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ENHANCED INTERROGATION, THE REPORT ON RENDITION, DETENTION, AND INTERROGATION, AND THE RETURN OF KRIEGSRAISON

*Benjamin R. Farley**

Last year's release of the Senate Select Committee on Intelligence's Report on Rendition, Detention, and Interrogation (RDI Report) brought with it a renewed debate over the United States' so-called enhanced interrogation program in the years following the September 11, 2001 attacks. The debate itself is tremendously disheartening for a variety of reasons, not least of which is its focus on the efficacy of torture.¹ Defenders of the enhanced interrogation program posit that enhanced interrogation techniques (EITs) were militarily

* J.D. with Honors, Emory University School of Law, 2011. Editor-in-Chief, *Emory International Law Review*, 2010-2011. M.A., The George Washington University Elliott School of International Affairs, 2007. Presidential Management Fellow 2012–2014. Senior Adviser to the Special Envoy for Guantanamo Closure at the U.S. Department of State. The opinions and views expressed are those of the author alone. They do not represent the views of the United States.

¹ John Yoo, Opinion, *Dianne Feinstein's Flawed Torture Report*, L.A. TIMES (Dec. 23, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-yoo-torture-feinstein-20141214-story.html> (“But the Feinstein report has one positive virtue: It has moved the debate beyond legality to effectiveness.”); Angus S. King, *Torture and the Arc of History*, HUFFINGTON POST (Dec. 23, 2014, 3:31 PM), http://www.huffingtonpost.com/sen-angus-s-king-jr/torture-and-the-arc-of-hi_b_6361304.html (“The second basic question . . . is whether torture works—is it an effective tool for extracting otherwise unavailable information which may save thousands or even millions of lives.”); George J. Tenet, Porter J. Goss, Michael V. Hayden, et al., *Ex-CIA Directors: Interrogations Saved Lives*, WALL STREET J. (Dec. 10, 2014), <http://www.wsj.com/articles/cia-interrogations-saved-lives-1418142644>. Some hold the Senate Select Committee on Intelligence responsible for injecting efficacy into the torture debate by seeking to debunk the utility of torture. Benjamin Wittes, *Thoughts on the SSCI Report, Part III: The Program's Effectiveness*, LAWFARE (Dec. 28, 2014, 11:32 PM), <http://www.lawfareblog.com/2014/12/thoughts-on-the-ssci-report-part-iii-the-programs-effectiveness/> (“It was the committee majority that was not content to argue merely that the program was immoral and illegal but insisted on arguing that it was entirely ineffective as well.”). However, utility has long figured prominently in the defense of the enhanced interrogation program. E.g., LEON PANETTA, WORTHY FIGHTS 223 (2014) (“The CIA got important even critical intelligence from individuals subjected to these enhanced interrogation techniques”); GEORGE W. BUSH, DECISION POINTS 168–69 (2011) (“I knew that an interrogation program this sensitive and controversial would one day become public. When it did, we would open ourselves up to criticism that America had compromised our moral values . . . But the choice between security and values was real. Had I not authorized waterboarding on senior Al Qaeda leaders, I would have had to accept a greater risk that the country would be attacked . . . I approved the use of the interrogation techniques. The new techniques proved highly effective.”); Siobhan Gorman, *Brennan Critics Zero in on CIA's Interrogations*, WALL STREET J. (Jan. 9, 2013) (“There has been a lot of information that has come out from these interrogation procedures that the agency has in fact used against the real hard-core terrorists. It has saved lives.”) (quoting Director of Central Intelligence John Brennan) (internal quotations omitted), <http://www.wsj.com/articles/SB10001424127887324442304578232113740569812>.

necessary to prevent additional terrorist attacks against the United States and defeat al-Qaeda. They argue that the United States and al-Qaeda were engaged in an armed conflict² following the 9/11 attacks, and that intelligence concerning future terrorist attacks and the al-Qaeda organization was required to prevent such attacks and to defeat al-Qaeda.³ According to defenders of EITs, those techniques were militarily necessary because members of al-Qaeda who were detained in the course of the armed conflict following the 9/11 attacks possessed critical intelligence information. Moreover, according to EIT defenders, the detainees who held critical intelligence information were trained to resist normal interrogation techniques; or, in some cases, the information they possessed was so time-sensitive that normal, lawful interrogation techniques were insufficient.⁴ In the face of these challenges, the United States was compelled to resort to EITs—interrogation techniques that were beyond those normally authorized in law-enforcement or intelligence gathering efforts—to extract information critical to protecting the United States and defeating al-Qaeda.⁵ Critically, EIT defenders argue that those techniques were in fact effective means of extracting information from detainees, and that

² See, e.g., *DCI Talking Points: CIA Detainee Issues* (July 2, 2004), <http://ciasavedlives.com/bdr/dci-talking-pts-cia-detainee-issues.pdf> (“Under other circumstances, *earlier in this war*, we would have immediately asked . . . to give . . . to us, and we would have rendered him to another site.”) (alteration in original) (emphasis added).

³ According to the Senate Select Committee on Intelligence, the CIA relied on examples of specific terrorist plots supposedly thwarted through the use of “enhanced interrogation techniques [that] were not only effective, but also necessary to acquire ‘otherwise unavailable’ actionable intelligence that ‘saved lives.’” S. REP. NO. 113-288, at xi (2014) [hereinafter RDI REPORT] (internal quotations omitted). See also Memorandum for John Rizzo, Acting Gen. Counsel of the Cent. Intelligence Agency, *Interrogation of al Qaeda Operative* (Aug. 1, 2002) [hereinafter Rizzo Interrogation Memorandum]; Memorandum for the National Security Adviser, *Reaffirmation of the Central Intelligence Agency’s Interrogation Program* (July 3, 2003) (“As you know, the primary national interest in interrogating [High Value Detainees] is to acquire critical intelligence that may be exploited by the United States to prevent future terrorist attacks. To accomplish that mission, CIA developed an Interrogation Program that includes the use of enhanced interrogation techniques to assist in obtaining that critical intelligence.”).

⁴ E.g., Memorandum for John A. Rizzo, Senior Deputy Gen. Counsel of the Cent. Intelligence Agency, *Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High Value al Qaeda Detainees* 5 (May 30, 2005) [hereinafter Rizzo Memorandum on Obligations Under Article 16] (explaining the criteria for applying enhanced interrogation techniques to detainees); Rizzo Interrogation Memorandum, *supra* note 3, at 1–4 (describing Abu Zubaydah’s supposed possession of critical intelligence and resistance to extant interrogation techniques); Bill Hoffman, *John Yoo: I Was Never Asked to Testify for Torture Report*, NEWSMAX (Dec. 11, 2014), <http://www.newsmax.com/Newsmax-Tv/John-Yoo-torture-report-Dianne-Feinstein-waterboarding/2014/12/11/id/612526/> (noting that John Yoo claims enhanced interrogation techniques “absolutely saved lives”).

