



**SAINT LOUIS UNIVERSITY SCHOOL OF LAW**  
Legal Studies Research Paper Series

No. 2015-3

Report on USA  
TRANSNATIONAL INQUIRIES AND THE PROTECTION OF FUNDAMENTAL  
RIGHTS IN CRIMINAL PROCEEDINGS

Stephen C. Thaman

Stefano Ruggeri  
Editor

# Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings

A Study in Memory of Vittorio Grevi  
and Giovanni Tranchina

 Springer

*Editor*  
Stefano Ruggeri  
Department of Public Law "T. Martines"  
University of Messina  
Messina  
Italy

ISBN 978-3-642-32011-8                      ISBN 978-3-642-32012-5 (eBook)  
DOI 10.1007/978-3-642-32012-5  
Springer Heidelberg New York Dordrecht London

Library of Congress Control Number: 2012955485

© Springer-Verlag Berlin Heidelberg 2013

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed. Exempted from this legal reservation are brief excerpts in connection with reviews or scholarly analysis or material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work. Duplication of this publication or parts thereof is permitted only under the provisions of the Copyright Law of the Publisher's location, in its current version, and permission for use must always be obtained from Springer. Permissions for use may be obtained through RightsLink at the Copyright Clearance Center. Violations are liable to prosecution under the respective Copyright Law.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

While the advice and information in this book are believed to be true and accurate at the date of publication, neither the authors nor the editors nor the publisher can accept any legal responsibility for any errors or omissions that may be made. The publisher makes no warranty, express or implied, with respect to the material contained herein.

Printed on acid-free paper

Springer is part of Springer Science+Business Media ([www.springer.com](http://www.springer.com))

# Report on USA

Stephen C. Thaman

## Contents

1	Introduction .....	510
2	Cross-Border Investigations and Human Rights .....	511
2.1	Investigations of Foreign Governments in the US .....	511
3	Investigations Conducted by US Officials Abroad .....	513
3.1	Detention of Suspects Abroad .....	513
3.2	Interrogations .....	516
3.3	Conducting Searches Abroad .....	518
3.4	Interception of Confidential Communications Abroad .....	519
3.5	Depositions of Witnesses Abroad .....	520
4	Admissibility of Evidence Gathered Abroad in US Courts .....	522
4.1	Effect of Unlawful Detentions on Admissibility of Evidence .....	522
4.2	Admissibility of Evidence Resulting from Illegal Interrogations .....	523
4.3	Admissibility of Evidence Resulting from Illegal Searches .....	524
4.4	Admissibility of Evidence Resulting from Illegal Wiretaps .....	525
4.5	Admissibility of Evidence Gathered in Violation of the Right to Confrontation ...	526
5	Cooperation with International Tribunals and Human Rights .....	528
5.1	The <i>Ad Hoc</i> Tribunals .....	528
5.2	The International Criminal Court .....	528
	References .....	529

**Abstract** This chapter in the book on transnational inquiries and the protection of fundamental rights in criminal proceedings takes into account the particular, and perhaps unique situation in the United States (US) following the terrorist attacks on 11 September 2001. It explores the laws regulating inquiries by foreign

---

The author would like to acknowledge the invaluable help of his research assistant, Saint Louis University J.D. candidate, Joshua Walker, in the preparation of this report.

S.C. Thaman (✉)

School of Law, Saint Louis University, 3700 Lindell Boulevard, St. Louis, MO, USA

e-mail: thamansc@slu.edu

governments who seek evidence in the US to use in criminal proceedings overseas, but primarily the protections recognized by US statutes and jurisprudence when US officials gather evidence abroad. In this respect, the chapter focuses on protections during interrogations, searches, interceptions of confidential communications, and examinations of witnesses and explores when the protection differs, depending on whether the target of the investigative measure is a US-, or non US-citizen, or whether the investigating officials are part of the criminal justice apparatus or belong to the military or the intelligence community. Finally, the chapter explores the admissibility of evidence gathered in the same areas, depending on whether it is used in the normal civilian criminal courts, or in the newly constituted military commissions instituted for trial of foreigners accused of international terrorism.

## Abbreviations

AG	Attorney General
ASPA	American Service-Members' Protection Act
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIA	Central Intelligence Agency
CIPA	Classified Information Protection Act
Const.	Constitution
CSRT	Combatant Status Review Tribunal
DOD	Department of Defense
DOJ	Department of Justice
DTA	Detention Treatment Act 2005
FBI	Federal Bureau of Investigation
FISA	Foreign Intelligence Surveillance Act
FRCrimP	Federal Rules of Criminal Procedure
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
KSM	Khalid Sheikh Mohammed
MLAT	Mutual Legal Assistance Treaty
NATO	North Atlantic Treaty Organization
USC	United States Code
USSC	United States Supreme Court

## 1 Introduction

Since the terrorist acts of 11 September 2001 (hereafter 9–11) there have been radical changes in the way evidence is gathered by US officials overseas. During the administration of George W. Bush, government officials sought to justify brutal and

illegal methods, such as kidnapping or “extraordinary rendition,” indefinite *incommunicado* detention and the use of torture and cruel, inhuman and degrading treatment, which would otherwise be impermissible in a normal criminal prosecution. Because evidence derived from such practices would not be admissible in a normal trial, the US set up a parallel system of military commissions to deal with those detained in the “war on terror” in which evidence tainted by illegal practices would have a better chance not only of being admitted, but also of being accepted by the triers of fact, who would be military officers in lieu of citizen jurors, and would decide by majority vote, rather than unanimous verdict. At risk are the very foundations of the American notions of due process in both the pre-trial treatment of criminal suspects and in the process of ascertaining guilt and imposing punishment.

Today, we find two sets of rules, two types of courts, and two types of accuseds: one for the normal criminal defendant and the other for the “enemy combatant.” In the US, criminal defendants enjoy a presumption of release pending trial.<sup>1</sup> The Sixth Amendment to the US Const. guarantees them the right to a speedy, public trial by jury and the right to confront and cross-examine the witnesses against them. The Fifth Amendment to the constitution and due process prevent the use of confessions which were given involuntarily, or without knowledge of the privilege against self-incrimination and the right to counsel. “Enemy combatants,” on the other hand, as will be seen below, are deprived of many of these rights.

In this country report, I will discuss the differing rules that apply for overseas investigations, depending on whether the investigation is conducted by federal law enforcement officials, or army or CIA officials, and I will discuss the admissibility of evidence gathered, both in the context of a normal criminal trial in the federal courts, and before a military commission.

