LEARNING FROM GUANTÁNAMO: AVOIDING LEGAL BLACK HOLES IN OUTER SPACE

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True peace is not merely the absence of war, it is the presence of justice.

– Jane Addams

ABSTRACT

"Legal black holes" are spaces beyond the reach of enforceable law and thus inflict people within their pull with "rightlessness." The term "legal black hole" arose originally around the Guantánamo Bay detention center, but it has since been used in other contexts, such as migrant drownings. There is a new frontier for legal black holes in the space beyond Earth. This topic is timely and pertinent to modern application because if places or spaces exist where fundamental laws cannot be applied or enforced, then such legal black holes undermine the rule of law.

This Article argues that outer space is, at present, a legal black hole. The increased human presence in outer space will result in legal black holes that cannot yet be imagined. This Article follows the throughline from the Guantánamo Bay detention center to outer space regarding the prohibition of torture and argues that space is the new frontier for legal black holes. This Article argues that established *jus cogens* norms, including the prohibition against torture, are also non-derogable in outer space because the principle that the "use and exploration" of outer space must be "in accordance with international law" is customary international law.

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INTRODUCTION

"Legal black holes" are spaces beyond the reach of enforceable law and thus inflict people within their pull with "rightlessness."[1] The term "legal black hole" arose originally around the Guantánamo Bay detention center, but it has since been used in other contexts, such as migrant drownings.[2]

Traditionally, the U.S. Constitutional "domain of protection" was categorical, and "[m]any legal black holes existed where persons, places, or contexts were on the wrong side of the categorical divide and were outside the protection of the law."[3] However, it is argued that "[i]n recent years, . . . [t]he distinctions between domestic and foreign, enemy and friend, peace and war, and citizen and noncitizen are breaking down[.] . . . Legal black holes are shrinking or closing entirely."[4] Further, "[c]ontemporary moral psychology and conceptions of equality seem also to be consistent with and supportive of convergence and closing of legal black holes."[5] Whether or not this is the legal reality on Earth, there is a new frontier for legal black holes in the space beyond it.

This Article argues that outer space is, at present, a legal black hole. Humans are currently in orbit around Earth on the International Space Station and there are targets to put humans back on the moon in

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1 Itamar Mann, *Maritime Legal Black Holes: Migration and Rightlessness in International Law*, 29 EUR. J. INT'L L. 347, 347 (2018).

2 *Id.*; *see also* R (on the application of Feroz Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department [2002] EWCA (Civ) 1598 [64] (noting that "in apparent contravention of fundamental principles recognised by [U.S. and English] jurisdictions and by international law, Mr. Abbasi is at present arbitrarily detained in a 'legal black-hole'").

3 Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029, 1032 (2015).

4 *Id.* at 1033.

5 *Id.* at 1067-69.

this decade and on Mars in the next.[6] This increased human presence in outer space will result in legal black holes that cannot yet be imagined.[7] As one non-exhaustive example, if a worker from Country X is tortured by cosmonauts of Country Y while in transit to mine an asteroid, which court has jurisdiction? Which laws should that court apply? Do *jus cogens* norms apply in outer space?

This Article follows the throughline from the Guantánamo Bay detention center to outer space regarding the prohibition of torture and argues that space is the new frontier for legal black holes.[8] As such, this Article argues that because the principle that the "use and exploration" of outer space must be "in accordance with international law" is customary international law, established *jus cogens* norms are also non-derogable in outer space—including the prohibition against torture.[9]

Part II discusses the history of the Guantánamo Bay detention center as a legal black hole.[10] Part III discusses the extraterritorial application of human rights instruments including the *Outer Space Treaty*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Convention Against Torture"), the *International Covenant on Civil and Political Rights* ("ICCPR"),

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6 Brian Dunbar, *Apollo's Legacy is NASA's Future*, NASA, https://www.nasa.gov/specials/apollo50th/back.html [https://perma.cc/SYM3-HA9W] (last visited Dec. 3, 2021); *How Investing in the Moon Prepares NASA for First Human Mission to Mars*, NASA, https://www.nasa.gov/sites/default/files/atoms/files/moon-investments-prepare-us-for-mars.pdf [https://perma.cc/S8CM-SKZA] (last visited Dec. 3, 2021). *See also* Darrell Etherington, *NASA Details Intent to Replace the International Space Station with a Commercial Space Station by 2030*, TECHCRUNCH (Nov. 30, 2021), https://techcrunch-com.cdn.ampproject.org/c/s/techcrunch.com/2021/11/30/nasa-details-intent-to-replace-the-international-space-station-with-a-commercial-space-station-by-2030/amp/ [https://perma.cc/EN59-VYET]; Joey Roulette, *Jeff Bezos' Rocket Company Wants to Build a Space Station*, N.Y. TIMES (Oct. 25, 2021), https://www.nytimes.com/2021/10/25/science/space-station-blue-origin-sierra.html?referringSource=articleShare [https://perma.cc/PZC2-TV7G] (discussing commercial space stations).

7 *See generally* Feyisola Ruth Ishola, Oluwabusola Fadipe & Olaoluwa Colin Taiwo, *Legal Enforceability of International Space Laws: An Appraisal of 1967 Outer Space Treaty*, 9 VOICES NEW SPACE GENERATION 33, 33 (2021). *See generally* SPACE LEGAL ISSUES, https://web.archive.org/web/20220405045209/https://www.spacelegalissues.com/ (last visited Apr. 8, 2022).

