Prosecuting al Baghdadi

How the United States Should Put the Leader of the Islamic State on Trial for His Crimes

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Prepared for use by Captain Jamie Sands, USN Counterterrorism and Operations Director for the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD SO/LIC), US Department of Defense

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Table of Contents

Executive Summary 4
I. Introduction of the Problem 7
II. Background of The Islamic State and its Leader, Abu Bakr al Baghdadi 9
A. The Islamic State and Its Crimes 9
B. Al-Baghdadi and His Crimes 12
III. The Value of Capture / Prosecution Strategies 14
A. Background of Scholarship on Decapitation Strategies 14
B. Independent Statistical Analysis in Support of Capture Strategies 16
IV. Legal Issues Relevant to Any Prosecution Strategy 17
A. The Irrelevance of Iraqi or Syrian Sovereignty to COA Analysis 17
B. Federal Law of Military Detention and Military Commissions 19
V. Courses of Action of Possible Prosecution 24
A. COA #1: Prosecution by an International Tribunal 24
a. Background 25
b. Method 28
c. Analysis of Challenges 32
B. COA #2: Prosecution by a United States Attorney 38
a. Background 38
b. Method 40
c. Analysis of Challenges 47
C. COA #3: Prosecution by An Allied Arab Government 58
a. Background and Method 60
b. Analysis of Challenges 64
VI. Comparative Analysis 70
A. Criteria 70
B. Analysis of Each COA by each Criterion 70
a. COA #1: Prosecution by an International Tribunal 70
b. COA #2: Prosecution by a United States Attorney 73
c. COA #3: Prosecution by an Allied Arab Government 76
D. Analysis Matrix 80

Appendix A: Independent Data Analysis 81
I. Data 81
a. Data Overview 81
b. Missing and Duplicative Data 82
II. Significant Variables 82
a. Dependent Variables 82
b. Independent (Treatment) Variables 82
c. Control Variables 84
II. Model Overview 85
III. Findings and Analysis 87
a. Results 87
b. Sensitivity Analysis 88
c. Discussion 88
Appendix B: Independent Data Analysis, Tables 90
Appendix C: Why ISIL is Not a Sovereign State in International Law 92
A. Criteria of Statehood in International Law 92
B. Lack of Recognition 96
Appendix D: A Brief Overview of the USG and the ICC 98

EXECUTIVE SUMMARY

Client Problem: The Islamic State of Iraq and the Levant ("ISIL") is a growing international terror threat. It has seized territory, and it challenges the fragile governments of Iraq and Syria. It threatens US core values and global interests.

Policy Question: How should the United States Government ("USG") prosecute the ISIL leader, Abu Bakr al-Baghdadi ("ABAB"), if it captures him?

Overall Recommendations:

1) **The USG should consider the empirically proven benefits of capturing terrorist leaders rather killing than them**. Both the scholarship discussed in Part III and the independent statistical analysis discussed in Appendix A shows the empiricism behind the benefits. The empirical evidence suggests decapitation hastens the demise of terror groups, but that "capture" decapitation strategies do so more than "kill" strategies. The intuitive rationale is that capture yields intelligence from interrogation and prosecution renders a strategic communications impact of the rule of law.

2) **The USG should only opt for a capture / prosecute strategy once it has sufficient admissible evidence to secure a conviction**. This calculation must be made for whichever court policymakers intend to try him. Different courts have different rules of evidence and pose different practical and procedural hurdles to bringing evidence before a judge and jury. If the USG can link ABAB to ISIL's crimes only through classified documents and source-protected witnesses, then prosecutors may not have sufficient evidence to convict without that information. This dilemma is more problematic the more "international" the prosecution becomes. US prosecution confronts its own evidentiary problems, such as the rule against hearsay.

3) **The USG should attempt to capture as many ISIL members in the top echelon as possible**. Beyond the obvious value of dealing more damage to ISIL, capturing a larger group of ISIL leaders than just ABAB serves two purposes. First, prosecuting a leader of a criminal organization is uniquely difficult. Prosecutors must link the actions of the leader to the crimes of the organization; testimony to that linkage becomes critical. While accomplices have loyalty to a leader, they still reveal information under interrogation and are often willing to testify to save themselves from a harsher sentence. Having witnesses with first-hand knowledge of ABAB's directives is particularly important for US prosecution, because the rule against hearsay bars second-hand testimony. Second, more detainees increases the achievability of the non-US prosecution options. Creating an international tribunal or hybrid court, or investing in an International Criminal Court inquiry, is more feasible if prosecutors will have a docket replete with defendants, rather than a sole offender.

Possible Courses of Action:

COA #1 - Prosecution by an International Tribunal. The USG would transfer ABAB to an international authority, either the International Criminal Court, or a separate tribunal created by the UN Security Council. International law prosecutors then try him for crimes against humanity, genocide, and war crimes.

COA #2 - Prosecution by a United States Attorney**.** The USG transports ABAB to the United States for trial in federal court on charges of material support to terrorism under Title 18, United States Code § 2339B, and other applicable federal charges, including a federal statute criminalizing genocide, 18 USC § 1091.

COA #3 - Prosecution by an allied Arab Government. The USG would transfer ABAB to an allied Arab government for crimes against their citizens, crimes of terror, and for international crimes. This COA includes consideration of a "hybrid court," an internationally supported institution that bolsters a national court's criminal court system to prosecute offenders of international crimes.

COA Recommendation:

COA #3: Prosecution by an allied Arab Government

The USG should submit Abu Bakr al-Baghdadi ("ABAB"), the leader of ISIL, to an allied Arab government for prosecution. The best candidate is Jordan, and the optimal method of Jordanian prosecution of ABAB is though a internationalized "hybrid court" structure similar to the globally-backed tribunals built atop the national legal systems of Bosnia, Sierra Leone, Iraq, East Timor and Cambodia.

COA #3 and the Criteria: COA #3 achieves, or partially achieves, all the criteria.

1. **Achievability:** COA #3 is feasible, as it rests either entirely or largely on the existing structure of the Jordanian State Security Court ("SSC"). It also offers finality to victims and policymakers alike. The SSC court proceeds quickly (in marked contrast to international tribunals), and offers capital punishment upon conviction.

2. **Conviction:** COA #3 offers a relatively high probability of a criminal conviction based on the cultural and geographic proximity to victims and witnesses, the lack of defendant-friendly procedural and evidentiary rules of COA #2, more flexibility than COA #1 to filtering foreign intelligence for evidence, and a strong track record of efficiency of the SSC against terror suspects. (This last point is not a euphemism that the SSC is illegitimate, as the recent Abu Qatada acquittal by the SSC highlights.)

3. **Control & Intelligence:** COA #3 partially offers the USG overall control and the USG an opportunity to extract significant intelligence. The USG can perform a military intelligence interrogation prior to a handover, and will maintain control of ABAB until the transfer. After the transfer, the USG will lose control but may retain significant influence.

4. **Security:** COA #3 avoids security concerns with an ABAB detention. Under this COA, the USG would never bring ABAB to the United States.

5. **Impact on ISIL:** COA #3 will negatively influence ISIL's popular and political support more so than the other COAs. The trial would be fully in Arabic. The strategic communications impact of this "local" prosecution compares favorably to prosecution by "the West," either by the USG or by international jurists in The Hague. This COA offers a trial in a Muslim and Arab court close to ISIL's primary propaganda target audience.

6. **Diplomatic Impact:** COA #3 will positively influence the USG's relationships with foreign governments and populations, though the impact will likely be more positive with Arab nations than with European allies. The former may welcome a USG initiative to have a Muslim and Arab lead in prosecuting the leader of the "Islamic State." Conversely, European allies would likely voice valid concerns about Jordan's human rights record towards defendants. They may argue that an international tribunal—specifically the International Criminal Court—is a superior option to safeguard ABAB's rights. Their opposition will be more fervent if a sentence of capital punishment is possible.

<u>Analysis Matrix</u>:

Analysis Matrix	**Criterion 1:** Achievability	**Criterion 2:** Conviction	**Criterion 3:** Control & Intelligence	**Criterion 4:** Security	**Criterion 5:** Impact on ISIL	**Criterion 6:** Diplomatic Impact
COA #1: International Tribunal	✗	✗	✗	✔	✔ -	✔
COA #2: U.S. Attorney Prosecution	✔	✔ -	✔	✗	✔ -	✔ -
COA #3: Allied Arab Gov't Trial	✔	✔	✔ -	✔	✔	✔

I. INTRODUCTION OF THE PROBLEM

President Obama moved the United States government ("USG") to an effective state of war with the Islamic State of Iraq and the Levant ("ISIL") in the summer of 2014. [1] Congress is now considering granting the President explicit authorization to use military force against ISIL specifically,[2] rather than have the White House attempt to justify military actions under previous congressional use of force authorizations.

The military effort against ISIL will likely soon confront a policy dilemma posed by ISIL leadership. Success against the organization as a whole will possibly provide an opportunity to either kill or capture the top ISIL leader, Abu Bakr al-Baghdadi ("ABAB"). The best course of action at that point for the USG to take is unclear. The US would face a choice of either ordering a lethal decapitation[3] strike against ABAB or attempting to capture him alive to try him as a criminal defendant.

On one hand, the US has employed lethal means against terrorist leaders since 9/11 rather than attempting to capture them for trial.[4] The most famous target of this approach was Osama bin Laden, against whom the President ordered a raid in 2011. Drone operations are the most well known means by which the United States has pursued targeted killing.[5] The Obama administration embraced and expanded this targeted killing counterterrorism strategy upon taking office.[6] However, the use

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[1] Jeffery Sparshott, *White House: Yes, We're at 'War' With ISIS*, WALL STREET J. (Sept. 12, 2014) http://blogs.wsj.com/washwire/2014/09/12/white-house-yes-were-at-war-with-isis/.

[2] Karen DeYoung & Ed O'Keefe, *Obama To Seek Congressional Authorization To Fight Islamic State*, WASH. POST (Feb. 11, 2015) http://www.washingtonpost.com/world/national-security/obama-to-seek-congressional-authorization-to-fight-islamic-state/2015/02/10/c150d2d2-b160-11e4-854b-a38d13486ba1_story.html ("The proposed new Authorization for the Use of Military Force, or AUMF, against the Islamic State 'and associated forces' includes no geographic limitations, in keeping with the administration's description of the group as seeking expansion beyond Iraq and Syria, and the Islamic State's own claim to head a "caliphate" spanning the Muslim world. The White House language prohibits the "enduring" deployment of U.S. ground forces, but it does not specifically ban limited boots on the ground if the president determines they are necessary.").

[3] To clarify, a decapitation strategy is a military effort to have a pronounced, crippling effect on a terrorist group by removing its leader. While ISIL has committed acts of literal decapitation against victims in territory under their control, such as Western journalists, the term in this presentation refers to the counterterrorist strategy of eliminating terrorists by removing their top leaders, such as the USG's lethal elimination of Osama bin Laden in Abbottabad, as a policy problem for the USG.

[4] Johnathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN RELATIONS, (May 23, 2013) http://www.cfr.org/counterterrorism/targeted-killings/p9627 (noting how the Bush administration "adopted targeted killing as an essential tactic to pursue those responsible for the terrorist attacks of September 11, 2001.").

[5] Targeted killing as a counterterrorist tool of the USG has become almost synonymous with "drone strike" because of the unmanned aerial vehicles that deliver the munitions. However, drone use is not a necessary element to targeted killing, which the Abbottabad raid to kill Osama bin Laden illustrates.

[6] *See* Tom Curry, *Obama continues, extends some Bush terrorism policies*, NBCNEWS.COM, http://nbcpolitics. nbcnews.com/_news/2013/06/06/18804146-obama-continues-extends-some-bush-terrorism-policies (describing how in his first term alone, the President approved six times more drone strikes than did Bush in his eight year tenure).

of drones is controversial domestically and even more so internationally. The European Parliament voted in February of 2014 "by a majority of 534 to 49 MEPs to . . . 'not perpetrate unlawful targeted killings or facilitate such killings by other states,' and 'oppose and ban practices of extra judicial targeted killings.'"[7] The UN has echoed Europe's opposition to the US practice. While significant opposition arises on grounds of international law,[8] most opponents, including many domestic critics, focus their denunciations on the drone strikes' collateral damage that in aggregate far exceeds the blood shed by the intended targets.[9]

On the other hand, the USG could send a different message by bringing ISIL's leader to justice in a literal sense. ISIL's atrocities in Iraq and Syria qualify as genocide and other grounds for prosecution.[10] European nations have already begun investigating the atrocities to gather sufficient evidence against ISIL leaders.[11] The US has not—at least not yet—endorsed this effort moving toward prosecution. World powers could try ABAB in the International Criminal Court or ad hoc tribunal such as established for the Rwandan genocide. In the alternative, the US could pursue a policy of capturing ABAB and prosecuting him under US law or even negotiate a handover to an allied Arab government for trial in one of its courts. Given the Obama administration's recognition of drone strikes' failings[12] and its

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[7] Jessica Elgot, *'Illegal' Drone Strikes Condemned In Landslide Vote By European Politicians*, HUFFINGTON POST (Feb. 27, 2014 15:16 GMT), www.huffingtonpost.co.uk/2014/02/27/europe-meps-vote-against-drone-strikes_n_4866217.html.

[8] Unsurprisingly, Amnesty International has voiced strong opposition, in large part because of the precedent drone strikes risk setting in interstate conduct as mere assassinations cloaked euphemism. It has also done an admirable job in tallying the International Law arguments against the practice. *See* Amnesty Int'l, *'Targeted Killing' Policies Violate The Right To Life*, AI Index AMR 51/047/2012 (June 2012) *available at* http://www.amnestyusa.org/sites/default/files/usa_targeted_killing.pdf. (citing a variety of sources, including: (1) *Principle 1 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* ("Governments shall prohibit by law all extra-legal, arbitrary and summary executions"); (2) ICRC provisions on what are implicitly human rights grounds; (3) Article 50(1) of the 1977 Protocol I to the Geneva Conventions; and (4) UN Special Rapporteur on Extrajudicial, Summary Or Arbitrary Executions, 'Study on Targeted Killings', p. 87-92, UN Doc A/HRC/14/24/Add.6 (May 28, 2010)).

[9] *Drone strikes kill, maim and traumatize too many civilians, U.S. study says*, CNN (Sep. 25, 2012, 8:33 PM) http://www.cnn.com/2012/09/25/world/asia/pakistan-us-drone-strikes/ ("The study by Stanford Law School and New York University's School of Law calls for a re-evaluation of the practice, saying the number of "high-level" targets killed as a percentage of total casualties is extremely low – about 2%."). *See also* Bill Riggs, *Study: US drone strikes more likely to kill civilians than US jet fire*, NBC NEWS (July 2, 2013, 8:34 PM) http://www.nbcnews.com/news/investigations/study-us-drone-strikes-more-likely-kill-civilians-us-jet-v19254842 ("Drone strikes — billed by President Barack Obama as tactically surgical and less deadly to civilians than conventional air power — are 10 times more likely to cause innocent casualties than bombs or missiles unleashed from U.S. jets, according to a new study based on classified military documents.").

[10] Jess Bravin, *Probe Into War Crimes Targets Islamic State Militants*, WALL ST. J. (Sept. 4, 2014 8:29 p.m. ET), http://online.wsj.com/articles/probe-into-war-crimes-targets-islamic-state-militants-1409864371.

[11] *Id.*

[12] *See* President Barak Obama, Remarks at National Defense University, (May 23, 2013). *See also* Bailey Cahall, *Obama to Curb CIA Drone Strikes,* FOREIGN POL'Y – THE AFPAK CHANNEL, (May 23, 2013, 9:34 AM), http://afpak.foreignpolicy.com/posts/2013/05/23/obama_to_curb_cia_drone_strikes.

pioneering of a new method of US prosecution of terrorists captured overseas, prosecution is politically a viable alternative to lethal action against ABAB.

This policy paper assesses these prosecution options. Because empirical data and intuition supports taking a policy of prosecution rather than targeted killing, providing more information on prosecution options will assist DoD policy makers to ensure the decision is an informed one.

The policy issue is important in two respects. First, this problem is a real-world policy dilemma the USG is likely to face if its efforts on the ground are successful enough to present the opportunity for an operation. The policy decision is pressing. The USG launched an airstrike in November of 2014 against a gathering of top ISIL leaders, a gathering that the media later revealed had included ABAB.[13] Second, even if this inquiry is "overcome by events" through an airstrike that moots the prosecution analysis for ABAB specifically, the examination of criteria and consequences regarding the ISIL dilemma would still benefit the government in facing future policy dilemmas of the same nature. While this paper focuses squarely on the factors involved in prosecuting a specific individual, these factors apply to his possible successors, both literally within ISIL and figuratively amidst the extremist movement.

This policy paper proceeds in five parts. Part II provides background information on ISIL, ABAB, and their crimes. Part III establishes the empirical premise that capturing a top terrorist leader may be a superior option to a government than killing one. Part IV explains the possible courses of action ("COA") the USG could take following a successful capture operation. Part V analyzes the COAs.

II. BACKGROUND OF THE ISLAMIC STATE AND ITS LEADER, ABU BAKR AL BAGHDADI

A. THE ISLAMIC STATE AND ITS CRIMES

ISIL has become a formidable, genocidal terrorist entity with thousands of members. It straddles the border between Iraq and Syria and threatens the governments of both states. Observers have estimated the territory that ISIL controls to be somewhere between the size of Belgium and the size of Jordan.[14] ISIL's success in the multi-party Syrian civil war has thrust the organization into a role of governing the population it has conquered. In that role, ISIL has become notorious its brutality in enforcing draconian edicts against civilians, but even more so for its atrocities. To be clear, however, the Islamic State is not, in fact, a sovereign

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[13] Adam Withnall, *Isis air strikes: Abu Bakr al-Baghdadi 'critically wounded' in air strikes near Mosul*, THE INDEPENDENT (Nov. 10, 2014), http://www.independent.co.uk/news/world/middle-east/isis-air-strikes-usled-coalition-bombs-convoy-of-militant-leaders-leaving-abu-bakr-albaghdadi-critically-wounded-9849411.html.

[14] Kathy Gilsinan, *The Many Ways to Map the Islamic 'State*,' THE ATLANTIC (Aug. 27, 2014, 3:39 PM) http://www.theatlantic.com/international/archive/2014/08/the-many-ways-to-map-the-islamic-state/379196/ (citing and assessing a variety of estimations from respectable outlets and organizations, such as the Wall Street Journal, New York Times, and the Institute for the Study of War).

state in international law. It lacks the necessary recognition from other states and defined territory required under the Montevideo Convention of 1933.[15]

ISIL originally grew out of al Qaeda in Iraq ("AQI"), which terror leader Abu Musab al Zarqawi led against the post-Saddam Iraqi government and coalition forces in Operation Iraqi Freedom. [16] After the US successfully eliminated Zarqawi from the battlefield in June 2006, a steady effort by the US military and allied Iraqi tribes diminished ISIL's institutional strength.[17]

ABAB took the reins from Zarqawi's successor in 2010 and changed AQI's name to reflect his "broadened ambitions" for ISIL once "instability in neighboring Syria [following] the 2011 uprising there created new opportunities to exploit."[18] He established ISIL as a major force in Syria's power vacuum and deftly recruited the foreign jihadis swarming into Syria to build his ranks.[19] Yet he still maintained a foothold in Iraq. He ordered bombings in August 2013 that killed 69 Baghdad civilians celebrating the Muslim Ramadan feast of Eid al-Fitr,[20] who were sadly just some of the thousands of ISIL's victims that year.[21]

ISIL has grown quickly since 2013, garnering global attention in early and mid-2014 for acts of brutality against conquered civilians and beheadings of reporters covering the conflict.[22] ISIL caused the most alarm when it quickly overran Iraqi military positions in its march out of Syria.[23] This advance highlighted the massive disaffection of Sunnis with the al Maliki leadership in Baghdad. International pressure forced Iraqis to oust Shiite President Maliki and replace him

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[15] *See* Appendix C for further explanation.

[16] KENNETH KATZMAN, CONG. RESEARCH SERV., R43612, THE "ISLAMIC STATE" CRISIS AND U.S. POLICY 30 (2015).

[17] Johnathan Masters & Zachary Laub, *Backgrounder: The Islamic State*, COUNCIL ON FOREIGN RELATIONS, (last updated Aug. 1, 2014) http://www.cfr.org/iraq/islamic-state-iraq-syria/p14811.

[18] *Id.*

[19] *See* Terrance McCoy, *How ISIS leader Abu Bakr al-Baghdadi became the world's most powerful jihadist leader*, WASH. POST (June 11, 2014) http://www.washingtonpost.com/news/morning-mix/wp/2014/06/11/how-isis-leader-abu-bakr-al-baghdadi-became-the-worlds-most-powerful-jihadi-leader/ ("But then Syria happened. The civil war there, which left a vacuum of authority in large tracts of the country, fueled a resurgence of the group. The upheaval gave rise to the Islamic State of Iraq and Syria (ISIS). Over the following years, as many as 12,000 militant Islamists — 3,000 of whom were from Western countries — flocked to the region to fight, according to the Soufan Group, an intelligence consultancy.").

[20] *Iraq car bombings leave 69 dead amid Eid al-Fitr celebrations*, CBS NEWS (Aug. 10, 2013 8:08PM), http://www.cbsnews.com/news/iraq-car-bombings-leave-69-dead-amid-eid-al-fitr-celebrations/ (detailing the carnage). *See also* Press Release, Jen Psaki, Spokesperson, Office of the Spokesperson, Department of State, U.S. Condemns Terrorist Attacks in Iraq and Pledges to Help Combat al Qaeda (August 10, 2013), http://www.state.gov/r/pa/prs/ps/2013/08/213032.htm (attributing the death toll to ABAB's orders).

[21] *See Islamic State of Iraq and the Levant*, GLOBAL SECURITY (2013), http://www.globalsecurity.org/military/world/para/aqi-1.htm (noting how overall ISIL killed the majority of the 7,000 terror victims in Iraq in 2013, the most victims Iraq had suffered since 2008).

[22] *ISIS Fast Facts*, CNN (last updated April 12, 2015 15:28 GMT), http://edition.cnn.com/2014/08/08/world/isis-fast-facts/.

[23] *See id.*

with a Shiite more willing to bring together Iraqis of all stripes—Sunnis and Shiite, Kurds and Arabs—against the ISIL incursion.[24]

After an effort of united Iraqis, with significant support from the United States, halted the ISIL advance, ISIL consolidated and began "governing" Iraqis under its rule. In August, it began committing genocide against the Yazidi religious minority. ISIL repeatedly kills Yazidi men and sells Yazidi women as sex slaves.[25] This campaign to eradicate Yazidi "heretics" briefly garnered global attention when US and Iraqi helicopters dramatically rescued surrounded Yazidis off a mountain top,[26] but now months after those airlifts the genocidal push against Yazidis continues.[27] ISIL has also begun to "cleanse" Iraq of Chaldean Catholics.[28]

Muslim Iraqis have fared little better. ISIL once murdered 1,500 captured members of Iraq's security forces in a "single massacre."[29] It has purged noncompliant Sunnis from conquered territory[30] and has submitted remaining Sunnis to their antediluvian edicts of personal conduct.[31]

ISIL's atrocities are no less horrific in Syria. There, ISIL systematically commits genocide against the Assyrian Christians: forcing them from ISIL territory, killing their members, burning their churches, desecrating their shrines, and kidnapping those who did not flee.[32] ISIL also attempted to purge the Kurds out of Syria, but the peshmerga broke their siege of Kobani earlier this year.[33]

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[24] *See* Zachary Laub & Jonathan Masters, *Islamic State in Iraq and Syria*, COUNCIL ON FOREIGN AFFAIRS (Aug. 8, 2014), http://www.cfr.org/iraq/islamic-state-iraq-syria/p14811 (recounting the history of ISIL's advance into Iraq).

[25] *See 'Terrifying' UN report details ISIS war crimes in Iraq*, RUSSIA TODAY (Oct. 2, 2014 20:41), http://rt.com/news/192692-un-isis-war-crimes/.

[26] *See* Martin Chulov, *40,000 Iraqis stranded on mountain as Isis jihadists threaten death*, THE GUARDIAN (Aug 6, 2014) http://www.theguardian.com/world/2014/aug/07/40000-iraqis-stranded-mountain-isis-death-threat.

[27] *See U.N. warns Yazidis facing 'attempted genocide'*, AL ARABIYA NEWS (Oct. 22, 2014), http://english.alarabiya.net/en/News/middle-east/2014/10/22/U-N-Yazidis-facing-attempted-genocide-.html. *See also* Mohammed A. Salih, *'I Did Not Convert. I Did Not Say Prayers.'*, FOREIGN POL'Y (Jan. 29, 2015), http://foreignpolicy.com/2015/01/29/i-did-not-convert-i-did-not-say-prayers-196-yazidis-released-islamic-state/.

[28] *See* Samuel G. Freedman, *As Iraqi Christians in U.S. Watch ISIS Advance, They See 'Slow-Motion Genocide'*, CNN.COM (Sept. 6, 2014), http://www.nytimes.com/2014/09/06/us/as-iraqi-christians-in-us-watch-isis-advance-they-see-a-slow-motion-genocide.html?_r=0.

[29] *See 'Terrifying' UN report details ISIS war crimes in Iraq, supra* note 25.

[30] *See* Tom Ricks, *The coming fall of the house of ISIS*, FOREIGN POL'Y (Jan. 14, 2015) http://foreignpolicy.com/2015/01/14/the-coming-fall-of-the-house-of-isis/ ("Examples of ISIS's increasing violence against Sunnis in Iraq include the execution of 15 men of the al-Jumaila tribe and a public execution of men, women and children of the Albu Nimr tribe. The executions in Iraq were in response to the burning of ISIS flags and Sunni opposition to ISIS oppression.").

[31] *See 'Terrifying' UN report details ISIS war crimes in Iraq, supra* note 25.

[32] *See* Sam Jones & Owen Bowcott, *Religious leaders say Isis persecution of Iraqi Christians has become genocide*, THE GUARDIAN (9 August 2014 08.05 EDT), http://www.theguardian.com/world/2014/aug/08/isis-persecution-iraqi-christians-genocide-asylum.

[33] *See* Sara Malm, *Victory dance: Kurds celebrate driving ISIS out of Kobane with synchronised jig*, THE DAILY MAIL (August 9, 2014 08.05 EDT), http://www.dailymail.co.uk/news/article-2935184/Watch-Victorious-Kurds-celebrate-victory-ISIS-Kobane-synchronised-dance.html.

International rights and refugee organizations have witnesses and victims in Iraq to record the scope of ISIL's crimes. They concluded the following in an early 2015 on ISIL's war crimes, crimes against humanity, genocide, and general persecution of Christians, Kaka'i, Shabak, Turkmen and Yazidi Iraqi minorities:

> Summary executions, forced conversion, rape, sexual enslavement, the destruction of places of worship, the abduction of children, the looting of property and other severe human rights abuses and crimes under international law have been committed repeatedly by ISIS. While minorities have long been vulnerable to attacks by extremists, this violence appears to be part of a systematic strategy to remove these communities permanently from areas where they have lived for centuries.

This Iraq conclusion mirrors the findings of the UN report focused on Syria aptly titled, "Rule of Terror: Living under ISIS in Syria."[34] The most appalling reports on ISIL from the UN arguably came this year from the U.N. Committee on the Rights of the Child. The committee said it had received reports of "several cases of mass executions of boys, as well as reports of beheadings, crucifixions of children and burying children alive."[35]

B. AL-BAGHDADI AND HIS CRIMES

ABAB is a Specially Designated Global Terrorist under Presidential Executive Order 13224 and is a terrorist named by the United Nations Security Council Resolution 1267/1989 al-Qaeda Sanctions Committee.[36] Time magazine warns he is the "the world's most dangerous man" and Le Monde decries him as "the new bin Laden."[37] Unfortunately, the condemnation of ABAB arises indirectly; the world knows of ISIL's crimes and knows he leads ISIL. The world knows little else of ABAB. As much as the international community has learned of ISIL's atrocities, it has scant evidence directly connecting Abu Bakr al-Baghdadi to those atrocities.

A minor figure in the Iraqi insurgency ten years ago, ABAB became a US military detainee at Camp Bucca in Iraq in late 2005.[38] Upon his release in 2009 he declared

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[34] *Rule of Terror: Living under ISIS in Syria*, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, (14 November 2014) *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/HRC_CRP_ISIS_14Nov2014.pdf.

[35] Eyder Perolta, *ISIS Is Killing, Torturing, Using Children As Suicide Bombers, Says U.N. Report*, NPR (Feb. 5, 2015 2:47 PM ET) http://www.npr.org/blogs/thetwo-way/2015/02/05/384088459/isis-is-killing-torturing-using-children-as-suicide-bombers-says-u-n-report. To add to this list, ISIL uses mentally disabled children as suicide bombers. *See* Faith Karimi & Greg Botelho, *ISIS putting price tags on Iraqi children, selling them as slaves, U.N. says*, CNN (Updated 4:26 PM ET, Fri February 6, 2015) http://www.cnn.com/2015/02/06/world/isis-children-torture/.

[36] *See* Press Release, Jen Psaki, *supra* note 20. The USG has long had a multi-million dollar bounty on his head. *Id.*

[37] *See* Terrance McCory, *supra* note 19.

[38] *See* Ruth Sherlock, *How a talented footballer became world's most wanted man, Abu Bakr al-Baghdadi*, THE TELEGRAPH (11 Nov 2014 8:32AM GMT), http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/10948846/How-a-talented-footballer-became-worlds-most-wanted-man-Abu-Bakr-al-Baghdadi.html.

his loyalty to AQI[39]—though it had gone through major changes in the interim due to Zarqawi's death—and began quietly climbing its dwindling leadership ranks.[40] After he took over AQI, his actions spoke volumes among jihadi terrorists. His ISIL rebranding reflected a true ambition to govern territory. It also accompanied a rebellion against (or essentially dismissal of) the stateless terrorism espoused al Qaeda ("AQ") and, more pointedly, the leadership AQ by Zawahiri, bin Laden's successor.[41]

Despite ordering his subordinates to broadcast ISIL's crimes, ABAB keeps a very low profile. Born Ibrahim Awwad Ibrahim Ali al-Badri, and sometimes called Abu Awad or Abu Dua, ABAB is highly educated. He is from Samarra (not Baghdad) and has (or at least had) the reputation of being exceedingly quiet and innocuous.[42] While these tidbits provide little insight, ABAB's behavior since taking over ISIL has revealed even less. ISIL requires new recruits to swear allegiance to him as the caliph of their "state," but ABAB himself rarely ventures into public settings.[43] When he does, his entourage prohibits photos and he usually covers his face with a scarf or a mask.[44] He claims to be divine, a descendent of the prophet Muhammad, but remains enigmatic.[45]

Due to this lack of information, evidence of a direct linkage between ABAB and ISIL's atrocities, at least as much as is available from open sources, is tenuous. This available information arises from private intelligence, leaks from government intelligence, and gumshoe reporting with confidential sources. In his only televised statement, from July 2014 in which he proclaimed an "Islamic State" and himself the Caliph of it, he spoke in generalities. He praised *terrorism* generally, but did not specifically command followers to commit other crimes.[46] His most recent audio

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[39] *Id*. ("Inside the prison Baghdadi is believed to have met with and been radicalised by jihadists from al-Qaeda, the group holding a reign of terror after the Iraqi invasion, with daily suicide bombings in towns and cities. When released he reaffirmed his membership to al-Qaeda in Iraq, a group which, even after its leader Abu Musab al-Zarqawi was killed by a US air strike in 2006, was known for its extreme violence.").

[40] *See* KENNETH KATZMAN, *supra* note 16, at 5-6.

[41] *See Al-Qaeda's leader in Iraq defies boss over Syria fight*, WASH. POST (June 15, 2013) http://www.washingtonpost.com/world/al-qaedas-leader-in-iraq-defies-boss-over-syria-fight/2013/06/15/05a92b92-d5e8-11e2-8cbe-1bcbee06f8f8_story.html (illustrating ABAB's defiance of al Qaeda dictates).

[42] *See* Janine Di Giovanni, *Who Is ISIS Leader Abu Bakr al-Baghdadi?*, THE TELEGRAPH (Dec. 8 2014 12:48 PM EST), http://www.newsweek.com/2014/12/19/who-isis-leader-abu-bakr-al-baghdadi-290081.html.

[43] *Id.*

[44] *Id.*

[45] Aaron Y Zelin of the Washington Institute for Near East Policy, *Abu Bakr al-Baghdadi: Islamic State's driving force*, BBC (July 31 2014) http://www.bbc.com/news/world-middle-east-28560449.

[46] *See What did Abu Bakr al-Baghdadi say?,* MIDDLE EAST EYE (5 July 2014 16:34 BST; last updated 12 February 2015 16:15 GMT) http://www.middleeasteye.net/news/what-did-baghdadi-say-320749010 (providing an English translation).

recording invoked action against foreign governments, but did not refer to ISIL conduct in Syria and Iraq.[47]

III. THE VALUE OF CAPTURE / PROSECUTION STRATEGIES

The reason for this inquiry regarding prosecution methods useable against ABAB is that the USG could not only choose to capture, rather than kill, a top terrorist leader, but it could also then prosecute him for his crimes. Such a choice would deviate from the policy embraced since 9/11. The USG has usually, though not always, chosen the lethal option. When the USG has chosen to capture a terrorist leader—or when an allied force captured a leader and transferred custody to the USG—formal, transparent prosecution has not always followed in due course. The prisoners in Guantanamo and those held through rendition are examples of the "capture but don't prosecute" policy of the previous administration and the opacity which accompanied it.