⁵ E.g., Rizzo Interrogation Memorandum, *supra* note 3, at 1.

information actually contributed to the defense of the United States and the defeat of al-Qaeda.⁶

Defenders of enhanced interrogation invoke these necessity and efficacy arguments when confronted by questions concerning the legality of the enhanced interrogation program.⁷ But some methods used in the course of the enhanced interrogation program, including waterboarding,⁸ constitute torture.⁹

⁶ *E.g.*, Rizzo Memorandum on Obligations Under Article 16, *supra* note 4, at 8 (citing Memorandum for Steven G. Bradbury, Principal Deputy Assistant Att’y Gen. of the Office of Legal Counsel, Effectiveness of the CIA Counterintelligence Interrogation Techniques (Mar. 2, 2005)) (“[T]he CIA believes that ‘the intelligence acquired from [enhanced] interrogations has been a key reason why al-Qa’ida has failed to launch a spectacular attack in the West since 11 September 2001.’”) *But see* RDI REPORT, *supra* note 3, at 172–452 (describing CIA representations in public and classified settings concerning the efficacy of enhanced interrogation techniques); Michael Hirsh, *Michael Hayden is Not Sorry*, POLITICO MAG. (Dec. 9, 2014), <http://www.politico.com/magazine/story/2014/12/torture-report-michael-hayden-not-sorry-113450>; Tenet, Goss, Hayden et al., *supra* note 1.

⁷ *See generally* RDI REPORT, *supra* note 3.

⁸ Waterboarding, as defined by the U.S. government, consists of

[Securely binding an individual] to an inclined bench, which is approximately four feet by seven feet. The individual’s feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual’s blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of “suffocation and incipient panic,” i.e., the perception of drowning. The individual does not breathe any water into his lungs. During those 20 to 40 seconds, water is continuously applied from a height of twelve to twenty-four inches. After this period, the cloth is lifted, and the individual is allowed to breathe unimpeded for three or four full breaths. The sensation of drowning is immediately relieved by the removal of the cloth. The procedure may then be repeated.

Rizzo Interrogation Memorandum, *supra* note 3. It is worth comparing the U.S. government’s definition of waterboarding with the descriptions of the “water cure,” an interrogation technique employed by some U.S. military personnel during the counterinsurgency campaign in the Philippines in 1902—and for which a handful of soldiers were court martialed: “[A] cloth was placed over the detainee’s mouth and nose and water poured over it producing a drowning sensation.” Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468, 474, 494–95, 501 (2007).

⁹ *E.g.*, President Barack Obama, Press Conference at the White House (Apr. 30, 2009), <https://www.whitehouse.gov/the-press-office/news-conference-president-4292009> (“What I’ve said—and I will repeat—is that waterboarding violates our ideals and our values. I do believe that it is torture. I don’t think that’s just my opinion; that’s the opinion of many who’ve examined the topic. And that’s why I put an end to these practices. I am absolutely convinced it was the right thing to do—not because there might not have been information that was yielded by these various detainees who were subjected to this treatment, but because we could have gotten this information in other ways, in ways that were consistent with our values, in ways that were consistent with who we are . . . I believe that waterboarding was torture. And I think that the—whatever legal rationales were used, it was a mistake.”); Dana Carver Boehm, *Waterboarding, Counter-Resistance, and the Law of Torture: Articulating the Legal Underpinnings of U.S. Interrogation Policy*, 41 U. TOL. L. REV. 1, 14–15, 19–41 (2009)

As such, use of these techniques on individuals detained in the course of an armed conflict violates international law's absolute prohibition on torture, as well as international humanitarian law's prescription to treat all individuals rendered *hors de combat* humanely.¹⁰ Thus, to the extent that defenders of

(arguing that although waterboarding is torture, most other Bush Administration-approved EITs are not); Wolfgang Form, *Charging Waterboarding as a Crime: U.S. War Crime Trials in the Far East After World War II*, 2 CHAP. J. CRIM. JUST. 247 (2011); Lindsey Graham & Paul R. Connolly, *Waterboarding: Issues and Lessons for Judge Advocates*, 69 A.F. L. REV. 65, 85 (2013) ("There may continue to be some debate about other interrogation techniques that are aggressive, but not unlawful, but there should be no disagreement on the legality of waterboarding. Restraining someone on their back and forcing water into their mouth and nose to suffocate them until they feel like they are about to die is unlawful and violates military regulations and both domestic and international law. We conclude that waterboarding, particularly when used repeatedly, rises to the level of inflicting severe physical or mental pain and suffering, and therefore violates Common Article 3 and the Torture Convention."); Daniel Kanstroom, *On "Waterboarding": Legal Interpretation and the Continuing Struggle for Human Rights*, 32 B.C. INT'L & COMP. L. REV. 203, 205 (2009) ("Waterboarding has long been understood as torture, from its earliest incarnations during the Spanish Inquisition through its systematic use by the Khmer Rouge."). Kanstroom also argues that whether waterboarding is properly defined as torture, it clearly violates Common Article 3 and, for that reason, is illegal. *Id.* at 213; Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1553–57 (2009); Wallach, *supra* note 8, at 468. Cf. *Hernandez-Barrera v. Ashcroft*, 373 F.3d 9, 15–23 (1st Cir. 2004) (finding that the "water torture," or submerging an individual's head in water, qualifies as torture for purposes of demonstrating past persecution under the Immigration and Nationality Act) ("[Plaintiff] was subjected to persecution and torture . . . [h]e stated that his commanders . . . submerged his head in water."); *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1463 (D. Haw. 1995) (asserting that placing a cloth over a detainee's mouth and nose and pouring water over it to produce a sensation of drowning is a form of torture). See also President Barack Obama, Press Conference at the White House (Aug. 1, 2014), <https://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president> ("With respect to the larger point of the RDI report itself . . . [w]e did a whole lot of things that were right, but we tortured some folks. We did some things that were contrary to our values."); Christopher Hitchens, *Believe Me, It's Torture*, VANITY FAIR (Aug. 2008), <http://www.vanityfair.com/news/2008/08/hitchens200808> ("You may have read by now the official lie about this treatment, which is that it 'simulates' the feeling of drowning. This is not the case. You feel that you are drowning because you *are* drowning—or, rather, being drowned, albeit slowly and under controlled conditions and at the mercy (or otherwise) of those who are applying the pressure."); William Safire, *On Language: Waterboarding*, N.Y. TIMES (Mar. 9, 2008), http://www.nytimes.com/2008/03/09/magazine/09wwlnSafire-t.html?_r=0 ("If the word *torture* . . . means anything (and it means 'the deliberate infliction of excruciating physical or mental pain to punish or coerce'), then *waterboarding* is a means of torture. The predecessor terms for its various forms are *water torture*, *water cure* and *water treatment*." (emphasis in original).

¹⁰ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. All persons rendered *hors de combat*, including by detention, must be treated humanely. *Id.* See also *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 137–39 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) ("[T]he proposition is warranted that a general prohibition against torture has evolved in customary international law. This prohibition has gradually crystallised from the Lieber Code and The Hague Conventions, in particular articles 4 and 46 of the Regulations annexed to Convention IV of 1907, read in conjunction with the 'Martens clause' laid down in the Preamble to the same Convention. Torture was not specifically mentioned in the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg . . . but it was one of the acts expressly classified as a crime against humanity under article II(1)(c) of Allied Control Council Law No. 10 . . . As stated above, the Geneva Conventions of 1949 and the Protocols of 1977 prohibit torture in terms. That these treaty provisions have

enhanced interrogation seek to excuse or justify use of illegal interrogation techniques under the guise of military necessity, they are actually invoking *kriegsraison*—a long-discredited military doctrine that holds that the laws of war may be overcome in the face of extreme danger or simply to achieve the object of the war.

