custody of another State. Detainees who had been in US (and Canadian) custody have lost their cases; based upon the approach of the UK courts and the ECtHR to date, the detainees who are or were in UK custody seem likely to win theirs.

US Cases

In 2006, two US nationals held by Multi-National Forces–Iraq (MNF-I) filed petitions for habeas corpus in US court, asking the court to block their transfer by MNF-I to Iraqi officials (who had issued arrest warrants for them).⁴⁰ The Supreme Court, hearing their consolidated cases as *Munaf v. Geren*, considered "whether United States district courts may exercise their habeas jurisdiction to enjoin our Armed Forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution."⁴¹ The Court concluded that, although US courts had statutory habeas jurisdiction over the individuals (presumably because they were US citizens), those courts could not grant the remedy sought.⁴²

Although not the sole basis for its holding, the Court took into account the fact that the individuals were captured in the context of an ongoing conflict. The Court considered other cases in which the United States had transferred US citizens to foreign countries for trial and remarked:

Neither *Neely* nor *Wilson* concerned individuals captured and detained within an ally's territory during ongoing hostilities involving our troops. *Neely* involved a charge of embezzlement; *Wilson* the peacetime actions of a serviceman. Yet in those cases we held

that the Constitution allows the Executive to transfer American citizens to foreign authorities for criminal prosecution. It would be passing strange to hold that the Executive lacks that same authority where, as here, the detainees were captured by our Armed Forces for engaging in serious hostile acts against an ally in what the Government refers to as “an active theater of combat.” . . . Such a conclusion would implicate not only concerns about interfering with a sovereign’s recognized prerogative to apply its criminal law to those alleged to have committed crimes within its borders, but also concerns about unwarranted judicial intrusion into the Executive’s ability to conduct military operations abroad.⁴³

Thus, the Court concluded that it could not enjoin US armed forces from transferring individuals detained within Iraq’s territory to the Iraqi government for criminal prosecution.

Guantanamo detainees have been no more successful in suing to block their transfers to other countries. In a case known as “*Kiyemba II*,” the D.C. Circuit held that *Munaf* controlled to bar courts from granting writs of habeas corpus to block transfers of detainees from the United States to foreign countries, even when those being transferred would face continued detention or prosecution under the receiving country’s laws.⁴⁴ The Supreme Court denied certiorari in 2010.⁴⁵ Federal judges thus lack the authority to block, even temporarily, the transfer of a detainee from Guantanamo to another country. This allows the US government to decide without judicial interference where and when to send detainees, as long as the United States acts consistently with its own policy not to transfer a detainee to a place where he is more likely than not to face torture.⁴⁶ US courts thus remain wary in this context of conducting inquiries into the legal process or treatment that an individual will face upon transfer, while leaving open the possibility that they would do so if it were manifest that the individual would be tortured if transferred.

Canadian Case

On facts similar to *Munaf*, Canada’s courts took a similarly skeptical view about the propriety of blocking transfers from a detaining State to a territorial State, at least where an agreed treatment framework was in place. In 2007, Amnesty International sued Canada to prevent Canadian troops in Afghanistan from transferring detainees to the Islamic Republic of Afghanistan (IRoA). It was claimed that IRoA mistreats detainees, which means that such transfers violated Canada’s constitution. A Canadian federal judge concluded in 2008 that Afghan detainees were not entitled to protection under the Canadian Charter and dismissed Amnesty International’s claim.⁴⁷ The Canadian Court of Appeal affirmed, concluding that the Canadian forces lacked “effective control” over Afghan territory; that the Canadian Charter therefore should not apply to that territory; that IRoA had not consented

to the application of the Canadian Charter over Afghan nationals; and that instead the Canadian government and IROA expressly identified international law as the law governing treatment of detainees in Canadian custody.⁴⁸

UK Cases

The ECtHR has been far less deferential to the laws and prerogatives of foreign sovereigns and to the diplomatic judgments of the ministries of States parties, including—but not limited to—situations in which a State seeks to transfer to another country a detainee picked up in a non-international armed conflict.

Al-Saadoon v. United Kingdom offers a current example.⁴⁹ Although the UK government won the case in its domestic courts, the case came out the opposite way from *Munaf*, on similar facts, in the ECtHR.⁵⁰ The UK courts deemed it lawful for the United Kingdom to transfer to Iraqi authorities for trial two Iraqi murder suspects.⁵¹ The individuals faced the death penalty under Iraqi law and sued to block their transfer from UK custody, claiming that it would violate the ECHR prohibitions against the death penalty and cruel, inhuman and degrading treatment. The UK Court of Appeal concluded that the individuals were not within the UK's jurisdiction for purposes of the application of the ECHR, considering an international arrangement between the United Kingdom and the government of Iraq regarding the allocation of legal and physical custody of detainees.⁵²

The individuals appealed to the ECtHR, which held that the transfer breached the ECHR.⁵³ The Court first concluded (in its opinion on the admissibility of the case) that the applicants were within the jurisdiction of the ECHR.⁵⁴ On the merits, the Court held that the death penalty could be considered inhuman and degrading and contrary to Article 3 of the Convention and that there were substantial grounds for believing that there was a real risk of the applicants' being sentenced to death and executed.⁵⁵ (The United Kingdom had not sought death penalty assurances from Iraq.) Although HMG argued that it had no option but to respect Iraqi sovereignty and transfer the applicants who were Iraqi nationals held on Iraqi territory to the custody of the Iraqi courts when so requested, the Court was not satisfied that the United Kingdom had done all it could have to secure the applicants' rights under the Convention, including by trying to negotiate death penalty assurances with the Iraqi government.⁵⁶ In contrast to the US Supreme Court's deference to the Iraqi legal system and Iraq's decision to prosecute someone alleged to have broken Iraqi law, the ECtHR stated, "There was no obligation under either Iraqi domestic law or international law which required either for the applicants' cases to be referred to the Iraqi criminal courts or for them to be reclassified as criminal detainees."⁵⁷ The Court concluded unanimously that there had been a violation of Article 3 of the Convention over the UK's objections that "a

finding that a Contracting State was under an obligation to secure the Convention rights and freedoms when acting territorially and outside the regional space of the Convention gave rise to real conceptual, practical and legal difficulties.”⁵⁸

The Court’s ruling makes clear that a European country cannot transfer a person in its custody to another government’s custody where there are substantial grounds for believing there is a real risk of the person’s being subjected to ill-treatment, even during an armed conflict and even where the transferring government is holding the individual in another State’s territory and seeking to transfer the individual to the custody of the territorial State. It is particularly notable that the ECtHR concluded that the transfer was unlawful even where the detainees at issue were Iraqi nationals (rather than the nationality of the forces holding them, that is, British). Further, the ECtHR ordered the UK government to undertake particular diplomatic steps, despite the UK government’s unambiguous assessment that doing so would have an adverse diplomatic effect. Thus, unlike the courts in *Munaf* and *Kiyemba II*, the ECtHR concluded that it had jurisdiction to hear the underlying allegations and reached a decision on the substance of those allegations.

Finally, in a case involving the conflict in Afghanistan, the United Kingdom faced a suit by former UK detainees in Afghanistan challenging a UK policy permitting transfers of detainees to the Afghan National Directorate of Security (NDS).⁵⁹ The detainees claimed that they were subjected to torture after they were transferred, and that their transfers therefore violated ECHR Article 3.⁶⁰ The UK court concluded that HMG could continue to transfer detainees to two NDS facilities if it met a number of conditions, but could not transfer detainees to a third NDS facility.⁶¹ Again, in contrast to the decisions of US courts in *Munaf* and *Kiyemba II*, the UK court concluded that it had jurisdiction to hear the underlying allegations and reached a decision on the merits based on an in-depth probe of those allegations. Although the UK court concluded that at least some UK transfers could continue and was more deferential to diplomatic judgments by HMG than the ECtHR, it seems likely that the claimants will appeal the decision first within the UK court system and subsequently to the ECtHR (if they continue to lose in UK courts).

Claims about Illegality in Intelligence Activities

Yet another category of litigation has raised hard questions for courts: litigation in which the heart of the case implicates classified intelligence information or relates to the activities of intelligence agencies. At times, this means that the litigation may implicate intelligence relationships between States, which are by definition highly sensitive. Of particular interest in this category of litigation is the direct interplay between several UK and US cases.

