

The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*

Jordan J. Paust**

1. THE PEREMPTORY PROHIBITION

Torture is a form of treatment of human beings that is absolutely prohibited under various forms of customary and treaty-based international law in all social contexts.¹ Other forms of treatment that are absolutely prohibited and that are often proscribed in the same international instruments that outlaw torture include prohibitions of cruel, inhumane, and degrading treatment.² Additionally, each form of ill-treatment constitutes a violation of peremptory rights and prohibitions *jus cogens*³ that trump any inconsistent portion of an international agreement and more ordinary forms of customary international law.⁴ These forms of ill-treatment can never constitute lawful public acts of any state or public official. Furthermore, as customary rights and prohibitions *jus cogens*, each applies universally and without any attempted limitations in reservations with respect to a particular

* The full version of this article was published in 43 Valparaiso University Law Review 1535 (2009).cc

** Mike & Teresa Baker Law Center Professor, University of Houston. Thanks to Dan Baker of our library staff for useful research.

¹ See, e.g., J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Colum. J. Transnat'l L. 811, 816-18, 820-22, 846 (2005) [hereinafter Paust, *Executive Plans*]; J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 Utah L. Rev. 345, 360-64, 366 (2007) [hereinafter Paust, *Above the Law*]; Committee Against Torture, Gen. Comm. No. 2, Implementation of Article 2 by States parties, paras. 1, 5, U.N. Doc. CAT/C/GC/2 (24 Jan. 2008) [hereinafter CAT Comm. Gen. Comm.]; text *infra* note 67. The articles have been revised in J. Paust, *Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror* (2007). Since there is no necessity or other exception, as a matter of law there is no necessity defense.

² See, e.g., Paust, *Executive Plans*, *supra* note 1, at 816-22, 835, 845-46. This is why it is inadequate for a government to state merely that it does not allow torture. Such a statement was part of a repeated ploy of the Bush Administration despite the fact that any lawyer in the Administration who was not professionally irresponsible would have known that inhumane treatment of any person under any circumstance is unlawful. See Paust, *supra* note 1, at 30-31.

³ See, e.g., *id.* at 821 & nn.39-40; Restatement of the Foreign Relations Law of the United States § 702(d), cmnt. n (3 ed. 1987); CAT Comm. Gen. Comm., *supra* note 1, para. 1.

⁴ With respect to the nature of *jus cogens* norms, see, e.g., J. Paust, Jon M. Van Dyke, Linda A. Malone, *International Law and Litigation in the U.S.* 61-63 (2 ed. 2005).

treaty.⁵ As customary human rights prohibitions, they also apply universally and in all social contexts as part of the legal obligation of all members of the United Nations under the United Nations Charter to ensure “universal respect for, and observance of, human rights.”⁶

In December 2007, the United Nations General Assembly reaffirmed nearly unanimous and consistent patterns of legal expectation or *opinio juris*⁷ that “no one shall be subjected to torture or to other cruel, inhuman or degrading treatment or punishment;”⁸ that freedom from such unlawful treatment “is a non-derogable right that must be protected under all circumstances, including in times of international or internal armed conflict or disturbance;”⁹ and that “a number of international, regional and domestic courts ... have recognized that the prohibition of torture is a peremptory norm of international law and have held that the prohibition of cruel, inhuman or degrading treatment or punishment is customary international law.”¹⁰ Stressing the absolute prohibition of torture and other outlawed forms of ill-treatment, the General Assembly condemned “all forms” of such “treatment or punishment, including through intimidation,” and reiterated the fundamental expectation of the international community that such forms of ill-treatment “are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified.”¹¹ One year earlier, the General Assembly had reaffirmed that “States are under the obligation to protect all human rights and fundamental

⁵ See, e.g., Paust, Executive Plans, *supra* note 1, at 822-23; Paust, *supra* note 1, at 4-5.

⁶ See, e.g., U.N. Charter, arts. 55(c), 56; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance With the Charter of the United Nations, U.N. G.A. Res. 2625 (Oct. 24, 1970), 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971) (“Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881-82 (2d Cir. 1980) (observing with respect to Articles 55(c) and 56 of the Charter that “the guarantees include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III) (A) (Dec. 10, 1948) which states in the plainest of terms, ‘no one shall be subjected to torture.’ The General Assembly has declared that the Charter precepts embodied in this Universal Declaration ‘constitute basic principles of international law.’ G.A. Res. 2625 (XXV) (Oct. 24, 1970)” [the 1970 Declaration on Principles of International Law]).

⁷ Concerning the nature of *opinio juris* as an element of customary international law, see, e.g., Paust, Van Dyke, Malone, *supra* note 4, at 4, 29-30, 42-43, 46-48, 93-94, 102-03, 105.

⁸ Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 62/148, prmb. (18 Dec. 2007), U.N. Doc. A/RES/62/148 (4 Mar. 2008). A 2008 resolution with the same title reaffirmed this and the next three points. See U.N. G.A. Res. 63/166, prmb. (18 Dec. 2008), U.N. Doc. A/RES/63/166 (19 Feb. 2009). Similar prior resolutions with the same name reaffirmed many of the points that follow. See, e.g., U.N. G.A. Res. 61/153, prmb. (19 Dec. 2006), U.N. Doc. A/RES/61/153 (14 Feb. 2007); U.N. G.A. Res. 60/148 (16 Dec. 2005), U.N. Doc. A/RES/60/148 (21 Feb. 2006).

⁹ U.N. G.A. Res. 62/148, *supra* note 8, prmb.

¹⁰ *Id.* prmb.

¹¹ *Id.* para. 1

freedoms of all persons”¹² and that “States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular, international human rights, refugee and humanitarian law.”¹³

2. CRIMES OF TORTURE AND SANCTION DUTIES

With respect to the obligation of every state to enforce such rights and prohibitions and the criminal nature of such forms of ill-treatment, the General Assembly has condemned “any action or attempt ... to legalize, authorize or acquiesce in torture and other cruel, inhuman or degrading treatment ... under any circumstances, including on grounds of national security or through judicial decisions.”¹⁴ Allegations that such forms of ill-treatment have occurred, the General Assembly has stressed, “must be promptly and impartially examined ... [and, with respect to nonimmunity and the duty to prosecute,] those who encourage, order, tolerate or perpetrate acts of torture must be held responsible, brought to justice and punished..., including the officials in charge of the place of detention.”¹⁵ While emphasizing that during armed conflict “acts of torture are serious violations of international humanitarian law and ... constitute war crimes” and that perpetrators “must be prosecuted and punished,” the General Assembly emphasized that they

¹² Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, U.N. G.A. Res. 61/171, prml. (19 Dec. 2006), U.N. Doc. A/RES/61/171 (1 Mar. 2007). The same language appeared in a 2008 resolution by the same title. U.N. G.A. Res. 63/185, prml. (18 Dec. 2008), U.N. Doc. A/RES/63/185 (3 Mar. 2009).

¹³ U.N. G.A. Res. 61/171, *supra* note 12, at para. 1. The same language appears in a 2008 resolution. See U.N. G.A. Res. 63/185, *supra* note 12, prml. The 2006 resolution used the same language that appeared in a 2004 resolution with the same title. U.N. G.A. Res. 59/191, para. 1 (20 Dec. 2004), U.N. Doc. A/RES/59/191 (10 Mar. 2005). See also Human Rights and Terrorism, U.N. G.A. Res. 59/195, prml. (20 Dec. 2004) (“Reaffirming that all measures to counter terrorism must be in strict conformity with international law, including human rights standards and obligations”), U.N. Doc. A/RES/59/195 (22 Mar. 2005).

¹⁴ U.N. G.A. Res. 63/166, *supra* note 8, at para. 5; U.N. G.A. Res. 62/148, *supra* note 8, at para. 4.

¹⁵ U.N. G.A. Res. 63/166, *supra* note 8, at para. 6. See also *id.* at para. 17 (“Calls upon States parties to the ... [CAT] to fulfil their obligation to submit for prosecution or extradite those alleged to have committed acts of torture”); U.N. G.A. Res. 62/148, *supra* note 8, at para. 5 (similar language); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. G.A. Res. 60/147, Annex, part III, para. 4 (“In case of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.”) (16 Dec. 2005); Human Rights Commission, Res. 32, Torture and other cruel, inhuman or degrading treatment or punishment, E/CN.4/RES/1999/32 (23 Apr. 1999); Human Rights Commission, Res. 1999/1 (6 Apr. 1999), quoted in Martin Scheinin, Yuji Iwasawa, Andrew C. Byrnes, Menno T. Kamminga, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses 7, International Law Association Conference (London 2000); *infra* notes 26-28, 31-32.

can also constitute “crimes against humanity”¹⁶ – a point evident in the customary post-World War II charters and laws created for prosecution of customary crimes against humanity in the international criminal tribunals at Nuremberg and Tokyo and in numerous fora that operated in Europe under Control Council Law No. 10, which crimes expressly included torture and “other inhumane acts.”¹⁷

The General Assembly also took note of the fact that “prolonged incommunicado detention or detention in secret places can facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment.”¹⁸ In 2006, in response to unlawful conduct authorized by President Bush and others in his administration,¹⁹ the Committee Against Torture, which operates under the auspices of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),²⁰ recognized that “secret detention ... constitutes, *per se*, a violation of the Convention” and that “enforced disappearance [a previously widely recognized crime against humanity under customary international law].²¹... constitutes, *per se*, a violation of the Convention.”²² The Committee Against Torture also declared that “detaining persons indefinitely without charge, constitutes *per se* a violation of the Convention.”²³

¹⁶ U.N. G.A. Res. 63/166, *supra* note 8, at para. 12; U.N. G.A. Res. 62/148, *supra* note 8, at para. 6. Prosecution of torture as a crime against humanity has occurred in the International Criminal Tribunal for Former Yugoslavia (ICTY). See, e.g., *Prosecutor v. Kunarac, Kovač, and Vuković*, Trial Judgement, Case No. ICTY-96-23/1-T, 22 February 2001.

¹⁷ See, e.g., Charter of the International Military Tribunal at Nuremberg, Annex to the London Agreement (8 Aug. 1945), art. 6(c) (“other inhumane acts committed against any civilian population”), 82 U.N.T.S. 279; Charter for the International Military Tribunal for the Far East (Tokyo Charter), as amended by General Orders No. 20 (26 Apr. 1946), art. 5(c) (“other inhumane acts committed before or during the war”), T.I.A.S. 1589; Allied Control Council Law No. 10, (20 Dec. 1945), art. II(1)(c) (“torture, rape, or other inhumane acts committed against any civilian population”), Control Council for Germany, Official Gazette 50 (Jan. 31, 1946).

¹⁸ U.N. G.A. Res. 63/166, *supra* note 8, at para. 20; U.N. G.A. Res. 62/148, *supra* note 8, at para. 15. See also U.N. G.A. Res. 61/153, *supra* note 8, at para. 12.

¹⁹ See, e.g., Paust, Executive Plans, *supra* note 1, at 812, 824-51; Paust, Above the Law, *supra* note 1, at 345-59.

