

## Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees

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*Not since the Nazi era have so many lawyers been so clearly involved in international crimes concerning the treatment and interrogation of persons detained during war. This Article provides detailed exposition of the types of improprieties abetted by previously secret memos and letters of various lawyers and others within the Bush Administration. The Article demonstrates why several of the claims in such memos were in serious error; what type of illegal orders and authorizations were actually given by the President, the Secretary of Defense, and various military commanders at Guantanamo and in Iraq; what type of other authorizations in support of a common plan to violate the Geneva Conventions and human rights law existed; and what type of illegal interrogation tactics were approved and used at Guantanamo, in Afghanistan, in Iraq, and apparently elsewhere by U.S. military personnel, civilians, and the CIA. The Article also provides detailed attention to various laws of war and human rights relevant to interrogation and treatment of detained persons; why relevant rights and duties are absolute and remain so regardless of claims by the President and others to deny full coverage to alleged terrorists and enemy combatants; why there can be leader responsibility for dereliction of duty in addition to responsibility of perpetrators, aiders and abettors, and those who issued illegal orders; and why the President and all within the executive branch are*

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*and must continue to be bound by the laws of war and other relevant international laws.*

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## INTRODUCTION

A common plan to violate customary and treaty-based international law concerning the treatment and interrogation of so-called “terrorist” and enemy combatant detainees and their supporters captured during the U.S. war in Afghanistan emerged within the Bush Administration in 2002. The plan was developed only three months after the United States had used massive military force in Afghanistan on October 7, 2001 against local members of al Qaeda and “military installations of the Taliban regime”<sup>1</sup> during the war in Afghanistan that is still ongoing. It was approved in January 2002 and led to high-level approval and use of unlawful interrogation tactics that year and in 2003 and 2004. A major part of the plan was to deny protections under the customary laws of war and treaties that require humane treatment of all persons who are detained during an armed conflict, regardless of their status and regardless of any claimed necessity to treat human beings inhumanely. The common plan and authorizations have criminal implications, since denials of these protections are violations of the laws of war, which are war crimes.<sup>2</sup>

1. See Letter from the Permanent Representative of the United States of America to the U.N. President of the Security Council, U.N. Doc. 5/2001/946 (Oct. 7, 2001).

2. See, e.g., U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 178, para. 499 (1956) [hereinafter FM 27-10] (“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”) [hereinafter FM 27-10]; UK WAR OFFICE, MANUAL OF MILITARY LAW, pt.3, 174, para. 624 & n.1 (W.O. Code No. 12333 1958) (“The term ‘war crime’ is the technical expression for violations of the laws of warfare, whether committed by members of the armed forces or by civilians” and “may be committed by nationals both of belligerent and of neutral States”) [hereinafter 1958 UK MANUAL]; *Report of the International Law Commission to the General Assembly on the Principles of*

## I. THE AFGHAN WAR, LAWS OF WAR, AND HUMAN RIGHTS

The October 7 Afghan war became an international armed conflict between U.S. combat forces and the Taliban regime, which had been a *de facto* government in control of some ninety percent of the territory of Afghanistan and had been recognized by a few states as the *de jure* government of Afghanistan.<sup>3</sup> The Taliban regime had also been involved in a belligerency with the Northern Alliance, an armed conflict to which the general laws of war applied even before U.S. entry into Afghanistan in October 2001.<sup>4</sup> Moreover, it was reported that during the belligerency thousands of members of the regular armed forces of Pakistan were involved in the armed conflict in support of the Taliban,<sup>5</sup> a circumstance that had also internationalized the armed conflict prior to the U.S. intervention.

During an international armed conflict such as the war between the United States and the Taliban regime, all of the customary laws of war apply.<sup>6</sup> These also apply during a belligerency.<sup>7</sup> Customary laws of war include the rights and duties reflected in the 1949 Geneva Conventions,<sup>8</sup> which had been, and still

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*International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, 5 U.N. GAOR, Supp. No. 12, at 11–14, U.N. Doc. A/1316 (1950) [hereinafter *Nuremberg Principles*] (Principle VI, “War crimes: Violation of the laws or customs of war”); *Prosecutor v. Tadic*, IT-94-1, Decision on the Defense Motion on Jurisdiction (Aug. 10, 1995), paras. 61–62 [hereinafter *Tadic*, Trial Chamber]. See also Hague Convention No. IV Respecting the Laws and Customs of War on Land, Annex, art. 23(h), Oct. 18, 1907, 36 Stat. 2277; T.S. No. 539 [hereinafter HC IV] (“it is especially forbidden – (h) To declare abolished, suspended, or inadmissible in a court of law the rights . . . of the nationals of the hostile party”).

3. See, e.g., Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT’L L.J. 533, 539 n.19, 543–44 (2002); see also *infra* note 58. The states were Pakistan, Saudi Arabia, and the United Arab Emirates.

4. See, e.g., Paust, *supra* note 3, at 539 n.19.

5. See, e.g., *id.* at 543 n.36.

6. See, e.g., JORDAN PAUST ET AL., INTERNATIONAL CRIMINAL LAW 803–04, 807–09, 816 (2d ed. 2000) [hereinafter PAUST, ICL]; FM 27-10, *supra* note 2, at 7–8, para. 8(b).

7. See, e.g., PAUST, ICL, *supra* note 6, at 809, 812–13, 815–16; FM 27-10, *supra* note 2, at 9, para. 11(a); *The Prize Cases*, 67 U.S. (2 Black) 635, 666–67, 669 (1862).

8. See, e.g., *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., para. 35, U.N. Doc. S/25704 (1993) (the 1949 Geneva Conventions are “part of conventional international humanitarian law which has beyond doubt become part of international customary law”). This report was unanimously approved by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217 mtg., U.N. Doc. S/RES/827 (1993). See UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 14 (2004) (“In practice, the Geneva Conventions are of virtually universal application and are generally considered to embody customary international law.”) [hereinafter 2004 UK MANUAL]; U.S. NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, 490 n.47 (A.R. Thomas and

are, treaties that are binding on the United States and Afghanistan and their nationals.<sup>9</sup> Common Article 1 of the Geneva Conventions expressly requires that all of the signatories respect and ensure respect for the Conventions “in all circumstances.”<sup>10</sup> It is widely recognized

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James C. Duncan eds., 1999) (“GPW is the universally accepted standard for treatment of POWs; virtually all nations are party to it and it is now regarded as reflecting customary law”); PAUST, ICL, *supra* note 6, at 658, 807; ADAM ROBERTS & RICHARD GUELF, DOCUMENTS ON THE LAWS OF WAR 8, 196 (3d ed. 2000); *infra* notes 17, 19, 27. *See also* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ 226, 258, paras. 81–82 (8 July).

9. *See, e.g.*, U.S. DEP’T OF STATE, TREATIES IN FORCE 452–53 (2002); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 160–61 (D.D.C. 2004). As Secretary of State Colin Powell had warned the White House in 2002, “[t]he United States and the international community have consistently held Afghanistan to its treaty obligations and identified it as a party to the Geneva Conventions.” Colin L. Powell, Memorandum, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), at 5, *available at* <http://www.msnbc.msn.com/id/4999363/site/newsweek>. *See also* ROBERTS & GUELF, *supra* note 8, at 355 (listing Afghanistan as a party). Treaties with a state continue to exist even if a particular government is not formally recognized. *See, e.g.*, New York Chinese TV Programs v. U.E. Enterprises, 954 F.2d 847 (2d Cir. 1992), *cert. denied*, 506 U.S. 827 (1992); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 202, cmt. b, 203(1), 208, cmt. a and reporters’ note 2 (1987) [hereinafter RESTATEMENT]. Moreover, “applicability of the rules of international humanitarian law is not dependent upon whether the parties to a conflict recognize one another.” Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT n.45 (Dieter Fleck ed., 1999).

10. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 1, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter GC or Geneva Civilian Convention]. A few have argued that the Geneva Conventions do not provide protections because they are not self-executing. Such a claim is in error for several reasons. First, most of the articles of the Conventions contain mandatory language, expressly address individual rights, and are self-executing under the language of the treaty considered in context. *See, e.g., id.* arts. 3, 5, 7, 8, 27, 38, 43, 48, 72, 73, 75, 76, 78, 80, 101, 147; Hamdan, 344 F. Supp. 2d at 164–65; In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 478–79 (D.D.C. 2005); Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 515–16 (2003) [hereinafter Paust, *Judicial Power*]; David L. Sloss, *International Decisions: Availability of U.S. courts to Detainees at Guantanamo Bay Naval Base—Reach of Habeas Corpus—Executive Power in War on Terror*, 98 AM. J. INT’L L. 788, 794 n.66 (2004); *see also infra* note 154. Second, if they were not, the President has an unavoidable constitutional duty faithfully to execute the laws, treaties ratified by the United States are such laws, and the President must execute such treaties and is bound by treaty law. *See, e.g.*, U.S. CONST., art. II, § 3; Francis v. Francis, 203 U.S. 233, 240, 242 (1906); The Lessee of Pollard’s Heirs v. Kibbe, 39 U.S. (14 Pet.) 353, 415 (1840); 1 OP. ATT’Y GEN. 566, 569–71 (1822); Alexander Hamilton, PACIFICUS NO. 1 (June 29, 1793); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 67–70, 169–73 (2d ed. 2003) [hereinafter PAUST, INTERNATIONAL LAW]. Third, several statutes execute treaties for civil sanction, habeas, and criminal sanction purposes. *See, e.g.*, Paust, *Judicial Power*, *supra*, at 516–17; *infra* note 47. Fourth, even non-self-executing treaties can be used defensively. *See, e.g.*, Paust, *Judicial Power*, *supra*, at 515, n.42. Fifth, the Geneva Conventions are also customary international law of universal application. *Supra* note 8. As such, they are also directly binding on the Executive and rights and duties under customary international law are also directly incorporable. *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* at 7–11, 169–73, 175, 488–89, 493–94, and numerous cases and opinions cited. *See* Part IV *infra*.

that Common Article 1, among other provisions, thereby assures that Geneva law is non-derogable, and that alleged necessity poses no exception<sup>11</sup> unless a particular article allows derogations on the basis of necessity.<sup>12</sup> Article 1 also provides that the duty to respect and to ensure respect for Geneva law is not based on reciprocal compliance by an enemy<sup>13</sup> but rests upon a customary *obligatio erga omnes* (an obligation owing by and to all humankind)<sup>14</sup> as well as an express treaty-based obligation assumed by each signatory that is owing to every other signatory whether or not they are involved in a particular armed conflict.<sup>15</sup> Further, Article 1 ensures that reprisals in response to enemy violations are not permissible.<sup>16</sup> Each recognition above

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11. See, e.g., IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 9, 15, 37 (“obligation is absolute,” “compulsory”), 39 (“prohibited absolutely . . . no exception or excuse”), 204–05 (“absolute character”), 219–20 (apply in “all cases,” “forbidden for any purpose or motive whatever,” “for any purpose or reason”), 228 (no “military necessity” exception exists to the prohibition of reprisals) (ICRC, Jean S. Pictet ed. 1958) [hereinafter IV COMMENTARY]; PAUST, ICL, *supra* note 6, at 847; 2004 UK MANUAL, *supra* note 8, at 23.

12. These are rare. See, e.g., GC, *supra* note 10, art. 27; IV COMMENTARY, *supra* note 11, at 200.

13. See, e.g., IV COMMENTARY, *supra* note 11, at 15 (“It is not an engagement concluded on the basis of reciprocity, binding each party . . . only in so far as the other party observes its obligations. . . . Each state contracts obligations *vis-à-vis* itself and at the same time *vis-à-vis* the others.”), 34 (“without any condition in regard to reciprocity”), 37; G.I.A.D. DRAPER, THE RED CROSS CONVENTIONS 8 (1958). More generally, the 1958 UK Manual recognizes: “A belligerent is not justified in declaring himself freed altogether from the obligation to observe the laws of war or any of them on account of their suspected or ascertained violation by his adversary.” 1958 UK MANUAL, *supra* note 2, at 44, para. 121; see also HC IV, *supra* note 2, art. 23(h). With similar effect, Article 60(5) of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, prohibits suspension of performance of “provisions relating to the protection of the human person contained in treaties of a humanitarian character,” like the Geneva Conventions, in response to a material breach by another party. The Vienna Convention is customary international law. See, e.g., Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 373 n.5 (2d Cir. 2004); Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 433 (2d Cir. 2001), *cert. denied*, 534 U.S. 891 (2001); RESTATEMENT, *supra* note 9, at 145–47; JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 66, 68, 257 (2000); Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT’L L. 281, 295–301 (1988). Additionally, the Geneva Conventions prohibit attempts to terminate adherence while a signatory is engaged in an armed conflict. See, e.g., GC, *supra* note 10, art. 158 (“denunciation . . . shall not take effect until peace has been concluded, and until after operations connected with the release, repatriation and re-establishment of the persons protected by the present Convention have been terminated.”). As customary international law, they are binding in any event.

14. See, e.g., PAUST ET AL., *supra* note 13, at 48. See also Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.) 1986 ICJ 4, 114–15, para. 220 (the obligation in Article 1 “does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression”) [hereinafter *Nicaragua*].

15. See *supra* note 13.

16. See, e.g., IV COMMENTARY, *supra* note 11, at 39, 228; FM 27-10, *supra* note 2, at 177, para. 497(c) (“Reprisals against the persons or property of prisoners of war, including

assures that, indeed, as expressly mandated in Article 1 the rights and duties set forth in the Geneva Conventions must be observed “in all circumstances.”

Common Article 3 of the 1949 Geneva Conventions is an example of the customary and treaty-based law of war<sup>17</sup> that provides certain rights and duties with respect to any person who is not taking an active part in hostilities, thus including any person detained whether or not such a person had previously engaged in hostilities and regardless of the person’s status. Common Article 3 also happens to require expressly that all such persons “shall in all circumstances be treated humanely,” thereby assuring that humane treatment is required regardless of claimed necessity or other alleged excuses. Although Common Article 3 was developed in 1949 to extend protections to certain persons during an insurgency or armed conflict not of an international character,<sup>18</sup> Common Article 3 now provides a minimum set of customary rights and obligations during any international armed conflict.<sup>19</sup>

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wounded and sick, and protected civilians are forbidden. . . . Collective penalties and punishment . . . are likewise prohibited”); 2004 UK MANUAL, *supra* note 8, at 420. *See also* GC, *supra* note 10, arts. 3, 33.

17. *See, e.g.*, Prosecutor v. Musema, ICTR-96-13-T, Judgment (Jan. 27, 2000), para. 287; Prosecutor v. Akayesu, ICTR-96-4-T, Judgment (Sept. 2, 1998), para. 49; Prosecutor v. Tadic, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), paras. 98, 102 (“some treaty rules have gradually become part of customary law. This holds true for Common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice”) [hereinafter *Tadic*, Appeals Chamber]; *Tadic*, Trial Chamber, *supra* note 2, paras. 51, 65, 67, 72, 74; Prosecutor v. Naletilic and Martinovic, IT-98-34, Judgment (Mar. 31, 2003), para. 228 (“It is . . . well established that Common Article 3 has acquired the status of customary international law”); Prosecutor v. Kunarac, IT-96-23, Judgment (June 12, 2002), para. 68 (Common Article 3 “is indeed regarded as being part of customary international law”); Prosecutor v. Blaskic, IT-95-14, Judgment (Mar. 3, 2000), paras. 166 (“Common Article 3 must be considered a rule of customary international law”), 176 (“customary international law imposes criminal responsibility for serious violations of Common Article 3”); 2004 UK MANUAL, *supra* note 8, at 5 (“Common Article 3 . . . [is] accepted as customary law and thus binding on all states.”); PAUST, ICL, *supra* note 6, at 689, 692–93, 695, 823, 833. *See also* note 27 *infra* and accompanying text (Common Article 3 rights and duties are also mirrored in an article in another treaty that is also customary international law applicable during any international armed conflict).

18. *See, e.g.*, PAUST, ICL, *supra* note 6, at 816.

19. *See, e.g.*, *Hamdan*, 344 F. Supp. 2d at 162–63; *Nicaragua*, 1986 ICJ at 113–14, paras. 218 (“There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick . . . and they are rules which . . . reflect . . . ‘elementary considerations of humanity’”), 255 (Common Article 3 is included in “general principles of humanitarian law . . . in the context of armed conflicts, whether international in character or not”); *Abella v. Argentina*, Case 11,137, Inter-Am. C.H.R., paras. 155-56, OEA/ser.L/V.97, doc. 38 (1997); Prosecutor v. Delalic, IT-96-21-A, Judgment (Feb. 20, 2001), paras. 143, 150; *Tadic*, Appeals Chamber, *supra* note 17, para. 102

(The International Court of Justice has confirmed that these rules reflect

Under the Geneva Conventions, any person who is not a prisoner of war has rights under the Geneva Civilian Convention, and there is no gap in the reach of at least some forms of protection and rights of persons.<sup>20</sup> For example, as noted, Common Article 3 assures

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“elementary considerations of humanity” applicable under customary international law to any armed conflict, whether it is of an internal or international character (Nicaragua Case, para. 218). Therefore, at least with respect to the minimum rules in Common Article 3, the character of the conflict is irrelevant);

*Tadic*, Trial Chamber, *supra* note 2, paras. 65, 67, 74; IV COMMENTARY, *supra* note 11, at 14, 58 (“This minimum requirement in the case of a non-international armed conflict, is *a fortiori* applicable in international conflicts.”); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 299, 306–19 (2005) (the prohibitions reflected in Common Article 3 are “fundamental guarantees” that apply as “customary international law applicable in both international and non-international armed conflicts”); ICRC, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT 9 (2003); PAUST, ICL, *supra* note 6, at 693, 695, 813–14, 816; U.S. DEP’T OF ARMY, OPERATIONAL LAW HANDBOOK 8–9 (2003); Derek Jinks, *Protective Parity and the Law of War*, 79 NOTRE DAME L. REV. 1493, 1508–11 (2004); Paust, *Judicial Power*, *supra* note 10, at 512 n.27. *See also* 2004 UK MANUAL, *supra* note 8, at 5 n.13 (recognizing that among “important judgments” the ICJ “referred to the rules in Common Art. 3 as constituting ‘a minimum yardstick’ in international armed conflicts”); *infra* note 27 and accompanying text (the same rights and duties are mirrored in an article in another treaty that is also customary international law applicable during any international armed conflict); William H. Taft, IV, letter to John C. Yoo (Jan. 23, 2002) (copy to then White House Counsel Gonzales), at 2 (“Even those terrorists captured in Afghanistan, however, are entitled to the fundamental humane treatment standards of Common Article 3 of the Geneva Conventions—the text, negotiating record, subsequent practice and legal opinion confirm that Common Article 3 provides the minimal standards applicable in any armed conflict.”), at [http://www.newyorker.com/online/content/?050214on\\_onlineonly02](http://www.newyorker.com/online/content/?050214on_onlineonly02); John C. Yoo, letter to William H. Taft, IV (Mar. 28, 2002), at 3–4 (noting that at page 89 of a March 22, 2002 memorandum prepared by Legal Adviser Taft it is stated “that all combatants are entitled, ‘as a minimum, [to] the guarantees of article 3 . . .’” and that at page 5 the March 22 memo states “that ‘[i]t is widely recognized internationally . . . that Common Article 3 reflects minimum customary international law standards for both internal and international armed conflicts’”), at [http://www.newyorker.com/online/content/?050214on\\_onlineonly02](http://www.newyorker.com/online/content/?050214on_onlineonly02).