From a legal perspective, the invalidity of *kriegsraison* is or should be self-evident. It is an invitation to lawlessness and barbarism. Despite the compelling reasons to abhor *kriegsraison*, the doctrine's essential logic is tempting. Why should mere law prevent states from using all available means to protect their citizens and defeat their enemies? Ultimately, the laws of war reflect the realization that—far from being necessary for victory¹¹—savagery is actually counterproductive.¹² Compliance with the laws of war “is not fighting with one hand tied behind one's back. Rather, law of war principles and rules are consistent with military doctrines for a profession of arms that are the basis for effective combat operations.”¹³ *Kriegsraison*, on the other hand, vests a commander in the field with potentially unreviewable authority to determine what is militarily necessary and whether to contravene every principle limiting the means and methods of warfare, every protection for civilians, developed

ripened into customary rules is evinced by various factors. First, these treaties and in particular the Geneva Conventions have been ratified by practically all States of the world. Admittedly those treaty provisions remain as such and any contracting party is formally entitled to relieve itself of its obligations by denouncing the treaty (an occurrence that seems extremely unlikely in reality); nevertheless the practically universal participation in these treaties shows that all States accept among other things the prohibition of torture. In other words, this participation is highly indicative of the attitude of States to the prohibition of torture. Secondly, no State has ever claimed that it was authorised to practice torture in time of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture. When a State has been taken to task because its officials allegedly resorted to torture, it has normally responded that the allegation was unfounded, thus expressly or implicitly upholding the prohibition of this odious practice. Thirdly, the International Court of Justice has authoritatively, albeit not with express reference to torture, confirmed this custom-creating process: in the *Nicaragua* case it held that common article 3 of the 1949 Geneva Conventions, which *inter alia* prohibits torture against persons taking no active part in hostilities, is now well-established as belonging to the corpus of customary international law and is applicable both to international and internal armed conflicts. It therefore seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law. In armed conflicts this rule may be applied both as part of international customary law and – if the requisite conditions are met – *qua* treaty law, the content of the prohibition being the same.”); JEAN-MARIE HENCKAERTZ ET AL., INT'L COMM. RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 306, 315 (2009); DEP'T OF DEF., OFF. OF GEN. COUNS., LAW OF WAR MANUAL 492–94 (2015) [hereinafter LAW OF WAR MANUAL].

¹¹ L. OPPENHEIM, 2 INTERNATIONAL LAW: A TREATISE 226–27 (H. Lauterpacht ed., 1948); GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 196–98 (5th ed. 1967). *Cf.* Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, art. 22 [hereinafter Hague Convention IV].

¹² LAW OF WAR MANUAL, *supra* note 10, at 1055–56.

¹³ *Id.*

through the history of war. For those reasons, *kriegsraison* was never widely accepted.

Moreover, it is not necessary to speculate as to the horrors that might emerge in warfare if *kriegsraison* were valid. The twentieth century's world wars provide ample evidence of the barbarism that may attend warfare when it is waged outside of the bounds of the laws of war, as well as examples of perpetrators invoking *kriegsraison* to avoid accountability for violating the laws of war. Nevertheless, the temptation to wage war outside the bounds of the law is strong—particularly when the illegal means or methods of warfare are labeled necessary, effective, life-saving. Thus, it is important for lawyers, scholars, and policymakers to recognize when proponents of a specific means or method rely on *kriegsraison*¹⁴ to justify their preferred courses of action. And it is incumbent upon lawyers, scholars, and policymakers to state clearly that those means and methods of warfare are illegal, as is the doctrine their proponents have invoked to justify them.

This Essay demonstrates that defenders of enhanced interrogation have relied, and continue to rely, on *kriegsraison* to justify the United States' use of enhanced interrogation techniques on al-Qaeda detainees following the attacks of September 11, 2001. It begins by examining the clear and continuing rejection of *kriegsraison* at international law, with particular reference to international tribunals since World War II to demonstrate the unambiguous invalidity of the doctrine. It then traces the development of arguments justifying enhanced interrogation since November 2001, highlighting the role *kriegsraison* has played in the legal and rhetorical justifications throughout, and concluding that ultimately defenders of enhanced interrogation have resorted to *kriegsraison* to excuse the illegal use of waterboarding and other prohibited methods of interrogation during the course of the United States' armed conflict with al-Qaeda.

¹⁴ Cf. Kanstroom, *supra* note 9, at 212 (“Once torture has been acclimatized in a legal system it spreads like an infectious disease. It saves the labour of investigation. It hardens and brutalizes those who have become accustomed to use it.”) (quoting William Holdsworth); Tina Nguyen, *Jeb Bush: Maybe We Shouldn't Rule Out Torture*, VANITY FAIR (Aug. 14, 2015, 12:24 PM), <http://www.vanityfair.com/news/2015/08/jeb-bush-wont-rule-out-torture> (describing Republican candidate for President Jeb Bush's refusal to rule out using torture to acquire intelligence if elected President).

I. THE UNLAWFUL DOCTRINE OF *KRIEGSRAISON*

Kriegsraison—short for *kriegsraison geht vor kriegsmanier*—perverts the notion of military necessity, one of the four fundamental principles of international humanitarian law,¹⁵ into *carte blanche* excusing all violations of the law of war.¹⁶ Military necessity, as it is properly understood, does not perform such absolution for those engaged in an armed conflict. Instead, military necessity justifies a party to an armed conflict’s use of all measures necessary to defeat the enemy as quickly as possible, so long as those measures are not forbidden by international law.¹⁷ Thus, lawful military necessity is self-limiting—the measures employed must be indispensable and they must not be forbidden by international law. As Francis Lieber enjoined more than a century-and-a-half ago, “military necessity . . . consists in the necessity of those measures which are indispensable for securing the ends of war, *and which are lawful according to the modern law and usages of war.*”¹⁸

In contrast to lawful military necessity, *kriegsraison* holds that the laws of war “lose their force in case of extreme necessity . . . when violation of the laws of war alone offers either a means of escape from extreme danger or the realisation of the purpose of war.”¹⁹ That is, “a battlefield commander is entitled to dispense with the rules of warfare if he determines that the military situation requires that he do so.”²⁰ The doctrine deems any departure from international law permissible so long as “a belligerent deems [that departure] necessary for the success of its military operations.”²¹ *Kriegsraison* has been invoked in attempts to excuse illegal acts such as by submariners who machine-gunned survivors of a torpedoed vessel,²² individuals who mistreated

¹⁵ LAURIE R. BLANK & GREGORY P. NOONE, *INTERNATIONAL LAW AND ARMED CONFLICT* 35 (2012). The four fundamental principles of international humanitarian law are military necessity, humanity, distinction, and proportionality. *Id.*

¹⁶ *E.g.*, Nobuo Hayashi, *Contextualizing Military Necessity*, 27 *EMORY INT’L L. REV.* 189, 263 (2013).

¹⁷ *E.g.*, *LAW OF WAR MANUAL*, *supra* note 10, at 52; JEFF A. BOVARNICK ET AL., *LAW OF WAR DESKBOOK* 129 (Brian J. Bill ed., 129th ed. 2010).

¹⁸ RICHARD SHELLY HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* 48 (1983) (emphasis added). Indeed, “some of the conventional rules regulating warfare are actually qualified by express reference to military necessity.” OPPENHEIM, *supra* note 11, at 233 n.3. *Cf.* Hague Convention IV, *supra* note 11, at pmb1.

¹⁹ OPPENHEIM, *supra* note 11, at 232.

²⁰ Scott Horton, *Kriegsraison or Military Necessity? The Bush Administration’s Wilhelmine Attitude Towards the Conduct of War*, 30 *FORDHAM INT’L L.J.* 576, 585 (2006).

²¹ Elihu Root, *Opening Address*, in 15 *PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 1, 2 (1921); William G. Downey, Jr., *The Law of War and Military Necessity*, 47 *AM. J. INT’L L.* 251, 253 (1953).