²⁰ 1465 U.N.T.S. 85 (Dec. 10, 1984) [hereinafter CAT].

²¹ With respect to the crime against humanity known as forced disappearance and involving a refusal to disclose either the name or whereabouts of a detainee, see, e.g., Rome Statute of the International Criminal Court, art. 7(1)(i), (2)(i) (forced disappearance is a crime against humanity), 2187 U.N.T.S. 90 [hereinafter Rome Statute of the ICC]; International Convention for the Protection of All Persons from Enforced Disappearance, *prmb.*, adopted by U.N. G.A. Res. 61/177 (20 Dec. 2006); Inter-American Convention on the Forced Disappearance of Persons, art. II, done in Belen, Brazil, June 9, 1994, reprinted in 33 I.L.M. 1529 (1994). (A detailed set of citations and material is found in the original footnote.)

²² U.N. Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture, United States of America, paras. 17-18, 36th sess., U.N. Doc. CAT/C/USA/CO/2 (18 May 2006) [hereinafter CAT Report], available at <<http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf>> .

²³ *Id.* para. 22.

Also in 2006, the United Nations Security Council reaffirmed “its condemnation in the strongest terms of all acts of violence or abuses committed against civilians in situations of armed conflict..., in particular ... torture and other prohibited treatment.”²⁴ Additionally, the Security Council demanded that all parties to an armed conflict “comply strictly with the obligations applicable to them under international law, in particular those contained in the Hague Conventions of 1899 and 1907 and in the Geneva Conventions of 1949.”²⁵ The Security Council also stressed “the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of humanitarian law,”²⁶ which can include the use of torture and cruel and inhumane treatment.

Article 146 of the 1949 Geneva Civilian Convention²⁷ expressly and unavoidably requires that all Parties, thus including the United States, “search for persons alleged to have committed, or to have ordered to be committed, ... grave breaches [of the Convention] and shall bring such persons, regardless of their nationality, before its own courts” for “effective penal sanctions” or, “if it prefers, ... hand such persons over for trial to another High Contracting Party.”²⁸ The obligation is absolute and applies with respect to alleged perpetrators of any status. As a party to the Geneva Conventions, the United States must either initiate prosecution or extradite to another state or, today, render an accused to

²⁴ U.N. S.C. Res. 1674, para. 5, U.N. Doc. S/RES/1674 (28 Apr. 2006).

²⁵ *Id.* para. 6. See also U.N. S.C. Res. 1566, prml., U.N. Doc. S/RES/1566 (8 Oct. 2004) (States must “ensure that any measures taken to combat terrorism comply with all their obligations under international law..., in particular international human rights, refugee, and humanitarian law”).

²⁶ U.N. S.C. Res. 1674, *supra* note 24, at para. 8; see also U.N. S.C. Res. 1820, prml. (“Reaffirming also the resolve expressed in the 2005 World Summit Outcome Document to eliminate all forms of violence against women and girls, including by ending impunity”), para. 4 (“Notes that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide, stresses the need for the exclusion of sexual violence crimes from amnesty provisions..., and calls upon Member States to comply with their obligations for prosecuting persons responsible for such acts ... and stresses the importance of ending impunity for such acts”), U.N. Doc. S/RES/1820 (19 June 2008); U.N. S.C. Res. 1261, prml., U.N. Doc. S/RES/1261 (25 August 1999) (stressing “the responsibility of all States to bring an end to impunity and their obligation to prosecute those responsible for grave breaches of the Geneva Conventions,” which include the use of torture), U.N. Doc. S/RES/1261 (30 Aug. 1999). Under international law, all states have a competence to prosecute such crimes that is termed universal jurisdiction. See, e.g., J. Paust, *International Law as Law of the United States* 420-23, 432-41 (2 ed. 2003). (A detailed set of citations and material is found in the original footnote.)

²⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 (1955) [hereinafter GC].

²⁸ GC, *supra* note 27, art. 146. See also Henckaerts & Doswald-Beck, *Customary International Humanitarian Law: Rules* (ICRC 2005), at 606-611; 4 Commentary, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 587, 590, 597, 602 (ICRC, Jean S. Pictet ed. 1958); U.S. Dep’t Army, FM 27-10, *The Law of Land Warfare* 178, para. 499 (“The term ‘war crime’ is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime”), 181, para. 506(b) (the requirements set forth in GC art. 146 “are declaratory of the obligation of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent’s own armed forces.”) (1956).

the International Criminal Court. “Grave breaches” of the Convention include “torture or inhuman treatment”²⁹ and transfer of a non-prisoner of war from occupied territory.³⁰ Similarly, Article 7, paragraph 1, of the Convention Against Torture expressly and unavoidably requires that a Party to the treaty “under whose jurisdiction a person alleged to have committed ... [for example, torture or “complicity or participation in torture”] is found, shall ... if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.”³¹ There are no other alternatives.

When 160 states met in Rome in 1998 to create the International Criminal Court (ICC), they emphasized that there is a lack of immunity for international crimes such as genocide, other crimes against humanity, and war crimes and affirmed the universal duty to end impunity and prosecute alleged perpetrators of such *crimen contra omnes* in international and domestic courts. For example, the preamble to the Statute of the ICC declares emphatically “that the most serious crimes of concern to the international community as a whole must not go unpunished and ... their effective prosecution must be ensured by taking measures at the national level,” expresses the determination of the community “to put an end to impunity for the perpetrators of these crimes,” and recalls the fact “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”³²

With respect to Article 7 of the International Covenant on Civil and Political Rights,³³ which mirrors customary human rights law and absolutely prohibits any form of torture and cruel, inhuman, and degrading treatment of any human being under any circumstances,³⁴ the Human Rights Committee that functions under the auspices of the treaty had declared as early as 1982 that “[c]omplaints about ill-treatment must be investigated ... [and t]hose found guilty must be held responsible.”³⁵ Ten years later, the Committee reiterated the requirement that those who violate Article 7, “whether [acts are] committed by public officials or other persons acting on behalf of the State, or by private persons,”³⁶ and “whether by encouraging, ordering, tolerating, or perpetrating prohibited acts must be held

²⁹ *Id.* art. 147.

³⁰ *Id.* arts. 49, 147; *infra* note 97.

³¹ CAT, *supra* note 20, art. 7(1).

³² See Rome Statute of the ICC, *supra* note 21, prmb1.

³³ International Covenant on Civil and Political Rights (9 Dec. 1966), 999 U.N.T.S. 171 [hereinafter ICCPR].

³⁴ ICCPR, *supra* note 33, art. 7. Regarding the customary and non-derogable nature of such rights and prohibitions, see, e.g., Paust, *supra* note 1, at 4-5. The obligations also apply wherever the U.S. exercises effective control over a person of any status. See, e.g., *id.* at 142-43 n.40, 183-84 n.40. The same obligations apply through the U.N. Charter and are similarly universal. See *supra* note 6 and accompanying text. The obligations under the CAT are also universal. See, e.g., Paust, *supra* note 1, at 173 n.1, 187 n.43, 199-200 n.145.

³⁵ H.R. Comm., General Comment No. 7, para. 1, Report of the H.R. Comm., 37 U.N. GAOR, Supp. No. 40, Annex V, U.N. Doc. E/CN.4/Sub.2/Add.1/963 (1982).

³⁶ H.R. Comm., General Comment No. 20, para. 13 (1992), in International Human Rights Instruments, U.N. Doc. HRI/GEN/1 (4 Sept. 1992), at 29-32. Concerning private duties under human rights law, see also *infra* note 65.

responsible.”³⁷ The Committee added that the state parties to the treaty have a duty to afford protection whether such acts are “inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”³⁸

A striking feature of every international criminal law treaty is that there is no recognition of any form of immunity for official elites. In fact, Article 27 of the Statute of the ICC expressly affirms that “official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility” and that “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction.”³⁹

3. TYPES OF CRIMINAL RESPONSIBILITY FOR TORTURE

At least four general types of criminal responsibility exist under international law with respect to torture and other outlawed treatment. First, it is obvious that direct perpetrators of violations of the Geneva Conventions, other laws of war, the Convention Against Torture, and crimes against humanity (such as forced disappearance of persons) have direct liability. Leaders who issue authorizations, directives, findings and orders to commit acts that constitute international crimes, such as former President Bush and former Secretary of Defense Rumsfeld, can also be prosecuted as direct perpetrators of crimes.⁴⁰

³⁷ *Id.* para. 13. As noted above, the responsibility to prosecute has been emphasized by the U.N. General Assembly and Security Council. See, e.g., *supra* notes 15-16, 26 and accompanying text.

³⁸ *Id.* para. 2.

³⁹ Rome Statute of the ICC, *supra* note 21, art. 27(1)-(2). See also Prosecutor v. S. Milosević, Decision On Preliminary Motions, Case No. ICTY-99-37-PT, 8 November 2001, paras. 26-34 (the lack of immunity of heads of state for war crimes, genocide, and other crimes against humanity that is reflected in Article 7 of the Statute of the ICTY “reflects a rule of customary international law”); *infra* notes 59-60; text *infra* note 62 (perpetrators under the CAT who are not immune expressly include “a public official or other person acting in an official capacity”). The ICC’s recognition that domestic immunities cannot obviate jurisdiction of the Court is an affirmation of the fact that under international law no limiting domestic laws, amnesties, pardons, or grants of immunity would be entitled to any legal effect in another state or in any international forum. See, e.g., Prosecutor v. Furundzija, Trial Judgement, Case No. ICTY-95-17/1-T, 10 December 1998), paras. 153-55 (“national measures authorising or condoning torture or absolving its perpetrators through an amnesty law” would have no affect internationally); Paust, *supra* note 1, at 202 n.150; J. Paust, M. Cherif Bassiouni, et al., *International Criminal Law* (3 ed. 2007), at 30, 34, 127-28, 132-34, 137-40, 163, 821; note 85. Further, if legally operative limitations exist under domestic law of a particular state, its duty shifts from the duty to initiate prosecution to a duty to extradite or render an accused to an international tribunal. See also *supra* note 26 and accompanying text; text *infra* notes 109-111.

⁴⁰ See, e.g., Paust, Bassiouni, et al., *supra* note 39, at 32, 35, 51-73. See also *infra* notes 69-72, 76, 78-80, 101-102. This and the next three paragraphs are borrowed from J. Paust, *Prosecuting the President and His Entourage*, 14 ILSA J. Int’l & Comp. L. 539, 542-43 (2008). The following form of responsibility has been applied to cabinet officials: “A member of a Cabinet which collectively, as one of the principal organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of crimes ..., and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future,

Second, any person who aids and abets torture has liability as a complicitor or aider and abettor before the fact, during the fact, or after the fact.⁴¹ Liability exists whether or not the person knows that his or her conduct is criminal or that the conduct of the direct perpetrator of torture is criminal or even constitutes torture as such.⁴² Under customary international law, a complicitor or aider and abettor need only be aware that his or her conduct (which can include inaction) would or does assist a direct perpetrator or facilitates conduct that is criminal.⁴³ In any case, ignorance of the law is no excuse. Especially relevant in this respect are the criminal memoranda and behavior of various German lawyers in the

he elects to continue as a member of the Cabinet. This is the position even though the Department of which he is in charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill-treatment in the future.” Judgment of International Military Tribunal for the Far East (1948), reprinted in Paust, Bassiouni, et al., *supra* note 39, at 53.