US Cases

Two recent cases in US courts bear mention: *el-Masri v. United States* and *Mohamed v. Jeppesen Dataplan*.⁶² The US executive branch invoked the “state secrets” privilege as a way to avoid litigating both cases. When the US government invokes that privilege, the head of the agency whose activities are at issue files an affidavit stating that the litigation, if allowed to proceed, might disclose information that could endanger national security.

In *el-Masri*, the plaintiff sued the former director of the Central Intelligence Agency (CIA), three aviation companies and unnamed intelligence agents, alleging that the CIA detained him in Macedonia and flew him to a detention facility in Afghanistan where he was abused, before the CIA realized it had detained the wrong person and released him. El-Masri claimed this violated the US Constitution and international norms prohibiting arbitrary detention and cruel, inhuman and degrading treatment.⁶³

The Fourth Circuit dismissed the case, concluding that even though US government officials had discussed the rendition program publicly at a high level of generality, secret information formed “the very subject matter” of the program. Specifically, the court noted that the state secrets privilege attaches and may bar the entire proceedings where “there is a reasonable danger that [the information’s] disclosure will expose military (or diplomatic or intelligence) matters which, in the interest of national security, should not be divulged” and where “the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information’s disclosure.”⁶⁴ The court concluded:

[W]e must reject El-Masri’s view that the existence of public reports concerning his alleged rendition (and the CIA’s rendition program in general) should have saved his Complaint from dismissal. Even if we assume, arguendo, that the state secrets privilege does not apply to the information that media outlets have published concerning those topics, dismissal of his Complaint would nonetheless be proper because the public information does not include the facts that are central to litigating his action. Rather, those central facts—the CIA means and methods that form the subject matter of El-Masri’s claim—remain state secrets.⁶⁵

The Supreme Court denied a writ of certiorari in 2008.

In *Jeppesen*, the Ninth Circuit, in a closely decided *en banc* opinion, took the same approach to the privilege. Five foreign nationals sued a subsidiary of Boeing, claiming that the subsidiary provided planes, flight planning and logistical support to the CIA to render individuals to “black sites,” knowing that they would be mistreated by US and foreign officials. The United States intervened, invoking the state

secrets privilege and arguing that the court must dismiss the entire action. An affidavit by former CIA Director Hayden stated, “Disclosure of the information covered by this privilege assertion reasonably could be expected to cause serious—and in some instances, exceptionally grave—damage to the national security of the United States and, therefore, the information should be excluded from any use in this case.”⁶⁶ The US government and the defendants relied on precedent holding that “a suit predicated on the existence and content of a secret agreement between a plaintiff and the government must be dismissed on the pleadings because the ‘very subject matter’ of the suit is secret.”⁶⁷

A Ninth Circuit panel rejected that view, concluding that it was not appropriate to stop the lawsuit at its outset, but the Ninth Circuit, sitting *en banc*, held that the state secrets privilege required dismissal of the plaintiffs’ case.⁶⁸ In discussing its role in evaluating the claim of the privilege, the court struck a balance between deference to the executive branch and the need to provide some objective review of the invocation of the privilege. It stated,

In evaluating the need for secrecy, “we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.” But “the state secrets doctrine does not represent a surrender of judicial control over access to the courts.” Rather, “to ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary, it is essential that the courts continue critically to examine instances of its invocation.”⁶⁹

Thus, in the face of highly controversial alleged US government activity, two circuit courts have taken a reasonably broad reading of the state secrets privilege, dismissing the cases at the pleading stage at the request of the US executive branch to avoid revealing in litigation sensitive evidence that would impact national security.

UK Cases

UK courts, by contrast, have been less sympathetic to the government’s interests in protecting intelligence information, a fact that seems likely to affect UK policies moving forward. This is illustrated by recent decisions in three cases: a case brought against the UK government by a UK resident, Binyam Mohamed, to obtain information about his alleged treatment by the United Kingdom and United States; cases brought by Mohamed and several other former Guantanamo detainees seeking damages from the UK government; and a case brought by Mohamed and others against Jeppesen UK.

The *Binyam Mohamed* litigation to obtain intelligence information was procedurally complex.⁷⁰ In 2008, Mohamed, then detained at Guantanamo and charged

in a military commission, sued the UK government to obtain any information it had received from the United States about his detention and interrogation. He claimed that he was detained in Pakistan, mistreated there, then moved by the United States to Morocco and Afghanistan, mistreated there, and ultimately sent to Guantanamo. He also claimed that the UK intelligence agencies knew where he was, provided to US intelligence officials questions to ask him, and received interview reports from the United States. Mohamed's stated goal of obtaining the information was to allow him fully to defend himself in the military commission.

Although the US government subsequently dropped the military charges against Mohamed and shared the relevant material in redacted form with Mohamed's habeas attorneys, a UK court ultimately ordered HMG to disclose certain secret information to his lawyers, and the press then sought to obtain that information. In 2009, the court concluded that the intelligence documents detailing Mohamed's treatment should not be published, based in part on "threats" by the United States to withhold from the United Kingdom future intelligence sharing. To that end, the court redacted seven paragraphs in its judgment that described the information the United Kingdom received from the United States regarding Mohamed's treatment during interrogation. That court subsequently reconsidered its decision, ordering the seven paragraphs to be made public.

On appeal, the Court of Appeal agreed, notwithstanding HMG's assertion that "the intelligence relationship between the United Kingdom and the United States is by far the most significant relationship the United Kingdom has from the point of view of internal security and the protection of broader international interest"⁷¹ and that revealing the intelligence information from the United States would be "profoundly damaging to the interests" of the United Kingdom.⁷² Indeed, the United States itself, under both the Bush and Obama administrations, had asserted that the release of this information would adversely affect the intelligence relationship.⁷³ The basis for the Court of Appeal's decision was its view that the information contained in the seven paragraphs already was public; it concluded that the United States had conceded that it had mistreated Mohamed, based on language in a public habeas decision reflecting that Mohamed had alleged torture and that the United States had not contested those allegations.⁷⁴ The Court of Appeal also cited the importance of "open justice,"⁷⁵ evidenced a skepticism that the Obama administration really would withhold important intelligence information from a close ally⁷⁶ and stated its own view that the information in the seven paragraphs would not undercut the UK's national security⁷⁷ in concluding that the paragraphs should be made public.

This decision is notable for at least three reasons. First, it illustrates the use of one State's courts to obtain information for use in another State's courts. Second, it

highlights a willingness by UK courts to look behind the UK government's national security judgments, even when the government has made clear its strong belief that a particular judgment will affect its ability to obtain future intelligence from its most important ally and that ally has made explicit on the record its views about the release of the information. Third, it illustrates that decisions in US habeas cases may have implications for foreign litigation. As noted above, all three Court of Appeal judges were influenced by their belief that the United States had, by choosing not to challenge Mohamed's allegations of mistreatment in another Guantanamo detainee's habeas case, effectively conceded that he had been tortured, thus making it far less important to preserve the secrecy of the seven paragraphs describing Mohamed's treatment.

The ongoing *Jeppesen* litigation reveals a similar interplay between litigation in US and UK courts. As noted above, Mohamed and four other defendants sued Jeppesen Dataplan in a US court. They also are suing a related subsidiary, Jeppesen UK, in a UK court. In July 2009, Jeppesen UK agreed to let the civil case brought by Mohamed go to trial.⁷⁸ Mohamed's counsel believe that, as a result, confidential information about his alleged rendition will become public, which likely will prove relevant to the US litigation.

Some of the same detainees filed a civil lawsuit against the United Kingdom, seeking compensation for the alleged complicity of UK authorities, including MI5 and MI6, in their torture and unlawful detentions. The UK government filed a response asking whether, in principle, the UK common law was sufficiently flexible to enable a court hearing on civil claims for damages to rely on a process whereby there would be parallel open and closed pleadings, disclosure, witness statements and hearings. The trial would be partly open and partly closed, as would the judgment. In the open elements of the proceedings, claimants' counsel would represent them in the normal way; for the closed elements, special advocates with security clearances would protect their interests but could not discuss the classified information with the claimants. In May 2010, the UK Court of Appeal held that such a closed procedure was not available in principle, in large part because

the principle that a litigant should be able to see and hear all the evidence which is seen and heard by a court determining his case is so fundamental, so embedded in the common law, that, in the absence of parliamentary authority, no judge should override it, at any rate in relation to an ordinary civil claim, unless (perhaps) all parties to the claim agree otherwise.⁷⁹

The United Kingdom sought permission to appeal to the UK Supreme Court. Although HMG's filings are not yet public, the United Kingdom presumably saw

itself as faced with an impossible choice between, on the one hand, withholding many documents that the United Kingdom would like and need to use to counter the allegations of misconduct by its officials and therefore allow the court to try the case fairly, and, on the other, disclosing all of those documents and thereby causing damage to the UK's national security interests. The UK government's other option—to seek public interest immunity certificates for as many as 140,000 documents—would have been incredibly time-consuming and seemed totally impractical.⁸⁰ Given the conundrum in which it found itself, it is not surprising that the United Kingdom announced in November 2010 that it settled the case with Mohamed and six other former Guantanamo detainees, reportedly for millions of pounds.⁸¹ In addition, the UK plans to seek a “judicial inquiry” about its possible role in facilitating US renditions.⁸² Any revelations in that inquiry seem likely to lead to further litigation (in both UK and US courts), unless the inquiry's findings remain confidential.