Empirical researchers have cast significant doubt on the intuitive reasoning behind decapitation strategies. Whether lethal or nonlethal, decapitation strategies seek to unravel the underlying terrorist organization by removing its leadership. This paper envisions capturing ABAB at a point when ISIL is still an active threat, and thus envisions the capture as a nonlethal decapitation operation. In that scenario, if policymakers decide that any type of decapitation is *ineffective* (at bringing down an organization) then ethically, if not legally, the USG would have to pursue a capture and prosecution strategy by default. If killing ABAB through a lethal decapitation strike does not hasten ISIL's demise, then the USG lacks any legal paradigm under which to kill him in an extrajudicial manner. The USG is not in the business of punitive executions. Arrest and trial would be the standing policy.

In the alternative, if policymakers conclude decapitation *is* effective, then policymakers should also consider the data and logic supporting the conclusion that a nonlethal decapitation strategy is as effective, if not more so, in ending a terrorist organization as lethal strikes. Previous research has considered the difference in effectiveness of lethal and nonlethal decapitation methods as a tangential point of inquiry, but here that difference is the focus. This policy paper's own quantitative inquiry examined capture strategies for ending terrorist organizations compared to lethal alternatives.

A. BACKGROUND OF SCHOLARSHIP ON DECAPITATION STRATEGIES

Some scholars researching the effectiveness of decapitation strategies against terrorist groups conclude that it is effective while others do not. This scholarship

[47] *See* Ian Black, *Islamic State leader Baghdadi reportedly resurfaces after claims US strike killed him*, THE GUARDIAN (Nov. 13 2014 14:48 EST) http://www.theguardian.com/world/2014/nov/13 /islamic-state-audio-tape-baghdadi (providing audio analysis).

builds on academic debates on the effectiveness of decapitation strategies against other organizations that threaten a state, such as other states.[48]

In one camp are scholars who have concluded that decapitation policies are ineffective and possibly can backfire by triggering more attacks and a stronger organization. Jenna Jordan has become a prominent voice in this camp.[49] Her quantitative study concluded that, "independent of other measures, going after the leaders of older, larger, and religious groups is not only ineffective[,] it is counterproductive."[50] She based her findings on her logit regressions. Researchers and statisticians use logit regressions to attain binary results, such as—in Jordan's research—answering the yes/no question of if particular state actions successfully terminated a terrorist group.[51] Jordan used a dataset of 169 terrorist organizations and observations of decapitation events from 1945 to 2004.[52]

Prior to Jordan's research, other scholars had previously examined both case studies and other available data on decapitation to question the strategy's effectiveness. Langdon, Sarapu, and Wells used empirical data analysis under a different methodology than that employed by Jordan to reach a similar, if less drastic, result.[53] They found decapitation did not counterproductively "radicalize" groups, nor did the strategy divide or disband terror outfits. However, they agreed with a key nuance of Jordan's conclusion: "religious organizations have rarely disbanded because they provide a strong source of group cohesion, and groups that rely heavily on a single leader's teachings are likely to withstand a crisis in leadership."[54]

On the other hand are scholars who believe decapitation is a strategy worthy of counterterrorist resources. Most recently, a 2012 edition of *International Security*, the esteemed joint publication of Harvard and MIT, published two separate articles challenging the skepticism on decapitation.[55] One article, authored by West Point's Bryan Price, argues that Jordan's model set an unrealistic standard for success.[56]

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[48] *Compare* John A. Warden, "Employing Air Power in the Twenty-First Century," in *The Future of Air Power in the Aftermath of the Gulf War*, ed. Richard H. Shultz Jr. and Robert L. Pfaltzgraff Jr. (Maxwell Air Force Base, AL: Air University Press, 1992), 65 (concluding decapitation is critical to victory against defeating a "nation's will to fight") *with* Robert A. Pape, *Bombing to Win* (Ithaca: Cornell University Press, 1996), 79 (disagreeing with Warden's conclusions).

[49] Regarding the attention her findings have received, see, e.g., Zack Beauchamp, *The entire basis for Obama's drone strategy may be wrong*, Vox (May 21, 2014, 2:00 PM) http://www.vox.com/2014/5/21/5738190/drone-study-decapitation-fails.

[50] Jenna Jordan, *When Heads Roll: Assessing the Effectiveness of Leadership Decapitation*, 18 SECURITY STUDIES 719, 723 (2009).

[51] A helpful introduction to logit models is offered at *An Introduction to Logistic Regression*, APPALACHIAN STATE UNIVERSITY, http://www.appstate.edu/~whiteheadjc/service/logit/intro.htm.

[52] *See* Jenna Jordan *supra* note 50 at 734.

[53] *See* Lisa Langdon, Alexander J. Sarapu, and Matthew Wells, *Targeting the Leadership of Terrorist and Insurgent Movements: Historical Lessons for Contemporary Policy Makers*, JOURNAL OF PUBLIC AND INTERNATIONAL AFFAIRS 15 (Spring 2004).

[54] *See* Jenna Jordan *supra* note 50 (discussing Landon, et. al.).

[55] Bryan Price, *Targeting Top Terrorists*, 36:4 INTERNATIONAL SECURITY 9 (Spring 2012); Patrick Johnston, *Does Decapitation Work*, 36:4 INTERNATIONAL SECURITY 47 (Spring 2012).

[56] *Id.* at 13.

Price employed a hazard-rate-centered survival model, specifically a Cox proportional hazard model, to explain which variables have historically affected the survival rates of terrorist organizations. Though he examined the data with the same general dependent variable of organizational survival as Jordan had, he looked further out in the evaluation of that metric than Jordan's two-year cutoff.[57] His statistical analysis of the database he created led to his argument that "leadership decapitation significantly increases the mortality rate of terrorist groups, even after controlling for other factors."[58]

B. Independent Statistical Analysis in Support of Capture Strategies

This policy paper applies the regression model—the same model Jordan used with her data—to Price's data. Applying Jordan's logistic regression to Price's data model produces a finding that capture decapitation is effective generally, and more effective than lethal decapitation strategies, when the model regresses Price's updated and larger dataset.

A primary reason for this model is to make more of an "apples to apples" comparison of Price's information to that used by Jordan. Jordan's data was markedly older, going from 1945 to 2004, compared to Price's data range of 1970 to 2008. However, despite Price's shorter range, his data includes more terrorist organizations. In terms of analysis, Price also employs a different model to reach a different conclusion: In contrast to Jordan's regression analysis, Price originally used a survival statistical model to analyze his data, as discussed in the subsection above.[59] The statistical model of this paper, as explained in more detail in **Appendix A**, analyzes Price's more recent and robust data under a general logistic regression model. This makes for a better comparison of results to those found by Jordan. Overall, the model cannot prove causation, but it can intuitively suggest it through a strong finding of correlation of types of decapitation and a terror group's demise.

The results favor capture decapitation strategies, backing Price's initials results but with a different model. The capture method proved to strongly correlate with a higher likelihood that a terrorist group folds,[60] both in comparison to a government performing no decapitation of any kind and in comparison to lethal decapitation actions. This finding remained true even when accounting for control variables, such as internal dynamics of groups and the group's relationship with external forces besides the state, and the finding held true even after filtering out all smaller groups. Finally, the conclusions were even more pronounced after adjusting the model to only "count" (as a linkage between a decapitation method and organizational death)

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[57] *Id.*

[58] *Id*. at 11.

[59] *See supra* Part III.A.

[60] Whether or not a group ceases to pose a significant threat is the dependent variable use by both Jordan and Price, but as this paper's model adopts Price's dataset it accordingly adopts Price's dependent variable definition. A group is "considered [] inactive if two years passed without a violent attack, with the year of the group's last attack serving as its end date." *See* Price *supra* note 55 at 27.

instances of terrorist group demise that occurred within four years of a decapitation event.

The analysis of those findings of decapitation strategies apply to ISIL and ABAB. A "capture and prosecute" strategy may be the right choice moving forward: it is not only more transparent and arguably more ethical; it may be empirically more effective. The strategy offers four key pragmatic benefits. First, the strategic communications benefits of governments enforcing the rule of law. Second, the diplomatic benefits of a nonlethal strategy are more agreeable to allies. Third, the diplomatic and strategic communication benefits in the Middle East of using a trial rather a martyr-making drone strike; and fourth, the intelligence benefits of detention and interrogation that are wholly absent from a lethal action.

IV. LEGAL ISSUES RELEVANT TO ANY PROSECUTION STRATEGY

A. THE IRRELEVANCE OF IRAQI OR SYRIAN SOVEREIGNTY TO COA ANALYSIS

One concern is so pervasive that its pervasiveness renders it moot altogether. All of the COAs discussed below have a common starting point of extraterritorial capture. In accord with that starting point, all COAs have the common problem that the capture would likely be inside Syrian sovereign territory, without Syrian government approval. All of these COAs would accordingly violate the fundamental tenet of sovereignty enshrined in international law under the UN Charter that, without a showing of self-defense, one nation-state cannot use force against or inside of another without the other's consent.[61]

A targeted killing also employs the use of force in sovereign territory. The same issue of international law colors USG action every time a drone mission or aerial sortie flies against ISIL in Syria, no matter the target. Based on this understanding of fundamental international law, the United States has arguably violated another state's sovereignty since it began bombing ISIL in the summer of 2014, based not on ISIL's rights (it has none, as a non-state) but on Syria's.[62] No act of Congress can alleviate these concerns. This is not a balance-of-powers legal problem in domestic law, but rather a sovereignty issue among states in international law.

To counter this argument, the USG could contend its actions are lawful measures of self-defense. In order to make this argument legitimately, the US would have to show that ISIL is a genuine threat to the US, *and* that Syria is either unable or unwilling to address that threat itself.[63] The latter would be easier to prove, but

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[61] U.N. Charter art. 2, para. 4. *See also* Ryan Goodman & Sarah Knuckey, *The Case of Abu Anas al-Libi: International Law Q & A*, JUST SECURITY (October 9, 2013 at 5:31 PM) http://justsecurity.org/1827/case-abu-anas-al-libi-international-law/ (explaining how the Charter applies to capture operations in light of the aftermath of the capture operation against al-Libi).

[62] *See* Josh Rogin, *White House Has No International Legal Justification for Hitting ISIS in Syria*, Daily Beast (Sep. 23, 2014, 12:00AM) http://www.thedailybeast.com/articles/2014/09/15/white-house-has-no-international-legal-justification-for-hitting-isis-in-syria.html (explaining the lack of lega justification in international law).

[63] The fact that ISIL is a non-state entity operating with the sovereign borders of Syria and Iraq does not undermine the USG's—or any government's—right to defend its citizens from that threat. See S.C.

insufficient on its own. Though international law demands states take action against terrorism within their own borders, other states cannot intercede unless threatened by the same terrorism.[64]

This debate, however, is currently an academic one.

The reason other nations and the UN have not decried US action against ISIL, in contrast to reactions to Operation Iraqi Freedom, is that the war against ISIL remains popular. ISIL's actions make it repugnant to all, and backing ISIL is in no country's best interests. In addition, the USG and its many allies, including not only Arab allies such as Jordan, Iraq, and the UAE, but also its implicit ally of Iran, are not attacking a recognized sovereign state *even if the conflict is within Syrian borders*.[65] International law is essentially law of, for, and by sovereign states. Despite its (transparently insecure) namesake, ISIL is *not* a sovereign state. While it controls territory, it fails other standards under international law, as explained in **Appendix C**. Thus, the international community has little incentive to apply its law on ISIL's behalf.

Whatever strategy the USG employs, acting in Syria without Assad's consent arguably violates international law. However, the world—at least at this point—cares not. Any "cost" of this violation applies equally for all COAs, which moots the issue in the comparison of the COAs.

Capturing ABAB in Iraq would moot the issue even further. Given the current disposition of the sovereign Iraqi government toward ISIL, a capture event in Iraq would likely eliminate the issue, as the Iraqi government would likely consent to the US or coalition action. The only potential problem with attaining Iraqi consent is if Baghdad itself prefers one COA to another, and conditions its consent accordingly.

Res. 1368, para. 1 & 3, U.N. Doc. S/RES/1368 (Sep. 21, 2001), for the UNSC's establishment of the principle that the right of self-defense extends to non-state terrorist organizations by its recognition of a state's "inherent right of individual or collective self-defense in accordance with the [UN] Charter" in its preamble. International jurists and scholars have interpreted the 1368 language as declaring a state's right of self-defense to respond to international terrorism even when committed by non-state actors. *See* BARRY E. CARTER & ALLEN E. WEINER, INTERNATIONAL LAW 72 (Walters Kluwer Law, 2011).

[64] The UNSC has mandated all states criminalize terrorism. 1(b), UNSC Res. 1373 – U.N. Doc. S/RES/1373 (Sep. 28,2001) ("Decides that all States shall . . . Criminalize the wilful [support of terrorism]."). Moreover, multiple UN and regional conventions, including the 1970 Hague Conv. for the Suppression of Unlawful Seizure of Aircraft, the 1979 New York Conv. Against the Taking of Hostages, and the 1997 New York Conv. for the Suppression of Terrorist Bombings, have so clearly condemned terrorism that its prohibition is now integrated within customary international law. *See* DAVID LUBAN, JULIE R. O'SULLIVAN, & DAVID P. STEWART, INTERNATIONAL & TRANSNATIONAL CRIMINAL LAW 690-94 (2010).

[65] While the actions are *within* Syria's recognized sovereign territory, ISIL is the target rather than Assad's regime. If the USG were to militarily target Assad's regime without a global backing, such as through a UN Security Council resolution, the response of the international community would almost certainly differ greatly, as highlighted by the President's failure to gather a global consensus to enforce a "red-line" of chemical weapons use in 2013.

B. FEDERAL LAW OF MILITARY DETENTION AND MILITARY COMMISSIONS

Recently passed federal legislation affirms the President's right to indefinitely detain non-American members of Al Qaeda and "associated forces" in military rather than civilian, custody. The same law, the National Defense Authorization Act of 2012 ("2012 NDAA"),[66] also mandates military detention for any such individuals the USG apprehends. Due to the specific wording of the legislation and the policies of the present administration, neither the indefinite detention in military custody provision nor the mandate will substantively affect the foregoing COAs discussed below.

The 2012 NDAA's indefinite detention language will not constrain the USG's COA flexibility. It should instead only put the COA on stronger ground. Section 1021 "affirms" the President's authority to detain certain "covered persons . . . under the laws of war."[67] This language spurred an outcry of concern that it would "open the door for trial-free, indefinite detention of anyone, including American citizens, so long as the government calls them terrorists"[68] and led to pleas for President Obama to veto the entire NDAA to prevent its codification as law.[69] President Obama signed it nonetheless, noting it "solely codifies established authorities" and that his administration would "not authorize the indefinite military detention without trial of American citizens."[70] However, the law now unequivocally grants the President power to detain non-citizens captured abroad under the laws of war.[71] The Obama administration has never had the military put a newly captured terrorist into

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[66] The National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011) (codified in scattered sections of the U.S. Code) [hereinafter 2012 NDAA].

[67] 2012 NDAA, § 1021(a). While many argue the § 1021 language only codified the existing legal power of the President to detain as a consequence of the 2001 Authorization of the Use of Military Force ("AUMF"), the debate centers on how much power the President had before the 2012 NDAA under the AUMF. *Compare* JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R42143, WARTIME DETENTION PROVISIONS IN RECENT DEFENSE AUTHORIZATION LEGISLATION 8 (January 23, 2015) *available at* http://www.fas.org/ sgp/crs/natsec/R42143.pdf ("Prior to passage of the 2012 NDAA, the AUMF constituted the primary legal basis supporting the detention of persons captured in the conflict with Al Qaeda and affiliated entities, but the scope of the detention authority it confers is not made plain by its terms, and accordingly can be subject to differing interpretations. Section 1021 of the 2012 NDAA appears intended to codify existing law, as interpreted and applied by the executive branch and the D.C. Circuit, and expressly disavows any construction that would limit or expand the President's detention authority under the AUMF.") *with* Raha Wala of Human Rights Watch, via Benjamin Witte's post, *Raha Wala Writes His Own FAQ*, LAWFARE (Dec. 20, 2011 at 10:01 PM) http://www.lawfareblog.com/2011/12/raha-wala-writes-his-own-faq/ (arguing how the 2012 NDAA indeed does expand the government's detention authority under the header, "Does the NDAA expand the government's detention authority?").

[68] Erik Kain, *The Problem With The National Defense Authorization Act*, FORBES (Dec. 5, 2011 at 9:48PM) http://www.forbes.com/sites/erikkain/2011/12/05/ the-national-defense-authorization-act-is-the-greatest-threat-to-civil-liberties-americans-face/.

[69] Rosenthal, A., *President Obama: Veto the Defense Authorization Act*, N.Y. TIMES, (30 Nov. 2011) http://takingnote.blogs.nytimes.com/2011/11/30/president-obama-veto-the-defense-authorization-act/.

[70] JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CRS *supra note* 67 at 19.

[71] Whether the law actually created any new detention powers for the President is open to debate. *See* Raha Wala, *supra* note 67 and accompanying footnoted text.

indefinite detention, but the law grants the USG this option, upheld in federal court.[72] At least in domestic law, this ensures the ability to hold a detainee such as ABA in the limbo status of military custody. This could provide policymakers with time to decide on a prosecution COA.

The NDAA's "mandatory military detention" language of § 1022 will not prevent any of the COAs discussed below. The provision, titled "Military Custody For Foreign Al-Qaeda Terrorists" seemingly mandates USG military detention for the same category of "covered persons" of § 1021.[73] However, this provision is unlikely to force military detention (or a military trial) of ABAB or his cohorts, or otherwise limit the President's prosecution prerogatives. First, ABAB might not fall within the limits of "covered persons." His subordinates almost certainly will not. The statute defines "covered persons" as one of two types of individuals. It includes those who supported the 9/11 attacks,[74] which would not include ABAB or any other member of ISIL. It also includes someone who "was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."[75]

Though ABAB was likely once a member of an AQ branch, AQI,[76] no evidence suggests any of his ISIL subordinates were also members of AQI or any other AQ branch. But the "covered persons" requirement of § 1022 is double-layered: an individual must fall into one of the two § 1021 categories and additionally meet two more standards of § 1022(a)(2). First, the person must either be an AQ member or "an associated force that acts in coordination with or pursuant to the direction" of AQ.[77] This standard is present tense; ABAB is definitely not now an AQ member and ISIL no longer associates with, much less takes marching orders from, AQ. Second, ABAB would have had to have attempted to attack the United States "or its coalition partners."[78] While ABAB meets this requirement—given his actions against the USG years ago and his actions against the US-supported government of Iraq over many years—the conjunction between the two § 1022 standards is an "and." Because of ABAB's tenuous link to AQ, particularly in the present tense, the mandatory military detention language likely does not apply to him.

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[72] *Obama wins back the right to indefinitely detain under NDAA*, RUSSIA TODAY (July 17, 2013 21:35), http://rt.com/usa/obama-ndaa-appeal-suit-229/ ("On Wednesday this week, an appeals court in New York ruled in favor of the government and once again allowed the White House to legally indefinitely detain persons that fit in the category of enemy combatants or merely provide them with support.") (citing Hedges v. Obama, 724 F. 3d 170 (2013)).

[73] 2012 NDAA, § 1022(a)(1) ("Except as provided in paragraph (4), the Armed Forces of the United States shall hold a person described in paragraph (2) who is captured in the course of hostilities authorized by the Authorization for Use of Military Force (Public Law 107–40) in military custody pending disposition under the law of war").

[74] § 1021(b)(1) (mirroring the language of the 2001 AUMF).

[75] § 1021(b)(2).

[76] *See* Part II.B.

[77] § 1022(a)(2)(A).

[78] § 1022(a)(2)(B).

Even if ABAB is "covered" in § 1022, the mandate for military detention would not prevent any of the COAs assessed below. The § 1021 language explicitly allows for international and foreign prosecution, COAs #1 and #3. A subsection permits transfer "for trial by an alternative court or competent tribunal having lawful jurisdiction" or transfer "to the custody or control of the person's country of origin, any other foreign country, or any other foreign entity."[79]

The statute grants a loophole of Presidential waiver that will also enable the President to pursue prosecution by United States Attorney, COA #2. "The President may waive the requirement of [military detention] if the President submits to Congress a certification in writing that such a waiver is in the national security interests of the United States."[80] The present administration has signaled by policy statements and prior practice it will exploit this waiver provision to bypass the mandate of military detention for captured terrorists. Presidential Policy Directive 14 cited the waiver prerogative to automatically waive § 1022 for captured terrorists who fell into at least one of several categories, one of which is if military detention would "impede counterterrorism cooperation, including on matters related to intelligence-sharing or assistance in the investigation or prosecution of suspected terrorists[.]"[81] If that is not broad enough to encompass ABAB, the directive maintains the Executive can "issue additional waivers for categories of conduct, or for categories of individuals, or on an individual case-by-case basis, when doing so is in the interest of national security."[82]

Finally, while § 1021 only enhances Presidential flexibility and § 1022 ultimately "does not prevent Article III trials of covered persons,"[83] the Executive Branch must be sure to check other bureaucratic boxes of the 2012 NDAA. Handling of terrorist detainees invokes §§ 1024,[84] 1028,[85] and 1029,[86] all of which require various reporting, consultations, and certifications either to Congress or within the

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[79] § 1021(c)(3) & (4).

[80] § 1024(a)(4) Waiver for National Security.

[81] *Fact Sheet: Procedures Implementing Section 1022 Of The National Defense Authorization Act For Fiscal Year 2012*, THE WHITE HOUSE (Feb. 28, 2012) *available at* https://www.whitehouse.gov/sites/default/files/ndaa_fact_sheet.pdf (citing Presidential Policy Directive 14, Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year (FY) 2012 (Feb. 28, 2012), *available at* http://www.justice.gov/sites/default/files/opa/legacy/2012/02/28/ppd-14.pdf).

[82] *Id.*

[83] *See* JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CRS *supra note* 67, at 23.

[84] *See* § 1024(b) (specifying baseline procedural requirements of a military judge and the availability of military defense counsel for an "unprivileged enemy belligerent who will be held in long-term detention under the law of war pursuant to the Authorization for Use of Military Force").

[85] *See* § 1022(a)(3) (barring any detainee transfer out of military detention "unless consistent with the requirements of section 1028").

[86] *See* § 1029(a) ("Before seeking an indictment of, or otherwise charging, an individual described in subsection (b) in a Federal court, the Attorney General shall consult with the Director of National Intelligence and the Secretary of Defense about—(1) whether the more appropriate forum for prosecution would be a Federal court or a military commission; and (2) whether the individual should be held in civilian custody or military custody pending prosecution.").

Executive Branch. However, none stymies any COA this paper proposes. First, none of the COAs triggers the "Elements of Procedures" of § 1024.[87] Second, the § 1022(a)(3) requirement of § 1028 compliance is immaterial to prosecution of ISIL leaders because § 1028 only applies to detainees held in Guantanamo Bay.[88] And third, while § 1029's interagency "consultation requirement" directly addresses a federal prosecution of terrorist as proposed in COA #2, ABAB might not meet the "covered persons" requirements of §§ 1021 and 1022,[89] which § 1029(b) requires. Even if he does, § 1029(a) presents little more than a formality that the Executive Branch sees as unnecessary due to pre-existing interagency cooperation and has thus interpreted in a way that "ensures critical executive branch functions are not inhibited."[90]

Other provisions of federal law may also appear to tie the USG's hands to a military detention and trial, but do not do so. Appropriations language from the 2011 NDAA and other statutes restrict the President's flexibility with Guantanamo detainees, essentially limiting the options to trial by military commission, release to foreign partner, or continued indefinite detention.[91] However, detainees subject to this language are all holdover detainees from the George W. Bush administration;[92] the Obama administration has stated the closure of the Guantanamo Bay detention facility for terrorists is a policy objective.[93] Thus, the measures to prevent civilian trial will not apply to newly captured individuals if the USG never transfers them to

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[87] *See* § 1024(c) ("APPLICABILITY.—The Secretary of Defense is not required to apply the procedures required by this section in the case of a person for whom habeas corpus review is available in a Federal court."). *See* JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CRS *supra* note 67, at 27 ("Captured unprivileged enemy belligerents destined for trial by military commission or Article III court, or to be transferred to a foreign country or entity, would not appear to be entitled to be represented by military counsel or to have a military judge preside at their status determination proceedings.").

[88] *See* § 1028.

[89] *See supra* notes 66 – 72 and accompanying text regarding ABAB's applicability to the "covered persons" standards of §§ 1021 and 1024.

[90] White House, Office of the Press Secretary, Statement by the President on H.R. 1540, December 31, 2011, [Presidential "Signing Statement" of the NDAA], *available at* http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540 ("My Administration will interpret and implement section 1029 in a manner that preserves the operational flexibility of our counterterrorism and law enforcement professionals, limits delays in the investigative process, ensures that critical executive branch functions are not inhibited, and preserves the integrity and independence of the Department of Justice.").

[91] *See* JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CRS *supra note* 67 at 6 ("The blanket restriction on transfers into the United States effectively makes trial by military commission the only viable option for prosecuting Guantanamo detainees for the foreseeable future, as no civilian court operates at Guantanamo.")(citing IKE SKELTON NATIONAL DEFENSE AUTHORIZATION ACT for FY2011 (2011 NDAA), P.L. 111-383, §1032 (applying to military funds); DEPARTMENT OF DEFENSE AND FULL-YEAR CONTINUING APPROPRIATIONS ACT, 2011 (2011 CAA), P.L. 112-10, §1112 (applying to any funds appropriated by the 2011 CAA or any prior act)).

[92] *Id.*

[93] *See, e.g.*, Rebecca Nelson, *Obama Again Promises to Close Guantanamo Bay In State of the Union Speech*, NATIONAL J. (Jan. 20, 2105) http://www.nationaljournal.com/white-house/obama-will-again-promise-to-close-guantanamo-bay-in-state-of-the-union-speech-20150120.

Guantanamo. Because the President has given clear indication the USG will not add to Guantanamo's detainee population as a matter of national security policy,[94] these restrictions do not prevent the USG from pursuing federal civil prosecution or any other COA discussed below.

Prosecution of ABAB in the military commission process, the United States Court of Military Commission Review ("MCR"), is not a COA this paper explores. The Obama administration could decide as a matter of policy to use the MCR for any non-Guantanamo detainees, such as ABAB and any of his subordinates the USG captures. That tack is highly unlikely. President Obama decided as a matter of policy in 2014 not to prosecute any terrorist detainee in the MCR beyond those same Guantanamo individuals the Obama administration inherited from its predecessor.[95] The decision is unsurprising given both the Obama administration's stated preference and practice to use Article III (civilian) courts[96] and the overlapping controversy[97] and constitutional challenges[98] that military trials for post-9/11 detainees have generated since their inception in 2002.[99]

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[94] *Id.* President Obama has never added to the Guantanamo population. *The Guantanamo Docket*, N.Y. TIMES, http://projects.nytimes.com/guantanamo/timeline.

[95] Spencer Ackerman, *Pentagon rules out transferring secret Bagram detainees to Guantánamo*, THE GUARDIAN (October 2014 13:27 EDT), http://www.theguardian.com/world/2014/oct/02/pentagon-rules-out-transfer-bagram-detainees-guantanamo ("The Obama administration has decided against charging detainees held outside Guantánamo Bay in its controversial military commissions, ending a year-long debate that has simmered among its national-security lawyers."). In regards to the Obama administration's reluctant decision—based largely on Congress preventing a civilian court alternative, see JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CRS *supra* note 67—to begin trying Guantanamo detainees in the military commission tribunals, see *Obama orders resumption of military commissions at Guantanamo*, CNN (March 8, 2011 11:20 a.m. EST) http://www.cnn.com/2011/POLITICS/03/07/obama.guantanamo/ ("President Barack Obama announced Monday that the United States will resume using military commissions to prosecute alleged terrorists held at the Guantanamo Bay, Cuba, detention facility. In the announcement, the president said his administration remains committed to closing the controversial detention facility but will rescind its previous suspension on bringing new charges before military commissions.").

[96] *See infra* Part V. B., COA #2 Prosecution by a United States Attorney.

[97] *See, e.g.,* Jack Goldsmith, *How Obama Learned To Love Military Commissions*, SLATE (Mar. 21 2012, 4:29 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/03/military_commissions_now_have_broad_political_support_from_republicans_and_democrats_alike_.html ("Presidents have deployed commissions in one form or another in most major wars in American history. But the ones created by George W. Bush in November 2001—without any new input from Congress and with relatively few defendant rights—sparked enormous controversy and were beset by legal and political difficulties throughout his administration.").

[98] *See* STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS, AND PETER RAVEN-HANSEN, NATIONAL SECURITY LAW 1064 – 1113 (5th ed., Aspen) (tracing the complicated history and detailing the many (often successful) court challenges to previous incarnations of the MCR, including many rejections of such incarnations by the Supreme Court).

[99] Moreover, the failure of Congress to pass a new, ISIL-specific AUMF makes any MCR prosecution difficult because a finding of a armed conflict, beyond a reasonable doubt, is required for each element. *See* Lt. Col. David Frakt, *Al Nashiri and the Existence of an Armed Conflict*, OPINIO JURIS (May 9, 2014, 2:00 PM EDT) http://opiniojuris.org/2014/05/09/guest-post-al-nashiri-existence-armed-conflict/ (noting the jury instruction in *U.S. v. Hamdan* included the necessity of a finding that "the actions of the accused took place in the context of and that they were associated with armed conflict"

V. COURSES OF ACTION OF POSSIBLE PROSECUTION

This policy question anticipates a possible moment in the USG effort against the ISIL organization when the U.S. or a coalition ally can identify the location of ABAB and decides to launch an operation—presumably successfully—to capture him for prosecution. The nonlethal choice fosters three subsequent branches of policy options: international prosecution, federal prosecution in the United States, or the USG facilitating ABAB's prosecution by an allied Arab government.

COA #1 - Prosecution by an International Tribunal. The USG would transfer ABAB to an international authority, either the International Criminal Court, or a separate tribunal created by the UN Security Council. International law prosecutors then try him for crimes against humanity, genocide, and war crimes.

COA #2 - Prosecution by a United States Attorney**.** The USG transports ABAB to the United States for trial in federal court on charges of material support to terrorism under Title 18, United States Code § 2339B, and other applicable federal charges, including a federal statute criminalizing genocide, 18 USC § 1091.

COA #3 - Prosecution by an allied Arab Government. The USG would transfer ABAB to an allied Arab government for crimes against their citizens, crimes of terror, and for international crimes. This COA includes consideration of a "hybrid court," an internationally supported institution that bolsters a national court's criminal court system to prosecute offenders of international crimes.

A. COA #1: PROSECUTION BY AN INTERNATIONAL TRIBUNAL

ABAB's crimes in Syrian and Iraqi territory have victimized thousands. The victims are so numerous, and so heinously injured, that the United Nations declared that these crimes constitute crimes against humanity under international law.[100] Buttressing this declaration are the reports from NGOs of actions that amount to genocide.[101] Accordingly, the USG could submit ABAB for an international criminal law trial much like the Allies prosecuted Axis leadership at the Nuremberg Trials.

This COA entails the capture of ABAB followed by a custodial transfer to either to the permanent International Criminal Court ("ICC") for prosecution or a new,

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and that one factor for the jury to include in that inquiry is the "statements of the leaders of both sides indicating their perceptions regarding the existence of an armed conflict, including the presence or absence of a declaration to that effect") (citing U.S. v. Hamdan, 548 U.S. 557 (2006)).

[100] Stephanie Nebehay, *U.N. rights boss condemns 'widespread' Islamic State crimes in Iraq*, REUTERS (Aug 25, 2014 11:18am EDT) http://www.reuters.com/article/2014/08/25/us-iraq-security-un-crimes-idUSKBN0GP0SP20140825 (citing statements by United Nations High Commissioner for Human Rights Navi Pillay for a variety of ISI of specific "[g]rave, horrific human rights violations [] being committed daily by ISIL" and assessments of genocide by the U.N. Committee for the Elimination of Racial Discrimination).

[101] *See* Part II.A.

temporary international tribunal such as those the UN established for the former Yugoslavia and Rwanda. Both paths are described and distinguished below. Either path would likely require action by the UN Security Council, though alternative arrangements bypassing the Council are possible.

Generally, this policy option sacrifices control and speed for international legitimacy and the avoidance of the prosecution and detention burden falling on USG shoulders. The USG would lack full control of this process and could not initiate the process unilaterally. However, Washington could exert powerful influence on the structure of the tribunal that will try ABAB. The degree of US influence will depend on the forum and the diplomatic agreements with partners that choose or create it.

a. Background

Before the recent establishment of the ICC, the international community secured trials of individuals for violations of international criminal laws on an ad hoc basis. The crimes of the Axis powers established this precedent, but Cold War politics and stalemate on the Security Council prevented its continuation.[102] The launch of the Yugoslavian tribunal reinvigorated use of global courts for violations of individual criminal law, to include trying individuals in leadership positions over subordinates who carry out atrocities directly.