⁴¹ See, e.g., CAT, *supra* note 20, art. 4(1); Paust, Bassiouni, et al., *supra* note 39, at 35, 44-49; Paust, *supra* note 1, at 18, 24, 30, 165, 167, 185, 193, 199, 277.

⁴² See, e.g., Rome Statute of the ICC, *supra* note 21, arts. 25(3)(c)-(d), 30, 32(2). See also Prosecutor v. Kordić & Čerkez, Appeals Judgement, Case No. ICTY-95-14/2-A, 17 December 2004), para. 311 (more generally, an accused need not know the “specific legal definition of each element of a crime.... It suffices that he was aware of the [relevant] factual circumstances.”); Guenael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 Harv. Int’l L.J. 237, 297 n.323 (2002) (regarding the factual quality, the accused “need not have known that his or her act ... amounted to an ‘inhumane act’ either in the legal or moral sense.”); CAT Comm. Gen. Comm., *supra* note 1, para. 9 (“elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances”). See also Jordan J. Paust, *The Complicity of Dick Cheney: No ‘Necessity’ Defense*, Jurist (May 2009), available at <http://jurist.law.pitt.edu/forumy/2009/05/complicity-of-dick-cheney-no-necessity.php>; Jordan J. Paust, Rice, *Waterboarding and Accountability* (May 2009), available at <http://jurist.law.pitt.edu/forumy/2009/05/rice-waterboarding-and-accountability.php>.

⁴³ See, e.g., Prosecutor v. Blaškić, Appeals Judgement, Case No. ICTY-95-14-T-A, 29 July 2004, para. 50 (“If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate ... that crime ... and is guilty as an aider and abettor”); Prosecutor v. Furundžija, Trial Judgement, Case No. ICTY-95-17/1-T, 10 December 1998, paras. 236-38, 245-46, 249 (“mere knowledge that his actions assist” and not a purpose to assist); Prosecutor v. Kambanda, Judgement and Sentence, Case No. ICTR-97-23-S, 4 September 1998, para. 39 (complicity included refusals to oppose criminal conduct during “meetings of the Council of Ministers, cabinet meetings and meetings of prefects where the course of ... [illegal conduct was] actively followed” and use of directives that “encouraged and reinforced” conduct that was criminal); *Almog v. Arab Bank, PLC*, 471 F. Supp.2d 257, 286-87 (E.D.N.Y. 2007); text *supra* note 37. At the International Military Tribunal for the Far East concerning the Trial of Koiso, an ex-Prime Minister, guilt was established where the accused knew that treatment of prisoners “left much to be desired” and he had asked for a full inquiry but did not resign from office or act more affirmatively to stop illegal treatment. 2 Judgment of the IMT for the Far East 1778-79 (1948). Cf Rome Statute of the ICC, *supra* note 21, art. 25(3)(c) (“[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists”). The forms of criminal complicity recognized in Kambanda and Koiso seem to be particularly relevant to meetings of former Vice President Cheney and other high level officials of the Bush Administration in the White House during 2002 and 2003. See *infra* notes 76-77

German Ministry of Justice, high level executive positions outside the Ministry, and the courts in the 1930s and 1940s that were addressed in informing detail in *United States v. Altstoetter* (The Justice Case).⁴⁴ Clearly, several memo writers and others during the Bush Administration abetted the “common, unifying” plan to use “coercive interrogation,” and their memos and conduct substantially facilitated its effectuation.⁴⁵ Therefore, prosecution or extradition of several former members of the Bush Administration for criminal complicity would be on firm ground.

Third, individuals can also be prosecuted for participation in a “joint criminal enterprise,”⁴⁶ which the International Criminal Tribunal for Former Yugoslavia has recognized can exist in at least two relevant forms: (1) where all the accused “voluntarily participate in one aspect of a common plan” and “intend the criminal result [whether or not they knew it was a crime], even if not physically perpetrating the crime”⁴⁷; and (2) where “(i) the crime charged is the natural and foreseeable consequence of the execution of that enterprise, and (ii) the accused was aware that such a crime was a possible consequence of the execution of that enterprise, and, with that awareness participated in that enterprise.”⁴⁸

Fourth, civilian or military leaders with *de facto* or *de jure* authority, such as former President Bush and former Secretary of Defense Rumsfeld, can also be liable for dereliction of duty with respect to acts of torture engaged in by subordinates when the leader (1) knew or should have known that subordinates were about to commit, were committing, or had committed international crimes; (2) the leader had an opportunity to act; and (3) the leader failed to take reasonable corrective action, such as ordering a halt to criminal activity or initiating a process for prosecution of all subordinates reasonably accused of criminal conduct.⁴⁹

⁴⁴ See *United States v. Altstoetter* (The Justice Case), 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1058 (1951).

⁴⁵ See, e.g., *infra* notes 76-80, 86-102.

⁴⁶ See, e.g., Paust, Bassiouni, et al., *supra* note 39, at 32, 37-38; Allison Marston Danner, *Joint Criminal Enterprise*, in 3 *International Criminal Law: Enforcement* 483 (M. Cherif Bassiouni ed., 3 ed, 2008).

⁴⁷ See, e.g., *Prosecutor v. Brdanin*, Trial Judgement, Case No. ICTY-99-36-T, 1 September 2004, para. 264. Concerning the Bush Administration’s “common, unifying” plan to deny rights and protections under international law and to use unlawful interrogation tactics, see, e.g., *infra* notes 69-72, 76-80, 86-102.

⁴⁸ *Id.* para. 265; *Prosecutor v. Blaškić*, Appeals Judgement, Case No. ICTY-95-14-T-A, 29 July 2004, para. 50.

⁴⁹ See, e.g., Paust, Bassiouni, et al., *supra* note 39, at 51-89. The President of the United States and the Secretary of Defense, among others, have *de jure* command authority. Further, this type of leader responsibility for dereliction of duty is part of customary international law that is part of the supreme law of the land in the United States. It has also been incorporated by reference in 10 U.S.C. § 818, which incorporates all violations of the laws of war as offenses against the laws of the United States. See, e.g., *infra* note 106. Leader responsibility incorporated through such a statute (then, through the same language found in the 1916 Articles of War) was recognized by the Supreme Court in *In re Yamashita*, 327 U.S. 1, 15-16 (1946); see also *Prosecutor v. Delalić*, Trial Judgement, Case No. ICTY-96-21-T, 16 November 1998, para.338. It has also been used with respect to civil sanctions against leaders. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995); *Xuncax v.*

4. THE RIGHT TO FAIR COMPENSATION

In 2007 and 2008, the United Nations General Assembly stressed “that national legal systems must ensure that victims of torture and other cruel, inhuman or degrading treatment or punishment obtain redress, are awarded fair and adequate compensation and receive appropriate social and medical rehabilitation.”⁵⁰ In 2005, the U.N. General Assembly had provided further detail concerning the right to an effective judicial remedy for victims of violations of human rights law⁵¹ and the type of “[a]dequate, effective and prompt reparation,” compensation, rehabilitation, and “satisfaction” required under international law.⁵²

The mandatory duty to provide fair compensation is set forth in Article 14 of the Convention Against Torture:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.⁵³

Similar rights to an effective remedy, access to courts, and nonimmunity are guaranteed in Articles 2(3)(a) and 14(1) of the International Covenant on Civil and Political Rights, as emphasized in General Comments of the Human Rights Committee that operates under the auspices of the Covenant.⁵⁴ They had also been reflected previously in Article 8 of the Universal Declaration of Human Rights,⁵⁵ which had mirrored customary patterns of expectation concerning customary roots of the right to an effective remedy in domestic courts for violations of human rights and other rights under international law.⁵⁶

Within the United States, Justice Breyer has recognized more generally that universal jurisdiction with respect to “torture, genocide, crimes against humanity, and war crimes” “necessarily contemplates a significant degree of civil tort recovery,”⁵⁷ and a remarkable number of U.S. cases have recognized the right

Gramajo, 886 F. Supp.162, 171-72 (D. Mass. 1995); Paust, Van Dyke, Malone, *supra* note 4, at 25, 367-70, 373, 382, 385-88, 440, 449.

⁵⁰ U.N. G.A. Res. 63/166, *supra* note 8, para. 18; Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 62/148, *supra* note 8, para. 13.

⁵¹ Basic Principles, *supra* note 15, Annex, prmb., part VIII, para. 12.

⁵² See *id.*, Annex, part IX, paras. 15-22.

⁵³ CAT, *supra* note 20, art. 14(1).

⁵⁴ See, e.g., ICCPR, *supra* note 33, arts. 2(3)(a), 14(1); Paust, Van Dyke, Malone, *supra* note 4, at 82-83, 340-42; Dubai Petroleum Co., et al. v. Kazi, 12 S.W.3d 71, 82 (Tex. 2000) (“Article 14(1) requires all signatory countries to confer the right of equality before the courts to citizens of all other signatories.... The Covenant not only guarantees foreign citizens equal treatment in the signatories’ courts, but also guarantees them equal access to these courts,” also citing H.R. Comm., General Comment No. 13 (1984)).

⁵⁵ Universal Declaration of Human Rights, art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating” human rights), U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948).

⁵⁶ See, e.g., Paust, *supra* note 39, at 224-29.

⁵⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring).

to civil remedies for torture and/or cruel, inhumane, and degrading treatment.⁵⁸ Several cases have also recognized the unavoidable fact that violations of international criminal law and human rights law cannot be lawful “official” or “public” acts of state and are not entitled to immunity.⁵⁹ As the International Military Tribunal at Nuremberg recognized, acts in violation of international criminal law (such as violations of the laws of war) are *ultra vires* or beyond the lawful authority of any state or official:

the doctrine of sovereignty of the State ... cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position.... He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.⁶⁰

As noted more particularly in *Filartiga v. Pena-Irala* with respect to torture, “the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”⁶¹

⁵⁸ See, e.g., *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232, 242-43, 245 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Cabello Barrueto v. Larios*, 205 F. Supp.2d 1325, 1333 (S.D. Fla. 2002); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289, 305-06 (S.D.N.Y. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp.2d 1322, 1344-49 (N.D. Ga. 2002); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp.2d 1345, 1360-61 (S.D. Fla. 2001); *Jama v. I.N.S.*, 22 F. Supp.2d 353, 363 (D.N.J. 1998); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (including that covered under common Article 3 of the Geneva Conventions); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1462-63 (D. Haw. 1995); *Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993) Section 5 of the 2006 Military Commissions Act (MCA) attempts to deny use by any person of “the Geneva Conventions or any protocols thereto in any ... civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.” Pub. L. 109-366, 109th Cong., 2d sess., 120 Stat. 2600, 2631-32 (Oct. 17, 2006) (codified at 28 U.S.C. § 2241) [hereinafter MCA]. (A detailed set of citations and material is found in the original footnote.)