Canadian/Swedish Cases

Canada took a very different approach than the United States in dealing with allegations that its government contributed to the transfer of Mr. Arar to Syria, where he claims he was tortured. A judicial inquiry in Canada concluded that the United States expelled Arar to Syria based on false assertions from the Royal Canadian Mounted Police to US officials that Arar was linked to al Qaeda. Canada paid Arar C\$10.5 million to settle his litigation and the Prime Minister issued him an apology.⁸³ Likewise, Sweden paid three million kronor to Ahmed Agiza, an individual allegedly handed over by Sweden to the CIA and rendered to Egypt, where he was mistreated.⁸⁴ Although the United States has come under pressure to compensate Arar too, it has declined to do so.

III. Real-World Effects of Litigation Wins and Losses

Having reviewed the types of cases that individuals have brought and seen the sharp divergences in the outcomes of litigation in the United States and European States, one must ask: Does the litigation matter? Have the outcomes of these cases had a real effect on how these States fight conflicts? The answer is a clear yes, both for the States that are parties to the litigation, and for third States.

Claims of Unlawful Detention

Litigation regarding unlawful detention has had an impact on both the United States and European States, though the impact is not the same for each group. As an immediate matter, courts have ordered the United States to transfer a number

of detainees as a result of the Guantanamo habeas litigation. The litigation has had other, less direct effects as well. First, it has forced the judicial branch to opine on the scope of people whom the United States legally may detain, a decision that, before *Boumediene*, largely was in the hands of the executive. The developing habeas caselaw thus narrows the executive branch's discretion, at least with regard to those detained at Guantanamo and arguably with regard to anyone the United States is detaining pursuant to the 2001 Authorization for Use of Military Force.⁸⁵ That said, the district courts have only narrowed slightly the US government's asserted definition of who it can detain at Guantanamo.⁸⁶

Second and relatedly, the litigation appears to have affected—at least on paper—the type of person the United States is choosing to detain in Afghanistan. Subsequent to the US filing on March 13, 2009, in which the government proffered its view of the scope of its detention authority over Guantanamo detainees, the Department of Defense modified its detention policy in Afghanistan to track that definition.⁸⁷ It is unclear the extent to which this change has affected whom the United States is detaining in Afghanistan, however.⁸⁸ Third, the fact that the judiciary has upheld the continued detention of some at Guantanamo may be having a positive effect in that it illustrates to those who are highly skeptical of the executive branch's arguments about whom it is detaining that another branch of government, seen as more neutral, is affirming the legality of some of the detentions.

For the United Kingdom and other States parties to the ECHR, the scope of their ability to conduct security detentions during armed conflict and the procedures that they must provide to those they detain remain unsettled. There does not appear to be public information about how the United Kingdom has implemented the holdings of *al-Skeini* and *al-Jedda* on the ground, perhaps in part because the United Kingdom is no longer detaining anyone in Iraq. However, the *al-Jedda* decision makes it quite likely that the United Kingdom and other European States will push hard to obtain UN Security Council resolutions in advance of using force abroad. Further, European States may begin to seek specific authorization to detain (rather than a more general authorization to take "all necessary measures"), to make plain that the right to conduct security detentions is authorized under a particular UN Charter Chapter VII resolution. Obtaining a Security Council resolution could at least narrow the scope of application of human rights law to activities in armed conflict, but it will not obviate the need for the United Kingdom (and possibly other States parties to the ECHR) to consider ECHR requirements, particularly given the admonitions of several Law Lords that at least part of ECHR Article 5 remains intact in the face of UNSCR 1546, which authorized States to take all necessary measures to contribute to the maintenance of the security and stability of another country. Another option would be for States parties to derogate from

ECHR Article 5, as authorized by ECHR Article 15, though a State that decided to do so would face high political costs.

Presumably ECHR States parties also will consider carefully whether—and how—to act in accordance with other ECHR rights, such as the right to life and the right not to be subjected to inhuman or degrading treatment (either by the ECHR State party that initially detains the person or by another State to which the first State transfers the person), during armed conflict and peacekeeping operations.⁸⁹

Even if States conclude that they do not have legal obligations to apply the ECHR in most overseas situations—a view that generally would be consistent with the language in *Bankovic v. Belgium*—they may begin to do so as a matter of policy and prudence. For example, it might be that the transfer rule that the International Security Assistance Force (ISAF) established in Afghanistan (that is, that ISAF forces would transfer detainees to the Afghan government within 96 hours of detaining them) was crafted by ISAF States with an eye toward ECtHR Article 5 caselaw. (In *Brogan v. United Kingdom*, the ECtHR concluded that a particular detention by the United Kingdom—in which UK officials held a person for 103 hours without bringing him before a judge or releasing him—violated ECHR Article 5.⁹⁰ Those crafting the 96-hour rule may have been trying to estimate a pre-court detention length that the ECtHR would find acceptable.)

These considerations—and the ability of individuals affected by armed conflict to bring cases directly against the governments for alleged violations of domestic or international law—mean that European States increasingly are inclined to take a more cautious approach to detention. European ISAF forces are choosing to detain few enemy fighters, and some States ultimately ceased to detain any, even while their troops remained present in Afghanistan.⁹¹ This poses problems for force protection and intelligence collection, and places practical burdens on forces. The most obvious problem with a very cautious use of detention is that it leaves many individuals known to be hostile to ISAF forces—including those caught shooting at or bombing those forces or Afghan civilians—free to engage in the same kind of conduct over and over. This makes the already dangerous job of an ISAF soldier even more dangerous, and it arguably delays the ability of ISAF forces to provide security to Afghans, something most ISAF States agree is an important element of reconstruction. A reluctance to detain inadvertently can provide incentives to kill rather than capture—not a desirable outcome from an intelligence or counterinsurgency point of view. The 96-hour rule also hinders intelligence collection. This is not to suggest that ISAF and Afghan authorities should not pursue the goal of prosecuting individuals to the extent possible, but it is to suggest that concerns about litigation in this context are adversely affecting ISAF's work.

Claims of Unlawful Treatment

As noted above, US courts have not handed victories to plaintiffs who sued government officials based on allegations that those officials had a hand in their mistreatment. Thus, these cases have had little practical effect on the US government, though of course events such as the detainee abuse at Abu Ghraib and other revelations of detainee mistreatment shone a harsh spotlight on US detention practices and resulted in both legislation (such as the Detainee Treatment Act of 2005)⁹² and executive orders (such as Executive Order 13491,⁹³ drafted to ensure that all US employees and agents treat detainees in a manner consistent with Common Article 3 of the Geneva Conventions).

In contrast, a case such as *al-Skeini* seems likely to have a significant impact on the UK government. The concession by the UK government that the ECHR applies to its detention facilities in foreign war zones suggests that the United Kingdom may be inclined to treat all future overseas detentions during armed conflict or peacekeeping operations as being covered by the ECHR. Some questions remain unanswered, such as whether the ECtHR's caselaw on what constitutes "cruel, inhuman, or degrading" detention conditions in the United Kingdom sets a baseline for conditions at UK overseas detention facilities and, per the *Soering* principle, for conditions in the facilities to which the United Kingdom seeks to transfer someone.⁹⁴ At the very least, the ECHR's requirement that a State party conduct an "independent and impartial" investigation into an alleged violation of the ECHR would attach to any alleged violations that took place in UK detention facilities abroad.⁹⁵

Claims of Unlawful Transfer

The real-world impact of the transfer litigation in US courts is minimal. In view of *Munaf* and *Kiyemba II*, the only principle with which the United States must comply when transferring a detainee picked up in a non-international armed conflict is one that the United States already follows: it cannot transfer a person when it is more likely than not that he will be tortured.⁹⁶ The other aspects of a transfer—the identity of the receiving State, the conditions under which the person will be transferred and the timing of transfer—are left to the executive branch.