²² OPPENHEIM, *supra* note 11, at 233; UNITED NATIONS WAR CRIMES COMM’N, *The Peleus Trial*, in *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 1 (1947) (invoking the defense of “operational” necessity).

and compelled labor from prisoners of war,²³ plunderers,²⁴ and those who engaged in reprisal killings of civilians.²⁵

Kriegsraison was never widely accepted due to the obvious risk it poses of being an exception capable of swallowing all the rules found in the laws of war.²⁶ The military tribunals charged with trying war crimes following World War II seemingly consigned the doctrine to the dustbin of history.²⁷ In addition to those military tribunals, *kriegsraison* has been rejected by modern scholars, as well as the authoritative commentary to Additional Protocol I.²⁸ This section

²³ *The Krupp Case*, in 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1344, 1346 (Leon Friedman ed., 1972).

²⁴ *Id.*

²⁵ *The Hostage Case*, in 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1303, 1317 (Leon Friedman ed., 1972).

²⁶ ROOT, *supra* note 21, at 3 (“Either the doctrine of *kriegsraison* must be abandoned definitely and finally, or there is an end of international law, and in its place will be left a world without law.”). See also L. OPPENHEIM, 2 INTERNATIONAL LAW: A TREATISE 84–85 (2d ed. 1912). Although the doctrine of *kriegsraison* is generally attributed to Germans writ large, it was met with skepticism from German scholars, as well. *Id.*

²⁷ E.g., Horton, *supra* note 20, at 589 (“The Nuremberg and Tokyo Tribunals were generally viewed as the death knell of the doctrine of *Kriegsraison*.”); MICHAEL SCHMITT, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, in ESSAYS ON LAW AND WAR AT THE FAULT LINES 89, 91 (2012). Importantly, the International Military Tribunal was able to draw a fine distinction between valid military necessity and invalid *kriegsraison*. For example, in *The High Command Case*, the Tribunal remarked, “The devastation prohibited by the Hague Rules and the usages of war is that not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult. Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature. We do not feel that in this case the proof is ample to establish the guilt of any defendant herein on this charge.” *The High Command Case*, in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER COUNCIL CONTROL LAW No. 10, at 1, 541 (1949).

²⁸ Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), ¶ 1386, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (“A number of different theories, of which some are still in existence, seek to contest the validity of the rule as such, i.e., the rule contained in the paragraph under consideration. The best known of these, though it is now out of date, was expressed by the maxim ‘Kriegsraison geht vor Kriegsmanier’ (‘the necessities of war take precedence over the rules of war’), or ‘Not kennt kein Gebot’ (‘necessity knows no law’). These maxims imply that the commander on the battlefield can decide in every case whether the rules will be respected or ignored, depending on the demands of the military situation at the time. It is quite obvious that if combatants were to have the authority to violate the laws of armed conflict every time they consider this violation to be necessary for the success of an operation, the law would cease to exist. Law is a restraint which cannot be confused with more usages to be applied when convenient. The doctrine of ‘Kriegsraison’ was still applied during the Second World War. It is possibly the uncertainty as to the applicability of the Hague law in conditions which had changed considerably since 1907 that contributed to this to some extent. However, it is probable that the resort to this doctrine was above all based on contempt for the law, the weakening of which is may be characteristic and a danger of our age. ‘Kriegsraison’ was

discusses several examples of international tribunals considering and rejecting *kriegsraison* or otherwise limiting military necessity in a manner that suggests the invalidity of *kriegsraison*.

A. *Kriegsraison as Considered and Rejected by the International Military Tribunals following World War II*

Following World War II, the military tribunals established in Europe and Asia by the victorious allied powers to try accused war criminals were forced to confront numerous defenders who excused seeming violations of the laws of war on the basis of *kriegsraison*. Although the doctrine was never widely accepted,²⁹ it had obtained certain currency within the Nazi Wehrmacht,³⁰ and various defendants invoked *kriegsraison* to avoid criminal liability for the acts they ordered or perpetrated during the course of World War II.³¹ These tribunals soundly rejected *kriegsraison*, and drew a fine distinction between unlawful *kriegsraison* and valid military necessity.

In one of the clearest rejections of *kriegsraison* following World War II, an American military tribunal operating under the Control Council Law in *United States v. Wilhelm List, et al. (The Hostage Case)*,³² faced defendants who invoked military necessity as a defense for “the killing of innocent members of the [occupied] population and the destruction of villages and towns in the occupied territory.”³³ In *The Hostage Case*, defendants were accused of, *inter alia*, mass murder for the taking of hostages and employing reprisal killings to dissuade the local partisan guerrilla campaign waged against the German occupation.³⁴ Following the occupation of Yugoslavia and Greece by German

condemned at Nuremberg, and this condemnation has been confirmed by legal writings. One can and should consider this theory discredited.”)

²⁹ In fact, the doctrine was implicitly rejected by a *German* tribunal following World War I in the *Llandoverly Castle Case*. *The Llandoverly Castle Case, Judicial Decisions Involving Questions of International Law*, in 16 AM. J. INT’L L. 708, 722–23 (1922) (emphasizing that the killing of individuals in lifeboats “could be nothing else but a breach of the law”).

³⁰ *The Hostage Case*, in 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1255 (1950) (citing *Introduction to GERMAN WAR BOOK* (J. H. Morgan trans., John Murray ed., 1915)).

³¹ *Id.*; *United States v. von Leeb (High Command)*, in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 541 (1950); *United States v. Krupp von Bohlen und Halbach (Krupp)*, in 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1340 (1950).

³² *The Hostage Case*, in 2 THE LAW OF WAR: A DOCUMENTARY HISTORY 1303, 1318–19 (1972).

³³ *Id.* at 1318.

³⁴ *Id.* at 1305 (“[D]efendants were principals or accessories to the murder of hundreds of thousands of persons from the civilian populations of Greece, Yugoslavia, and Albania by troops of the German armed

forces, members of the civilian population took up arms to resist the occupation.³⁵ German forces resorted to detaining members of the civilian populace who were not engaged in the resistance under threat of death to quell the resistance. When the taking of hostages—though lawful³⁶—proved insufficient to prevent partisan attacks targeting German occupation forces, the German forces used increasingly “severe and harsh measures,”³⁷ including the killing of those innocents previously taken hostage.³⁸

In response to the charges he faced, Field Marshal Wilhelm List, the German officer responsible for the occupation of Yugoslavia and Greece, invoked military necessity.³⁹ “Military necessity has been invoked by the defendants as justifying the killing of innocent members of the population and the destruction of villages and towns in the occupied territory.”⁴⁰ But the tribunal concluded that “[i]t is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification of their acts.”⁴¹ Rightly characterizing List’s invocation of military necessity as a resort to *kriegsraison*,⁴² the tribunal opined that

[Military necessity] permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill.⁴³

Rejecting the legality of *kriegsraison*, the tribunal found that “International Law is prohibitive law The rights of the innocent population therein set

forces; that attacks by lawfully constituted enemy military forces, and attacks by unknown persons, against German troops and installations, were followed by executions of large numbers of the civilian population by hanging or shooting without benefit of investigation or trial; that thousands of noncombatants, arbitrarily designated as ‘partisans,’ ‘Communists,’ ‘Communist suspects,’ ‘bandit suspects’ were terrorized, tortured, and murdered in retaliation for such attacks by lawfully constituted enemy military forces and attacks by unknown persons; and that defendants issued, distributed, and executed orders for the execution of 100 ‘hostages’ in retaliation for each German soldier killed and 50 ‘hostages’ in retaliation for each German soldier wounded.”)

³⁵ *The Hostage Case*, *supra* note 30, at 1243, 1245–46.

³⁶ *Id.* at 1250–51.

³⁷ *Id.* at 1260.