⁵⁹ See, e.g., *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1210 (9th Cir. 2007) (“acts of racial discrimination cannot constitute official sovereign acts,” also quoting *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992) (“[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act”)); *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting) (“officials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts.)”) (A detailed set of citations and material is found in the original footnote.)

⁶⁰ Judgment and Opinion, International Military Tribunal (Nuremberg) (Oct. 1, 1946). Regarding nonimmunity, see also Paust, Bassiouni, et al., *supra* note 39, at 29-34, 36-43, 131-34, 138-40, 168-70, 207, 355, 427; Inter-American Convention on the Forced Disappearance of Persons, *supra* note 21, art. IX; *supra* notes 14, 39 and accompanying text.

⁶¹ 630 F.2d at 890.

5. WHAT IS TORTURE?

The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment provides a lengthy definition of torture. Article 1, paragraph 1 of the treaty declares:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁶²

Article 1 also acknowledges that “[t]his article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.”⁶³ Therefore, there is implicit recognition that the treaty’s definition might be too limited. In fact, many recognize that human rights law that also prohibits torture and cruel, inhuman and degrading treatment⁶⁴ is not limited to official perpetrators or to those who act at their instigation or with their consent or acquiescence and that private perpetrators can commit illegal acts of torture.⁶⁵ Most agree, however, that prohibited acts of “torture” involve (1) an intentional act, and (2) “severe” pain or suffering, whether the prohibition is

⁶² CAT, *supra* note 20, art. 1(1). See also Rome Statute of the ICC, *supra* note 21, art. 7(2)(e) (similar definition of torture as a crime against humanity); 18 U.S.C. § 2340(1) (“‘torture’ means an act ... specifically intended to inflict severe physical or mental pain or suffering....”).

⁶³ CAT, *supra* note 20, art. 1(1).

⁶⁴ See, e.g., ICCPR, *supra* note 33, art. 7; American Convention on Human Rights, art. 5, O.A.S. Treaty Ser. No. 36 (1969), 144 U.N.T.S. 123; American Declaration of the Rights and Duties of Man, arts. I (“security of his person”), XXV (“humane treatment”), O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser.L/V/I.4 Rev. (1965); Universal Declaration of Human Rights, *supra* note 55, art. 5.

⁶⁵ Concerning private duties under human rights law, see, e.g., ICCPR, *supra* note 33, prmb., art. 5(1); American Convention on Human Rights, *supra* note 64, arts. 29(a), (d), 32(1); American Declaration, *supra* note 64, prmb., Chpt. Two (“Duties”); Universal Declaration, *supra* note 55, prmb., arts. 1, 29(1), 30; H.R. Comm., General Comment No. 20, *supra* note 36; Ireland v. United Kingdom, 25 Eur. Ct. H.R. (Ser. A), para. 149 (1978) (“terrorist activities ... of individuals or of groups ... are in clear disregard of human rights.”); J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 Harv. Hum. Rts. J. 51 (1992); J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 Vand. J. Transnat’l L. 801 (2002); J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 Mich. J. Int’l L. 1229, 1241-45 (2004); Declaration on Measures to Eliminate Terrorism, U.N. G.A. Res. 49/60, Annex, prmb. (addressing “links between terrorist groups and drug traffickers and their paramilitary gangs, which have resorted to all types of violence, thus ... violating basic human rights”), para. 2 (“Acts, methods and practices of terrorism ... aim at the destruction of human rights”) (9 Dec. 1994); text *supra* notes 36, 38.

found, for example, in the CAT, human rights law, or the laws of war.⁶⁶ The severe pain or suffering, whether physical or mental, does not have to be long lasting, damage health, or produce any identifiable bodily injury.

As noted above, a widespread recognition exists that under international law there are no exceptional circumstances that can justify the use of torture as a matter of law. Similarly, there are no temporal or geographic gaps with respect to the prohibition of torture and it applies regardless of the status of the direct victim of torture, for example, whether or not the victim is an alleged criminal, enemy, or terrorist. Article 2, paragraph 2 of the CAT is emblematic of widely shared understanding in this regard: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”⁶⁷ Furthermore, Article 2, paragraph 3, affirms that “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture.”⁶⁸ It is simply beyond question that an act of torture cannot constitute a lawful sovereign or public act of any state.

6. UNLAWFUL TACTICS USED DURING THE BUSH ADMINISTRATION

Among specific interrogation tactics authorized by President Bush and/or Secretary Rumsfeld, Secretary Rice, Attorney General Ashcroft, and several others within the Bush Administration and used on detained persons that manifestly and unavoidably constitute torture are water-boarding or related inducement of

⁶⁶ See, e.g., Paust, Executive Plans, *supra* note 1, at 845-46 & nn.127, 129; see also Paust, Above the Law, *supra* note 1, at 408 n.174, 410 n.181; *supra* note 62 and accompanying text.

⁶⁷ CAT, *supra* note 20, art. 2(2). Quite clearly, war is not an excuse and the CAT expressly applies during a war. In any event, the same prohibition applies under the laws of war, human rights law (which also applies in time of war), the U.N. Charter (which applies universally and in all social contexts), and customary norms *jus cogens* (same). See *supra* notes 1-6. Importantly, there is no so-called *lex specialis* limitation or obviation of the reach of any relevant treaty or customary international law regarding freedom from torture and cruel, inhuman, or degrading treatment. In fact, the phrase *lex specialis* appears in no treaty identifying international criminal conduct and in no human rights treaty. To claim that the CAT does not apply when the laws of war apply is patent nonsense. See Paust, *supra* note 1, at 173 n.1 (quoting the U.N. Committee Against Torture that the CAT “applies at all times, whether in peace, war or armed conflict”), 187 n.43. Further, as a matter of law there is no necessity defense. See also Memorandum from the Office of Legal Counsel, Dep’t of Justice, to James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, at 17 (Dec. 30, 2004) (noting with respect to the U.S. torture statute that “a defendant’s motive (to protect national security, for example) is not relevant”), available at <<http://www.usdoj.gov/olc/18usc23402340a2.htm>>.

⁶⁸ *Id.* art. 2(3). See also CAT Comm. Gen. Comm., *supra* note 1, para. 26 (“subordinates may not seek refuge in superior authority and should be held to account individually”).

suffocation,⁶⁹ use of dogs to create intense fear,⁷⁰ threatening to kill the detainee or family members,⁷¹ and the cold cell or related induced hypothermia.⁷² With respect to these and other unlawful interrogation tactics authorized by the Bush Administration, the Committee Against Torture declared in 2006 that the United States “should rescind any interrogation technique, including methods involving sexual humiliation, ‘water boarding,’ ‘short shackling’ [e.g., shackling a detainee to a hook in the floor], and using dogs to induce fear, that constitute torture, cruel, inhuman or degrading treatment or punishment, in all places of detention under its *de facto* effective control, in order to comply with its obligations under the Convention.”⁷³ Although the intentional use of sexual violence and rape as tactics

⁶⁹ See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 26 (1992) (Thomas, J., dissenting) (“water torture” violates the Eighth Amendment, quoting *Williams v. Boles*, 841 F.2d 181, 183 (7th Cir. 1988)); *Coleman v. Alabama*, 399 U.S. 1, 16 n.3 (1970) (Douglas, J., concurring) (forms of torture include “dripping water on the head,” “intense noise to prevent sleep,” and “threats to shoot or kill the victim”); *Robinson v. California*, 370 U.S. 660, 669 (1962) (Douglas, J., concurring) (“water cures” are “terror”); *Abdel-Rahman v. Gonzales*, 493 F.3d 444, 448 (4th Cir. 2007) (“various types of torture, including simulated drownings” claimed); *Don v. Gonzales*, 476 F.3d 738, 753 (9th Cir. 2007) (Wardlaw, J., dissenting) (“methods of torture” include “near drownings,” quoting the 2001 U.S. Dep’t of State, Country Report on Human Rights Practices for Sri Lanka); M. Nowak, *What Practices Constitute Torture: US and UN Standards*, 28 H.R. Q. 809, 829 (2006) (plastic bag over the head to simulate asphyxiation) (a detailed set of citations and material, including 29 U.S. cases and 7 U.S. Executive Country Reports, is found in the original footnote).

⁷⁰ See, e.g., Paust, *supra* note 1, at 12-16, 25-27, 43, 155, 159-62, 173-75, 256; Bob Woodward, *Detainee Tortured*, Says U.S. Official, *The Washington Post*, Jan. 14, 2009, at A1 (Susan J. Crawford, the convening authority of the GTMO military commissions, dropped charges against Mohammed al-Qahtani because “[h]is treatment met the legal definition of torture,” which involved a combination of threatening “with a military working dog,” stripping naked, subjecting to extreme cold, sexual humiliation, and allowing little sleep for many days); see also *Rasul v. Rumsfeld*, 414 F. Supp.2d 26, 27 (D.D.C. 2006) (allegations of “various forms of torture, which include hooding, forced nakedness, ... subjection to extremes of heat and cold, ... and the use of unmuzzled dogs for intimidation”); *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 493 (D. Fla. 1980) (“method of torture” included use of dogs eating cadavers at night whereby “the sinister barking of the dogs would take sleep away from all prisoners”); *Chitayev and Chitayev v. Russia*, [2007] ECHR 59334/00, para. 159 (Eur. Ct. H.R. Jan. 18, 2007) (“the ill-treatment at issue [where “dogs were set on them”] ... amounted to torture”).

⁷¹ See, e.g., *Coleman v. Alabama*, 399 U.S. at 16 n.3 (quoted *supra* note 69); *Tourchin v. Attorney General of the U.S.*, 277 Fed. Appx. 248, 252, 2008 WL 1962273 (3d Cir. 2008) (claim of likelihood of torture addressed in the CAT was supported by past torture of an alien and death threats against alien’s loved ones made by the KGB, also quoting 8 C.F.R. § 208.18(a)(4)(iii)-(iv), which notes that torture includes “[t]he threat of imminent death; or [t]he threat that another person will imminently be subjected to death, severe physical pain or suffering”) (a detailed set of citations and material is found in the original footnote).

⁷² See, e.g., *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F. Supp. at 1463 (“forms of torture” include “[f]orcing a detainee while wet and naked to sit before an air conditioner often while sitting on a block of ice”); *Acree v. Republic of Iraq*, 271 F. Supp.2d 179, 218 (D.D.C. 2003) (Saddam Hussein’s “agents of torture” used “excruciating physical and mental torture” on U.S. pows, including “mock executions, threats of death, intense fear, ... severe sleep deprivation, ... intense cold”); Paust, *supra* note 1, at 28, 178 n.15, 255 nn.86-87 (a detailed set of citations and material, including 14 U.S. cases, is found in the original footnote).