20. *See, e.g.*, IV COMMENTARY, *supra* note 11, at 51, 595; III COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 51 n.1, 76, 423 (Jean S. Pictet ed., 1960); FM 27-10, *supra* note 2, at 31, para. 73; 2004 UK MANUAL, *supra* note 8, at 145, 148, 150, 216, 225; 1958 UK MANUAL, *supra* note 2, at 96; HENCKAERTS & DOSWALD-BECK, *supra* note 19, at 389; Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment (Nov. 16, 1998), para. 271 (“there is no gap between the Third and the Fourth Geneva Conventions”); MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 261–63 (1982); HILLARE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 137 (2d ed. 1998); Knut Dormann, *The Legal Situation of “Unlawful/Unprivileged Combatants,”* 85 INT’L REV. RED CROSS 849 (2003); Jinks, *supra* note 19, at 1504, 1510–11; Paust, *Judicial Power*, *supra* note 10, at 511–12 & n.27; Sloss, *supra* note 10, at 796; Johannes van Aggelen, *A Response to John C. Yoo, The Status of Soldiers and Terrorists under the Geneva Convention*, 3 CHINESE J. INT’L L. 1, 5, 8–9 (2004). *See also* Hamdan, 344 F. Supp. 2d at 161–62 (if a detainee is not a POW, rights and protections exist under Common Article 3); U.S. Dep’t of Army, Subject Schedule 27-1, THE GENEVA CONVENTIONS OF 1949 AND HAGUE CONVENTION NO. IV OF 1907, at 7–8 (Oct. 8, 1970) (“these rules are embodied in one general

that any person detained has certain rights “in all circumstances” and “at any time and in any place whatsoever,” whether the detainee is a prisoner of war, unprivileged belligerent, terrorist, or noncombatant.<sup>21</sup> Such absolute rights include the right to be “treated humanely;” freedom from “violence to life and person;”<sup>22</sup> freedom from “cruel treatment and torture;”<sup>23</sup> freedom from “outrages upon personal dignity, in particular, humiliating and degrading treatment;”<sup>24</sup> and minimum human rights to due process in case of trial.<sup>25</sup> Article 75 of Protocol I to the 1949 Geneva Conventions assures the same minimum guarantees to every person detained, regardless of status.<sup>26</sup> Although the United States has not ratified the Protocol, the then Legal Adviser to the U.S. Secretary of State had rightly noted that the customary ““safety-net”” of fundamental guarantees for all persons detained during an international armed conflict found “expression in Article 75 of Protocol I,” which the United States regards “as an articulation of safeguards to which all persons in the hands of an enemy are entitled,” and that even unprivileged belligerents or terrorists “are not ‘outside the law’” and “do not forfeit their right to humane treatment—a right that belongs to all humankind, in war and in peace.”<sup>27</sup>

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principle: treat all prisoners of war, civilians, or other detained personnel *humanely*. . . . To repeat, we must insure that all persons are treated humanely. These persons may not be subjected to murder, torture, corporal punishment, mutilation, or any form of physical or mental coercion.”) (emphasis in original); *infra* note 111 (regarding Army doctrine).

21. See GC, *supra* note 10, art. 3; Jinks, *supra* note 19, at 1500, 1511; *supra* note 20.

22. See GC, *supra* note 10, art. 3(1)(a).

23. See *id.*

24. See *id.* art. 3(1)(c).

25. See *id.* art. 3(1)(d), which incorporates customary human rights to due process by reference and, thus, all of the provisions in Article 14 of the International Covenant on Civil and Political Rights [ICCPR]. See, e.g., Paust, *supra* note 10, at 511–12 & n.27; Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1, 10–18 (2001) [hereinafter Paust, *Courting Illegality*]; Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT’L L. 677, 678 & n.9, 685–90 (2002).

26. See 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. 75, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I].

27. William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 321–22 (2003). See also Christopher J. Greenwood, *Customary Law Status of the 1977 Additional Protocols*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 103 (Delissen & Tanja, eds., 1991); Jinks, *supra* note 19, at 1510–11; U.S. DEP’T OF ARMY TJAG SCHOOL, OPERATIONAL LAW HANDBOOK 11 (2002) (Articles 73–89 are among several articles in Protocol I that the United States views “as either binding as customary international law or acceptable practice though not legally binding”), available at <http://www.jagcnet.army.mil/TJAGSA>.

In addition to fundamental *erga omnes* and customary rights and protections under Common Article 3 of the Geneva Conventions and customary law reflected in Article 75 of Protocol I, there are several other articles in the Geneva Civilian Convention that provide rights and protections. Article 4 of the Geneva Civilian Convention assures that foreign persons outside the territory of the United States are entitled to protections in Parts II and III of the Convention.<sup>28</sup> Part II applies to “the whole of the populations of the countries in conflict”<sup>29</sup> and protections therein include the duty of parties to an armed conflict, “[a]s far as military considerations allow . . . to assist . . . persons exposed to grave danger, and to protect them against . . . ill-treatment.”<sup>30</sup> Within Part III of the Convention, one finds additional rights and guarantees relevant to the treatment and interrogation of persons. For example, Article 27 recognizes that “[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs;” it also adds that “[t]hey shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.”<sup>31</sup>

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28. See GC, *supra* note 10, art. 4, stating that “[p]ersons protected by the Convention [in GC Part III] are those who, at a given moment and in any manner whatsoever, find themselves . . . in the hands of a Party to the conflict or Occupying Power of which they are not nationals;” that a narrow exclusion for “[n]ationals of a neutral State” applies only when such nationals are “in the territory of a belligerent State” and their state of nationality “has normal diplomatic representation in the State in whose hands they are”; and that “[t]he provisions of Part II are, however, wider in application, as defined in Article 13.” Thus, nationals of a neutral state who are in the territory of the United States could fit within the exclusion in Article 4, but they might be covered under Part II of the Convention (see *infra* note 29) and they have the customary rights and protections mirrored in Common Article 3 (which pertains if they are detained). However, nationals of a neutral state detained by the United States outside “the territory of” the United States are covered and have protections listed in Part III of the Convention as well as in Common Article 3. See also *infra* note 149 (concerning nationals of a neutral state in occupied territory). In any event, limitations in Article 4 are obviated once the general rights, duties and protections in the Convention become customary international law of universal application. In a related manner, the International Military Tribunal at Nuremberg ruled that the fact that (1) Germany refused to ratify the 1907 Hague Convention, and (2) the treaty contained a general participation clause in Article 2 that limited the treaty’s reach to armed conflicts between contracting parties became irrelevant once the rules mirrored in the treaty became customary international law. See Opinion & Judgment, International Military Tribunal at Nuremberg (1946), *reprinted in* 41 AM. J. INT’L L. 172, 248–49 (1947).

29. See GC, *supra* note 10, art. 13. This language can reach nationals of a neutral state and any other person who was part of the “population” of a country in conflict (*e.g.*, a resident alien of Saudi nationality who is part of the population of the United States).

30. GC, *supra* note 10, art. 16.

31. *Id.* art. 27. See also *id.* art. 147 (torture and inhuman treatment are “grave breaches”).

Article 31 requires that “[n]o physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.”<sup>32</sup> Article 32 supplements the prohibitions by requiring that parties to the Convention are “prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands . . . [which] applies not only to murder, torture, corporal punishment, mutilation and . . . [other conduct], but also to any other measures of brutality whether applied by civilian or military agents.”<sup>33</sup> Article 33 includes the recognition that “all measures of intimidation or of terrorism are prohibited.”<sup>34</sup>

Customary and treaty-based human rights are also relevant to the treatment and interrogation of human beings, and human rights law continues to apply during war.<sup>35</sup> Human rights law provides basic rights for every human being and includes the fundamental and inalienable right to human dignity.<sup>36</sup> Some human rights are derogable under special tests in times of public emergency or other necessity,<sup>37</sup> but many human rights are non-derogable and are therefore absolute regardless of claims of necessity or any other

32. *Id.* art. 31.

33. *Id.* art. 32. *See also id.* art. 147 (“torture or inhuman treatment, . . . willfully causing great suffering or serious injury to body or health” are “grave breaches”).

34. *Id.* art. 33.

35. *See, e.g.,* HENCHAERTS & DOSWALD-BECK, *supra* note 19, at 299–306; Paust, *Judicial Power*, *supra* note 10, at 505–06 n.5; Alfred de Zayas, *The Status of Guantanamo Bay and the Status of Detainees*, 37 U.B.C. L. REV. 277, 281–82, 309–10 (2004). *See also* Ex parte Milligan, 71 U.S. (4 Wall.) 2, 119 (1866) (“human rights”); The Julia, 12 U.S. (8 Cranch) 181, 193 (1814) (“rights of humanity” pertain in war); Kadic v. Karadzic, 70 F.3d 232, 242–44 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); 11 OP. ATT’Y GEN. 19, 21 (1864) (“human rights”); Council of Europe, Parliamentary Assembly, Resolution 1433, para. 4 (2005), available at <http://assembly.coe.int/Documents/AdoptedText/ta05/RES1433.htm>; Resolution on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 59/182, U.N. Doc. A/RES/59/182 (2004) [hereinafter General Assembly Torture Resolution].

36. *See, e.g.,* International Covenant on Civil and Political Rights, pmbl., arts. 10(1) (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”), 16 (“Everyone shall have recognition everywhere as a person before the law.”), 26 (“All persons shall be equal before the law and are entitled without any discrimination to the equal protection of the law. . .”), 999 U.N.T.S. 171 [hereinafter ICCPR]; Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 HOW. L.J. 145 (1983). Our Courts have recognized more generally that cruel or inhumane treatment “cannot comport with human dignity.” *See, e.g.,* Furman v. Georgia, 408 U.S. 238, 271, 279–81, 286 (1972); *see also* Bell v. Wolfish, 441 U.S. 520, 583 (1979); Estelle v. Gamble, 429 U.S. 97, 102 (1976); Gregg v. Georgia, 428 U.S. 153, 173 (1976); United States ex rel. Caminito v. Murphy, 222 F.2d 698, 701 (2d Cir. 1955) (psychological torture, cruelty).

37. *See, e.g.,* ICCPR, *supra* note 36, arts. 4(1), 18(3), 19(3), 22(2).

putative excuse.<sup>38</sup> Certain human rights are also peremptory *jus cogens* that cannot be derogated from and that preempt any other laws.<sup>39</sup>

Thus, in every circumstance every human being has some forms of protection under human rights law. With respect to treatment and interrogation of human beings, customary and treaty-based human rights law that is nonderogable and also part of peremptory rights and prohibitions (*jus cogens*) requires that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>40</sup> As customary and peremptory rights and

38. See, e.g., *id.* art. 4(2); Human Rights Committee, General Comment No. 24, para. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), reprinted in PAUST, INTERNATIONAL LAW, *supra* note 10, at 376–77; General Assembly Torture Resolution, *supra* note 35, paras. 1 (“Condemns all forms of torture and other cruel, inhuman or degrading treatment . . . , including through intimidation, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified”), 2 (“Condemns in particular any action or attempt by State or public officials to legalize or authorize . . . [such conduct] under any circumstances, including on grounds of national security”).

39. See, e.g., General Comment No. 24, *supra* note 38, para. 8; RESTATEMENT, *supra* note 9, § 702 and cmts. a, n, reporters’ note 11; PAUST ET AL., *supra* note 13, at 49–53. Among *jus cogens* prohibitions listed in the Restatement are: murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and a consistent pattern of gross violations of human rights. RESTATEMENT, *supra* note 9, § 702 (c)-(g).

40. See, e.g., ICCPR, *supra* note 36, art. 7; General Comment No. 24, *supra* note 38, para. 8

(Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. . . . Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a state may not reserve the right . . . to torture, to subject persons to cruel, inhuman or degrading treatment or punishment);

Prosecutor v. Furundzija, IT-95-17/1-T, Judgment (Dec. 10, 1998), paras. 153, 155. The ICTY commented that the prohibition of torture has

evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys higher rank in the international hierarchy than treaty law and even “ordinary” customary rules. The most conspicuous consequence of this higher rank is that . . . [the proscription of torture] cannot be derogated from by States through international treaties. . . . [T]reaties or customary rules providing for torture would be null and void *ab initio* . . . [and states cannot take] national measures authorizing or condoning torture or absolving its perpetrators.

See also *Kadic v. Karadzic*, 70 F.3d 232, 243–44 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Filartiga v. Pena-Irala*, 630 F.2d 876, 878, 882 (2d Cir. 1980); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 305–06, 326 (S.D.N.Y. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347–48 (N.D. Ga. 2002) (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”); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1360–61 (S.D. Fla. 2001); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 45 (D.D.C. 2000); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 65–

prohibitions *jus cogens*, the prohibitions of torture and cruel, inhuman or degrading treatment apply universally and without any limitations in allegedly valid reservations or understandings during ratification of a relevant treaty,<sup>41</sup> such as those attempted with respect to the

69 (D.D.C. 1998); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184–89 (D. Mass. 1995); ICCPR, *supra* note 36, art. 10(1) (“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”); Universal Declaration of Human Rights, art. 5, G.A. Res. 217A(III), U.N. GAOR, at 71, U.N. Doc. A/810 (1948) (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment. . . .”); U.S. Memorial before the International Court of Justice in Case Concerning United States Diplomatic Staff in Tehran (*United States v. Iran*), 1980 ICJ Pleadings (the Executive recognizes that Article 5 of the Universal Declaration is customary human rights law); 22 U.S.C. § 262 d(a) (Congress has recognized that gross violations of human rights include “torture or cruel, inhumane, or degrading treatment”); RESTATEMENT, *supra* note 9, § 702(d) & cmt. n; General Assembly Torture Resolution, *supra* note 35, paras. 1-2 (quoted *supra* note 38).

The ICCPR also happens to apply to all persons subject to the jurisdiction of a signatory. *See, e.g.*, ICCPR, *supra* note 36, art. 2(1); Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ paras. 108–11 (The ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”), *reprinted in* 43 I.L.M. 1009, 1039–40 (2004); Human Rights Committee, General Comment No. 31, at para. 10 (applies to all persons subject to their jurisdiction. This means . . . anyone within the power or effective control of that State party, even if not situated within the territory of the State. . . . [The ICCPR applies] to all individuals . . . who may find themselves in the territory or subject to the jurisdiction of a State Party. . . . [It] also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained), para. 11 (“the Covenant applies also in the situation of armed conflict to which the rules of international humanitarian law are applicable.”), U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); General Comment No. 24, *supra* note 38, at paras. 4, 12 (“all those under a State party’s jurisdiction”); HENCKAERTS & DOSWALD-BECK, *supra* note 19, at 305 (“wherever they have jurisdiction. . . [or] effective control. . . . State practice has interpreted this widely.”); Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 72, 74 (Louis Henkin ed., 1981); Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78, 78–80 (1995); Zayas, *supra* note 35, at 281–82, 310–12.

Clearly, persons detained and being interrogated by the United States are subject to jurisdiction of the United States. Moreover, Guantanamo and U.S. naval vessels are under the complete jurisdiction and control of the United States. *See, e.g.*, *Rasul v. Bush*, 124 U.S. 2686 (2004); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1347–49 (2004) [*hereinafter* Paust, *Overreaction*]; Zayas, *supra* note 35, at 282, 311–12. Where the U.S. is an occupying power, it also has jurisdiction and control of detainees. Paust, *Overreaction, supra*, at 1347. More generally, U.S. obligations under the UN Charter to respect and ensure respect for human rights are applicable universally. *See* U.N. CHARTER, arts. 55(c), 56.

41. *See, e.g.*, *Furundzija*, *supra* note 40; Vienna Convention on the Law of Treaties, *supra* note 13, arts. 53, 64 (recognizing that *jus cogens* norms prevail over any inconsistent treaties or portions thereof); General Comment No. 24, *supra* note 38, para. 8, quoted *supra* note 40. U.S. obligations under the UN Charter to respect and ensure respect for human rights are absolute and without limitation. Moreover, they assure that customary human rights that are incorporated by reference apply universally and without limitations attempted in other treaties. *See* U.N. CHARTER, arts. 55(c), 56, 103 (“In the event of a conflict between

ICCPR<sup>42</sup> or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>43</sup>

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the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter prevail.”). As the IMT at Nuremberg recognized, specific limitations in a treaty are obviated once the rights, duties and protections become customary international law. *See supra* note 28.

42. A U.S. reservation to the ICCPR attempted to limit the reach of the ICCPR with respect to proscribed cruel, inhuman and degrading treatment. *See* Reservation No. 3, 138 CONG. REC. S4781-01 (daily ed., Apr. 2, 1992) (“the United States considers itself bound by Article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States”). Clearly, the attempted reservation would deny full protection under the ICCPR with respect to all forms of cruel, inhuman and degrading treatment. As such, it is incompatible with the object and purpose of the treaty and void *ab initio* as a matter of law. *See, e.g.*, Vienna Convention on the Law of Treaties, *supra* note 13, art. 19(c) (reservations are void if they are “incompatible with the object and purpose of the treaty”); General Comment No. 24, *supra* note 38, para. 8, quoted *supra* note 40. In any event, the customary prohibition of such treatment applies universally and without such an attempted limitation.

43. Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). A putative U.S. reservation to the Convention attempted to preclude its reach to all forms of cruel and inhuman treatment. *See* Reservation No. 1, available at CONG. REC. S 17486-01 (daily ed., Oct. 27, 1990) (“the United States 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.”). Clearly, the attempted reservation would be incompatible with the object and purpose of the Convention, since application of the reservation would preclude coverage of all forms of cruel, inhuman and degrading treatment as required under the Convention. As such, it is void *ab initio* as a matter of law. *See* Vienna Convention on the Law of Treaties, *supra* note 13, art. 19(c). It was claimed recently by Alberto Gonzales that the putative reservation not only sought to limit the type of treatment proscribed (*i.e.*, that the phrase “cruel, inhuman, or degrading” set forth in a multilateral treaty “means” merely that which is recognized under U.S. constitutional amendments), but also sought to limit the treaty’s reach overseas (*i.e.*, “means” treatment or punishment prohibited by the amendments and, if they do not apply overseas, such treatment or punishment overseas is permissible). *See* Sonni Efron, *Torture Becomes a Matter of Definition: Bush Nominees Refuse to Say What’s Prohibited*, N.Y. TIMES, Jan. 23, 2005, at A1. Such an attempted reservation would be doubly incompatible with the object and purpose of the treaty and void as a matter of law. In any event, the customary prohibitions have no such limitations. Congress recently declared that “the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhuman, or degrading treatment of foreign prisoners held in custody of the United States” here or abroad. *Sense of Congress and Policy Concerning Persons Detained by the United States*, Pub. L. No. 108-375, 118 Stat. 1811, § 1091 (a)(1)(6) (Oct. 28, 2004). Congress also reiterated the requirement that “no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States” (*Id.* § 1091 (a)(1)(8)) and reiterated “the policy of the United States to . . . investigate and prosecute, as appropriate, all alleged instances of unlawful treatment of detainees in a manner consistent with the international obligations, laws, or policies of the United States.” *Id.* § 1091 (b)(2).

## II. EXECUTIVE PLANS AND AUTHORIZATIONS

Despite such clear and absolute requirements under the laws of war and human rights law, the plan within the Bush Administration to deny protections under international law that led to approval and use of illegal interrogation tactics rested on what White House Counsel Alberto Gonzales advised President Bush in January 2002 was a supposed “high premium on other factors, such as the ability to quickly obtain information,”<sup>44</sup> supposed “military necessity,”<sup>45</sup> and a claim that a supposedly “new paradigm renders obsolete Geneva’s strict limitations on questioning.”<sup>46</sup> However, none of these claims could possibly justify the plan to violate Geneva law and nonderogable human rights. Moreover, the Gonzales memo clearly placed the President on notice that the Geneva Conventions provide “strict limitations on questioning,” but the President’s subsequent decisions and authorizations, coupled with recommendations, decisions, authorizations, and orders of others within the Administration and the military, set the common plan to deny Geneva protections and use illegal interrogation tactics in motion.