³⁸ *Id.* at 1272.

³⁹ *Id.* at 1253.

⁴⁰ *Id.*

⁴¹ *Id.* at 1255.

⁴² *Id.* at 1272.

⁴³ *Id.* at 1253.

forth must be respected even if military necessity or expediency decree otherwise.”⁴⁴ Moreover,

It is quite evident that the High Command insisted upon a campaign of intimidation and terrorism as a substitute for additional troops. Here again the German theory of expediency and military necessity (*Kriegsräson geht vor Kriegsmanier*) superseded established rules of [I]nternational [L]aw. As we have previously stated in this opinion, the rules of [I]nternational Law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation As a last resort, hostages and reprisal prisoners may be shot in accordance with international custom and practice. If adequate troops were not available or if the lawful measures against the population failed in their purpose, the occupant could limit its operations or withdraw from the country in whole or in part, but no right existed to pursue a policy in violation of [I]nternational [L]aw.⁴⁵

Thus, the American military tribunal rejected List’s invocation of *kriegsraison* and concluded that, as a matter of law, military necessity is limited to those acts that are otherwise lawful under the laws of war.

B. Modern Judicial Rejection of *Kriegsraison*

More recent international jurisprudence confirms the continuing invalidity and illegality of *kriegsraison*. The post-World War II jurisprudence implicitly rejects *kriegsraison* by affirming that military necessity is limited and that certain proscriptions on the means or methods of warfare may not be overcome—even in the face of a plea of military necessity.

For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) has charged individuals with, and convicted them for, violations of the customary international humanitarian law like torture that admit no exception based on military necessity.⁴⁶ In *Prosecutor v. Furundžija*, a Croatian and a commander of a special unit of the Croatian Defense Council (HVO),⁴⁷ was charged with, *inter alia*, torture for his role in the interrogation of a Bosnian-Muslim woman with alleged connections to the Bosnian Army.⁴⁸ Although the

⁴⁴ *Id.* at 1256.

⁴⁵ *Id.* at 1272–73.

⁴⁶ *See, e.g.*, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgment (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

⁴⁷ *Id.* ¶ 262.

⁴⁸ *Id.* ¶¶ 39–50.

woman may have possessed useful intelligence of military value,⁴⁹ military necessity played no role in the accused's defense⁵⁰ nor in the trial chamber's determination of the accused's guilt. Instead, the trial chamber took pains to explain the scope of international law's prohibition on torture⁵¹ and the international community's "revulsion against torture."⁵² The ICTY's recognition of an absolute prohibition on a method of warfare like torture is an implicit rejection of the doctrine of *kriegsraison*.

The ICTY demonstrated an even clearer rejection of *kriegsraison* in a series of cases addressing attacks directed at civilians and civilian populations. In *Prosecutor v. Blaškić*,⁵³ *Prosecutor v. Kordić & Čerkez*,⁵⁴ and *Prosecutor v. Galić*, the ICTY Trial and Appeals Chambers affirmed the absolute prohibition on directly targeting civilians in the course of an armed conflict,⁵⁵ and specifically rejected the claim that military necessity could overcome that absolute bar. Most precisely, the *Galić* Trial Chamber stated that Article 51(2) of Additional Protocol I⁵⁶—which the Trial Chamber determined to be customary international law⁵⁷—“states in clear language that civilians and the civilian population as such should not be the object of attack. It does not mention any exceptions. In particular, it does not contemplate derogating from this rule by invoking military necessity.”⁵⁸ Moreover, the *Galić* Appeals Chamber specifically rejected a military-necessity-based challenge to the Trial Chamber's pronouncement of an absolute bar to targeting civilians in

⁴⁹ *Id.* ¶ 265.

⁵⁰ *Id.* ¶¶ 47–50.

⁵¹ *Id.* ¶¶ 134–42.

⁵² *Id.* ¶¶ 147–57.

⁵³ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgment, ¶ 109 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

⁵⁴ *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Appeal Judgment, ¶ 54 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

⁵⁵ *Prosecutor v. Galić*, Case No. IT-98-29-T, Trial Judgment, ¶ 44 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003); *Prosecutor v. Galić*, Case No. IT-98-29-A, Appeal Judgment, ¶¶ 129–30 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006); *Blaškić*, Case No. IT-95-14-A, *supra* note 53; *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Appeal Judgment, ¶ 54 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 2004).

⁵⁶ Additional Protocol I, *supra* note 28.

⁵⁷ *Galić*, Case No. IT-98-29-T, *supra* note 55, ¶ 45 (“The Trial Chamber recalls that [Article 51(2) of Additional Protocol I] explicitly confirms the customary rule that civilians must enjoy general protection against the danger arising from hostilities. The prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish at all times between the civilian population and combatants and between civilian objects and military objectives and accordingly to direct their operations only against military objectives.”).

⁵⁸ *Id.* ¶ 44.

upholding the Trial Chamber's determination of General Galić's guilt.⁵⁹ The ICTY's affirmation that military necessity cannot overcome an absolute bar on a specific method of warfare—targeting civilians—is an explicit, modern rejection of *kriegsraison*.

II. DEFENSE OF THE ENHANCED INTERROGATION PROGRAM RELIES ON *KRIEGSRAISON*

Despite international humanitarian law's comprehensive rejection of *kriegsraison* as an excuse for committing unlawful acts, the doctrine figures prominently, if implicitly, in the defense of the United States' enhanced interrogation program since the release of the RDI report. *Kriegsraison*'s role in defending the enhanced interrogation program should not be surprising.⁶⁰ *Kriegsraison* formed part of the defense and justification of the enhanced interrogation program from the very beginning—even before the program itself was contemplated. This section explores the use of *kriegsraison* in the legal and rhetorical justification of the enhanced interrogation program from its inception, and concludes that *kriegsraison* is the crux of defenders' efforts to justify enhanced interrogation.

Kriegsraison was part of the incipient legal justification for the use of enhanced interrogation techniques and tainted the legal analysis for treatment of individuals detained in the course of the armed conflict between the United States, al-Qaeda, and the Taliban. As early as November 2001, when the CIA first began researching potential legal defenses for utilizing interrogation techniques viewed as torture by foreign governments, CIA lawyers drafted a legal memorandum stating that the “CIA could argue that torture was necessary to prevent imminent, significant, physical harm to persons, where there is no other available means to prevent the harm.”⁶¹ In so far as the individuals subject to torture were detained in the course of an armed conflict,

⁵⁹ Galić, Case No. IT-98-29-A, *supra* note 55, ¶¶ 129–30 (“Galić submits that the Trial Chamber erred in finding that the targeting of civilians cannot be justified by military necessity . . . The Appeals Chamber has previously emphasized that ‘there is an absolute prohibition on the targeting of civilians in customary international law’ and that ‘the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity.’ The Trial Chamber was therefore correct to hold that the prohibition of attacks against the civilians and the civilian population ‘does not mention any exceptions [and] does not contemplate derogating from this rule by invoking military necessity.’”).

⁶⁰ *Cf.* Horton, *supra* note 20, at 577–78 (describing the Bush administration's use of “military necessity” to avoid the laws of war as an attempted resurrection of *kriegsraison*).

⁶¹ RDI REPORT, *supra* note 3, at 19 (internal quotations omitted).

this proposed defense invokes *kriegsraison* by allowing military necessity to supersede the law's absolute prohibition on torture.