8 Michael Isikoff, *The Gitmo Fallout*, NEWSWEEK (July 16, 2006, 8:00 PM EDT), https://www.newsweek.com/gitmo-fallout-112933 [https://perma.cc/932L-J725].

9 *See infra* note 41.

10 *See infra* Part II.

and the *European Convention on Human Rights*.[11] Part III concludes that while there is a growing trend toward the extraterritorial application of universal human rights instruments, no such norm has yet evolved, and no decisions have focused on their application in outer space.[12] Part IV argues that *jus cogens* norms are non-derogable in outer space and discusses the future of natural law.[13] This Article concludes that this topic is timely and pertinent to modern application because if places or spaces exist where fundamental laws cannot be applied or enforced, then such legal black holes undermine the rule of law.[14]

I. THE GUANTÁNAMO BAY DETENTION CENTER

Guantánamo Bay is located on the southeast side of Cuba and is the current location of a U.S. Naval Base and military prison called "Camp Justice."[15] It is explained that:

> There is a long history of America's control of Guantánamo that goes back more than a century. The United States Navy entered Guantánamo Bay, Cuba, in 1989, during the Spanish-American War. We never left. In 1903 the US and Cuba entered into a lease guaranteeing that 'the United States shall exercise jurisdiction and control over and within' forty-five square miles of land and water along the southeast coast of the island housing the Guantanamo Bay Naval Base. A treaty in 1934 affirmed Cuba's ultimate sovereignty over the territory, while confirming US control. The treaty required that both parties agree to the termination of the lease. Over the years, Cuba has sought to terminate the lease, and has refused to accept the annual lease payment of 'two thousand dollars in gold coin.' The US has rejected every effort by Cuba to terminate the contract.[16]

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11 *See infra* Part III.

12 *Id.*

13 *See infra* Part IV.

14 *See infra* Conclusion.

15 Mohammed Haddad, *Guantanamo Bay Explained in Maps and Charts*, ALJAZEERA (Jan. 9, 2022), https://www.aljazeera.com/news/2021/9/7/guantanamo-bay-explained-in-maps-and-charts-interactive [https://perma.cc/N77C-7YEP]; *Camp Justice Housing*, OFF. OF MIL. COMM'NS, https://www.mc.mil/FACILITIESSERVICES/Facilities/CampJusticeHousing.aspx [https://perma.cc/9KEZ-M589] (last visited Apr. 8, 2022).

16 PETER JAN HONIGSBERG, A PLACE OUTSIDE THE LAW: FORGOTTEN VOICES FROM GUANTANAMO 19-20 (2019).

One of the reasons the Bush Administration chose the Guantánamo Bay location as a detention center was because officials were directed to "find the legal equivalent of outer space"—a place with no law.[17] Bush administration officials viewed Guantánamo Bay as having a "legal equivalence" to outer space "because of Cuba's theoretical, residual sovereignty over the United States' de facto perpetual leasehold there."[18] It is further described that:

> When the administration chose Guantánamo, it believed it had found a place outside the law—a place under American control but where federal courts could not interfere. However, Guantánamo was not an obvious choice from the start. Members of an interagency working group in fall 2001 considered and rejected a number of other locations.
>
> The Pacific island of Guam, although isolated, was rejected because it was a US territory and had a federal courthouse. American bases in Europe were rejected because European Union countries were subject to the jurisdiction of the European Court of Human Rights. Non-European countries that were willing to house the detainees had substantial infrastructure issues and costs. Diego Garcia, an atoll south of the equator, was too far away from Washington, DC. *Housing captives on ships at sea would not work. There were too many captives.*[19]

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17 Pauline Canham, *Guantanamo Bay: 'The Legal Equivalent of Outer Space'*, ALJAZEERA (Jan. 4, 2022), https://www.aljazeera.com/features/2022/1/4/guantanamo-bay-the-legal-equivalent-of-outer-space [https://perma.cc/762B-3UER]; Randall Mikkelsen, *National Geographic Film goes "Inside Guantanamo"*, REUTERS (Apr. 2, 2009, 7:09 PM), https://www.reuters.com/article/us-guantanamo-film-sb1/national-geographic-film-goes-inside-guantanamo-idUSTRE53201020090403 [https://perma.cc/D6RJ-34EQ]; *see* Michael Isikoff, *The Gitmo Fallout*, NEWSWEEK (July 16, 2006, 8:00 PM EDT), https://www.newsweek.com/gitmo-fallout-112933 [https://perma.cc/97MN-HZ9Z].

18 Benjamin R. Farley, *The Fairy Tale America Likes to Tell Itself*, THE ATLANTIC (June 29, 2021), https://www.theatlantic.com/ideas/archive/2021/06/what-biden-must-do-right-wrongs-guantanamo/619309/ [https://perma.cc/39WL-XS42].

19 HONIGSBERG, *supra* note 16, at 18-19 (emphasis added). *See also Guantánamo Bay Detention Camp*, ACLU, https://www.aclu.org/issues/national-security/detention/guantanamo-bay-detention-camp [https://perma.cc/P6E3-JMES] (last visited Apr. 8, 2022) (describing how Guantánamo Bay was "[o]riginally intended to be an 'island outside the law' where terrorism suspects could be detained without process and interrogated without restraint").