## **2 Cross-Border Investigations and Human Rights**

### ***2.1 Investigations of Foreign Governments in the US***

#### **2.1.1 Letters Rogatory and Their Enforcement**

Federal courts have the inherent power to issue letters rogatory. The relevant statute is 28 USC § 1782, which provides, in pertinent part:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request

---

<sup>1</sup> 18 USC §3142(b), provides that a judicial officer “shall” release a person before trial, unless certain factors require coercive measures.

made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court (. . .) The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

Letters rogatory may be issued in situations where ordinary means of discovery under Rule 15 FRCP fail.<sup>2</sup> According to the USSC, an "interested person," could refer not only to "litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance."<sup>3</sup> The term "tribunal" in the statute does not include private arbitrations,<sup>4</sup> but otherwise includes "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."<sup>5</sup> Letters rogatory may be issued even if a criminal case has not yet been charged, as long as the initiation of criminal proceedings "be within reasonable contemplation."<sup>6</sup>

Furthermore, a court may issue a letter rogatory related to a proceeding in a foreign court even when the information sought would not be discoverable under the same circumstances in a US domestic criminal proceeding and even when the country requesting the letter rogatory would not allow discovery under the same circumstances in its own courts.<sup>7</sup> This approach is in line with the policy reasons behind letters rogatory of assisting foreign litigation in order to encourage reciprocal behavior on the part of foreign courts and of promoting judicial economy in international litigation.<sup>8</sup>

In exercising their discretion on whether to issue a letter rogatory, courts must take a number of factors into consideration: (1) Is the person from whom discovery is sought a participant in the foreign proceeding? (2) What is the nature of the foreign tribunal? (3) What is the character of the proceedings underway? (4) What is the receptivity of the foreign tribunal to US federal court assistance? (5) Does the discovery request seek to circumvent restrictions or policies of the foreign government or the US? (6) Is the discovery request unduly burdensome or intrusive?<sup>9</sup>

---

<sup>2</sup> *United States v. Jefferson*, 594 F. Supp. 2d 655 (E.D. Va. 2009).

<sup>3</sup> *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 257 (2004).

<sup>4</sup> *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).

<sup>5</sup> *USSC, Intel Corp. v. Advanced Micro Devices* (footnote 3), 258

<sup>6</sup> *Ibid.*, 259.

<sup>7</sup> *Ibid.*, 262.

<sup>8</sup> *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1102 (2nd Cir. 1995).

<sup>9</sup> *Intel Corp. v. Advanced Micro Devices* (footnote 3), 264, 265.

### 2.1.2 Mutual Legal Assistance Treaties

MLATs provide an alternative framework for judicial assistance than that established by 28 USC § 1782 and subsequent case law. The US is party to dozens of MLATs, most of these being bilateral treaties. Several MLATs govern judicial assistance with supranational organizations. Such supranational organizations include the European Union, Europol and Eurojust.<sup>10</sup> MLATs provide a broad range of cooperation measures between the US and foreign countries in criminal matters, including the taking of testimony or statements from witnesses, obtaining documents, records, and evidence, serving legal documents, locating or identifying persons, executing requests for searches and seizures, and providing assistance related to the forfeiture of the proceeds of crime and collecting fines imposed as a sentence in a criminal prosecution.<sup>11</sup>

## 3 Investigations Conducted by US Officials Abroad

### 3.1 *Detention of Suspects Abroad*

#### 3.1.1 Arrest and Pre-trial Detention of Suspected Criminals

The Fourth Amendment of the US Const.<sup>12</sup> requires probable cause that a person has committed a crime, before any arrest is possible. An arrested person must be brought before a judge as soon as is practicable, but in no case later than 48 hours from the time of arrest.<sup>13</sup> The prosecutor may request that a person charged with certain serious felonies be detained pretrial,<sup>14</sup> or a person may be detained due to an inability to post bail. However, the length of detention is strictly limited by the right to a speedy trial guaranteed by the Sixth Amendment and by the federal speedy trial statute, which requires that trial start no later than 100 to 130 days after arrest unless a judge makes a reasoned decision to grant an extension based in the interests of justice.<sup>15</sup>

---

<sup>10</sup> See U.S. Dep't of State, *Treaties in Force* 86, 87, 88 (2010), <http://www.state.gov/s/l/treaty/tif/index.htm>.

<sup>11</sup> *United States v. Atiyeh*, 402 F.3d 354, 363 (3rd Cir. 2005).

<sup>12</sup> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

<sup>13</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991).

<sup>14</sup> 18 USC § 3142(f)(1).

<sup>15</sup> 18 USC §§ 3161(b,c); 3161(h)(8)(A).



### The Detention of “Enemy Combatants”

On 18 September 2001, Congress gave the President the authority to “utilize all necessary and adequate force against the nations, organizations or persons who, in his opinion, planned, committed or aided the terrorist attacks which took place on September 11<sup>th</sup>, or against those who gave them refuge to prevent future acts of international terrorism against the United States by these nations, organizations and persons.”<sup>16</sup>

On 13 November 2001, President Bush issued a decree authorizing the detention of persons whom the president identified as “enemy combatants” and their prosecution by military commissions.<sup>17</sup> After the invasion of Afghanistan large numbers of prisoners were transported to the US naval base at Guantánamo Bay in Cuba, which began to function as an internment camp. Other more high-level prisoners, such as the alleged mastermind of the 9–11 attacks, Khalid Sheikh Mohammed (hereafter KSM) were kept in secret “black sites” in the Middle East and elsewhere. The Bush Administration denied the internees prisoner of war status under the Geneva Conventions<sup>18</sup> and used this *as* pretext to subject them to severe methods of interrogation. The government also maintained, given that Guantánamo was not located on US territory, that the prisoners were not entitled to the benefits of the writ of *habeas corpus* to question the legality of their detention.<sup>19</sup>

The strategy of the Bush administration to find a detention center where neither international nor American law would apply, was rebuffed by the USSC. In *Rasul v. Bush*, the USSC rejected the argument, that the federal courts do not have jurisdiction over foreigners held at Guantánamo and interpreted the *habeas corpus* statute to bestow upon them the right to seek review of their detention status in the federal courts.<sup>20</sup> Immediately following this decision, the DOD established two types of courts to decide the legality of the Guantánamo detentions: (1) “combatant status review tribunals” (CSRT) would decide if the detainees are, in fact, enemy combatants and (2) military commissions would judge those accused of terrorist crimes, such as aiding Al Qaeda.