Even though Canada won its Afghan transfer litigation, the case arguably still had a chilling effect on Canada's actions during armed conflict. From November 2007 to February 2008, pending Amnesty International's request for an interim injunction against transfers, Canada chose not to transfer detainees to the Afghans, presumably relying instead on short-term, ad hoc detention arrangements.⁹⁷ A top Canadian general stated publicly that if Canada lost the Amnesty International case, Canadian troops would have been unable to detain combatants and would have been forced to hunker down in secure bases. This would effectively have ended

Canada's contribution to the ISAF mission and would have taken a significant NATO troop contributor off the battlefield.⁹⁸ Even after its win in the litigation, the Canadian government's Afghan detention policy remains under significant political pressure in light of allegations that the government knew that IRoA mistreated detainees at the time that Canada handed its detainees to IRoA. Opposition members of the Canadian Parliament have held hearings and are demanding access to unredacted versions of relevant military records.⁹⁹ In view of this intense public scrutiny, it seems safe to assume that Canadian forces in Afghanistan are choosing to detain few, if any, individuals on the battlefield out of concern that their troops will have nowhere to transfer the detainees. The litigation thus appears indirectly to have had a significant impact on Canadian detention policy.

Litigation has had an even more direct impact on UK detention policy. The death penalty appears to be the third rail for the ECtHR, such that any transfers of detainees who might realistically face the death penalty are certain to be deemed unlawful by that court. This suggests that any State party in that situation will seek death penalty assurances from the receiving State, even if the transferring State's judgment is that it is unlikely to be able to obtain such assurances. Coupled with concerns about mistreatment of transferred detainees, as in the *Evans* case, it seems almost certain that as transfers get harder, States will reduce the number of individuals they detain in the first place.¹⁰⁰ It also means that States are placing additional weight on their ability to monitor a detainee after he is transferred, something they will not always be able to secure. Indeed, the *Evans* court placed explicit conditions on the UK's ability to continue to transfer detainees to certain NDS facilities; these conditions include that

- (i) all transfers must be made on the express basis . . . that the UK monitoring team is to be given access to each transferee on a regular basis, with the opportunity for a private interview on each occasion; [and] (ii) each transferee must in practice be visited and interviewed in private on a regular basis.¹⁰¹

It seems fair to say that this transfer litigation has caused the United Kingdom to be far more circumspect in detaining belligerents or civilians taking direct part in hostilities in Afghanistan, and thus directly has impacted the way the UK conducts itself on the battlefield.

Claims about Intelligence Activities

It is difficult to predict the real-world implications if Binyam Mohamed succeeds in his case against Jeppesen Dataplan. If a court found the company liable for Mohamed's alleged mistreatment during part of his time in detention (and implied

a relationship between Jeppesen and the US government), it presumably would have a chilling effect on other contractors who are deciding whether to perform particular activities for the US government. It is difficult to say how much of a chilling effect it would have, though. If the Supreme Court granted certiorari and Mohamed won his case against Jeppesen in the United States, it seems very likely that the UK courts would take that into account in the litigation before them. Likewise, if his UK litigation against Jeppesen results in any disclosure of confidential information about the rendition program, that would make it easier for his US lawyers to use that information in US court and avoid the state secrets privilege by claiming that the information already was public.¹⁰²

The litigation by Mohamed seeking access to US intelligence reports in the UK's possession has the potential to affect intelligence sharing between the United States and the United Kingdom. In a letter to the United Kingdom, former State Department Legal Adviser John Bellinger wrote, "We want to affirm the public disclosure of these documents is likely to result in serious damage to US national security and could harm existing intelligence information-sharing arrangements between our two Governments."¹⁰³ The Obama administration affirmed that view.¹⁰⁴ In the wake of the release of the seven paragraphs, a White House spokesman stated, "We're deeply disappointed with the court's judgement because we shared this information in confidence and with certain expectations. As we warned, the court's judgement will complicate the confidentiality of our intelligence-sharing relationship with the United Kingdom, and it will have to factor into our decision-making going forward."¹⁰⁵ Because the two governments are unlikely to say more publicly about how and the extent to which intelligence sharing may be affected, it is difficult to assess the actual impact of the case. One might expect, though, that intelligence officers of each government now may be aware that the information they exchange with each other might be at risk of release to a court (and eventually to the public), especially in legally contentious areas such as those discussed here.

The Jeppesen litigation, the damages litigation against the United Kingdom by former Guantanamo detainees and the Binyam Mohamed treatment litigation all stem from allegations that the United Kingdom assisted the United States in rendering and detaining individuals believed to be fighting the United States. As a general matter, this seems likely to heighten the UK's caution when cooperating with the United States on sensitive issues, because the political, financial and resource-related costs for the United Kingdom have been high, even if the plaintiffs ultimately lose their cases. At a time when intelligence cooperation among allies is critical, this is an unfortunate development.

Penumbral Effects

In addition to the specific real-world implications that flow from each set of litigation, there are a few other ways in which this type of litigation will affect how States fight armed conflicts, particularly (but not exclusively) for European States.

First, this litigation sets precedent that litigants will use in future litigation associated with non-international armed conflicts. Unlike decisions made exclusively by the executive branches of governments, court decisions such as those in the United Kingdom bind the government, not just in the specific cases before the courts, but also in factually similar situations in the future. Of course, decisions in the ECtHR create precedent not just for the State involved in the suit, but also for all other States parties to the ECHR.

Second, the sheer quantum of litigation creates penumbral concerns about operating in “gray areas” where the legal rules are not black and white. This may cause European States to take the opposite approach from the one made famously by then-Deputy Director of National Intelligence Michael Hayden, who stated, “We’re going to live on the edge. . . . My spikes will have chalk on them. . . . We’re pretty aggressive within the law.”¹⁰⁶ Knowledge that courts have been reasonably sympathetic to the extension of human rights rules to armed conflict cannot but cause States to think hard when considering establishing a policy that may not be consistent with human rights principles, even if it is consistent with the law of war.

Third, if one State in a military coalition such as NATO loses a case and is forced to change its policy, that almost certainly will affect the operations and policies of other States within that coalition, as well as non-coalition States involved in the conflict. For example, if a court concludes that State A, which is fighting a conflict against non-State actors in State B, may not transfer detainees in its custody to State B, State A is likely to have to rely on its coalition partners (or State B) to detain individuals in the first instance. Thus, a litigation loss by one coalition partner may affect another partner that itself has won similar litigation. Therefore, it is in the interest of those challenging State practices during armed conflict to litigate in as many fora as possible in order to increase the likelihood of success and of having a policy and operational impact greater than the actual litigation victory.

IV. Reasons for Divergence and Future Steps

Part II identified a series of cases and a trend within US courts to limit litigation about decisions made by the United States (as well as other States and contractors) during armed conflict, in contrast to a trend within UK courts and the ECtHR to allow such litigation and to review (and often deem unlawful) the decisions and actions taken by the United Kingdom during armed conflict (or during activities

related to the US conflict with al Qaeda). This Part considers possible reasons for this divergence.¹⁰⁷

Reasons for Diverging Outcomes in US and European Cases

One possible reason for the divergence is the strong tradition of deference in the US system to the executive in areas of national security and armed conflict.¹⁰⁸ Bolstered by doctrines such as the political question and act of state doctrines and the rule of non-inquiry, courts generally have hesitated to step into certain areas that are likely to have a direct impact on foreign policy decisions by the executive branch. While the UK courts have used a doctrine of “justiciability” that is similar to the US political question doctrine, it appears that in the past few years UK courts have taken a more robust approach to judicial review of executive national security decisions. For example, in *A v. Secretary of State for the Home Department*, the House of Lords held that the legal regime that permitted the United Kingdom to detain certain terrorist suspects without trial was inconsistent with the ECHR.¹⁰⁹ As one scholar has written, “The decision appears to presage a new judicial boldness regarding national security—a sphere in which scrutiny by British courts has traditionally been blunted by a self-imposed custom of judicial deference to the executive branch.”¹¹⁰ This stands in contrast to the traditional view of UK courts that they should not

set aside administrative decisions save where they were aberrant or totally “unreasonable”—a doctrine of judicial self-restraint that bit with particular force when national security was at stake. The extent to which the [Human Rights Act] frees British courts from these shackles by encouraging the use of the more intensive proportionality test favored by the European Court of Human Rights has been the subject of considerable controversy. Courts and commentators have expressed quite diverse views as to how much deference should be extended to the policies of the executive and legislature by courts charged with determining whether a given measure breaches an ECHR right.¹¹¹

A second, related element that is fostering this divergence is the way in which the United States and European States approach their international human rights obligations. The US executive branch consistently has taken the position that the International Covenant on Civil and Political Rights (ICCPR)¹¹² does not apply extraterritorially. US courts accordingly have not sought to extend the application of the ICCPR to US activity overseas. (Nor have courts determined that the treaty is self-executing.) Indeed, given how cautious US courts have been in extending constitutional rights extraterritorially, it is no surprise that the ICCPR has not served as a mechanism for US litigants to persuade courts to apply human rights principles to US activity abroad, including during armed conflict.