Notably, the only reason listed for why holding detainees at sea would not work is that there were too many detainees.[20] Since international law applies at sea and it could hardly be argued that a floating prison is not within the control of its guards, how does this pursuit for a place beyond enforceable law predict the future uses of outer space? Regardless, the Bush Administration believed detainees within its control had no fundamental human rights, whether abroad, at sea, or in outer space.[21] As such, the Guantánamo Bay detention center was intended and designed to be a legal black hole and deprive its prisoners of fundamental human rights.

It is argued that the Guantánamo Bay detention center was a "legal black hole" because those detained indefinitely pre-trial could not access U.S. courts, and the Bush Administration argued the Geneva Conventions did not apply because the detainees were "unlawful enemy combatants"—a category not recognized in the Geneva Conventions.[22] In 2004, the Supreme Court held in *Rasul v. Bush* that the Guantánamo Bay detainees had the right to access U.S. courts because the U.S. government, under its lease agreement with Cuba, has "complete jurisdiction and control" over the base, despite Cuba's sovereignty of the land.[23] However, the legal black hole at Guantánamo Bay did not close until 2006 when the Court decided in *Hamdan v. Rumsfeld* that the Geneva Conventions applied to the war on terror.[24]

While the legal black hole was technically closed in 2006, in fact closing the Guantánamo Bay detention center itself remains a glacial

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20 HONIGSBERG, *supra* note 16.

21 *Id.*

22 Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L COMP. L.Q. 1 (2004); *Guantanamo Litigation – History*, LAWFARE, https://www.lawfareblog.com/guantanamo-litigation-history [https://perma.cc/27BF-QCUN] (last visited Apr. 8, 2022).

23 Rasul v. Bush, 542 U.S. 466, 480 (2004).

24 Hamdan v. Rumsfeld, 548 U.S. 557, 629 (2006) ("[T]here is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a 'conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,' certain provisions protecting '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by . . . detention.' One such provision prohibits 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'"). *See also* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Boumediene v. Bush, 553 U.S. 723 (2008).

process.[25] A January 2021 Amnesty International Report details the ongoing human rights violations at the Guantánamo Bay detention facility.[26] As of April 8, 2022, thirty-seven detainees continue to be held at the Guantánamo Bay detention facility.[27] On December 7, 2021, during the hearing "Closing Guantanamo: Ending 20 Years of Injustice" before the Full Senate Committee on the Judiciary, the Chair, Senator Dick Durban (D-IL), explained:

> It seems to me that we put these prisoners, these detainees, in a black hole on an island which we could claim is not part of the territory of the United States and decided that we would treat them in some kind of unusual legal manner with these military commissions. As the testimony has made clear, that experiment failed.[28]

Further, Brigadier General John Baker, the Chief Defense Counsel for Military Commissions for the United States Department of Defense, testified:

> The 9/11 conspiracy was originally charged in *2008*, almost fourteen years ago, and as yet there is no date set to try that case. That the military commissions have been unable to bring the men charged with the worst criminal act in United States history to trial 20 years after the fact (and 14 years after they were first charged) is alone enough to prove that the system has failed.[29]

Thus, ironically named "Camp Justice," the Guantánamo Bay detention center is one where justice cannot be realized.[30]

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25 Ben Fox, *Guantanamo Prison Lingers, an Unresolved Legacy of 9/11*, AP NEWS (Sept. 9, 2021), https://apnews.com/article/joe-biden-cuba-crime-prisons-afghanistan-717bf364f1ca7e028d5c82421bd842ec [https://perma.cc/VD6Q-6YCX]; *see also* The Times Editorial Board, *Editorial: Guantanamo Detainees are Still Trapped in a Legal Black Hole*, L.A. TIMES (June 12, 2019, 3:10 AM), https://www.latimes.com/opinion/editorials/la-ed-breyer-guantanamo-20190612-story.html [https://perma.cc/NP7X-TSX7].

26 AMNESTY INTERNATIONAL, USA: RIGHT THE WRONG, DECISION TIME ON GUANTÁNAMO (2021).

27 *The Guantánamo Docket*, N.Y. TIMES, https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html [https://perma.cc/ZAH3-FUEJ] (last visited Apr. 8, 2022).

28 *Closing Guantanamo: Ending 20 Years of Injustice, Hearing Before the S. Comm. On the Judiciary*, 117th Cong. (2021) (see Mr. Durbin speaking between 1:09:59-1:10:19).

29 *Id.* at 2 (testimony of John G. Baker, Brigadier Gen., U.S. Marine Corps, Chief Def. Couns., Mil. Comms. Def. Org., Dep't of Def.).

30 *Camp Justice Housing*, *supra* note 15.

II. THE EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS INSTRUMENTS

The vastness of space beyond Earth makes the possibilities of sending prisoners beyond the reach of the rule of law more conceivable and endless. An increased human presence in outer space is fast approaching.[31] Thus, ensuring that the enforcement of fundamental human rights extends to wherever humans are is vital.

The 1966 Outer Space Treaty entered into force in October 1967 and 111 States have ratified it.[32] It is referred to as the "Magna Carta of international space law."[33] The Treaty states, in relevant part:

> *Article I*
>
> Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and *in accordance with international law*, and there shall be free access to all areas of celestial bodies . . . .
>
> *Article III*
>
> States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, *in accordance with international law*, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.[34]

Treaties, customary international law, *jus cogens* norms, and judicial decisions by international courts are all regarded as sources of international law under Article 38 of the International Court of Justice ("ICJ") Statute.[35] It is argued that certain principles in the Outer Space Treaty have attained the status of customary international law.[36]

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31 *See* Etherington, *supra* note 6; *see also* Roulette, *supra* note 6.