The USSC found, however, that the procedures before the CSRT violated the prisoners’ rights to confront the charges, inasmuch as there was no right to counsel and there were no limits on the admission of hearsay testimony and the opportunity to question witnesses was “more theoretical than real.” It also held that the appeal provisions again violated the right to petition in *habeas corpus* before the federal district courts.<sup>21</sup>

<sup>16</sup> § 2, Pub. Law 107–140, 115 Stat. 224 (18 September 2001).

<sup>17</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (13 November 2001), 66 Fed. Reg. 57833.

<sup>18</sup> Abrams (2008), 630.

<sup>19</sup> Art. I, § 9 US Const. provides that: “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”

<sup>20</sup> *Rasul v. Bush*, 542 U.S. 466, 483–484 (2004).

<sup>21</sup> *Boumediene v. Bush*, 553 U.S. 723, 771, 789–792 (2008).

The USSC also held that the Military Commissions Act of 2006, regulating trial before the new courts, violated the Geneva Conventions and due process, because it did not provide a defendant the safeguards one has before a normal military court martial in the US.<sup>22</sup> Immediately after being elected, President Obama announced that he would close the detention center at Guantánamo, but he also declared that he had the power to detain alleged terrorists indefinitely in other countries and that he would maintain prisons in Afghanistan to use for this purpose.<sup>23</sup> Since then, however, Congress has stifled this attempt by passing legislation preventing the transfer of any of the Guantánamo detainees to prisons on US soil except to stand trial.<sup>24</sup>

### Kidnapping and Extraordinary Rendition

In order to avoid the restrictions on torture by US officials, the CIA has, since 1996, engaged in the practice of “extraordinary rendition,” that is, transporting prisoners captured overseas to “black sites” in the Middle East and elsewhere, so they could be subjected to torture or cruel, inhuman or degrading treatment while interrogated by foreign officials.<sup>25</sup>

Already in 1886, the USSC held that the fact that a US citizen is kidnapped overseas in order to be brought to trial in the US does not violate due process or prevent a trial from going forward.<sup>26</sup> More recently, the USSC held that the kidnapping of a Mexican citizen in Mexico, and his forced transport to the US, did not prevent his standing trial for murder of a US drug enforcement officer even if the abduction violated the US-Mexico extradition treaty.<sup>27</sup>

Although Art. VI, US Const., expressly gives treaties status as the “law of the land,” the US courts have authorized Congress to, if necessary, enact laws which contravene customary international law.<sup>28</sup> As early as 1989, the Office of Legal Counsel of the US DOJ, issued an opinion, claiming it does not violate the Fourth Amendment for the US FBI to investigate and arrest criminal suspects overseas even if it violates customary international law.<sup>29</sup>

In the few cases of “extraordinary rendition” that have made it to the US courts, it has been difficult for the victims to prevail in their suits against the government due to the doctrine of “official secrets.” Thus, a civil suit by Khalid el-Masri,

---

<sup>22</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 615–624 (2006).

<sup>23</sup> *Savage* (2009), A20.

<sup>24</sup> *Mayer* (2010), 60.

<sup>25</sup> Since 9–11, the C.I.A. has transported from 100 to 150 alleged terrorists between countries, especially in the Middle East. See Jehl and Johnston (2005).

<sup>26</sup> *Ker v. Illinois*, 119 U.S. 436, 444–445 (1886).

<sup>27</sup> *United States v. Alvarez-Machain*, 504 U.S. 655, 669–670 (1992).

<sup>28</sup> *United States v. Yousef*, 327 F.3d 56, 86 (2nd Cir. 2003).

<sup>29</sup> O.L.C., D.O.J. Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities (21 June 1989).

a German citizen of Lebanese descent who was detained in Macedonia, turned over to the CIA, and then sent to a “black site” in Afghanistan, where he alleged he was tortured, was prevented from suing the CIA and private companies because the government claimed it would have to reveal classified information relating to the program of rendition which would compromise national security.<sup>30</sup>

## 3.2 Interrogations

### 3.2.1 Rules If Conducted by US Law Enforcement Officials (or with their Cooperation)

In normal criminal investigations, American courts use two tests to ascertain the constitutionality of a police interrogation: the test developed in the landmark decision of *Miranda v. Arizona*, which applies only to suspects who are in police custody and requires police, before interrogating, to advise the suspect of the right to silence, the right to counsel, and the right to court-appointed counsel if indigent,<sup>31</sup> and the “voluntariness” test, which applies to all interrogations, even those which are conducted after a suspect is properly advised of his rights under the *Miranda* decision.

An important exception to the rules articulated in the *Miranda* case was carved out when the USSC allowed interrogators to withhold giving the warnings if there were an issue of public safety, such as finding a dangerous weapon.<sup>32</sup> On 21 October 2010, the FBI issued a memorandum, advising its officers to intensively interrogate terrorism suspects under the “public safety” exception, about any possible plots or dangers before advising them of their rights under *Miranda*.<sup>33</sup>

Confessions obtained by torture and other methods designed to undermine the free will of the suspect have always been prohibited in the US under the “voluntariness” test.<sup>34</sup> The US ratified the CAT in November of 1994.

If an interrogation is conducted abroad by US officials, or by foreign officials in a “joint venture,” in which US officials play a substantial role, then US rules apply to the extent practicable. Courts have, however, said that the *Miranda* warnings may be modified due to the possibility that the government will have difficulty overseas in obtaining counsel for prisoners.<sup>35</sup>

<sup>30</sup> *El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2007).

<sup>31</sup> *Miranda v. Arizona*, 384 U.S. 436, 467–468 (1966).

<sup>32</sup> *New York v. Quarles*, 467 U.S. 649, 655–656 (1984).

<sup>33</sup> Savage (2011), A14.

<sup>34</sup> *Brown v. Mississippi*, 297 U.S. 278, 286–287 (1936).

<sup>35</sup> *In re Terrorist bombings of U.S. Embassies in East Africa*, 552 F.3d 177, 198–199 (2d Cir. 2008).

Finally, the Fifth Amendment right against self-incrimination does not prevent US officials from compelling a citizen under oath in an extradition proceeding to make statements that might open him up to criminal liability in the country seeking his extradition.<sup>36</sup>

### 3.2.2 Rules If Conducted by Military Officials or the CIA

Before 9–11, the US military used deception, tricks, and certain types of threats during interrogation of prisoners, which might have violated the due process test of “voluntariness” and the fruits of which would not have been admissible in a normal criminal trial. But the U.S. military has never officially allowed techniques that would violate the CAT.