Conversely, all States that are members of the Council of Europe (including all European Union States) are parties to the ECHR, which essentially serves as a “bill of rights” for these States, and which applies during both peacetime and wartime.¹¹³ As has been discussed throughout this article, the ECHR contains an enforcement mechanism—the European Court of Human Rights—which hears and decides cases brought by individuals against States parties (as well as by States against other States). Decisions from the ECtHR (and from domestic European courts interpreting the ECHR), including those discussed above, are a critical—and underreported—factor affecting the rules by which Europeans have fought—and will fight—conflicts. If European historical and political concerns about armed conflict serve as a “pushing” mechanism away from conflict, the ECHR serves as a “pulling” mechanism toward the increasing application of human rights rules to warfighting. In the view of one scholar who has written on this issue, “European governments increasingly have to take into account the possible effects of the European Convention on military operations both at home and abroad.”¹¹⁴

Indeed, section 2(1) of the UK’s Human Rights Act requires UK courts, when considering a question that arises in connection with an ECHR right, to consider relevant ECtHR caselaw.¹¹⁵ Although ECtHR decisions do not constitute formally binding precedent for UK courts, “the fact that a complainant unable to get a remedy at the domestic level can take the matter to Strasbourg increases the pressure on UK courts to produce outcomes consistent with European jurisprudence.”¹¹⁶ The HRA thus may account for reduced judicial deference in UK courts in areas that traditionally did receive deference, such as national security decisions.

Others are more skeptical that the ECHR has played a major role in affecting European warfighting. In this view, actions by European governments and their armed forces are driven as much by a fear of triggering criminal law prohibitions, including murder, torture and other offenses derived from their International Criminal Court obligations, as by a concern about litigation in the ECtHR. Further, some believe that using human rights principles to fill in gaps in the laws of war may help win hearts and minds, and thus better achieve the States’ military goals. Yet others believe that certain European States use the applicability of the ECHR as an excuse not to undertake certain lawful, though politically unpopular, activities, even though they may not be overly concerned about actually losing a case before the ECtHR. It may even be the case that some government officials hope, through the application of human rights rules, to make conflict harder to fight, and thus to stem the frequency of conflict.

A third reason that the US government may prevail more often in its courts is because the United States has a vibrant ongoing debate about national security issues, with loud and persuasive voices on both sides of the political spectrum (as

well as in the middle). Judges considering these types of cases have been exposed to the whole range of arguments about why certain national security decisions are sensible or indefensible. Although these arguments may not factor directly into a judicial decision, atmospherics matter. Indeed, one might point to a wide range of views among the federal judges considering detention cases (and identify a divide loosely along partisan lines) as an illustration of the breadth of judges' positions on national security-related issues. In contrast, the United Kingdom (and other States in Europe) appear to have fewer politicians, journalists and academics making compelling public arguments about the importance of a robust national security policy; the louder voices come from the human rights community. Judges, being human, are influenced by what they do—and do not—hear. Thus, it may be the case that the UK court decisions, which of late have tended to favor human rights arguments over national security arguments, stem in part from the atmospherics in the country, which largely are set by those who prioritize civil liberties over national security arguments.¹¹⁷

Ways to Mitigate the Divergence

It is beyond cavil that the type of litigation described above is having a very real impact on how States are fighting conflicts. For those who have brought and won their cases against States, this impact is all for the good. For States losing the cases, this impact can be detrimental, particularly where the judicial decision insufficiently takes into account operational realities of armed conflict and thus leaves States with no acceptable options. (This is not to suggest, however, that State officials should bear no accountability if they violate the law, as is discussed below.) What steps might these States take to minimize the occurrence of this litigation (and maximize their ability to win cases when litigation arises)?

A good first step would be for States' political leadership to make the national security arguments clearly and persuasively to their judges, parliamentarians and the European publics. For European governments to gain greater support for defense missions, they need to better educate their publics about why the current military missions are important for European security. To date, they have been slow to do so. For example, it took two years for German Chancellor Angela Merkel to give a speech to the German parliament about Afghanistan (and Germany's role in ISAF) or to visit Afghanistan.¹¹⁸ Of course, it is the European parliaments that ultimately must fund military expenditures, and that can offer constructive support or open criticism of European participation in ISAF and other operations. European cabinets should ensure that their parliamentarians are sufficiently briefed on various threats; parliamentary concerns are a major reason that the German government, for instance, has limited its presence and role in Afghanistan. Yet many

domestic parliaments do not have access to important intelligence information. France, for instance, lacks a parliamentary intelligence oversight committee.¹¹⁹ Even in States in which parliaments have not served as major stumbling blocks to European participation in coalitions, parliaments that are well-educated about the threats can serve as another bridge between the government and the public.

Another step—and an important one for the US government—would be to recognize the interconnectedness of this litigation and the fact that a State’s national security policy decisions now have an impact that extends beyond that State’s courts. The US and European governments should avoid, to the greatest extent possible, surprising each other with changes in laws or with high-impact court decisions. The best way to do this is to hold early consultations with close allies on pending legislation or court cases that could affect how that State conducts itself during armed conflict. For instance, Canada convened a meeting of ISAF partners to describe a court case it faced regarding detention in Afghanistan. One can imagine any of a number of other existing fora in which relevant State officials could hold such discussions.

A final step—and one that will require further study—is to consider whether certain principles drawn from counterinsurgency (COIN) doctrine offer ways to minimize litigation in the future. For example, one source of problems in the transfer litigation is the weakness of the host government, which results both in subpar detention facilities and in a weak domestic law enforcement system that is unable to prosecute those who engage in detainee abuse. The US COIN manual emphasizes the importance of building up the domestic institutions of the State under challenge from insurgents.¹²⁰ Doing so—creating better detention facilities, better-trained guards and stronger prosecution systems—would improve the conditions into which the United States and European States hope to transfer detainees, and thus would reduce litigation in the transfer realm. Further, it should be apparent to all States participating in ISAF that any legal violations or abuses committed by their troops are likely to come to light and are almost certain to undermine their COIN operations.¹²¹ With fewer actual (as opposed to falsely claimed) violations, the quantum of litigation should fall as well. Finally, COIN doctrine recognizes that *ex gratia* or *solatia* payments, made in sympathy or recognition of someone’s loss during a conflict, may advance the cause of the State undertaking COIN.¹²² These payments, which are distinct from claims payments, may serve to diminish the impetus to bring legal claims against the State undertaking COIN.

States should consider other non-judicial mechanisms by which to hold themselves accountable. The mechanisms should be able to reflect operational realities in wartime, including the need to preserve intelligence relationships, while ensuring that the executive branches do not operate unchecked. These might include

internal investigations by entities such as inspectors general, which are housed within an agency, but independent from its leadership. These investigations could produce classified and unclassified versions of reports, as well as recommendations, where appropriate, that individuals wronged by governmental conduct be compensated. These might also include inquiries led by retired esteemed individuals such as retired federal judges (which appears similar to what the United Kingdom is considering in establishing an inquiry about its role in renditions). If seen as credible and fair, these types of investigations could also stanch the flow of litigation.

At the same time, an increased effort by the United States and European States to embed journalists and otherwise document their own compliance with the law, as well as to draw attention to violations of the law by non-State actors, may affect the outcomes of specific cases and may also improve for States the wider atmospherics surrounding the cases that non-State actors are bringing.

V. Conclusion

These cases illustrate that litigation is having an impact on how States currently fight, and on how they will fight in the future. This is not to argue against all judicial involvement in issues that implicate national security. It is to suggest, though, that such involvement should be measured and cautious; court judgments, while often addressing genuine problems with certain aspects of warfare, sometimes are crafted in ways that are overly abstracted from the choices that the losing governments have to make. Nor is this to suggest that executive branch decisionmakers should not have to comply with laws, regulations and related restrictions, or should not face criminal sanctions when their behavior warrants it. It is to suggest the need for the judiciary to act with restraint in this area, and to suggest that in some cases there may be non-judicial mechanisms that are better tailored to thread the needle between oversight and accountability, on one hand, and the need to preserve the confidentiality of certain types of decision making and policies, on the other.