32 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *adopted* Dec. 5, 1979, 18 U.S.T. 2410, 610 U.N.T.S. 205 (entered into force Oct. 10, 1967) [hereinafter Outer Space Treaty]; Comm. on the Peaceful Uses of Outer Space, *Status of International Agreements relating to Activities in Outer Space as at 1 January 2021*, U.N. Doc. A/AC.105/C.2/2021/CRP.10, at 1, 10 (2021).

33 He Qizhi, *The Outer Space Treaty in Perspective*, 25 J. SPACE L. 93 (1997).

34 Outer Space Treaty, *supra* note 32, arts. 1, 3 (emphasis added).

35 Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

36 Ian Perry, *The Customary Status of the Outer Space Treaty is not an All or Nothing Proposition*, GROUND BASED SPACE MATTERS (Sept. 22, 2017), https://groundbasedspacematters.com/index.php/2017/09/22/the-customary-status-of-the-outer-space-treaty-is-not-an-all-or-nothing-proposition-by-ian-perry/

Customary international law is "a general practice accepted as law."[37] A binding customary international law is established by showing (1) state practice and (2) *opinio juris*.[38] State practice is state conduct and can include inaction.[39] *Opinio juris* "means that the practice in question must be undertaken with a sense of legal right or obligation."[40] It is argued here that the principle that the "use and exploration" of outer space must be "in accordance with international law" is customary international law.[41] As a result, it is further argued that established *jus cogens* norms, as a part of international law, are also non-derogable in outer space.

Jus cogens norms are general principles of law and are internationally recognized to be both the highest of accepted norms in society and obligatory to follow.[42] *Jus cogens* norms induce obligations *erga omnes* that are owed to "the international community as a whole," which all states have a legal interest to protect.[43] *Jus cogens* norms are

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[https://perma.cc/X5GU-RKVV] ("[E]xisting state practice is insufficient to make the entire Outer Space Treaty customary international law.") (on file with L. Off. of Laura Montgomery).

37 Statute of the International Court of Justice art. 38, ¶ 1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 [hereinafter ICJ Statute].

38 Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, 1985 I.C.J. Rep. 13, 29-30, ¶ 27 (June 3, 1985) (explaining "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them"); *Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session*, U.N. Doc. A/73/10, at 13 (2018) [hereinafter 2018 Int'l Law Comm'n Rep.].

39 2018 Int'l Law Comm'n Rep., *supra* note 38, at 37, 43, 49.

40 *Id.* at 120.

41 Outer Space Treaty, *supra* note 32, art. I; *see also Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of The Moon, Mars, Comets, and Asteroids for Peaceful Purposes*, NASA (2020), https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords-signed-13Oct2020.pdf [https://perma.cc/E59R-QKEB] ("The Signatories affirm that cooperative activities under these Accords should be exclusively for peaceful purposes and in accordance with relevant international law."). *But see* Perry, *supra* note 36 ("A particular provision of the Outer Space Treaty might embody customary international law with regard to activities in an area where there is more state practice (such as with regard to free movement in earth orbit), and not embody it with regard to all activities in a physically different area where there is less state practice.").

42 Vienna Convention on the Law of Treaties arts. 53, 64, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

43 Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5); *id.* ¶ 34 (Obligations *erga omnes* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial

peremptory because they are non-derogable.[44] The prohibition of torture is a *jus cogens* norm.[45] Thus, because the principle that the use and exploration of outer space must be in accordance with international law is customary international law, established *jus cogens* norms are also non-derogable in outer space—including the prohibition against torture.

The Convention Against Torture is an international treaty with 173 State Parties.[46] It states, in relevant part:

> *Article 4*
>
> 1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
>
> 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.[47]
>
> *Article 5*
>
> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
>
> (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
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> (b) When the alleged offender is a national of that State;
>
> (c) When the victim is a national of that State if that State considers it appropriate.

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discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character."); *see also* Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, ¶ 56, Conclusion 17 (2019) [hereinafter 2019 Int'l Law Comm'n Rep.] (concluding that, "[a]ny State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts").

44 2019 Int'l Law Comm'n Rep., *supra* note 43, ¶ 56, Conclusion 2.

45 *Id.* at Conclusion 23, cmt. 11.

46 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113 [hereinafter Convention Against Torture]. *See also Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, https://indicators.ohchr.org [https://perma.cc/73ZZ-UTGJ] (last visited Apr. 8, 2022).

47 Convention Against Torture, *supra* note 46, art. 4.

> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.[48]
>
> *Article 8*
>
> 4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.[49]

Each of the 173 State Parties has an obligation to establish its jurisdiction over violations of torture under the circumstances listed in Article 5.[50] Extraterritoriality flows from Article 5, Section 2.[51] Article 8, Section 4, attempts to remedy the issue of a State establishing its jurisdiction extraterritorially by advancing a "legal fiction" that the crime in fact took place under the territorial jurisdiction of two sovereign states.[52] Regardless of this impossibility, if the crime was perpetrated in outer space, how would jurisdiction be decided? If the crime was perpetrated on a space object and not a celestial body, what factors would be used to determine whether such space object was legally a "ship," "aircraft," both, or neither under Article 5, Section 1, Part (a)?