⁷³ CAT Report, *supra* note 22, at para. 24. In *Mehinovic v. Vuckovic*, 198 F. Supp.2d 1322, 1347-49 (N.D. Ga. 2002), the court recognized that “[c]ruel, inhuman, or degrading treatment is a

are recognizably torture,⁷⁴ some forms of sexual humiliation that were authorized and used might not have constituted severe pain or suffering. Nonetheless, they can be manifestly inhumane or degrading and, therefore, equally unlawful. Earlier, the Committee had condemned the following tactics as either torture or cruel, inhuman or degrading treatment proscribed by the Convention: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill.⁷⁵

Many of these illegal tactics, including water-boarding and the “cold cell,” were addressed and expressly and/or tacitly approved during several meetings of the National Security Council’s Principals Committee in the White House during 2002 and 2003 that were attended by Dick Cheney, his lawyer David Addington, Condoleezza Rice, Donald Rumsfeld, George Tenet, John Ashcroft, and others who facilitated their approval and use, including John Yoo.⁷⁶ With a typical

discrete and well-recognized violation of customary international law and is, therefore, a separate ground for liability,” adding: “cruel, inhuman, or degrading treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of ‘torture’” and that being “forced to observe the suffering of their friends and neighbors... [is] another form of inhumane and degrading treatment”). See also Rome Statute of the ICC, *supra* note 21, arts. 8(b)(xxi), (c)(ii) (“humiliating and degrading treatment” are “outrages upon personal dignity” and are war crimes). (A February 27, 2004 ICRC report is also quoted in the original footnote.)

⁷⁴ See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 852, 854 (1994) (Blackmun, J., concurring); *Doe I v. Unocal Corp.*, 395 F.3d 932, 945 (9th Cir. 2002); *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003) (“[r]ape can constitute torture”); *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995); *In re Extradition of Suarez-Mason*, 694 F. Supp. 676, 682 (N.D. Cal. 1988); *Prosecutor v. Kunarac, Kovač, and Vuković*, Appeals Judgement, Case No. ICTY-96-23, ICTY-96-23/1A, 12 June 2002, paras. 137, 150-51, 153; *Prosecutor v. Musema*, Judgement and Sentence, Case No. ICTR-96-13-T, 27 January 2000, para. 222; *Torture Victims Relief Act*, 22 U.S.C. § 2152 note (torture includes “rape and other forms of sexual violence”); *Henckaerts & Doswald-Beck*, *supra* note 28, at 318 & n.99; *Diane Marie Amann*, *International Decisions: Prosecutor v. Akayesu*, 93 Am. J. Int’l L. 195, 196-97 (1999); *Evelyn Mary Aswad*, *Torture by Means of Rape*, 84 Geo. L.J. 1913, 1915-16 (1996); *Beth Stephens*, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 Hofstra L. & Pol’y Symp. 87, 95-96 (1999); see also *Prosecutor v. Delalić*, Trial Judgement, Case No. ICTY-96-21-7, 16 November 1998, paras. 475-497; *Paust, Bassiouni, et al.*, *supra* note 39, at 693, 748.

⁷⁵ *Concluding Observations of the Committee against Torture: Israel*, 18th Sess., U.N. Doc. A/52/44 (1997), paras. 256-57. Concerning torture by sleep deprivation, see also *Acree v. Republic of Iraq*, 271 F. Supp.2d at 218 (quoted *supra* note 72); *Shepherd v. Ault*, 982 F. Supp. 643, 648 (N.D. Ill. 1997) (“the effectiveness of sleep deprivation as a tool of torture has long been recognized. See *Reck v. Pate*, 367 U.S. 433 ... (1961) ...; *Ashcraft v. Tennessee*, 322 U.S. 143, 151 ... (1944)”); *Rounds v. State*, 106 S.W.2d 212, 213 (Tenn. 1937) (“To deprive a human of sleep for four days and nights is a form of torture not less severe than physical violence. See *Ziang Sun Wan v. United States*, 266 U.S. 1” (1924)).

⁷⁶ *Jan Crawford Greenburg*, *Howard L. Rosenberg & Ariane de Vogue*, *Bush Aware of Advisers’ Interrogation Talks*, ABC News, Apr. 11, 2008 (adding: “the most senior Bush administration officials repeatedly discussed and approved specific details,” “meetings ... were typically attended by most of the principals or their deputies,” and “[s]ources said that at each discussion, all the Principals present approved”), available at <<http://abcnews.go.com/print?id=4635175>>. The

smug defiance, Cheney admitted that “he was directly involved in approving severe interrogation methods ... including ... ‘waterboarding’” and that he was “involved in helping get the process cleared.”⁷⁷ With respect to the configurative contributions of his team, President Bush was quoted as stating “yes, I’m aware our national security team met on this issue. And I approved.”⁷⁸

meetings were often held in the White House situation room. Greg Miller, *Cheney Says He Had Key Role in Interrogation Methods*, *Balt. Sun*, Dec. 16, 2008, at 14A; Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, *N.Y. Times*, Oct. 4, 2007, at 1 (Attorney General Gonzales approved a memo written by Steven G. Bradbury attempting to justify coercive CIA tactics, including “simulated drowning and frigid temperatures” and their use for “combined effects;” Deputy Attorney General James B. Comey warned Gonzales that he should not approve, but Gonzales “made clear that the White House was adamant about it, and that he would do nothing to resist;” and some officials warned “that no reasonable interpretation of ‘cruel, inhuman or degrading’ would permit” certain CIA methods, including water-boarding); J. Yoo, *War by Other Means 30-31* (starting in December 2001, “senior lawyers from the attorney general’s office, the White House counsel’s office, the Departments of State and Defense, and the NSC met.... This group of lawyers would meet repeatedly over the next months to develop policy of the war on terrorism. We certainly did not all agree.... Meetings were usually chaired by Alberto Gonzales.... At meetings, his deputy, Timothy Flanigan, usually played the role of inquisitor....”), 32-33; Report, *Senate Armed Services Committee Inquiry Into the Treatment of Detainees in U.S. Custody*, Dec. 20, 2008 [hereinafter *Senate ASC Report*], available at <http://armed-services.senate.gov/Publications/EXEC%20SUMMARY-CONCLUSIONS_For%20Release_12%20December%202008.pdf>; (A detailed set of citations and material is found in the original footnote.)

⁷⁷ See Miller, *supra* note 76, adding that when “[a]sked whether he still believes it was appropriate to use the waterboarding method...,” Cheney said: “I do.” Concerning the role of Cheney, see also Paust, *supra* note 1, at 12, 27-28, 30, 150 n.89, 153-54 n.97, 175-77 nn.9-10, 13-14; Demetri Sevastopulo, *Cheney Endorses Simulated Drowning*, *MSNBC*, Oct. 26, 2006, <<http://www.msn.com/id/15433467>>; Scott Hennen interview with Vice President Richard Cheney, in Washington, D.C. (Oct. 24, 2006) (waterboarding has “been a very important tool that we’ve had to be able to” use), available at <<http://www.whitehouse.gov/news/releases/2006/10/20061024-7.html>>; *supra* note 76.

⁷⁸ ABC News Apr. 11, 2008, *supra* note 76. See also Shane, Johnston & Risen, *supra* note 76 (in July 2006, President Bush signed a new executive order to further his program of “enhanced” interrogation and secret detention); Randall Mikkelsen, *CIA Detention Program Remains Active: U.S. Official*, *Reuters News*, Oct. 4, 2007; Dan Eggen, *White House Defends CIA’s Use of Waterboarding in Interrogations*, *The Washington Post*, Feb. 7, 2008, at A3 (White House spokesman Tony Fratto said water-boarding is legal and can be authorized and that “every enhanced technique that has been used by the CIA for this program was brought to the Department of Justice, and they made a determination”; “CIA Director Michael V. Hayden confirmed ... that the agency had used waterboarding”); Interview of President George W. Bush by Brit Hume, *Fox News Sunday* (Jan. 7, 2009) (Bush admits that he approved the use of such “techniques” or “tools” and had authorized their use on at least “one such person who gave us information,” Khalid Sheik Muhammad), available at <<http://www.youtube.com/watch?v=gnpZgMlw9-o>>; President George W. Bush, radio address, Mar. 8, 2008 (concerning his veto of an Intelligence Authorization Act of 2008 that would have required CIA personnel to follow a military manual that prohibits water-boarding, sensory deprivation, hypothermia, and denial of food, water or medical care, Bush stated that the legislation “would take away one of the most valuable tools in the war on terror – the CIA program to detain and question” – and take away “specialized interrogation procedures to question” and “would eliminate all the alternative procedures we’ve developed to question” detainees), available at <<http://www.whitehouse.gov/news/releases/2008/03/20080308.html>>.

During President Bush's admitted "program" of "tough" interrogation and secret detention or forced disappearance⁷⁹ and as part of the well-documented "common, unifying" plan to deny Geneva law protections and to use and attempt to justify serial and cascading criminality in the form of "coercive interrogation,"⁸⁰ the Administration used shifting definitions of "torture" as if the manifest illegality of its approved interrogation tactics could be defined away. The definitions did not reflect well-known definitions and criteria used in customary and treaty-based international law⁸¹ or, at times, those used by the U.S. Executive in its Department of State Country Reports on Human Rights Practices and for a number of years and by judges in many U.S. federal and state court cases addressing the types of treatment authorized by President Bush and his entourage,⁸² including several cases addressing the prohibition of "cruel" treatment and torture under the Eighth Amendment to the U.S. Constitution.⁸³ These cases and Country Reports

⁷⁹ See, e.g., Paust, *supra* note 1, at 29, 179-80 n.22; *supra* notes 21-22. Concerning Bush admissions, authorizations, directives, and findings, see, e.g., *id.* at x, 7-8, 17, 26, 28-30, 32, 35, 145-47, 176, 179-80; Majority Staff Report, House Committee on the Judiciary, *Reining in the Imperial Presidency: Lessons and Recommendations Relating to the Presidency of George W. Bush*, Jan. 13, 2009, at 136 ("in Secretary Powell's view, Mr. Bush was 'complicit' in those abuses") [hereinafter House Comm. Report], available at <<http://judiciary.house.gov/hearings/printers/110th/IPres090113.pdf>>; *supra* note 78; *infra* notes 101-102.

⁸⁰ See, e.g., Paust, *supra* note 1, at 27-30, 32; Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* 150 (noting an early 2002 meeting of Yoo, Gonzales, Addington, Flanigan, and Haynes discussing "what sorts of pain" to inflict), 185 (noting conflicts between Addington and Bellinger), 198-99 (noting that Addington, Gonzales, Haynes, Goldsmith, and others had flown to Guantanamo in September 2002 to discuss and observe use of SERE [Survival Evasion Resistance and Escape] tactics on detainees who were still held in secret detention or forced disappearance), 304, 307, 311-2 (noting the facilitating role of Gonzales) (2008); Yoo, *supra* note 76, at ix, 30, 35, 39-40, 43, 171-172, 177-178, 190-192, 200, 202; House Comm. Report, *supra* note 79, at 110-46; UN Torture Investigator Calls on Obama to Charge Bush for Guantanamo Abuses, *JURIST*, Jan. 21, 2009, available at <<http://jurist.law.pitt.edu/paperchase/2009/01/un-torture-investigator-calls-on-obama.php>>; *supra* notes 76-78; *infra* text at notes 84-102. John Yoo wrote that he had also flown with other lawyers to Guantanamo in early January 2002. See Yoo, *supra* note 76, at 18, 38-39, 44. Those lawyers knew that persons transferred to Guantanamo were held in secret detention because their names were not released. Such constitutes a form of forced disappearance, a crime against humanity that during an armed conflict is also a war crime. See *supra* note 21.