The 2002 Gonzales memo to the President addressed certain war crimes under one of two federal statutes that can be used to prosecute U.S. and foreign nationals for war crimes.<sup>47</sup> It expressly noted that a war crime includes “any violation of Common Article 3 . . . (such as ‘outrages against personal dignity’)”<sup>48</sup> and rightly

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44. See Alberto R. Gonzales, Memorandum for the President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban 2 (Jan. 25, 2002), available at <http://www.msnbc.msn.com/id/4999148/site/newsweek>. See also *infra* notes 46, 89, 97.

45. See *id.* at 4. See also *id.* at 2 (“needs and circumstances”). President Bush authorized this alleged excuse for denial of required treatment under the Geneva Conventions in his Feb. 7, 2002 Memorandum. See *infra* note 60.

46. Gonzalez, *supra* note 44, at 2. Subsequently, John Yoo indicated the reason for the plan to deny “Geneva’s strict limitations on questioning.” See John Yoo, *Behind the “Torture Memo,”* SAN JOSE MERCURY NEWS, Jan. 2, 2005 (“Why? Because the United States needed to be able ‘to quickly obtain information. . . .’”).

47. See Gonzalez, *supra* note 44, at 2, addressing the War Crimes Act, 18 U.S.C. § 2441. The other federal statute that incorporates laws of war as offenses against the laws of the United States is 10 U.S.C. § 818. Unlike the War Crimes Act, it incorporates all of the laws of war and can reach any war crime committed by any person. Federal district court jurisdiction pertains under 18 U.S.C. § 3231, which reaches “all offenses against the laws of the United States.” See, e.g., PAUST, ICL, *supra* note 6, at 253–59; Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971) [*hereinafter* Paust, *After My Lai*].

48. See Gonzales, *supra* note 44, at 2. This advice was correct. See, e.g., *supra* notes 2, 17.

warned that “[s]ome of these provisions apply (if the GPW<sup>49</sup> applies) regardless of whether the individual being detained qualifies as a POW.”<sup>50</sup> The plan to deny Geneva protections and to authorize illegal interrogation tactics would be furthered, it was opined, by “[a]dhering to your determination that GPW does not apply.”<sup>51</sup> The Memo further claimed that “[a] determination that GPW is not applicable to the Taliban would mean that . . . [the federal criminal statute addressed supposedly] would not apply to actions taken with respect to the Taliban.”<sup>52</sup> The latter claim is not true in view of numerous judicial decisions throughout our history reviewing Executive decisions concerning the status of persons during war<sup>53</sup> and affirming constitutionally based judicial power ultimately to decide whether and how the laws of war, as relevant law, apply.<sup>54</sup> Nonetheless, the claim is evidence of an unprincipled plan to evade the reach of law and to take actions in violation of Geneva law while seeking to avoid criminal sanctions.

As the Gonzales memo noted, the President had previously followed the White House Counsel’s advice on January 18 as well as that set forth in a Department of Justice formal legal opinion and the President had decided, in error, that GPW did not apply during the war in Afghanistan.<sup>55</sup> The Gonzales memo noted that “the Legal Adviser to the Secretary of State has expressed a different view,” but Gonzales pressed the plan to adhere “to your determination that GPW does not apply” precisely because among the “consequences of a

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49. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316 (*entered into force* Oct. 21, 1950) [hereinafter GPW].

50. Gonzales, *supra* note 44, at 2. *See also supra* notes 20–21, 27 and accompanying text.

51. Gonzalez, *supra* note 44, at 2.

52. *Id.* By this language, Gonzales probably meant if GPW did not apply to the armed conflict, since he recognized that if Geneva law applies to the armed conflict those who are not prisoners of war are still protected under various Geneva protections, including Common Article 3. *See supra* notes 48–50 and accompanying text. Nonetheless, it was strange to focus on GPW, since those who are not prisoners of war under GPW are still protected under Common Article 3 and the Geneva Civilian Convention. *See supra* notes 20–21.

53. *See, e.g.,* Paust, *Judicial Power*, *supra* note 10, at 518–24, and cases cited therein.

54. *See, e.g.,* The Prize Cases, 67 U.S. (2 Black) 635, 666–67 (1862); Paust, *Judicial Power*, *supra* note 10. Moreover, the President is bound by and must faithfully execute international law, especially the laws of war. *See Part IV infra.*

55. Gonzales, *supra* note 44, at 2. Former White House Counsel John Dean has stated that “[t]he Gonzales memo shows the president was up to his eyeballs in the decision about how to extract information from those captured in Afghanistan” and there is “indisputable evidence that President Bush issued orders” to deny protections under the laws of war. John W. Dean, *Crime and No Punishment: Who is Accountable for the Legal Measures that Justify Torture?*, PLAYBOY, Oct. 2004, at 51.

decision to adhere to . . . your earlier determination that the GPW does not apply to the Taliban” would be the supposed avoidance of “Geneva’s strict limitations on questioning” so as to enhance “the ability to quickly obtain information.” Another supposed consequence would be the avoidance of “foreclosing options for the future, particularly against non-state actors.” Most importantly, Gonzales supposed a consequence of the determination would be a “[s]ubstantial reduc[tion] of the threat of domestic criminal prosecution [of U.S. personnel] under the War Crimes Act (18 U.S.C. 2441)” because it “would mean that Section 2441 would not apply to actions taken with respect to the Taliban,” and the determination “would provide a solid defense to any future prosecution.”<sup>56</sup> As noted above, however, Geneva law clearly did apply and the President cannot foreclose judicial recognition of the reach and application of international law.

The day after Gonzales crafted his memo an outraged Secretary of State Colin Powell sent a memo to the White House Counsel and the Assistant to the President for National Security Affairs warning that “[t]he United States has never determined that the GPW did not apply to an armed conflict in which its forces have been engaged. . . . The GPW was intended to cover all types of armed conflict and did not by its terms limit its application.”<sup>57</sup> Such a warning was reiterated a week later in a memo by the Legal Adviser to the Department of State, William H. Taft, IV, to White House Counsel Gonzales:

The President should know that a decision that the Conventions do apply is consistent with the plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years. It is consistent with the advice of DOS lawyers and, as far as is known, the position of every other party to the Conventions. It is consistent with UN Security Council Resolution 1193 affirming that “[a]ll parties to the conflict [in Afghanistan] are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions.”<sup>58</sup>

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56. Gonzales, *supra* note 44, at 1-2.

57. Powell, *supra* note 9, at 5.

58. William H. Taft, IV, Memorandum to Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), at 1, *available at* [http://pegc.noip.info/archive/State\\_Department/20020202\\_taft\\_memo\\_to\\_gonzales.pdf](http://pegc.noip.info/archive/State_Department/20020202_taft_memo_to_gonzales.pdf)

Attorney General John Ashcroft, however, had been opposed to similar advice from the National Security Council and had urged the President to deny applicability of the Geneva Conventions and their protections in an effort to avoid criminal sanctions because:

a Presidential determination against treaty applicability would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States.<sup>59</sup>

The President adhered to the erroneous decision until February 7, 2002 (four months after U.S. entry into the Afghan war), when the White House reversed itself and announced that the Geneva Conventions applied to the war in Afghanistan, but in a memorandum issued on that date the President authorized the denial of protections under Common Article 3 of the Geneva Conventions to members of al Qaeda and the Taliban.<sup>60</sup> This memorandum also authorized the

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(quoting S.C. Res. 1193, U.N. SCOR, 53rd Sess., 3921 mtg. para. 12, U.N. Doc. S/RES/1193 (1998). See also *infra* note 85. Earlier, Legal Adviser Taft had written to the Office of Legal Counsel of the Department of Justice that a January 9, 2002 DOJ memo relied on by Gonzales (the Yoo & Delahunty OLC, DOJ memo) was “seriously flawed,” its reasoning was “incorrect as well as incomplete” and “contrary to the official position of the United States, the United Nations and all other states that have considered the issue,” and the claim that the President could suspend the Geneva Conventions was “legally flawed and procedurally impossible.” See John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26, 30; R. Jeffrey Smith, *Lawyer for State Dept. Disputed Detainee Memo; Military Legal Advisers Also Questioned Tactics*, WASH. POST, June 24, 2004, at A7; William H. Taft, IV, Draft Memorandum to John C. Yoo (Jan. 11, 2002) (copies to Secretary of State and then White House Counsel Gonzales), at 1, 4–5 (Afghanistan continues to be a state and “[a] failed State does not thereby cease to be a State, nor does it cease to be a party to relevant Conventions”), 7–8 (Geneva law continues to apply), 29 (U.S. “is bound to respect all of the provisions of the Convention”), available at [http://pegc.no-ip.info/archive/State\\_Department/taft\\_memo\\_20020111.pdf](http://pegc.no-ip.info/archive/State_Department/taft_memo_20020111.pdf).

59. Letter from Attorney General John Ashcroft to President George W. Bush (Feb. 1, 2002), available at <http://news.findlaw.com/wp/docs/torture/jash20102ltr.html>.

60. See, e.g., Memorandum of President George W. Bush (Feb. 7, 2002), in FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS (Aug. 2004), Appendix C [hereinafter Final Report 2004], available at <http://wid.ap.org/documents/iraq/040824finalreport.pdf>; Final Report 2004, *supra*, at 33–34; Barry, *supra* note 58, at 30–31; Katharine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A1. Secretary Rumsfeld issued similar orders limiting treatment required by Geneva law on January 19, 2002, see *infra* note 110, and April 16, 2003, see *infra* note 120. President Bush’s memo stated that he accepted “the legal conclusion of the Department of Justice dated January 22, 2002,” and determined “that none of the provisions of Geneva apply to our conflict with al Qaeda . . . because, among other

denial of protections more generally by ordering that humane treatment be merely “in a manner consistent with the principles of Geneva” and then only “to the extent appropriate and consistent with military necessity,” despite the fact that (1) far more than the “principles” of Geneva law apply, (2) it is not “appropriate” to deny treatment required by Geneva law, and (3) alleged military necessity does not justify the denial of treatment required by Geneva law. The memorandum’s language limiting protection “to the extent appropriate” is potentially one of the broadest putative excuses for violations of Geneva law. Necessarily, the President’s memorandum of February 7, 2002, authorized and ordered the denial of treatment required by the Geneva Conventions and, therefore, necessarily authorized and ordered violations of the Geneva Conventions, which are war crimes.

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reasons, al Qaeda is not a High Contracting Party.” Bush memo, *supra*, para. 2(a); *but see infra* notes 62–63. This January 22 memo was most likely the 37-page “Bybee Memo.” Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, Regarding Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>. *See, e.g., Timeline of Memos on Treatment of Prisoners*, MIAMI HERALD, June 23, 2004, at 15. The Bybee memo was basically a reiteration of the Yoo-Delahanty memo, *infra* note 66.

The President’s memo also stated that the President accepted “the legal conclusions” of DOJ and determined “that Common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees because . . . the relevant conflicts are international in scope and Common Article 3 applies only to ‘armed conflict not of an international character.’” Bush Memo, *supra*, para. 2(c); *but see supra* note 19; *supra* notes 26–27 and accompanying text. Moreover, the President’s memo attempted to deny treatment required under the Geneva Conventions on the basis of alleged necessity, stating that detainees will be treated “to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.” Bush Memo, *supra*, paras. 3, 5. However, necessity is no defense with respect to violations of Geneva law, which are war crimes, and non-derogable human rights protections. *See supra* notes 2, 10–11, 42; *infra* note 94. The message in the President’s memo that alleged necessity could justify denial of treatment required under Geneva law was an authorization with criminal implications. The “to the extent appropriate” limitation is an even broader order with criminal implications. It had its intended effect. For example, Colonel Manuel Superville admitted that he implemented a similar order concerning treatment at Guantanamo, that he categorized Geneva articles as “green, yellow, and red” and that various “yellow” and “red” duties and protections were denied. Col. Manuel Superville, remarks, during a panel session at the American University, Washington College of Law, Mar. 24, 2005, during a conference on The Geneva Convention and the Rules of War in the Post 9-11 and Iraq World, shown on C-Span. *See also* Council of Europe Resolution, *supra* note 35, para. 7(i). It has been reported recently that a draft DOD Joint Publication 3-63, Joint Doctrine for Detainee Operations (23 Mar. 2005) would perpetuate criminal denials of protections under the Geneva Conventions with a “subject to military necessity, consistent with the principles of GC” limitation of protections. *See* Human Rights Watch, *Letter to Secretary Rumsfeld on the “Joint Doctrine for Detainee Operations,” available at* <http://hrw.org/english/docs/2005/04/07/usdom10439.htm>, citing the draft JP 3-63, chapter 1, at 11, *available at* <http://hrw.org/campaigns/torture/jointdoctrine/jointdoctrine040705.pdf>.

With respect to members of al Qaeda in particular, the White House announced at that time that members of al Qaeda “are not covered by the Geneva Convention” and will continue to be denied Geneva law protections, supposedly because al Qaeda “cannot be considered a state party to the Geneva Convention.”<sup>61</sup> As noted soon thereafter, however,

The White House statement demonstrates remarkable ignorance of the nature and reach of treaties and customary international law. First, any member of al Qaeda who is a national of a state that has ratified the relevant treaties is protected by them. Nearly every state, including Saudi Arabia, is a signatory to these treaties. Second, the 1949 Geneva Conventions are part of customary international law that is universally applicable in times of armed conflict and, as such, protect all human beings according to their terms.

Third, Common Article 3 provides non-derogable protections and due process guarantees for every human being who is captured and, like Common Article 1, assures their application in all circumstances. Also, international terrorism and terrorism in war are not new and clearly were contemplated during the drafting of the treaties.<sup>62</sup>

The Legal Adviser to the State Department had also aptly warned that the portion of the Gonzales memo

[s]uggesting a distinction between our conflict with al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions

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61. See Seelye, *supra* note 60; see also Bybee, *supra* note 60, at 1, 9 (“We conclude that these treaties do not protect the members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war.”).

62. Paust, *Courting Illegality*, *supra* note 25, at 7–8 n.15. With respect to treaties, it was affirmed long ago that “every citizen is a party to them.” *Henfield’s Case*, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6,260). This fundamental aspect of treaty law assures that individuals and groups (such as members of al Qaeda) are bound by treaties that have been adhered to by the state of which they are nationals. It is why an array of treaties addressing international crimes such as aircraft hijacking, aircraft sabotage, hostage-taking, genocide, and war crimes are binding on various individuals and groups that have never “ratified” such treaties. It is also why insurgents are bound by and can be prosecuted for violations of Common Article 3 of the Geneva Conventions.

are applicable to all persons involved in that conflict—al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc.<sup>63</sup>

The plan involving White House Counsel Gonzales and President Bush evidenced in the Gonzales memo was legally inept for an additional reason. The memo openly admitted the unavoidable fact that “the customary laws of war would still be available. . . . Moreover, even if GPW is not applicable, we can still bring war crimes charges” against members of al Qaeda and the Taliban with respect to violations of the customary laws of war occurring during the war in Afghanistan.<sup>64</sup> Thus, the plan recognized that the customary laws of war apply to the war in Afghanistan and apply to members of al Qaeda and the Taliban, but the plan involved a design and decision to refuse to apply provisions of the Geneva Conventions that provide protections for such persons despite the unavoidable facts: (1) that as treaty law the Geneva protections also apply during the international armed conflict in Afghanistan, and (2) that Geneva protections are also widely recognized as constituting part of the customary laws of war that apply to international armed conflicts like the war in Afghanistan and, thus, to members of al Qaeda and the Taliban during and within that armed conflict.<sup>65</sup> Moreover, the Gonzales memo had paid no attention to similar protections and requirements under customary and treaty-based human rights law.

Behind the Gonzales-Bush plan was a memorandum written on January 9, 2002 that had also addressed possible war crime responsibility of U.S. nationals and designs for attempted avoidance of international and domestic criminal responsibility for interrogation tactics (that would later be approved) by claiming that Geneva law did not protect members of al Qaeda or the Taliban. The memo was written in the Office of Legal Counsel of the Department of Justice by John Yoo and Robert J. Delahunty for William J. Haynes, II, General Counsel of the Department of Defense.<sup>66</sup> It was the DOJ memo that

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63. Taft, *supra* note 58, at 2. *See also supra* notes 20–21 and accompanying text.

64. Gonzales, *supra* note 44, at 3. It has been reported more recently that a memorandum from Patrick F. Philbin of the Department of Justice’s Office of Legal Counsel to Gonzales on Nov. 6, 2001, had argued that trying detainees for violations of the laws of war “does not mean that terrorists will receive protections of the Geneva Conventions.” Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1.

65. *See supra* notes 8, 14, 17, 19–20, 28.

66. John Yoo, Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), *available at* <http://www.msnbc.msn.com/id/5025040/site/newsweek>.

had been referred to in the Gonzales memo to President Bush and it was quickly “endorsed by top lawyers in the White House, the Pentagon and the vice president’s office”<sup>67</sup> to further the common plan.

The Yoo-Delahunty memo had argued in support of denial of Geneva protections for members of al Qaeda that “the laws of armed conflict . . . [created by] treaties do not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war.”<sup>68</sup> As noted, however, protection of al Qaeda persons during an armed conflict does not depend on whether al Qaeda is a state actor or a party to law of war treaties.<sup>69</sup> The Yoo-Delahunty memo recognized that violations of Common Article 3 of the Geneva Conventions are war crimes,<sup>70</sup> but argued that the text and historic origins of Common Article 3 support their preference that it only applies during a non-international armed conflict.<sup>71</sup> As noted, however, Common Article 3 is now part of customary international law that provides a set of rights and obligations during any international armed conflict.<sup>72</sup> Moreover, the same rights and obligations are mirrored in Article 75 of Protocol I, which the United States recognizes as customary international law applicable during international armed conflicts.<sup>73</sup> Yoo and Delahunty

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67. Neil A. Lewis, *Justice Memos Explained How to Skip Prisoner Rights*, N.Y. TIMES, May 21, 2004, at A1; Michael Isikoff, *Double Standards?*, NEWSWEEK web exclusive, at 5 (May 21, 2004), at <http://www.msnbc.msn.com/id/5032094/site/newsweek>; see also Final Report 2004, *supra* note 60, at 33; *infra* note 97. The Gonzales memo stated that Attorney General John Ashcroft “delegated this role to OLC.” Gonzales, *supra* note 44, at 1.

68. Yoo & Delahunty, *supra* note 66, at 1, 11; but see Gonzales, *supra* note 44, at 6 (recognizing that Common Article 3 would apply “even if other parties to the conflict are not parties to the Conventions.”). An express purpose of the memorandum was to address “the effect of international treaties and federal laws on the treatment of individuals detained by the U.S. Armed Forces during the conflict in Afghanistan. In particular . . . whether the laws of war apply to the conditions of detention. . . .” *Id.* at 1; see also *id.* at 2 (“Department . . . plans regarding the treatment of members of al Qaeda and the Taliban . . . detained during the Afghanistan conflict.”), 3 (a focus on the War Crimes Act and “application of the Geneva Conventions to the treatment of detainees”), 11 (“As a result, the U.S. military’s treatment of al Qaeda members is not governed by the bulk of the Geneva Conventions”), 12 (“the military’s treatment of al Qaeda members”); *infra* notes 77–78 and accompanying text; *infra* note 78.