Universal human rights instruments, including the Convention Against Torture, are treaties subject to the VCLT.[53] Article 29 of the VCLT addresses the "[t]erritorial scope of treaties" and explains that "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."[54] However, Article II of the Outer Space Treaty says: "Outer space, including the moon and other celestial bodies, is not

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48 Convention Against Torture, *supra* note 46, art. 5.

49 *Id.* art. 8.

50 *Id.*

51 *Id.*

52 *Legal Fiction*, LEGAL INFO. INST, https://www.law.cornell.edu/wex/legal_fiction [https://perma.cc/Q98W-P5KK] (last visited Apr. 8, 2022) (A legal fiction is "[a]n assumption and acceptance of something as fact by a court, although it may not be, so as to allow a rule to operate or be applied in a manner that differs from its original purpose while leaving the letter of the law unchanged. A legal fiction is created typically to achieve such varied aims as convenience, consistency, equity, or justice.").

53 VCLT, *supra* note 42; Convention Against Torture, *supra* note 46.

54 VCLT, *supra* note 42, art. 29.

subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[55] As such, "it must be accepted that, for the immediate future at least, no earthly entity will be able to establish itself in outer space as a nation-state in the formal sense of the word."[56] Thus, strict approaches by international human rights instruments that require a state's sovereign control over "territory" where human rights are violated will create legal black holes in outer space.[57]

However, "human rights bodies have found that in 'exceptional' or 'special' circumstances the acts of States party to a humanitarian treaty which are performed outside their territory, or which produce effects there may amount to exercise by them of their 'jurisdiction' within the meaning of the jurisdictional provisions."[58] The "exceptional circumstances" justifying the extraterritorial application of human rights obligations may be roughly grouped into either: a) "Exercise by the State of its authority and control over an area situated outside its national territory" or b) "Extraterritorial action of State agents in situations short of overall control."[59] For example, the ICJ has followed the extraterritorial application of human rights instruments:

> In some instances the Court interprets terms and phrases contained in a particular instrument itself (such as 'subject to its [a state's] jurisdiction' and 'within its [a state's] territory' and 'any territory under its [a state's] jurisdiction' to mean that such an instrument enjoys extra-territorial application. In other instances, where the particular instrument is totally silent on the issue of extra-territorial application and does not contain any of these or similar terms and phrases, the Court

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55 Outer Space Treaty, *supra* note 32 (emphasis added). *See also Artemis Accords*, *supra* note 41 ("The Signatories affirm that the extraction of space resources does not inherently constitute national appropriation under Article II of the Outer Space Treaty.").

56 Anél Ferreira-Snyman & Gerrit Ferreira, *The Application of International Human Rights Instruments in Outer Space Settlements: Today's Science Fiction, Tomorrow's Reality*, 22 POTCHEFSTROOM ELEC. L.J. 1, 25 (2019).

57 *See id.* (reviewing the words "jurisdiction" and "territory" as they are ambiguously used in the *International Covenant on Civil and Political Rights*; the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the *International Covenant on Economic, Social and Cultural Rights*; and the *Convention on the Elimination of All Forms of Discrimination Against Women*).

58 Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War On Terror"*, 87 INT'L REV. OF THE RED CROSS 39, 56 (2005).

59 *Id.* at 56, 60.

> still, without any explanation, accepts the extra-territorial application as a given fact. *It furthermore seems clear that a state's sovereignty over a particular territory is not viewed as a prerequisite for the extra-territorial application of the international human rights instruments to which that state is a party.*[60]

Article 7 of the ICCPR, an international treaty with 173 States party, unconditionally bans torture: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."[61]

The United Nations Human Rights Committee ("HRC") in its General Comment No. 31 on the nature of the general legal obligation imposed on States Parties to the ICCPR explained, "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[62]

Also, while only in "exceptional circumstances," the European Court of Human Rights ("ECtHR") similarly allows the extraterritorial application of the European Convention on Human Rights.[63] In *Al-Skeini v. The United Kingdom*, the ECtHR explained:

> To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-

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60 Ferreira-Snyman & Ferreira, *supra* note 56, at 24 (emphasis added).

61 International Covenant on Civil and Political Rights, arts. 4, 7, Dec. 16, 1966, S. EXEC. DOC. NO. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR] (with an accompanying non-derogation clause in Article 4).

62 United Nations Human Rights Committee General Comment No. 31, U.N. Doc CCPR/C/21/Rev.1/Add.13, ¶ 10 (Mar. 19, 2004).

63 EUROPEAN CT. HUM. RTS., FACTSHEET – EXTRA-TERRITORIAL JURISDICTION OF STATES PARTIES 12 (2018), https://www.echr.coe.int/documents/fs_extra-territorial_jurisdiction_eng.pdf [https://perma.cc/6PGC-Y8PK]. This is an interpretation of "jurisdiction" as used in Article 1 of the ECHR's Convention: "Obligation to respect Human Rights. The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." EUROPEAN CONVENTION ON HUM. RTS., CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 6 (1950), https://www.echr.coe.int/Documents/Convention_ENG.pdf [https://perma.cc/9F3J-CC9T] [hereinafter ECHR].

> territorially must be determined with reference to the particular facts.[64]

While these decisions show a growing trend toward the extraterritorial application of universal human rights instruments, no such derivative norm has evolved, and no decision has focused on their application in outer space.[65]

It is argued that the "effective control" standard is problematic both on Earth[66] and in outer space.[67] Regarding its application to outer space, it is argued that "it should at least be abundantly clear that due to the particular circumstances and living conditions in outer space the current human rights treaties concluded between states on Earth are not suited for unqualified extra-territorial application to settlements in outer space."[68] Without coming to a conclusion on the "unqualified extra-territorial application" of human rights treaties *generally* "to

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64 Al-Skeini v. U.K., App. No. 55721/07, ¶ 132 (July 7, 2011), https://hudoc.echr.coe.int/eng?i=001-105606 [https://perma.cc/MC5R-6RXA].