But after 9–11, the official attitude changed. After the publication of photographs of the sadistic acts of torture and humiliation performed by US soldiers in the Iraqi prison of Abu Ghraib, it was revealed that lawyers in the White House and DOJ had written memoranda, maintaining that the President has the right to use “enhanced interrogation methods” in the exercise of his emergency powers during wartime. They maintained that, for a technique to amount to “torture,” it would have to inflict physical pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” For purely mental pain or suffering to amount to torture, it would have to “last for months or even years.”<sup>37</sup>

The DOD permitted so-called “Category II” techniques, which included the use of stress positions, false information and documents, isolation of up to 30 days, interrogations which lasted up to 20 hours, stimulus deprivation, the use of hooding, forced nudity, cutting the hair and beards of Muslim detainees, the exploitation of phobias and scaring the prisoners with dogs. However, only with the permission of Secretary of Defense Donald Rumsfeld, could the interrogators resort to more intensive “Category III” techniques, such as exposure to cold and water, the use of a wet towel to provoke a false perception of asphyxiation (“waterboarding”)<sup>38</sup> and the use of physical contact which did not cause injuries.<sup>39</sup>

Congress finally responded to the outrage caused by the torture memos and specifically prohibited the use of torture and cruel, inhuman or degrading methods in the 2005 DTA.<sup>40</sup> Upon taking office, President Barack Obama decreed that all

---

<sup>36</sup> United States v. Balsys, 524 U.S. 666, 673 (1998).

<sup>37</sup> Bybee memorandum, 1 August 2002 (main author, John Yoo). In: Abrams (2008), 460.

<sup>38</sup> Water boarding was used more than 183 times against KSM. Mayer (2010), 58.

<sup>39</sup> US DOD, Legal Brief on Proposed Counter-Resistance Strategies (Oct. 11, 2002). Abrams (2008), 461.

<sup>40</sup> 42 USC § 2000dd. The DTA defines “cruel, inhuman or degrading treatment” as that prohibited by the Fifth, Eighth and Fourteenth Amendments, thus referring back to the “involuntariness” test discussed above.

interrogations in the war on terror would, in the future, abide by the US Army Field Manual on Interrogation,<sup>41</sup> which, in its 2006 revision, clearly prohibits cruel, inhuman and degrading treatment and classifies waterboarding as torture.<sup>42</sup>

In 2010, however, Congress drew a clear line between the rules applicable for interrogations conducted by DOJ personnel (such as the FBI) for purposes of normal criminal investigations, and military or CIA interrogators, by explicitly prohibiting the latter from advising suspects of their right to counsel and to silence as required by *Miranda*.<sup>43</sup>

### 3.2.3 Rules If Conducted by Foreign Officials

Although courts have not enforced the strict requirements of due process and *Miranda* on foreign interrogators when not acting in a “joint venture” with US authorities, and would accept evidence gathered in violation of those tests, the line has been drawn at conduct which “shocks the conscience of the court,” and torture would certainly constitute such conduct.

## 3.3 Conducting Searches Abroad

### 3.3.1 Rules If Conducted by Foreign Officials

The USSC has elaborated comprehensive case-law governing searches conducted by US law enforcement officials in the US. In general, a search warrant based on probable cause is required for the search of homes and other private spaces, unless the police act under exigent circumstances.<sup>44</sup> However, these rules are not applied when foreign officials independently conduct searches which yield evidence that is subsequently offered in a US court. As with interrogations, the only limitation would be if the way in which the search was conducted “shocked the conscience” of the US Court. If US law enforcement officials “substantially participate” in the investigation leading up to the search, then US Fourth Amendment law will be applied. Mere presence of US law enforcement officials during the search and their having requested foreign police to conduct the search does not, however, constitute “substantial participation.”<sup>45</sup>

---

<sup>41</sup> Shane et al. (2009), A16.

<sup>42</sup> §§ 5–74, 5–75 Army Field Manual on Interrogation, FM2-22.3 (FM 34–52), Abrams (2008), 474.

<sup>43</sup> 10 USC § 1040(a)(1)(2010).

<sup>44</sup> For the exigent circumstances exception related to “hot pursuit” of a criminal, see *Warden v. Hayden*, 387 U.S. 294, 310–311 (1967). For exceptions to protect life or property, see *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403–404 (2006).

<sup>45</sup> *United States v. Rosenthal*, 793 F.2d 1214, 1230–1231 (11th Cir. 1986).

### **3.3.2 Rules If Conducted by US Law Enforcement Officials (or with Their Cooperation)**

If US officials conduct a search overseas, the target of which is a US-Citizen, then the Fourth Amendment protection against “unreasonable searches and seizures” applies. US courts have, however, determined that it is would not be practicable to necessarily require judicial authorization, due to the lack of US magistrates overseas who have authority to issue such search warrants.

If a search is conducted overseas, however, and the target of the search is not a US-citizen and has no ties to the US, then the USSC has held that the Fourth Amendment only protects “the People” and that a foreigner would not be included among the “People” as envisioned by the authors of the US Bill of Rights.<sup>46</sup> The Fourth Amendment also does not apply when US officials search a foreigner on board a ship in international waters.<sup>47</sup>

## ***3.4 Interception of Confidential Communications Abroad***

### **3.4.1 Rules If Conducted by Foreign Officials**

As with searches, a wiretap conducted by foreign officials will be governed by US law and the Fourth Amendment if it is characterized as a “joint venture.” For instance, in one case wiretaps by Danish authorities were considered to be “joint ventures” because US officials requested the wiretaps, were involved in daily decoding and translation of the intercepted messages, and all information gathered was turned over to US officials.<sup>48</sup> Once a “joint venture” has been found, then US courts do not apply the US wiretap law, but determine, rather, whether the procedure used by the foreign country was “reasonable” under the Fourth Amendment.<sup>49</sup>

### **3.4.2 Rules If Conducted by US Law Enforcement Officials**

Where US officials engage in wiretapping overseas in normal criminal cases, then courts will apply the Fourth Amendment “reasonableness” analysis, and not insist on judicial authorization, because there is usually no ability for US courts to issue warrants in such situations.<sup>50</sup> Thus the federal wiretapping statute, known as “Title III”, which requires probable cause and judicial authorization,<sup>51</sup> will not be applied.

---

<sup>46</sup> United States v. Verdugo-Urquidez, 494 U.S. 259, 274–275 (1990).

<sup>47</sup> United States v. Bravo, 489 F.3d 1, 8–9 (1st Cir. 2007).