Notes

1. See, e.g., Mary Crane, *U.S. Treatment of Terror Suspects and U.S.-EU Relations*, CFR.ORG (Dec. 6, 2005), http://www.cfr.org/publication/9350/us_treatment_of_terror_suspects_and_useu_relations.html (describing how controversy over the use of renditions affected European domestic politics).

2. Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 27, 2009) (Ensuring Lawful Interrogations); Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 27, 2009) (Review and Disposition of

Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities); Exec. Order No. 13493, 74 Fed. Reg. 4901 (Jan. 27, 2009) (Review of Detention Policy Options).

3. Indeed, even foreign government officials and contractors sued in US courts for alleged violations of international law during armed conflicts against non-state actors have won their cases. See *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (dismissing on common law immunity grounds case against former Israeli military official who authorized particular bombing); *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007) (dismissing on political question grounds case against company accused of aiding and abetting war crimes by knowingly selling bulldozers to Israeli government).

4. Notably, there have been few cases in which individual victims of US and European aerial bombings during armed conflict have sued to obtain compensation for their losses. This presumably is due to statutes that quite clearly bar such causes of action, such as the Federal Tort Claims Act (FTCA) in the United States and comparable provisions in other States' laws, as well as judicial doctrines related to non-justiciability. See *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010) (holding that decision to launch missile strike abroad presents non-justiciable political question); *Bankovic et al. v. Belgium et al.*, App. No. 52207/99, 2001-XII Eur. Ct. H.R., available at 41 INTERNATIONAL LEGAL MATERIALS 517 (rejecting suit by victims of an aerial bombing in Kosovo); *German Court Rejects Civilian War Damages Claim*, DW-WORLD.DE (Nov. 2, 2006), <http://www.dw-world.de/dw/article/0,,2223146,00.html>.

5. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (“There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF [Authorization for Use of Military Force]. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”). As a US citizen, Hamdi was not held at Guantanamo, but his case nonetheless is relevant to the scope of US detention authority.

6. *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006) (referring to “the relevant conflict” between the United States and al Qaeda).

7. *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that Guantanamo detainees were entitled to statutory habeas corpus); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (holding that Guantanamo detainees were entitled as a constitutional matter to habeas corpus).

8. HUMAN RIGHTS FIRST, HABEAS WORKS 1–2 (2010), available at <http://www.humanrightsfirst.info/pdf/Habeas-Works-final-web.pdf> [hereinafter HABEAS WORKS] (suggesting that the courts generally have followed the US government’s proposed scope of detention).

9. See BEN WITTES, ROBERT CHESNEY & RABEA BENHALIM, THE EMERGING LAW OF DETENTION: THE GUANTANAMO HABEAS CASES AS LAWMAKING (2010) [hereinafter EMERGING LAW OF DETENTION] (noting that the Supreme Court in *Boumediene* “refused to define the contours of either the government’s detention authority or the procedures associated with the challenges” and that this “placed an astonishing raft of difficult questions in the hands” of federal judges); HABEAS WORKS, *supra* note 8, at 29 (noting that the Guantanamo litigation has tested the judiciary but arguing that the judiciary has risen to the challenge).

10. Chisun Lee, *Judges Reject Interrogation Evidence in Gitmo Cases*, PRO PUBLICA (Aug. 13, 2010), <http://www.propublica.org/article/judges-reject-interrogation-evidence-in-gitmo-cases>.

11. *Boumediene*, 128 S. Ct. at 2259.

12. *Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

13. *Id.* at 98.
14. *Id.* at 95.
15. *Id.* at 99. The court did not decide what would happen if there were evidence that the US government had brought the person to Bagram in an attempt to evade habeas corpus, stating, We need make no determination on the importance of [the possibility that the United States chose a place of detention in order to evade judicial review], given that it remains only a possibility; its resolution can await a case in which the claim is a reality rather than a speculation.
16. *R (on the application of Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58.
17. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.
18. In addition, ECHR Article 5 states, “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”
19. S.C. Res. 1546, ¶ 2, U.N. Doc. S/RES/1546 (June 8, 2004).
20. *Al-Jedda*, [2007] UKHL, ¶ 39.
21. *Id.*, ¶¶ 39, 125–29, 136.
22. *Id.*, ¶¶ 126–29 (“The right is qualified but not displaced. This is an important distinction, insufficiently explored in the all or nothing arguments with which we were presented. . . . The right is qualified only to the extent required or authorised by the resolution. . . . We have devoted little attention to the precise scope of the authorisation. There must still be room for argument about what precisely is covered by the resolution and whether it applies to the facts of this case.”).
23. For a discussion of the conflict between the norms of the ECHR and the laws of war, see Marco Milanovic, *Norm Conflicts and Human Rights*, EJIL: TALK! (May 13, 2009), <http://www.ejiltalk.org/norm-conflicts-and-human-rights/>.
24. For an example of a suit against a contractor for detainee abuse, see *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009) (holding that combat activities exception to the FTCA precluded suit by hundreds of Iraqi detainees against contractors providing interrogation and translation services at U.S. detention facilities in Iraq, including Abu Ghraib).
25. *Rasul v. Rumsfeld*, 414 F. Supp.2d 26 (D.D.C. 2006).
26. *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008); *Rasul v. Myers*, 129 S. Ct. 763 (2008).
27. *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009).
28. *Id.*, at 529, 530.
29. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010).
30. *Id.* at 575 (“A suit seeking a damages remedy against senior officials who implement an extraordinary rendition policy would enmesh the courts ineluctably in an assessment of the validity and rationale of that policy and its implementation in this particular case, matters that directly affect significant diplomatic and national security concerns.”).
31. *Id.* at 565.
32. See, e.g., Brief of Respondents at 12–13, *Hamdan v. Rumsfeld*, No. 03-6696, 542 U.S. 507 (2004).
33. *Al-Skeini and Others v. Secretary of State for Defence*, [2007] UKHL 26, [2008] 1 A.C. 153.
34. *Al-Skeini*, [2007] UKHL, ¶ 2.
35. Under ECtHR caselaw, including *Ozkan v. Turkey*, App. No. 21689/93, ¶¶ 311–14, 358 Eur. Ct. H.R. (Apr. 6, 2004), when a State considers that it might have violated Article 2, it must undertake an official investigation, ensure accountability for deaths, take steps to secure relevant evidence and ensure that the investigation be independent from those implicated in the events at

issue. Dominic McGoldrick, *Human Rights & Humanitarian Law in UK Courts*, 40 ISRAEL LAW REVIEW 527, 551 (2007).

36. *Al-Skeini*, [2007] UKHL, ¶¶ 3–4.

37. *Id.*, ¶ 61. It conceded that the ECHR applied to Mr. Mousa’s case after a lower court finding that a UK-run detention facility fell within a narrow exception to the general rule (as articulated in *Bankovic v. Belgium*) that the ECHR does not apply outside the territories of States parties to the Council of Europe. Mr. Mousa’s detention in the *al-Skeini* case occurred before the UN Security Council had passed a resolution authorizing Multi-National Forces–Iraq to take “all necessary measures” to ensure the security and stability of Iraq; al-Jedda’s detention occurred after the Security Council passed UNSCR 1546, which explains why the United Kingdom attempted to argue that a Security Council resolution could effectively trump other international legal obligations.

38. Tobias Thienel, *High Court: British Soldiers in Iraq under ECHR Protection*, INVISIBLE COLLEGE BLOG (May 13, 2008), <http://invisiblecollege.weblog.leidenuniv.nl/2008/05/13/high-court-british-soldiers-in-iraq-unde>; see also McGoldrick, *supra* note 35, at 543.

39. McGoldrick speculates that there was a division of views between the “Ministry of Defence, which took the view that the HRA does not apply in Iraq at all (which explains why the UK has never derogated from the ECHR or the ICCPR), and the Foreign and Commonwealth Office, which took the view that it does exceptionally apply.” McGoldrick, *supra* note 35, at 555–56.

40. *Omar v. Harvey*, 410 F. Supp.2d 19 (D.D.C. 2006); *Mohammed v. Harvey*, 456 F. Supp.2d 115 (D.D.C. 2006).

41. *Munaf v. Geren*, 553 U.S. 674, 688 (2008).

42. *Id.* at 688.