President George W. Bush's February 2002 memorandum concerning the "Humane Treatment of Taliban and al Qaeda Detainees"⁶² likewise exhibits *kriegsraison*. In that memorandum, the President determined that "none of the provisions of [the 1949 Geneva Conventions] apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because . . . al Qaeda is not a High Contracting Party to Geneva,"⁶³ and that "common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflicts not of an international character.'"⁶⁴ Notwithstanding the memorandum's erroneous conclusion that Common Article 3 does not apply to al-Qaeda or Taliban detainees,⁶⁵ it clearly invokes the logic and language of *kriegsraison*: "[A]s a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, *to the extent . . . consistent with military necessity*, in a manner consistent with the principles of Geneva."⁶⁶ That is, the principles of the Geneva Conventions—not even the conventions themselves—were applicable only subject to the exigencies of military necessity. Interestingly, DCI Tenet also invoked *kriegsraison* in arguing against application of the February 2002 memorandum to the Central Intelligence Agency in a letter to President Bush.⁶⁷

Despite *kriegsraison*'s early presence in the legal analysis intended to authorize the use of "interrogation techniques that were considered torture by foreign governments,"⁶⁸ the Office of the Legal Counsel (OLC) memorandum ultimately did not rely on it to explicitly excuse the use of enhanced

⁶² Memorandum from President George W. Bush on Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002) [hereinafter George W. Bush Memorandum].

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ For an excellent deconstruction of this memorandum, see Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005).

⁶⁶ George W. Bush Memorandum, *supra* note 62 (emphasis added). See also Horton, *supra* note 20, at 576–77.

⁶⁷ S. REP. NO. 113-288, at 20 (2014) (citing an email to President George W. Bush (Feb. 1, 2002, 1:02:12 PM)) ("A letter drafted for DCI Tenet to the president urged that the CIA be exempt from any application of these protections, arguing that application of Geneva would 'significantly hamper the ability of CIA to obtain critical threat information necessary to save American lives' . . . The attorney concluded that, if [the Geneva principles did apply to CIA], 'then the optic becomes how legally defensible is a particular act that probably violates the convention, but ultimately saves lives.'").

⁶⁸ *Id.* at 19.

interrogation techniques on Abu Zubaydah and other detainees. Instead, OLC's legal analysis turned on the absence of specific intent to inflict severe pain or suffering on the part of interrogators, as well as the absence of severe pain and suffering in fact.⁶⁹ OLC's unclassified opinion concerning enhanced interrogation techniques also included a discussion of necessity and self-defense as possible legal defenses for interrogators accused of torture for their use of enhanced interrogation. That said, OLC premised its opinion on the extreme danger of the post-9/11 period and the need for information to prevent attacks and defeat al-Qaeda:

Zubaydah is one of the highest ranking members of the al Qaeda terrorist organization, with which the United States is currently engaged in an international armed conflict following the attacks on the World Trade Center and the Pentagon on September 11, 2001 . . . The interrogation team is certain that he has additional information that he refuses to divulge. Specifically, he is withholding information regarding terrorist networks in the United States or in Saudi Arabia and information regarding plans to conduct attacks within the United States or against our interests overseas . . . Moreover, your intelligence indicates that there is currently a level of "chatter" equal to that which preceded the September 11 attacks. In light of the information you believe Zubaydah has and the high level of threat you believe now exists, you wish to move the interrogations into what you have described as an "increased pressure phase."⁷⁰

Such an argument is the very essence of *kriegsraison*: "[T]he laws of war lose their binding force in case of extreme necessity. Such a case [is] said to arise when violation of the laws of war alone offers either a means of escape from extreme danger or the realisation of the purpose of war—namely, the overpowering of the opponent."⁷¹

The OLC memorandum's premise—that enhanced interrogation techniques were necessary to defeat al-Qaeda and prevent additional attacks—and its implicit adoption of *kriegsraison*, continues to animate the defense of enhanced interrogation techniques in the wake of the release of the RDI report. For example, former Vice President Dick Cheney recently argued that "the techniques that we did, in fact, use . . . gave us the information we needed to be

⁶⁹ Memorandum from Jay S. Bybee, Assistant Att'y Gen. of the Office of Legal Counsel to John Rizzo, Acting Gen. Counsel of the Cent. Intelligence Agency, Interrogation of al-Qaeda Operative 9–17 (Aug. 1, 2002).

⁷⁰ *Id.* at 1.

⁷¹ OPPENHEIM, *supra* note 11, at 232.

able to safeguard the nation against further attacks and to be able to track those guilty for 9/11 did, in fact, work,⁷² and that the United States “did exactly what we needed to be done in order to catch those who were guilty of 9/11 and to prevent a further attack.”⁷³ Likewise, in a sweeping rebuttal of the RDI report, three former CIA Directors and CIA Deputy Directors who oversaw the enhanced interrogation report argued that:

[t]he program was invaluable in three critical ways: It led to the capture of senior al Qaeda operatives, thereby removing them from the battlefield. It led to the disruption of terrorist plots and prevented mass casualty attacks, saving American and Allied lives. It added enormously to what we knew about al Qaeda as an organization and therefore informed our approaches on how best to attack, thwart and degrade it.⁷⁴

John Yoo similarly defends the use of waterboarding on the basis that “[w]e knew little about Al-Qaeda, and intelligence indicated that more attacks were coming, perhaps using weapons of mass destruction.”⁷⁵

These defenders of enhanced interrogation do not appear to proffer the necessity of enhanced interrogation techniques as a legal excuse. Indeed, John Yoo even lauds the RDI report for “mov[ing] the debate beyond legality to effectiveness.”⁷⁶ Instead, defenders assert the legality of the enhanced interrogation program on the basis of opinions provided by the OLC⁷⁷ and the necessity of enhanced interrogation seems to provide a separate rhetorical argument. For example, former Vice President Cheney defended the legality of

⁷² Meet the Press, *Meet the Press Transcript-December 14, 2014*, NBC NEWS (Dec. 14, 2014, 12:16 PM) [hereinafter *Meet the Press*] (emphasis added), <http://www.nbcnews.com/meet-the-press/meet-press-transcript-december-14-2014-n268181> (interview with former Vice President Dick Cheney).

⁷³ *Id.*

⁷⁴ Tenet, Goss, Hayden et al., *supra* note 1.

⁷⁵ Yoo, *supra* note 1. The architect of the enhanced interrogation program, James Mitchell, explained the context surrounding the authorization to waterboard Abu Zubaydah as: “It was clear that there was a second wave coming. There was [sic] all these fears about nuclear devices and anthrax and, you know, multiple people dying and a catastrophic thing, and there was all this pressure not just from the CIA but from Washington and everywhere. They were saying the gloves are off, you know, we have to take extraordinary measures, that sort of stuff.” *CIA Interrogation Architect Reacts To Senate Report*, FOX NEWS (Aug. 30, 2015, 4:49 PM), <http://www.foxnews.com/transcript/2014/12/16/cia-interrogation-architect-reacts-to-senate-report/> (emphasis added). Mitchell further assessed that the enhanced interrogation program saved lives: “I’m proud of the work we did. We saved lives. They told us we did a good job, they told us we saved lives, and I believe that we did.” *Man Who Waterboarded 9/11 Mastermind: ‘If It Was Torture, I Would Be In Jail,’* FOX NEWS (Aug. 30, 2015, 4:48 PM), <http://www.foxnews.com/transcript/2014/12/17/man-who-waterboarded-11-master-mind-if-it-was-torture-would-be-in-jail/>.

⁷⁶ Yoo, *supra* note 1.