International Criminal Tribunals of Yugoslavia and Rwanda. The USG has supported ad hoc international criminal tribunals as adjudicators of justice in response to many atrocities following the fall of the Berlin Wall. The US became the primary backer of the International Criminal Tribunal for the former Yugoslavia ("ICTY")[103] and the International Criminal Tribunal for Rwanda ("ICTR")[104] following the revelations of atrocities in both locations in the 1990s.[105] Secretary of State Madeline Albright played a large role in backing the ICTY at the UN,[106] President Clinton rallied domestic and international audiences,[107] and a Republican-controlled Congress responded with broad support, through

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[102] The concept of international criminal law predates the trial of Axis leaders, but had failed to come to fruition as a court under the League of Nations or at any preceeding point in the modern era. *See* John P. Cerone, *U.S. Attitudes Toward International Criminal Courts and Tribunals, in* THE SWORD AND THE SCALES 131, 133 (Cesare P.R. Romano ed., 2009).

[103] The UNSC established it under the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704, annex (1993).

[104] The UNSC established it under the Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994).

[105] John P. Cerone, *supra* note 102 at 143, 144 (noting how the USG was "the driving force behind" the tribunals, "contributing the greatest share of political and financial muscle[,]" and originating the concept of the first of the two courts, the Yugoslavian court).

[106] *Id*. at 144.

[107] *Id.* (quoting William J. Clinton, *Remarks at the University of Connecticut in Storrs*, 31 Wkly. Comp. Pres. Docs. 1840, 1842 (Oct. 23, 1995); and William J. Clinton, *Remarks to the 52d Session of the UN General Assembly in New York City*, 33 Wkly. Comp. Pres. Docs. 1386, 1389 (Sept. 29, 1997)).

appropriations and oversight, both in the tribunals' formative years and into the post-9/11 era.[108]

The UN Security Council ("UNSC") chartered the ICTY under Charter VIII of the UN Charter in 2003, and the ICTR the following year under the same authority.[109] The ICTs have successfully tried scores of individuals charged with the worst types of violations of international criminal law: (1) genocide, (2) crimes against humanity, and (3) violations of the laws of war, including breaches of the Geneva Conventions.[110] Both ICTs have their own trial chambers, but they share an appeals court for purposes of efficiency and consistency.[111] Neither ICT trial facility is in the geographic area of its mandate. The ICTY sits in The Hague, and the ICTR sits in Tanzania.[112] Both locations also house each ICT's respective detention facility.[113]

ICTs have not adjudicated the cases on their dockets quickly. While the Nuremberg trials concluded in two years, the ICTY's work has stretched two decades. That work continues today despite the ICTY having only indicted 161 individuals, 13 of which it transferred for trial in supporting nations' domestic courts.[114] Early on, refusals to cooperate with the ICTY by governments sheltering high profile suspects hindered progress.[115] But even after the worst of this foot-dragging ended in 2001, the ICTY recognized it would need an additional 15 years to complete its mandate.[116] The UNSC passed two new resolutions to ensure the ICTY reach that goal, one appointing more judges and another that both focused judges on the worst crimes and that set the tribunal on a completion timeline.[117] The court, however, has already "had to slide" on this timeline.[118]

The ICTR suffered similar delays from the Rwandan government's initial disinclination to handover suspects, as well as from a litany of translation, staffing,

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[108] *Id*. at 145. Total USG support for the tribunals after the first twelve years of their existence was half a billion dollars. *Id*.

[109] *Supra* notes 103 and 104.

[110] For explanations of the respective scopes from the tribunals themselves, see both Tribunal's posted online information at http://www.icty.org/sid/11186 & http://www.unictr.org/en/tribunal. The ICTY divides its substantive war crimes charges into two categories, "Grave Breaches Of The Geneva Conventions of 1949" (Article 2 of the ICTY Statute), and the "residual clause" of Article 3, "Violations Of The Laws Or Customs Of War" (Article 3 of the ICTY Statute). Robert Cryer, *International Criminal Law, in* INTERNATIONAL LAW 752, 770 (Malcolm D. Evans ed., 2010). The ICTR's war crimes scope is more narrow; the ICTR covers only war crimes that are violations of common Article 3 of the Geneva Convention and Geneva's Additional Protocol II. *Id.* (citing Article 4 of the ICTR Statute).

[111] ICTR Statute, Article 12(2) ("The members of the Appeals Chamber of the [ICTY] shall also serve as the members of the Appeals Chamber of the [ICTR]."). *See also* Robert Cryer, *supra* note 110, at 771.

[112] United Nations Security Council Resolution 977 located the ICTR in Tanzania, S/RES/977(Feb. 22, 1995), while the founding for the ICTY, UNSC Resolution 827, S/RES/827(May 25, 1993), located the ICTY in The Hague, The Netherlands.

[113] *Id.*

[114] See the respective times discussed in *supra* note 110.

[115] *See* Robert Cryer, *supra* note 110, at 771.

[116] *Id*.

[117] *Id.* (citing UNSC Resolutions 1329 (Dec. 5, 200) and 1534 (March 26, 2004)).

[118] *Id.*

and management complications.[119] It also received a "completion strategy" from the same subsequent, prodding UNSC resolution that the UNSC provided the ICTY to hasten its completion.[120]

The International Criminal Court. The UNSC established the ICTs to address crimes that offenders had committed in specific locations in particular windows of time. In contrast, the ICC is a permanent fixture with global reach. The ICC's development occurred from the mid-1990s to July 1, 2002, when 60 states ratified the Rome Treaty creating the court. [121] Since 2002, 63 more nations have joined.[122] The ICC's scope of jurisdiction includes the same types of serious crimes adjudicated in the Yugoslavian and Rwandan ICTs, and adds to those possible offenses the crime of aggression.[123]

Most of the ICC's work arises from "self-referrals" of party states burdened with divisive, grave atrocities. The Ugandan government submitted the first referral in 2003 when it asked for ICC involvement in its long-running conflict with the Lord's Resistance Army, led by Joseph Kony.[124] In the next four years, the ICC would open only three other cases: the Democratic Republic of the Congo, the Central African Republic, and the Darfur region of Sudan.[125] Darfur was not a self-referral, and Sudan has never been a party to the Rome Treaty. Instead, the UNSC referred the Darfur situation to the ICC,[126] as it would again in the only other case of UNSC referral, post-Arab Spring Libya.[127]

The United States is not member of the ICC. The USG's history with the ICC has varied over the years, and has been at times deeply hostile to the ICC's installment in the international order. See Appendix D for a synopsis of this history. However, by the start of President Obama's second term the USG and the ICC had settled into a

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[119] *Id.* at 771-2. *See also* DAVID LUBAN, *supra* note 64, at 119-120.

[120] *Id*.

[121] Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9 (adopted July 17, 1998, entered into force on July 1,2002) [hereinafter ICC Statute]. *See also* YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 224 (2014) (citing *id.* and describing the background). The Rome Treaty is the treaty that created the ICC statute, so named for the city of its convention and drafting in 1998. *Id*.

[122] *The States Parties to the Rome Statute,* INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Oct. 30, 2013, 12:22 PM) ("123 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States.").

[123] Parties added the language of the crime of aggression into the ICC Statute through amendment at the Kampala Conference in 2010. Sarah Miley, *ICC nations define crime of aggression*, JURIST (June 10 2010, 10:06AM), http://jurist.org/paperchase/2010/06/icc-nations-adopt-crime-of-aggression.php.

[124] *See also* DAVID LUBAN at *supra* note 64, at 772.

[125] *Id.* at 772-3.

[126] *Id.* at 773. *See also* S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005), *available at* http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf.

[127] S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011), *available at* http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf.

productive relationship. The USG has been indirectly supporting ICC's prosecutions through information sharing for investigations and with a multi-million fund for bounty payments to catch ICC fugitives.[128] In November 2009, the USG also began participating in "an observer capacity in meetings of the I.C.C. Assembly of States Parties (ASP)."[129]

Many other nations important to an ICC prosecution of ABAB are also not members of the treaty, which could indicate their level of support for an ICC referral. Neither China nor Russia, two UNSC members, has joined.[130] Iraq, Syria, Israel, and Turkey have also never ratified the treaty.[131] Jordan, however, is a member.[132]

b. Method

The charges. Regardless of the specific international court that tries ABAB, he will only be subject to international criminal law regarding specific, grave offenses. This law differs substantively from the laws of domestic judicial systems. As phrased by the Rome Treaty, this body of criminal law only addresses "the most serious crimes of concern to the international community as a whole."[133] The threshold of seriousness excludes many other traditional international criminal law violations of "relatively lesser importance," including the oldest international crime of piracy.[134]

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[128] *See* Marlise Simons, U*.S. Grows More Helpful to International Criminal Court, a Body It First Scorned*, N.Y. TIMES (April 2, 2013) http://www.nytimes.com/2013/04/03/world/europe/us-assists-international-criminal-court-but-still-has-no-intention-of-joining-it.html?_r=0 ("Under [the ASPA], no money can be paid directly to the court. But a law adopted by Congress in January allows for payments to third parties for crucial information leading to fugitive arrests. Similar payments were offered to track down fugitives from the courts investigating atrocities in Rwanda and the former Yugoslavia. . . . Washington can also help the court in more discreet, indirect ways, by, for example, protecting crucial witnesses, sharing DNA data and providing forensic assistance, he said, declining to give details."). *See also* David Kaye, *America's Honeymoon with the ICC*, FOREIGN AFFAIRS (April 16, 2013) http://www.foreignaffairs.com/articles/139170/david-kaye/americas-honeymoon-with-the-icc ("In March, Bosco Ntaganda, a rebel leader in the Democratic Republic of the Congo wanted by the ICC since 2006 for war crimes and crimes against humanity, surrendered to the U.S. embassy in Kigali, Rwanda. Despite the Rwandan government's opposition to the ICC, U.S. officials quickly transferred Ntaganda into ICC custody. Less than two weeks later, Washington announced an expansion of the Rewards for Justice program, offering up to five million dollars for information that leads to the arrest, transfer, and conviction of Joseph Kony, the leader of the Lord's Resistance Army (LRA), and others wanted for arrest by the ICC. Moreover, the expansion of the program had the support of congressional Democrats and Republicans . . . . In short, although the United States is not a party to the ICC's charter, the Rome Statute, it is arguably doing as much as, if not more than, member states are doing to bolster the work of the court.").

[129] *International Criminal Court*, Office of Global Criminal Justice, Under Secretary for Civilian Security, Democracy, and Human Rights, U.S. DEPARTMENT OF STATE http://www.state.gov/j/gcj/icc/ (last visited April 14, 2015) (quoting the May 2010 National Security Strategy).

[130] *The States Parties to the Rome Statute, supra* note 122.

[131] *Id.*

[132] *Id.*

[133] ICC Statute pmbl. ("The State Parties to this Statute . . . Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . ").

[134] WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES, 29, 32 (2012, Oxford)(quoting drafts of the General Assembly's attempt to criminalize genocide).

Modern international criminal law charges generally fall into the three categories mentioned above: (1) genocide, (2) crimes against humanity, and (3) war crimes.[135] Given that ISIL almost certainly does not qualify as a party to the Geneva Conventions—though arguably it could be susceptible to prosecution under international humanitarian law for its war crimes—the first two categories are most relevant to a prosecution of any ISIL member participatory to its Middle East crimes.

International law defines genocide in the Convention on the Prevention and Punishment of the Crime of Genocide. The convention defines genocide as,

> "any of the following acts committed with intent to destroy, in whole or in part, a national ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in party;
> (d) Imposing measures intended to prevent births with the group;
> (e) Forcibly transferring children of the group to another group."[136]

The convention criminalizes both the direct commission of genocide and the penumbra of evil that accompanies it: conspiracy to commit genocide, complicity in genocide, direct and public incitement to commit genocide, and attempt to commit genocide.[137] Whether or not the accused is head of state, or acting under orders, is immaterial to determination of criminal culpability.[138]

Crimes against humanity include a litany of crimes, many of which are commonly prosecuted in domestic criminal law. Unlike the crime of genocide, this category lacks a multinational treaty separate from one of the tribunals to provide it definition. The ICC definition from Article 7 of the Rome Statute is accordingly the best guide:

> For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;

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[135] As discussed in the previous subsection on the background of international courts, these classifications are the general categories both the ICTs and the ICC use.

[136] Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

[137] *Id.*, art III.

[138] *Id.*, art IV ("Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.").

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law . . . ;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[139]

Taking its cue from the ICTR, this definition removes any need to prove connection of the crime to an armed conflict. It does, however, require the prosecutor prove a *mens rea* in the commission of the act—the intent to commit the crime—by requiring the defendant have knowledge of the actions.

While this definition does not seem to account for leaders who ordered others to bloody their hands in the commission of these crimes, the ICC statute includes leaders' culpability in a later provision. Article 25 creates criminal culpability for all the ICC's offenses for someone who "[o]rders, solicits or induces" the crime, "aids, abets or otherwise assists," or "[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose."[140]

The International Criminal Tribunals. UN Security Council resolutions chartered and created both the ICTR and the ICTY, and both are organs of the United Nations.[141] This basis of authority puts both tribunals on exceptionally strong legal footing; a UN Security Council resolution provides the most certain legal authority available in international law, aside from possibly the UN Charter itself.[142] In international law, a Security Council Resolution *is* the law.[143] It is not only binding, it also supersedes any other law, such as treaties.

The tribunals combine international support—financing and management—with local cooperation from governments sovereign over the territory (and the citizens) where the criminals committed the respective atrocities. Both have sometimes been lacking; bureaucratic mismanagement has slowed the ICTs as has uncooperative governments in both the Balkans and Central Africa, particularly Serbia and Rwanda.[144] Regardless of any resistance by national governments, the ICTs have primacy over national courts to prevent a government from shielding

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[139] ICC Statute, art. VII(1).
[140] ICC Statute, art. XXV(3).
[141] *Supra* notes 103 and 104.
[142] In contrast, a UN General Assembly resolution is not enforceable in international law, and even though such a resolution can support the creation of customary international law, that body of law itself has less weight than a Security Council resolution. *See* CARTER & WEINER, *supra* note 63, at 483.
[143] U.N. Charter art. 24 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."). *See also* CARTER & WEINER, *supra* note 63, at 468 ("While other organs of the United Nations make recommendations to governments, the Council alone has the power to make decisions which Members States are obliged to implement.").
[144] *See* Robert Cryer, *supra* note 110 at 771-2, and accompanying text in the preceding subsection.

favored defendants from prosecution.[145] This primacy still allows for cooperative, concurrent jurisdiction with national judicial systems, which have allowed the ICTs to unload some cases on their docket on domestic courts. Ultimately though, the ICTs have the final word. This arrangement differs from the ICC's statute, wherein national courts have primacy and can thus short-circuit ICC jurisdiction.[146]

The ICTs rely on national governments for much of the grunt work. They have power to investigate, but no police force either to facilitate investigation or to capture indicted fugitives. Before national governments of the former Yugoslavia began cooperating, the ICTY relied on UN and NATO troops to capture suspects.[147] However, peacekeeping troops had a conflict of interest; capturing indicted suspects risked disrupting the tentative peace.[148] The ICT trial facilities detain defendants on site,[149] but the ICTs have incarcerated convicted criminals in the prisons of contributing states.

The International Criminal Court. In contrast to the ICTs, the ICC is a product of a multinational treaty rather than a UNSC resolution, or any organ of the UN at all. Only in 2004, two years after its formation, did the ICC begin a cooperative relationship with the UN, forging an agreement with the UN General Assembly then the more authoritative Security Council.[150]

In addition to the requirement that the ICC only has jurisdiction to hear criminal charges of the serious crimes discussed above,[151] the ICC also requires the following:[152]

1. Territorial or personal jurisdiction: The ICC attains this type of jurisdiction over a matter in one of three ways: (1) with the consent of the state in which the crimes occurred; (2) with the consent of the states of which the perpetrators are nationals; and (3) by a UNSC resolution referring the matter to the ICC.[153] All of these could apply to a potential ABAB prosecution.

2. Qualifying trigger: In order to begin an investigation for prosecution, the ICC must receive a referral by the UNSC, a referral by state party, or by unilateral initiation of the ICC's Office of the Prosecutor.[154] In the case of the latter two options, the UNSC must also not have "deferred" jurisdiction.

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[145] ICTR Statute, art. 8 ("The [ICTR] shall have primacy over the national courts of all States. At any stage of the procedure, the [ICTR] may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the [ICTR].") *See also* Luban at 100 (discussing this legal logic for the ICTY).

[146] DAVID LUBAN at *supra* note 64, at 100. (differentiating the ICC from the ICTY in this respect).

[147] *Id.* at 101.

[148] *Id.*

[149] *See* Julian Mortenson, *Inside the United Nations Detention Unit*, SLATE (Jan. 9, 2006 6:17 AM) http://www.slate.com/articles/news_and_politics/dispatches/features/2006/inside_the_united_nations_detention_unit/where_accused_war_criminals_build_model_ships_and_play_volleyball.html

[150] Relationship Agreement Between the United Nations and the International Criminal Court, Oct. 4, 2004, U.N. Doc. A/58/874/Annex (Oct. 4, 2004).

[151] In legalese, this requirement is the subject matter jurisdiction of the ICC. *See* ICC Statute, art 5.

[152] *See* DAVID LUBAN at *supra* note 64, at 779.

[153] ICC Statute, arts 12-15.

[154] ICC Statute, arts 13-15.

3. Admissibility and complementarity: A state whose domestic courts have proper jurisdiction must not already be "genuinely" investigating the matter for prosecution, prosecuting the matter, or have already considered and declined prosecution.[155]

Like the ICTs, the ICC also has few independent investigative resources beyond what national governments can contribute through funding or through cooperation with the ICC's investigating prosecutors.[156] Additionally, the ICC currently handles many cases throughout the world, which has strained its resources,[157] and its charter is much more deferential to national governments' willingness to cooperate than the ICTs. As worrisome as these problems are in the ICC dealing with state parties, cooperation would be more difficult still for non-members—which includes Iraq, Syria, Turkey, and the United States.[158] The ICC would not be able to compel their cooperation.

c. Analysis of Challenges

The ICC, and possibly an ICT, will be unable to try ABAB for terrorism. International law's lexicon of serious crimes does not include support for, or even acts of, terrorism.[159] Only ABAB's conduct that falls into the categories of those violations discussed above, such as genocide, would make him culpable to international criminal law. His leadership of ISIL as a terrorist organization would be meaningless in an international court.

Insufficient international support could prevent prosecution. The USG cannot initiate this option without the support of other governments. The Department of State could develop novel arrangements, but based on the parameters of the past two decades of practice, the USG has two routes to secure support. First, the USG could shepherd a resolution through the UNSC to either send

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[155] ICC Statute, arts 17.

[156] WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, 128-130 (discussing how the ICC's mechanism "closely resemble[s] those that already exists in the form of bilateral or multilateral treaties on judicial assistance" and the requirement of state parties that receive the request to comply under articles of the Rome Treaty). *See also ICC: Court Needs Cooperation, Resources,* HUMAN RIGHTS WATCH (Dec. 8, 2014) http://www.hrw.org/news/2014/12/08/icc-court-needs-cooperation-resources (describing the ICC's political inability to overcome intransigence by Kenyan authorities despite Kenya's treaty obligations to comply with the investigation).

[157] *See id.* (describing how "[t]he ICC is investigating cases in eight countries but has struggled with its existing caseload and calls to act in many other situations"). *See also* DAVID BOSCO ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS 94 ("Unlike the Yugoslav and Rwanda tribunals, which had prescribed areas of operation, the ICC would have to choose where to focus its investigative resources. Also, unlike the ad hoc tribunals, the ICC was required to defer to national courts when they were conducting credible investigations.").

[158] *The States Parties to the Rome Statute, supra* note 122 and accompanying text.

[159] See the discussion of international criminal law charges in the methods subsection above. UN members have long tried to initiate convention banning international terrorism, but this decades-long effort has produced an admirable draft, but never has effectuated a successful multi-national treaty defining and banning terrorism. *See* DAVID LUBAN at *supra* note 64, at 684-687 (explaining this struggle and providing an excerpt of Draft Comprehensive Convention Against International Terrorism, UN Doc. A/59/894 (2005)).

ABAB or the ISIL matter to the ICC, or create an ISIL-specific, ad hoc ICT. Second, the USG could win key support of Arab allies, particularly Iraq (due to where the offenses took place and ABAB's nationality), and European partners to submit ABAB to the ICC jurisdiction.

Insufficient international support: *opposition in the UNSC*. If the USG opts to use the UNSC to either refer the situation to the ICC or to establish an ad hoc tribunal, the USG must (1) convince a majority of UNSC members to vote for the proposal, and (2) avoid a veto from any other permanent member of the Council, namely France, Russia, China, and the United Kingdom. The chances are promising that the USG could secure a majority based on the other ten non-permanent members.[160] The hanging sword of a Russian or Chinese veto is the bigger worry.

A Russian UNSC veto poses the most significant obstacle to USG diplomacy. An ally of Bashar al-Assad, Russia vetoed the referral of actors in the Syrian civil war just prior to the rise of ISIL in the spring of 2014.[161] Russia's position could shift with a resolution strictly limited in wording to ABAB and his ISIL cohorts (cutting off jurisdiction from Assad's regime), particularly given ISIL's long-term threat to Assad's own grip on power in Damascus.[162] However, that limitation could risk the loss of the British and French votes. Moreover, the roiling tensions between Russia and other UNSC members over Ukraine jeopardizes Russian assent to any USG-sponsored proposals, though a Russia-crafted UNSC resolution to impede ISIL's funding presents a glimmer of hope.[163]

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[160] The ten non-permanent members of the UNSC, as of April 1, 2015, are (with end of term date): Angola (2016), Chad (2015), Chile (2015), Jordan (2015), Lithuania (2015), Malaysia (2016), New Zealand (2016), Nigeria (2015), Spain (2016), Venezuela (Bolivarian Republic of) (2016). *Current Members*, UNITED NATIONS SECURITY COUNCIL (last visited April 14, 2015) http://www.un.org/en/sc/members/. Of those ten, only Venezuela has signaled it would oppose a USG / Anti-ISIL coalition UNSC proposal, though Angola might abstain, based on prior Syria votes of the members. *See January 2015 Monthly Forecast: Syria*, SECURITY COUNCIL REPORT (23 December 2014) http://www.securitycouncilreport.org/monthly-forecast/2015-01/syria_15.php (recounting the positions of the countries in previous 2014 and early 2014 deliberations).

[161] Ian Black, *Russia and China veto UN move to refer Syria to international criminal court*, THE GUARDIAN (May 22, 2014) http://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court. Russia has also blocked previous UNSC actions related to Syria. *See* Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES (July 19, 2012). http://www.nytimes.com/2012/07/20/world/middleeast/ russia-and-china-veto-un-sanctions-against-syria.html?_r=0.

[162] *See, e.g., Assad forced to hit advancing ISIS in Syria*, CBS NEWS (Aug 19, 2014, 5:16AM) http://www.cbsnews.com/news/isis-us-airstrikes-iraq-jihadists-pose-threat-in-syria/ ("While ISIS militants have so far concentrated their attacks against the Western-backed fighters seeking to topple Assad, they have in the past month carried out a major onslaught against Syrian army facilities in northeastern Syria, capturing and slaughtering hundreds of Syrian soldiers and pro-government militiamen in the process.").

[163] *UN adopts Russian-drafted resolution on blocking funding for ISIS*, RBTH (February 13, 2015) http://rbth.com/international/2015/02/13/un_adopts_russian-drafted_resolution_on_blocking_funding_for_is_43715.html ("The United Nations Security Council on Feb. 12 unanimously approved a Russian-sponsored resolution on measures aimed at depriving terrorists from the Islamic State (ISIS), Jabhat al-Nusra and other Al-Qaeda-linked groups of financial income. The resolution represents Russia's first significant diplomatic success at an international level since the beginning of

Finding a non-USG lead in the UNSC diplomacy could help. For example, a UNSC resolution sponsorship by the Republic of France, rather than the USG, could prevent a Moscow veto. French relations with Russia are relatively stronger than Russo-American relations, and France has leverage with the sale of two naval vessels.[164] The downside is that a Francophile approach might also entail even more loss of USG control than already is intrinsic to this policy option, as France and EU allies may assert their own initiative.

China's position is harder to gauge. China joined Russia in vetoing the May 2014 ICC referral of Syria in the UNSC.[165] However, Beijing's support is less in degree; it is not as strong an ally to Assad as Moscow, and is not at loggerheads with "the West" in same vein as is Russia post-Ukraine. While Beijing initially opposed the two African referrals to the ICC—Sudan and Libya—the UNSC ultimately passed each resolution later with Chinese assent.[166] China has signaled a willingness to fight ISIL on the ground, but not inside the US coalition.[167]

Insufficient international support: *unsupportive Arab allies*. If the USG instead opts to bypass the UNSC, it can only then route ABAB to the ICC through a Rome Treaty party state. This alternative would likely require the diplomatic cooperation and consent of the Iraqi government. Iraq is both the location of many of ISIL's atrocities and the country of which ABAB himself is a citizen.

Investigation of ABAB's crimes by another state could eliminate ICC jurisdiction. The ICC has no jurisdiction over a defendant if a country with proper jurisdiction over that individual is "genuinely investigating" or prosecuting that individual for the same conduct.[168] If Iraq or Jordan—or even the USG or the UK—investigates ABAB for the purpose of trying him in its own domestic courts, then by its own binding rules the ICC will not accept any party subjecting ABAB to it.

Establishing an ICT with jurisdiction similar to that of the ICTR and ICTY avoids this legal hurdle, as their governing statutes grants those tribunals primacy over national courts. However, even if nations in the UNSC cooperate on either option, establishing a new ICT would take more time than a referral to the preexisting apparatus of the ICC. In that time, another state's indictment could jeopardize an ICT diplomatic push as a matter of international politics.

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the conflict in Ukraine and the subsequent breakdown in relations with the West. According to Russia's Permanent Representative to the United Nations Vitaly Churkin, the adoption of the resolution testifies to the ability of the international community to work together in the fight against global threats.").

[164] *See, e.g.*, John Irish, France to review military cooperation with Russia in future sanctions, REUTERS (Mar 15, 2014 5:58pm EDT),www.reuters.com/article/2014/03/15/us-ukraine-crisis-hollande-idUSBREA2E0QW20140315.

[165] *See* Ian Black, *supra* note 161. China had also joined Russia in blocking previous UNSC actions on Syria. *See also* Gladstone, *supra* note 161.

[166] Joel Wuthnow, *China and the ICC*, THE DIPLOMAT (December 07, 2012), http://thediplomat.com/2012/12/china-and-the-icc/.

[167] *China offers military help to Iraq to defeat ISIS – report*, RUSSIA TODAY (December 14, 2014 04:20), http://rt.com/news/214243-china-iraq-military-isis/.

[168] ICC Statute, art 17. This standard is the principle of complementarity. SHANY, *supra* note 121, at 225.

International proceedings could take years, depriving stakeholders of justice finality.

The ICC lacks any "timeline or statute of limitations" and already has nine pending cases of "alleged war crimes in countries such as Ukraine, Afghanistan and Colombia that have been grinding along for seven or eight years without a resolution."[169]

The ICTs have moved relatively faster, but still have taken two decades to move through their entire dockets. While that timeline includes the entire mandate of each ICT for all claims and investigations, the trial timelines are not encouraging for quick results, even excluding appeals.

The trial of Radovan Karadzic for genocide and crimes against humanity is an example of prosecution by an ICT in its later years, which is arguably a *more* efficient process than ICC prosecution. Serbian law enforcement arrested the infamous Bosnian Serb President in July 2008. The ICTY scheduled his initial appearance (where the defendant enters a plea) for the end of the month, but due to the court's indulgence of his personal obstinacy, the ICTY did not effectuate his initial appearance until March 2009, eight months later.[170] His trial commenced in October of 2009. After hearing 580 witnesses testify over the course of five years, the trial chambers heard closing arguments in October of 2014. The tribunal has still not yet rendered verdict, and once it does so—if it finds him guilty—it must then bring him in for sentencing.

A major reason for the extraordinary length of trial time in international courts is that most efforts posit the revelation of evidence is as important, if not more so, than actually bringing criminals to justice.[171] The ICTR's prosecutors made a "deliberate strategic choice" to call a great many witnesses in order to create a historic record of the atrocities and foster reconciliation.[172] The full opinions are "very lengthy, running to hundreds of pages, because—in the civil law tradition [of Europe and most the world]—they include detailed descriptions of the evidence and fully reasoned factual findings as well as legal findings."[173] Though that work produces a lengthy record, many researchers disbelieve this tedious rigor made available to the publics of affected states has helped parties reconcile.[174]

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[169] William Booth & Ruth Eglash, *Palestinian move at International Criminal Court signals a volatile new stage*, WASH. POST (Jan. 18, 2015), http://www.washingtonpost.com/world/middle_east/palestinian-move-at-international-criminal-court-signals-a-volatile-new-stage/2015/01/18/15336c6e-9ed5-11e4-86a3-1b56f64925f6_story.html.

[170] *Case Information Sheet: Rodovan Karadzic,* COMMUNICATIONS SERVICE OF THE ICTY, IT-95-5/18, *available at* http://www.icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf.

[171] *See* DAVID LUBAN at *supra* note 64, at at 120.

[172] *Id*.

[173] *Id.* at 101.

[174] David Tolbert, *Can international justice foster reconciliation?*, AL JAZEERA (10 Apr 2013 08:41 GMT), http://www.aljazeera.com/indepth/opinion/2013/04/20134107435444190.html ("[The ICTY's] contribution to the process of reconciliation in the region has been severely limited. In searching for the reasons why this is so, we may need to recognise that international courts may not be equipped to fulfill such expectations - and that, as in the case of the ICTY, there is sometimes simply no existing process of reconciliation for them to contribute to.").

A secondary reason for the lengthy international process, compared to US judicial system, is that appeals are entertained and adjudicated during trials. These "interlocutory appeals" allow either the defendant or the prosecution to appeal a ruling by the trial court judge up to the appeals court, effectively freezing the trial court's handling of the facts until the appeals court can rule on the issue of law. The Karadzic trial stalled for a year awaiting such a mid-trial appeal.[175] In contrast, interlocutory appeals are extremely rare in US criminal trials, and almost certainly would not interrupt a US trial of ABAB under COA #2.

A final contributing factor to multi-year prosecutions is a defendant who refuses to cooperate with the court. Karadzic's own history as a defendant is (again) illustrative. He refused to enter a plea and insisted on representing himself, doing so in a manner that slowed the proceedings against him.[176] ABAB is likely to be similarly uncooperative, and a future international judicial body of any sort could be just as disinclined to stymie such disruptions as the ICTY was with Karadzic.

Uncontrolled actions of an ICT or the ICC could cut against US interests. Even though ICTs have received far more support from the USG than the ICC,[177] they have "infuriated" USG officials at times.[178] In 1999, the ICTY officially (and publically) reviewed NATO's Belgrade bombing as a violation of the laws of war, and earlier in the decade ICTY issued an indictment for key Serbian leader when the USG was busy negotiating with the warring parties to end the conflict with the Dayton Accords.[179] Recently, ICC prosecutors began an inquiry into conduct of individuals in Israel's Gaza actions in the Israeli-Palestinian conflict, despite chances that the probe will worsen tensions and unduly legitimize Gazan sovereignty.[180] Israeli leaders have decried the probe as illegitimate.[181]

Wider interests of the USG in the region may, at some key point, overshadow the importance of the integrity of ABAB judicial proceedings. Yet the jurists will likely have no regard for that utilitarian calculus. This problem of priorities—in the USG's inability to shuffle them once it has submitted ABAB for prosecution—could arise in any of prosecution COA. However, the problem will be particularly acute, or at least particularly difficult to mitigate, if an ICT or the ICC has jurisdiction and control over the proceedings rather than the USG or an allied Arab state.

An international trial may be unable to gather sufficient evidence against ABAB with the conflict ongoing. For both ICTs, gathering evidence—particularly witness statements—against defendants in the locations of the atrocities proved difficult even after the heat of the conflicts had subsided. The communities were often hostile to the investigation, and getting witnesses to the out-of-country trial

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[175] *Case Information Sheet: Rodovan Karadzic*, *supra* note 170.

[176] *Id. See also Karadzic says defence 'not ready'*, AL JAZEERA (28 Oct 2008 12:41 GMT), http://www.aljazeera.com/indepth/opinion/2013/04/20134107435444190.html.

[177] Regarding the USG's rocky relationship with the ICC, see Appendix D.

[178] John P. Cerone, *supra* note 102, at 146 (citing an interview with former State Department official).

[179] *Id.*

[180] William Booth & Ruth Eglash, *supra* note 169.

[181] *Id*.

sites was never easy or cheap.[182] Despite their large budgets, ICTs generally cannot afford witness protection.[183]

A prosecution of ABAB will run into these same difficulties if that process begins *after* sovereign governments have restored peace and order to the area of ISIL's crimes. If this process begins *before* that point, then the difficulty will be even more severe, perhaps prohibitively so.

However, this hurdle presents an even worse problem for COA #2, USG prosecution. The longer period for international trials essentially "buys time" for the USG and its allies to make progress on the ground against ISIL to allow for successful evidentiary investigations in the wake of that success.