<sup>48</sup> United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995).

<sup>49</sup> *Ibid.*, 1094–1095 (here Danish law appeared to give similar protection as American law).

<sup>50</sup> In re Terrorist Bombings of US Embassies in East Africa, United States v. Odeh, 552 F.3d 157, 159 (2nd Cir. 2008)

<sup>51</sup> 18 USC § 2516.

In 1978 Congress enacted the FISA, which allowed the President, through the AG, to order wiretapping of foreign agents or foreigners engaged in international terrorism and conduct searches without judicial authorization.<sup>52</sup> The only exception was if the execution of the measure might affect a US citizen or permanent resident, in which case an order was required from a secret court, the FISA Court, based on probable cause that the persons whose conversations were to be intercepted were “foreign agents” or “involved in international terrorism.” However this law was mainly conceived for wiretapping and bugging within the US.

Following amendments to FISA in 2008, the President, through the AG, may now authorize wiretaps of foreigners abroad for up to 1 year to collect foreign intelligence information or if there is probable cause that they are involved in international terrorism. Although no judicial authorization is required, the AG must submit a certification to the court indicating the necessity of the wiretaps, the fact that precautions have been made to minimize interception of conversations of US citizens, etc.<sup>53</sup>

If, however, the government wants to intercept conversations of US citizens when they are abroad, but by using telecommunications facilities located in the US, they must get authorization from the FISA court, which authorization is valid for 90 days.<sup>54</sup> If there are emergency circumstances, however, the government may intercept private conversations of a US-citizen for 7 days before getting retroactive authorization from the FISA court.<sup>55</sup> If US officials wish to target a US-citizen abroad under any other circumstances (i.e. when the law enforcement officials are conducting the interceptions abroad) in order to obtain foreign intelligence information, then they only may do so if the person would not have a reasonable expectation of privacy<sup>56</sup> had the interception been conducted in the US.<sup>57</sup>

### 3.5 *Depositions of Witnesses Abroad*

The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right [...] to be confronted with the witnesses against him.” The Confrontation Clause is meant “to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding.” This is accomplished generally by giving a criminal defendant “the

---

<sup>52</sup> 50 USC § 1802.

<sup>53</sup> 50 USC § 1881a(a,g).

<sup>54</sup> 50 USC § 1881b(a,b).

<sup>55</sup> 50 USC § 1881b(d)(1)(B).

<sup>56</sup> Only investigative actions which violate a citizen’s “reasonable expectation of privacy” are regulated by the Fourth Amendment. USSC, *Katz v. United States*, 394 U.S. 347, 360–361 (1967) (Harlan, concurring).

<sup>57</sup> 50 USC § 1881c(a)(2).

right to confront appearing witnesses face to face and the right to conduct rigorous cross-examination of those witnesses.”<sup>58</sup> Out-of-court statements introduced to prove the truth of the matter stated, which are the results of police investigative measures, such as questioning, or depositions, are barred by the Sixth Amendment unless it is shown that the witness is unavailable to testify at trial and the defendant had prior opportunity to cross-examine the witness.<sup>59</sup>

Depositions to preserve testimony in criminal cases, are, pursuant to FRCrimP 15, to be used only in “exceptional circumstances and in the interest of justice” and are generally disfavored in criminal cases.<sup>60</sup> When the government conducts a Rule 15 deposition in a foreign land with a view toward introducing it in a US criminal trial, the Sixth Amendment requires, at a minimum, that the government undertake diligent efforts to facilitate the defendant’s presence at the deposition and the witness’s presence at trial.<sup>61</sup>

A court was held to have “diligently” undertaken to secure the defendant’s appearance at a deposition in the United Kingdom, where it directed the US government to transport the defendant’s attorney to the deposition and install two telephone lines—one to allow the defendant to monitor the deposition from prison and another to allow him to consult privately with counsel.<sup>62</sup>

In a case involving an alleged Al-Qaeda affiliate charged with a number of terrorist acts in the US, including conspiracy to assassinate President George W. Bush, the validity of a handwritten confession given by the defendant in Saudi Arabian custody was at issue. Because it was impossible to bring two Saudi officials, whom the defendant accused of torturing him, to the US, the trial court ordered two defense attorneys to attend their depositions in Saudi Arabia. A live, two-way video link was used to transmit the proceedings to a courtroom in Virginia, where the defendant and his lawyer could see and hear the testimony contemporaneously and the witnesses could see and hear the defendant as they testified.<sup>63</sup> The USSC has allowed the taking of testimony in the physical absence of the defendant so long as the denial of face-to-face confrontation is “necessary to further an important public policy” and “the reliability of the testimony is otherwise assured.”<sup>64</sup> In *Abu Ali*, the court found that national security against terrorist acts was a sufficiently compelling public policy.<sup>65</sup> In contrast, in a prosecution for

---

<sup>58</sup> *United States v. McKeeve*, 131 F.3d 1, 8 (1st Cir. 1997).

<sup>59</sup> *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

<sup>60</sup> *United States v. Drogoul*, 1 F.3d 1546, 1551 (11th Cir. 1993).

<sup>61</sup> *United States v. McKeeve*, 131 F.3d 1, 8–9 (1st Cir. 1997).

<sup>62</sup> *Ibid.*, 9.

<sup>63</sup> USSC, *United States v. Abu Ali*, 528 F.3d 210, 238–243 (4th Cir. 2008).

<sup>64</sup> USSC, *Maryland v. Craig*, 497 U.S. 836, 849–852 (1990)(case involving testimony of a child who was allowed to testify outside of the courtroom to avoid direct confrontation with her alleged sexual abuser).