⁷⁷ See generally *Meet the Press*, *supra* note 72.

the enhanced interrogation program by pointing to opinions offered by the OLC:

[W]e went specifically to [the Office of Legal Counsel] because we did not want to cross that line into where we violating some international agreement that we'd signed up to. They specifically authorized and okayed, for example, exactly what we did. All of the techniques that were authorized by the president were, in effect, blessed by the Justice Department opinion that we could go forward with those without, in fact, committing torture.⁷⁸

Similarly, after the RDI report's release, John Yoo argued that:

[a]ttorneys in the Bush Justice Department, including me, reviewed whether the CIA's proposed interrogation of Abu Zubaydah, an Al Qaeda planner captured in March 2002 in Pakistan, met that law . . . Three reasons persuaded us to approve waterboarding. First, Al Qaeda terrorists were not POWs under the Geneva Conventions, because they fought for no nation and flouted the laws of war by killing civilians and beheading prisoners (such as Daniel Pearl). Second, the U.S. armed forces had used it in training tens of thousands of officers and soldiers, without any physical injury or long-term mental harm. Finally, the United States had suffered the deaths of 3,000 civilians and billions of dollars in damage; we knew little about Al Qaeda, and intelligence indicated that more attacks were coming, perhaps using weapons of mass destruction.⁷⁹

Despite defenders' apparent rhetorical reliance on necessity, for the use of enhanced interrogation techniques to be lawful under international humanitarian law (IHL), the techniques must be both militarily necessary and otherwise lawful.⁸⁰ Thus, while defenders' necessity argument appears to be merely rhetorical it must be performing legal work for them, too. They must claim that (1) enhanced interrogation techniques are lawful; and (2) that enhanced interrogation techniques are indispensable to achieving the submission of al-Qaeda. But if defenders are wrong about the lawfulness of enhanced interrogation techniques in the first instance, then the potentially lawful use of enhanced interrogation techniques becomes either plainly illegal or salvageable only under the guise of a resurrected doctrine of *kriegsraison*.

⁷⁸ *Id.*

⁷⁹ Yoo, *supra* note 1.

⁸⁰ *Cf.* BOVARNICK ET AL., *supra* note 17, at 129.

In fact, defenders of the enhanced interrogation program are wrong about the lawfulness of the program. What defenders do not acknowledge in their public comments is that OLC opinions authorizing the enhanced interrogation program—premised on the notion that the Geneva Conventions, including Common Article 3, do not apply to members of al-Qaeda or the Taliban—have been found to be invalid as a matter of Constitutional law,⁸¹ have been withdrawn by the OLC,⁸² and resulted in a Department of Justice Office of Professional Responsibility determination that their authors perpetrated professional misconduct in providing such opinions.⁸³ Thus, defenders are left either with no valid legal argument justifying enhanced interrogation or an argument that the military necessity of enhanced interrogation overrides its illegality.

The importance of military necessity to the defense of enhanced interrogation techniques elucidates defenders' emphasis on the effectiveness of enhanced interrogation techniques. Were the enhanced interrogation techniques not effective, then defenders could not establish that they were necessary.⁸⁴ Instead, the discomfort or pain—physical or psychological—

⁸¹ Hamdan v. Rumsfeld, 548 U.S. 557, 629–30 (2006).

⁸² Memorandum for James B. Comey, Deputy Att'y Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, at 2 (Dec. 30, 2004) (“We decided to withdraw the August 2002 Memorandum This memorandum supersedes the August 2002 Memorandum in its entirety.”). Although the December 30, 2004 memorandum concluded that use of the waterboard and other enhanced interrogation techniques do not violate the U.S. torture statute, 18 U.S.C. §§ 2340-2340A, tellingly, it expressly did not consider whether such techniques violate “the Geneva Conventions; the Uniform Code of Military Justice []; the Military Extraterritorial Jurisdiction Act []; and the War Crimes Act.” *Id.* at 2 n.6. “There is no exception under the statute permitting torture to be used for a ‘good reason.’ Thus, a defendant’s motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute.” *Id.* at 17. See also John P. Mudd, Memorandum for the Record, Meeting with National Security Adviser Rice in the White House Situation Room (2004); Daniel B. Levin, Letter to John A. Rizzo Concerning Use of the Waterboard (Aug. 6, 2004) (imposing new limits on the use of the waterboard to conform with OLC’s revised view of the lawfulness of the technique).

⁸³ OFFICE OF PROF’L RESPONSIBILITY, DEP’T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 11 (July 29, 2009). The “professional misconduct” determination was subsequently downgraded to a “poor judgment” determination. Memorandum from David Margolis, Assoc. Deputy Att’y Gen., Dep’t of Justice, Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists 2 (Jan. 5, 2010). For a critique of the reasoning behind the subsequent change in the sanction, see James Fallows, *The OPR Report: This Era’s ‘Hiroshima,’* ATLANTIC (Feb. 21, 2010), <http://www.theatlantic.com/politics/archive/2010/02/the-opr-report-this-eras-hiroshima/36313/>.

⁸⁴ Indeed, the absence of effect undermined Lieutenant Heinz Eck’s proffered defense of military necessity in *The Peleus Trial*. See *The Peleus Trial*, in 1 UNITED NATIONS WAR CRIMES COMMISSION LAW

inflicted on detainees subject to enhanced interrogation techniques would be merely wanton. It is imperative that defenders of the program contest the Senate Select Committee on Intelligence's conclusion that enhanced interrogation was ineffective. Thus, former CIA Directors and Deputy Directors who defend the enhanced interrogation report emphasize:

Once they had become compliant due to the interrogation program, both Abu Zubaydah and KSM turned out to be invaluable sources on the al Qaeda organization. We went back to them multiple times to gain insight into the group. More than one quarter of the nearly 1,700 footnotes in the highly regarded 9/11 Commission Report in 2004 and a significant share of the intelligence in the 2007 National Intelligence Estimate on al Qaeda came from detainees in the program, in particular Zubaydah and KSM.⁸⁵

It is also why defenders of the program ignore the Committee's conclusion that at least two dozen of the individuals subject to enhanced interrogation were totally innocent and, as a result, subject to totally unnecessary and useless torture.⁸⁶

Even if enhanced interrogation were effective, defenders of the program are unable to satisfy the lawful parameters of military necessity because the program relied on techniques, such as waterboarding, that clearly violate the laws of war. The goals articulated by defenders of the use of enhanced interrogation techniques—preventing further attacks by al-Qaeda, removing al-Qaeda leaders from the battlefield, and acquiring critical information on the

REPORTS OF WAR CRIMINALS 1, 15–16, ¶ 2(iii) (Brit. Mil. Ct. 1947). On March 13-14, 1944, Eck's U-boat sank the *Peleus*, an allied steamship, in the Atlantic and Eck subsequently ordered the surviving crew to be killed while in the water. *Id.* at 3, ¶ 4 ("Eck . . . ordered the shooting and the throwing of hand grenades at the rafts and the floating wreckage.") Eck was charged with violating the laws of war for ordering the murder of the surviving crew. *Id.* at 2, ¶ 2. He claimed that "the elimination of the traces of the 'Peleus' was operationally necessary in order to save the U-boat." *Id.* at 4, ¶ 5. According to Eck, "he had heard of cases where the loss of the U-boat had actually been caused by the presence of survivors . . . He thought that the rafts were a danger to him, first because they would show aeroplanes the exact spot of the sinking, and secondly because rafts at that time of the war . . . could be provided with modern signalling communications." *Id.* at 4–5, ¶ 6. The *Peleus* court rejected Eck's justification, noting that "[t]he firing went on for about five hours." *Id.* at 5, ¶ 6. Thus, rather than make way from the location of the sinking, for five hours the U-boat remained surfaced and in the vicinity of the sinking, at clear risk of being spotted and attacked. *Id.* The court did not have occasion to address the question of whether military necessity could overcome the laws of war—in this case, killing the surviving crew of the *Peleus*—because the killing of the crew was not effective. *Id.* at 5, ¶ 2(iii)).