The USG could still pursue COA #1 while the conflict wages on in Syria and Iraq (and/or while ISIL retains sufficient territory to deny evidence collection), but an international prosecution in that scenario would be unprecedented. The Nuremberg Trials, the Tokyo IMTs, the ICTY, and the ICTR all addressed crimes and atrocities that were, for lack of a better word, over. Conducting those trials after the respective conflicts in which the crimes occurred had ended allowed for much easier evidentiary investigations.

While very difficult, an international on-the-ground evidentiary investigation in the midst of a "live" conflict Syria's civil war (and ISIL's war against Iraq) would be neither impossible nor unprecedented. To its credit, the ICC has experience in many of its investigations, such as inquiries in Uganda and the Congo, of proceeding while the embers of conflict are still aglow. However, those areas were still more permissive than ISIL's territory is now.

If an international court proceeds against ABAB before governments have pacified current ISIL territory, then its prosecutors may be unable to secure the evidence necessary for a conviction. This result does beg the question of whether an indefinite detention of ABAB by an ICT or the ICC pending sufficient quieting of the conflict for an investigation would be legal. The answer is unknown, largely because that exact hypothetical is without precedent.

An international tribunal has no procedural mechanism to permit classified intelligence as evidence. The ICC's rules for using evidence that a national government has classified for national security reasons are "lengthy and confusing."[184] However, the treaty language addresses if, not how, the ICC will use that evidence when a party state makes a national security claim to the material's contents.[185] The ICC has no language allowing for any procedures of screening or redacting classified evidence so that a state could submit it for prosecution without disgorging the classified aspects of the document.[186]

Creating an ICT may be cost prohibitive. Creating an ICT for ABAB alone would also be unprecedented. The UNSC established both ICTs to investigate and

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[182] *See* DAVID LUBAN at *supra* note 64, at 101.

[183] *Id.*

[184] *See* SCHABAS, AN INTRODUCTION, *supra* note 156, at 154 (citing the ICC Statute, art. 72).

[185] *Id.* at 154-5.

[186] *Id.* A US prosecution under COA #2 would have this ability under the Classified Information Procedures Act. *See supra* Part V.B.c. Analysis of Challenges.

prosecute all those who caused the respective atrocities, not one man. As the ICTY is in its waning years, its budget is now $180M,[187] but just six years ago it cost contributors $350M per year.[188] The ICTR cost contributors a quarter of billion dollars the same year.[189] For comparison, even the most expensive USG trials for high-profile terrorists or mafia leaders cost a one-time expenditure (as opposed to annual cost) of $70M.[190]

If establishing an ISIL ICT is not feasible, the USG could still submit ABAB to the ICC. The ICC is also expensive. After its first decade of operation, it had only one conviction at a total expenditure of nearly a billion USD.[191]

B. COA #2: PROSECUTION BY A UNITED STATES ATTORNEY

This policy option would entail capture, detention, formal arrest and indictment for violations of US criminal laws, and finally the transfer of ABAB for prosecution in US federal court. Trying a criminal defendant in a US federal district court is a straightforward affair for USG policymakers compared to other COAs. A charge of material support for terrorism is just another violation of the Title 18 USC criminal code, with elements a prosecutor must prove beyond a reasonable doubt. The difficulty in pursuing this option against ABAB lies in the extra-territoriality of the application of domestic law. This policy considers using US federal criminal law to prosecute an individual who lives and operates overseas, who commits his crime outside the territory of the United States, and whose victims are almost entirely non-American.

This option ensures greater USG control of both ABAB and the overall process than other options. This method also uses a ready and tested judicial system for trying terrorists, providing some certainty for policymakers. However, the USG has only recently pioneered the method of trying foreign terrorists captured overseas in federal courts.

a. Background

The USG has only pursued this option with three terrorists: the Somali Ahmed Abdulkadir Warsame in 2011,[192] Anas al-Libi, who the USG captured in Libya in early October of 2013 for his role in the 1998 embassy bombings,[193] and Ahmed Abu

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[187] *The Cost of Justice*, ICTY, http://www.icty.org/sid/325 (last visited April 14, 2015).

[188] *See* DAVID LUBAN at *supra* note 64, at 101.

[189] *Id.*

[190] *Id.* (citing Michael P. Shcarf, *The Tools for Enforcing International Criminal Justice in the New Millennium*, 49 DE PAUL L. REV. 925, 934 (2000)).

[191] Jon Silverman, *Ten years, $900m, one verdict: Does the ICC cost too much?*, BBC (March 14 2012) http://www.bbc.com/news/magazine-17351946.

[192] Shane Harris, *Team Obama Tries Capturing a Terrorist Instead of Droning Him*, FOREIGN POL'Y (Oct. 6, 2013, 11:55 AM) http://killerapps.foreignpolicy.com/posts/2013/10/06/team_obama_tries_capturing_a_terrorist_instead_of_droning_him.

[193] *See* Adam Goldman, *Video shows U.S. abduction of accused al-Qaeda terrorist on trial for embassy bombings*, WASH. POST (Feb. 10, 2014) http://www.washingtonpost.com/world/national-security/video-shows-us-abduction-of-accused-al-qaeda-terrorist-on-trial-for-embassy-

Khattala, indicted for his role in the Benghazi attack in 2012 that killed the U.S. Ambassador to Libya.[194] The prosecution of Ahmed Ghailani, UBL's bodyguard and conspirator in the 1998 African embassy bombings, would also arguably fit on the list. However, unlike the other three, the USG never targeted him for capture, let alone for federal prosecution, which came years after his arrival in Guantanamo Bay. Lessons from his prosecution are nonetheless helpful, and are discussed in relevant sections below. The primary reference will still be these other three individuals, Warsame, al-Libi, and Khattala, the "WAK3" for short.

The first of these intentional captures by the USG, the Warsame arrest, indicated President Obama might shift away from his controversial embrace of drone strikes abroad towards a law-centered strategy. Warsame, a lifelong Somali national and resident, was an important go-between for al Qaeda on the Arabian Peninsula ("AQAP") and Al Shabab. Fittingly, the US Navy caught him in the international waters of the Red Sea between the two nations. Despite his illicit activities, Warsame had never been involved in any known, discrete act of terror against the USG or its nationals. In other words, his role made him a traditional drone target and a surprising individual for federal prosecution. Yet the Navy captured him in international waters, subjected him to (non-tortuous) interrogation by national security professionals for two months, and then handed him over to the US Attorney for the Southern District of New York. Federal prosecutors submitted Warsame for a grand jury indictment for providing material support to terrorism, as well as other associated charges, and arraigned him in federal court. He pled guilty and cooperated with law enforcement.[195]

Warsame was an important facilitator for two different lethal and large terrorist organizations, but nothing linked him individually to discernable criminal acts against Americans. If the USG prosecuted Warsame under federal statutes criminalizing material support for terror, the USG could prosecute any terrorist anywhere in the world against whom the USG had evidence of supporting an officially designated terrorist organization. The precedent was practical as well as legal. Warsame cooperated. He not only pled; he talked. Observers have noted the intelligence value provided by Warsame's interrogation, which came both before and after the government afforded him due process.[196] Observers also noted this benefit is one that is inherently lost in a successful drone strike.[197]

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bombings/2014/02/10/7f84927a-8f6b-11e3-b46a-5a3d0d2130da_story.html (noting he is also known by his birth name, Nazih Abdul-Hamed al-Ruqai).

[194] Eyder Perolta, *Benghazi Suspect, Ahmed Abu Khattala, Is Indicted On 17 New Charges*, NPR (Oct. 14, 2014 6:25 PM ET) http://www.npr.org/blogs/thetwo-way/2014/10/14/356196973/benghazi-suspect-ahmed-abu-khattala-is-indicted-on-17-new-charges.

[195] Robert Chesney, *A Successful Conclusion to the Warsame Experiment?*, LAWFARE (March 25, 2013 at 4:21 PM) http://www.lawfareblog.com/2013/03/a-successful-conclusion-to-the-warsame-experiment/.

[196] *Id.*

[197] Carol Cratty, *Terror Figure Yields Valuable Intel, U.S. Officials Say*, CNN (March 26, 2013, 1:45 PM) http://www.cnn.com/2013/03/25/world/africa/new-york-terror-charges/ ("Justice Department spokesman Dean Boyd said the United States 'continues to make active use of the information' Warsame provided and his 'cooperation has been and continues to be enormously valuable.").

The capture and prosecution of al-Libi contrasts with the Warsame ideal. Unlike Warsame, prosecutors could link al-Libi to discrete crimes against U.S. citizens and interests. Evidence showed his involvement in the 1998 US embassy bombings. However, he also differentiated himself from Warsame in that he did not cooperate with the prosecuting US Attorney's Office in either agreeing to a plea or in providing substantive information of any intelligence value before his death by disease at the outset of his trial. Furthermore, while he possibly admitted exculpatory information to prosecutors about his AQ after transfer into DOJ custody, his lawyers had grounds to suppress this information.[198] This legal wrangling raises concern regarding a prosecution of ABAB addressed below in subsection ***c. Analysis of Challenges*.** Overall, the USG's choice to use the Warsame model against al-Libi showed the model is not a "slam dunk" even when prosecution has strong evidence for specific acts against Americans.

The capture of Ahmed Abu Khattala in June of 2014 has thus far aligned generally with the al-Libi experience, in that the defendant contests the charges and has not (at least not in any publically known way) cooperated with the USG after his capture. The Abu Khattala case differs from both the Warsame and al-Libi examples, however, in how his lack of an AQ connection limited the USG's discretion to handle him under the laws of war. This section details the problem of a lack of an AQ nexus below in subsection, ***c. Analysis of Challenges.***

b. Method

This method involves a relatively straightforward summation of two well-established processes, namely a detention and interrogation phase followed by a charging and prosecution phase. A handover from military handlers of the captured prisoner to federal law enforcement occurs at a site of military detention, specifically (or, at least, up this point) a US Navy vessel equipped for the task.[199]

Detention and intelligence interrogation. First, the US government would detain ABAB following either his capture by US personnel or his transfer to US custody by a coalition partner, such as a Kurdish force or the Jordanian government, which would have successfully secured ABAB's detention. At that point of capture, initial detention, and initial interrogation, ABAB would be an enemy combatant.

Following the WAK3 example, the USG could then subject their detainee to the first of two phases of interrogation. The purpose of this first phase is to collect information of intelligence value. No information obtained in this first phase would

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[198] *See* Phil Hirschkorn, *Fed Prosecutors: al-Libi Admitted al-Qaeda Membership, Was bin Laden Pen Pal*, JUST SECURITY (Dec. 16, 2014 at 3:10 PM) http://justsecurity.org/18443/al-libi-admitted-al-qaeda-membership-bin-laden-pen-pal/.

[199] The USG detained Warsame on the *USS Boxer*, al-Libi on the *USS San Antonio*, and Abu Khattala on the *USS New York*. DANIEL KLAIDMAN, KILL OR CAPTURE 250; Bob Orr, *Libyan terror suspect Anas al-Libi being interrogated at sea*, CBS (October 8, 2013, 7:09 AM) http://www.cbsnews.com/news/libyan-terror-suspect-anas-al-libi-being-interrogated-at-sea/; Thomas Gibbons-Neff, *USS New York, carrying a Benghazi suspect, has gone dark*, WASH. POST (June 25, 2014) http://www.washingtonpost.com/news/checkpoint/wp/2014/06/25/where-in-the-world-is-the-uss-new-york/.

be admissible as evidence in later prosecution. Members of a joint High-value Interrogation Group ("HIG"), comprised of intelligence, military, and FBI specialists, implement this non-Mirandized phase of interrogation.[200] The second phase would take only place *after* the first phase is complete, at a point the USG is ready to charge ABAB with violations of federal criminal law pursuant to an indictment by a grand jury.

Based on the precedent set in handling the WAK3, the USG would detain ABAB on a USN ship equipped for detention and this initial interrogation. No other practical detention alternative is available. The President *could* add ABAB to the cells of Guantanamo, but the administration has already made a policy decision—one the President has indicated he is unwilling to reconsider—that the USG will not add any new enemy combatant detainees to the rolls in Guantanamo. The US also had enemy combatant prisoners in Bagram Air Base in Afghanistan, but with the late 2014 handover to the Government of the Islamic Republic of Afghanistan, that option is also no longer available. If the USG does use a naval vessel for such a detention, the DoD must notify Congress.[201]

At this detention facility, seaborne or not, the HIG group would conclude its interrogation and allow for a "clean break" between its work and the second phase of interrogation. The second phase includes an initial Miranda warning, and then, only if ABAB chooses *not* to remain silent, the commencement of questioning solely by federal law enforcement. For Warsame, the break lasted four days on the *USS Boxer*, and the "clean team" brought a trained and ready representative of the International Committee of the Red Cross to verify the suitability of Warsame's detention conditions under international law.[202] These agents on the clean team, most if not all of whom are with the FBI but none of whom participate in the first phase, use the standard interrogation methods of law enforcement after Mirandizing a suspect.[203] These measures ensure that a federal judge cannot suppress any evidence obtained during the second phase for lack of voluntariness on the part of the detainee.[204]

After reading him his rights and obtaining any incriminating evidence, the FBI agents of the clean team, likely in cooperation at some point with US Marshalls, will oversee his transfer from the brig of the naval vessel to a federal detention facility in the jurisdictional venue of his arraignment. Despite an unconventional history compared to his cellmates, he would be a federal inmate like any other. He would be

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[200] DANIEL KLAIDMAN, KILL OR CAPTURE 250, 251 (Haughton Mifflin Harcourt, 2012).

[201] *See* Benjamin Wittes, *What is in the New NDAA, Why it Warrants a Veto, and Why it Probably Won't Get One*, LAWFARE (December 22, 2012 at 9:36 AM) http://www.lawfareblog.com/2012/12/what-is-in-the-new-ndaa-why-it-warrants-a-veto-and-why-it-probably-wont-get-one/ ("Section 1024—call it the Warsame provision—requires notification to Congress each time a suspect is detained on a U.S. naval vessel. It also requires, more generally, "a report on the use of naval vessels for the detention outside the United States of any individual who is detained pursuant to the Authorization for Use of Military Force.") (citing § 1021 of the 2011 NDAA).

[202] Charlie Savage, *U.S. Tests New Approach to Terrorism Cases on Somali Suspect*, N.Y. TIMES (July 6, 2011) http://www.nytimes.com/2011/07/07/world/africa/07detain.html?_r=0.

[203] DANIEL KLAIDMAN, supra note 199 at 250, 251.

[204] *See* Charlie Savage, supra note 202.

in the custody of US Marshalls and agents of the Bureau of Prisons, under the authority of the DOJ and with access to a lawyer.

The USG could still pursue a variation of this first part of this policy option even if a friendly foreign government captures and initially detains ABAB. The example of how the USG handled the prosecution of Sulaiman Abu Ghaith could be instructive.[205] Turkish authorities arrested the Kuwaiti-born Abu Ghaith, a senior AQ leader and bin Laden son-in-law, after he entered illegally from Iran. They held him for 33 days. The Turkish government covertly cooperated with the USG and gave the HIG access to Abu Ghaith during his month in Turkish detention.[206] Turkey would not extradite him to the US formally because he could face the death penalty.[207] Instead, Turkey deported him to Kuwait, likely using the deportation as a pretext to deliver him into USG hands.[208] En route to Kuwait, he flew through Jordan, where FBI agents took him into custody presumably with both Turkish consent and Jordanian cooperation.[209] USG agents transferred him "almost immediately" to the United States, where the DOJ successfully prosecuted him for conspiracy and material support to terrorism.[210] He is now serving a life sentence in a federal penitentiary.[211]

If ABAB falls into the custody of an allied government willing to ultimately transfer him to the US for federal prosecution, the same "behind the scenes" arrangements would still be possible, and legal. As long as no information obtained by the HIG is introduced as evidence (unless that information is also voluntarily provided to the clean team), and as long as US personnel never perform or facilitate any prohibited interrogation methods (regardless of if the information procured is

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[205] *See* Robert Chesney, *Why No Period of Detention and Interrogation for Abu Ghaith, ala the Warsame Model?*, LAWFARE (March 7, 2013 at 4:14 PM), http://www.lawfareblog.com/2013/03/detention-interrogation-abu-ghaith-warsam/.

[206] John Miller, *How Sulaiman Abu Ghaith was caught*, CBS NEWS (Mar. 8, 2013, 7:56 PM), http://www.cbsnews.com/news/how-sulaiman-abu-ghaith-was-caught ("While in Turkish custody, he was interrogated by a U.S. multi-agency group known as the High-Value Interrogation Group, or the HIG. Made up of experienced interrogators, polygraph experts from the CIA, FBI and Department of Defense, the HIG also brings in the agents and analysts who know the most about the person being questioned. They gathered hours of intelligence from Abu Ghaith which was eventually summarized in a 22-page document. It included details about the mechanics of how Abu Ghaith and his fellow al Qaeda members operated while under house arrest in Iran.").

[207] *Id.*

[208] He is no longer a Kuwaiti citizen. The emirate stripped him of that status for his terrorist associations before his capture. *US captured Bin Laden son-in-law on the way to Kuwait*, DAILY NEWS (Mar. 8, 2013, 7:56 PM), http://www.hurriyetdailynews.com/us-captured-bin-laden-son-in-law-on-the-way-to-kuwait.aspx?pageID=238&nID=42498&NewsCatID=359.

[209] John Miller, *supra* note 206 ("Quietly, an arrangement was made to have him flown to Jordan where an FBI Gulfstream 5 was waiting with a team of agents. Abu Ghaith was flown last Friday, March 1, to Stewart Air Force Base outside New York City and brought to the Metropolitan Correctional Facility to await his arraignment on charges of conspiring to kill Americans.").

[210] *See* Robert Chesney, *supra* note 205.

[211] Leigh Remizowski, Osama bin Laden's son-in-law sentenced to life in prison, CNN (Sep. 23, 2014, 12:31 PM ET) http://www.cnn.com/2014/09/23/justice/bin-laden-relative-sentenced/.

introduced as evidence), a coordinated transfer from a foreign partner that captures ABAB could also lead to federal prosecution.

Prosecution. Once formally charged, ABAB would be in the hands of not only the DOJ, but also the federal criminal justice system writ large. Members of the USG whom policymakers cannot control—namely Article III judges and magistrates—would have control over ABAB's fate, as would regular citizens sitting in their roles as jurors. Accordingly, the USG should only prosecute ABAB for violations of federal criminal law that a prosecutor believes he or she can prove to a jury ABAB committed beyond a reasonable doubt.

Due to the well-publicized depravity of ISIL and the presumption that ABAB gave the orders, the USG can consider many different criminal charges against ABAB. Given ISIL's actions, the presumption evidence can link ABAB to those actions, and the charges filed against terrorists in recent cases, the possible charges include:

1. Genocide. 18 USC § 1091.
2. Torture. 18 USC § 2340A.
3. Multinational Terrorism. 18 USC § 2332B.
4. Harboring Terrorists. 18 USC § 2339.
5. Financing of Terrorism. 18 USC § 2339A.
6. Material Support to Terrorism 18 USC § 2339B.
7. Conspiracy to Provide Material Support to Terrorism.
8. Terrorist murder of a U.S. national in another country. 18 USC § 2332.
   - *Four counts*, specifically for journalists James Foley and Steven Sotloff, former U.S. Army Ranger and aid worker Peter Kassig, and humanitarian Kayla Mueller[212]
9. Conspiring to kill U.S. nationals. 18 USC § 2332.
   - *Four counts*, for same victims.
10. Hostage taking. 18 USC § 1203.
    - *Four counts*, for same victims.
11. Murder during a hostage taking 18 USC § 1203.
    - *Four counts*, for same victims.

Each offense includes its own elements. A prosecutor must prove each element beyond a reasonable doubt at trial.[213]

The overseas location of the crimes does not prevent domestic prosecution. The perpetrator of these specific crimes makes himself subject to US federal law—i.e.,

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[212] Brooke Lewis, *By the numbers: Kayla Mueller becomes the fourth American killed by ISIS*, SYRACUSE POST-STANDARD (Feb 11, 2015, 2:41 PM) http://www.syracuse.com/opinion/index.ssf/2015/02/kayla_mueller_marks_fourth_american_killed_by_isis.html.

[213] For example, for a local prosecutor to prove a thief committed burglary under the common law, the prosecutor must show that the (1) defendant committed an unauthorized breaking and entering (2) into a building or occupied structure (3) at night (4) with the intent to commit a crime inside. If jury was convinced of all but one—perhaps unconvinced that the sun had yet to set at the time of entry, or, separately, unconvinced beyond a reasonable doubt that the defendant intended to commit a crime—then the jury must respond with not guilty.

makes himself susceptible to United States jurisdiction. Under US domestic law, prosecutors could establish jurisdiction for each of the above overseas crimes either through case law precedent or the terms of the statute itself.[214] Under international law, the US courts have jurisdiction to apply laws to ABAB[215] under two principles. First, customary international law permits a country to apply its laws against a non-citizen who commits a crime overseas against that country's citizens under the "passive personality" principle.[216] If an American (or any non-Canadian) robs a Canadian in Chicago, and then the Canadian spots him in Toronto, the Canadian government can prosecute the wrongdoer in Canada for the Chicago crime. For the crimes that ABAB committed against Americans, the location is immaterial precisely because the victims were Americans. Second, international law has evolved to recognize some particularly heinous crimes such as genocide under the principle of "universal jurisdiction." Under this principle, one country can submit the alleged perpetrator of such a crime to its courts' laws even if that country otherwise lacks jurisdiction over the criminal, the victims, or the location of the atrocity.[217]

The only jurisdiction issue under international law that could be problematic is for the charge of, and conspiracy to commit, material support for terrorism. Terrorism is not a war crime, nor have U.S. judges considered it conduct such as piracy that facially violates criminal international law,[218] despite legitimate arguments to the contrary.[219] However, the clear grant of jurisdiction in domestic law on this point should moot the point before a federal judge.[220]

Procedurally, successful prosecution of ABAB under federal law will require: (1) a grand jury determining the government has sufficient evidence to show it has probable cause to indict him for violations of specific offenses, and then (2) either a petit jury (a "regular" jury) finding beyond a reasonable doubt that he committed those acts, or a voluntary plea of guilty by ABAB himself. ABAB would have nearly all the constitutional and statutory rights afforded any other criminal defendant

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[214] *See, e.g.*, 18 USC § 2339B(d)(2) ("Extraterritorial jurisdiction. — There is extraterritorial Federal jurisdiction over an offense under this section.") For example and explanation, see also *Criminal Resource Manual 1103 Jurisdictional Requirements, United States Attorney's Manual*, DEPARTMENT OF JUSTICE, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01103.htm (last visisted April 14, 2014).

[215] Jurists and scholars refer to this type of jurisdiction as *prescriptive* jurisdiction. *See* CARTER & WEINER, *supra* note 63, at 659 – 668.

[216] *See, e.g.*, United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

[217] *See* CARTER & WEINER, *supra* note 63, at 713 – 721.

[218] *See* Eugene Kontorovich, *The Offenses Clause & Universal Jurisdiction Over Terrorists*, THE VOLOKH CONSPIRACY (January 2, 2013 2:53 PM) http://volokh.com/2013/01/02/the-offenses-clause-universal-jurisdiction-over-terrorists/ ("Material support for terrorism is a particularly weak case for the Offenses Clause, as the D.C. Circuit had ruled in *Hamdan* that it was not a war crime (though this does not rule out its being another type of international offense), and terrorism itself does not violate international law, as the Second Circuit has held in *Yousef*.")

[219] *See Unnamed defendant*, *infra* note 318, and accompanying text and note text.

[220] *See* Robert Chesney, *Judge Rejects Extraterritoriality Objection in Terrorism Prosecution*, LAWFARE (October 27, 2011 9:51 AM), http://www.lawfareblog.com/2011/10/judge-rejects-extraterritoriality-objection-in-terrorism-prosecution/.

indicted for federal prosecution.[221] If found guilty, he would serve his sentence in a federal prison and have the same right to an appeal as any other convicted federal inmate.

Because all these charges are felonies, the DOJ, through the Assistant US Attorneys ("AUSAs") in the US Attorney's Office in which it plans to prosecute ABAB, must impanel a grand jury of up to 23 and at least 12 impartial citizens to attain an indictment. In contrast to trial juries, grand juries do not see evidence or hear from witnesses in a public forum.[222] All their work is sealed.[223] In addition, the evidence is one-sided: the suspect's lawyer does not present evidence *not* to indict, and may not even know the grand jury is considering a charge against the client. For terrorism cases, the suspect is unlikely to have a lawyer until charged, arrested, and arraigned before a federal magistrate. At least 12 grand jurors must believe the evidence shows probable cause to believe the defendant committed the crime(s) in order to issue an indictment.[224]

For terrorists, and WAK3-method terrorists in particular, the indictment allows the USG to arrest the suspect and bring him before a federal magistrate for an arraignment, also called an "initial appearance." The magistrate will advise the suspect of all of his rights, and the AUSA will state the charges against him.[225] At this stage, the USG will give defendant access to his own counsel—either hired or appointed by the government—and that counsel will represent the defendant from this point forward. If, however, the suspect had requested a lawyer after agents read the suspect his Miranda rights, that defense lawyer's access would begin as quickly as the DOJ could arrange such a meeting.

Terror suspects, particularly high profile defendants, have often been loath to cooperate with their appointed counsel, but their counsel nonetheless will endeavor to ensure any improper evidence against their client is suppressed at trial.

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[221] An important exception, for various reasons, is the right to counsel under the Sixth Amendment. The DOJ will certainly provide ABAB—like other foreign-captured non-citizen terrorists before him—competent representation. But other factors of this right, particularly as would pertain to a citizen's right to counsel during a post-capture interrogation, should not be an issue. *See* Jennifer Daskal & Steve Vladeck, *The Case of Abu Anas al-Libi: The Domestic Law Issues*, JUST SECURITY (October 10, 2013 at 9:00 AM) http://justsecurity.org/1850/case-abu-anas-al-libi-domestic-law-issues/ (discussing the Sixth Amendment dynamics in the context of the al-Libi detention and prosecution).

[222] *Charging, Office of the United States Attorneys*, DEPARTMENT OF JUSTICE, http://www.justice.gov/usao/justice-101/charging (last visisted April 14, 2014)("The grand jury listens to the prosecutor and witnesses, and then votes in secret on whether they believe that enough evidence exists to charge the person with a crime. . . . All proceedings and statements made before a grand jury are sealed, meaning that only the people in the room have knowledge about who said what about whom.").

[223] *Id.*

[224] *Id.*

[225] *Initial Hearing ,Office of the United States Attorneys*, DEPARTMENT OF JUSTICE, http://www.justice.gov/usao/justice-101/initial-hearing (last visisted April 14, 2014). A detention hearing follows as a matter of course a few days (~3) after the initial appearance. The magistrate decides whether or not to release the defendant in the time between that hearing and trial. Given the key standards of risk of flight and danger to the community in making this decision, plus the non-citizenship of ABAB, a magistrate is *extremely* unlikely to approve release. *Id.*

While prosecutors must successfully make a case before both a grand jury and a petit jury (presuming no plea), many steps await ABAB, his attorney, and the prosecutors in the full process of criminal litigation. According the DOJ, the federal criminal process *can* include eleven basic steps:[226]

1. Investigation
2. Charging (the Indictment)
3. Initial Appearance / Arraignment
4. Discovery
5. Plea Bargaining
6. Preliminary Hearing
7. Pre-Trial Motions
8. Trial
9. Post-Trial Motions
10. Sentencing
11. Appeal

However, most defendants never go through each of these eleven steps because many, including Warsame, skip the middle steps altogether; plea bargaining leads to (guilty) plea agreements and sentencing hearings. They also rarely file appeal motions, as their agreements bar later appeals. On the other hand, defendants might reject attempts at plea-bargaining.[227] Al-Libi never cooperated and insisted on a trial.[228]

Critically, the last step of appeal is almost exclusively the province of the defendant. If the federal government fails to secure a guilty verdict, the principle of double jeopardy generally bars a government appeal of the result. However, the USG could extradite ABAB after a not guilty verdict to other countries that have indicted him for crimes committed pursuant to their own laws. This limitation of prosecutorial appeal in the federal system differentiates COA 2 from COA 1; the ICC and the ICTs offer prosecutors relatively more avenues of appeal[229] compared to the US criminal court system, which offers almost none.

The time between arraignment and trial in federal court should take a matter of months, rather than years (as would likely be the case for an international tribunal) or weeks (for Arab government prosecution). However, pre-trial motions could slow the process beyond a year. Trial itself should not exceed two months.

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[226] *Steps In The Federal Criminal Process, Office of the United States Attorneys*, DEPARTMENT OF JUSTICE, http://www.justice.gov/usao/justice-101/steps-federal-criminal-process (last visisted April 14, 2014) (emphasis added).

[227] Of course, any defendant who is found not guilty at trial (or earlier, through a motion or any other change of circumstance that leads to the withdrawal of charges) never reaches the later steps.

[228] Deborah Feyerick & Lateef Mungin, *Alleged al Qaeda operative Abu Anas al Libi pleads not guilty*, CNN.COM (October 16, 2013, 0107 GMT), http://edition.cnn.com/2013/10/15/justice/al-libi-case/.

[229] The prosecution's ability right to appeal in a COA #1 prosecution is highlighted by the interlocutory appeal that lengthened the Karadic trial, as discussed *supra* in Part III.B.c.

c. Analysis of Challenges

Some of these hurdles are practical impediments, but most of the following hurdles for this COA are legal, including dangers of how this COA could violate international law. International law matters in a practical sense for two reasons.

First, if it matters in philosophical sense to a federal judge, it could dictate what happens to ABAB. Federal judges care about international law. The Supreme Court provides a telling example, not just because of the high-profile nature of the Court, but also because how the Justices have repeatedly cited international law as authority.[230] The Court has invalidated USG action multiple times since 9/11 in part due to international law.[231]

Second, international law matters to the international community in general and US allies in particular. If the USG chooses this COA over the more international alternatives, skepticism of this COA's legality will run high in friendly capitals the world over. With skepticism comes scrutiny. Events have caught the USG flat-footed in the past; the USG has often struggled to provide convincing legal justifications to its conduct after taking aggressive action against terror. That disconnect led to (and helped popularize the phrase) second and third order effects. Pursuit of this COA must include sufficient legal and strategic communications preparation to avoid similar loss of faith with any ABAB prosecution in federal court.

Capture and detention may not be AUMF-authorized. Two of the three WAK3 defendants—Warsame and al-Libi—fell within the President's authority to use force (lethally or non-lethally) as enemy combatants. That authority originates from his Article II powers and the Authorization of the Use of Military Force ("AUMF") Congress passed after 9/11. The 2001 AUMF permitted force against—and only against—entities behind the 9/11 attack and any entity that harbored the same.[232] Until amended or withdrawn by Congress, the AUMF permits the President to use force against AQ. Because al-Libi worked directly for AQ in his role in the 1998 embassy bombings, he fell within the ambit of the 2001 AUMF even without a 9/11 connection.[233] Warsame did not support the core of AQ. However, his ongoing work

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[230] The hallmark of this principle is the *Charming Betsy* Canon, espoused by Chief Justice John Marshall in *Murray v. The Schooner Charming Betsy*, 6 US (2 Cranch) 64 (1804), which holds that "an act of Congress outhgt never to be construed to violate the law of nations if any other possible construction remains." *Id.* at 118.

[231] These cases have specifically dealt with the detention and prosecution of terrorists, the same issue presented by a prosecution of ABAB. *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004) (ruling that the judicial branch could hear wrongful imprisonment claims by Gauntanamo detainees) & Boumediene v. Bush, 553 U.S. 723 (2008) (ruling that Gauntanamo detainees' habeas rights had been violated).

[232] *See* Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter 2001 AUMF] ("That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons").

[233] The White House Press Secretary made this point explicitly. *White House: Al-Libi capture 'clearly fell within AUMF'*, NBC NEWS (October 07, 2013) http://www.nbcnews.com/video/nbc-news/53210459#53210459 (providing the video of the White House Press Secretary's remarks). National security legal scholars seemed to agree. *See e.g.*, Wells Bennett, *When There's No AUMF*

for both the formal franchise of AQ in Yemen, AQAP, and an AQ ally that later formally merged with AQ, al Shabab, put him safely within the 2001 AUMF parameters.[234]

ABAB's placement within the legal framework of the 2001 AUMF is less certain. The case of the third member of the WAK3 trio, Abu Khattala, has raised the same question, and the uncertain answer presents a problem for the prosecution of ABAB under the 2001 AUMF.[235] Abu Khattala's alleged involvement in the Benghazi attacks does not itself subject him to the 2001 AUMF; he had no role in the 2001 attacks, has never been a member of the organization that was (i.e., AQ), nor supported a government that gave them safe harbor (i.e., the Taliban). Both legal scholars and the Pentagon itself concluded that Khattala and his co-conspirators did not fall within the 2001 AUMF.[236] Without an AUMF nexus, the USG would have no authority to capture, militarily interrogate, or militarily detain a criminal defendant.

Like abu Khattala, most ISIL members likely fail to fall within the 2001 scope AUMF, despite a proclamation by the White House that the 2001 AUMF authorizes ongoing actions against ISIL.[237] Nothing links ISIL to either 9/11 or the Taliban. Fortunately for any future prosecution, ABAB differs from his ISIL subordinates in his historical ties to an al Qaeda offshoot, AQI, as *discussed infra* Part II.B.