<sup>65</sup> USSC, *United States v. Abu Ali* (footnote 63), 240.



fraud and conspiracy, it was reversible error to allow two Australian witnesses to testify via two-way video, when there was no important public policy other than the convenience of not paying for their trip to the US.<sup>66</sup>

## 4 Admissibility of Evidence Gathered Abroad in US Courts

### 4.1 *Effect of Unlawful Detentions on Admissibility of Evidence*

#### 4.1.1 In the Civilian Criminal Courts

An unlawful arrest constitutes an unlawful “seizure” in terms of the Fourth Amendment, but will never constitute a hindrance to a prosecution of the person arrested. On the other hand, a person unlawfully arrested may move to suppress evidence which was gathered pursuant to a search incident to the arrest as long as it is deemed to have been a “fruit of the poisonous tree”.<sup>67</sup> Similarly, a confession taken after an unlawful arrest has also been deemed to be “fruit of the poisonous tree” even when the police have advised the unlawfully arrested person of the right to silence and aid of a lawyer as required by the *Miranda* decision.<sup>68</sup>

Although a person arrested by police without an arrest warrant must be brought to court within 48 hours to enable him to challenge the validity of his arrest,<sup>69</sup> the fact that this time limit was violated will not automatically lead to suppression of a statement taken after the 48 hours had elapsed.<sup>70</sup> In the federal courts, however, there is a presumption that a confession will be suppressed if it was taken more than 6 hours after arrest and the defendant was not brought to court in a speedy manner.<sup>71</sup> When someone has been held as an enemy combatant for years at Guantánamo Bay, for instance, and is then charged in the criminal courts, the US courts do not treat the time spent in the camps for enemy combatants as time which counts in the analysis of whether the right to a speedy trial, guaranteed by the Sixth Amendment of the US, has been violated.<sup>72</sup> At any rate, the remedy for a violation of the right to a speedy trial in the US civilian courts is normally dismissal, and not suppression of evidence.<sup>73</sup>

---

<sup>66</sup> USSC, *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006). But for a case allowing two robbery victims to testify by video link from Argentina against the person who allegedly robbed them during a visit to the U.S. *Harrell v. Butterworth*, 251 F.3d 926, 928–931 (11th Cir. 2001).

<sup>67</sup> *Wong Sun v. United States*, 371 U.S. 471, 477–479 (1963).

<sup>68</sup> *Brown v. Illinois*, 422 U.S. 590, 602–603 (1975).

<sup>69</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991).

<sup>70</sup> *Powell v. Nevada*, 511 U.S. 79, 84–85 (1994).

<sup>71</sup> 18 USC § 3501(c). *Corley v. United States*, 129 S.Ct. 1558, 1571 (2009).

<sup>72</sup> *Padilla v. Hanft*, 547 U.S. 1062 (2006) (cert. denied).

<sup>73</sup> *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

### 4.1.2 In Military Commissions

The Sixth Amendment right to a speedy trial is not applicable in a trial by military commission.<sup>74</sup>

## 4.2 *Admissibility of Evidence Resulting from Illegal Interrogations*

### 4.2.1 In the Civilian Criminal Courts

The USSC has consistently held that “involuntary” confessions which were the products of coercion, deception, threats or promises, most of which do not amount to “cruel, inhuman or degrading treatment”, much less torture, could not be used in US criminal trials. The prevailing view has been that evidence derived from involuntary statements is inadmissible in a criminal trial, even if the “fruit” of the involuntary statement is a subsequent voluntary statement.<sup>75</sup> The prohibition extends to all “fruits of the poisonous tree”, including physical evidence.<sup>76</sup> For example, Rwandan nationals were arrested in Uganda for the murder of two US tourists. They were first subject to coerced interrogation by Ugandan officials and then turned over to US officials, who interviewed them in a non-coercive manner. The US federal district court, however, refused to use the statements taken by US officials, for it ruled they were the “fruit” of the earlier coercive interrogations by Ugandan officials.<sup>77</sup>

Where US law enforcement officials are involved in conducting interrogations overseas and are thus required to give modified *Miranda* warnings to those under interrogation, a failure to give the modified warnings would also lead to exclusion of the statements.

### 4.2.2 In Military Commissions

The secret use of the “enhanced interrogation techniques,” described above, in Afghanistan, Iraq, Guantánamo, and other unnamed “black sites” by military and CIA interrogators, would, of course, result in the inadmissibility of any declaration, or its “fruits” in a subsequent criminal prosecution in the civilian courts. However, the USSC recently ruled that the Fifth Amendment privilege against self-incrimination is not violated unless the statement gathered as a result of the use of illegal interrogation methods is actually used in a criminal proceeding.<sup>78</sup> Thus, the

---

<sup>74</sup> 10 USC § 948b(d)(1)(A).

<sup>75</sup> *Oregon v. Elstad*, 470 U.S. 298, 316–317 (1985).

<sup>76</sup> *United States v. Patane*, 542 U.S. 630, 639 (2004). *LaFave et al.* (2009), 543.

<sup>77</sup> *United States v. Karake*, 443 F.Supp.2d 8, 86–89 (D.D.C. 2006).

<sup>78</sup> *Chavez v. Martinez*, 538 U.S. 760, 767 (2003).

government could conceivably continue to use torture or cruel, inhuman or degrading treatment for the purpose of gathering intelligence information, as long as they do not present it at trial. For example, José Padilla, an American citizen who alleged he was tortured after being arrested for having allegedly planned an attack on American soil with a “dirty bomb,” was denied the right to sue one of the author of the torture memos, John Yoo, because no incriminating statements were introduced in criminal proceedings against him.<sup>79</sup>

It has been surmised, that the evidence linking Padilla to the “dirty bomb” plot resulted from the “waterboarding” of KSM and that the government thus eventually dropped those charges when Padilla’s case was set for trial in the civilian courts.<sup>80</sup> Many believe that the government established military commissions, however, for the express purpose of prosecuting alleged terrorists using such tainted evidence.

10 USC § 948r(a) of the Military Commissions Act of 2009, which amended the 2006 act after Obama took office, explicitly outlaws use of any statements induced by torture or cruel, inhuman or degrading treatment, in trials by military commission. 10 USC § 948r(c) also provides that only “voluntary” statements are admissible before military commissions, unless “the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence.” This allowance of more intensive methods of interrogation would thus only apply where the capture of the interrogated person was effected under battlefield-like conditions.

### ***4.3 Admissibility of Evidence Resulting from Illegal Searches***

#### **4.3.1 In the Civilian Criminal Courts**

In a certain sense, evidence gathered by foreign officials, even if done in violation of their own laws, is admissible on a “silver platter” in the US courts, which will not inquire into whether the foreign officials followed their own laws properly.<sup>81</sup> The underlying reason for the Fourth Amendment exclusionary rule in the US is to deter willful police violations of the constitutional rights of US citizens,<sup>82</sup> and exclusion of evidence in the US courts would not have such an effect on foreign law enforcement officials.<sup>83</sup> Evidence from a foreign search of a US-citizen will,

<sup>79</sup> Padilla v. Yoo, 633 F. Supp. 2d 1005, 1035–1036 (N.D. Cal. 2009).

<sup>80</sup> Risen et al. (2004), A1, A13.

<sup>81</sup> Government of Canal Zone v. Sierra, 594 F.2d 60, 71–72 (5th Cir. 1979).