⁸⁵ Tenet, Goss, Hayden et al., *supra* note 1.

⁸⁶ In response to this point, former Vice President Cheney stated, "I have no problem as long as we achieve our objective. And our objective is to get the guys who did 9/11 and it is to avoid another attack against the United States." Meet the Press, *supra* note 72.

organization itself—fit squarely within those measures which are indispensable for securing the complete submission of the enemy as quickly as possible. But waterboarding individuals detained in the course of an armed conflict is *per se* unlawful because it constitutes torture. As such, it cannot be saved by lawful military necessity, which is self-limited to measures that are otherwise lawful.⁸⁷ Instead, only an unlawful military necessity reconceived as excusing violations of the laws of war—*kriegsraison*—could provide defenders of the enhanced interrogation program with safe harbor.

CONCLUSION

Kriegsraison is a pernicious, lawless doctrine that holds within it the potential to eviscerate the laws of war and give life to Cicero's maxim, "[I]nter arma enim silent leges." By elevating the subjective determination of military necessity above all other considerations, *kriegsraison* excuses all the means, methods, and behaviors that international humanitarian law seeks to limit or prohibit. As Elihu Root said more than a century ago, "[e]ither the doctrine of *kriegsraison* must be abandoned definitely and finally, or there is an end of international law, and in its place will be left a world without law."⁸⁸ It is for precisely those reasons that *kriegsraison* has never been widely accepted; that IHL has soundly rejected it since World War II; and that the concept itself carries such a stigma.

But *kriegsraison*'s logic is also compelling—why should a state not be able to do everything it believes is necessary to defeat its enemies, regardless of what is prohibited by the law? Such is the Clausewitzian perspective on war⁸⁹

⁸⁷ It is important to highlight here that many defenders of the program do not conclude themselves that waterboarding is legal. Instead, they point to determinations by the Attorney General and the U.S. Department of Justice that enhanced interrogation was "consistent with U.S. policy, law and our treaty obligations." Tenet, Goss, Hayden et al., *supra* note 1; Meet the Press, *supra* note 72 ("Definitions, and one that was provided by the Office of Legal Counsel, we went specifically to them because we did not want to cross that line into where we violating some international agreement that we'd signed up to. They specifically authorized and okayed, for example, exactly what we did. All of the techniques that were authorized by the president were, in effect, blessed by the Justice Department opinion that we could go forward with those without, in fact, committing torture."). Those who do address the legality often assert that torture was carefully avoided, *see, e.g.*, Meet the Press, *supra* note 72 (former Vice President Dick Cheney argued, "[w]e were very careful to stop short of torture"), or that what was authorized came up against the line of legality. Whatever the merits of this legal hand-washing on the part of those responsible for implementing enhanced interrogation techniques, the conclusion that waterboarding was lawful is incorrect *as a matter of law*.

⁸⁸ Elihu Root, Opening Address at the Fifteenth Annual Meeting of the American Society of International Law (Apr. 27, 1921), in 15 AM. SOC'Y. INT'L. L. PROC. 1, 3 (1921).

⁸⁹ *See generally* KARL VON CLAUSEWITZ, ON WAR 3–5 (O.J. Matthijs Jolles trans., 1943); Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV.

and its rejoinders multifarious. IHL exists to protect persons caught up in an armed conflict and reduce unnecessary suffering. IHL compliance ensures effective military operations.⁹⁰ Failure to adhere to IHL may undermine good order and discipline, reducing the effectiveness of a fighting force.⁹¹ Failure to adhere to IHL may undermine mission success, as well.⁹² Finally, IHL compliance protects the fighting force from moral injury.⁹³

The enhanced interrogation program has yielded numerous examples bearing out the negative results of *kriegsraison*. The breakdown in good order and discipline is evident in the use of horrific interrogation techniques beyond even those that were authorized and erroneously viewed as lawful at the time.⁹⁴ Enhanced interrogation techniques have undermined our efforts to defeat al-Qaeda, the Taliban, and associated forces.⁹⁵ And, of course, at least twenty-six

INT'L L.J. 49, 63–64 (1994) (“What leader would allow his country to be destroyed because of international law?”) (quoting German Chancellor von Bismark).

⁹⁰ Stephen W. Preston, *Foreword to LAW OF WAR MANUAL*, *supra* note 10, at ii (“Similarly, the law of war’s prohibitions on torture and unnecessary destruction are consistent with the practical insight that such actions ultimately frustrate rather than accomplish the mission.”). *See also* LAW OF WAR MANUAL, *supra* note 10, at 1055–56.

⁹¹ LAW OF WAR MANUAL, *supra* note 10, at 1055–56; BLANK & NOONE, *supra* note 15, at 10.

⁹² LAW OF WAR MANUAL, *supra* note 10, at 1055–56; BLANK & NOONE, *supra* note 15, at 11.

⁹³ *E.g.*, TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 40–41 (1970) (“[An] even more important basis of the laws of war is that they are necessary to diminish the corrosive effect of mortal combat on the participants. War does not confer a license to kill for personal reasons—to gratify perverse impulses, or to put out of the way anyone who appears obnoxious, or to whose welfare the soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of the state; it does not countenance the infliction of suffering for its own sake or for revenge. Unless troops are trained and required to draw the distinction between military and nonmilitary killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense for that distinction for the rest of their lives. The consequence would be that many returning soldiers would be potential murderers.”).

⁹⁴ *E.g.*, Yoo, *supra* note 1 (“If some CIA interrogators went beyond these methods, they would not have received Justice Department approval; they could have been disciplined, even prosecuted.”). The RDI Report details various interrogation techniques employed that went beyond those that were authorized by the Justice Department. RDI REPORT, *supra* note 3, at xxi.

⁹⁵ President Barack Obama, Remarks by the President on National Security, Washington, D.C. (May 21, 2009), https://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (“I know some have argued that brutal methods like waterboarding were necessary to keep us safe. I could not disagree more. As Commander-in-Chief, I see the intelligence. I bear the responsibility for keeping this country safe. And I categorically reject the assertion that these are the most effective means of interrogation . . . What’s more, they undermine the rule of law. They alienate us in the world. They serve as a recruitment tool for terrorists, and increase the will of our enemies to fight us, while decreasing the will of others to work with America. They risk the lives of our troops by making it less likely that others will surrender to them in battle, and more likely that Americans will be mistreated if they are captured. In short, they did not advance our war and counterterrorism efforts—they undermined them, and that is why I ended them once and for all.”).

of those individuals detained by the CIA, some of whom were subject to EITs—including one who died due to his treatment—were innocent.⁹⁶

Appropriately labeling the argument invoked by defenders of the enhanced interrogation program as *kriegsraison* should give the program's defenders pause. It should spur them to reconsider their argument, consider its provenance, and consider the reasons for its universal rejection since World War II. Even if the mere label *kriegsraison* is not sufficient to shame the program's defenders into reconsideration, the fact that the logic of *kriegsraison* led the United States to employ techniques—e.g., waterboarding—after 9/11 that it had determined to be illegal a century earlier should be. In either event, we should never have reached a debate over whether torture was an effective means of warfare—and we should cease entertaining that argument immediately—continuing to do so perpetuates an assault on the rule of law generally and on international humanitarian law specifically.

⁹⁶ RDI REPORT, *supra* note 3, at xxi. This is not to suggest that guilt would justify the use of enhanced interrogation techniques any more than military necessity does.