The USG could instead capture, detain, and interrogate ABAB or any of his ISIL subordinates under the 2002 AUMF Congress passed to authorize Operation Iraqi Freedom, *if* the USG captures him in Iraq. Congress provided no sunset provision in that authorization, and it provides only a geographic limitation permitting the President to "defend the national security of the United States against the continuing threat posed by Iraq."[238] If ABAB remains in Syria, this AUMF is immaterial.

Without an AQ connection or his presence in Iraq—or a new, ISIL-specific AUMF—the result is *not* that the USG cannot try ABAB in a civilian court, but rather that the USG must treat him as a civilian indicted for criminal acts. The only legal authority to prosecute would be the grand jury indictment. Not only would the HIG

Nexus: Abu Khattalla and Criminal Procedure, LAWFARE (June 20, 2014, 6:43 AM) http://www.lawfareblog.com/2014/06/when-theres-no-aumf-nexus-abu-khattalla-and-criminal-procedure/ (differentiating al-Libi's situation with Abu Khattala on this very point of an AUMF nexus). *See also* Jennifer Daskal & Steve Vladeck, *supra* note 221 (concluding that "there is little doubt under current law that he can be detained without trial under the 2001 Authorization for the Use of Military Force (AUMF)").

[234] Robert Chesney, *Ahmed Warsame and Law of War Detention,* LAWFARE (July 6, 2011 at 3:31 PM) http://www.lawfareblog.com/2011/07/ahmed-warsame-and-law-of-war-detention/.

[235] Jack Goldsmith, *Civilian Trial is the Only Option for Abu Khattala,* LAWFARE (June 18, 2014, 7:08 AM) http://www.lawfareblog.com/2014/06/civilian-trial-is-the-only-option-for-abu-khattala/.

[236] *Id.*

[237] Karen DeYoung, *Obama To Seek New Authorization For Fight Against Islamic State*, WASH. POST (Nov. 15, 2014) http://www.washingtonpost.com/world/national-security/obama-to-seek-new-authorization-for-fight-against-islamic-state/2014/11/05/67bb0998-652c-11e4-bb14-4cfea1e742d5_story.html (explaining how the Obama administration has used both AUMFs to justify military action against ISIL under the law).

[238] Pub. L. No. 107-243, 116 Stat. 1498 (2002).

be unable, under both domestic and international law, to lawfully interrogate him as a POW, but also his very capture as an enemy combatant would be suspect.

The White House has tried to secure a new AUMF providing clear authority to battle ISIL, but Congress has yet to act.[239] The failure of a legal foundation may have little impact, however, due to a political consensus in support of the operation. But law—rather than politics—*will* impact a federal district court judge's rulings if and once ABAB is hauled before a magistrate. The capture will be the minor issue; Supreme Court case law permits civilian criminal prosecution even if the government brings a defendant to court's jurisdiction through improper means, such as a military capture that violated another country's sovereignty or executed without congressional authorization.[240] However, a federal judge would *not* permit the USG to prosecute a non-AUMF-linked defendant by a military tribunal. More importantly to this COA, the judge could conclude any military detention (and its delay) or information procured from military interrogation is prejudicially invalid, raising the following challenges for prosecutors in securing a conviction.

Prolonged detention, particularly without an AUMF nexus, could violate ABAB's statutory and constitutional rights. A lack of an AUMF nexus for ABAB could cause significant problems in court. Even if the HIG interrogation avoids techniques that spur issues of torture,[241] it still risks creating legal problems for later DoJ prosecution, due to the government's intent in the seizure and interrogation of the captured individual.

First, under the federal rules of criminal procedure, whenever the USG arrests a suspect outside the United States, it "must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise."[242] Attorneys refer to this rule as "presentment." Though presentment seems like a formality where a magistrate informs the defendant of the charges and his or her rights, prompt presentment is not merely an aspirational standard. Failure has consequences. It could trigger a judge to exclude evidence gathered pre-presentment, even by the "clean team."[243] While the logistics of transport will not "count" against the government, the Supreme Court has specifically ruled that "delay for the purpose of interrogation" is the "epitome" of impressible delay.[244] For terrorists legitimately covered by an AUMF, the respective US Attorney could argue that the later transfer to the DoJ does not make the initial capture an "arrest" in the criminal justice context. Rather, the initial capture was still detention under the laws

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[239] *See* Jennifer Daskal & Steve Vladeck, *supra* note 221.

[240] *See infra* note 278, regarding the Ker-Frisbee Doctrine.

[241] Any mistreatment bad enough to "shock the conscience" risks dismissal of not only the entire case, but also the entire charge under the Due Process Clause of the U.S. Constitution. *See* Jennifer Daskal & Steve Vladeck, *supra* note 221.

[242] FED. R. CRIM. P. 5.

[243] *See* Jennifer Daskal & Steve Vladeck, *supra* note 221 (explaining that "the remedy for a violation of Rule 5 is not dismissal of the charges, but rather suppression of any statements obtained during the unreasonable pre-presentment period" though estimating that the prosecutors would still stand a good chance of winning in an evidentiary hearing on such an issue).

[244] Corley v. United States, 566 US 303, 309 (2009).

of war *as authorized by an AUMF*.[245] This line of reasoning proved sufficient for both Warsame and al-Libi. Without that AUMF nexus, the prosecutor's argument that the USG captured ABAB primarily as a law of war interrogation would be harder to make to federal judge.

Second, not only must the USG promptly present a defendant to a magistrate, the USG must also respect a defendant's Constitutional right to a speedy trial.[246] While the federal district court judge in Ahmed Ghailani's trial rejected a defense motion that the USG had violated his speedy trial rights by holding him in Guantanamo for five years before his trial,[247] which the Second Circuit affirmed,[248] the 2001 AUMF also clearly covered Ghailani as an AQ member activity directly tied to Osama bin Laden. He was inaugural member of the FBI's 2001 Most Wanted Terrorist Watch[249] and a similar UN list the same month.[250] The 2001 AUMF covered him easily.

Third, the AUMF would substantiate the HIG side of the Miranda wall as a valid intelligence interrogation pursuant to an AUMF conflict, rather than as a pretext for a criminal investigation. The Constitution does not require Miranda warnings every time the government interrogates an individual. It only prohibits any testimony as evidence that the government procured without giving a Miranda warning. It also prohibits the "fruit" of any *involuntary*, non-Mirandized statements. This prompts the need for true break between the HIG and the "clean" team.[251] The latter does not just have to start anew; it cannot "benefit" at all from what the HIG learned, as doing so would be harvesting the "fruit" of the wrongful interrogation.[252] However, if a judge finds the HIG team was just an extension of the DoJ interrogators because the AUMF does not permit a military interrogation of the subject, the failure to

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[245] *See* Jennifer Daskal & Steve Vladeck, *supra* note 221.

[246] U.S. Const. amend. VI.

[247] United States v. Ghailani, 751 F. Supp. 2d 515, 541 (S.D.N.Y. 2010), slip opinion *available at* http://www.nysd.uscourts.gov/cases/show.php?db=special&id=110.

[248] United States v. Ghailani, 733 F.3d 29, 51-52 (2d Cir. 2013) cert. denied, 134 S. Ct. 1523 (2014) ("Ghailani has failed to demonstrate that the District Court's denial of his motion to dismiss the indictment for violation of the Speedy Trial Clause was based on any error of law or clearly erroneous factual finding. Further, we agree with the District Court's conclusion that '[c]onsidering all of the circumstances, particularly the lack of significant prejudice of the sort that the Speedy Trial Clause was intended to prevent, the delay in this case did not materially infringe upon any interest protected by the right to a speedy trial.'").

[249] Faraj Abdallah Tamim and Malinda S. Smith, *Human Rights and Insecurities: Muslims in Post-9/11 East Africa*, SECURING AFRICA: POST-9/11 DISCOURSES ON TERRORISM 114-115 (ed. Malinda S. Smith) (Ashgate Publishing, 2010).

[250] *Ahmed Khalfan Ghailani, Narrative Summaries Of Reasons For Listing*, SECURITY COUNCIL COMMITTEE PURSUANT TO RESOLUTIONS 1267 (1999) AND 1989 (2011) CONCERNING AL-QAIDA AND ASSOCIATED INDIVIDUALS AND ENTITIES, U.N. SECURITY COUNCIL, http://www.un.org/sc/committees/1267/NSQDi028E. shtml (last visited April 14, 2015).

[251] *See* Jennifer Daskal & Steve Vladeck, *supra* note 221 ("If al-Libi's statements are involuntary—as opposed to merely un-Mirandized—then the issue become a bit trickier. In that case, both the statements and the fruits would be inadmissible at trial under federal law. Thus, in order for subsequent Mirandized statements to be admissible, the government would have to establish a break in the taint created by the initial round of coercive interrogations.") (citing 18 U.S. Code § 3501 (2014)).

[252] *Id*.

Mirandize initially could "taint" all the admissions and "fruit" the process secures, even if the two teams execute a clean break in sequence.

The handling of Khattala, the most recent of the WAK3, is instructive of possible Miranda and presentment problems without an AUMF. As of April 2014, due to his non-AUMF status, Khattala's interrogators on the *USS New York* might not be able to set aside his intelligence interrogation as a law of war interrogation separate from his criminal proceedings.[253] Under the law, a federal judge could characterize any time Khattala spent in detention, from capture until his arraignment, as being *solely* for his questioning pursuant to the same criminal matter.[254] Accordingly, the judge may rule that *all* the questioning was for law enforcement purposes and the failure to both Mirandize Abu Khattala and to promptly bring him before a magistrate negates *any* evidence produced from interrogation, even self-incriminating statements rendered to a clean team.[255]

Taking that risk might not be wise. As discussed below, the Federal Rules of Evidence will block some evidence helpful to convince impartial jurors of ABAB's guilt. Any post-Miranda statements, perhaps made out of bravado, could be determinative in obtaining a conviction for ABAB.[256] This hurdle will create tension between the two "parts" of this COA: transfer ABAB quickly to the DOJ and the HIG could lose needed intelligence value, but allow the HIG to hold him for too long and the DOJ could lose the admissibility of any admissions of guilt.

A clear AUMF by Congress granting the President clear authority to use force against ISIL would eliminate this hurdle and significantly minimize (if not altogether eliminate) the others.

Detention at sea could violate the Geneva Convention. International law, through the Geneva Conventions, governs treatment of prisoners of war ("POW").[257] This COA implicitly rests on the principle that a terrorist the USG captures and

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[253] *See* Wells Bennett, *supra* note 224 ("[T]he election of civilian process, coupled with a multi-day, post-capture detention, implies the prosecution's healthy confidence in the courts not rejecting, or even substantially narrowing, the criminal case against Abu Khattalla—AUMF hook or no. The remedy for Miranda and presentment violations would almost certainly be suppression of statements made by Abu Khattalla during interrogation aboard the *New York*; we thus can infer that the United States amassed a trove of highly inculpatory, admissible evidence of the defendant's guilt, prior to capture, and that it consequently isn't depending on post-capture interrogation to furnish evidence for the criminal case.").

[254] *Id.*

[255] *Id.*

[256] The easiest way to convict a criminal is an admission. Though no criminal must testify against himself or herself due to the Fifth Amendment, many arrested criminals fail to take full advantage of their Fifth and Sixth Amendment rights in the custodial period between arrest and trial. In short, criminals waive their rights and sing, hoping to explain their way out of the criminal allegation, but instead allowing for easy evidence for prosecution.

[257] The US Congress ratified the Geneva Convention in 1955. Under the U.S. Constitution, ratified treaties have the force of law. U.S. Const. art VI. ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and *all treaties made, or which shall be made*, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.") (emphasis added). *See also* CARTER & WEINER, *supra* note 63, at 159 – 176.

detains for weeks before formal arrest is a POW under the Law of Armed Conflict ("LOAC"), a subset of international law built largely on the Geneva Conventions. If a foreign terrorist *is not* a combatant under the domestic law of the AUMF, the USG would lack legal basis to detain that foreigner under the LOAC. Arguably, the only basis in international law upon which to detain the foreigner is charging that individual with a crime.[258] For example, the USG immediately charged Sulaiman Abu Ghaith with criminal violations of federal law rather than detain him on a ship for HIG questioning first.

While without an AUMF/LOAC nexus the USG cannot detain ABAB on a ship for HIG questioning, ship-based detention may be illegal either way. Article 22 of the Third Geneva Convention states that a country detaining a POW must do so on "premises located on land."[259] The brigs of the US Navy that carried the WAK3 certainly do not qualify.[260]

The USG could make two legal arguments in response. First, if the Article 22 principle is so enshrined as principle to be a matter of customary international law, then the USG could assert that this literal reading sacrifices the spirit of the convention for the letter. The purpose of the provision was to prevent similar poor treatment of POWs as experienced in the "Hell Ships" of the Imperial Japanese Navy in WWII.[261] The accompanying phrase with the mandate for a land-based detention is that the detaining nation affords the captive "every guarantee of hygiene and healthfulness."[262] No legitimate critic of the USG or a WAK3 defendant has claimed poor treatment during the naval detention. Historic practice, critical in establishing the parameters of law among nations, also supports the legality of temporary naval detention.[263]

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[258] *See* Ryan Goodman & Sarah Knuckey, *The Case of Abu Anas al-Libi: International Law Q&A,* JUST SECURITY (Oct. 9, 2013, 5:31 PM) http://justsecurity.org/1827/case-abu-anas-al-libi-international-law/ (making this argument in the context of al-Libi's detention using a human rights treaty many countries have ratified, including the United States, and hyperlinked commentary from UN committees, which in the author's view does *not* amount to international *law*). *Compare* International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 *available at* http://www1.umn.edu/humanrts/instree/b3ccpr.htm (the treaty itself), *with* Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994), *available at* http://www1.umn.edu/humanrts/gencomm /hrcom8.htm (the commentary on the treaty from the UN Human Rights Committee).

[259] Convention (III) relative to the Treatment of Prisoners of War, art. 22, Geneva, 12 August 1949, *available at* https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId =2EC4EDF33D483B15C12563CD0051AC47 [hereinafter Third Geneva Conv.].

[260] *See* Charlie Savage & Benjamin Weiser*, How the U.S. Is Interrogating an al Qaeda Suspect,* NY TIMES (Oct. 7, 2011) http://www.nytimes.com/2013/10/08/world/africa/q-and-a-on-interrogation-of-libyan-suspect.html ?ref=world&pagewanted=all&_r=0 (raising the Geneva Convention concern for a al-Libi).

[261] Peter Margulies, *Al-Libi and Detention at Sea,* LAWFARE (October 10, 2013, 5:00 PM) http://www.lawfareblog.com/2013/10/al-libi-and-detention-at-sea/.

[262] Third Geneva Conv. *supra* note 259 at art. 22.

[263] *See* Peter Margulies, *supra* note 261 (noting the precedent set by Britain, and accepted by Argentina, during the Falklands War).

Second, because the Geneva Convention only applies to interstate conflict (or "international conflict" to use the parlance of the LOAC) and the war against AQ and stateless enemies is non-interstate, or non-international, armed conflict, ABAB lacks Article 22 protections. Neither AQ nor ISIL are state parties to the Geneva Conventions,[264] and terrorist members such as ABAB do not operate under the rules of the Geneva Conventions as uniformed soldiers respecting the *jus ad bello* of war.[265] The Supreme Court holding in *Hamdan* gives strong weight to this argument domestically because the Court characterized the war against AQ as a non-international armed conflict.[266]

If Article 22 does not apply, no binding authority under international law prevents a sea-based detention for ABAB.[267] The USG navigates itself into a gray area where the terrorist detainee is subject to the LOAC, but not privileged with the rights of a traditional POW.[268]

The shift to legal prosecution from POW detention limits interrogation. Due to many of the reasons already discussed—particularly if the ABAB's nexus with the 2001 AUMF is suspect—the USG intelligence interrogators may have only a month or two in which to attain information from ABAB. This hurdle is merely the other side of that coin. If the USG chooses to shorten the HIG interrogation phase, that increases the chances prosecutors can use incriminating statements (provided by

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[264] *Id*. (". . . Article 22 only applies to state parties to the Geneva accords.")(affirming the points made in Goodman & Knuckey, *supra* note 258).

[265] *See* Goodman & Knuckey, *supra* note 258 (dismissing critics' Geneva arguments by noting that the Convention strictly applies to interstate conflict, which this is not, partly because terrorists do "not wear arms openly, abide by the laws of war, etc.").

[266] Hamdan v. Rumsfeld, 548 U.S. 557, 724 – 725 (2006) (holding that the "President's findings about the nature of the present conflict with respect to members of al Qaeda operating in Afghanistan [that that conflict is a non-international conflict, outside the realm of the Geneva Convention] represents a core exercise of his Commander in Chief authority that this Court is bound to respect."). *See also* Jack Goldsmith, *Why I Think the Obama Administration Did Not Extend Article 75 to Terrorists*, LAWFARE (March 11, 2011 at 5:09 AM) http://www.lawfareblog.com/2011/03/why-i-think-the-obama-administration-did-not-extend-article-75-to-terrorists/ (discussing the *Hamdan* holding, and concluding that under the Obama Administration, "the war against al Qaeda and the Taliban, and all legal authorities asserted in that war (including detention and military commissions), continue to be governed by Common Article 3 of the 1949 Geneva Conventions" rather than *jus ad bello* for "international armed conflict.")

[267] *See id.* (asserting that other rules apply to non-international detainees, but making that argument without citing any binding authority of international law, such as a provision in a Geneva Convention, other binding treaty, a norm of Customary International Law, or a provision of the UN Charter).

[268] This gray area is not new; the Bush administration developed it after 9/11 despite protests from legal scholars who later joined the current administration. However, the current administration has not deviated from this useful precedent. *See* John Bellinger, *Do the Geneva Conventions Apply to the Detention of al-Libi?*, LAWFARE (Oct,7, 2013 at 11:21 AM) http://www.lawfareblog.com/2013/10/do-the-geneva-conventions-apply-to-the-detention-of-al-libi/ ("The Bush Administration, of course, was much criticized (including by officials now in the Obama Administration) for holding al-Qaida detainees under the laws of war (rather than as criminal suspects) and for not applying the Geneva Conventions to them. . . . [D]espite affirming its commitment to the Geneva Conventions, the Obama Administration has not applied the Conventions as a legal framework differently than its predecessor and, in particular, has not treated al-Qaida detainees as POWs under the Third Convention or as Protected Persons under the Fourth Convention.").

ABAB in the DOJ interrogation phase) in court, but a shorter HIG phase also decreases the likelihood the HIG procures valuable military intelligence from ABAB. Lengthen the interrogation phase and the risks of suppression of the evidence of incriminating statements increase, but so do the chances of gaining valuable intelligence against ISIL members still on the battlefield.

A US Attorney cannot easily use classified information as evidence without revealing its content. The USG likely has more information than is currently available "open source." Yet, if that information is classified, the USG may have to decide if use at trial to secure a guilty conviction is more important that its secrecy from the defendant and the world at large.

The Classified Information Procedures Act ("CIPA") and sundry case law generally permit federal prosecutors to avoid the harsh evidentiary choice of tender and disclose or avoid and keep classified. During pre-trial discovery, a defendant has the right to view the prosecution's evidence, including both incriminating and exculpatory evidence as well as information about witnesses.[269] A judge can block the defendant's access to classified information while allowing material aspects of the documents as incriminating evidence by redacting parts of the documents or by allowing the government to summarize or substitute material in lieu of the originals that enables a defense without compromising the information.[270]

These options under CIPA do not guarantee the government will block the sensitive information from the defendant. The government proposes; the judge decides. A federal judge will determine if unreleased information is "relevant and helpful to the defense of an accused"[271] and do so erring on the side of the defendant.[272]

A loss on the motion could trigger dismissal of charges. If government prosecutors lose in the CIPA motion to keep the information classified, they must then decide if they will continue to oppose disclosure (for national security) despite the judge's ruling. If they do, the judge will consider sanctions, including, "(A)

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[269] The requirements that the government provide a defendant access to any exculpatory material and any written statements by a prosecution witness come from the Supreme Court decisions that have named the respective materials ever since, *Brady* and *Jencks* material. CRS at 4-5(citing Brady v. Maryland, 373 U.S. 83 (1963) and Jencks v. U.S., 353 U.S. 657 (1957)). The *Jencks* holding came about specifically in a national security context, rejecting that context as grounds to withhold the material from the defendant. *Id*.

[270] 18 U.S.C. app. 3 § 4 (2012) ("The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information, from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove.").

[271] United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998) ("In order to determine whether the government must disclose classified information, the court must determine whether the information is 'relevant and helpful to the defense of an accused.'").

[272] *See* United States v. Rezaq, 134 F.3d 1121, 1142 (D.C. Cir. 1998) ("[I]f some portion or aspect of a document is classified, a defendant is entitled to receive it only if it may be helpful to his defense. A court applying this rule should, of course, err on the side of protecting the interests of the defendant."). *See also* United States v. Hanjuan Jin, 791 F. Supp. 2d 612, 620 (N.D. Ill. 2011) ("The Court will . . . give [the accused] the benefit of the doubt in its analysis.").

dismissing specified counts of the indictment or information; (B) finding against the United States on any issue as to which the excluded classified information relates; or (C) striking or precluding all or part of the testimony of a witness."[273]

The CIPA process is similar for trial. The prosecutors will have the same redaction, summarization, or substitution alternatives to full disclosure of the classified information used as evidence.[274] However, a trial adds the uncertainty of the Confrontation Clause. This constitutional right to face one's accuser jeopardizes a procedural technique called the "silent witness rule" that allows a prosecution witness with classified (but incriminating) testimony to testify with references to a classified document to which the public had no access. For a recent terrorist prosecution, *United States v. Abu Ali*, the defendant and "uncleared" members of his defense counsel had only a redacted document. In his appeal, the defendant, an alleged terrorist, claimed that this use of the "silent witness rule" infringed on his Confrontation Clause right, and he prevailed:

> If the government does not want the defendant to be privy to information that is classified, it may either declassify the document, seek approval of an effective substitute, or forego its use altogether. What the government cannot do is hide the evidence from the defendant, but give it to the jury. Such plainly violates the Confrontation Clause.[275]

If the bulk of evidence the government has against ABAB is classified and no redaction, summarization, or substitution can provide the evidence without violating ABAB's right, the government will have to decide if conviction is worth revelation.

The USG will be limited in the international crimes for which it can prosecute ABAB. The USG criminalized genocide in its own criminal law in 1988 when Congress passed, and President Reagan signed, implementation legislation of the Convention on Genocide.[276] Congress and President George W. Bush expanded the jurisdictional scope of the crime to apply to any offender "brought into, or found in, the United States, even if that conduct occurred outside the United States."[277] While this may seem an overreach of jurisdiction, the Supreme Court has approved the principle for all US criminal law.[278]

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[273] 18 U.S.C. app. 3, §6(e)(2). The government can, however, file an interlocutory appeal—an appeal to a higher court on this issue *before* proceeding to trial. *Id*. "Such appeals will be expedited by the court of appeals." CRS at 3 (citing 18 U.S.C. app. 3, §7(b)).

[274] 18 U.S.C. app 3. §6(c)(1).

[275] U.S. v. Abu Ali, 528 F.3d 210, 255 (4th Cir. 2008), *cert. denied*, Ali v. U.S., 129 S. Ct. 1312 (2009). The success on the Confrontation Clause appeal was insufficient to overturn the verdict in this case because the error was harmless. *Id.* at 257. *See also* CRS at 11-12 (citing and explaining this case law).

[276] An Act to Implement the International Convention on the Prevention and Punishment of Genocide PL 100–606, November 4, 1988, 102 Stat 3045, codified as 18 U.S.C. § 1091 (2014).

[277] The Genocide Accountability Act of 2007, PL 110–151, December 21, 2007, 121 Stat 1821. The USC has summarized this language as providing jurisdiction upon an alleged offender if "present in the United States." § 1091.

[278] The principle is the Ker-Frisbee Doctrine, named after the two cases undergirding it, Ker v. Illinois, 119 U.S. 436 (1886), and Frisbie v. Collins, 342 U.S. 519 (1952), in which the Supreme Court dismissed as immaterial the illegitimate nature upon which a defendant was brought into a jurisdiction for criminal arraignment. The Court affirmed the doctrine in a 1992 case where law

However, Congress has never passed a complement bill for other grave atrocities. The proposed Crimes Against Humanity Act of 2010 never became law,[279] likely out of concerns of overbroad and vague language.[280] Without such codification of these international crimes, the USG could only prosecute ABAB for crimes under the rubric of the specific statutes discussed above in Part V.B.b. Method.

A not guilty plea requires a trial to prove guilt, and trial prosecution requires admissible evidence. To prove each element of each crime charged, a prosecutor must use—and can only use—public evidence admissible under the Constitution and Federal Rules of Evidence ("FRE"). This burden is significant, particularly for a defendant like ABAB. A prosecutor *cannot* prove her case by providing the jury with reams of classified intelligence reports that explain how ABAB leads ISIL in its reign of terror and genocide. Secret classification of incriminating documents or sources is a significant problem, but not the primary problem. The primary problem is standard intelligence reports—even if unclassified—would fail the FRE, and a judge will only allow the prosecutor to submit FRE-proper (i.e., "admissible") evidence before the jury.

A particular example of how FRE could disrupt efforts to prove ABAB's criminal conduct is hearsay. Much of the intelligence reporting that led intelligence analysts and journalists to name ABAB as the head of ISIL originated from the words of trusted sources. A court, however, will not trust those sources available. The rule against hearsay is an odd, arguably counter-intuitive rule of evidence. Hearsay is an out of court statement made by the declarant to prove the matter asserted.[281] Thus, the rule against hearsay prohibits a police officer from repeating to a jury the statements a landlord gave the officer about a wife-beating tenant. It even prevents the officer from telling the jury a statement the victim-wife tells the officer about her husband-assailant. For that information to reach the jury, both the neighbor and the wife must testify themselves in court.

The hearsay problem for ABAB could be significant. As the leader of ISIL, one of the best methods to prove he ordered ABAB's criminal acts is through witnesses. The witnesses who are often necessary to convict leaders of a criminal enterprise are their lieutenants, much the same way prosecutors "turn" underlings against mafia dons. In ABAB's case, the USG lacks similar underlings and lieutenants to testify against him. In lieu of their testimony, the USG *cannot* have an intelligence

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enforcement violated extradition procedures with Mexico. United States v. Alvarez-Machain, 504 U.S. 655 (1992).

[279] To view the bill's lack of progress on Capitol Hill, see *S.1346 - Crimes Against Humanity Act of 2010*, CONGRESS.GOV https://www.congress.gov/bill/111th-congress/senate-bill/1346/actions (last visited April 15, 2015).

[280] See Brian W. Walsh & Steven Groves, *The Crimes Against Humanity Act: Another Step Toward "Universal Jurisdiction",* HERITAGE FOUNDATION (April 21, 2010) http://www.heritage.org/research/reports/2010/04/the-crimes-against-humanity-act-another-step-toward-universal-jurisdiction#_ftnref1 ("But in addition to trying to extend U.S. law enforcement power to the four corners of the globe, the act defines new criminal offenses (punishable in certain instances by up to life imprisonment) using such vague, overbroad language that they could put U.S. soldiers and military officials at risk of criminal prosecution.").

[281] FED. R. EVID. 801(c).

analyst testify on the stand to recount what he—the analyst—heard second-hand from those same sources, even if those sources themselves have willingly decided to help the prosecution. The sources must themselves testify.

Prosecutors may even have problems securing admissible testimony from intelligence analysts with incriminating information about ABAB's actions that is *not* from HUMINT or other sources. A witness can only testify to a jury with information about information about which the witness has "personal knowledge" from his or her own direct experience.[282] A journalist, Kurdish soldier, or coalition UH-60 pilot who had been to Mount Sinjar could testify about the suffering of the Yazidis at the hands of ISIL there,[283] but an intelligence analyst might not be so able, even if that analyst had *physical evidence* (as opposed to receiving hearsay) of the deaths from those on the ground. The USG must bring in those with personal knowledge into court.

The rule about personal knowledge does not apply to expert witnesses, but the prosecutor must then manage to convince the judge that an analyst has the qualifications necessary to be an expert witness. Trial courts have decades of experience handling, and clear precedent governing, experts in fields of "hard science" such as medicine, pharmacology, and chemistry. Submission of an intelligence analyst as an expert in a social science, such as in the field of political science or international relations, is far from certain. Even if admitted as expert, an expert witness cannot give testimony that equates to a legal conclusion.[284] [need authority] An intelligence analyst testifying as an expert witness cannot say to the jury under direct examination, "It is my expert opinion that Mr. al-Baghdadi instructed ISIS to commit acts of terror," or even, "Based on my education and experience, the events on Sinjar and leading up to it on August 7, 2014 were acts of genocide."

One solution for ABAB's prosecutors is to secure incriminating pre-capture statements, particularly any made in writing or on video or audio recordings. Often criminals often dig their proverbial grave by talking *before* arrest. The rule of hearsay does not apply to "admissions," self-incriminating statements provided by a defendant.[285] A judge could suppress admissions by ABAB *given in custody* to law enforcement on the constitutional grounds discussed above. But no matter what happens to ABAB after his capture, the rules of evidence would admit anything he said publically beforehand.

Moreover, any admission ABAB makes to another individual could certainly come in *through that individual*, such as an ISIL lieutenant. First, the lieutenant could testify against ABAB personally in court. Better yet for prosecutors hard-pressed to secure the testimony of a loyal ISIL subordinate, a lieutenant's role in ABAB's criminal organization implicates an exception in the rule against hearsay. That

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[282] FED. R. EVID. 602.

[283] The Yazidi religious minority, a non-Muslim enclave in Iraq, retreated to Mount Sinjar in Iraq after ISIL began to systematically kill the non-Muslims for their faith. *See* Martin Chulov, *supra* note 26.

[284] FED. R. EVID. 704.

[285] FED. R. EVID. 801(d)(2).

exception would allow testimony of a USG agent who heard (or elicited) that same lieutenant provide the incriminating information against ABAB.[286]

Because of the evidentiary aid lieutenants could provide prosecutors, the military capture operation should capture co-defendants who would be willing to testify against ABAB to save their own skin. As a concept of criminal law accurately portrayed in film and television, juries often convict defendants based on the testimony of fellow criminals, particularly co-conspirators in the same criminal activity. Prosecutors can provide these criminals more favorable plea agreements in return for their court testimony against other—possibly higher ranking—defendants. Many arrested criminals, particularly unsophisticated criminals, also provide incriminating statements inadvertently against co-conspirators in initial interrogation in hopes they can talk their way out of the charge. In the attempt, they might just give prosecutors more incriminating statements.

Prosecutors' evidentiary requirement to prove ABAB ordered the criminal actions of ISIL creates the most critical need for incriminating statements by fellow ISIL members. Contrary to the actions of many previous initiators of atrocities, such as the Nazis and the Khmer Rouge, ISIL broadcasts its actions rather than trying to hide them.[287] Prosecutors' problem rests in finding a connection between ABAB and these actions by the ISIL rank-and-file. Without statements from ABAB establishing his direction in ordering the crimes, statements by other ISIL members may be necessary to secure a conviction for any of the charges against ABAB.

Even with a rank-and-file terrorist, a US Attorney cannot guarantee a conviction, and especially on all counts. The DoJ's overall conviction rate for individuals charged with terrorist counts is very impressive,[288] but (as is the case with many federal prosecutions) the convicted charge may be ancillary to more major counts. However, any one count could carry a very long sentence. The Ghailani prosecution resulted in an acquittal on 284 of 285 charges stemming from his role in the 1998 embassy bombings, but the sole count on which the jury found him guilty resulted in a life sentence.[289]

C. COA #3: PROSECUTION BY AN ALLIED ARAB GOVERNMENT

This policy option would entail the capture, detention, formal arrest and indictment for violation of the criminal laws of an allied Arab nation, with

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[286] FED. R. EVID. 801(d)(2).

[287] Peter Bergen, *Why does ISIS keep making enemies?*, CNN.COM (Feb. 18, 2015, 9:06 AM ET), www.cnn.com/2015/02/16/opinion/bergen-isis-enemies/index.html.

[288] Dashiell Bennett, *Civilian Courts Are Way Better Than Military Courts at Convicting Terrorists*, THE ATLANTIC (Apr. 23, 2013 1:59PM ET), http://www.thewire.com/politics/2013/04/civilians-courts-vs-military-courts-terrorism/64489/ (using many sources to show the government's success in civilian court prosecutions is not only plainly effective, but more than through military courts; citing a NYU report, among the many others, that "says the conviction success rate on terror cases in civilian courts is nearly 90 percent").

[289] Warren Richey, *Ahmed Ghailani gets life sentence for Al Qaeda bombing of US embassies*, THE CHRISTIAN SCIENCE MONITOR (Jan. 25, 2011), http://www.csmonitor.com/USA/Justice/2011/0125/Ahmed-Ghailani-gets-life-sentence-for-Al-Qaeda-bombing-of-US-embassies.

corresponding transfer for trial by that government's prosecutors. While trying a criminal defendant in a US federal district court is a straightforward affair, submitting ABAB to the courts of an Arab judiciary ventures into the unknown. The difficulty in pursuing this option against ABAB includes both the same questions of the extra-territoriality of the application of domestic law policy-makers would face with the previous COA, but with a much higher degree of uncertainty of how an Arab court would resolve that question.