69. See *supra* notes 20–21, 62–63 and accompanying text. See also Hamdan, 344 F. Supp. 2d at 161 (Geneva Conventions “are triggered by the place of the conflict, and not by what particular faction a fighter is associated with.”).

70. See Yoo & Delahunty, *supra* note 66, at 4, 6.

71. See *id.* at 6–7, 10, 12.

72. See *supra* note 19. Moreover, the 1958 ICRC Commentary had already recognized this general point just 11 years after formation of the Geneva Conventions. See IV COMMENTARY, *supra* note 11, at 14, 58.

73. See *supra* note 27 and accompanying text.

knew that their claim was completely contrary to developments in the customary laws of war recognized by the International Court of Justice and the International Criminal Tribunal for Former Yugoslavia,<sup>74</sup> but they thought that their reliance on a 53-year-old text and “historical context” was preferable<sup>75</sup> despite the fact that it is well-known that treaties are to be construed also in light of their object and purpose, subsequent practice, and developments and evolved meanings in customary international law.<sup>76</sup> Moreover, they did not address customary and treaty-based human rights law that provide the same fundamental rights and duties.

With respect to the Taliban, Yoo and Delahunty argued in support of denial of Geneva protections during the war in Afghanistan that Afghanistan “ceased . . . to be an operating State and therefore that members of the Taliban . . . were and are not protected by the Geneva Conventions.”<sup>77</sup> Their ploy was hinged upon a claim that Afghanistan had ceased to be a state and, thus presumably, had ceased to be a party to the Geneva Conventions. Therefore, U.S. citizens could supposedly ignore “the protections of the Geneva Conventions” and allegedly avoid criminal prosecution for future war crimes.<sup>78</sup> They confused the question of whether Afghanistan existed with the

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74. See Yoo & Delahunty, *supra* note 66, at 9 & n.19; see also *supra* note 19.

75. See Yoo & Delahunty, *supra* note 66, at 10.

76. See, e.g., Vienna Convention on the Law of Treaties, *supra* note 13, art. 31(1), (3)(b)-(c); RESTATEMENT, *supra* note 9, § 324 & cmt. c; PAUST ET AL., *supra* note 13, at 57–58, 131, 171. Another well-recognized rule of construction in the U.S. is that treaties are to be construed in a broad manner to protect both express and implied rights. See, e.g., *Factor v. Laubenheimer*, 290 U.S. 276, 293–94 (1933); *Nielsen v. Johnson*, 279 U.S. 47, 51 (1929); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924) (“Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.”); *United States v. Payne*, 264 U.S. 446, 448 (1924) (“Construing the treaty liberally in favor of the rights claimed under it, as we are bound to do . . . .”); *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (“[w]here a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.”); *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1879) (“Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred”); *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 249 (1830) (“If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?”); *Owings v. Norwood’s Lessee*, 9 U.S. (5 Cranch) 344, 348–49 (1809) (“Whenever a right grows out of, or is protected by, a treaty . . . whoever may have this right, it is to be protected.”).

77. Yoo & Delahunty, *supra* note 66, at 14. See also *id.* at 2.

78. *Id.* at 14. See also *id.* at 16 (stating erroneously that “[if] the Executive made such a determination, the Geneva Conventions would be inoperative as to Afghanistan”), 19, 22–23, 42 (stating erroneously that “[I]n narrowing the scope of the substantive provisions that apply in a particular conflict, the President . . . could thus preclude the trials of United States military personnel on specific charges of violations of the . . . laws of war.”).

question of whether the Taliban government was a *de jure* or *de facto* government.<sup>79</sup> It did not suit their purpose that foreign states had recognized the Taliban government,<sup>80</sup> that the Taliban controlled some “90% of the country,”<sup>81</sup> that it had a government and could field an army in war, and that it was engaged in a war with the United States, so they downplayed or ignored such features of context. Incredibly, they also argued that even if the Geneva Conventions do not apply, the United States could prosecute members of the Taliban for war crimes, including, illogically, “grave violations of . . . basic humanitarian duties under the Geneva Conventions.”<sup>82</sup> Of course, prosecution of members of the Taliban for war crimes is not legally possible if the laws of war do not apply to their actions, and if the laws of war do apply they will restrain actions of U.S. nationals as well. The same is necessarily true with respect to violations of the Geneva Conventions as such.

Despite their argument, Afghanistan continued to be recognized as a state and a party to the Geneva Conventions;<sup>83</sup> the Taliban regime had been recognized as a *de jure* and a *de facto* government engaged in war;<sup>84</sup> the United Nations Security Council had recognized that the laws of war “and in particular the Geneva Conventions” applied to the war in Afghanistan before the U.S. military intervention and, after the use of military force by the United States in 2001, the Security Council expressly called “on all Afghan forces . . . to adhere strictly to their obligations under . . . international humanitarian law;”<sup>85</sup> and although he initially followed the manifestly faulty advice of Yoo and Delahunty, President Bush finally recognized that the Geneva Conventions apply to the war in

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79. *See id.* at 2, 19, 22.

80. *See id.* at 22, 25.

81. *Id.* at 17, quoting a State Department note. *See also id.* at 22 (“Afghanistan, when largely controlled by the Taliban”).

82. *See id.* at 26, 29 (also addressing “[n]on-performance of such duties” by the Taliban, thereby recognizing that the Geneva Conventions applied and the Taliban had duties under the Geneva Conventions). *See also id.* at 31 (“Assuming Afghanistan could . . . be in material breach” of the Geneva Conventions), 33, n.101 (addressing Taliban breaches of Geneva law, but providing completely erroneous advice concerning reprisals and refusing to cite FM 27-10, *supra* note 2, at 177, para. 497(c) (quoted *supra* note 16) while citing other portions of paragraph 497).

83. *See supra* notes 9, 58.

84. *See supra* notes 3–5 and accompanying text.

85. *See* S.C. Res. 1378, U.N. SCOR, 55th Sess., 4415 mtg. para. 2, U.N. Doc. S/RES/1378 (2001). This resolution was adopted on November 14, 2001. *See also supra* note 58 and accompanying text.

Afghanistan.<sup>86</sup> The International Committee of the Red Cross<sup>87</sup> and the international community more generally had also recognized the obvious fact that Geneva law applied.<sup>88</sup>

In August 2002, Assistant Attorney General Jay S. Bybee prepared a 50-page memo for the CIA and addressed to White House Counsel Gonzales that became Executive policy. The memo attempted to justify torture, as well as the intentional infliction of pain more generally, as interrogation tactics.<sup>89</sup> The Bybee torture memo

86. See *supra* note 60.

87. See, e.g., Paul Groves, *When the Rules of War Don't Apply*, BIRMINGHAM POST, Jan. 21, 2002, at 9; Neil A. Lewis, *Red Cross Criticizes Indefinite Detention in Guantanamo Bay*, N.Y. TIMES, Oct. 10, 2003, at A1; *Photos Breach Prisoner Rules Says Red Cross*, NEW ZEALAND HERALD, Jan. 23, 2002; Robert Russo, *Under Fire From Allied Critics, Rumsfeld Shoots Back Over Prisoner Treatment*, CANADIAN PRESS NEWSWIRE, CBCA-ACC-No. 5294538, Jan. 22, 2002; David R. Sands, *Britain Backs U.S. on Cuba Detainees*, WASH. TIMES, Jan. 22, 2002, at A1; Katharine Q. Seelye, *Rumsfeld Defends Treatment by U.S. of Cuba Detainees*, N.Y. TIMES, Jan. 23, 2002, at A1; *The Prisoners of Guantanamo Bay*, IRISH TIMES, Jan. 21, 2002, at 15. See also Paust, *Courting Illegality*, *supra* note 62, at 7 n.15.

88. See, e.g., *Hamdan*, 344 F. Supp. 2d at 161–63; Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263, 270–73 (2004); Paust, *Courting Illegality*, *supra* note 25, at 7 n.15, 16 n.35; Zayas, *supra* note 35, at 285–87, 317–18; *Blair Wants Britons' Legal Status Resolved*, HOUS. CHRON., Oct. 23, 2003, at A23; Lynn Cockburn, *"Unlawful Combatants" Are Prisoners of War*, EDMONTON SUN, Jan. 23, 2002, at 11; Groves, *supra* note 87; *Most POWs "Will Be Sent Home,"* THE AUSTRALIAN, Jan. 21, 2002, at 6; Sands, *supra* note 87, at A1; Seelye, *supra* note 87, at A1; Richard A. Serrano & John Hendren, *Rumsfeld Strongly Denies Mistreatment of Prisoners*, L.A. TIMES, Jan. 23, 2002, at A1; Thom Shanker & Katharine Seelye, *Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12. See also *supra* notes 58, 85.

89. See Jay S. Bybee, Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), available at <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf>; [http://pegc.no-ip.info/archive/DOJ/20022602\\_bybee.pdf](http://pegc.no-ip.info/archive/DOJ/20022602_bybee.pdf); Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2002, at A1; see also Final Report 2004, *supra* note 60, at 34. The memo expressly noted that its drafters considered “this question . . . in the context of the conduct of interrogations outside of the United States” and “possible defenses that would negate any claim that certain interrogation methods violate” a U.S. criminal statute. Bybee, *supra*, at 1. It has also been reported that Vice President Cheney’s “top lawyer” David Addington “was a principal author of the White House memo justifying torture.” Dana Milbank, *In Cheney's Shadow, Counsel Pushes the Conservative Cause*, WASH. POST, Oct. 11, 2004, at A21. The memo used the word “we,” thereby indicating that others were involved in its planning and drafting. See, e.g., Bybee, *supra* at 1–3, 11–12, 14, 22, 31, 36, 39, 46; John Yoo has stated that he “helped draft the main memo defining torture” so that the administration could adopt “aggressive measures.” See Yoo, *supra* note 46. It was reported that the August 2002 memo was drafted after

White House meetings convened by . . . Gonzales, along with Defense Department general counsel William Haynes and David Addington . . . who discussed specific interrogation techniques . . . Among the methods they found acceptable: “water-boarding,” or dripping water into a wet cloth over a suspect’s face, which can feel like drowning; and threatening to bring in more-brutal interrogators from other nations.

Michael Hirsh et al., *A Tortured Debate*, NEWSWEEK, June 21, 2004, at 50, available at

also argued that the infliction of pain is not necessarily torture.<sup>90</sup> Of course, the point is hardly relevant when Geneva and human rights law expressly prohibit not merely “torture,” but also “violence,” threats of violence, “cruel” treatment, “physical and moral coercion . . . to obtain information,” “physical suffering,” “inhuman” treatment, “degrading” treatment, “humiliating” treatment, and “intimidation” during interrogation.<sup>91</sup> Since each form of illegal treatment is clearly and absolutely prohibited under Geneva law, Jay Bybee and all who read the malevolent memo should have been on notice that Bybee’s general claim that “necessity and self-defense could justify interrogation methods needed to elicit information . . . and provide justifications that would eliminate any criminal liability”<sup>92</sup> was completely erroneous with respect to Geneva law and war crime responsibility.<sup>93</sup> The claim would also be completely and patently erroneous with respect to both the Convention Against

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<http://www.msnbc.msn.com/id/5197853/site/newsweek>.

Others reported that, because of opposition within the Executive branch to the decision to deny Geneva protections to detainees “that Yoo, Attorney General John D. Ashcroft and senior civilians at the Pentagon no longer sought to include the State Department or the Joint Staff in deliberations” and that the Bybee torture memo was an example. Smith, *supra* note 58; *see also* Golden, *supra* note 64, at 12-13. Thus, advice that was forthcoming was that which was wanted, manipulated, and in error; an ideologic corruption of the Executive decisional processes was part of the common plan. After all of the revelations through January 2005, John Yoo stated in an interview regarding “torture as an interrogation technique” that “[i]t’s the core of the Commander-in-Chief function. [Congress] can’t prevent the President from ordering torture.” *See* Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, THE NEW YORKER, Feb. 14, 2005. The media also report that there is a “March 14, 2003, memo by . . . John Yoo to Haynes titled ‘Military Interrogations of Alien Unlawful Combatants,’ which tracks the analysis in the” Bybee torture memo and addresses tactics. *See* Michael Isikoff, *Torture: Bush’s Nominees May Be ‘DOA,’* NEWSWEEK, Mar. 21, 2005, at 7.

90. *See* Bybee, *supra* note 89, at 1–3, 5–6, 13, 22, 29–30, 46 (attempting to redefine torture as “intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result”); Final Report 2004, *supra* note 60, at 7, 34 (also stating that the Bybee memo had argued that the President could authorize torture and that mere “cruel, inhumane, or degrading” treatment would not violate the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 42, which would be patently ludicrous in view of the title, preamble, and Article 16 of the treaty); Smith, *supra* note 89.

91. *See, e.g., supra* notes 22–24, 27, 40; GC, *supra* note 10, arts. 3, 5, 27, 31 (“No physical or moral coercion . . . in particular, to obtain information”), 32 (“any measure of such a character as to cause their physical suffering . . . also any other measures of brutality”), 33 (“all measures of intimidation”), 147. With respect to treatment of prisoners of war, *see, e.g., GPW, supra* note 49, arts. 3, 13-14, 16-17, 130.

92. *See* Bybee, *supra* note 89, at 2, 39, 46; Smith, *supra* note 89, at A1, quoting the Bybee memo, *supra* note 89, at 46.

93. *See also supra* notes 2, 10–11, 47 (also recognizing that two federal statutes provide a basis for prosecution of war crimes).

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>94</sup> and relevant customary, non-derogable and peremptory human rights law.<sup>95</sup> Similarly, inquiry into whether President Bush and Alberto Gonzales ever condoned “torture” as such without addressing other prohibited treatment would be markedly incomplete.

Later, the media reported that President Bush “signed a secret order granting new powers to the CIA” and “authorized the CIA to set up a series of secret detention facilities outside the United States, and to question those held in them with unprecedented harshness.”<sup>96</sup> A

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94. Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). The Convention expressly prohibits any such exceptions: “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.” *Id.* art. 2(2). The Bybee memo stated that the Convention leaves cruel, inhuman or degrading treatment “without the stigma of criminal penalties.” Bybee, *supra* note 89, at 15. However, the memo generally ignored the fact that the laws of war do create criminal responsibility for such conduct (*cf. id.* at 15 n.7), and that, in any event, such conduct would also violate the express and unavoidable duty in Article 16 of the Convention “to prevent” such conduct. Thus, orders or authorizations to engage in cruel, inhuman or degrading treatment would be in violation of the Convention. Moreover, with respect to the same prohibitions under Article 7 of the ICCPR, the Human Rights Committee’s General Comment No. 31 declares that states “must ensure that those responsible are brought to justice. . . . These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment . . . and enforced disappearance.” General Comment No. 31, *supra* note 40, para. 18. With respect to criminal sanctions, “inhumane acts” committed against civilians are also expressly recognized as crimes against humanity in famous international instruments reflecting customary international law. *See, e.g.*, Charter of the International Military Tribunal at Nuremberg, art. 6(c) (1945), Annex to the London Agreement (Aug. 8, 1945), 82 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East, art. 5(c), as amended by General Orders No. 20 (Apr. 26, 1946), T.I.A.S. No. 1589; Allied Control Council Law No. 10, art. II(1)(c) (1945).

95. *See supra* notes 40–43 and accompanying text; *supra* note 40. Mayer, *supra* note 89.

96. Barry, *supra* note 58, at 31. *See also* Association of the Bar of the City of New York & Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (Oct. 29, 2004), available at [http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20\(PDF\).pdf](http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf); Human Rights First, *Ending Secret Detentions* (June 2004), available at [http://www.humanrightsfirst.org/us\\_law/PDF/EndingSecretDetentions\\_web.pdf](http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf); Human Rights Watch, *The United States “Disappeared”: The CIA’s Long-Term “Ghost Detainees”* (Oct. 2004), available at <http://www.hrw.org/backgrounder/usa/us1004>; *CIA Outsourcing Interrogation to Jordan, Says Israeli Paper*, IRISH TIMES, Oct. 14, 2004, at 12; Inigo Gilmore & Robin Gedye, *Jordan Ghost Jail “Holds al-Qa’eda Men,” Israeli Intelligence Expert Claims*, DAILY TELEGRAPH, Oct. 14, 2004, at 16; Tim Golden, *Administration Officials Split Over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, at A1, 9 (the Bush Administration is transferring persons to other countries for detention and intends to shift more from Guantanamo to other countries); Toby Harnden, *Gloves Off as Bush Scraps Ban on “Dirty War” by CIA Intelligence*, THE DAILY TELEGRAPH, Oct. 22, 2001, at 8 (“The gloves are off,” a senior official told the paper. “The president has given the agency the green

year earlier, just five days after 9/11, Vice President Cheney had gone on public television stating the U.S. military might “have to work . . . sort of the dark side” and “[a] lot of what needs to be done here will have to be done quietly, without any discussion, using . . . methods that are available to our intelligence agencies . . . to use any means at our disposal, basically, to achieve our objective.”<sup>97</sup> When pressed by

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light to do whatever is necessary,” including “pressure,” which can include “physical beating.”); Douglas Jehl, *Questions Left by C.I.A. Chief on Torture, Use*, N.Y. TIMES, Mar. 18, 2005, at A1 (Central Intelligence Director Goss “could not assure Congress” that C.I.A. methods “had been permissible under federal laws prohibiting torture” and considers “waterboarding, in which a prisoner is made to believe that he will drown”, falls “into ‘an area of what I will call professional interrogation techniques.’”); Eric Lichtblau, *Gonzales Says ‘02 Policy on Detainees Doesn’t Bind C.I.A.*, N.Y. TIMES, Jan. 19, 2005, at A17 (also stating that C.I.A. tactics “include ‘water boarding,’ in which interrogators make it appear that the suspect will be drowned”); Mayer, *supra* note 89; Dana Priest & Barbara Gellman, *U.S. Decries Abuse but Defends Interrogations; “Stress and Duress” Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1 (Cofer Black, head of the CIA Counterterrorist Center, testified before a joint hearing of the House and Senate Intelligence Committees that “the gloves come off”; secret CIA interrogation centers exist at Bagram air base in Afghanistan, Diego Garcia island in the Indian Ocean and elsewhere; the CIA also engages in “extraordinary renditions” of detainees to Jordan, Egypt and Morocco for interrogation; U.S. tactics include “stress and duress” techniques like standing or kneeling for hours and in painful positions, use of black hoods or spray-painted goggles, deprivation of sleep and bombardment of lights); Dana Priest & Joseph Stephens, *Secret World of U.S. Interrogation*, WASH. POST, May 11, 2004, at A1; James Risen et al., *CIA Worried About Al-Qaida Questioning*, PITTS. POST-GAZETTE, May 13, 2004, at A1.