65 Ferreira-Snyman & Ferreira, *supra* note 56.

66 Vassilis P. Tzevelekos, *Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility*, 36 MICH. J. INT'L L. 129, 131 (2014) ("[C]ontrary to the opinion that prevails in case law and in scholarship, effectiveness in the exercised control *should not* be a precondition for the exercise of jurisdiction when a state has caused wrongfulness outside its own territory. In that scenario, the criterion of effective control ought to be entirely disconnected from the question of jurisdiction.").

67 Ferreira-Snyman & Ferreira, *supra* note 56.

68 *Id.* at 28-30 ("The application of the control test in outer space law gives rise to specific problems. Firstly, as has been indicated, the *Outer Space Treaty* not only prohibits the establishment of sovereignty over any celestial body but also explicitly provides that no state may occupy any celestial body. The occupation referred to must of necessity be a permanent occupation, the reason being that in terms of the *Outer Space Treaty* states are allowed to explore outer space. Temporary occupation of a celestial body could form an inherent part of the exploration of outer space . . . . Secondly, the *Outer Space Treaty* is binding on the state parties to the treaty only, except and insofar as one could argue that the provisions of the treaty have attained the status of customary international law and are thus binding on all states, a viewpoint to which the authors subscribe. It must, however, be noted that states in many instances are not the only institutions concerned with space exploration . . . . Thirdly, a specific outer space project (for example, the functioning and maintenance of the International Space Station) often concerns, by way of agreement, the simultaneous involvement of a number of states and private enterprises. This 'fragmentation' of the rights and obligations between the various parties to the agreement could create a lot of uncertainty as to who exercises control over what in terms of which legal regime. Fourthly, . . . clarity needs to be obtained as to what would constitute a colony in outer space. Literature describes these colonies as planetary settlements and artificial habitats depending on whether they are established on a planetary body, like Mars, or on an artificially-created habitat.").

settlements in outer space," this Article argues that *jus cogens* norms must be afforded such "unqualified extra-territorial application."[69]

III. *JUS COGENS* NORMS IN OUTER SPACE

Wherever humans go, law must follow. Natural law ("*Jus naturale*") is "a philosophical system of legal and moral principles that are purported to be based on human nature and moralistic ideals of right and wrong rather than on legislation, judicial action, or statutes."[70] The purported counterpart of natural law is positive law ("*ius positum*"), defined as "[l]egislature that consists of guidelines, statutes and codes which are imposed upon a country."[71] It is argued that "[t]his distinction between natural law and positive laws is erroneous since the latter is an implementing component of the former at any given level of evolving empirical knowledge."[72] This Article also adopts this view.

Jus cogens norms are based upon natural law.[73] After World War II and the Holocaust, public international law leaned into natural law:

> The distinctive character essence of *jus cogens* is such, I submit, as to blend the concept into traditional notions of natural law. Such a blending makes sense both historically and

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69 *Id.* at 31.

70 *Jus naturale,* LEGAL INFO. INST., https://www.law.cornell.edu/wex/jus_naturale [https://perma.cc/YE7V-NBKP] (last visited Mar. 20, 2023). *See also* Kenneth Einar Himma, *Philosophy of Law*, INTERNET ENCYCLOPEDIA PHIL., https://iep.utm.edu/law-phil/#SH1c [https://perma.cc/U3YH-CUGT] (last visited Apr. 8, 2022) ("All forms of natural law theory subscribe to the *Overlap Thesis*, which is that there is a necessary relation between the concepts of law and morality. According to this view, then, the concept of law cannot be fully articulated without some reference to moral notions.").

71 *Positive Law, Definition & Legal Meaning,* L. DICTIONARY, https://thelawdictionary.org/positive-law/ [https://perma.cc/NEG8-HR9G] (last visited Apr. 8, 2022). *See also* Himma, *supra* note 70 ("Opposed to all forms of naturalism is legal positivism, which is roughly constituted by three theoretical commitments: (i) the Social Fact Thesis, (ii) the Conventionality Thesis, and (iii) the Separability Thesis. The *Social Fact Thesis* (which is also known as the *Pedigree Thesis*) asserts that it is a necessary truth that legal validity is ultimately a function of certain kinds of social facts. The *Conventionality Thesis* emphasizes law's conventional nature, claiming that the social facts giving rise to legal validity are authoritative in virtue of some kind of social convention. The *Separability Thesis*, at the most general level, simply denies naturalism's Overlap Thesis; according to the Separability Thesis, there is no conceptual overlap between the notions of law and morality.").

72 George Robinson, *What Does Philosophy Do for Space Jurisprudence and Implementing Space Law? Secular Humanism and Space Migration Essential for Survival of Humankind Species and Its "Essence"*, 19 OCCASIONAL PAPER SERIES 1, 34 (2016).