43. *Id.* at 699–700.

44. *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

45. *Kiyemba v. Obama*, 130 S. Ct. 1880 (2010).

46. *Munaf*, 553 U.S. at 702 (appearing to reserve the “extreme case” in which the executive determines that a transferee is likely to face torture but chooses to transfer him anyway).

47. *Amnesty International Canada v. Canada* (Chief of the Defence Staff) [2008] F.C. 336, available at <http://decisions.fct-cf.gc.ca/en/2008/2008fc336/2008fc336.html>.

48. *Amnesty International Canada v. Canada* (Chief of the Defence Staff), 2008 FCA 401, [2009] 4 F.C.R. 149, available at <http://recueil.cmf.gc.ca/eng/2008/2008fca401/2008fca401.html>.

49. *Al-Saadoon & Mufdhi v. United Kingdom*, App. No. 61498/08 (Judgment), Eur. Ct. H.R. (Mar. 2, 2010), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=prof&highlight=al-saadoon&sessionid=58994524&skin=hudoc-en>.

50. *Id.*

51. The divisional court declared the proposed transfer lawful. [2008] EWHC 3098 (Admin).

52. *R* (on the application of *Al-Saadoon*) v. Secretary of State for Defence, [2009] EWCA (Civ) 7, ¶¶ 32–33, 37–39.

53. *Al-Saadoon*, App. No. 61498/08, ¶ 143 (Judgment).

54. *Al-Saadoon*, App. No. 61498/08, ¶ 88 (Admissibility Decision) (June 30, 2009) (“The Court considers that, given the total and exclusive *de facto*, and subsequently also *de jure*, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom’s jurisdiction.”), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=852086&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA3986>.

55. Al-Saadoon, App. No. 61498/08, ¶ 143 (Judgment).
56. *Id.*, ¶ 141 (declining to give deference to HMG’s judgment that raising such a prospect with the Iraqis would have been impolitic); *see also* ¶ 169 (noting HMG’s assertion that “[c]areful further consideration had been given to these matters and it was the Government’s considered view that the diplomatic representations sought would be inappropriate, could harm bilateral relations and would be ineffective”) & ¶ 171 (ordering HMG to seek death penalty assurances).
57. *Id.*, ¶ 104.
58. Al-Saadoon, App. No. 61498/08, ¶ 81 (Admissibility Decision). The UK Ministry of Defence’s Joint Doctrine Publication on the Handling of Detainees notes, in a section governing detainee transfers, “It should be borne in mind that the application of the European Convention on Human Rights to those held in UK facilities in some circumstances may impose additional restrictions on their transfer, in particular if they are likely to be tried for an offence which carries the death penalty.” UK Ministry of Defence, JDP 1-10.3, Joint Doctrine Publication: Detainees ¶ 114 (2006).
59. The Queen (on the application of Maya Evans) v. Secretary of State for Defence, [2010] EWHC (Admin) 1445.
60. *Id.*, ¶¶ 1, 239.
61. *Id.*, ¶¶ 315–21.
62. El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007); Mohamed v. Jeppesen Dataplan, 614 F.3d 1070 (9th Cir. 2010) [hereinafter *Jeppesen II*].
63. *El-Masri*, 479 F.3d at 300–301.
64. *Id.* at 307–8.
65. *Id.* at 311.
66. *Jeppesen II*, 614 F.3d at 1076.
67. Mohamed v. Jeppesen Dataplan, 579 F.3d 943, 952 (9th Cir. 2009), *rehearing en banc granted*, 586 F.3d 1108 (9th Cir. 2009) (citing *Totten v. United States*, 92 U.S. 105 (1875)).
68. *Jeppesen II*, 614 F.3d at 1073.
69. *Id.* at 1081–82 (citations omitted).
70. For a summary of the procedural history of the case, see Binyam Mohamed v. Secretary of State for Foreign Affairs, [2010] EWCA (Civ) 65.
71. *Id.*, ¶ 11.
72. *Id.*, ¶ 5.
73. *Id.*, ¶¶ 95–98.
74. *Id.*, ¶¶ 121–26 (citing *Mohammed v. Obama*, 689 F. Supp.2d 38 (D.D.C. 2009)).
75. *Mohamed*, [2010] EWCA (Civ), ¶¶ 37–42.
76. *Id.*, ¶¶ 154, 172.
77. *Id.*, ¶ 52.
78. Jamie Doward, *Secrets of CIA “ghost flights” to be revealed*, THE OBSERVER (England), July 26, 2009, at 19, *available at* <http://www.guardian.co.uk/world/2009/jul/26/cia-rendition-guantanamo> (“Lawyers bringing the case against Jeppesen UK on behalf of the former Guantánamo Bay detainee, Binyam Mohamed, claimed last night the climbdown had wide-ranging legal implications that could help expose which countries and governments knew the CIA was using their air bases to spirit terrorist suspects around the world.”).
79. Al Rawi & Others v. Security Service & Others, [2010] EWCA (Civ) 482, ¶ 30, *available at* <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2010/482.html&query=binyam&method=boolean>.
80. *Id.*, ¶ 9.

81. Patrick Wintour & Matthew Weaver, *Guantanamo Bay prisoners to get millions from British government*, GUARDIAN.CO.UK (Nov. 16, 2010), <http://www.guardian.co.uk/world/2010/nov/16/guantanamo-bay-prisoners-compensation>.

82. Ian Cobain, *Council of Europe welcomes UK inquiry into torture and rendition*, GUARDIAN (London), June 10, 2010, at 5, available at <http://www.guardian.co.uk/politics/2010/jun/09/council-europe-welcomes-uk-inquiry-torture> (noting that the UK Foreign Secretary had confirmed that HMG would establish an inquiry but had not yet defined what form it would take).

83. Ian Austen, *Canada Reaches Settlement with Torture Victim*, NYTIMES.COM (Jan. 26, 2007), <http://www.nytimes.com/2007/01/26/world/americas/26cnd-canada.html> (quoting one of his US lawyers as saying that she hopes the Canadian settlement will increase pressure on the United States government to do the same).

84. *Sweden to compensate exonerated terror suspect*, NYTIMES.COM (July 3, 2008), http://www.nytimes.com/2008/07/03/world/europe/03iht-sweden.5.14218093.html?_r=1.

85. EMERGING LAW OF DETENTION, *supra* note 9, at 3 (“The rules the judges craft could have profound implications for decisions in the field concerning whether to initially detain, or even target, a given person, whether to maintain a detention after an initial screening, . . . and so forth.”).

86. See HABEAS WORKS, *supra* note 8 (describing district court decisions). In *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), a panel of the D.C. Circuit decided that the United States had broader authority to detain than the government itself had claimed, because it asserted that international law does not limit the scope of the government’s detention authority. In rejecting a request for *en banc* review of the decision, seven D.C. Circuit judges appear to have concluded that that language was dicta. *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010).

87. Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detention Litigation, Misc. No. 08-442 (TFH) (D.C. Cir. Mar. 13, 2009); Brief for Respondent-Appellant, Addendum, *Maqaleh v. Gates*, Nos. 09-5265, 09-5266, 09-5277 (D.C. Cir. Sept. 14, 2009), available at <http://www.scotusblog.com/wp-content/uploads/2009/09/US-Bagram-brief-9-14-09.pdf> (containing new US detention policy in Afghanistan, which states that the modified procedures adopt the definitional framework of detention authority that the administration published in its March 13, 2009 habeas filing); Jennifer K. Elsea & Michael John Garcia, Congressional Research Service, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court* 40 n.235 (2010), available at www.fas.org/sgp/crs/natsec/RL33180.pdf (noting that although the March 13 standard referred only to detainees held at Guantanamo the Obama administration subsequently made clear in court filings and congressional reports that it would use the same standard to justify the detention of suspected belligerents at Bagram).

88. Because the new policy requires not only that a person meet particular criteria rendering him detainable, but also that US forces assess the level of threat that a person poses, DoD presumably is detaining fewer people in the first instance, though it is not clear whether those reduced numbers are due to the “scope” requirement or “threat” requirement.

89. This concern about the principle of “*non-refoulement*” is reflected in the decision of many European States that were present in Afghanistan to obtain assurances from the government of Afghanistan that it would treat humanely those detainees the European ISAF contingents transfer to the Afghans.

90. *Brogan v. United Kingdom*, 145 Eur. Ct. H.R. (ser. A) ¶ 62 (1988).