The Taft memo to Gonzales had indicated that “lawyers involved all agree that the CIA is bound by the same legal restrictions as the U.S. military.” See Taft, *supra* note 58, at 4. The disappearance of individuals and secret detentions trigger other serious violations of international law. See, e.g., Council of Europe Resolution, *supra* note 35, paras. 7(vi)–(vii), 8(vii)–(x); HENCHAERTS & DOSWALD-BECK, *supra* note 19, at 340–43; Paust, *Overreaction*, *supra* note 40, at 1352–56, 1358. Moreover, transfer of non-POWs out of occupied territory is a war crime. See *id.* at 1363–64; *infra* notes 149–151. During a press conference in 2005, President Bush was asked about “written responses that Judge Gonzales gave to his Senate testimony . . . specifically, his allusion to the fact that cruel, inhumane and degrading treatment of some prisoners is not specifically forbidden so long as it’s conducted by the CIA and conducted overseas” and “[i]s that a loophole that you approve?” See *President Holds Press Conference*, US Fed News, Jan. 26, 2005. The President’s response was: “Listen, Al Gonzales reflects our policy, and that is we don’t sanction torture. . . .” *Id.* By not fully responding to such a specific question and not condemning a “loophole” for “cruel, inhumane and degrading treatment,” the President sends an apparent message of approval of such treatment and, in terms of dereliction of duty (see *infra* notes 158–159 and accompanying text), fails to take reasonable corrective action.

97. See Vice President Dick Cheney, NBC News’ Meet The Press (Sept. 16, 2001) [hereinafter Cheney Interview], available at <http://stacks.msnbc.com/news/629714.asp>. It has also been reported that Cheney stated “we think . . . that we’ll have the kind of treatment of these individuals that we believe they deserve.” Golden, *supra* note 64, at 1. At the annual meeting of the American Society of International Law on April 1, 2005, during a panel session on Legal Ethics and the War on Terror, Scott Horton offered the following hypothetical while smiling to convey the impression of the hypo’s accuracy and stating that it “does not rest on conjecture”: soon after 9/11, Vice President Cheney was told that current interrogation tactics went to the limits of the law but Cheney was unhappy with that advice

the interviewer concerning human rights restrictions placed on intelligence gathering and use of “unsavory characters,” Cheney responded that “[y]ou need to have on the payroll some very unsavory characters if . . . you’re going to be able to learn all that needs to be learned. . . . It is a mean, nasty, dangerous dirty business out there, and we have to operate in that arena.”<sup>98</sup>

### III. ILLEGAL INTERROGATION TACTICS

Pictures of outrageous abuse of detainees at Abu Ghraib, Iraq disclosed in May, 2004 demonstrated that some human beings in control of the U.S. military had been stripped naked with hoods placed over their heads and threatened with dogs near their bodies. Were these forms of patently illegal treatment isolated aberrations at the hands of a few errant soldiers or had the tactics of stripping naked, hooding, and use of dogs been approved at highest levels in the Bush Administration and the military?

On October 11, 2002, Major General Michael B. Dunlavey, Commander of the Joint Task Force 170, Guantanamo Bay, Cuba sought approval of various special interrogation tactics from General James T. Hill, Commander, United States Southern Command.<sup>99</sup> The Dunlavey request was in the form of a memorandum that also contained three enclosures bearing the same date: (1) a request for approval of three categories of listed techniques from Lieutenant Colonel Jerald Phifer;<sup>100</sup> (2) a memorandum by Lieutenant Colonel Diane E. Beaver, the Staff Judge Advocate, stating that the tactics did not violate applicable federal law;<sup>101</sup> and (3) a legal brief by LTC

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and organized meetings to press the need for memos to justify new aggressive interrogation tactics. Cheney, in Horton’s words, wanted to “‘take the gloves off’ and ‘use the dark arts’ . . . [and] aggressively advocated a change in the [intelligence] service’s authorized interrogation techniques to include ‘extreme’ measures. He was told that in the opinion of the service, their current set of approved techniques went fully to the limit of what the law permitted. Not satisfied with this response, the high official involved his counsel and other White House lawyers, including one now at the helm of DOJ, in a discussion over what steps could be taken to persuade the service to adopt these new techniques.” *Id.* (copy on file with the author).

98. See Cheney Interview, *supra* note 97.

99. Michael B. Dunlavey, Memorandum for Commander, United States Southern Command, Counter-Resistance Strategies (Oct. 11, 2002), *available at* <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf>.

100. Jerald Phifer, Memorandum for Commander, Joint Task Force 170, Request for Approval of Counter-Resistance Strategies (Oct. 11, 2002), *available at* [http://www.yirmeyahureview.com/archive/documents/prisoner\\_abuse/dod\\_sc\\_021011.pdf](http://www.yirmeyahureview.com/archive/documents/prisoner_abuse/dod_sc_021011.pdf).

101. Diane E. Beaver, Memorandum for Commander, Joint Task Force 170, Legal

Beaver addressing various tactics in the three categories and recommending approval of each tactic requested by LTC Phifer.<sup>102</sup> Among the Category I tactics requested by LTC Phifer and recommended by LTC Beaver was yelling (but “not directly in his ear or to the level that would cause physical pain or hearing problems”).<sup>103</sup> Among Category II tactics were use of dogs, removal of clothing, hooding, stress positions, isolation for up to 30 days, 20-hour interrogations, and deprivation of light and auditory stimuli.<sup>104</sup> The Category III tactics sought were “use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family,” “[e]xposure to cold weather or water,” “[u]se of a wet towel and dripping water to induce the misperception of suffocation,” and “[u]se of mild, non-injurious physical contact.”<sup>105</sup> LTC Beaver dismissed limitations in the Geneva Conventions and “international law” more generally with terse and manifestly faulty reasoning that since detainees are not prisoners of war “the Geneva Conventions do not apply.”<sup>106</sup> General Hill forwarded the request to the Chairman of the Joint Chiefs of Staff on October 25, 2002.<sup>107</sup>

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Review of Aggressive Interrogation Techniques (Oct. 11, 2002), *available at* [http://www.yirmeyahureview.com/archive/documents/prisoner\\_abuse/dod\\_sc\\_021011.pdf](http://www.yirmeyahureview.com/archive/documents/prisoner_abuse/dod_sc_021011.pdf).

102. *Id.*

103. See Phifer, *supra* note 100, at 1; Beaver, *supra* note 101, at 5.

104. See Phifer, *supra* note 100, at 1–2; Beaver, *supra* note 101, at 6.

105. See Phifer, *supra* note 100, at 2–3; Beaver, *supra* note 101, at 6. LTC Phifer also stated that Category III tactics “and other aversive techniques, such as those used in U.S. military interrogation resistance training or by other U.S. government agencies may be utilized in a carefully coordinated manner to help interrogate exceptionally resistant detainees.” Phifer, *supra* note 100, at 2. *Contra infra* note 132 and accompanying text. Nonetheless, in addition to relevant international law, 18 U.S.C. § 2340(2)(c) expressly prohibits “the threat of imminent death” and § 2340(2)(d) covers “prolonged mental harm caused by or resulting from the threat that another person will be subjected to death, or severe mental pain or suffering.”

106. See Beaver, *supra* note 101, at 1, 5; *but see supra* notes 19–21, 27, 62–63. For those in the military, the Army Field Manual was right on point. See FM 27-10, *supra* note 2, at 31, para. 173. See also *supra* note 20; *infra* note 111 (regarding Army doctrine). Whether or not particular detainees at Guantanamo are prisoners of war is more complex, but this complexity should have alerted military lawyers at various levels that a sweeping denial of POW status for all members of the armed forces of the Taliban was highly problematic if not patently in error. See, e.g., Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 328, 332–33 (2003) [*hereinafter* Paust, *War and Enemy Status*]; Paust, *Courting Illegality*, *supra* note 25, at 5–7 n.15. See also Hamdan, 344 F. Supp. 2d at 161–62; W. Hays Parks, *Special Forces’ Wear of Non-Standard Uniforms*, 4 CHI. J. INT’L L. 493 (2003); Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda, and the Mistreatment of Prisoners at Abu Ghraib*, 36 CASE W. RES. J. INT’L L. (forthcoming, 2005).

107. James T. Hill, Memorandum for Chairman of the Joint Chiefs of Staff (Oct. 25, 2002), *available at* [http://www.npr.org/documents/2004/dod\\_prisoners/20040622doc4.pdf](http://www.npr.org/documents/2004/dod_prisoners/20040622doc4.pdf).

On November 27, 2002, DOD General Counsel William Haynes prepared an action memo seeking approval by Secretary Donald Rumsfeld of the request from Major General Dunlavey concerning use of specific tactics outlined in enclosures attached to the Dunlavey memo.<sup>108</sup> William Haynes stated that he believed that Deputy “Doug Feith and General Myers . . . join in my recommendation” that the Secretary authorize the specific tactics in Categories I and II, but not an advanced “blanket approval of Category III techniques” beyond one that had been listed in the Dunlavey request, the use of mild, non-injurious physical contact.<sup>109</sup> Secretary Rumsfeld approved the request on December 2, 2002.<sup>110</sup> Thus, by December 2, 2002, Secretary Rumsfeld had approved use of most of the specific tactics recommended in the Dunlavey memo. Sixteen of the approved tactics had not been permitted in a 1992 U.S. Field Manual on Intelligence Interrogations.<sup>111</sup> Among the sixteen

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108. William J. Haynes II, Action Memo, Counter-Resistance Techniques (Nov. 27, 2002), available at [http://www.npr.org/documents/2004/dod\\_prisoners/20040622doc5.pdf](http://www.npr.org/documents/2004/dod_prisoners/20040622doc5.pdf). The request was actually for approval of the use of such tactics by the U.S. SOUTHCOM Commander. *Id.*

109. *Id.*

110. *See id.*, signed “Approved” by Secretary Rumsfeld on Dec. 2, 2002, available at [http://www.npr.org/documents/2004/dod\\_prisoners/20040622doc5.pdf](http://www.npr.org/documents/2004/dod_prisoners/20040622doc5.pdf). Already, Secretary Rumsfeld had required the Chairman of the Joint Chiefs of Staff to notify combat commanders that members of al Qaeda and the Taliban “are not entitled to prisoner of war status for purposes of the Geneva Conventions” and that the military should only apply Geneva standards “to the extent appropriate and consistent with military necessity.” *See Memorandum for Chairman of the Joint Chiefs of Staff, Status of Taliban and Al Qaida* (Jan. 19, 2002) available at <http://www.defenselink.mil/news/Jun2004/d20040622doc1.pdf>. The order was carried out by a Memorandum of the Joint Chiefs of Staff, Subj/Status of Taliban and Al Qaida (Jan. 19, 2002), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc2.pdf>. Of course, military necessity does not permit violations of Geneva law, unless such an exception expressly exists in a particular article. *See supra* notes 11–12, 60.

111. *See, e.g.*, U.S. DEP’T OF ARMY, FIELD MANUAL 34-52: INTELLIGENCE INTERROGATIONS (1987) (the Manual also expressly prohibits “acts of violence or intimidation, including physical or mental torture, threats, insults or exposure to inhumane treatment as a means of or aid to interrogation”), available at <http://www.globalsecurity.org/intell/library/policy/army/fm/fm34-52/toc.htm>; U.S. DEP’T OF DEFENSE WORKING GROUP, WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS 53 (Apr. 4, 2003) (regarding tactics approved in FM 34-52 and the fact that “Army interrogation doctrine . . . places particular emphasis on the humane handling of captured personnel” regardless of their status and that prohibitions such as “mental torture, threats, and exposure to inhumane treatment of any kind” “apply to all types of interrogations”) [hereinafter DOD WORKING GROUP REPORT], available at <http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf>; Final Report 2004, *supra* note 60, at 7, 14, 35, 38 (noting that the 1992 Field Manual had specifically left out manipulation of “lighting and heating, as well as food, clothing, and shelter,” and quoting a 1987 version of FM 34-52), Appendices D, E; Barry, *supra* note 58, at 32; Smith, *supra* note 89. FM 34-52 also warned its readers: “The use of force, mental torture, threats, insults, or

tactics were those that are either patently illegal under Geneva and human rights standards or those that could be illegal in particular instances, including stripping detainees naked, use of hoods, use of dogs, yelling, stress positions, isolation for 30 days, light deprivation, and use of loud sounds as interrogation tactics.<sup>112</sup>

On January 15, 2003, Secretary Rumsfeld rescinded his general approval of these tactics, leaving open the possibility of specific approval in specific instances, and directed DOD General Counsel William Haynes to set up a Department of Defense Working Group to consider “exceptional” interrogation tactics and their legal implications.<sup>113</sup> The DOD Working Group, headed by Air Force General Counsel Mary Walker, issued a report on April 4, 2003 that perpetuated the common plan to authorize torture and to deny protections and violate the Geneva Conventions by reiterating two completely and manifestly false but familiar conclusions within the Administration: (1) that members of al Qaeda are supposedly not protected “because, *inter alia*, al Qaeda is not a High Contracting Party to the Convention,” and (2) that with respect to members of the Taliban the Geneva Civilian Convention supposedly “does not apply to unlawful combatants.”<sup>114</sup> As late as May 2004, Secretary Rumsfeld

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exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government.” FM 34-52, *supra*, at 1-10-1-12.

112. See also Final Report 2004, *supra* note 60, at 38, 68 (“[t]echniques employed at Guantanamo included the use of stress positions, isolation for up to 30 days and removal of clothing.”), Appendices D, E; Human Rights Watch, *Interrogation Techniques for Guantanamo Detainees, Table of Interrogation Techniques Recommended/Approved by U.S. Officials* (Aug. 19, 2004) (listing yelling, significantly increased fear, stress, isolation, sensory deprivation, hooding, removal of clothing, use of dogs, among others) [hereinafter Human Rights Watch Table], available at <http://hrw.org/backgrounder/usa/0819interrogation.htm>. Concerning reports of other tactics used at Guantanamo, see, e.g., *infra* notes 122, 138, 144-45.

113. See Final Report 2004, *supra* note 60, at 7-8, 35; Secretary of Defense Donald Rumsfeld, Memorandum for the General Counsel of the Department of Defense (Jan. 15, 2003), available at [http://www.npr.org/documents/2004/dod\\_prisoners/20040622doc6.pdf](http://www.npr.org/documents/2004/dod_prisoners/20040622doc6.pdf); Human Rights Watch Table, *supra* note 112, at 2; Smith, *supra* note 89, at A1. See also DOD WORKING GROUP REPORT, *supra* note 111, at 17 (“Crimes that Could Relate to Interrogation Techniques”), 20 (“Legal doctrines under the Federal Criminal Law that could render specific conduct otherwise criminal, *not* unlawful” (emphasis in original)), 33 (“the defense of superior orders will generally be available for U.S. Armed Forces personnel engaged in exceptional interrogations except where the conduct . . . [is] patently unlawful.”).

114. See DOD WORKING GROUP REPORT, *supra* note 111, at 4 (also using the wrong title for the GC); see also Jess Bravin, *Pentagon Report Set Framework for Use of Torture*, WALL. ST. J., June 7, 2004, at A1. Names of all members of the group are not yet available, and a rumor that several members who are or were military personnel refused to sign the report cannot be confirmed at this time. Concerning the manifestly false conclusions, see *supra* notes 8, 19-21, 27, 62-63. During a “discussion of international law that . . . could be cited by other countries,” the Report addressed Article 75 of Protocol I and the ICRC Commentary to the Geneva Civilian Convention, but only with respect to “policy

told a Senate Committee investigating widely publicized, widespread and criminal interrogation abuses in Iraq and reports of abuse at Guantanamo that the Geneva Conventions apply to all detainees in Iraq but, in his (and the President's) manifestly erroneous view, they do not apply to persons held at Guantanamo because they are all "terrorists."<sup>115</sup> Clearly, such a public message by the Secretary of Defense in the face of war crime abuse can abet criminal activity.

Writing in a prominent newspaper in May 2004, and with the then publicized criminal treatment and interrogation of detainees in

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considerations" relevant to widespread expectations of other states that Geneva law provides certain minimum protections for all persons and not to recognize and set legal limits to U.S. interrogation tactics. See DOD WORKING GROUP REPORT, *supra* note 111, at 58. Concerning torture, the Report argued incorrectly that the President is above the law when exercising Commander in Chief powers such as those relating to interrogation of enemy detainees. See *id.* at 20–21; but see PAUST, INTERNATIONAL LAW, *supra* note 10, at 7–9, 169–73, 175, 488–89, 493–94; Paust, *Judicial Power*, *supra* note 10, at 517–22; *infra* notes 181–82, 188–95 and accompanying text. Concerning congressional power to set limits to presidential war powers, see, for example, *Herrera v. United States*, 222 U.S. 558, 572 (1912) (quoting *Planters' Bank v. Union Bank*, 83 U.S. (16 Wall.) 483, 495 (1873) ("It was there decided that the military commander at New Orleans 'had power to do all that the laws of war permitted, except so far as he was restrained by . . . the effect of congressional action.'"); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 330–38 (1818); *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); *Little v. Barreme (The Flying Fish)*, 6 U.S. (2 Cranch) 170, 177–78 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28, 41 (1801); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40–42 (1800); *Hamdan*, 344 F. Supp. 2d at 158–59; 9 Op. ATT'Y GEN. 517, 518–19 (1860); PAUST, INTERNATIONAL LAW, *supra* note 10, at 461–62, 474–75 n.54, 478 n.58; see also *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2653 (2004) (Souter, J., dissenting in part and concurring in judgment); *id.* at 2671 (Scalia, J., dissenting); *Ex parte Milligan*, 71 U.S. 2, 139 (1866) (Chase, C.J., dissenting) (Congress . . . has . . . the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns.).

With respect to cruel, inhuman and degrading treatment proscribed under the ICCPR and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Report stressed that in reservations to each treaty the U.S. stated that it "considers itself bound" only to the extent these forms of impermissible treatment are also prohibited under the Fifth, Eighth or Fourteenth Amendments to the U.S. Constitution. See DOD WORKING GROUP REPORT, *supra* note 111, at 6; see also *supra* notes 42–43. Such a reservation is void *ab initio* under international law because it is incompatible with the object and purpose of the treaty to reach all forms of proscribed treatment. Concerning the ICCPR, see, for example, *supra* note 42. Concerning the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, see, for example, *supra* note 43. In any event, the prohibition of cruel, inhuman and degrading treatment is now a customary and peremptory prohibition *jus cogens* that applies universally and without any limitations in allegedly valid reservations or understandings. See *supra* note 41 and accompanying text.

115. See Esther Schrader & Greg Miller, *U.S. Officials Defend Interrogation Tactics*, L.A. TIMES, May 13, 2004, at A11 (regarding Rumsfeld's views); *Mr. Kerry on Prisoners*, WASH. POST, Oct. 20, 2004, at A26 (President "Bush continues to take the position that the Geneva Conventions should not be applied to many detainees, including anyone captured in Afghanistan, and that harsh interrogation techniques foresworn by the U.S. military for decades should be used").

mind, John Yoo continued to further the manifestly mistaken mantra of the Bush Administration that every member of the armed forces of the Taliban can be denied prisoner of war status and, it would allegedly follow, they can be denied any protections under any portions of any of the Geneva Conventions.<sup>116</sup> In context, such a message can also abet war crime activity. Equally astounding, other DOD officials testified before the Senate Committee that techniques approved for use in Iraq such as use of dogs during interrogation and humiliating treatment did not violate international law.<sup>117</sup> The Senate Committee was told that approved interrogation tactics also included use of “fear up harsh” and “sleep management” up to 72 hours,<sup>118</sup> tactics that in given instances can clearly trigger war crime responsibility.