73 Mark Weston Janis, *The Nature of Jus Cogens*, 3 CONN. J. INT'L L. 359 (1988).

> functionally. Historically, it is significant that the proponents of the idea of peremptory norms invalidating treaty rules were, in no small measure, reacting to the abuses of Nazism during the Second World War. They rejected the positivist proposition that state acts, even the making of treaties, should be always thought capable of making binding law. Verdross, one of *jus cogens*' earliest advocates, explained that the concept of *jus cogens* was quite alien to legal positivists, but '[t]he situation was quite different in the natural law school of international law.' Natural lawyers were ready to accept 'the idea of a necessary law which all states are obliged to observe . . . , [that is, an] ethics of the world.'[74]

In their casebook on international law, Janis, Noyes, and Sadat ask: "To what extent do beliefs in legal positivism and that states alone are legitimate sources of legal rules depend on an unrealistic expectation that governments will always act responsibly?"[75] Further, genocide, crimes against humanity, and other atrocities are often preceded by a drastic change in the laws or legal systems in place.[76] When the law or legal systems are weaponized, what is the fallback? Since "positive law is an implementing component of natural law at any given level of evolving empirical knowledge," natural law remains a foundation to return to after times of unrestrained, weaponized legal power.[77] It is explained:

> In so far as the revival of the authority of natural law, in its modern connotation, has tended to undermine the rigid positivism of the nineteenth century, that development received an accession of strength . . .. The rise of the German and the other totalitarian dictatorships, trampling upon the rights of man and universally accepted notions of law, once more tended to bring into prominence the importance of the vitality of legal standards which, though they may not be enforceable before municipal courts, are of an enduring validity transcending the positive law of any one sovereign state.[78]

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74 *Id.* at 361.

75 MARK WESTON JANIS, JOHN E. NOYES & LEILA NADYA SADAT, INTERNATIONAL LAW: CASES AND COMMENTARY 175 (6th ed. 2020).

76 *See e.g.*, the Holocaust, the Rwandan Genocide, and the Uyghur Genocide.

77 Robinson, *supra* note 72.

78 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE: VOLUME I—PEACE 108 (H. Lauterpacht ed., 8th ed. 1955).

Article 53 of the VCLT addresses *Treaties conflicting with a peremptory norm of general international law ('jus cogens')* and finds void any treaty that conflicts with *jus cogens* norms.[79] Notably:

> The inclusion of Article 53 in the VCLT sanctioned the 'positivization' of natural law. In other words, to have codified in a treaty a normative category with an open-ended character, the content of which could become intelligible only by reference to some natural law postulates, was tantamount to dignifying the latter's otherwise uncertain foundation by granting it the status of positive law.[80]

Thus, quite opposite to natural and positive law being mutually exclusive, they have more of an interdependent relationship since positive law derives consensus for positivization from natural law and implements empirical natural law as it evolves.[81]

The Future of Natural Law

Natural law is based on a moral agreement in humans and "'morality' is a constantly shifting measurable trait depending upon its usefulness as a biological characteristic or series of interactive

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79 VCLT, *supra* note 42, art. 53 ("*Article 53. Treaties conflicting with a peremptory norm of general international law ('jus cogens')*. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."). *See also* Andrea Bianchi, *Human Rights and the Magic of Jus Cogens,* 19 EUR. J. INT'L L. 491, 495-96 ("It is an irony of sorts that we know the most about the effects of a violation of *jus cogens* in the one area in which they are least likely to be relevant: the law of treaties. It is indeed highly unlikely that two or more states would make a treaty to commit an act of genocide or to subject certain individuals to torture. And yet we know from Article 53 that, as a matter of law, any such treaty would be null and void for the parties to the VCLT and, likewise, for all states as a matter of customary international law.").

80 Bianchi, *supra* note 79, at 495 ("The introduction of ethical and moral concerns into the international legal system takes place for the first time in an overt manner. The classical international law attitude of hiding ethical and political considerations behind the screen of the objectivity of positive law rules derived directly or inductively from the will of states yields to the express acknowledgment that rules can be hierarchically ordered on the basis of their underlying values. The inner moral aspiration of the law thus materialized in international law with the advent of *jus cogens*."). *See* René-Jean Dupuy's remarks at the meeting of the Committee of the Whole on Apr. 30, 1968 (UN Conference on the Law of Treaties, First Session Vienna, Mar. 26-May 24, 1968, Official Records, Summary records of the plenary meetings of the Committee of the Whole, at 258, ¶ 74).

81 Robinson, *supra* note 72, at 34.

biochemical relationships aimed at specimen or even species survival."[82] This definition will have to expand to accommodate for a future where humans will likely have to cooperate under a legal system with other nonhuman or part-human species at varying levels of intelligence:

> *Homo sapiens sapiens* is not the final step in organic life and its essence evolution. The next step is developing *trans*humanism and post humanism evolution that cultivates its own respective levels and characteristics of essence and its evolution. An empirical understanding of the biotic and biotechnologically integrated characteristics of post humanism is critical regarding the future evolution of the empirical and seemingly abstract characteristics of 'essence', i.e., relying on the unfolding methodologies presented by philosophic inquiries. Their defining characteristics will serve as the principal catalysts for evolving understandings of what constitutes space jurisprudence and its implementing positive laws addressed toward facilitating human*kind* migration off-Earth.[83]

This evolution will have a direct impact on positive laws in space since, as previously concluded, positive law implements natural law.[84]

As natural law evolves, so too will positive law. Part III evaluated the extraterritorial application of human rights instruments and *jus cogens* norms on Earth.[85] Without coming to a conclusion on whether human rights instruments generally are "suited for unqualified extraterritorial application to settlements in outer space," this Article argues that *jus cogens* norms must be afforded unqualified extraterritorial application in outer space.[86]

By their nature, *jus cogens* norms are non-derogable.[87] Thus, since the principle that the use and exploration of outer space must be

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82 *Id.* at 37.