Information on this COA is relatively scant. The USG should consider the two most plausible paths of allied Arab government ("AAG") prosecution under this COA: (1) a trial in Jordan and (2) a trial in a "hybrid" internationally sanctioned court that applies domestic law of an AAG, such as Jordan, Iraq, or a Gulf State. These two paths provide the most clarity of method and process for USG policymakers, but they still lack the clarity provided by international or US federal prosecution.

This COA could ultimately provide more certainty than expected, but only after the USG clarifies the many "known knowns" and "known unknowns" through diplomacy and inquiry with the AAG partnered for this endeavor. While legal and policy research about the Jordanian legal system primarily reveals the relative obscurity of that information as it pertains to an ABAB prosecution (at least in English sources), government-to-government discussions could reveal specifics that policymakers require before committing to that sub-path of this COA. If the USG attempts to develop a hybrid court with an AAB, US diplomats could draft language that accounts for many of the forecasted issues and overcomes them.

Other paths within this COA, such as handing ABAB over to the nascent Iraqi government's judicial system, offer even less "known knowns" for the USG. Pursuing prosecution through the current, nascent Iraqi judicial system offers too much uncertainty. Overall, few Arab venues offer more reliability, transparency, and certainty for the USG than could be offered by a cooperative Jordan. The best means for finding necessary information if the USG chooses to pursue Jordanian prosecution is both through Department of State diplomats in Amman and the US embassy's Legal Attachés ("LEGATs"), the FBI's representatives in Jordan.[290] A LEGAT coordinates with host nation counterparts to pursue criminal investigations in both countries.[291] The LEGAT could use that position to inform policy-makers about the Jordanian criminal justice system and facilitate any ABAB handover.

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[290] *Federal Bureau Of Investigation Legal Attaché Program*, U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, Audit Division Audit Report 04-18 (March 2004) *available at* http://www.justice.gov/oig/reports/FBI/a0418/final.pdf (showing the USG has had a LEGAT in Jordan since 2001).

[291] Thomas V. Fuentes, Assistant Director, Office of International Operations, Federal Bureau of Investigation, Statement before the Subcommittee on Border, Maritime, and Global Counterterrorism House Homeland Security Committee, Washington, DC, October 04, 2007 *available at* http://www.fbi.gov/news/testimony/the-fbi2019s-legal-attache-program ("The role of Legal Attachés is primarily one of coordination, as they do not conduct foreign intelligence gathering or counterintelligence investigations. The rules for joint activities and information sharing are generally spelled out in formal agreements between the United States and the host nation.").

a. Background and Method

Transferring ABAB from DoD detention to Jordan. LEGATs would transfer ABAB into Jordanian custody. As ABAB would first be subject to control of the USG under the law of armed conflict, the USG could still take the time to conduct an HIG interrogation, exactly as in the first phase of COA#2. In this regard, this COA compares well with COA #1, which would likely, for reasons of diplomacy if not international criminal law and procedure, prevent extensive interrogation by USG intelligence agents prior to a handover to an international tribunal. In another favorable comparison, in contrast to a US prosecution a Jordanian court would likely accept incriminating information procured through that interrogation as evidence against ABAB.[292]

The Jordanian judiciary and its State Security Court. The USG could transfer ABAB directly to Jordanian law enforcement, which would have its own courts try him for his serious crimes under international law codified in their own systems. Jordan would almost certainly also try ABAB for any crimes against their own citizens, with Jordanian pilot Mouath al-Kasasbeh being preeminent among such victims. ISIL infamously burned him alive in Syria after his aircraft crashed after attacking ISIL positions in ISIL-occupied Syria.[293] He became a martyr in Jordan. The King of Jordan has committed his nation to a "relentless" campaign to avenge al-Kasasbeh's immolation and eliminate ISIL as an "outlaw" of the Islamic faith.[294]

Though King Abdullah has declared the "gloves have come off,"[295] he could be a willing partner in a prosecution, particularly if he could try ABAB in his own courts of justice. Available information about those courts is rather superficial compared to information available on the legal systems of the other COAs.

Jordan divides its judiciary into three court systems, religious, civil code, and military. Each applies different law to different subject matters of disputes. Religious courts handle all probate and family law issues, applying the faith-based code of the parties, which for the vast majority is Sharia law. [296] Other civil matters go to Jordan's civil code court system, which also tries most criminal offenses.

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[292] There is no evidence Jordan has the equivalent of a *Miranda* rule.

[293] Laura Smith-Spark & Michael Martinez, *Who was Jordanian pilot Moath al-Kasasbeh, killed by ISIS?*, CNN.COM (Feb. 4, 2015, 0226 GMT), http://edition.cnn.com/2015/01/29/middleeast/who-is-jordan-pilot-isis-hostage/.

[294] Ashley Fantz, *Exclusive: King Abdullah calls ISIS 'outlaws' of Islam*, CNN.COM (March 1, 2015, 2352 GMT), http://edition.cnn.com/2015/03/01/world/isis-king-abdullah-jordan/. *See also* Ian Black, *Jordan's King Abdullah vows 'relentless' war against Isis*, THE GUARDIAN (Feb. 4 2015 12.36 EST) http://www.theguardian.com/world/2015/feb/04/jordan-king-abdullah-war-isis-pilot. While these events have galvanized Jordanian resolve against ISIL, Jordan had already committed its forces to the coalition effort against ISIL in 2014. *See* JEREMY M. SHARP, CONG. RESEARCH SERV., L33546, JORDAN: BACKGROUND AND U.S. RELATIONS 30 (2014).

[295] *See* Ashley Fantz, *supra* note 294.

[296] *Jordanian Legal System, U.S. Citizen Services*, EMBASSY OF THE UNITED STATES, AMMAN, JORDAN, http://jordan.usembassy.gov/acs_jordanian_legal_system.html (last visited April 15, 2015) ("Religious courts have jurisdiction over all matters of "personal status". This includes most family law matters such as marriage, divorce, child custody, and adoption or guardianship. Consequently, there is no civil marriage or divorce in Jordan.").

Magistrate courts and "courts of first instance" handle lesser criminal charges, and "major felonies court" handles offenses that are more serious.[297] The Court of Appeals hears cases from the first two criminal courts, while felony appeals go directly to the Court of Cassation, Jordan's highest court.[298]

The third subdivision, the military court system, is far more likely to try ABAB. Jordan's State Security Court ("SSC") tries any offense related to national security, such as treason, espionage, narcotics trafficking, bribery of public officials, trafficking in narcotics or weapons, black marketing, terrorism, and other "security offenses."[299] Though military judges preside over the trials,[300] defendants can be either military or civilian. The SCC allows defendants representation and the right to cross examination, but appeals go to the King-appointed Prime Minister rather than the Court of Cassation.[301]

The Court of Cassation does decide which court system hears a case, and thus might rule on whether the SSC or the major felonies court would hear a terrorism charge.[302] However, all available indicia of practice signals the SSC will try all ISIL-related crimes. Such ISIL trials are now commonplace in Amman, particularly since the immolation of Mouath al-Kasasbeh:

> At Jordan's State Security court, Islamic State militants, clad in green military fatigues with long, unkempt beards, stood impassively, awaiting sentence inside a black iron cage. The barred enclosure was very much like the one in which their fellow jihadis in Syria burned alive Jordanian pilot Mouath al-Kasaesbeh, igniting a storm across a troubled kingdom in an uneasy alliance with the West against Islamic State (IS).
>
> The defendants did not blink when the military judge handed down sentences ranging from three to 15 years with hard labor.
>
> The charges were comprehensive: recruiting and smuggling arms and men to fight with terrorist groups (in Syria); promoting the ideology of a terrorist group via videos on social media; oaths of allegiance to Abu Bakr al-Baghdadi, the self-proclaimed Caliph of the Islamic State, and inducing others to follow suit.

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[297] *Id.*

[298] *Id.*

[299] *Id. S*ee *also* Rana F. Sweis, *Jordan Talks of Reform, but Old System Holds Sway*, N.Y. TIMES (Dec. 19, 2012), http://www.nytimes.com/2012/12/20/world/middleeast/jordan-talks-of-reform-but-old-system-holds-sway.html?_r=0 ("Jordan's State Security Court is a special body that has jurisdiction over crimes considered harmful to Jordan's internal and external security — involving drugs, terrorism, weapons, espionage and treason, but also speech-related crimes, including insulting the king.").

[300] *Jordanian Legal System*, *supra* note 296. Civilian defendants will have civilian judges except for "crimes of treason, espionage, terrorism, the crimes of drugs and currency forgery." JT, *King Directs Gov't To Amend State Security Court Law*, JORDAN TIMES (Sep 01, 2013 22:51). http://jordantimes.com/king-directs-govt-to-amend-state-security-court-law (referencing the Jordanian Constitution).

[301] *See id.* (noting the Jordanian legislature's approval of this change). *See also Jordanian Legal System*, *supra* note 296.

[302] *Jordanian Legal System*, *supra* note 296 (noting the Court of Cassation "determines which court has jurisdiction over a case where there is a jurisdictional dispute").

> They had no direct link to the immolation, but one of the men's defense lawyers, Hikmat al-Rawashdeh, said the stiff sentences had been influenced by it.
>
> He said growing numbers had been brought before the military courts since IS killed the Jordanian pilot, whose jet-fighter crashed in its territory in December.
>
> Officials dispute allegations of injustice. They say many of those on trial had admitted to having fought in Syria. The men said they had returned to Jordan repelled by so many executions and so much devastation. But the government fears they could be part of sleeper cells planning terrorist operations.[303]

The Jordanian government also recently ended an eight-year moratorium on capital punishment.[304] In contrast to the use of the death penalty in the US, neither litigation nor other bureaucratic delays slow Jordanian executions once ordered by the Executive Branch. In clear response to the al-Kasasbeh immolation, the government swiftly hung two ISIL inmates, including a female would-be suicide bomber, in the dark of night—only hours after ISIL's video release of the pilot's killing.[305]

Hybrid courts. An alternative to the domestic courts of an Arab nation is the application of an Arab nation's domestic law and international criminal law in a court sponsored by the US and other international partners. Such "hybrid courts" have only a recent history, but present advantages over either a purely domestic or rigidly international criminal law forum. For example, they can benefit from the support of international benefactor nations but, in contrast to the Yugoslavian and Rwandan ICTs, they have emerged without UNSC resolutions.

The governments of Sierra Leone and the United States worked with the UN, and the UNSC, to found the Special Court for Sierra Leone ("SCSL").[306] The USG provided

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[303] Samia Nakhoul & Suleiman Al-Khalidi, *Insight: Jordan takes no chances in confronting homegrown Jihadis*, REUTERS (Feb 26, 2015 10:44am EST), http://www.reuters.com/article/2015/02/26/us-mideast-crisis-jordan-insight-idUSKBN0LU1TU20150226.

[304] *Jordan Resumes Death Penalty, Executes 11*, HUMAN RIGHTS WATCH (Dec 21, 2014), http://www.hrw.org/news/2014/12/21/jordan-resumes-death-penalty-executes-11.

[305] John Hall, Julian Robinson, Tom Wyke, Steph Cockroft, & David Williams, *Jordan executes ISIS jihadists*, DAILY MAIL (Feb. 4 2015, 08:46 EST), http://www.dailymail.co.uk/news/article-2938199/Burned-alive-cage-ISIS-release-video-claiming-horrifying-murder-captured-Jordanian-pilot.html ("The executions, at about 4am local time today, came just hours after Islamic State militants released a sickening video showing a captured Jordanian fighter pilot being burned alive in a cage. Jordan had vowed a swift and lethal response and government officials this morning revealed that two prisoners, Sajida al-Rishawi and Ziad al-Karbouli, have already been hanged. Al-Rishawi had been on death row for her role in a triple hotel bombing in the Jordanian capital Amman in 2005 that killed dozens. The executions took place after gruesome footage emerged showing Jordanian pilot Moaz al-Kasasbeh being torched to death by his captors."). *See also* Eric Goldstein, *Dispatches: Jordan's Executions Are Not the Answer to ISIS Brutality*, HUMAN RIGHTS WATCH (Feb. 4 2015), http://www.hrw.org/news/2015/02/04/dispatches-jordan-s-executions-are-not-answer-isis-brutality (directly linking the hangings to the immolation).

[306] *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone* (Jan. 16, 2002), *available at* http://www.rscsl.org/Documents/scsl-agreement.pdf. *See also* CARTER & WEINER, *supra* note 63, at 1192-3 (recounting the history of UNSC action in "calling for" the establishment of the court).

the lion's share of external expertise, funding, and framework to a court that amalgamated both international law and domestic law of the host nation.[307] Though chartered through an agreement with the UN, it was never an instrument of the UNSC or any UN component or committee in the same vein as the ICTY or ICTR.[308] The USG had heavy clout through the support rendered and through an "energetic" chief prosecutor,[309] a former DOD senior executive and Army JAG officer.[310]

SCSL tackled the need for justice following the horrific bloodshed warlords and their underlings caused in West Africa over the previous decade. Though the ultimate cost of the court was four times higher than planners had expected, and the court's proceedings took thrice longer that its intended timeline, the court obtained its judicial goals:

> The Special Court for Sierra Leone made its final major decision on 26 September 2013 when its Appeals Chamber upheld the 50-year sentence handed down to former Liberian President Charles Taylor. The court ruling in April 2012 found Mr. Taylor guilty of five counts of crimes against humanity, five counts of war crimes and one count of other serious violations of international humanitarian law perpetrated by Sierra Leone's Revolutionary United Front (RUF) rebels, who he supported.
>
> Taylor was tried . . . for his role in the murders, rapes and acts of terrorism against the civilian population of Sierra Leone during a vicious civil war from 1991 to 2002. He was also found guilty of recruiting children under 15 years as soldiers. The 2,493-page judgment found that Mr. Taylor was the main backer of the RUF, and was aware of its atrocities at the time. Mr. Taylor was transferred to a prison in the UK in October 2013 to serve the remainder of his sentence . . . . The former Liberian leader is the first head of state [since WWII] to be convicted by an international court for war crimes and crimes against humanity. . . .
>
> The court's other important achievements include first-ever convictions for attacks against UN peacekeepers, convictions for forced marriage as a crime against humanity, and for the recruitment of children for combat.[311]

SCSL represents a proven model, replete with shortcomings of time and cost, for trying the lead figure of non-uniformed forces, as the RUF forces certainly were.[312]

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[307] John P. Cerone, *supra* note 102, at 167-9 (describing the US role).

[308] Lansana Gberie, *The Special Court For Sierra Leone Rests – For Good*, AFRICA RENEWAL (Strategic Communications Division, Department of Public Information, United Nations) (April 2014) http://www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests-%E2%80%93-good.

[309] *Id.* ("The point is that once David Crane, an energetic—not to say theatrical—American defence department lawyer, was appointed as prosecutor, all pretense that [former Sierra Leone President] Kabbah was even marginally in control of the court disappeared.").

[310] John P. Cerone, *supra* note 102, at 171 (detailing prosecutor David Crane's background).

[311] Gberie, *supra* note 308. *See also* Tamasin Ford, *Charles Taylor Faces Verdict From Brutal African War*, NPR (April 25, 2012 3:19PM) http://www.npr.org/2012/04/25/151365144/charles-taylor-faces-verdict-from-brutal-african-war (discussing Taylor's crimes and his victims). Regarding one of the critical holdings from the bench that a sitting head of state is subject to prosecution by the court, see *Prosecutor v. Taylor*, Decision of the Appeals Chamber on Immunity from Jurisdiction, SCSL-03-01-I-059, May 31, 2004.

Other hybrid courts have had varying levels of success, but they are only "international" to differing degrees. The Extraordinary Chambers in the Courts of Cambodia ("ECCC"), the hybrid court Cambodia's government established in 2003 to address crimes of the Khmer Rouge era, operates under a treaty with the UN that supports the primary role of domestic law.[313] After some hesitation due to a variety of factors, the US offered substantive support in 2008.[314]

The Cambodian example is indicative of how much more "domestic" hybrid courts are in comparison to the ICTs of Yugoslavia and Rwanda. While the US has financially backed hybrid courts in East Timor, Kosovo, Bosnia, and Iraq, this backing of "international" action has come about largely because the US was more or less supporting a locally controlled effort by a stable government to act internally and apply (mostly) their own domestic law.[315] These courts are "international courts" only in (1) the foreign support, sanction, and involvement, and (2) the application of some components international law, such as the "serious crimes" usually not found in a country's domestic law. Even the latter characteristic is fungible. In 2011, the Special Tribunal for Lebanon ("STL") held that terrorism is an international crime, despite a lack of precedent for that holding of law in either ICT or the ICC.[316] The court had this flexibility, as it technically only tried defendants under the standards of international law as applied to Lebanese criminal (domestic) law.[317] This decision to accept terrorism as an international crime highlights the possible advantages of trying ABAB in a hybrid court rather than submitting to more established process, such that of the ICC.

b. Analysis of Challenges

The USG could fail to convince an AAG to prosecute. This hurdle is the most critical. Even a hybrid option would need significant cooperation from an AAG. The costs an AAG must consider are not just financial. The costs include the risk of both political backlash from US cooperation and the risk of terror attacks in reprisal.

For many of the challenges discussed below, the US may opt for a hybrid option, as that alleviates many of the concerns. However, convincing a nation to partner substantially enough to create a hybrid court may become an even larger challenge. Jordan, for example, may be willing to accept and try ABAB, but unwilling to become an Arab state that partners with the USG in the complex endeavor of an ad hoc hybrid court.

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[312] For more information on the SCSL's success and impact, see *Charles Taylor: Q&A on The Case of Prosecutor v. Charles Ghankay Taylor at the Special Court for Sierra Leone*, HUMAN RIGHTS WATCH (April 17, 2012) http://www.hrw.org/news/2012/04/16/charles-taylor-qa-case-prosecutor-v-charles-ghankay-taylor-special-court-sierra-leon.

[313] John P. Cerone, *supra* note 102, at 175 – 178. *See also* CARTER & WEINER, *supra* note 63, at 1193.

[314] *See* John P. Cerone, *supra* note 102, at 175 – 178.

[315] John P. Cerone, *supra* note 102, at 178-9 ("[T]he United States provided personnel to assist in the work of each of these institutions. U.S. prosecutors and judges served in [these courts] and provided directs financial support to each of these institutions.").

[316] WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES 33 (2012).

[317] *Id*.

An AAG court could refuse to find jurisdiction under international law. International law applies to Jordan just as it does the United States. The legal aspects are the same in the discussion in COA #2 above, under Part IV.B.c. How a Jordanian judge will consider the legal issue relative to how a US judge will consider the precept, however, is a complete unknown. While Jordan has not been hesitant to try individuals with ISIL backgrounds, Jordanian agents have arrested those individuals all within Jordan's sovereign territory.

Add to the concern that another Arab government, such as Syria or Iraq, objects to the prosecution under the same international law that makes it suspect. A by-the-book, human-rights focused European power may also object. The USG may shrug off such protests, but a Jordanian court may not, nor may King Abdullah.

An AAG court could, by its own law, lack jurisdiction to try ABAB for ISIL's atrocities. Whether Jordanian law has jurisdictional limits of its own by statute or by interpretations of its constitution is unknown, possibly even in Jordan. The US, for all its counterterrorism efforts and resources, has scarcely scratched the conceptual surface of capturing foreign terrorists who have killed mostly foreign victims in foreign places for domestic (U.S.) trial. Jordanian courts may have never considered the idea of accepting a foreign-born, foreign-found, foreign-victimizing (for all but the Jordanian pilot) criminal defendant, and thus have no law to handle what is now a hypothetical.

An AAG could lack the substantive criminal law to try ABAB for ISIL's atrocities. While the USG has codified the act of genocide into statute, no information exists (in English) proving Jordan has done the same. Jordan is a signatory of the Convention on Genocide, but never ratified it. Accordingly, Jordan laws may simply have no statutory provision criminalizing genocide, even if Jordan courts accept the case despite jurisdictional concerns.

Notably however, a hybrid court option could avoid this difficulty, as that model typically mixes international with criminal law. As discussed in the final paragraph of the background on hybrid courts, the STL—the Lebanese court—held that terrorism *was* an international crime. The ICC cannot join in this rationale, however well argued,[318] as the Rome Treaty language cabins its jurisdiction to the crimes of genocide, crimes against humanity, crimes of aggression, and war crimes. This is a virtue of the hybrid option; it allows prosecution of both traditional state crimes and those offenses generally consigned to international criminal law, such as crimes against humanity.

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[318] The logic of the STL ruling is sound, however unprecedented. As the court explained, "To turn into an international crime, a domestic offence needs to be regarded by the world community as an attack on universal values (such as peace or human rights) or on values held to be of paramount importance in that community; in addition, it is necessary that States and other subjects sanction this attitude by clearly expressing the view that the world community considers the offence at issue as amounting to an international crime." The opinion proceeds to note how the UNSC has commanded states to criminalize terrorism, and the many states' opinions that it is a violation of international law. *See Unnamed defendant* (STL-11-01/I), Interlocutory Decision on the applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 Feb. 2011, para. 91, *available at* http://legalarabforum.com/node/278.

The need for classified intelligence in an AAG prosecution could become prohibitively problematic. The US, and other allied anti-ISIL nations, may be unwilling to share with an AAG the classified material necessary for a conviction. Not only would the USG have to trust the AAG with the information, but the USG would have to trust the AAG has a procedure similar to CIPA[319] that enables its prosecutors to use the evidence without disclosing its contents. The USG has tiers of trust of international sharing partners, ranging from the "Five Eyes" of four closely trusted partners (UK, Canada, Australia, and New Zealand) to wider circles of trust with the "Nine Eyes" and "Fourteen Eyes."[320] No Arab country, or Turkey, has joined—or rather, been invited to join—one of these intelligence sharing consortiums.[321]

The USG would have make a decision about how much it not only trusts a partner in prosecution such as Jordan, but how much it trusts its legal procedures to fairly use evidence without disclosing it. The USG has shown increased willingness to share and collaborate with Jordan on ISIL intelligence in the past year,[322] an unsurprising push given not only the threat but also the professionalism and competence of Jordan's intelligence service.[323] Jordan's own willingness to take the lead in prosecution could be sufficient to gain full USG trust on the ISIL intelligence portfolio, at least as necessary for an ABAB conviction.

If the USG pursues a hybrid option, incorporating the proven procedures and precedent of CIPA into the ad hoc tribunal would greatly help not only the security of the information but also the credibility of the process, as US law includes important protections for defendants' rights when subjected to classified evidence at trial.[324]

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[319] *See supra* Part V.B. c. Analysis of challenges: *A US Attorney cannot easily use classified information as evidence without revealing its content*.

[320] Kevin Collier, *How The NSA Ranks Its International Spying Partners*, DAILY DOT (Nov 5, 2013, 11:41am CT), http://www.dailydot.com/politics/nsa-five-nine-14-41-eyes-alliances-spying/.

[321] *Id*.

[322] *See US fears Islamic State group attack on Jordan*, DAILY MAIL (Sept. 8, 2014, 16:14EST), http://www.dailymail.co.uk/wires/ap/article-2748490/US-fears-Islamic-State-group-attack-Jordan.html ("Worried that Jordan could be vulnerable to the Islamic State militant group, the U.S. is stepping up its intelligence cooperation with one of its most stalwart Middle East allies. The CIA has approached a retired former agency official with close ties to King Abdullah II about setting up a special task force to help Jordan deal with the threat from the Islamic State group, according to two former agency officials who would not be quoted by name discussing a secret mission.").

[323] *See Jordan responds to the Islamic State threat*, JANE'S INTELLIGENCE REVIEW (29 October 2014), http://www.janes.com/article/45177/jordan-responds-to-the-islamic-state-threat ("Many security experts, including those based at the Washington Institute for Near East Policy, have argued that Jordan's General Intelligence Directorate (GID) is the most professional and capable security service in the region. 'GID has [the] highest level of professionalism in handling internal and external security crises,' a senior Palestinian Authority security officer told IHS Jane's on 22 September. Another Arab intelligence official agreed, before adding, 'But Jordan could not stand and counter the ISIS [Islamic State] threat without external support from the Gulf, the US, and EU countries. We are [in a] dangerous threat circle, and we do not know when ISIS will decide to target Jordan or Jordanian interests directly.'").

[324] *See supra* Part V.B. c. Analysis of challenges: *A US Attorney cannot easily use classified information as evidence without revealing its content*.

An AAG prosecution increases the risk of human rights violations. Jordan has aggressively pursued terrorists, but it has earned the ire of watchdog organizations for its arrests and SSC trials of protestors and government critics. Jordan prosecuted political protestors in the SSC in 2012,[325] and a notable social media detractor of an allied Arab government received a sentence of 18 months of hard labor.[326] Amendments to Jordan's anti-terror law in 2006 permit a wide definition of terror that, by US standards, deprive citizens of freedom of expression.[327] The US Department of State has catalogued many recent instances of politically driven prosecutions.[328]

Judicial rights for defendants do not improve after arrest. Law enforcement rarely facilitates genuine jailhouse access to legal counsel, most defendants have no legal representation at trial, and judicial officers rarely "respect the right of defendants to be informed promptly and in detail of the charges against them or to a fair and public trial without undue delay."[329] For serious crimes in the SSC, legal access is better, but criminal rights secured fall short of expected standards. According to the Department of State, "Defendants before the State Security Court frequently met with their attorneys only one or two days before their trial began. Defendants were not afforded adequate time and facilities to prepare their defense."[330]

Human rights concerns will also implicate the USG's own treaty obligations. The US is a party to the Convention Against Torture ("CAT"),[331] which states no parties "shall expel, return, or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[332] Though the executing U.S. law largely mirrors that treaty language,[333]

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[325] *See Jordan: End Protester Trials in State Security Courts*, HUMAN RIGHTS WATCH (Nov. 30, 2012), http://www.hrw.org/news/2012/11/30/jordan-end-protester-trials-state-security-courts (protesting this practice).

[326] *Jordan Muslim Brotherhood Leader Jailed For Social Media Criticism Of UAE*, MIDDLE EAST EYE (Feb. 2015 14:12 GMT), http://www.middleeasteye.net/news/jordan-muslim-brotherhood-leader-jailed-social-media-criticism-uae-344572653.

[327] *Id.* (citing a Human Rights Watch report).

[328] *Country Reports on Human Rights Practices for 2013: Jordan*, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEPT. OF STATE, ()*available at* http://www.state.gov/documents/organization/220572.pdf ("During the year the government detained activists for political reasons including criticism of the government, religious political activism, criticism of the government's foreign policy, the publication of critical articles, and the chant of slogans against the king. . . . The constitution provides for freedom of speech and press; however, the government did not respect these rights.").

[329] *Id*.

[330] *Id*.

[331] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter, CAT], G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984).

[332] *Id.* at art 3(1).

[333] *See* The Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), P.L. 105-277 at § 2242(a)-(b) (stating the USG will not "expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States"). Some nuanced differences separate the treaty language from US law, however, prompting US courts to rule that the former—the US code—is the standard. *See e.g.*, Castellano-

the Senate ratified the treaty with the understanding this "substantial grounds" phrasing is to be a "more likely than not" test, just as the USG uses for extradition concerns of persecution.[334] While the USG and Jordan have had an extradition agreement since 1995,[335] the transfer of a high-profile prisoner—either through formal extradition or through a mil-to-mil transfer—would likely trigger concerns about Jordan's record on torture and legal concerns in regards to the USG's CAT obligations.

Jordan's record on torture is poor. Multiple human rights groups have recounted reports of torture by Jordanian authorities,[336] and the State Department details similar concerns in its own assessment.[337] These concerns prompted a long-running legal battle between counsel of suspected terrorist Abu Qatada and the British government. Abu Qatada's counsel cited Jordan's record on torture, particularly in relation to Abu Qatada, to thwart British extradition to Jordan for many years. Finally, the governments reached an agreement that torture would play no role in Abu Qatada's trial in Jordan, and the UK commenced with the extradition.[338] This agreement raises the policy potential of a hybrid option. A USG-steered hybrid option could entail the necessary procedural safeguards, oversight, and international transparency to avoid any legal questions from the CAT and enhance the credibility of the anti-coalition as whole.

An Arab court may be unable to gather sufficient evidence against ABAB with the conflict ongoing. This difficulty mirrors that for the other COAs, but is less of a concern relative to COAs 1 and 2. First, the evidentiary requirement for an Arab judicial system is likely less than that of US federal court. Second, the cultural and geographic proximity to the conflict—and the fewer bureaucratic restraints—will alleviate this concern relative to an international prosecution.

While this concern is less for this COA compared to the others, Jordanian criminal courts are no sham. The Abu Qatada trial ended in a not guilty verdict in the

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Chacon v. INS, 341 F.3d 533 (6th Cir. 2003) (holding an immigrant facing removal could not challenge the removal with the words of the treaty, but instead must rely on the executing language of the US code).

[334] CRS at 8 (citing Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification, (1990) at II.(2) and INS v. Stevic, 467 U.S. 407, 429-30 (1984)).

[335] Michael John Garica & Charles Doyle, Extradition To and From the United States: Overview of the Law and Recent Treaties, 7-5700 CRS, 38 (March 27, 2010) (citing S. Treaty Doc. 104-3 (1995)).

[336] *Annual Report: Jordan 2013*, AMNESTY INT'L (May 23, 2013), http://www.amnestyusa.org /research/reports/annual-report-jordan-2013; Jordan: Torture in Prisons Routine and Widespread, HUMAN RIGHTS WATCH (Oct. 8, 2008), http://www.hrw.org/news/2008/10/08/jordan-torture-prisons-routine-and-widespread-0.

[337] *Country Reports on Human Rights Practices for 2013: Jordan, supra* note 328.

[338] *See Abu Qatada timeline*, BBC (May 10, 2013), http://www.bbc.com/news/uk-17769990. *See also* Laura King, *Muslim cleric Abu Qatada acquitted of terror charges in Jordan*, L.A. TIMES (Sep. 24, 2014, 10:30AM), http://www.latimes.com/world/middleeast/la-fg-jordan-acquits-radical-cleric-of-terrorism-charges-20140924-story.html ("British authorities were unable to deport Abu Qatada to Jordan because of torture concerns, but the two countries last year ratified a treaty that paved the way for his return. Under the treaty, evidence that might have been obtained through use of torture could not be used against him or other defendants extradited from Britain.").

SSC due to insufficient evidence.[339] The AQ-linked Jordanian citizen went free despite strong connections to AQ and one terrorist bombing in particular, and despite a long legal row in the United Kingdom to extradite him from Britain.[340] London still bars him from entry into the UK and is still on a UN Terrorist Watch List.

Unknown unknown hurdles. More than the two previous COAs, this option ventures the USG prosecution strategy into unknown territory. The USG obviously has extensive experience with what can go wrong and what it needs to "get right" to successfully prosecute a defendant in US federal courts. While ICC prosecutions are rare, and only twice has the UNSC created ICTs, those methods are still more proven for trying serious offenders of crimes such as genocide.

[339] Linda al-Maayeh & Ruth Sherlock, Abu Qatada cleared of terror charges in Jordan, THE TELEGRAPH (Sep 24 2014, 8:32AM BST), http://www.telegraph.co.uk/news/worldnews/middleeast/jordan/11117777/Abu-Qatada-cleared-of-terror-charges-in-Jordan.html ("Court rules there was insufficient evidence against Abu Qatada and he is expected to be released 'within hours'").

[340] *See* Laura King, *supra* note 338.

VI. COMPARATIVE ANALYSIS

A. CRITERIA

1. **Achievability:** Offers reasonable achievability, which includes subordinate criteria of feasibility and finality.

2. **Conviction:** Offers a high probability of a criminal conviction.

3. **Control & Intelligence:** Offers the USG overall control and the USG an opportunity to extract significant intelligence.

4. **Security:** Avoids security concerns with an ABAB detention.

5. **Impact on ISIL:** Will negatively impact ISIL's popular and political support.

6. **Diplomatic Impact:** Will positively impact the USG's relationships with foreign governments and populations.

B. ANALYSIS OF EACH COA BY EACH CRITERION

a. COA #1: Prosecution by an International Tribunal

1. Achievability: COA #1 fails this criterion. COA1 may never "get off the ground" due to a lack of international support, making it questionably feasible. Even if it does, the process would take much longer than the two alternative COAs.

Regarding feasibility, the USG would face a high degree of difficulty in attaining the necessary international support in the UNSC for either the founding of a new ad hoc ICT or for an ICC submission. Though the USG would likely win a majority of support on the UNSC, the voting history of Russia and (to a lesser extent) China in the UNSC on similar issues indicates these strategic opponents of the USG would likely drag out the negotiations or veto the necessary resolutions.[341]

Without the UNSC, the USG cannot pursue an ICT and has only limited routes to refer ABAB to the ICC. Those routes require Baghdad's cooperation, due to ABAB's nationality and the location of his crimes, and the Iraqi government's support for such an international judicial forum at any future point of capture, let alone the government' s very stability, is highly uncertain.[342] In addition, if an Iraqi government is competent to offer its own criminal investigation, that would legally

[341] *See supra* Part V.A. c. Analysis of Challenges: *Insufficient international support could prevent prosecution and Insufficient international support: opposition in the UNSC*.