The Judge Advocate Generals of the Armed Services and other military lawyers had protested efforts by the DOD Working Group and others to authorize such illegal interrogation tactics,<sup>119</sup> but on April 16, 2003 Secretary Rumsfeld approved 24 interrogation tactics from among 35 recommended by the DOD Working Group for use on detainees at Guantanamo. Secretary Rumsfeld stated that if the U.S. Commander, U.S. Southern Command required “additional interrogation techniques for a particular detainee,” he should send a written request to be approved by the Secretary.<sup>120</sup> Some of the

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116. See John Yoo, *Terrorists Have No Geneva Rights*, WALL ST. J., May 26, 2004, at A16 (“Taliban fighters . . . lost POW status. . . . As a result, interrogations of detainees captured in the war on terrorism are not regulated under Geneva.”). The sweeping denial of POW status for every member of the armed forces of the Taliban, and before any hearing for particular detainees, is problematic enough and rests on a mistaken view of the tests for POW status under Article 4(A)(1) and (3) of the GPW. See, e.g., GPW, *supra* note 49, art. 4(A)(1), (3); Paust, *Courting Illegality*, *supra* note 25, at 5–7 n.15; Paust, *War and Enemy Status*, *supra* note 106, at 328, 332–33; Wallach, *supra* note 106. The statement that persons who are not prisoners of war have no rights under the Geneva Conventions is patently false and outrageous. See, e.g., *supra* notes 8, 19–28, 62–63.

117. See Schrader & Miller, *supra* note 115, at A11. *But see supra* notes 22–24, 31–34, 40, 91.

118. Schrader & Miller, *supra* note 115, at A11.

119. See, e.g., Barry, *supra* note 58, at 32; Bravin, *supra* note 114; Ken Silverstein, *U.S. Military Lawyers Felt ‘Shut Out’ of Prison Policy*, L.A. TIMES, May 14, 2004, at A10; Smith, *supra* note 58 (mentioning classified memos in the spring of 2003 from top military lawyers (Air Force Major General Rives, Marine Brigadier General Sandkuhler, and Army Major General Romig) and Air Force General Counsel Alberto J. Mora, and various protestations from the Chairman of the Joint Chiefs of Staff (General Myers) and “Lawyers for the Joint Chiefs of Staff”); Smith, *supra* note 89. See also Final Report 2004, *supra* note 60, at 7 (the General Counsel of the Navy, Alberto J. Mora, had also raised “concerns”). Certain military lawyers apparently did little more than protest and apparently none resigned. Cf. Silverstein, *supra*. Other military lawyers furthered the common plan. See, e.g., *supra* notes 60, 101–06 and accompanying text; *infra* note 141 and accompanying text.

120. See, e.g., Secretary of Defense Donald Rumsfeld, Memorandum for the

tactics had been authorized in the 1992 Field Manual, but others had not been.<sup>121</sup> It has been reported that tactics approved by Secretary Rumsfeld and implemented by Major General Geoffrey Miller at Guantanamo involved the use of dogs for interrogation, stripping persons naked, hooding for interrogation, stress positions designed to inflict pain, isolation in cold and dark cells for more than 30 days, other uses of harsh cold and heat, and the withholding of food.<sup>122</sup> In a

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Commander, U.S. Southern Command (Apr. 16, 2003), *available at* [http://www.npr.org/documents/2004/dod\\_prisoners/20040622doc9.pdf](http://www.npr.org/documents/2004/dod_prisoners/20040622doc9.pdf); Barry, *supra* note 58, at 32; Robert Burns, *Lawyers Opposed Questioning at Guantanamo*, THE TRIBUNE, SanLuisObispo.com, May 21, 2004; Smith, *supra* note 89; Final Report 2004, *supra* note 60, at 8, 35; Human Rights Watch, *supra* note 112, at 3. The 35 tactics recommended by the DOD Working Group are listed in the DOD WORKING GROUP REPORT, *supra* note 111, at 63–65, and in charts at the end of the REPORT. The REPORT noted that “[e]ach of the techniques requested or suggested for possible use for detainees by US SOUTHCOM and US CENTCOM is included.” *Id.* at 62. Among the 35 tactics were:

5. Fear Up Harsh: Significantly increasing the fear level in a detainee. . . .
20. Hooding. . . .
26. Threat of Transfer: Threatening to transfer the subject to a 3rd country that subject is likely to fear would subject him to torture or death .
27. Isolation . . . .
28. Use of Prolonged Interrogations. . . (e.g., 20 hours per day per interrogation). . . .
31. Sleep Deprivation: . . . Not to exceed 4 days in succession . . . .
33. Face slap/ Stomach slap: A quick glancing slap to the fleshy part of the cheek or stomach. These techniques are used strictly as shock measures . . . .
34. Removal Of Clothing . . . .
35. Increasing Anxiety by Use of Aversions . . . (e.g., simple presence of dog).

*Id.* at 63–65.

121. *See supra* note 111.

122. *See, e.g.*, Barry, *supra* note 58, at 32–33; Julian Borger, *Harsh Methods Approved at Top*, THE GUARDIAN (London), May 12, 2004, at 13 (Rumsfeld approved tactics for Guantanamo such as “stripping detainees naked, making them hold ‘stress’ positions and prolonged sleep deprivation”); Bravin, *supra* note 114 (General Hill said four tactics required special approval by Rumsfeld and they have been used at Guantanamo on two detainees; tactics used more generally at Guantanamo included threatening to immediately kill family members, denial of clothing, shackling in stress positions, sleep deprivation for up to 96 hours, placing women’s underwear on prisoners’ heads); Neil A. Lewis & Eric Schmitt, *Inquiry Finds Abuses at Guantanamo Bay*, N.Y. TIMES, Apr. 30, 2005, at 35; Neil A. Lewis, *Broad Use of Harsh Tactics Is Described at Cuba Base*, N.Y. TIMES, Oct. 17, 2004, at 1; Dana Priest & Joe Stephens, *Harsh Actions Okayed by U.S. Officials*, TORONTO STAR, May 9, 2004, at 7 (harsh tactics included exposure “to heat, cold and ‘sensory assault,’ including loud music and bright lights”); Tim Reid, *Files Implicate Bush in Iraqi Jail Abuses*, THE TIMES (London), Dec. 22, 2004, at 26 (FBI memos show use at Guantanamo and in Iraq of “snarling dogs and forcing detainees to defecate on themselves, was still an interrogation tactic months after the Abu Ghraib abuse scandal”); R. Jeffrey Smith & Dan Eggen, *New Papers Suggest Detainee Abuse Was Widespread*, WASH. POST, Dec. 22, 2004, at A1; *see also supra* notes 103–05, 112, 118; *infra* notes 144–145. *Cf.* Final Report 2004, *supra* note 60, at 68 (tactics used at Guantanamo included: “stress positions, isolation for up to 30 days and removal of clothing”), Appendix E (not listing some tactics); Human Rights Watch

given circumstance, some of these approved tactics might not constitute “torture” or “cruel” treatment; but each tactic, including use of “fear up harsh,” could reach such a level of illegality and, in any event, it is quite obvious that each can constitute illegal treatment that is “physical suffering,” “inhumane,” “degrading,” “humiliating,” a use of “physical or moral coercion,” or a use of “intimidation.”<sup>123</sup> A tactic that violates any Geneva proscription is a war crime.<sup>124</sup> In this author’s opinion, stripping a person naked for interrogation, the use of dogs for interrogation, hooding for interrogation, and the infliction of pain for interrogation are among the tactics that are patent violations of the laws of war that necessarily involve a number of proscribed forms of treatment under Geneva law. Necessarily also, they violate human rights law and our common dignity.

Decisions of international courts and committees and U.S. Army publications offer guidance concerning interpretation of related proscriptions. For example, in *Ireland v. United Kingdom*,<sup>125</sup> the European Court of Human Rights ruled that British interrogation tactics of wall-standing (forcing the detainees to remain for periods of some hours in a “stress position”), hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink “constituted a practice of inhuman and degrading treatment” proscribed under human rights law.<sup>126</sup> In 1996, the European Court recognized that where a detainee “was stripped naked, with his arms tied behind his back and suspended by his arms. . . [, s]uch treatment amounted to torture.”<sup>127</sup> In another case, the European Court stated that treatment

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Table, *supra* note 112, at 2–4 (similarly listing yelling, “significantly . . . increasing fear,” and “isolating prisoner for up to 30 days,” but not others such as use of dogs, stripping naked, or hooding); Rumsfeld, *supra* note 120, Tab A (listing as tactics approved in advance fear up harsh and isolation, among other tactics, but not listing use of dogs, stripping persons naked, hooding, stress to inflict pain, among others).

123. See also *supra* notes 22–24, 27, 31–34, 40, 91, 111.

124. See, e.g., PAUST, ICL, *supra* note 6, at 693, 695, 803, 807 n.5, 821–22, 831; *supra* note 2.

125. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 5 (1978).

126. *Id.* at 41, 66, paras. 96, 167. The court noted that the “techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation,” and, “accordingly,” were forms of inhuman treatment. *Id.* at 66, para. 167. The Court concluded that the “techniques were also degrading, since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.” *Id.*

127. *Aksoy v. Turkey*, 6 Eur. Ct. H.R. 2260, 23 E.H.R.R. 553, paras. 60, 64 (Dec. 18, 1996). The Court stated that “torture attaches only to deliberate inhuman treatment causing very serious and cruel suffering.” *Id.* paras. 63–64. The victim was detained for some two weeks and had claimed to have been subjected to beatings and had been stripped naked,

was “degrading” because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them.”<sup>128</sup> The International Criminal Tribunal for Former Yugoslavia has also identified criteria for determining whether certain conduct constitutes criminally sanctionable “torture”<sup>129</sup> or “cruel” or “inhuman” treatment.<sup>130</sup> Moreover, the Committee against Torture created under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has condemned the use of the following interrogation tactics as either torture or cruel, inhuman or degrading treatment: (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.<sup>131</sup> Earlier, a U.S. Army pamphlet addressing Geneva and other law of war proscriptions warned that an illegal means of interrogation of a detainee included “dunking his head into a barrel of water, or putting a plastic bag over his head to make him talk,” adding: “No American soldier can commit these brutal acts, nor permit his fellow soldiers to do so.”<sup>132</sup>

On August 18, 2003, at the request of Under-Secretary Stephen Cambone and Secretary Rumsfeld, Major General Miller was ordered to inspect and aid in upgrading interrogation efforts and

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hooded, and subjected to electric shocks. *Id.* paras. 60, 64.

128. *T & V v. United Kingdom*, Judgment of Dec. 16, 1999, 30 E.H.R.R. 121, para. 71 (2000).

129. *See, e.g., Prosecutor v. Kunarac*, IT-96-23-T & IT-96-23/1-T, Judgment, para. 497 (Feb. 22, 2001) (intentional “infliction, by act or omission, of severe pain or suffering, whether physical or mental”); Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 ALBANY L. REV. 427 (2003).

130. With respect to “cruel” treatment, a trial chamber of the ICTY declared that “cruel treatment is treatment which causes serious mental or physical suffering and constitutes a serious attack on human dignity.” *Prosecutor v. Delalic*, IT-96-21-T, Judgment, para. 551 (Nov. 16, 1998). The same decision recognized that “inhuman treatment is an intentional act or omission, that is an act which, when judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.” *Id.* para. 543. Other ICTY cases confirm the *Delalic* recognitions. *See, e.g.,* KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 65 n.72 (regarding inhuman treatment), 398-99 n.7-8 (regarding cruel treatment) (2003). Concerning U.S. decisions whether certain conduct constitutes cruel, inhuman and/or degrading treatment, see *supra* note 40. With respect to torture, see *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003) (“[r]ape can constitute torture”), and *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001).

131. Concluding Observations of the Committee against Torture: Israel, 18th Sess., paras. 256-57, U.N. Doc. A/52/44 (1997).

132. U.S. Dep’t of Army Subject Schedule 27-1, *The Geneva Conventions of 1949 and Hague Convention No. IV of 1907*, at 7 (Oct. 8, 1970). *Contra supra* note 105 and accompanying text; Lichtblau, *supra* note 96.

tactics in Iraq.<sup>133</sup> During his visit from August 31 to September 9, Major General Miller brought the Rumsfeld April 16, 2003 list of tactics to Iraq and gave them to the Commander of the Joint Task Force-7, Lieutenant General Ricardo Sanchez. General Miller reportedly gave them to General Sanchez “as a potential model” and General Miller’s team used them as “baselines.”<sup>134</sup> Although conflicting reports exist whether General Miller warned General Sanchez not to apply them to detainees in Iraq, on September 14, 2003 General Sanchez “signed a memorandum authorizing a dozen interrogation techniques beyond Field Manual 34-52—five beyond those approved for Guantanamo.”<sup>135</sup> On October 12, 2003, the Sanchez memo was revised to exclude certain tactics and General

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133. See Jeffrey Smith, *Memo Gave Intelligence Bigger Role, Increased Pressure Sought on Prisoners*, WASH. POST, May 21, 2004, at A17. See also Scott Horton, Expert Report, *Strafanzeige gegen den US-Verteidigungsminister Donald Rumsfeld, u.a.* (Jan. 28, 2005), para. 16, available at [http://www.ccmv.org/v2/legal/september\\_11th/docs/ScottHortonGermany013105.pdf](http://www.ccmv.org/v2/legal/september_11th/docs/ScottHortonGermany013105.pdf). The Report stated that

Rumsfeld gave an oral order to dispatch MG Miller to Iraq to “Gitmoize” the intelligence gathering operations there as part of a consciously crafted . . . evasion of the requirements of the Geneva Conventions—and to introduce them to Iraq . . . [that] rested on the express and unlawful order of Rumsfeld, [offering no citations for the revelation but stating that the oral order is “well known to many senior officers involved in the process.”]

It was also reported that Judge Advocate Generals for the Armed Services went to Horton for advice and told him that there was “a calculated effort” to ignore the demands of the Geneva Conventions and that “prime movers in this effort were DOD Under Secretary for Policy Douglas Fieth and DOD general counsel William Haynes.” Barry, *supra* note 58.

134. See Final Report 2004, *supra* note 60, at 9 (“He brought the Secretary of Defense’s April 16, 2003 policy guidelines for Guantanamo with him and gave this policy to CJTF-7 as a possible model for the command-wide policy that he recommended be established.”), 37 (“as a potential model”); ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 7-8 (Feb. 2004) (“MG Miller’s team used JTF-GTMO procedures and interrogation authorities as baselines. . . . MG Miller’s team recognized that they were using JTF-GTMO operational procedures and interrogation authorities as baselines for its observations and recommendations.”) [hereinafter ARTICLE 15-6 INVESTIGATION], available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf).

135. See, e.g., Final Report 2004, *supra* note 60, at 9-10. See also Borger, *supra* note 122 (Under-Secretary of Defense Stephen Cambone testified before a Senate Committee that severe and “stress matrix” tactics, including use of dogs to intimidate, had been approved by U.S. commanders in Iraq; and Senator Carl Levin stated that “sleep management, sensory deprivation, isolation longer than 30 days and dogs” were considered to be permissible tactics if approved in particular cases by the commanding general); *Protecting the System*, WASH. POST, May 12, 2004, at A22; *Iraqi Prison Scandal: Most “Arrested by Mistake,”* L.A. TIMES, May 11, 2004, at A11; Schrader & Miller, *supra* note 115 (tactics included fear up harsh, use of dogs, use of hoods, isolation for longer than 30 days, sleep management up to 72 hours); Smith, *supra* note 133 (tactics included use of dogs, long-term isolation, forced stress positions, sleep deprivation). Seymour Hersh has written that Cambone decided that harsh interrogation tactics should be used in Iraq and that “Rumsfeld and Myers approved the program.” SEYMOUR M. HERSH, CHAIN OF COMMAND 60 (2004).

Sanchez has stated that after issuing the revised memo he personally approved long-term isolation in some 25 cases in Iraq.<sup>136</sup>

It was also reported by the Independent Panel that some 50,000 persons had been detained at Guantanamo and at some 25 sites in Afghanistan and 17 sites in Iraq,<sup>137</sup> that Rumsfeld's "augmented techniques for Guantanamo migrated to Afghanistan and Iraq where they were neither limited nor safeguarded,"<sup>138</sup> that "the chain of

136. See Smith, *supra* note 133.

137. Final Report 2004, *supra* note 60, at 11. The Report did not address those secretly detained elsewhere and who might have numbered in the thousands. See, e.g., Paust, *Overreaction*, *supra* note 40, at 1353 n.74; *supra* note 96.

138. Final Report 2004, *supra* note 60, at 14. See ARTICLE 15-6 INVESTIGATION, *supra* note 134, at 16–17. The Report notes that

intentional abuse of detainees by military police personnel included the following acts . . . Forcing detainees to remove their clothing and keeping them naked for several days at a time . . . Forcing naked male detainees to wear women's underwear . . . Using military working dogs (without muzzles) to intimidate and frighten detainees . . . Pouring cold water on naked detainees, [and even more egregious conduct].

Amann, *supra* note 88, at 323–25; Carlotta Gall, *U.S. Military Investigating Death of Afghan In Custody*, N.Y. TIMES, Mar. 4, 2003, at A14; John Hendren, *Pentagon Files Reveal More Allegations of Abuse in Iraq: Documents Contain Descriptions of Severe Detainee Mistreatment Beyond Abu Ghraib*, L.A. TIMES, Jan. 25, 2005, at A1; John Hendren & Mark Mazzetti, *Army Implicates 28 U.S. Troops in Deaths of 2 Afghan Detainees*, L.A. TIMES, Oct. 15, 2004, at A13; Carlotta Gall, *Captives; Released Afghans Tell of Beatings*, N.Y. TIMES, Feb. 11, 2002, at A1; Barton Gellman & R. Jeffrey Smith, *Report to Defense Alleged Abuse By Prison Interrogation Teams; Intelligence Official Informed Defense Dept. in June*, WASH. POST, Dec. 8, 2004, at A1; Stephen Grey, *Britons Sounded Alert on Abu Ghraib*, SUN. TIMES (London), Dec. 5, 2004, at 22; Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42; Deborah Horan, *Ex-UN Envoy: U.S. Feared Discovery of Prison Abuse*, CHICAGO TRIB., Apr. 29, 2005, at C6; *Mr. Kerry on Prisoners*, *supra* note 115; Todd Richissin & Gail Gibson, *Memo Purportedly Foresaw Iraq Abuses; "Gloves Are Coming Off" at Abu Ghraib Prison*, BALT. SUN, Aug. 24, 2004, at A1; Eric Schmitt, *Pentagon Failed to Set Policy on Detainees*, N.Y. TIMES, Dec. 6, 2004, at 6 (Naval Inspector General Vice Admiral Albert Church investigation reveals that Rumsfeld's approved techniques for Guantanamo were being used in Afghanistan; and Navy Seals in Iraq are accused of abuse, photos demonstrate abuse); *US Military in New Scandal—Abuse Photos on Internet*, SUN TELEGRAPH (Australia), Dec. 5, 2004, at 53; Josh White, *U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds*, WASH. POST, Dec. 1, 2004, at A1; Josh White, *'Wish Lists' of Detainee Tactics Cited*, WASH. POST, Apr. 19, 2005, at A16; Editorial, WASH. POST, Apr. 26, 2005, at A14 (stating that "simulated drowning and the withholding of pain medication, were authorized for the CIA at White House meetings presided over by President Bush's counsel;" "Lt. Gen. Ricardo S. Sanchez . . . signed an order on Sept. 14, 2003, authorizing a number of interrogation methods that violated the Geneva Conventions," including "use of guard dogs to 'exploit Arab fear of dogs,'" regarding "Maj. Gen. Geoffrey D. Miller," "[a]ccording to one official investigation . . . , dogs were introduced" at Guantanamo "at his suggestion;" "Maj. Gen. Barbara Fast, as the senior intelligence officer on Gen. Sanchez's staff...failed to act on, reports of abuses in the fall of 2003;" and "Maj. Gen. Walter Wojdakowski, Gen. Sanchez's deputy, was responsible for detention operations" and "reportedly approved interrogation plans involving the use of dogs"). See also *Memo Appealed for Ways To Break Iraqi Detainees*, WASH. POST, Aug. 23, 2004, at A12; William Ponce Jr, *ALCON memo, in Purported Army Memo on Intelligence*, BALT. SUN, Aug. 24,

command ignored reports” of abuse,<sup>139</sup> and that “[m]ore than once a commander was complicit.”<sup>140</sup> Among the many who were criticized was a high ranking military lawyer in Iraq, the CJTF-7 Staff Judge Advocate who failed “to initiate an appropriate response to the November 2003 ICRC [International Committee of the Red Cross] report on the conditions at Abu Ghraib.”<sup>141</sup> The Independent Panel also noted that the 2002 DOJ “OLC opinions” had led some commanders and others in Iraq to believe that they could deny Geneva law protections to certain detainees and that General Sanchez approved improper tactics “using the reasoning from the President’s memorandum” of 2002.<sup>142</sup> With respect to detainee abuse in Iraq, the International Committee of the Red Cross stated that from the start of the war in Iraq in 2003 they regularly informed highest level officials and others in Iraq that abuse of detainees was occurring.<sup>143</sup>

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2004, at A9.