⁸¹ See, e.g., Paust, *supra* note 1, at 11, 150-51 nn.89-90; *supra* notes 62, 69-75; *infra* notes 85, 107.

⁸² See *supra* notes 69-73.

⁸³ More generally, the Supreme Court has recognized the impermissibility of "coercive cruelty." *Weems v. United States*, 217 U.S. 349, 373 (1910). U.S. cases have also provided informing recognition of what types of conduct can amount to cruel treatment under the Eighth Amendment. See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 14, 17 (1992) (Blackmun, J. concurring) ("shocking them with electric currents, asphyxiating them short of death, intentionally exposing them to undue heat or cold" and infliction of "psychological pain"); *Wilson v. Seiter*, 501 U.S. 294, 305 (1991) (combination of deprivation of food and warmth, "for example a low cell temperature at night combined with a failure to issue blankets." (a detailed set of citations and material is found in the original footnote).

on Human Rights could have been easily discovered through use of computer-assisted research, thus demonstrating that several writers of memoranda did not attempt to provide independent, careful, and professional legal advice.

In particular, one memorandum (the so-called Bybee “torture memo”),⁸⁴ completed in August 2002 by John Yoo and Jay Bybee after participants at several of the White House meetings noted above (including John Yoo) had addressed and approved or facilitated the use of several specific interrogation tactics, set forth what had become the Administration’s preferred but patently improper standard regarding “torture.” According to the Bybee memo, “torture” should involve far more than the widely known treaty-based and customary international legal test of “severe” physical or mental pain or suffering (the same test set forth in 18 U.S.C. § 2340(1)) – it “must rise to the level of death, organ failure, or the permanent impairment of a significant bodily function.”⁸⁵ Because the memo was written *after* several of the White House meetings during which an inner circle (and John Yoo) had discussed and approved specific interrogation tactics,⁸⁶ and was created expressly with respect to “the conduct of interrogations outside the United States” and “possible defenses that [allegedly] would negate any claim that certain interrogation methods [already approved] violate” a particular federal statute,⁸⁷ it is obvious that the memo was not written for independent professional

⁸⁴ See Paust, *supra* note 1, at 11, 150 n.89.

⁸⁵ *Id.* at 151 n.90. Some news media have referred to the Bybee torture memo as “the Golden Shield,” as if it can shield those who planned, authorized, ordered, abetted, or perpetrated torture, cruel, inhumane or degrading treatment from criminal prosecution. See, e.g., Greenburg, Rosenberg & de Vogue, *supra* note 76. However, the shield is made of fool’s gold and is full of holes. For example, orders or authorizations to engage in interrogation tactics that will manifestly produce what the community will judge to be torture, cruel, inhumane or degrading treatment are orders or authorizations to engage in conduct that is manifestly illegal whether or not the criminal accused knows that the conduct is illegal or knows that the conduct is torture, cruel, inhumane, or degrading. Manifestly unlawful orders or authorizations are not a defense. See, e.g., Paust, Bassiouni, et al., *supra* note 26, at 100-14; Rome Statute of the ICC, *supra* note 21, art. 33 (1) (an order does not relieve the recipient of responsibility unless “(b) [t]he person did not know that the order was unlawful; and (c) [t]he order was not manifestly unlawful”); see also *id.*, art. 33(2) (“orders to commit ... crimes against humanity are manifestly unlawful” per se. (A detailed set of citations and material is found in the original footnote.)

⁸⁶ See *supra* note 76; see also Senate ASC Report, *supra* note 76, at xv-xvi (Bellinger “said that he was present in meetings [of the NSC’s Principals Committee] ‘at which SERE training was discussed’”; two Bybee memos were written “after consultation with senior Administration attorneys, including” Gonzales and Addington [one memo is public and known as the Bybee torture memo. Another memo had addressed specific interrogation tactics and has not been declassified]; “[b]efore drafting the opinions, Mr. Yoo ... met with Alberto Gonzales” and Addington “to discuss the subjects he intended to address in the opinions”; Bybee “saw an assessment of the psychological effects of military resistance training [the SERE program] in July 2002 in meetings in his office with John Yoo ... [and] Bybee said that he used that assessment to inform the August 1, 2002 OLC legal opinion” on tactics; “Bybee also recalled discussing detainee interrogations in a meeting with Attorney General John Ashcroft and John Yoo in late July 2002, prior to” creation of the opinions). As Steven Kleinman noted during the symposium, those who recommended and authorized the use of SERE tactics did not understand that they are unavoidably counterproductive and harm efforts to produce needed reliable intelligence.

⁸⁷ See Paust, *supra* note 1, at 150 n.89.

legal advice, but to provide possible cover for tactics already approved and to facilitate their use in the future. Moreover, because the memo writers had refused to use the widely known test with respect to torture, the Bybee memo was facially devoid of legal propriety and blatantly facilitated use of criminal interrogation tactics. The memo had also made the patently erroneous claim that as a matter of law “necessity and self-defense could justify interrogation methods needed to elicit information.”⁸⁸

Criticism of the manifestly erroneous memo grew so widespread in the U.S. and abroad that it was eventually withdrawn and replaced by a 2004 memo that is still classified; however, criticism continued that the Bush Administration’s definition of torture remained unacceptable and that unlawful tactics being used for interrogation had not been withdrawn. There was actually a second August 2002 Bybee memo prepared by John Yoo that addressed specific interrogation tactics.⁸⁹ It was not withdrawn until June 2004⁹⁰ when the new head of OLC, Jack Goldsmith, finally decided to withdraw the opinion nearly eight months after he had learned of the secret CIA tactics for interrogation authorized in the second Bybee memo.⁹¹ For nearly eight months, Goldsmith apparently decided that he would not oppose use of any particular tactic addressed in the memo or otherwise known to be used by the CIA.⁹²

A March 14, 2003 memo written by John Yoo for William Haynes⁹³ (after several of the White House meetings of the Principals Committee) had, in Goldsmith’s words, “contained abstract and overbroad legal advice, but the actual techniques approved by the [defense] department were specific.”⁹⁴ In December 2003, Goldsmith decided to withdraw the March 2003 Yoo memo, but he told Ashcroft and Haynes that he allowed DOD “to continue to employ the twenty-four techniques.”⁹⁵

In March 2004, a draft memo penned and “circulated” by Jack Goldsmith fit perfectly within the common, unifying plan to deny Geneva protections and

⁸⁸ *Id.* at 11. But see *supra* notes 1, 9, 11, 14, 67 and accompanying text.

⁸⁹ See *supra* note 86; Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 150-51, 155 (2007) (in “a second August 1, 2002, opinion that still remains classified, OLC applied ... abstract analysis to approve particular and still-classified techniques ... that underlay the CIA interrogation program” and “attendant CIA techniques”).

⁹⁰ Goldsmith, *supra* note 89, at 159.

⁹¹ See *id.* at 150-55, 159.

⁹² See *id.* Despite the fact that the second August 2002 opinion remains classified, we know that some of the illegal tactics authorized for use included water-boarding, use of dogs to create intense fear, threatening to kill, the cold cell, stripping naked and hooding, and sexual humiliation. See *supra* notes 69-73, 76-80. See also Senate ASC Report, *supra* note 76, at xxvii (Rumsfeld’s approval of Haynes’s recommendation in 2002 “influenced and contributed to the use of abusive techniques, including military working dogs, forced nudity, and stress positions, in Afghanistan and Iraq.”).

⁹³ John C. Yoo, Memorandum for William J. Haynes II, General Counsel of the Department of Defense (Mar. 14, 2003), available at <http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf>.

⁹⁴ Goldsmith, *supra* note 89, at 151.

⁹⁵ *Id.* at 153-55. Goldsmith was referring to Rumsfeld’s twenty-four techniques. *Id.* at 153. Concerning these tactics, see Paust, *supra* note 1, at 15, 158-159 n.122; see also *supra* note 92.

engage in secret detention and coercive interrogation by claiming that persons in Iraq can be transferred “to another country to facilitate interrogation”⁹⁶ despite the clear, absolute, and criminal prohibition of the transfer of any non-prisoner of war out of occupied territory under the Geneva Civilian Convention and customary

⁹⁶ See Paust, *supra* note 1, at 18, 163 n.148. See also Goldsmith, *supra* note 89, at 99-100 (Goldsmith flew to GTMO with Addington, Philbin, Rizzo, and others and they were briefed and “witnessed an ongoing interrogation”), 119 (“the United States could not, in my view, be bound by any customary laws of war to confer legal protections on the terrorists detained at GTMO”), 136 (even after the Supreme Court rightly recognized in Hamdan in 2006 that common Article 3 provides a set of minimum rights “of humane treatment,” Goldsmith thought [without explanation] that the “Article 3 holding was legally erroneous”), 153 (Goldsmith, Philbin and others decided that the 24 tactics that had been authorized in the April 2003 Rumsfeld memo were lawful, including “Fear Up Harsh: Significantly increasing the fear level in a detainee” [See Secretary Donald Rumsfeld, Memorandum for the Commander, US Southern Command, Apr. 16, 2003, Tab A, #E, reprinted in Karen J. Greenberg & Joshua L. Dratel, *The Torture Papers* 334, 335 (2005). Other tactics authorized reportedly included unlawful tactics of stripping naked and hooding for interrogation, use of dogs for interrogation, short shacking, etc.]; Mayer, *supra* note 80, at 198-99 (on Sept. 26, 2002, Goldsmith, who was in the Office of DOD General Counsel Haynes, was among several lawyers (including Addington, Gonzales, and Haynes) who flew to Guantanamo to discuss and observe actual use of SERE tactics during interrogations of detainees held in secret detention or forced disappearance. Thus, Goldsmith must have known by 2004 what transfer to “facilitate interrogation” meant under the Bush program both in terms of likely tactics to be used by U.S. and foreign interrogators (especially after having worked for Haynes in DOD “as his ‘Special Counsel’” since September of 2002 and admittedly “worrying about the possibility of excessive interrogation” while at DOJ in 2003. Goldsmith, *supra* note 89, at 21, 141) and the concomitant secret detention or forced disappearance of persons to be transferred as a consequence of his facilitating memorandum), 261-63 (Goldsmith, then at OLC in DOJ in October 2003, before writing his 2004 memo, had “been beset by doubts” about the Bush program and prior memos, but did not protest against the use of any unlawful tactics or resign); cf Goldsmith, *supra* note 89, at 29 (stating that he did not know about the CIA’s interrogation program before starting at DOJ in October 2003, but thereafter he did not oppose use of any tactic or secret detention), 40-41 (stating that the conclusion in his OLC opinion of October 2003 was personally communicated to Gonzales and Addington, that all Iraqis of any status in occupied Iraq have protections under the Geneva Civilian Convention), 59 (under Haynes at DOD, “[a]s a ... critic of many aspects of the international human rights movement, I was the perfect person for the assignment” to oppose use of human rights law and law of war “judicialization”), 172 (claiming that although his 2004 draft opinion “had circulated in March 2004,” he never finalized it and “it never became operational.” On March 19, 2004, Goldsmith sent his memorandum to Taft, Haynes, Bellinger, and Muller (CIA General Counsel) and copied it to David Leitch). Concerning the September trip to GTMO, see also Senate ASC Report, *supra* note 76, at xvi.