83 *Id.* at 48-49; *see also id.* at 20 ("[T]he *transhuman* and, indeed, *posthuman* entities incorporating biotechnological integration to the point where human descendants ultimately may be considered totally separate and independent self-replicating and metabolising sentient entities with whom or which modern humans must interact in the context of 'metalaw.'" (citation omitted)).

84 *See* Robinson, *supra* note 72.

85 *See supra* Part III.

86 Ferreira-Snyman & Ferreira, *supra* note 56, at 28-31.

87 2019 Int'l Law Comm'n Rep., *supra* note 43, ¶ 56, Conclusion 2 ("A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

in accordance with international law is customary international law, established *jus cogens* norms are also non-derogable in outer space—including the prohibition against torture. Any other conclusion that places or spaces exist where fundamental laws cannot be applied or enforced would undermine the rule of law on Earth.

IV. CONCLUSION

In the case of the Guantánamo Bay detention center, the September 11 attacks caused a change in and focus on anti-terrorism laws globally. In the United States, there was an expansion of the Executive Branch and reining in of the Judiciary via the Patriot Act and other legislation.[88] The law and legal systems of the United States and its military were weaponized against an endless and elusive "War on Terror."[89] President Bush's Military Order of November 13, 2001, called for the creation of a detention center, which resulted in Guantánamo

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88 USA PATRIOT Act, 18 U.S.C.A. § 1 (2008). *See also* Emmanuelle Quintart, *Law, Crisis and Guantanamo After 9/11*, 76 REVUE INTERDISCIPLINAIRE D'ÉTUDES JURIDIQUES 211, 217 (2016) [hereinafter *Quintart*] ("[T]he Patriot Act was passed in order to extend the Executive's power and restrict certain fundamental rights. However, in order to respect the rule of law, those exceptional measures conferring powers to the Executive or restricting constitutional guarantees should be limited. There are some rights that should remain untouched, such as the prohibition of torture. Unfortunately, those limits have not been respected.").

89 *See* George W. Bush, *Address to a Joint Session of Congress and the American People* (Sept. 20, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html [perma.cc/654Z-GNGG]. *See also Quintart*, *supra* note 88, at 214-15 (Explaining how the "War on Terror" has an unlimited spatial scope: "The enemy is not identified but is instead generalized under the term of enemy combatant. This term first appeared in the case *Ex Parte Quirin*, before being defined in several legal documents. However, the definitions are quite divergent, and no standard has been established. Nevertheless we can consider that this term applies to persons captured in the theatre of hostilities who acted as combatants or aided the enemy effort . . . . Furthermore, this war has an undetermined character. As a matter of fact, its aim and justifications are vague." Further, the "War on Terror" refers to a war that is unlimited in time. "This implies that all the exceptional measures and legal acts adopted in the course of this war could remain in force forever. Yet those measures significantly curtail important human rights and should thus be temporary. Moreover, the special powers conferred to the executive power by the legislative power may also be indefinite. Therefore, the legal certainty is threatened. Furthermore, it implies that all those enemy combatants who are supposed to remain imprisoned until the end of the war can be held indefinitely, unless it is proven that they do not constitute a threat to the nation. As a consequence of the indefinite duration, the war and its exceptional character are normalized. In fact, the state of exception is normalized.").

Bay.[90] And, despite the Military Order calling for detainees to be "treated humanely," detainees were subjected to torture.[91]

Guantánamo Bay was not the first and will not be the last legal black hole. Outer space is the new frontier for legal black holes like Guantánamo Bay. Plans for humans to live in outer space will continue to grow in the coming decades.[92] The resulting legal black holes from human exploration of outer space cannot yet be imagined. This topic is timely and pertinent to modern application because if places or spaces exist where fundamental laws cannot be applied or enforced, then such legal black holes undermine the rule of law.

As such, closing some of these legal black holes beforehand is vital. Since the principle that the use and exploration of outer space must be in accordance with international law is customary international law, established *jus cogens* norms are also non-derogable in outer space—including the prohibition against torture. This conclusion reinforces the rule of law on Earth.

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90 Press Release, George W. Bush, President, United States of America, President Issues Military Order (Nov. 13, 2001), https://www.mc.mil/Portals/0/MilitaryOrderNov2001.pdf [https://perma.cc/7V62-EDXD].

91 *Id.* (stating, in relevant part:

> Sec. 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be – (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States; (b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria; (c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
>
> (d) allowed the free exercise of religion consistent with the requirements of such detention; and (e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.).

See also e.g., Carol Rosenberg, *For First Time in Public, a Detainee Describes Torture at C.I.A. Black Sites*, N.Y. TIMES, https://www.nytimes.com/2021/10/28/us/politics/guantanamo-detainee-torture.html [https://perma.cc/Y63T-HCEE] (Oct. 30, 2021).

92 Christian Davenport, *Rockets Aren't Enough. Jeff Bezos and the Growing Commercial Space Industry Now Want to Build Space Stations.*, THE WASHINGTON POST (Oct. 25, 2021, 12:44 PM EDT), https://www.washingtonpost.com/technology/2021/10/25/private-space-stations-blue-origin-boeing/ [https://perma.cc/SH8X-TUTH].