91. For a general discussion of ISAF’s limited detention activities, see Ashley S. Deeks, *Starting from Here*, in INTERNATIONAL LAW AND MILITARY OPERATIONS 161, 175–76 (Michael Carsten ed., 2008) (Vol. 84, US Naval War College International Law Studies).

92. Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28 and 42 U.S.C.).

93. *Supra* note 2.

94. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶¶ 89–91 (1989) (concluding that it is possible to breach an ECHR obligation by transferring an individual to another State in which he might face treatment that violates the ECHR, even if the State party itself did not inflict that treatment on the person).

95. See McGoldrick, *supra* note 35 (noting that conducting such investigations would entail a significant departure from existing military practice).

96. See, e.g., Press Release, Department of Justice, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President (Aug. 24, 2009), available at <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>.

97. See ASHLEY S. DEEKS, PROMISES NOT TO TORTURE: DIPLOMATIC ASSURANCES IN U.S. COURTS 70 (2008), available at <http://www.asil.org/files/ASIL-08-DiscussionPaper.pdf> (describing policy recommendations intended to “ensure that U.S. practices in such transfers comply with U.S. law, policy and international obligations and do not result in the transfer of individuals to face torture”).

98. *Id.*

99. Allan Woods, *Censure Tories over probe of detainee abuse, MPs urged*, TORONTO STAR, Feb. 4, 2010, at A06, available at <http://www.thestar.com/news/canada/afghanmission/article/760370--censure-tories-over-probe-of-detainee-abuse-mps-urged>.

100. For a general discussion of this problem, see Ashley S. Deeks, *Detention in Afghanistan: The Need for an Integrated Plan* (Feb. 14, 2008), http://csis.org/files/media/csis/pubs/080213_deeks_afghanistan.pdf.

101. *The Queen (on the application of Maya Evans)*, [2010] EWHC (Admin), ¶ 320.

102. Binyam Mohamed’s attorneys have stated that this interaction between the UK and US litigation is a deliberate decision on their part. In an interview in which he was asked whether the UK’s actions would affect the US Jeppesen litigation, an Amnesty International attorney stated,

I would think so. I mean one would think the judges would look at government’s assertions of damage to national security in Jeppesen case, particularly in relation to Binyam Mohamed’s claims, with skepticism. Because if what the government is essentially trying to cover up in the Jeppesen litigation in the U.S. is the same as what it now publicly acknowledged in the U.K.—and I can’t see that it would be any different—it just makes their assertions increasingly improbable, and I think’ll be viewed, as I say, with skepticism. . . . I think it’s the way to pursue justice in a paradigm where you have the United States, both the prior administration and now this administration, trying to act outside the law by making assertions that these incidents arose outside of the United States, so therefore you can’t come into a United States courtroom to assert your rights. As advocates we now need to look outside the United States. In the same way that the U.S. administrations are looking outside the United States to justify their positions, we should be looking outside the U.S. to hold them to account.

Larry Siems, *Transnational Justice and the Binyam Mohamed Case*, THE TORTURE REPORT BLOGS (Mar. 1, 2010, 4:08 PM), <http://www.thetorturereport.org/diary/transnational-justice-and-binyam-mohamed-case>.

103. Richard Norton-Taylor, *Miliband faces new “torture cover-up” storm*, GUARDIAN (London), Feb. 16, 2009, Home Pages at 4 (quoting Bellinger letter).

104. *UK: Intelligence sharing with the US threatened*, JPOST.COM (July 29, 2009), <http://www.jpost.com/Home/Article.aspx?id=150287>.

105. White House “disappointed” at Binyam Mohamed ruling, POLITICS.CO.UK (Feb. 11, 2010), [http://www.politics.co.uk/news/foreign-policy/white-house-disappointed-at-binyam-mohamed-ruling-\\$1359476.htm](http://www.politics.co.uk/news/foreign-policy/white-house-disappointed-at-binyam-mohamed-ruling-$1359476.htm).

106. Dana Priest, *Covert CIA Program Withstands New Furor*, WASHINGTON POST, Dec. 30, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/29/AR2005122901585.html>.

107. For an extensive discussion of the US courts’ focus on process rather than substance in “war on terror” cases, see Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUMBIA LAW REVIEW 1013 (2008). Martinez argues that one reason US courts have focused heavily on procedural issues is that the litigants chose to present the issues to the courts as procedural ones.

108. See, e.g., David Jenkins, *Judicial Review under a British War Powers Act*, 43 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 611, 619 & n.36 (2010) (citing examples of American courts’ reluctance to get involved in matters of war). *Hamdan* and *Boumediene* arguably reflect important exceptions to this statement.

109. *A v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.).

110. Mark Elliott, *United Kingdom: Detention Without Trial and the “War on Terror,”* 4 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 553, 553 (2006).

111. *Id.* at 561.

112. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

113. The fact that ECHR Article 15 permits States parties to derogate from certain rights during wartime makes clear that, barring a derogation, those rights, as well as the non-derogable rights, apply during wartime. See Charles H.B. Garraway, *Interoperability and the Atlantic Divide: A Bridge over Troubled Waters*, in ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS 337, 350 (Richard B. Jaques ed., 2006) (Vol. 80, US Naval War College International Law Studies) (noting that the ECHR applies in time of war, subject to any derogation). That said, the treaty is not perfectly crafted to handle wartime situations. For instance, Article 5, which contains an exclusive list of the situations in which a State may deprive people of their liberty, does not include the detention of prisoners of war during international armed conflict or administrative detention during non-international armed conflict, even though those forms of detention are otherwise permissible under international law.

114. *Id.* at 352.

115. Human Rights Act, 1998, c. 42, § 2(1).

116. Andrew Geddis & Bridget Fenton, “Which Is to Be Master?” – Rights-Friendly Statutory Interpretation in New Zealand and the United Kingdom, 25 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 733, 745 (2008) (noting that “if the United Kingdom’s domestic courts fail to provide an applicant with a satisfactory remedy under the HRA, he or she can always pursue the matter to Strasbourg and obtain a judgment from the ECtHR that will require the United Kingdom to alter its law in any case. To avoid such an outcome, ‘[domestic] courts should . . . treat the HRA as the nexus to a new legal order of European human rights law, so that every [domestic] court is now a European human rights court.’”).

117. See, e.g., Gary Schmitt, *How Will British Elections Change Their National Security Policy?*, THE ENTERPRISE BLOG (Apr. 1, 2010, 12:09 PM), <http://blog.american.com/?p=12142> (“[G]iven the state of British public opinion these days about such matters as Afghanistan, Israel, and government budget deficits, one can hardly expect the Tories to come out with a more aggressive set of forward-leaning foreign and defense policies.”). Similar trends are found elsewhere in Europe.

See Wolfgang Ischinger, *Afghanistan and German Security Policy—A Few Thoughts to Remember*, MONTHLY MIND (Jan. 2010), <http://www.securityconference.de/Monthly-Mind-Detail-View.67+M5d625cd60f9.0.html?&L=1> (“We must in fact come up with our own explanations why German and European alliance interests require this mission [in Afghanistan]. The nation-building ideals that various German politicians set forth occasionally, which relate to human rights, women’s rights, social or democratic aspects, are not enough. . . . It is time for parliament and the government to deal with the strategic and tactical aims and options in Afghanistan instead of focusing their energies on the investigations into the events at Kunduz, trying to score points on the home front. . . . If Europe has ambitions of developing into a global player, shouldn’t we be interested in an active role of our own in Asia? Would a European withdrawal from Afghanistan not only be a disaster for NATO, but also a decisive step towards the global strategic irrelevance of Europe? . . . Such questions are asked too rarely in our country. They do, however, deserve answers—as part of a German and European debate on security policy that thinks in strategic terms and provides more than hasty and short-lived responses to daily events.”).

118. Judy Dempsey, *Merkel Is Aloof as German Public Wavers on Troops in Afghanistan*, NYTIMES.COM (Oct. 18, 2007), <http://www.nytimes.com/2007/10/18/world/europe/18iht-letter.1.7941391.html>.

119. Hans Born, *Parliamentary Oversight of Intelligence Services 1* (2006), <http://www.dcaf.ch/Publications/Series/Detail?lng=en&id=18411> (then Parliamentary Oversight of Intelligence Services hyperlink).

120. Headquarters, Department of the Army & Headquarters, Marine Corps Combat Development Command, FM 3-24/MCWP 3-33.5, *Counterinsurgency* (2006).

121. *Id.*, ¶ 1-107 (“Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local population and eventually around the world because of the globalized media and work to undermine the COIN effort.”).

122. *Id.*, app. D, ¶ D-34.