international law.⁹⁷ To “facilitate interrogation,” the Goldsmith memo also made the patently erroneous claim that a detainee who was not lawfully in Iraq could be denied protections under Geneva law.⁹⁸

In 2005, a memo penned by Steven G. Bradbury of the Office of Legal Counsel at the Department of Justice and approved by then Attorney General Alberto Gonzales provided “an expansive endorsement of the harshest interrogation techniques ever used by the Central Intelligence Agency,” including water-boarding and use of “frigid temperatures.”⁹⁹ In July, 2006, soon after the Supreme Court had ruled that detainees are entitled at a minimum to the rights reflected in common Article 3 of the Geneva Conventions,¹⁰⁰ President Bush signed a new executive order re-authorizing unlawful interrogation tactics such as water-boarding and the “cold-cell” while furthering his program of coercive

⁹⁷ GC, *supra* note 27, arts. 49, 147; Paust, *supra* note 1, at 18, 30, 163-64 nn.147-152. See also Rome Statute of the ICC, *supra* note 21, art. 8(2)(a)(vii), (b)(viii); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 85(4)(a), 1125 U.N.T.S. 3. The rights, duties, and prohibitions reflected in the 1949 Geneva Conventions are customary international law. See, e.g., Paust, *supra* note 1, at 8, 134 n.8. It is widely known that any violation of the laws of war is a war crime. *Id.* at 133 n.2. A memorandum by Bybee to Haynes in 2002 also addressed the transfer of members of the Taliban, al Qaeda and others “who have come under the control of the United States armed forces, to other countries.” The memo argued that such transfers were permissible under GPW and (in error) the CAT, but did not address the Geneva Civilian Convention’s absolute prohibition of transfer of anyone who is not a prisoner of war. See Jay S. Bybee, Memorandum for William J. Haynes, II, General Counsel, Department of Defense, Re: The President’s power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations (Mar. 13, 2002), available at <<http://www.usdoj.gov/opa/documents/memorandumpresidentpower03132002.pdf>>. The memo erroneously claimed that the CAT does not apply outside U.S. territory. *Id.* at 23-24. But see CAT Comm. Gen. Comm., *supra* note 1, paras. 7 (“any person ¼ subject to the de jure or de facto control of a State”), 16 (“where a State party exercises, directly or indirectly, de facto or de jure control over persons”), 19; Paust, *supra* note 1, at 173, 187-88, 190, 199-200. Given control over occupied territory, transfer therefrom can fit within words such as “expel, return ¼ or extradite” within the meaning of Article 3(1) of the CAT. See CAT, *supra* note 20, art. 3(1). Since U.S. registered aircraft and vessels are the equivalent of U.S. territory under international law, the same should pertain with respect to transfers from a U.S. aircraft or vessel.

⁹⁸ See Paust, *supra* note 1, at 18, 163-64 nn.149-152. There are no gaps in protection from torture or cruel, inhuman or degrading treatment and denial of rights to minimum due process because of the status of a detainee. See, e.g., *id.* at 1-4, 8, 42, 70, 138 n.20, 183-88, 190 n.59, 215 n.27, 267 n.15, 294 n.171; Hamdan v. Rumsfeld, 548 U.S. 557, 6329-31 & n.63 (2006). In particular, rights, duties and prohibitions reflected in common Article 3 of the Geneva Conventions are customary international law applicable in all armed conflicts. Paust, *supra* note 1, at 2-3, 136-38 nn. 17, 19; Hamdan v. Rumsfeld, 548 U.S. at 631 n.63.

⁹⁹ Shane, Johnston & Risen, *supra* note 76. See also Senate ASC Report, *supra* note 76, at xvi (Bradbury testified “that the CIA’s use of waterboarding was ‘adapted from the SERE training program.’”); House Comm. Report, *supra* note 79, at 134 (on Feb. 14, 2008, “Bradbury provided detailed information about ... the U.S. form of waterboarding”). (subsequently in 2009, three Bradbury memos were declassified and released.)

¹⁰⁰ See Hamdan v. Rumsfeld, 548 U.S. at 633 & n.63.

interrogation and secret detention.¹⁰¹ In September, 2006, President Bush admitted that a CIA program had been implemented using secret detention and “tough” forms of treatment and he stated that the program would continue.¹⁰²

Later in 2006, Congress enacted the Military Commission Act (MCA),¹⁰³ which amended the War Crimes Act.¹⁰⁴ The MCA was enacted to further define “torture” prohibited under common Article 3 of the 1949 Geneva Conventions, a violation of which is a war crime under international law, the War Crimes Act,¹⁰⁵ and other federal legislation that was not amended and incorporates all of the laws of war for prosecution as offenses against the laws of the United States.¹⁰⁶ However, the MCA’s definition does not comply with Article 1 of the Convention Against Torture, because: (1) the MCA definition applies only to torture of a person in the perpetrator’s custody or control, whereas the CAT’s definition also applies to any “complicity or participation in torture” of any person; (2) the MCA definition has a limitation with respect to the purposes for which torture is used, whereas the CAT assures that torture for any purpose is illegal and lists purposes in a non-exclusive manner (*i.e.*, listing purposes with the phrase “such as”); and (3) a definition of “severe mental pain or suffering” in the MCA is limited to the meaning set forth in other U.S. legislation that the Committee Against Torture has already found to be in breach of the Convention’s obligation to enact appropriate laws to cover all forms of torture as well as all forms of cruel, inhuman, and degrading treatment.¹⁰⁷

¹⁰¹ Shane, Johnson & Risen, *supra* note 76, adding that Bradbury had “reviewed and approved” the 2006 executive order. Bush re-authorized unlawful tactics after their general outlawry the year before in the Detainee Treatment Act, Title X of the Department of Defense Appropriations Act, Public Law 109-48, 119 Stat. 2680 (Dec. 30, 2005), § 1003(a) (“No individual in the custody or under the control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”).

¹⁰² See, e.g., Paust, *supra* note 1, at 29.

¹⁰³ MCA, *supra* note 58.

¹⁰⁴ 18 U.S.C. § 2441.

¹⁰⁵ See, e.g., 18 U.S.C. § 2441(c)(3).

¹⁰⁶ 10 U.S.C. § 818. See Paust, Bassiouni, et al., *supra* note 39, at 253-259; J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 Tex. L. Rev. 6 (1971).

¹⁰⁷ See CAT Report, *supra* note 22, at para. 13 (“sections 2340 and 2340 A of [title 18 of] the United States Code limit federal criminal jurisdiction over acts of torture to extraterritorial cases. The Committee also regrets that, despite the occurrence of cases of extraterritorial torture of detainees, no prosecutions have been initiated under the extraterritorial torture statute.... [The U.S.] should enact a federal crime of torture consistent with article 1 of the Convention ... to prevent and eliminate acts of torture ... in all its forms.... [The U.S.] should ensure that acts of psychological torture ... are not limited to ‘prolonged mental harm’ as set out in the State party’s understandings lodged at the time of ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or its duration.”). The treaty mandates that all parties “shall ensure that all acts of torture are offenses under its criminal law” and “[t]he same shall apply ... to an act by any person which constitutes complicity or participation in torture” and, therefore, whether or not such person has custody or control over the victim. CAT, *supra* note 20, art. 4(1). See also *id.* art. 1(1) (the crime reaches conduct “initiated by or at the instigation of or with the consent or acquiescence of” certain persons, thereby demonstrating that such persons need not have custody or control of victims). The MCA does not “provide immunity

It is time for new legislation regarding torture and cruel, inhuman and degrading treatment to reach all forms of such unlawful treatment in order to comply with the CAT, human rights law (customary and treaty-based), the laws of war (customary and treaty-based) and, more generally, to comply with what the United Nations Security Council and General Assembly have recognized as the duty of all states to end any form of impunity for and to prosecute international crime.¹⁰⁸ Full coverage would also allow the United States to exercise a greater flexibility to request extradition of U.S. and foreign nationals for prosecution in the United States. Otherwise, U.S. extradition requests for the return of U.S. nationals and custody of foreign nationals can be denied because of a lack of dual criminality when an alleged offense is not a crime that is prosecutable under the laws of the foreign requested state and the U.S. as the requesting state.¹⁰⁹ In such a circumstance, U.S. nationals will be prosecuted in foreign courts using foreign

from prosecution for any criminal offense.” MCA, *supra* note 58, § 8(b); Paust, *supra* note 1, at 261 n.115

¹⁰⁸ See, e.g., *supra* notes 15-16, 26, 37 and accompanying text. President Obama’s Executive Order on January 22, 2009 requiring that all U.S. interrogation practices comply, at a minimum, with the requirements under treaty-based and customary international law reflected in common Article 3 of the Geneva Conventions (and, therefore, that all persons “shall in all circumstances be treated humanely”) and shall comply with the U.S. Army’s interrogation manual is helpful, but does not lessen the need for new legislation to cover all forms of participation in torture and cruel, inhuman, and degrading treatment. See Exec. Order, ___ (Jan. 22, 2009), available at <http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations>. The U.S. Army manual declares that handling and treatment “must be accomplished in accordance with applicable law and policy,” which include “U.S. law; the law of war; relevant international law; [and] relevant directives.” U.S. Dep’t of Army, Field Manual No. 2-22.3, Human Intelligence Collector Operations vii (6 Sept. 2006), available at <<http://www.army.mil/references/FM2-22.3.pdf>>. Common Article 3 of the Geneva Conventions provides a minimum standard of treatment. *Id.*; Paust, *supra* note 1, at 43. The manual also lists specific tactics that must not be used, such as water-boarding, use of extreme cold, use of dogs, and stripping persons naked and hooding. See Paust, *supra* note 1, at 43. Of further interest is the fact that the Executive Order’s requirement of humane treatment refers to common Article 3 “as a [m]inimum [b]aseline,” but notes that treatment must also be consistent with the requirements of the CAT (which also applies in times of relative peace) “and other laws regulating the treatment and interrogation of individuals detained in any armed conflict,” among others. See Exec. Ord., *supra* Section 3(a).