139. Final Report 2004, *supra* note 60, at 30, 36–37; *see also id.* at 43, 68, 82–83; Grey, *supra* note 138; Schmitt, *supra* note 138; White, *supra* note 138.

140. Final Report 2004, *supra* note 60, at 30; *see also id.* at 43 (“the Independent Panel finds that commanding officers and their staffs at various levels failed in their duties and that such failures contributed directly or indirectly to detainee abuse”).

141. Final Report 2004, *supra* note 60, at 47.

142. *See id.* at 10, 83.

143. *See, e.g.,* ICRC, *Iraq: ICRC Explains Position Over Detention Report and Treatment of Prisoners*, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/5YRMYC?OpenDocument>; *Excerpts From Red Cross Report*, WALL ST. J., May 7, 2004; *Alarm Raised by ICRC*, SUNDAY TIMES (Perth, Australia), May 9, 2004; Neil Lewis & Eric Lichtblau, *The Struggle for Iraq: Outcry; Red Cross Says That for Months It Complained of Iraq Prison Abuse to the U.S.*, N.Y. TIMES, May 7, 2004, at A12; Mark Matthews, *Prison Abuse Revealed in 2003, Agency Says; Red Cross, British Official Say U.S. Authorities Were Slow to Respond*, BALT. SUN, May 8, 2004, at 14A (“ICRC director of operations Pierre Kraehenbuehl . . . said, ‘The elements we found were tantamount to torture. There were clearly incidents of degrading and inhuman treatment.’”); Robin Wright & Bradley Graham, *Bush Privately Chides Rumsfeld*, WASH. POST, May 6, 2004, at A1

U.S. officials blamed the Pentagon for failing to act on repeated recommendations to improve conditions for thousands of Iraqi detainees. . . Rumsfeld and the Pentagon resisted appeals in recent months from the State Department and the Coalition Provisional Authority to deal with problems relating to detainees. . . “It’s something Powell has raised repeatedly” . . . State Department officials . . . have been particularly concerned about . . . the Pentagon’s reluctance to heed urgings earlier from the International Committee of the Red Cross.

*See also* ICRC, *Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* (Feb. 2004), available at <http://www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf>. Amnesty International also stated that they gave the Coalition Provisional Authority a memorandum detailing alleged abuse in June, 2003. *See, e.g.,* Farah Stockman, *Right Groups Say Mistreatment Was Reported Last Year*, BOSTON GLOBE, May 8, 2004, at A1.

Additionally, in January, 2004 the ICRC spoke with Secretary Powell, National Security Adviser Condoleezza Rice, and Deputy Defense Secretary Paul Wolfowitz about prison abuse in Iraq and at Guantanamo Bay, Cuba.<sup>144</sup> Newer revelations about interrogation tactics at Guantanamo were revealed in an ICRC report to the Bush Administration in July 2004. The ICRC labeled the Guantanamo interrogation process as “an intentional system of cruel, unusual and degrading treatment and a form of torture.”<sup>145</sup>

After all of the revelations, reports and outcry noted above and after U.S. prosecution of some low-ranking military personnel with respect to abuse of detainees in Iraq,<sup>146</sup> media reported the continued attempt of the Administration to deny protections under the Geneva Conventions to a select group of detainees in Iraq and to transfer persons protected under Common Article 3 and other articles of the Conventions from occupied territory to other countries.<sup>147</sup> The Administration’s claim set forth in a previously secret March 19, 2004 draft DOJ memo prepared by Jack L. Goldsmith recognizes that everyone lawfully in Iraq is a protected person under the Geneva Conventions but argues that “protected persons,” such as Iraqi nationals, can be transferred “from Iraq to another country to facilitate interrogation, for a brief but not indefinite period,” and that persons who are not lawfully in Iraq can be denied protections and transferred.<sup>148</sup> Yet, the denial of protections under Common Article 3

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144. See, e.g., Robert Reid, *U.S. Soldier Faces Court Martial*, TORONTO STAR, May 10, 2004, at A1.

145. See, e.g., Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, Nov. 29, 2004, at A1 (tactics included “humiliating acts, solitary confinement, temperature extremes, use of forced positions, . . . exposure to loud and persistent noise and music and to prolonged cold, . . . some beatings” and raised questions regarding “psychological torture”); see also *supra* notes 112, 122.

146. See, e.g., *Sergeant Gets 8 Years, Trials Start for 2 Over Iraq Prison Abuse*, INT’L HERALD TRIB., Oct. 23, 2004, at 5; Josh White, *Abu Ghraib Guards Kept a Log of Prison Conditions*, WASH. POST, Oct. 25, 2004, at A14.

147. See, e.g., Douglas Jehl, *U.S. Action Bars Right of Some Captured in Iraq*, N.Y. TIMES, Oct. 26, 2004, at A1; Dana Priest, *Detainees Secretly Taken Out of Iraq, Practice is Called Breach of Protections*, WASH. POST, Oct. 24, 2004, at A1. Concerning such transfers, see also *supra* note 96. Additionally, transfer of any “person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture” is prohibited by article 3 of the Convention Against Torture, or Other Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 43, art. 3(1). The outsourcing of interrogation when there is a real risk of human rights violations creates state responsibility and can form the basis for an individual’s responsibility. See, e.g. Paust, *Overreaction*, *supra* note 40, at 1358 n.97.

148. See, e.g., Jack Goldsmith, Memorandum to William H. Taft, IV, et al., Regarding Draft Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Permissibility of Relocating Certain “Protected Persons” from Occupied Iraq, 2–5, 14 (Mar. 19, 2004), available at [http://www.washingtonpost.com/wp-srv/nation/documents/doj\\_memo031904.pdf](http://www.washingtonpost.com/wp-srv/nation/documents/doj_memo031904.pdf);

with respect to any detainee under any circumstances is a violation of Geneva law and, therefore, a war crime; and the transfer from occupied territory of any “protected person” under the Geneva Civilian Convention who is not a prisoner of war, such as those protected under Common Article 3, is a war crime in violation of Article 49 of the Geneva Civilian Convention<sup>149</sup> as well as a “grave breach” of the Convention under Article 147.<sup>150</sup> The Charter of the International Military Tribunal at Nuremberg also lists “deportation . . . for any other purpose of civilian population of or in occupied territory” as a war crime.<sup>151</sup> It also lists “deportation . . . committed against any civilian population” as a crime against humanity.<sup>152</sup>

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Jehl, *supra* note 147; Priest, *supra* note 147. The Goldsmith memo offered a specious claim that to “remove” or “relocate” is not to “transfer” or “deport.” See Goldsmith, *supra* at 2–5. However, treaties are to be interpreted with respect to their object and purpose as well as the ordinary meaning of their terms (see *supra* note 76), which clearly encompasses transfer of any sort, for any purpose, and for however long. See also 2004 UK MANUAL, *supra* note 8, at 293 (“forbidden to *transfer* forcibly . . . not *moved* outside occupied territory”) (emphasis added). An earlier military pamphlet recognized that the prohibition involves “forced individual or mass *relocation*.” *Lectures of the Geneva Conventions of 1949*, in U.S. DEP’T OF ARMY PAM. NO. 20-151 at 19 (28 Apr. 1958) (emphasis added). The only exceptions are specifically addressed in the Geneva Civilian Convention. See GC, *supra* note 10, art. 49, paragraph 2 (certain types of “evacuation”); IV COMMENTARY, *supra* note 11, at 279 (“The prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2”).

149. See GC, *supra* note 10, art. 49 (“Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory . . . are prohibited, regardless of their motive”); Paust, *supra* note 40, at 1363. Afghan and Iraqi nationals are “protected persons” within the meaning of Article 4 of the Geneva Civilian Convention at least while the state of which they are nationals is not “neutral” and their government does not have “normal diplomatic representation in the State in whose hands they are.” See GC, *supra* note 10, art. 4. Even if persons are nationals of a “neutral” state and their state of nationality has normal diplomatic relations with the detaining state, they are protected persons if they are in occupied or other territory that is not the territory of the detaining state, since the narrow exclusion in paragraph 2 in Article 4 only applies to persons detained “in the territory of” a detaining state. See, e.g., *id.*; IV COMMENTARY, *supra* note 11, at 48 (“in occupied territory they are protected persons and the Convention is applicable to them”); U.S. DEP’T OF ARMY, Pam. 27-161-2, II INTERNATIONAL LAW 132 (1962) (“If they are in occupied territory, they remain entitled to protection.”); 2004 UK MANUAL, *supra* note 8, at 274 (“Neutral nationals in occupied territory are entitled to treatment as protected persons under Geneva Convention IV whether or not there are normal diplomatic relations between the neutral states concerned and the occupying power.”). Moreover, all detainees remain protected under the customary law reflected in Common Article 3.

150. See GC, *supra* note 10, art. 147 (“unlawful deportation or transfer . . . of a protected person”); Protocol I, *supra* note 26, art. 85(4)(a); Paust, *Overreaction*, *supra* note 40, at 1363-64. Concerning other relevant violations of international law with respect to transfer to other countries, see *supra* note 96.

151. Charter of the I.M.T. at Nuremberg, *supra* note 94, art. 6(b). The Charter’s use of “of or in” does not distinguish between persons who are nationals or aliens in occupied territory or who are lawfully or unlawfully under domestic law “in” occupied territory.

152. *Id.* art. 6(c).

In addition to possible criminal<sup>153</sup> and civil liability here<sup>154</sup> or

153. With respect to war crimes, see, for example, *supra* notes 2, 47, 93, 146; Council of Europe Resolution, *supra* note 35, para. 8(ii); Brenda S. Jeffreys, *Abu Ghraib Prisoner Abuse Case Set of January Trial in Texas*, 20 TEX. LAWYER at 8 (Nov. 22, 2004); David Johnson, *Rights Group Cites Rumsfeld and Tenet in Report on Abuse*, N.Y. TIMES, Apr. 24, 2005, at 14; Brian Knowlton, *Will Abu Ghraib Prosecution Go Higher? Many Doubt It*, INT'L HERALD TRIB., Jan. 20, 2005, at 4 (discussing the conviction of Charles Graner Jr.). Although tactics utilized against civilians amounting to inhumane acts can constitute crimes against humanity, the United States presently has no legislation permitting prosecution of crimes against humanity as such. A new crimes against humanity statute could be enacted and apply retrospectively without violating *ex post facto* prohibitions if the statute reaches what were crimes against humanity at the time they were committed. See generally *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582–83 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); PAUST, ICL, *supra* note 6, at 244–48.

154. See, e.g., 28 U.S.C. § 1350; *Ali v. Rumsfeld*, Complaint for Declaratory Relief and Damages, (N.D.I.L. Mar. 1, 2005), available at [http://www.humanrightsfirst.org/us\\_law/etn/lawsuit/PDF/rums-complaint-022805.pdf](http://www.humanrightsfirst.org/us_law/etn/lawsuit/PDF/rums-complaint-022805.pdf); Jordan J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act*, 16 FLA. J. INT'L L. 249 (2004). War crimes and human rights were of particular concern to the Founders and early members of the Judiciary. See, e.g., PAUST, INTERNATIONAL LAW, *supra* note 10, at 12, 60 n.82, 67–70, 89, 169–73, 193, 195–203, 208–10, 226–27, 291–92, 488–89, 493–94; Jordan J. Paust, *My Lai and Vietnam: Norms, Myths, and Leader Responsibility*, 57 MIL. L. REV. 99, 112–15, 129–30 (1972). In a given case, claims may be possible also under the Torture Victim Protection Act, Public Law 102-256; 106 Stat. 73 (1992). A claim can proceed under Section 2(a)(1), for example, where a U.S. national “under . . . color of law, of any foreign nation” “subjects an individual to torture.” Tests for “color” of foreign law recognize that conduct “together with,” “in concert with,” or “in close cooperation with” a foreign state fits. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 244–45 (2d Cir. 1995); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445–46, n.27 (D.N.J. 1999). Such a circumstance might arise when a U.S. national transfers a detainee to a foreign country for jointly planned and beneficial interrogation if foreign conduct would foreseeably involve torture.

With respect to civil liability for war crimes and complicity in war crimes, see, for example, *Kadic* and *Iwanowa* above, and *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2783 (2004) (Breyer, J., concurring in part and concurring in judgment). See also *The Paquete Habana*, 189 U.S. 453, 464 (1903); *id.*, 175 U.S. 677, 700, 711, 714 (1900); *Linder v. Portocarrero*, 963 F.2d 332, 336–37 (11th Cir. 1992); *Estate of Rodriguez v. Drummond Co.*, 206 F. Supp.2d 1250, 1259–61 (N.D. Ala. 2003); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 310–11, 320–25 (S.D.N.Y. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1350–52 (N.D. Ga. 2002); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 5, 8 (D.D.C. 1998); PAUST, INTERNATIONAL LAW, *supra* note 10, at 64 n.130, 226–27, 291–92; WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 889 (2d ed. 1920); GC, *supra* note 10, arts. 29 (state and individual liability), 148 (“liability”); IV COMMENTARY, *supra* note 11, at 209–11, 602–03 (“liable to pay compensation”); 1958 UK MANUAL, *supra* note 2, at 174, para. 620 (“compensation”); Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351, 360–63 (1991), and cases cited therein. See also *Henfield’s Case*, 11 F. Cas. 1099, 1107 (C.C.D. Pa. 1793) (with respect to international crime, “[w]hen the offending citizen escapes to his own country, his nation should oblige him to repair the damage, if reparation can be made”); *Resolution of the Continental Congress of 1781*, 21 J. CONT. CONG. 1136–37 (1782) (regarding “infractions of the laws of nations” and “infractions of treaties” or “offenses against the law of nations” and “any transgression of that law by a citizen of the united States,” “the author of those injuries should compensate the damage out of his private fortune.”), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(jc0211\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc0211))); *infra* note 193.

With respect to claims to immunity by the United States or public actors, the

abroad<sup>155</sup> for the issuance of Executive plans, authorizations or orders

ICCPR as treaty law of the United States expressly mandates that victims of relevant human rights “shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.” ICCPR, *supra* note 36, art. 2(3)(a); *see also id.* art. 50 (all of “[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”) (emphasis added); Human Rights Committee, *General Comment No. 20*, paras. 2 (“whether inflicted by people acting in their official capacity, outside their capacity or . . .”), 13 (“whether committed by public officials or other persons acting on behalf of the State . . . those who violate . . . must be held responsible”) (forty-fourth session, 1992), U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), *available at* <http://www1.umn.edu/humanrts/gencomm/hrcomm.htm>. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment expressly covers torture committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987). The Torture Convention expressly mandates that each signatory “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.” *Id.* art. 14(1).

Additionally, with respect to war crimes there is no immunity under international law. *See generally infra* note 158. The 1988 Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679, which in subsection (b)(1) generally provides that the United States is to be substituted as a defendant and that claims are to proceed under the Federal Tort Claims Act (28 U.S.C. § 1346) [hereinafter FTCA] if claims arise out of a federal employee “acting within the scope of his official duties,” should not apply to violations of international law since such violations are *ultra vires* and beyond the lawful authority of any government. *See* Opinion and Judgment of the International Military Tribunal at Nuremberg, *reprinted in* 41 AM. J. INT’L L. 172, 221 (1947) (principles of immunity “cannot be applied to acts which are condemned as criminal under international law. The authors of these acts cannot shelter themselves behind their official position,” and “one cannot claim immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law”). Concerning non-immunity more generally and the *ultra vires* rationale, *see, for example*, PAUST, INTERNATIONAL LAW, *supra* note 10, at 422, 435–39, and cases cited. Moreover, the 1988 Act and the FTCA are prior in time to the two treaties mentioned above that deny any form of immunity. Under the last in time rule, the treaties must prevail; and they would prevail even if the legislation were enacted subsequent to ratification of the treaties under the “rights under a treaty” exception to the last in time rule. *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 10, at 101–02, 104–05, 120.

155. *See, e.g.*, Jeffrey Fleishman, *German Suit Accuses U.S. of Condoning Iraq Torture*, L.A. TIMES, Dec. 1, 2004, at A10 (the Center for Constitutional Rights filed a criminal complaint with federal prosecutor in Karlsruhe, Germany alleging criminal responsibility of Donald Rumsfeld, George Tenet, Stephen Cambone, Lt. Gen. Sanchez, and others concerning war crimes, torture, and other human rights violations). *But see German Prosecutor Rejects Investigation of Rumsfeld*, L.A. TIMES, Feb. 11, 2005, at A9. More generally, violations of international law are a legal concern of the entire community, with universal jurisdiction attaching for both civil and criminal sanctions even though there are no contacts with the forum. *See, e.g.*, *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159–61 (1795) (“all . . . trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it”); *United States v. Yousef*, 327 F.3d 56, 79 (2d Cir. 2003); *Kadic v. Karadzic*, 70 F.3d at 236, 240; *In re Estate of Marcos Litigation*, 978 F.2d 493, 499–500 (9th Cir. 1992); *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991); *Filartiga v. Pena-Irala*, 630 F.2d 876, 878, 885 (2d Cir. 1980); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 52–54 (D.D.C. 2000); RESTATEMENT,

to deny protections under the laws of war and to engage in interrogation tactics and transfers of protected persons in violation of international law, civilian and military persons can be liable for conspiracy<sup>156</sup> and complicity<sup>157</sup> in connection with war crimes. Additionally, a President, Cabinet Officer, and military commander, among others, can be responsible for a separate offense of dereliction of duty.<sup>158</sup> The latter form of liability can exist, for example, when a leader (1) either knew or should have known that tactics in violation of international law had been committed, were being committed, or were about to be committed by persons under the leader's effective authority or influence; (2) the leader had an opportunity to act; and (3) the leader failed to take reasonable corrective action under the circumstances.<sup>159</sup> With respect to corrective actions, especially after many of the ICRC reports and media revelations of abuse, we know of no new order by President Bush, Secretary Rumsfeld, or others to actually comply with the requirements of the Geneva Conventions concerning interrogation of detainees in or from Afghanistan or Iraq and, thus, to abandon the orders that merely Geneva "principles" should be applied and then only if "appropriate" and if "consistent with military necessity." Further, we know of no corrective order concerning what media have reported as a presidential authorization of excessively harsh CIA interrogation tactics, especially cruel, inhuman, and degrading treatment. Moreover, serious investigation of all who appear reasonably accused of participating in a common plan to deny Geneva protections, authorizing and/or aiding and abetting violations of the Conventions, or being derelict in duty appears to be lacking.