[342] *See supra* Part V.A. c. Analysis of Challenges: *Insufficient international support: unsupportive Arab allies*.

torpedo an ICC referral by the ICC's own terms, even if that initiative meant not to do so.[343]

COA#1 is also expensive. The cost for an ICT could be prohibitive and unreasonable unless the USG and its allies could capture and prosecute more defendants than one man, though perhaps a raid could secure ABAB plus some of his coterie. The ICC presents a better option as pre-existing body, and one that has triggers beyond the UNSC, but its $1M per conviction is not a cheap rate.[344]

International contributions mitigate this expense: the USG may pay only a fraction of the bill, and perhaps pay nothing at all. State Department diplomats would have to negotiate the USG's portion of the financial burden of prosecution either for a new ISIL ICT or for an USG-engineered submission of ABAB to the ICC, to which the USG is not a party.[345] The difficulty for the latter option is that US law currently prohibits any direct contribution to the ICC.[346] This dissonance could in turn alienate international partners who would suspect that the USG is creating and shipping off its problem for others—primarily Europeans—to handle in a court the USG has decried as unneeded.

This COA also presents the bleakest chance at a quick resolution. Neither victims nor policymakers should expect an ICT or the ICC to provide finality quicker than a range of five to ten years.[347] ICTs have moved faster with their docket than the ICC has progressed through its own docket, but still take many years. This sluggish pace is particularly the norm for high profile cases, cases with uncooperative witnesses, cases where gathering evidence is difficult, and cases where the court finds value in having multiple witnesses testify to produce a historic record of an atrocity. All four factors will hinder any expedition to an ABAB prosecution.

In another respect, this resolution prevents finality altogether: unlike the alternatives of COAs 2 and 3, this COA would not permit capital punishment if the prosecution procures a guilty verdict.

2. Conviction: COA #1 fails this criterion.

The ICTs and the ICC have substantially built a strong firmament of international criminal law with statutes of culpability encompassing the leadership role ABAB took in carrying out the crimes.[348] Unfortunately, the two bodies also lack much investigative power to secure the evidence necessary for a conviction. [349]

For the ICC, the more achievable of the two COA #1 options, that limitation hampers investigative progress on matters pressing in the jurisdiction of Rome Treaty. It may well prove impossible to compel any involuntary compliance by Iraqi

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[343] *See supra* Part V.A. b. Method: *The International Criminal Court*; *See also supra* Part V.A. c. Analysis of Challenges: *Investigation of ABAB's crimes by another state could eliminate ICC jurisdiction*.

[344] *See supra* Part V.A. c. Analysis of Challenges: *Creating an ICT may be cost prohibitive*.

[345] *See* Appendix D.

[346] *Id.*

[347] *See supra* Part V.A. c. Analysis of Challenges: *International proceedings could take years, depriving stakeholders of justice finality*. *See also supra* notes 114 – 120 and accompanying text.

[348] *See supra* Part V.A. b. Method: *The charges*.

[349] *Id.*

authorities, and Syrian authorities have been subject to frequent ICC threats themselves, so will be even less likely to cooperate.[350]

Two other conditions also lessen the probability of a criminal conviction First, an international criminal proceeding lacks any terrorist-related statutes with which to charge ABAB as related offenses.[351] In contrast, COAs #2 and #3 will not be limited to the crimes of genocide and crimes against humanity. Second, the ICC lacks any screening procedure to allow classified intelligence documents into evidence for incriminating the defendant while redacting sensitive parts the providing national government needs to keep classified.[352]

3. Control & Intelligence: COA #1 fails this criterion.

Once the USG delivers ABAB to an international tribunal, that tribunal will pay no heed to USG prosecution preferences or the impact that prosecution will have on wider Middle East objectives.[353]

This lack of control overall also undermines the USG's potential to extract intelligence value. Unlike either COA #2's integrated intelligence phase or COA #3's inherently more intelligence-friendly context of allied Arab detention (and/or the US military detention that would precede that detention), a handover for international prosecution includes no phase of USG prosecution. European allies are highly suspect of the USG's post-9/11 treatment of detainees, particularly foreign detainees, and the degree of any pre-transfer USG intelligence interrogation would proportionately risk the international support necessary for this COA's global authorization by the UNSC or individual interstate partners.

4. Security: COA #1 achieves this criterion.

An international tribunal would detain ABAB in The Hague if it accepted him for prosecution. This is certain for the ICC and would very likely be the location of detention if the UNSC creates an ICT.[354]

5. Impact on ISIL: COA #1 partially achieves this criterion.

A global prosecution of ABAB will better push a narrative that ISIL represents a universal violation of the rules of law, rather than being a Muslim underdog opponent to an imperial USG superpower that prosecutes ABAB itself under COA #2.

One of the weaknesses of international tribunals in quickly adjudicating cases could help in this regard. The tribunals' philosophy of using hundreds of witness accounts to record the historical record of a defendant's crime could greatly

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[350] If they do cooperate, they will have an incentive to taint any evidence and possibly implicate ISIL in Syria's own crimes.

[351] *See supra* Part V.A. c. Analysis of Challenges: *The ICC, and possibly an ICT, will be unable to try ABAB for terrorism*.

[352] *See supra* Part V.A. c. Analysis of Challenges: *An international tribunal has no procedural mechanism to permit classified intelligence as evidence*.

[353] *See supra* Part V.A. c. Analysis of Challenges: *Uncontrolled actions of an ICT or the ICC could cut against US interests*.

[354] *See supra* note 113 and accompanying text.

undermine ISIL's political support everywhere.[355] However, such an exposition requires available witnesses, and witnesses require investigative resources that tribunals usually lack.[356] Witnesses are even harder to procure when conflicts have yet to abate.

The counterpoint to an auspicious strategic communications impact of COA#1 is that *any* prosecution thousands of miles away from ISIL territory may minimally affect ISIL's local support. ISIL has not shown the specifically anti-American focus displayed for years by AQ, but rather holds all Western powers in low regard. The USG could overestimate the strategic communications value of trying ABAB in the Hague rather than Richmond.

To the degree a difference of location matters, a European prosecution setting may enable ISIL more than a US venue. While both the US and the EU have dealt with citizens pledging allegiance to ISIL, the latter has more radicalized Muslims than the US. The drawn out prosecution of ABAB by a tribunal in the Hague could become a focal point and rallying cry that enables ISIL growth abroad in fertile European soil that it would not if the USG implemented COA #2 instead.

6. Diplomatic Impact: COA #1 achieves this criterion.

European allies now active in the anti-ISIL coalition began collecting evidence for an international criminal law prosecution of ISIL in January of 2014.[357] Of all the COAs, choosing COA#1 would best strengthen USG ties to many international friends and allies, particularly helping to alleviate misgivings about the USG in many quarters over the long-running acrimony between the USG and the ICC.[358]

A US prosecution would be superior to a US drone strike, but the HIG interrogation phase will still raise concerns of violations of international law. Similarly, if COA #3 sends ABAB to an Arab nation with perennial NGO reports of torture and general deprivation of defendant rights,[359] the USG's strategic communications—and/or its "soft power," depending on the phrase of choice—will suffer.

b. COA #2: Prosecution by a United States Attorney

1. Achievability: COA #2 achieves this criterion.

This option is feasible. A US Attorney prosecution in a USG Article III federal district is the oldest and most proven of any of the COAs.[360] The WAK3 method combining such a prosecution with military capture and interrogation may only

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[355] *See supra* notes 170 – 173 and accompanying text.

[356] *See supra* Part V.A. c. Analysis of Challenges: *An international trial may be unable to gather sufficient evidence against ABAB with the conflict ongoing*.

[357] *See* Jess Bravin, *supra* note 10.

[358] *See* Appendix D.

[359] *See supra* Part V.C. b. Analysis of Challenges: *An AAG prosecution increases the risk of human rights violations*.

[360] The modern nation of Jordan is younger than the United States, having arisen from the fall of the Ottoman Empire at the close of the WWI. *See, e.g., Keys to the Kingdom – History*, THE HASHEMITE KINGDOM OF JORDAN, http://www.kinghussein.gov.jo/history.html (last visited April 14, 2015).

have occurred in three cases, but those prosecutions worked well (in the sense measured by this criterion).[361] Unlike an ICT or a hybrid court, all the mechanisms are ready-made; the USG would not have to create anything new. Unlike an ICC or AAG prosecution, USG diplomats would not have secure the support of international partners. Terror prosecutions are not cheap, but much of the costs are sunk; the courtrooms are standing and the judges, prosecutors, marshals and agents all salaried. However, in contrast to the other options, all costs of this COA would fall on the USG budget.

The prosecution of the WAK3 chartered a new policy alternative to drone strikes and renditions.[362] Like any new method, it has raised new challenges. While these challenges may seem more numerous than those of the other two COAs,[363] the lengthy discussion of this COA's challenges only reflects the greater knowledge of the challenges of pursuing this COA compared to COAs 1 and 3. The difficulties posed by COA #2 challenges are relatively less in part for that reason. Despite the novel sequential phasing of an intelligence interrogation with formal Mirandizing, this COA relies on—to again rely on Rumsfeld's categories—known knowns and known unknowns.

The WAK3 prosecutions have proven that despite the legal issues involved, the USG can extract intelligence and then prosecute a criminal for acts of terror. ABAB presents additional prosecution options of genocide and crimes against humanity, which only add the possible counts of conviction and thus help with the chances of conviction.

The finality offered by this COA should encourage policymakers. In contrast to the prosecutions of an ICT or the ICC, federal criminal trials move at steady clip from the point of arrest to the conclusion of trial.[364] In addition, this COA will offer the possibility of ultimate finality of capital punishment, though securing that sentence will be more difficult than in an AAG prosecution.[365]

2. Conviction: COA #2 partially meets this criterion.

The USG's empirical track record of convicting terrorists has been strong.[366] However, USG policymakers should be aware of two branches of legal concerns, one evidentiary and the other a basket of interstate limitations, which could become particularly problematic for an ABAB prosecution.

The most significant hurdle in attaining suitable evidence is finding witnesses. While securing witness testimony will make a conviction more likely for all three COAs, witness testimony is most critical for this COA because of the rule against

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[361] *See supra* Part V.B. a. Background.
[362] *See supra* Part V.B. b. Method.
[363] *See supra* Part V.B. c. Analysis of Challenges.
[364] *See supra* Part V.B. b. Method. This haste is not optional, which itself is a concern of which policymakers and prosecutors must be aware. *See supra* Part V.B. c. Analysis of challenges: *Prolonged detention, particularly without an AUMF nexus, could violate ABAB's statutory and constitutional rights*.
[365] *See* John Hall, et. al., s*upra* note 305.
[366] *See* Dashiell Bennett, *supra* note 288.

hearsay.[367] The best solution is for the USG to capture subordinate ISIL leaders and officer, similarly charge them, and then offer them a degree of leniency for their testimony.[368]

Additional legal issues arise in international law, such as the detention as sea question.[369] The question becomes how a federal judge interprets international law overall and how that jurist interprets it vis-a-vis the domestic prosecution.

Finally, the President may lack the domestic legality necessary for this COA: a suitable AUMF for ISIL.[370] The WAK3 raised many of these issues, but resolved few. The Warsame case did not produce much guidance, as he pled.[371] Al-Libi died during trial.[372] Khattala's case has yet to go to trial, but he has colorable claims that could affect an ABAB prosecution.[373] The litany of exceptions should not overshadow the rule; prosecution by a US Attorney's Office offers more certainty than not once the prosecutors have identified sufficient evidence for indictment and proving guilt.

3. Control & Intelligence: COA #2 achieves this criterion.

The USG would maintain custody of the defendant the entire time, and would not internally transfer ABAB from military custody to a DoJ "clean team" until a US Attorney had secured an indictment through a grand jury.[374] The HIG is the only built-in USG intelligence interrogation component in any of the three COAs.[375]

4. Security: COA #2 fails this criterion.

After a brief detention at sea, ABAB would be detained in the United States and thus bring with him any security risks of his detention.

5. Impact on ISIL: COA #2 partially achieves this criterion, but only if the value of military intelligence from an interrogation is not fully lumped with the "Control & Intelligence" criterion above. That intelligence could greatly help the USG undermine ISIL's political support. But beyond that, this COA does the worst out of the three in terms of political optics with ISIL's audience.

While a trial in a civilian court may seem more credible to a domestic audience in comparison to a military commission or a lethal strike, the USG's credibility among potential ISIL supporters for detaining Muslims suspects is low.[376] In

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[367] *See supra* Part V.B. c. Analysis of challenges. A not guilty plea requires a trial to prove guilt, and trial prosecution requires admissible evidence.

[368] *See id.*

[369] *See supra* Part V.B. c. Analysis of challenges: *Detention at sea could violate the Geneva Convention*.

[370] *See supra* Part V.B. c. Analysis of challenges: *Capture and detention may not be AUMF-authorized, & Prolonged detention, particularly without an AUMF nexus, could violate ABAB's statutory and constitutional rights*.

[371] *See supra* Part V.B. a. Background.

[372] *See id.*

[373] *See supra* Part V.B. c. Analysis of challenges: *Prolonged detention, particularly without an AUMF nexus, could violate ABAB's statutory and constitutional rights*.

[374] *See supra* Part V.B. b. Method.

[375] *Compare* Part V.B. b. Method *to* Part V.A. b. Method. *&* Part V.C. b. Method.

[376] This alludes to Abu Ghraib as much as Guantanamo Bay.

addition, the aforementioned difficulties of the rule against hearsay in a US court could mean the prosecution relies more on classified evidence under CIPA; this creates its own questions of a defendant's rights, which in turn could further mitigate the otherwise positive rule of law optics from a trial.[377]

The counterpoint is that the evidentiary requirement for more witnesses with direct knowledge of ABAB's role, due in large part to hearsay, should incentivize the USG to capture many senior ISIL leaders. If the prosecutors can get these other leaders to testify against ABAB, that could be a strategic communications coup.

6. Diplomatic Impact: This COA partially meets this criterion

While some allies may prefer COA #1 or #3, many of the USG's strongest partners would welcome a legal prosecution over the predicted lethal resolution to the ABAB question by way of drone, raid, or other means.[378] Yet those allies would still look more favorably upon submission to an international tribunal, particularly the ICC.

c. COA #3: Prosecution by an Allied Arab Government

1. Achievability: COA #3 achieves this criterion.

This COA is feasible. It relies on the Jordanian SSC, a pre-existing court system able now to try ABAB, provided prosecutors have sufficient evidence of his ISIL linkage.[379] However, Jordan would have to incorporate international criminal offenses into its domestic legal system. The SSC regularly tries defendants for charges of terrorism[380] but like almost every national court in the international community, it does not regularly try defendants for genocide and other grave atrocities, and may lack both the substantive criminal law and the procedural breadth to do so.[381]

That problem prompts two solutions.

First, Jordan's government could codify genocide and any other relevant atrocity offenses in its own criminal law just as the USG did with genocide in 1988.[382] Jordan is already a signatory to the Genocide Convention, and thus passing executing language may not be difficult given political opposition to ISIL's behavior after the immolation of Jordan's fighter pilot. Like the USG, it could also ensure its

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[377] *See supra* Part V.B. c. Analysis of challenges. A US Attorney cannot easily use classified information as evidence without revealing its content.

[378] *See supra* Part I.

[379] *See supra* Part V.C. a. Background and Method: *The Jordanian judiciary and its State Security Court*.

[380] *See id*., specifically Samia Nakhoul & Suleiman Al-Khalidi, *supra* note 303.

[381] *See supra* Part V.C. b. Analysis of Challenges: *An AAG court could, by its own law, lack jurisdiction to try ABAB for ISIL's atrocities* & *An AAG could lack the substantive criminal law to try ABAB for ISIL's atrocities*.

[382] *See* Part V.B.c. Analysis of Challenges: *The USG will be limited in the international crimes for which it can prosecute ABAB*.

codification allows for "universal jurisdiction" allowing it to try a foreigner for genocide that happened to non-Jordanians in Iraq and Syria.[383]

The second option is an initiative by the USG to create a hybrid court applying mostly Jordanian domestic law through Jordanian courts but adding in the international criminal law, just as was done in previous hybrid tribunals.[384] This option provides the USG the diplomatic leeway to work in concert with the Jordanian monarch. The nations can add substantive international criminal law of genocide and crimes against humanity based on the respective convention language of those offenses and international judicial precedent adjudicating those offenses in the international tribunals of COA #1. Unlike COA #1, COA #3 would not need the UNSC or other triggering mechanisms of the ICC. This option could benefit from the developments of COA #1 while avoiding its significant obstacles.

In terms of cost, the USG would pay little to nothing if it transfers ABAB to the Jordanian SSC. If the USG pursues the hybrid option, the costs would be at the discretion of USG for whatever measures of physical security, legal expertise, evidentiary and investigative support, and other supporting contributions the USG believes in the best interest of justice and USG policy. For example, the Sierra Leone hybrid court notably took three times longer than expected, though it produced a laudable outcome against the titular leader of the respective atrocities.[385] However, these costs should still pale in comparison to the international tribunal options, particularly the similarly "ad hoc" comparison of an ICT, which the international community would have to establish and build. In contrast, the hybrid option uses the sunk overhead costs of the SSC foundation.

COA #3 also offers finality, though hybrid courts will move slower than a national court. A Jordanian court will dispense justice much more quickly than the other COAs, particularly COA #1.[386] A Jordanian SSC verdict against ABAB would also likely lead to a capital sentence. While the Sierra Leone hybrid court dragged through its docket, it may be poor indicator given that, despite a strong USG role in certain aspects, the SCSL was as much a product of the UNSC as multilateral coordination with the USG.[387]

A strong example of the pace of a Jordanian court may be the prosecution of Abu Qatada, which Jordan handled in its own courts, albeit subject to restrictions imposed by a bilateral agreement with the UK necessary for British extradition. Despite the conditions, and the attention on the proceeding due to its high-profile nature, the SSC dispensed with the case in 15 months.[388]

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[383] For more on universal jurisdiction, see CARTER & WEINER, *supra* note 63, at 713 – 721.

[384] See Part V.C.a. Background and Method: *Hybrid courts*.

[385] See Part V.C.a. Background and Method: *Hybrid courts*, specifically Tamasin Ford, *supra* note 311.

[386] *Compare* Part V.C.a. Background and Method *to* Part V.A. c. Analysis of Challenges: International proceedings could take years, depriving stakeholders of justice finality. *See also supra* notes 114 – 120 and accompanying text.

[387] See Part V.C.a. Background and Method.

[388] *See* Laura King, *supra* note 338 (showing that the UK deported him in July of 2013 and the Jordanian court acquitted him in September of 2014).

2. Conviction: COA #3 achieves this criterion.

The SSC has been very active in prosecuting suspected terrorists who came before it, but also showed in the Q case that it is not a "kangaroo court" either, as that case resulted in not guilty verdict.[389]

The hybrid option also offers a possibility offered by no other COA: an array of charges against ABAB that includes both the full set of "international crimes," such as genocide and crimes against humanity charges, and terror offenses. The STL's holding that terrorism is an international crime creates a strong precedent of persuasive authority upon which a new hybrid court could build.[390]

In terms of evidence, the closer proximity of this court to witnesses helps procure their testimony, and Jordanian courts will not have the same evidentiary restrictions that would be problematic for US prosecution, such as stringent rules against hearsay.[391] As discussed above in analyzing this COA against the previous criterion, Jordan may also have to codify international crimes and ensure its courts have jurisdiction to adjudicate those offenses.

One limitation, however, is classified evidence. The USG may retain much of the incriminating evidence, particularly that linking ABAB to ISIL's crimes, in classified reports that it could admit to a jury through CIPA procedures in COA #2. This COA would not necessarily prevent any similar filtering (as would COA#1), but the two governments will need to create such procedures to create a CIPA-like process to introduce USG classified information against ABAB without divulging classified content.

3. Control & Intelligence: COA #3 partially achieves this criterion.

This criterion would allow the USG HIG to interrogate ABAB for intelligence prior to a transfer to Jordanian judicial custody.[392] The Jordanians will also likely want to interrogate ABAB, but while that could produce useful intelligence, it also risks diplomatic criticism from allies of Jordanian torture, so the USG should consider conditioning a handover on monitoring.

Once the USG transfers ABAB to Jordan, the control is lost. Though a hybrid court could retain significant USG influence over the process, to reap the other benefits of a hybrid court, the USG must sacrifice control.

4. Security: COA #3 achieves this criterion.

After capture and any preliminary military detention, ABAB would remain in custody in Jordan for his prosecution and any eventual incarceration. The USG could assist in physical security, particularly if choosing a hybrid option.

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[389] *Id.*

[390] See Part V.C.a. Background and Method.

[391] See Part V.C.b. Analysis of Challenges: *An Arab court may be unable to gather sufficient evidence against ABAB with the conflict ongoing*.

[392] See Part V.C.a. Background and Method: *Transferring ABAB from DoD detention to Jordan*.

5. Impact on ISIL: COA #3 achieves this criterion.

A Sunni, Arab-led prosecution would do more to undermine ISIL's own propaganda among the terror group's target audience than the alternatives offered by COAs 1 and 2. Even cultural nuances, specifically lingual, between a "local" prosecution and a non-Arab prosecution could have a significant difference in the punch of a prosecution on the proverbial "Arab Street."

Adding to that impact is that the speed of this COA will better hold the attention of an audience, and increase the likelihood that the court will pass a verdict when ISIL is still a threat, rather than prosecution that takes years.

6. Diplomatic Impact: COA #3 partially achieves this criterion.

Just as with COA #2, other states--particularly in Europe--may favor COA #1, but will still welcome COA #2 over a drone strike. This COA not only avoids the "imperial America" tinge of COA #2, but also generally dilutes the connation of the West intervening in Arab and Islamic matters by prioritizing an Arab role. The major caveat is that the branch of this COA the USG chooses dictates which foreign relationships will react more favorably.

If the USG pursues a Jordanian court without a hybrid construct on top of it, then other nations (particularly USG allies in Europe) could bristle at the risk Jordan might torture ABAB or otherwise violate ABAB's human rights.[393] If the USG pursues a hybrid option, the degree of visible USG involvement—particularly if seen as directing rather than supporting the process—would proportionately correlate to an undercutting of the "Arab lead" strength of this COA.

The USG diplomats and LEGATs who negotiate and craft a hybrid court should find an optimum balance of a USG role, one sufficient to quiets human rights and secure the prosecution generally (ethically, procedurally, and physically) but not so strong a role it deprives the prosecution of ABAB of all but an Arab imprimatur. The Jordanian role must be primary, and the USG role secondary and supportive.

[393] See Part V.C.b. Analysis of Challenges: *An AAG prosecution increases the risk of human rights violations*.

D. Analysis Matrix

An "X" represents a COA failed that criterion, check marks represent achievement of criteria, and a check minus represent partial fulfillment.

Analysis Matrix	**COA #1:** International Tribunal	**COA #2:** U.S. Attorney Prosecution	**COA #3:** Allied Arab Government
Criterion 1: Achievability	✗	✓	✓
Criterion 2: Conviction	✗	✓ -	✓
Criterion 3: Control & Intelligence	✗	✓	✓ -
Criterion 4: Security	✓	✗	✓
Criterion 5: Impact on ISIL	✓ -	✓ -	✓
Criterion 6: Diplomatic Impact	✓	✓ -	✓

APPENDIX A: INDEPENDENT DATA ANALYSIS

Using the data made available by Price from his research in *Targeting Top Terrorists*,[394] I apply logistic regression models to test whether capture decapitation strategies versus kill decapitation strategies more strongly predict terrorist group mortality. My model provides the probability of how "treatments" of differing strategies (kill, capture, neither) will produce outcomes of "curing" a terrorist organization of its own existence. In other words, my model answers (historically) which decapitation treatments are effective strategies, relative to both each other and the "placebo" of not pursuing any decapitation strategy at all. I employed Stata to perform all calculations for the logistic regression analysis as well as the creation of new variables necessary for that regression.

I. DATA

a. Data Overview

The data originally included 207 observations, all of which are terrorist groups active in sixty-five nations from 1970 to 2008. Price's data does not overlap with Patrick Johnston's, who focused on the *lethality* of terrorist *and* insurgent groups.[395] Significant overlap with Jordan's data is possible but unknown. She has not made her data publically available.

Within the 207 observations are 204 "treatments" of leadership decapitation spread unevenly among the observations / organizations. Many such "treatment" instances occur multiple times within the same terrorist group. For example, the observation of the Irish National Liberation Army endured three separate lethal leadership decapitations and one decapitation via capture during the period covered by the data. A significant number of the terrorist organizations included in the dataset (74 of the 207 groups) did not experience a decapitation 'treatment' of any type of decapitation strategy by a government.

The data includes other causes of leadership change, such as internal expulsion of a leader from the organization or death of a leader by natural causes. In total, the 204 observations include 299 observations of leadership change.

Lacking any objective threshold, Price subjectively chose "only groups that posed a legitimate threat to the target state" in collecting the 207 total observations, arbitrarily setting a threshold of four attacks for inclusion. One of the attacks must have caused a fatality in order for Price to include the terror group as an observation. To ascertain the number of attacks by each group, Price relied on the Global Terrorism Database, the (now-defunct) Terrorism Knowledge Base, and individual research using open-source information to resolve missing data. In regards to the treatment variables of decapitation, the "dataset excluded the killing

[394] Bryan Price, *Targeting Top Terrorists*, 36:4 INTERNATIONAL SECURITY 9 (Spring 2012).
[395] *See* Patrick Johnston, *Does Decapitation Work*, 36:4 INTERNATIONAL SECURITY 47 (Spring 2012).

or capture of high-ranking or upper-echelon leaders who were not the primary leaders or co-leaders."

b. Missing and Duplicative Data

The data set is not missing any data, nor does it include duplicative data. The data originally included seven illogical data point conflicts: observations where no decapitation event is coded, but where the variable for having experienced decapitation indicates a decapitation event occurred. I fixed those seven conflicts.

II. SIGNIFICANT VARIABLES

a. Dependent Variables

The dependent variable is binary indicator of terrorist group mortality. In other words, the variable equals 1 if the group folded and 0 if it did not. While Price also measured terrorist organization mortality, he did so using total number of years and used an entirely different model: the Cox proportional hazard model. Price concluded, reasonably, that the logistic model is ill-suited because it will naturally contain censured data. [396] However, because Jordan does not make her data available, using Price's arguably superior model on Jordan's data is not possible.

In my logistic regression model, the timing of an organization's birth year—an estimation that troubled Price—is immaterial. Death of a group, however, is important. Price coded a group as having folded if "two years passed without a violent attack" credited to the organization. Using this standard, I also updated his data for a variety of organizations close to his sunset mark of 2008 given the information now available six years later on these groups.

b. Independent (Treatment) Variables

The first two treatment effects are intuitive: "capture" variables, noting each instance of a decapitation-by-capture event, and a "kill" variable for each lethal decapitation event. In addition, Price included a treatment variable that addressed historical incidents that fell in a grey area in between killing a terrorist leader and capturing a terrorist leader for prosecution. This "execution" treatment involved the capture of a leader followed by an execution without formal judicial proceedings.[397] This independent variable accounts for 12 instances where the state captured the top leader, but the leader then "died shortly thereafter,"[398] generally dying after

[396] Relayed from phone interview with Major Bryan Price from his office at the U.S. Miliary Academy, November 3, 2014.

[397] Price initially named this variable "both," but it is named "execution" in this paper to prevent the term "both" from misleading readers.

[398] This was presumably not from natural causes.

interrogation but without due process of trial.[399] After filtering, the number of these instances fell to 7.

Originally, Price coded these treatment variables as linear integers rather than binary or categorical variables, even though neither metric exceeds the integer of 3 for any observation, and most observations have less than 2 total events. I created new binary variables simply coded to reflect if the group experienced that type of decapitation event. Again, these "kill," "capture," and "execute" variables are *not* mutually exclusive, though all are mutually exclusive with the "none" variable.

ExpCap. Group experienced a decapitation event wherein the state captured the top terrorist leader and did not execute him. Total: 79.

		Was a Decapitation Strategy Used?					
		Yes		No		TOTAL	
Experienced	No	55	*43%*	73	*57%*	**128**	*62%*
Capture Decapitation?	Yes	79	*100%*	0	*0%*	**79**	*38%*
	TOTAL	**134**	*65%*	**73**	*35%*	**207**	

		Did Group Fold?					
		No		Yes		TOTAL	
Experienced	No	54	*42%*	74	*58%*	**128**	*62%*
Capture Decapitation?	Yes	19	*24%*	60	*76%*	**79**	*38%*
	TOTAL	**73**	*35%*	**134**	*65%*	**207**	

ExpExe. Group experienced a decapitation event wherein the state captured the top terrorist leader and executed him shortly after the capture. Total: 12.

		Was a Decapitation Strategy Used?					
		Yes		No		TOTAL	
Experienced	No	122	*63%*	73	*37%*	**195**	*94%*
Execution Decapitation?	Yes	12	*100%*	0	*0%*	**12**	*6%*
	TOTAL	**134**	*65%*	**73**	*35%*	**207**	

		Did Group Fold?					
		No		Yes		TOTAL	
Experienced	No	69	*35%*	126	*65%*	**195**	*94%*

[399] Relayed from phone interview with Major Bryan Price from his office at the U.S. Miliary Academy, November 3, 2014.

Execution Decapitation?	Yes	4	*33%*	8	*67%*	**12**	*6%*
	TOTAL	**73**	*35%*	**134**	*65%*	**207**	

ExpKill. Group experienced a decapitation event wherein the state killed the top terrorist leader without ever apprehending him. Total: 67.

		Was a Decapitation Strategy Used?					
		Yes		No		TOTAL	
Experienced	No	67	*48%*	73	*52%*	**140**	*68%*
Kill Decapitation?	Yes	67	*100%*	0	*0%*	**67**	*32%*
	TOTAL	**134**	*65%*	**73**	*35%*	**207**	

		Did Group Fold?					
		No		Yes		TOTAL	
Experienced	No	52	*37%*	88	*63%*	**140**	*68%*
Kill Decapitation?	Yes	21	*31%*	46	*69%*	**67**	*32%*
	TOTAL	**73**	*35%*	**134**	*65%*	**207**	

None. Group never experienced a decapitation event. Total: 73.

		Did Group Fold?					
		No		Yes		TOTAL	
Experienced	Yes	39	*29%*	95	*71%*	**134**	*65%*
Any Decapitation?	No	34	*47%*	39	*53%*	**73**	*35%*
	TOTAL	**73**	*35%*	**134**	*65%*	**207**	

c. Control Variables

While the data set included some covariates that were likely to be unhelpful, such as the dates of the birth and death of any given group, most covariates effectively control for important considerations.

Size. Of particular importance, at least intuitively, is the size of any given terrorist group. Of course, this number is an estimation. Terrorist groups do not provide union rates for statisticians, much less government officials, to pour over and analyze. Price made estimations in general round numbers and grouped them into the ballpark categories. Price categorized the size rather than estimating linear number sets. These categories rise exponentially: the data set groups all observations into different buckets ranging from small groups of 10 to 99, slightly

larger groups of 100 up to 999, and then large size groups of 1,000 up to 9,999 and then those groups of over ten thousand. Admittedly, these numeric values are somewhat subject to scrutiny. However, this estimation categorized into ballpark buckets is not only the best possible given limitations of open-source intelligence about these organization—it also provides the most meaningful aspect of size covariance. After all, a group of 20 terrorist differs in many ways from a group of 2000.

Allies and Rivals. Price also uses historical data research create to intriguing categorical binary variables for whether or not groups had an ally, such as a state sponsored activities, and if they had a rival, to include rival terrorist groups. Rival does not mean simply the terrorist group had an opposing state, as that is a defining feature of all terrorist organizations.

Non-treatment impacts on leaders. The dataset assembled by Price also contains important information in particular in terms of leadership decapitation strategies. Covariates of whether or not a leader was thrown out by members of the organization, left by mutual arrangement, or whether or not the top leader had a co-leader are all covariates included for each observation organization.

Terrorist Group Ideology. Finally, the data includes a variable for the group's ideological objective coded as either religious, nationalistic, or Marxist. For the sake of something useful as a quantitative value, I used this information to make a binary variable of whether or not a group was/is religious in its ideological nature and objective.

II. MODEL OVERVIEW

The model shows the predicted probability for a terrorist group folding given particular treatments of decapitation strategies when controlling for other factors. It uses a logistic regression to analyze the binary predictors of the categorically dependent variable of terrorist group mortality based on those binary predictor variables. This is to provide the probability of the treatments in outcomes: which decapitation treatments are effective strategies compared to each other and the "placebo" (coded as "none") of not pursuing any decapitation strategy at all. I employed Stata to perform all calculations for the logistic regression analysis as well as the creation of new variables necessary for that regression.

With a relatively clean data set,[400] the only small fixes necessary before running a logistic regression with Stata were to create new variables using the information from the variables already available.

First, to ensure the data included a placebo variable with through which to run comparisons with the three treatment effects—kill, capture, and both—I created the variable "none." This variable simply excluded all observations that had any type of

[400] *See* Appendix A.I.b.

leadership decapitation strategy applied to them which had a 0 instead of a 1. As discussed above, "none" is a binary variable like the other independent treatment variables. The coding is just a little counterintuitive, because for none a 1 means nothing was done in terms of leadership decapitation.