¹⁰⁹ Concerning the customary dual criminality principle, see, e.g., Paust, Bassiouni, et al., *supra* note 39, at 142, 331-32, 334, 348, 351, 353-56, 377. If a U.S. amnesty or immunity precludes U.S. prosecution, the U.S. must extradite or render to an international tribunal. See also *supra* note 39. One of the worst responses would involve creation of a farcical “truth commission” where lawyered-up Bush Administration officials who are reasonably accused would be granted immunity to testify, but would refuse to testify about secreted meetings, authorizations, findings, directives, and memoranda that the Obama Administration had still not made public despite claims to transparency. If the U.S. could not prosecute such persons, the U.S. obligation would shift to a duty to extradite. Additionally, the U.S. could not assure extradition of such persons from any foreign country exercising universal jurisdiction and they could be prosecuted in any country they visited or in which they were otherwise found. They would have no jury trial and, if found guilty of authorizing or facilitating crime or dereliction of duty, they would most likely serve their sentence in a foreign jail. As Professor Tony D’Amato has remarked, they would “lose the home court advantage.” Anthony D’Amato, private email to the author.

procedures¹¹⁰ or rendered to the International Criminal Court.¹¹¹ Moreover, the principle of complementarity set forth in Article 17 of the Statute of the ICC, which requires suspension of ICC prosecution when the United States is able to and “genuinely” proceeds with prosecution in good faith,¹¹² will not be applicable where U.S. legislation does not cover crimes within the jurisdiction of the ICC or for any other reason the U.S. cannot or will not initiate prosecution of those who are reasonably accused. One set of federal statutes allows prosecution of any war crime in the federal district courts,¹¹³ but presently there is no federal legislation allowing prosecution of crimes against humanity as such. Nonetheless, some crimes against humanity committed during an armed conflict, such as torture and secret detention or forced disappearance of individuals, are also war crimes.¹¹⁴

It is also time for the United States to withdraw its attempted reservation to the Convention Against Torture which had declared erroneously that the U.S. “considers itself bound by the obligation under Article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’ only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”¹¹⁵ The Committee Against Torture under the auspices of the CAT has recognized that, if operative, the putative reservation (which technically is phrased merely as a unilateral understanding that happens to be in plain error and could be withdrawn) would result in a failure to cover all violations of the Convention and that, therefore, the attempted reservation is “in violation of the Convention.”¹¹⁶

¹¹⁰ In case of foreign prosecution of U.S. nationals, customary human rights law reflected in Article 14 of the ICCPR provides a set of minimum due process guarantees. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 & n.66 (2006); Paust, Bassiouni, et al., *supra* note 39, at 473-74; Paust, *supra* note 1, at 105, 113, 126-127.

¹¹¹ Concerning possible ICC jurisdiction over U.S. nationals, see, e.g., J. Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 *Vand. J. Transnat'l L.* 1 (2000); Rome Statute of the ICC, *supra* note 21, arts. 12(2)(a), 13(a) and (c). One circumstance that makes ICC jurisdiction possible is where an alleged crime occurs on the territory of a party to the treaty and that or any other party renders an accused to the Court. *Id.* art. 12(2)(a) (ICC jurisdiction exists if “[t]he State on the territory of which the conduct in question occurred” is a party). By the end of 2008, there were 108 parties to the treaty, including Afghanistan. There are no rulings by the ICC yet on point, but it is otherwise normal under customary international law concerning jurisdiction to recognize that when an alleged perpetrator outside the territory of a state intends to produce effects within such state and the relevant conduct occurs within such state by a co-conspirator, an actual agent, or an unknowing or innocent “agent” (a mere “agent” by fiction), that the conduct of the latter person is attributed to the alleged perpetrator just as if the alleged perpetrator engaged in conduct within such state. See, e.g., Paust, Van Dyke, Malone, *supra* note 4, at 515-16, 518, 541-42, and cases cited; Paust, Bassiouni, et al., *supra* note 39, at 179-83, and cases cited.

¹¹² See Rome Statute of the ICC, *supra* note 21, art. 17.

¹¹³ See *supra* note 106 and accompanying text.

¹¹⁴ See, e.g., Paust, *supra* note 1, at 39-40; *supra* notes 16-17, 21 and accompanying text.

¹¹⁵ Reservation No. 1, available at Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

¹¹⁶ See, e.g., Paust, *supra* note 1, at 190 n.59 (also addressing a U.N. Experts’ Report that agreed with the decision of the CAT Committee). The attempted limitation or false understanding is also incompatible with customary, jus cogens, and U.N. Charter obligations regarding cruel, inhuman, and degrading treatment that pertain in any event. See text *supra* notes 3-6.

As in the case of any attempted reservation that is inconsistent with the object and purpose of a treaty, the attempted reservation is void *ab initio* as a matter of law and has no legal effect.¹¹⁷ Thus, it cannot protect the United States or any U.S. national but, as is the case with other void attempted reservations to human rights treaties, it communicates a lack of meaningful commitment to human rights. Since it is void as a matter of law, President Obama can act now to notify the Secretary-General of the United Nations (as the depository for the treaty) that the United States formally withdraws its attempted reservation. Such an act by the President would help to end an embarrassment for the United States and restore U.S. integrity and respect as a country committed to human dignity and human rights. Concomitantly, President Obama can notify the Secretary-General of the U.S. withdrawal of the same type of putative, but void, reservation to the International Covenant on Civil and Political Rights.¹¹⁸

7. CONCLUSION

It is time for real change in America. It is time to restore the rule of law; to bring an end to seven years of impunity that must be effectuated through Executive prosecution or extradition of all who are reasonably accused; and to restore American honor, integrity, and respect within the international community.¹¹⁹ At this defining moment in our history, none of these critically needed outcomes

¹¹⁷ See Paust, *supra* note 1, at 143-44 n.43, 189-90 n.59; Nowak, *supra* note 69, at 836. An attempted declaration of non-self-execution of Articles 1-16 is also inconsistent with the object and purpose of the CAT, since several of the articles are phrased in mandatory “shall” language that is typically self-executing. The declaration should also be withdrawn.

¹¹⁸ See Reservation No. 3, available at Cong. Rec. S4781-01 (daily ed., April 2, 1992); Paust, *supra* note 1, at 143 n.42, 189-90 n.59 (also addressing a U.N. Experts’ Report agreeing with the conclusion of the Human Rights Committee that operates under the auspices of the ICCPR that the attempted reservation is inconsistent with the object and purpose of the treaty and is void *ab initio* as a matter of law); Nowak, *supra* note 69, at 836. While doing so, President Obama can also withdraw the declaration of partial non-self-execution from the U.S. instrument of ratification regarding the ICCPR because it is also disingenuous and void *ab initio* as a matter of law. See, e.g., Paust, *supra* note 26, at 363-66, 368, 376-78 (quoting H.R. Comm., General Comment No. 24, U.N. Doc. CCPR/C/21/REV.1/Add.6 (2 Nov. 1994)). Some do not understand that it was only an attempted declaration of partial non-self-execution and never reached Article 50 of the ICCPR which mandates in clear self-executing language that all of “[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.” ICCPR, *supra* note 33, art. 50. See Paust, Van Dyke, Malone, *supra* note 4, at 87-89, 507-08; Paust, *supra* note 1, at 361-62. In any event, we cannot lead in human rights if some of our own rights are held in chains.

¹¹⁹ Concerning various damaging consequences of the Bush Administration’s program of serial and cascading criminality, see, e.g., J. Paust, *Serial War Crimes in Response to Terrorism Can Pose Threats to National Security*, forthcoming 35 William Mitchell L. Rev. (2009) (addressing the placing of our people in harm’s way, mission failure, aid to the enemy, and deflation of authority, our values, law and power, among other consequences). If for any reason the United States fails to prosecute or extradite those who are reasonably accused, the U.S. would remain in violation of critically important treaties and various damaging consequences will continue. Among several abnegative consequences would be a general deflation of respect for the rule of law (especially the

can be accomplished by new commission or committee reports.¹²⁰ Ultimately, they can only be accomplished by adherence to the express and unavoidable constitutional duty of the President of the United States faithfully to execute the laws,¹²¹ including customary and treaty-based international law that requires prosecution or extradition of those who authorized, ordered, abetted, or engaged in torture and other forms of illegal treatment of human beings. Never in the long history of the United States has there been such widespread serial criminality

laws of war) and doubt whether the United States will fulfill its commitments under other treaties that are of great significance to the international community.

¹²⁰ New investigations should not be used to postpone prosecution or extradition of those who are already reasonably accused. At most, they would delay the need for President Obama to exercise his constitutionally-based duty to prosecute or extradite those who are later identified as persons who are reasonably accused of international crime. Presently, there is extensive evidence of manifest criminality engaged in by several individuals and many authoritative reports, published paper trails, and admissions already exist. See, e.g., Paust, *supra* note 1, at 5-19, 25-30, 32, 35-36, 45-46; *supra* notes 19, 21-22, 73, 76-80, 107 and accompanying text. They offer proof that what we saw in Abu Ghraib photos and water-boarding, the cold cell, stripping persons naked and use of snarling dogs to instill intense fear are torture authorized and abetted at the highest levels. If they were not torture, they are cruel treatment. If they were not, they constitute inhumane treatment. As such, they are manifest violations of the laws of war and any violation of the laws of war is a war crime. It is time to move beyond what for some has been convenient disbelief and for others has been racist indifference.

A great President must surely realize that we cannot restore the rule of law, we cannot adequately train soldiers to obey the laws of war, we cannot properly move forward without complying with international law and ending impunity through Executive prosecution or extradition of those who are reasonably accused. We must reaffirm the fundamental expectations of the Founders and Framers and countless others here and abroad that no one is above the law, that law exists not merely for those who are outside of government and without substantial wealth or power. See Paust, *supra* note 1, at xi-xii, 20-23, 65-67, 71-76, 80-81, 86-91, 99; J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C.-Davis J. Int'l L. & Pol'y 205 (2008). Former President Bush and others in his Administration have created a major crisis here and abroad with respect to our commitment to the rule of law and consequences for the integrity of government that would only be exacerbated if President Obama does not reaffirm that public servants are bound by the law and, whether or not it is comfortable, that he will faithfully execute the laws of the United States, which include treaty-based and customary international legal duties to either initiate prosecution or extradite. It has been left to President Obama to make the decision to end the seven-year trajectory of impunity. It is not a decision for committees, politics, and compromises, but of law.

¹²¹ U.S. Const., art. II, § 3 (“he ... shall take Care that the Laws be faithfully executed”). That such laws include treaties and customary international law and the President is bound thereby, see, e.g., Paust, *supra* note 26, at 169-73, and numerous cases cited; Paust, *supra* note 1, at 20-23, 72-75, 86, 87-89, 92, 124-125, 168-72 nn.179-195, 233-237 nn.3-5, 20. Every relevant judicial opinion since the beginning of the United States has recognized that the President and all within the Executive branch are bound by the laws of war, a point famously recognized by President Lincoln’s Attorney General in 1865 while addressing the need to prosecute war crimes and the lack of congressional power to limit the reach of the laws of war. See, e.g., Paust, *supra* note 1, at 234-36 n.4; 11 Op. Att’y Gen. 297 (1865). International laws that President Obama must faithfully execute at the beginning of the creation of his legacy include the unavoidable obligation to initiate prosecution of or to extradite all persons of any status who are reasonably accused of war crimes, crimes against humanity, and crimes under the CAT. See, e.g., *supra* notes 26, 28, 31.

authorized and abetted at the highest levels of our government. Never in the history of our country has any other President been known to have authorized war crimes and crimes against humanity.