<sup>82</sup> United States v. Leon, 468 U.S. 897, 918–923 (1984) (holding, therefore, that violations made in “good faith” therefore do not require exclusion).

<sup>83</sup> United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976).

however, be inadmissible, if the manner in which the foreign officials conducted the search “shocks the conscience” or if the search is part of a “joint venture” with US officials and it violates the Fourth Amendment.<sup>84</sup>

### **4.3.2 In Military Tribunals**

10 USC § 949a(b)(2)(B) of the Military Commissions Act of 2009, provides that “evidence shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or other authorization. This essentially means, that the Fourth Amendment exclusionary rule articulated in *Mapp v. Ohio* does not apply to such trials.

## **4.4 Admissibility of Evidence Resulting from Illegal Wiretaps**

### **4.4.1 In the Civilian Criminal Courts**

When core provisions of the US wiretap statute have been violated, 18 USC § 2515 provides that “no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof.” This is likely the broadest explicit statutory exclusionary rule in US law and clearly extends to “fruits of the poisonous tree.” It also does not allow a “good faith” exception.<sup>85</sup> A similar strong exclusionary rule applies if the provisions for FISA are violated, either during a wiretap or search for foreign intelligence information conducted in the US or in relation to a US-citizen abroad.<sup>86</sup>

### **4.4.2 In Military Tribunals**

It is unclear whether the provision in the Military Commissions Act of 2009, which allows evidence to be used even if it was gathered without judicial authorization, would trump the seeming ironclad exclusionary rules in the domestic wiretap act and FISA.

---

<sup>84</sup> *United States v. Rosenthal* (1986), 1230–1231.

<sup>85</sup> *United States v. Rice*, 478 F.3d 704, 711–712 (6th Cir. 2007).

<sup>86</sup> 50 USC §§ 1805(e)(1); 1881d(b)(4) relating to emergency wiretaps that are not retrospectively validated by the FISA court.

## 4.5 *Admissibility of Evidence Gathered in Violation of the Right to Confrontation*

### 4.5.1 In the Civilian Criminal Courts

In a normal criminal trial, due process requires that exculpatory evidence or evidence which might mitigate punishment must be turned over to the defense. If that evidence is not turned over, and would have resulted in an acquittal or mitigation in charge or judgment, reversal of the judgment is required.<sup>87</sup> If the potentially exculpatory evidence is protected by a privilege, then, once the defendant has made a plausible offer of proof that the evidence could be relevant and helpful to defense, the judge usually must review the requested material in an *in camera* hearing to determine whether the evidence should be disclosed.<sup>88</sup> If it should, then the prosecutor has a choice of revealing the evidence, or dismissing the case to protect the privileged information.<sup>89</sup>

Since 9–11, the federal government has maintained that nearly all evidence gathered during terrorist investigations, especially that gathered overseas by intelligence agents, is subject to the “official secrets” privilege and that its revelation would prejudice national security and impede the war against terrorism.<sup>90</sup>

In 1980 Congress passed the *Classified Information Protection Act (CIPA)*,<sup>91</sup> to deal with cases involving state secrets or “classified information.” In CIPA, the legislator attempted to balance the right of the defense to discover evidence in the hands of the prosecution against the needs of the state to protect information which was crucial to national security. CIPA attempted to minimize the defense threat to reveal secret evidence during the trial, a practice called “graymail.” According to CIPA, “classified information” consists in any information or material determined by the government of the US to “require protection against unauthorized revelation for reasons of national security.”<sup>92</sup> A typical “graymail” case is where a former employee of the CIA, charged with criminal wrongdoing, threatens to reveal, or to use in his defense, evidence the government considers to be classified.

If the defendant seeks discovery of information which is “classified” or contains state secrets, which may be in the form of statements given by a witness to US officials, the judge may authorize the prosecutor to “eliminate classified information in the documents which are turned over to the defense” or to substitute it with a summary of the information in lieu of the secret documents themselves, or to offer a declaration, admitting the relevant facts which the classified information would

<sup>87</sup> *United States v. Bagley*, 473 U.S. 667, 678–682 (1985).

<sup>88</sup> *Pennsylvania v. Ritchie*, 480 U.S. 39, 56–58 (1987).

<sup>89</sup> *Roviaro v. United States*, 353 U.S. 53, 62 (1957).

<sup>90</sup> Referral to Abu Ali (2008), pp. 244–248.

<sup>91</sup> Pub.Laws 96–456, 94 Stat. 2025 (Oct. 15 1980), codified at 18 USC app. 3 ff.

<sup>92</sup> 18 USC app. 3 § 1(a).

have a tendency to prove.”<sup>93</sup> The prosecutor can request that the hearing be held *in camera* to prevent divulgence of the information to the public.<sup>94</sup> If a summary or substitute finding of fact is deemed by the trial judge to not satisfactorily protect the rights of the defendant to present a defense, the court may order full disclosure.

CIPA played a role in the case against Zacharias Moussaoui, an admitted member of Al Qaeda, who the Department of Justice originally thought was the 20th hijacker in the 9–11 attacks. Moussaoui’s defense counsel wanted to interview two Al Qaeda members, Ramzi bin al-Shibh and KSM, when they were being held by the CIA in “black sites” at an unknown location. Moussaoui maintained, that the prisoners could have testified at trial that he did not participate in the conspiracy which resulted in the 9–11 attacks. Despite this claim, the appellate courts ruled that the trial should continue despite the fact that the defendant did not have the possibility to examine the witnesses. The court of appeal relied on CIPA in holding that the prosecutor could utilize a summary of the declarations of the prisoners in lieu of the declarations.<sup>95</sup> The use of “summaries,” or stipulations in lieu of actual witnesses clearly undermines the right to confront witnesses, the right to discovery of useful evidence, and the ability of the triers of fact, whether jury or military panel, to assess the credibility of evidence in terrorist cases.

#### 4.5.2 In Military Commissions

Provisions very similar to those of CIPA are also included in the Military Commissions Act of 2009, and allow the use of stipulations, summaries, and other substitutes for directly cross-examining a witness.<sup>96</sup> More importantly, however, while the defendant has a right to cross-examine the witnesses who testify against him,<sup>97</sup> the rule of *Crawford v. Washington*, which prevents the introduction of testimonial evidence in the form of witness declarations made outside of trial (for instance to a police officer), does not apply, for hearsay evidence is clearly admissible. Thus, 10 USC § 949a(b)(2)(A) allows the judge to accept any evidence which would have “probative value to a reasonable person” and 10 USC § 949a(b)(2)(E) provides:

hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained).