Second, after I ran logistic regressions using the treatment effects and then the treatment effects covariance, I eliminated those observations that included different types of treatment effects. For example, the Khmer Rouge observation included both capture and kill treatments. Gush Enam in Israel suffered from all three types of treatments: kill, capture, *and* "execute." Reasonably, that risk of contamination of the effect of one of those variables infected the results of the other. Gush Enam folded, but which of the three treatments played a (positive) role in that termination if any is unclear. One treatment can piggyback off the success of the other, or, for that matter, drag down as counterproductive the other treatments. Accordingly, this model filters out all those observations, 48 in total, though this filtering significantly decreased the total number observations.

Third, the model re-filters out all those observations bias from *differing* treatments—those organizations that received more than one type of decapitation action, such as a "kill" event one year followed by "capture" event two years later. With the remaining observations, this model also filters out observations with multiple treatments of the same type that were more than four years apart, as any effect those treatments have had on group mortality is unclear. Thus, the final filtering does *not* exclude from my dataset an observation that, for example, had multiple decapitation events that were both "kill" events in the same year.

Here are the treatments variables after filtering:

ExpCap. Group experienced a decapitation event wherein the state captured the top terrorist leader and did not execute him. Total: 55.

		Did Group Fold?					
		No		Yes		TOTAL	
Experienced	No	50	*42%*	70	*58%*	**120**	*69%*
Capture Decapitation?	Yes	12	*22%*	43	*78%*	**55**	*31%*
	TOTAL	**62**	*35%*	**113**	*65%*	**175**	

ExpExe. Group experienced a decapitation event wherein the state captured the top terrorist leader and executed him shortly after the capture. Total: 7.

		Did Group Fold?					
		No		Yes		TOTAL	
Experienced	No	60	*36%*	108	*64%*	**168**	*96%*
Execution Decapitation?	Yes	2	*29%*	5	*71%*	**7**	*4%*
	TOTAL	**62**	*35%*	**113**	*65%*	**175**	

ExpKill. Group experienced a decapitation event wherein the state killed the top terrorist leader without ever apprehending him. Total: 43.

		Did Group Fold?					
		No		Yes		TOTAL	
Experienced	No	48	*36%*	84	*64%*	**132**	*75%*
Kill Decapitation?	Yes	14	*33%*	29	*67%*	**43**	*25%*
	TOTAL	**62**	*35%*	**113**	*65%*	**175**	

None. Group never experienced a decapitation event. Total: 73.

		Did Group Fold?					
		No		Yes		TOTAL	
Experienced	Yes	28	*27%*	74	*73%*	**102**	*58%*
Any Decapitation?	No	34	*47%*	39	*53%*	**73**	*42%*
	TOTAL	**62**	*35%*	**113**	*65%*	**175**	

III. FINDINGS AND ANALYSIS

a. Results

Capture. The capture method proved to correlate with a higher likelihood that the terrorist group folds. ***See Table 1 below.*** Whenever a government used a capture decapitation strategy versus none at all, the odds of the target group folding increased by 295%. In other words, the probability of the terrorist group ending almost tripled. These results were statistically significant, with a p value of 0.002.

Nonlethal decapitation was also a better strategy than killing a terrorist leader on a group's mortality, though the results were not statistically significant. ***See Table 2 below.*** Whenever a government used a capture decapitation strategy versus a kill strategy, the odds of the target group folding increased by 75%. However, these results had a p value of 0.224, so they cannot be said to be from other than chance.

Kill and Execute. The findings of both kill and execute were not statistically significant. The correlation of both treatments to terror group mortality could not be attributed beyond chance.[401] While this insignificance is due to the small degree of power for execute treatments, the reason is unclear for kill treatments.

However, both treatments correlated positively with group mortality; using them increases the likelihood that a group would fold.

[401] Their p values were always above 0.5 no matter the control variables included in the regression.

Control Variable: the significance of faith. The only covariate that correlated with any statistical significance to terror group mortality was whether the group had a religious orientation. Whenever a terror group was religious in its religious orientation, it was 83% less likely to fold (p value of 0.000) subsequent to either a capture or kill decapitation. The correlation of other control variables was not statistically significant.

b. Sensitivity Analysis

Dismissing small terrorist groups from the model: Because of the size of ISIL, the inclusion of smaller terror groups could skew the findings to indicate decapitation, whether generally or any specific method, is more effective than would be for a group of ISIL's size. Intuitively, smaller terror groups would likely be less resilient to surviving decapitation operations. While the observations of the largest size terror groups were too few too run a meaningful regression on them alone,[402] filtering out the observations of the smallest groups left 135 observations—a sufficient number—to regress.

Re-running the model for just groups larger than 99 members, the effect of capturing a terrorist leader remained powerful.[403] With this large-size-only filter, the predicted probability that a group will fold is more than twice (170% increase) as likely using capture methods than not using any decapitation method at all. The p value is .043. Admittedly, this increased probability of ending a terror ground is not as large as the increased probability without filtering out the smaller groups—a 170% *with* the filter (i.e., excluding the smaller groups) versus the 295% increase without the filter (keeping them in the dataset). However, the fact that the "capture" treatment is still valid even excluding the smaller size is critical to policy considerations with ISIL , particularly given this same 'filtering-out' of small groups bore much worse results for the other decapitation alternatives. In comparison, the results with this filter for kill and execute were favorable but not as much as capture and without statistical significance.

c. Discussion

Based on these findings, capturing a top terrorist leader was more likely to lead to its demise than not employing any type of decapitation. Successful implementation of a nonlethal decapitation strategy—capturing a terrorist leader—correlates to a much stronger likelihood a group will fold than a government *not* using a decapitation strategy. It was also more effective than using lethal means. The intuitive reason for this correlation is that the capture decapitation not only removes the terror leader, but the decapitation also makes interrogation possible. In addition, capturing a leader (rather than killing him) entails a powerful strategic communications message of rule of law and state control that undercuts the terror organization's strategic messaging to target populations.

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[402] The dataset includes (thankfully) only 20 observations of groups with over a thousand members.
[403] See ***Table 3*** in Appendix B.

One important caveat is the finding for the "execute" variable. Though the findings were for both that variable and the kill treatment were not statistically significant due to the low number of occurrences of "execute" as a "treatment," the effect size of this method of decapitation is greater than that of the kill method.[404] This difference implies a significant value in interrogation. However, the aforementioned characteristic of the rule of law and firm state control (that does not feel like it must resort to extrajudicial executions that lack due process) might also explain why capture strategies are even superior to the execution strategies, which lack that message of legitimacy. Capture strategies provide both benefits.

In addition, other theories could explain how the correlation found in the odds ratio of "capture" compared to the "none" treatment does not mean the former is a cause of terror group collapse. For example, terror groups that are already weak (and thus, perhaps, closer to folding for reasons other than a decapitation operation) would likely be most susceptible to legal decapitation rather than the others. They would not be likely to avoid decapitation operations altogether if they are weak, and thus would be unlikely to be coded for "none." They are also unlikely to be "kill" targets because governments would likely prefer to capture and interrogate top terrorists, and weaker terror groups would be unable to prevent "capture" operations. (Lethal operations such as drone and missile strikes are likely common against stronger groups, whose strength prohibitively precludes government agents "getting close enough" to perform arrests and transport away the leaders.)

For the purpose of making "an apples to apples" predictive comparison with a group of ISIS's size, the ideal range of observations would arguably only be larger terror organizations. Even with this condition, the linkage still holds: those organizations subjected to capture decapitation operations are much more likely to fold than those which are not.

[404] 81% more likely than 34% more likely to precede group death; see Table 1.

APPENDIX B: INDEPENDENT DATA ANALYSIS, TABLES

Table 1: Logistic regression of all decapitation treatments in comparison to executing no decapitation strategy, full covariates [405]

Logistic regression — Number of obs = 175; LR chi2(10) = 40.63; Prob > chi2 = 0.0000; Log likelihood = -93.446637; Pseudo R2 = 0.1786

group_end	Odds Ratio	Std. Err.	z	P>|z|	[95% Conf.	Interval]
expcap	3.947848	1.781406	3.04	0.002	1.630305	9.55987
expkill	2.481238	1.177144	1.92	0.055	.9791361	6.287728
expexe	3.126379	3.044043	1.17	0.242	.4637215	21.07784
ally	.4186184	.2017596	-1.81	0.071	.1627678	1.076634
rival	.632355	.2665156	-1.09	0.277	.2768275	1.444484
coleader	1.414921	.675221	0.73	0.467	.5552979	3.605272
mutual	1.748359	.7561434	1.29	0.196	.7490252	4.080981
thrown_out	.272227	.2227661	-1.59	0.112	.05475	1.353561
size	1.000031	.0000615	0.51	0.611	.9999108	1.000152
relig	.1739583	.0732304	-4.15	0.000	.0762287	.3969827
_cons	3.101697	1.542479	2.28	0.023	1.170295	8.220595

[405] STATA command: logistic group_end expcap expkill expexe ally rival coleader mutual thrown_out size relig.

Table 2: Logistic regression of capture and execution to kill decapitation. [406]

```
Logistic regression                               Number of obs   =        175
                                                  LR chi2(10)     =      39.75
                                                  Prob > chi2     =     0.0000
Log likelihood = -93.886553                       Pseudo R2       =     0.1747
```

group_end	Odds Ratio	Std. Err.	z	P>|z|	[95% Conf.	Interval]
expcap	1.751651	.9102543	1.08	0.281	.6325812	4.850414
none	.438111	.2129999	-1.70	0.090	.1689463	1.136108
expexe	1.348573	1.383041	0.29	0.771	.180683	10.06542
ally	.4089992	.1965582	-1.86	0.063	.159459	1.049049
rival	.6402574	.2689008	-1.06	0.288	.2810993	1.458309
coleader	1.406552	.6716616	0.71	0.475	.5516798	3.586118
mutual	1.718723	.7414917	1.26	0.209	.737871	4.003422
thrown_out	.2762087	.2249563	-1.58	0.114	.0559735	1.36299
size	1.000028	.0000615	0.45	0.652	.9999073	1.000148
relig	.176924	.0740209	-4.14	0.000	.0779226	.4017075
_cons	7.421924	4.258691	3.49	0.000	2.41045	22.85257

Table 3: Logistic regression of all treatments in comparison to executing no decapitation strategy, **for terror groups (observations) larger than 99**.[407]

```
Logistic regression                               Number of obs   =        135
                                                  LR chi2(10)     =      28.08
                                                  Prob > chi2     =     0.0018
Log likelihood =  -78.19567                       Pseudo R2       =     0.1522
```

group_end	Odds Ratio	Std. Err.	z	P>|z|	[95% Conf.	Interval]
expcap	2.707024	1.333151	2.02	0.043	1.031083	7.107071
expkill	2.488825	1.308729	1.73	0.083	.8879669	6.975765
expexe	1.75354	1.969288	0.50	0.617	.1940823	15.84329
ally	.3439695	.1887722	-1.94	0.052	.1173211	1.008471
rival	.7147391	.3145379	-0.76	0.445	.3016867	1.69332
coleader	1.71815	.8921922	1.04	0.297	.6209455	4.754104
mutual	1.820337	.8047928	1.35	0.175	.765289	4.329904
thrown_out	.2848659	.2372342	-1.51	0.132	.0556886	1.457186
size	1.000062	.0000645	0.97	0.334	.9999359	1.000189
relig	.2193864	.1010707	-3.29	0.001	.0889331	.5411977
_cons	2.661986	1.55129	1.68	0.093	.8494985	8.341592

[406] STATA command: logistic group_end expcap none expexe ally rival coleader mutual thrown_out size relig.

[407] STATA command: logistic group_end expcap expkill expexe ally rival coleader mutual thrown_out size relig if bigsize==1.

APPENDIX C: WHY ISIL IS NOT A SOVEREIGN STATE IN INTERNATIONAL LAW

The Islamic State is a misnomer. It is not a country or "state" in the parlance of international law. The entity is not a valid state in international law for two reasons. First, the Islamic State has not proven it fulfills the four specific criteria of statehood. Second, ISIL is not state because no other states recognize it as such.

A. CRITERIA OF STATEHOOD IN INTERNATIONAL LAW

The 1933 Montevideo Convention of the Rights and Duties of States contains specific criteria for statehood since echoed in restatements of customary international law.[408] First, an entity must include a permanent population.[409] ISIL now has large swaths of people who must live under their dictates. However, both Damascus and Baghdad would legitimately contend that, particularly given ISIL's specific behavior, these people are exclusively in the permanent populations of Syria and Iraq, though they are currently just hostages of a terrorist entity, not the permanent populations of a government.[410]

The fact that these people live in the territory of Syria and Iraq and other states have long recognized them as Syrians and Iraqis undermines the notion they are part of ISIL's permanent population. If an entity's claimed permanent population lives in the territory of another recognized state, that population does not 'count' towards that entity's attempt to meet this first criterion. For example, the land territory of Kiribati may soon vanish underneath rising sea levels that will force its population to migrate into other recognized states. Accordingly, Kiribati President Anote Tong is considering establishing a small government outpost with permanent residents on the highest point of the sinking islands to retain Kiribati statehood due to this very criterion.[411] Because ISIL has no permanent population that is not in the

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[408] *See generally* 1933 Montevideo Convention Rights on the Rights and Duties of States (including the United States as a signatory) [hereinafter, Montevideo Convention]. *See also Restatement (Third) of Foreign Relations Law* § 201, St. Paul, Minn., The American Law Institute Publishers, 1987.

[409] Montevideo Convention, Art. 1(a); § 201(b).

[410] Yuval Shany, Amichai Cohen, & Tal Mimran, *ISIS: Is the Islamic State Really a State?*, THE ISRAEL DEMOCRACY INSTITUTE (Sept.14, 2014) http://en.idi.org.il/analysis/articles/isis-is-the-islamic-state-really-a-state/ (noting in regards to this criterion and the Islamic State that "the citizens of Iraq and Syria who are now in territory controlled by the caliphate did not choose to tie their fate to that of the Islamic State; rather, they found themselves in their current situation because of the Islamic State's journey of conquest" and that "the citizens of Iraq and Syria who are under the organization's rule cannot oppose the organization without risking their lives; consequently, it is impossible to say that they chose to be citizens of the caliphate and that they are interested in realizing their shared aspirations within that State").

[411] Bobby Yu, *The Sinking Nation of Kiribati: The Lonely Stand Against Statelessness and Displacement from Rising Oceans*, 3 ARIZ. J. ENVTL. L. & POL'Y 1 (2013) ("When Kiribati's permanent population becomes migratory and lives under another state's jurisdiction, Kiribati will fail the current statehood criteria. In response, President Tong has proposed establishing a small government outpost of up to a few hundred people on the island of Banaba at its highest point to retain de jure statehood.") (citing JANE MCADAM, CLIMATE CHANGE, FORCED MIGRATION, AND INTERNATIONAL LAW 128 (2012)).

territory of another recognized state, they have no permanent population. Though ISIL may believe all the Syrian and Iraqi land under their control now *is* their sovereign territory, that presumption only raises the second point of inquiry.

The second criterion of the Montevideo Test is defined territory.[412] The requirement has some leeway,[413] but the boundaries of the territory ISIL controls are anything but defined. Throughout the second half of 2014 and into the early months of 2014, journalists and scholars have issued helpful maps of the territory under ISIL's control, but rarely do any two match in terms of the boundaries shown.[414] In addition, the very fact that the Islamic State acquired this territory "by use of force and gross violations of international law" greatly undermines its claims that the territory constitutes it as a new state.[415] Finally, international law has only given exceptions to this standard for those states already firmly established in the international order.[416] For example, after Nazi Germany invaded (in violation of international law) a variety of states and sent their governments into exile, those established states continued as states in international law.[417] The same remained true for a time for Somalia in the post-Cold War era.[418] Thus, if ISIL overran Baghdad, that military success would not only fail to trigger statehood for ISIL, it would not even trigger a loss of statehood for Iraq.

The third criterion is that of an effective government.[419] The conventional wisdom among scholars is this criterion is the most critical of the four.[420] No particular type of government is necessary, but the entity must show "some authority exercising governmental functions."[421]

ISIL cannot show an "effective government." ISIL's actions to enforce its version of Sharia law could qualify,[422] particularly when coupled with "the normal activities

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[412] Montevideo Convention, Art. 1(b); § 201(a).

[413] *See* § 201(b) Comment ("An entity may satisfy the territorial requirement for statehood even if its boundaries have not been finally settled, if one or more of its boundaries are disputed, or if some of its territory is claimed by another state.").

[414] *See* Gilsinan, *supra* note 14.

[415] Yuval Shany, Amichai Cohen, & Tal Mimran, *supra* note 410.

[416] *See* Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 435 (1999) (citing Starke's International Law 85, 722-28 (I.A. Shearer ed., 11th ed. 1994)).

[417] *See id.* ("Though their governments lost all territorial power, the Polish, Yugoslav, Czechoslovak, and Baltic states retained recognition, at least by the Allied Powers.") (citing JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 78-79 (1979)).

[418] *See id.* ("In the context of the [late 1990s] civil strife in Somalia, it has also been noted that statehood survives illegal occupation.")(citing Yemi Osinbajo, *Legality in a Collapsed State: The Somali Experience*, 45 INT'L. & COMP. L.Q. 910, 910-11 n.4 (1996)).

[419] Montevideo Convention, Art. 1(c); § 201(c).

[420] Matthew Craven, *Statehood, Self-Determination, and Recognition* in INTERNATIONAL LAW 3d ed., 224 (Ed. Malcolm Smith) ("To a large extent, those addressing the criteria for statehood are unified on one matter above all else: that the criteria are ultimately aimed towards the recognition of 'effective' governmental entities.").

[421] § 201(c), Comment.

[422] Kenneth Waddell, *ISIS Is More Than Just a 'Terrorist Organization'*, NAT'L J. (June 17, 2014) http://www.nationaljournal.com/defense/isis-is-more-than-just-a-terrorist-organization-20140617 ("ISIS is already laying down new laws in Iraq. Last week, the group handed out a "Contract of the

of governance such as control of the use of force or the functioning of utilities combined with some of revenue collection would indicate a government in control."[423] ISIL does collect revenue, from both taxes and the sale of oil, and exercises control of the use of force with a nascent civil governmental hierarchy and public works functions.[424] However, mid-2014 worries that ISIL was building a true state infrastructure were premature. ISIL has not. By December of 2014, *The Washington Post* had revealed the reality of ISIL's Potemkin Village:

> The Islamic State's vaunted exercise in state-building appears to be crumbling as living conditions deteriorate across the territories under its control, exposing the shortcomings of a group that devotes most of its energies to fighting battles and enforcing strict rules.
>
> Services are collapsing, prices are soaring, and medicines are scarce in towns and cities across the "caliphate" proclaimed in Iraq and Syria by the Islamic State, residents say, belying the group's boasts that it is delivering a model form of governance for Muslims.
>
> Slick Islamic State videos depicting functioning government offices and the distribution of aid do not match the reality of growing deprivation and disorganized, erratic leadership, the residents say. A trumpeted Islamic State currency has not materialized, nor have the passports the group promised. Schools barely function, doctors are few, and disease is on the rise.
>
> . . .
>
> The government workers who help sustain what is left of the crumbling infrastructure, in Syrian as well as Iraqi cities, continue to be paid by the Syrian government, traveling each month to collect their salaries from offices in government-controlled areas.[425]

Even if an observer ignores this evidence and concludes ISIL represents a *de facto* government, the same indicia are insufficient for *de jure* status of statehood.

City" to residents of the northern Niniveh province, where Mosul, Iraq's second-largest city, is located. *The Washington Post* translated the contract's 16 main points, in which ISIS threatens to punish thieves by amputation, promises to sentence nonbelievers to death, and urges women to stay indoors unless absolutely necessary.").

[423] Aoife O'Donoghue, *Isis, the Caliphate and new states*, HUMAN RIGHTS IN IRELAND (June 30, 2014) http://humanrights.ie/international-lawinternational-human-rights/isis-the-caliphate-and-new-states/.

[424] Faysal Itani, *We Must Treat ISIS Like a State to Defeat It*, TIME (Aug. 14, 2014) http://time.com/3111276/isis-terror-iraq-treat-it-like-a-state/ ("As an aspiring government authority, ISIS is also committed to providing public and social services to the population, activities in which it is already deeply engaged. These many public goods include power and water services, law enforcement, health care, dispute resolution, employment, education and public outreach. These responsibilities cost money, which in ISIS' case comes from extortion (or taxation, as it were), control of energy and water resources, and plunder.").

[425] Liz Sly, *The Islamic State Is Failing At Being A State*, WASH. POST (Dec. 15 2014), http://www.washingtonpost.com/world/middle_east/the-islamic-state-is-failing-at-being-a-state/2014/12/24/bfbf8962-8092-11e4-b936-f3afab0155a7_story.html.

The problem with ISIL passing the effective government criteria is twofold. First, ISIL's monopoly of force lacks permanence. According to Matthew Craven of the University of London, an entity "must demonstrate unrivalled possession and control of public power . . . , and that once that unrivalled possession is established with a degree of permanence recognition of statehood may follow."[426] ISIL's control is nothing if not replete with rivals active in its undoing, to include the governments of the states in which it straddles as well as other governments and other non-government groups, some of which—the Kurds in particular—offer a far longer history of effective government without statehood than ISIL. Furthermore, for insurgencies growing out of recognized states contesting the statehood, centuries old international practice has been to ignore the fact of effective government until the "parent State gave way in the face of those of the secessionist movement."[427]

Second, *how* ISIL obtained "effective governance" undercuts any claim it meets the criterion. Attaining it through a clear display of self-determination would have helped,[428] but ISIL has shown no such legitimacy by showing no genuine support of conquered populations. Instead, ISIL built its purported government through violations of international law—the very point of this paper's inquiry—which significantly undercuts the validity of ISIL as an effective government. As exhibited in the historical precedents of Northern Cyprus and Southern Rhodesia, evidence of effective government (as both of those entities could proffer) is immaterial if the "effective government" came about through international law violations.[429]

The fourth criterion of the Montevideo Test is the capacity to conduct international relations.[430] ISIL has communicated with the world through its (often macabre) internet videos of its actions and proclamations,[431] and its decisions to challenge multiple governments militarily could indicate some degree of the criterion. But the requirement is more stringently defined than internet use and violence—even well organized and effective violence—against recognized states. "An entity is not a state unless it has competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical and financial capabilities to do so."[432] ISIL need not establish embassies,

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[426] *See* Matthew Craven, *supra* note 420, at 224-5.

[427] *See id.* (rendering this history of European powers in relation to South American secession movements and insurgencies growing out of sovereign territories of Spain).

[428] *See id.* (noting that the criterion of effective governance is "of relatively less significance if the State in question is one that enjoys a right of self-determination").

[429] *Id.* (discussing both examples).

[430] Montevideo Convention, Art. 1(c); § 201(c).

[431] Kenneth Waddel, ISIS Is More Than Just a 'Terrorist Organization', NATIONAL J. (June 17, 2014) http://www.nationaljournal.com/defense/isis-is-more-than-just-a-terrorist-organization-20140617 ("ISIS also has a strong public-relations arm that trumpets the group's successes and trawls for new recruits. It maintains an active presence on Twitter and YouTube—apparently a must for any terrorist in this day and age—and used social media to publicize claims of a 1,700-person massacre in Tikrit over the weekend. Residents in Riyadh, Saudi Arabia, a city far removed from the conflicts in Iraq and Syria, found propaganda leaflets stuffed into their car door handles and windshields last month.").

[432] § 201(c), Comment.

join international organizations, welcome travelers by their passports, or sign treaties, but it must evince the competence to do so "within its own constitutional system[.]" ISIL's proclamations of caliphate borders and its disregard for the rules of international conduct provide every reason that its "constitutional system" fails to include such a "competence."

B. LACK OF RECOGNITION

The second reason that ISIL is not a valid state in the international order is simpler: no other country says that it is. Comment h of the 1987 Restatement of International Law explains: "Whether an entity satisfies the requirements for statehood is ordinarily determined by other states when they decide whether to treat that entity as a state."[433] Though recognition can be through a manner other than formal recognition,[434] the determination still rests with the decisions of existing states in the international community. The language is not, "determined by other states when they decide whether to *recognize* that entity as a state."

No state in the international community has decided to treat the "Islamic State" as a state through either formal recognition or through deliberate informal conduct, such as how the USG and other states conduct relations with Taiwan.[435] No matter ISIL's strength of military force or its competence of effective governance, either now or in the future, states have no obligation to recognize its proclaimed sovereign "caliphate."[436] While states must still theoretically treat an entity as a state if it meets the Montevideo Convention despite non-recognition,[437] the determination of those criteria is, again, with other states.[438]

Moreover, important exceptions apply to ISIL, barring its statehood. First, the requirement for nations to treat an entity that passes the Montevideo Test as a state does not apply if the entity "has attained the qualifications for statehood as a result of a threat or use of armed force in violation of the United Nations Charter."[439] Second, the same provision's commentary specifies even more broadly that if the entity's purported statehood was created through a violation of international law, that violation creates a "a duty not to recognize or accept the entity's statehood."[440] ISIL has gained all of its territory through use of force that violated the sovereign

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[433] § 201(h), Comment.

[434] *Id.* ("Ordinarily, a new state is formally recognized by other states, see sec. 202, but a decision to treat an entity as a state may be manifested in other ways.").

[435] *See* Matthew Craven, *supra* note 420, at 245–6.

[436] *See* CARTER & WEINER, *supra* note 63, at 448 ("Recognition, *as a public act of state,* is an optional and political act and there is no legal duty in this regard.")(emphasis in the original)(quoting IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 90 (6th Ed. 2003).

[437] *Id*.

[438] § 202, n.1 *Statehood and Recognition*. (noting two contrasting views, the constitutive theory that statehood requires recognition and the declaratory view that recognition only affirms fulfilment of the Montevideo criteria; but also noting that even under the former, "whether an entity satisfies the requirements for statehood is, as a practical matter, determined other states").

[439] § 202. *See also* CARTER & WEINER, *supra* note 63, at 448.

[440] § 202, n.1 *Statehood and Recognition*.

territory of two recognized states, and did so through other violations of international law such as those discussed at length above in regards to crimes against humanity and genocide.

Finally, as a matter of practice and political reality, tension between an entity meeting the criteria of the Montevideo Convention and the same entity failing to secure treatment as a state by other states is resolved against the entity. International law is a law governed only by its members. For example, when the Belgians established a very weak bureaucratic apparatus in the Congo upon their colonial exit in 1960, it quickly fell into chaos for clear lack of "effective government."[441] Yet Belgium had secured the new entity international recognition as a state, and thus the failure to 'pass' the Montevideo criteria was immaterial. Congo was a state because the international community said it was.[442] The aforementioned examples of the non-statehood of Northern Cyprus and Southern Rhodesia, effective governments, highlight the same point. ISIL will not be a state in international law until other nations grant it that status.

[441] *See* Matthew Craven, *supra* note 420, at 225.
[442] *See id.* at 225.

APPENDIX D: A BRIEF OVERVIEW OF THE USG AND THE ICC

The USG supported the push for a permanent court for international crimes, but withdrew support once the final language failed to satisfy US interests. Both Presidents Clinton and George W. Bush feared that if the Senate ratified the final treaty, the language would have endangered US troops to politically motivated prosecutions in the ICC and generally undercut U.S. sovereignty.[443]

Congress acted on those fears in 2002 by passing the American Service-members Protection Act ("ASPA"). The ASPA required a country sign a bilateral agreement that the nation will never submit US citizens to the ICC in order to receive US military assistance,[444] conditions any US role in peacekeeping to similar exemptions,[445] and generally limits ICC support.[446] The most notable provision authorized the President to use force to liberate US citizens detained by the ICC,[447] a provision prompting opponents to mock the bill as the "The Hague Invasion Act."[448]

Despite its opposition to joining as a party, the United States has gradually become more accepting of the ICC as an institution that can support USG national and moral objectives. Three global challenges illuminate this policy evolution. First, the USG ultimately green-lighted UNSC referral of criminal actors in the Darfur region of Sudan to the ICC. Secretary of State Powell declared that actions in the Darfur region of Sudan constituted genocide in September 2004, and then pushed the UN to formally investigate.[449] The USG thereafter lobbied other nations on the Council to sanction a "Sudan Tribunal" for the crimes, an USG-funded tribunal that the UNSC could administratively attach to the African Union. Council members believed that the USG pushed this ICC alternative out of its own hostility towards—and desire to undermine—the ICC.[450] Nonetheless, having failed to gather support for this alternative, the USG conceded to ICC referral, paving the way for the correspondent UNSC action, Security Council Resolution 1593.[451] Though its "support" on the day of the vote manifested in an abstention rather than a veto, the

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[443] *See* John P. Cerone, *supra* note 102, at 148 – 154.

[444] 22 U.S.C. § 7426 (2012). Diplomats refer to these bilateral agreements as "Article 98 agreements," a moniker taken from the article in the Rome Treaty that creates the loophole allowing bilateral treaties and agreements between parties and non-parties to exempt submission of the citizens of the non-party state to the ICC. *See* Luban at 817-8, n.5 (discussing the term, its history, and other phrasing variants, such as the term "Bilateral Non-surrender Agreements.").

[445] § 7424.

[446] § 7423.

[447] § 7427. Commentators often reference this provision as "Section 2008," after the section number in the legislation prior to its codification. *See* PL 107–206, August 2, 2002, 116 Stat 820.

[448] *See, e.g.*, *'Hague Invasion Act' Becomes Law*, HUMAN RIGHTS WATCH (Aug. 3, 2002), http://www.hrw.org/en/news/2002/08/03/us-hague-invasion-act-becomes-law.

[449] John P. Cerone, *supra* note 101, at 159 (citing Secretary Colin L. Powell, Testimony before the Senate Foreign Relations Committee Washington, D.C., September 9, 2004).

[450] *Id.* at 160 (citing interviews and *Human Rights News, U.S. Fiddles over ICC while Darfur Burns* HUMAN RIGHTS WATCH (Jan. 31, 2005).

[451] S.C. Res. 1593, U.N. Doec. S/RES/1593 (March 31, 2005).

USG offered support of ICC's prosecutions of Darfur's criminal actors if the ICC requested it.[452] Though such support could have run afoul of the ASPA, Bush's State Department had begun to criticize that Republican-sponsored legislation as inimical to USG objectives.[453]

The second important instance of support signaled more explicit acceptance of the ICC as an institution. The USG had strongly been supporting the hybrid court of the Special Court for Sierra Leone when the arrest of the court's most high profile target in March 2006 caused alarm.[454] Recognizing that a prosecution of Liberian President Charles Taylor in West Africa created significant security concerns and risked regional stability, the USG coordinated with the ICC to have the Special Court for Sierra Leone use the ICC's facilities in The Hague to detain and prosecute him.

Successful cooperation on the Taylor prosecution led to more pro-ICC USG policies. Department of State officials began speaking more favorably of the ICC's impact, both privately and publically.[455] Daunted in part by China's growing influence, advocates in the DOD had persuaded President Bush to waive ASPA military funding prohibitions for nations that refused to sign bilateral exemption treaties.[456] Congress followed suit in 2006 and 2008 by eliminating ASPA's restrictive military assistance bans to countries that had not signed exemption agreements.[457] The ICC has generally helped itself win over Washington by opting not to unilaterally pursue prosecutions,[458] but rather accepting deferrals by either governments that request external scrutiny or (in the case of Darfur) by way of UNSC resolution.[459]

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[452] John P. Cerone, *supra* note 101, at 163 (citing H.R. Subcomm. on Africa, Global Human Rights, and Intl. Operation of the Comm. on Intl. Relations, *Sudan: Losing Ground on Peace?*, 109th Cong. 16, 29 (Nov. 1, 2005)).

[453] *Id*. (quoting Press Release, Condoleezza Rice, Sec. of State, *Trip Briefing* (March 10, 2006), at http://www.state.gov/secretary/rm/2006/63001.htm).

[454] *Id.* at 163-4.

[455] *Id.* at 164-5.

[456] *Id.* at 165.

[457] The FY2007 Defense Authorization Act, signed in 2006, erased the prohibition on International Military Education and Training ("IMET") assistance to countries without bilateral exemption agreements. *See* H.R. 5122; P.L. 109-364. President Bush signed legislation doing the same for Foreign Military Funds ("FMF") when approving the following fiscal year's defense authorization on January 28th, 2008. *See Congressional Update: Anti-ICC Legislation*, AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALITION FOR THE INTERNATIONAL CRIMINAL COURT (last visited April 15, 2015) http://www.amicc.org/usicc/legislation (showing the elimination of this provision in § 2007 of the ASDA, Public Law 107-206, through H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008, via link at http://www.amicc.org/docs/ASPA_2008.pdf).

[458] Megan A. Fairlie, *The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage*, 29 BERKELEY J. INT'L L. 528, 547 (2011) ("In light of the U.S.'s long-standing opposition to the prosecutor's independent powers, it may well have seemed shrewd to avoid utilizing them. Considered alongside the prosecutor's determination to avoid publicly shaming states by privately rejecting inappropriate referrals,116 avoiding the *proprio motu* option appears likely to have been part of a larger design to quell concerns about his independent authority.").

[459] John P. Cerone, 166 (citing the examples of the Central African Republic, the Congo, and Uganda for the self-referral examples).