---

<sup>93</sup> 18 USC app. 3 § 4.

<sup>94</sup> 18 USC app. 3 § 6(a).

<sup>95</sup> USSC, *United States v. Moussaoui*, 365 F.3d 292, 312–315 (4th Cir. 2004); *United States v. Moussaoui*, 382 F.3d 453, 476–478 (4th Cir. 2004).

<sup>96</sup> 10 USC § 949d(f).

<sup>97</sup> 10 USC § 949b(b)(1)(A).

## 5 Cooperation with International Tribunals and Human Rights

### 5.1 *The Ad Hoc Tribunals*

American judicial assistance to the International Criminal Tribunal for the Former Yugoslavia and the Rwanda Tribunal (hereafter the *ad hoc* tribunals) is given through two surrender agreements,<sup>98</sup> corresponding implementing legislation,<sup>99</sup> and use of the normal judicial assistance framework including the use of letters rogatory discussed above. These provide American cooperation with *ad hoc* tribunals in conformity with Article 29 of the ICTY Statute, and Article 28 of the ICTR Statute governing judicial assistance.

### 5.2 *The International Criminal Court*

It is well-known that President George W. Bush withdrew former President Bill Clinton's signature of the Rome Treaty which set up the ICC, and withdrew all cooperation with the new court. The US has signed bilateral agreements with at least one hundred countries preventing those countries from extraditing US citizens to the ICC without prior US approval.<sup>100</sup> The goal of these agreements is to protect US citizens, and especially US military personnel, from ICC prosecution. Critics have accused the US of blackmailing third countries into signing Article 98 agreements with the specter of withdrawal of US aid.<sup>101</sup> In 2002, Congress passed the ASPA<sup>102</sup> which prohibits military assistance to countries (other than NATO countries or major non-NATO allies) that are party to the ICC but do not have Article 98 agreements with the US.

Apart from withholding military aid from countries not signing Article 98 agreements, the ASPA also puts a long list of restrictions on US involvement with the ICC, as well as with countries who are parties to the ICC. These include: (1) a prohibition on funding extradition to a foreign country that is under an obligation to surrender persons to the ICC<sup>103</sup>; (2) a prohibition on judicial cooperation with the ICC, including responding to requests for assistance, transmitting letters rogatory sent by the ICC to their intended recipient, providing financial

---

<sup>98</sup> Both agreements are identical. Godinho (2003), 502–516. The ICTY agreement is UNTS, vol. 1911, at 224 (UNTS reg. no. 32555); TIAS. No. 12570.

<sup>99</sup> National Defense Authorization Act, Pub. L. No. 104–106, §1342, 110 Stat. 486 (1996), providing that federal extradition statutes are to apply to the surrender of persons to the ICTR and the ICTY.

<sup>100</sup> Elsea (2006), p. 26.

<sup>101</sup> Ribando (2006), p. 2.

<sup>102</sup> P.L. 107–206, title II.

<sup>103</sup> 22 USCA. § 7402.

assistance to the ICC, extraditing to the ICC, or allowing ICC agents to perform investigations within the US<sup>104</sup>; (3) a prohibition on sending classified information to the ICC<sup>105</sup>; (4) express authorization for the president to use “all means necessary and appropriate” (apart from bribes) to release US citizens or allies detained or imprisoned by, on behalf of, or at the request of the ICC.<sup>106</sup>

The Obama administration, however, has increased its cooperation with the ICC. State Department legal advisor Harold Koh said after the 2010 Kampala conference, at which the crime of aggression was defined, that “we have reset the default on the US relationship with the court from hostility to positive engagement.” The US was the only country not a State Party to make a pledge at the Kampala conference. Secretary of State Hillary Clinton said in 2009 regarding US relations with the ICC: “Whether we work toward joining or not, we will end hostility toward the ICC and look for opportunities to encourage effective ICC action in ways that promote US interests by bringing war criminals to justice.”<sup>107</sup> The US became an observer nation to the ICC in 2009, and is continuing to look for ways to assist the ICC in spite of US laws restricting cooperation.<sup>108</sup>

## References

- Abrams N (2008) *Anti-terrorism and criminal enforcement*, 3rd edn. West, St. Paul
- Elsea J (2006) U.S. policy regarding the International Criminal Court, Cong. Research Service, Washington. [http://assets.opencrs.com/rpts/RL31495\\_20060829.pdf](http://assets.opencrs.com/rpts/RL31495_20060829.pdf)
- Elsea J (2009) International Criminal Court cases in Africa: status and policy issues, Cong. Research Serv.: Washington. [http://opencrs.com/rpts/RL34665\\_20090714.pdf](http://opencrs.com/rpts/RL34665_20090714.pdf)
- Godinho J (2003) The surrender agreements between the US and the ICTY and ICTR: a critical view. *J Int Crim Justice* 1:502
- Jehl D, Johnston D (2005), Rule change lets C.I.A. freely send suspects abroad to jails, *NY Times*, 6 March. <http://www.nytimes.com/2005/03/06/politics/06intel.html?hp&ex=1110171600&en=1cc93f4f41f5156b&ei=5094&partner=homepage>
- LaFave WR, Israel JH, King NJ, Kerr OS (2009) *Criminal procedure*, 5th edn. West, St. Paul
- Mayer J (2010) The trial, *New Yorker*, 15 & 22 Feb., pp 52–63
- Pincus W (2009) Clinton’s goals detailed, *Wash. Post*, 19 Jan. <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/18/AR2009011802268.html>
- Ribando C (2006) Article 98 agreements and sanctions on U.S. foreign aid to Latin America, Cong. Research Service, Washington. <http://www.hsdl.org/?view&did=461709>
- Risen J, Johnston D, Lewis NA (2004) Harsh C.I.A. methods cited in top Qaeda interrogations, *NY Times*, 13 May, A1
- Savage C (2009) Obama’s war on terror may resemble Bush’s in some areas, *NY Times*, 18 Feb., A20
- Savage C (2011) Delayed Miranda warning ordered for terror suspects, *NY Times*, 25 March, A14
- Shane S, Mazzetti M, Cooper H (2009) Obama reverses key Bush security policies, *NY Times*, 23 Jan., A16

<sup>104</sup> 22 USCA. § 7423.

<sup>105</sup> 22 USCA. § 7425.

<sup>106</sup> 22 USCA. § 7427.

<sup>107</sup> Pincus (2009).

<sup>108</sup> Elsea (2009), p. 4.