Additionally, there has been no effort by the President or two Attorneys General to stop lawyers in the Department of Justice from attempting to involve the judiciary in the continued denial of rights and protections of detainees required under the Geneva Conventions

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*supra* note 10, § 404, cmts. a, b; PAUST, INTERNATIONAL LAW, *supra* note 10, at 420-23.

156. See, e.g., PAUST, ICL, *supra* note 6, at 32, 86.

157. See, e.g., *id.* at 28, 30, 32, 39-43; Nuremberg Principles, *supra* note 2, Principle VII; U.S. DEP'T OF ARMY, Pam. No. 27-161-2, *supra* note 149, at 240 ("aided, abetted or encouraged"). An example would be aiding and abetting the denial of protections under the Geneva Conventions. See also Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 694 (2004).

158. See, e.g., PAUST, ICL, *supra* note 6, at 28-29, 46-69, 73-75; FM 27-10, *supra* note 2, at 178-79, para. 501. Under international law, there is no immunity from prosecution of international crimes. See, e.g., *id.* at 27-34, 38, 42, 46-53, 55-70, 73-74, 88-99, 132, 134, 136, 171-76, 621-22, 660, 677, 699-708, 717, 741-47, 821; Nuremberg Principles, *supra* note 2, Principles I, III.

159. See, e.g., *supra* note 158.

and other customary laws of war. For example, some government lawyers further the denial of rights and protections by continuing to claim in court briefs and argument that al Qaeda detainees supposedly have no rights under Geneva law because al Qaeda as such is not a party to the Conventions.<sup>160</sup> This had been part of the manifestly erroneous claim for denial of Geneva protections in the Yoo-Delahunty memo<sup>161</sup> adopted by the President<sup>162</sup> and rightly opposed by the Legal Adviser of the Department of State.<sup>163</sup> What is particularly disturbing is the attempt to mislead and misuse the judiciary to further the denial of required rights and protections. One judge has recently been misled.<sup>164</sup> Condemnatory language in the customary 1907 Hague Convention declaring that “it is especially forbidden . . . [t]o declare . . . inadmissible in a court of law the rights . . . of the nationals of the hostile party”<sup>165</sup> partly reflects the concern and criminalizes certain forms of denial of protection in a court of law. The criminal memoranda and behavior of various German lawyers in the 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 “The Justice Case”<sup>166</sup> also partly reflects the concern regarding government lawyer attempts to use courts to further a denial of required rights and protections under the laws of war. Consequences for the German legal system were disastrous. Consequences for the direct victims included the outrages of the Holocaust, and consequences for a number of the lawyers included criminal convictions for, among other crimes, aiding and abetting violations of the laws of war.<sup>167</sup>

#### IV. THE EXECUTIVE IS BOUND BY INTERNATIONAL LAW

The plan and authorizations to violate international law were

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160. See, e.g., U.S. Govt. Motion to Dismiss or for Judgment as a matter of Law at 70 n.80, addressed in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 478–79 (D.D.C. 2005)

161. See *supra* note 68 and accompanying text.

162. See *supra* note 60; *supra* notes 61–62 and accompanying text.

163. See *supra* notes 20–21, 62, 63 and accompanying text.

164. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 479.

165. See *supra* note 2.

166. See *United States v. Altstoetter (The Justice Case)*, 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 3, 1010–27, 1031–81, *passim* (1951).

167. See, e.g., *id.* at 17–22, 1034, 1082–87, 1093–95, 1107, 1118, 1128, 1132, *passim*.

not only illegal but were also unconstitutional. Under the Constitution, the President is expressly bound to faithfully execute the laws,<sup>168</sup> which include treaty law and customary international law.<sup>169</sup> The well-documented and unanimous views of the Founders and Framers and unanimous decisions and dicta of U.S. courts for some 200 years was that the President and every member of the Executive branch is bound by treaties and customary international law in times of relative peace and war.<sup>170</sup> Additionally, judicial power clearly exists to review the legality of Executive decisions and actions in time of war.<sup>171</sup>

Nonetheless, the Yoo-Delahunty memo offered an erroneous, unprofessional,<sup>172</sup> and subversive conclusion that is too typical within the Bush Administration: “that customary international law, whatever its source and content, does not bind the President, or restrict the actions of United States military, because it does not constitute federal law.”<sup>173</sup> What apparently did not suit them and they simply ignored were unanimous affirmations by the Founders and Framers, over twenty federal cases (at least fourteen of which were Supreme Court cases), and three historic Opinions of Attorneys General recognizing that the President is bound by the customary law of nations.<sup>174</sup>

When reiterating and attempting to justify their error in their memo, they cited *United States v. Alvarez-Machain*,<sup>175</sup> but the ruling in that case, which merely addressed an interpretation of a bilateral extradition treaty that the majority found had not been violated, is

168. U.S. CONST. art. II, § 3.

169. See, e.g., PAUST, INTERNATIONAL LAW, *supra* note 10, at 7–11, 67–70, 169–73, 175, 488–90, 493–94, and cases cited therein; David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT’L L. & POL. 363 (2003); Paust, *Judicial Power*, *supra* note 10, at 514, 517–24; *infra* notes 182, 188–195.

170. See *supra* note 169.

171. See, e.g., *supra* note 169.

172. In view of the fact that there are so many cases affirming that the President and others are bound and that their claims concerning the extremely few cases they cite are so obviously erroneous, it is evident that their statement that customary international law does not bind the President or the military was either purposely dishonest or professionally inept. At best, in the context of providing important legal advice within the Executive branch on the treatment of human beings, it was unavoidably unprofessional. See also *infra* note 198.

173. See Yoo & Delahunty, *supra* note 66, at 2. The same patent nonsense appears in the Bybee memo, *supra* note 60, at 32, and the DOD WORKING GROUP REPORT, *supra* note 111, at 6.

174. Compare *supra* note 169 with *infra* notes 181–82, 188–95, regarding various cases and opinions cited.

175. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), cited in Yoo & Delahunty, *supra* note 66, at 34 n.105.

explicitly based on very narrow grounds. The Court did not state that the Executive can violate customary international law.<sup>176</sup> Yoo and Delahunty argued that the understanding at the time of the Framers was that the phrase “laws of the United States” did not include the law of nations,<sup>177</sup> but this is completely erroneous<sup>178</sup> and, in any event, the President’s constitutionally mandated duty expressly reaches “laws” in the broadest sense.<sup>179</sup>

Yoo and Delahunty engaged in complete fabrication when pretending that cases like *The Schooner Exchange v. McFaddon*<sup>180</sup> or *Brown v. United States*<sup>181</sup> had anything to do with a claim that the

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176. *Alvarez-Machain*, 504 U.S. at 668–69.

177. See Yoo & Delahunty, *supra* note 66, at 35.

178. See, e.g., PAUST, INTERNATIONAL LAW, *supra* note 10, at 7–11, 38 n.36, 44 n.54, 50 n.60. See also Finzer v. Barry, 798 F.2d 1450, 1456–57 (D.C. Cir. 1986); *supra* notes 169–70 and accompanying text.

179. See U.S. CONST. art. II, § 3; PAUST, INTERNATIONAL LAW, *supra* note 10, at 7–11, 67–70, 169–73, 175, 488–90, 493–94, and cases cited therein; Golove, *supra* note 169; Paust, *Judicial Power*, *supra* note 10, at 514, 517–24; *infra* notes 182, 188–195. The President’s constitutional duty is to execute laws faithfully, not to violate them or authorize their violation. We have not consented to a presidential dictatorship and the text, structure, and history of the Constitution do not allow the exercise of presidential powers unbounded by law.

180. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145–46 (1812) (addressed in Yoo & Delahunty, *supra* note 66, at 36). Customary international law allowed discretion, as a matter of comity, in the United States to grant or refuse immunity for a foreign ship of war entering our waters and although such ships had an implied waiver of our jurisdictional reach, the waiver of U.S. jurisdiction could be taken back. *Schooner Exchange*, 11 U.S. (7 Cranch) at 136–45. See also *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2247–48 (2004); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983); *Berg v. British and African Steam Navigation Co. (The Prize Ship “Appam”)*, 243 U.S. 124, 153–56 (1917); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 350–55 (1822). *The Schooner Exchange* clearly did not hold or even suggest that either the United States or the President could violate customary international law.

181. See *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), addressed in Yoo & Delahunty, *supra* note 66, at 36. Their memorandum quoted a statement in *Brown* that had addressed merely “usage” or long-term practice, not customary international law. Moreover, the majority never disagreed with Justice Story, who was otherwise in dissent, that the President is bound by the customary international laws of war. The point of the majority was that the power to confiscate enemy property during war is that of Congress, that Congress can set limits regarding Executive war-time seizures (which Story agreed with, 12 U.S. (8 Cranch) at 145), and that Congress passed no law permitting confiscation in that case and, thus, the President could not unilaterally seize property that the laws of war would otherwise permit the U.S. to seize at its discretion (*i.e.*, that Congress must exercise such a competence afforded to the U.S. by the laws of war, not the President alone, and that although the laws of war allowed confiscation, such property, “according to modern usage, ought not to be confiscated,” but mere “usage is a guide,” implicating a “question rather of policy than of law,” which “may be disregarded” by Congress). See, e.g., *Brown*, 12 U.S. (8 Cranch) at 123, 128; *id.* at 145, 149, 153 (Story, J., dissenting); PAUST, INTERNATIONAL LAW, *supra* note 10, at 170–71, 182 n.19, 21. Congress is also bound by the laws of war. See, e.g. PAUST, INTERNATIONAL LAW, *supra* note 10, at 48–49 n.57, 106–09, and cases cited.

President can violate customary international law. In fact, in *Brown* Justice Story addressed the well-known requirement that the laws of war limit the President's powers and are fully binding during war:

[B]y what rule . . . must he be governed? . . . by the law of nations as applied to a state of war. . . . He has a discretion vested in him, as to the manner and extent; but he cannot lawfully transcend the rules of warfare. . . . He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims.<sup>182</sup>

Next, they engaged in clear falsehood regarding the decision in *The Paquete Habana*<sup>183</sup> when stating that the Court considered customary international law to be mere common law,<sup>184</sup> that the Court "acknowledged that customary international law is subject to override by the action of the political branches,"<sup>185</sup> and that "the Court also readily acknowledged that the political branches and even the federal judiciary could override it at any time."<sup>186</sup> However, customary international law was not mere common law, and *Paquete Habana* never stated that customary international law is common law.<sup>187</sup> The ruling in *Paquete Habana* was that Executive seizures of enemy alien vessels and enemy aliens abroad in time of war in exercise of Executive war powers were void because they were in violation of customary international law despite Executive claims to the contrary.<sup>188</sup> The Court never stated that the political branches or the judiciary could override customary international law. Again, unanimous and constant expectations that the President is bound by customary international law had existed since the time of the

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182. *Brown*, 12 U.S. (8 Cranch) at 149, 153. Concerning law's limit on Commander in Chief or military discretion, see, e.g., PAUST, INTERNATIONAL LAW, *supra* note 10, at 487–89, 493–94; Paust, *Judicial Power*, *supra* note 10, at 520–24, and cases cited. See also *Hamdan*, 344 F. Supp. 2d at 158 (Congress set limits for presidential use of military commissions).

183. *The Paquete Habana*, 175 U.S. 677 (1900).

184. See Yoo & Delahunty, *supra* note 66, at 37.

185. *Id.* This nonsense was repeated in the Bybee memo, *supra* note 60, at 35, and the DOD WORKING GROUP REPORT, *supra* note 111, at 6.

186. Yoo & Delahunty, *supra* note 66, at 37.

187. See, e.g., PAUST, INTERNATIONAL LAW, *supra* note 10, at 9, 39–43 n.50; Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301, 301–13 (1999).

188. See, e.g., *The Paquete Habana* 175 U.S. at 698 ("law of war"), 700, 708, 711, 714 (1900); PAUST, INTERNATIONAL LAW, *supra* note 10, at 172, 175–76, 183–84 n.24, 189–90 n.67; Jordan J. Paust, *Paquete and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT'L L. 981 (1994). See also *The Paquete Habana*, 189 U.S. 453, 464 (1903).

Founding, during the time of and within the decision in *Paquete Habana*, and thereafter until the last pronouncement one finds in Supreme Court opinions—in 1984, when Justice O’Connor recognized that power “delegated by Congress to the Executive Branch” as well as a relevant congressional-executive “arrangement” must not be “exercised in a manner inconsistent with . . . international law.”<sup>189</sup>

A few other examples are worth highlighting. In 1800, Justice Chase affirmed that war’s “extent and operations are . . . restricted by the *jus belli*, forming a part of the law of nations.”<sup>190</sup> In 1801, Chief Justice Marshall recognized that when the U.S. is at war “the laws of war, so far as they actually apply to our situation, must be noticed.”<sup>191</sup> In 1865, Attorney General Speed recognized that it is not a presidential prerogative to violate the laws of war:

That the law of nations constitutes a part of the laws of the land must be admitted. . . . From the very face of the Constitution . . . it is evident that the laws of nations do constitute a part of the laws of the land. . . . the laws of war constitute much the greater part of the law of nations. Like the other laws of nations, they exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress. . . . [War] must be, under the Constitution, carried on according to the known laws and usages of war amongst civilized nations. Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government to prosecute a war as an uncivilized and barbarous people.<sup>192</sup>

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189. See *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 261 (1984); *supra* note 161.

190. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800).

191. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

192. 11 OP. ATT’Y GEN. 297, 299-300 (1865). During the Civil War, the Supreme Court also affirmed that the President has no powers *ex necessitate*, “is controlled by law, and has his appropriate sphere of duty, which is to execute [and not violate] the laws,” and “[b]y the protection of the law *human rights* are secured; withdraw that protection, and they are at the mercy of wicked rulers.” *Ex parte Milligan*, 71 U.S. (4 Wall) 2, 119–21 (1866) (emphasis added). Also concerning events during that War, the Supreme Court made a significant recognition with respect to Executive authority and the reach of law. See *United States v. Lee*, 106 U.S. 196, 220 (1882):

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

In 1870, Justice Field affirmed a consistent expectation and constitutional requirement that “[t]he power to prosecute war . . . is a power to prosecute war according to the law of nations, and not in violation of that law.”<sup>193</sup> In 1901, a year after the first decision in *The*

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It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

193. *Miller v. United States*, 78 U.S. (11 Wall.) 268, 314–16 (1870) (Field, J., dissenting). See also *Herrera*, 222 U.S. at 572–73 (quoted *supra* note 114, the Court adding: “if it was done in violation of the laws of war . . . , it was done in wrong.”); *New Orleans v. The Steamship Co.*, 87 U.S. (20 Wall.) 387, 394 (1874) (limits exist “in the laws and usages of war”); *United States v. Adams*, 74 U.S. 463 (1869) (argument of counsel: “The war powers of Congress, and of the President, as commander in chief . . . and (as a necessary consequence) of his subordinate commanding generals . . . are unlimited in time of war, except by the law of war itself”); *The Prize Cases*, 67 U.S. (2 Black) 635, 667–68, 671 (1862) (the President “is bound to take care that the laws be faithfully executed,” including in context the “laws of war,” “*jure belli*”); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 137 (1852) (illegal orders provide no defense); *Ex parte Duncan*, 153 F.2d 943, 956 (9th Cir. 1946) (Stephens, J., dissenting) (regarding U.S. occupation commander, “[h]is will is law subject only to the application of the laws of war”); *United States v. American Gold Coin*, 24 F. Cas. 780, 782 (C.C.D. Mo. 1868) (No. 14,439) (it became necessary for the national government to take every possible measure against an enemy “and at the same time [use measures] consistent with the laws of war”); *Elgee’s Adm’r v. Lovell*, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4,344) (concerning the “law of nations . . . no proclamation of the president can change or modify this law”); *United States ex rel. Henderson v. Wright*, 28 F. Cas. 796, 798 (C.C.W.D. Pa. 1863) (No. 16,777) (war cartel is like a treaty and “[u]nder the law of nations the president could not [do a particular act], and what the president of the United States cannot do, will not be assumed by the judiciary”); *Dias v. The Revenge*, 7 F. Cas. 637, 639 (C.C.D. Pa. 1814) (No. 3,877) (Washington, J., on Circuit) (concerning improper conduct under the laws of war, the owner of a privateer cannot “shield himself, by saying that the privateer . . . acts under the president’s instructions”); *Johnson v. Twenty-One Bales*, 13 F. Cas. 855, 863 (C.C.D.N.Y. 1814) (No. 7,417) (courts cannot construe Executive orders so as to abrogate a right under the law of war); *In re Agent Orange Product Liability Litigation*, --- F.Supp.2d ----, 2005 WL 729177 (E.D.N.Y. 2005); 8 OP. ATT’Y GEN. 365 (1857) (regarding *jus belli*, “[t]he commander of the invading, occupying, or conquering army rules . . . with supreme power, limited only by international law, and the orders of the sovereign or government”); *State ex rel. Tod v. Court of Common Pleas*, 15 Ohio St. 377, 389-91 (1864)

(There is no limitation placed upon this grant of the power to carry on war, except those contained in the laws of war . . . . If a party bring a suit against the president, or any one of his subordinates . . . do not questions at once arise, of the extent and lawfulness of the power exercised, and of the right to shield the subaltern acting under orders, and hold his superior alone responsible? And are not these constitutional questions? If so, then, the case is one “arising under the Constitution” [for federal courts] . . . . The controversy is merely as to the occasions and manner of its exercise, and as to the parties who should be held responsible for its abuse. In time of war . . . he possesses and exercises such powers, not in spite of the constitution and laws of the United States, or in derogation from their authority, but in virtue thereof and in strict subordination thereto. . . . And in time of war, without any special legislation, not the commander-in-chief only, but every commander . . . is lawfully empowered by the constitution and laws of the United States to do whatever is necessary, and is sanctioned by the laws of war . . . . The president is responsible for the abuse of this power. He is responsible civilly and criminally. . . .);

*Paquete Habana*, the Supreme Court affirmed that Executive military powers during a war-related foreign occupation are “regulated and limited . . . directly by the laws of war . . . the law of nations.”<sup>194</sup> And in 1936, the Court affirmed that “operations of the nation in . . . [“foreign”] territory must be governed by treaties . . . [as well as] the principles of international law.”<sup>195</sup> More recently, Justice Stevens stressed the importance of “the constraints imposed on the Executive by the rule of law.”<sup>196</sup> He rightly condemned torture of the mind imposed through incommunicado detention and offered a prescient warning to Executive miscreants:

Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.<sup>197</sup>

## CONCLUSION

As various memoranda, authorizations and actions noted above demonstrate, there were plans to deny protections under the Geneva Conventions to persons detained during the armed conflicts in Afghanistan and Iraq. The plans to deny protections that are owed to other human beings under the Geneva Conventions were necessarily

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*In re Kemp*, 16 Wis. 359, 392 (1863) (“His [the President’s] duty is still only to execute the laws, by the modes which the laws themselves prescribe; to wage the war by employing the military power according to the laws of war.”), *Id.* at 395 (“Within those limits let the war power rage, controlled by nothing but the laws of war.”); *Ward v. Broadwell*, 1 N.M. 75, 79 (1854) (quoting President Polk:

The power to declare war against a foreign country, and to prosecute it according to the laws of war . . . exists under our Constitution. When Congress has declared that war exists with a foreign nation, the laws of war apply . . . and it becomes the duty of the president . . . to prosecute it,

*citing* Message of the President of July 24, 1848, Exec. Doc. No. 70). With respect to breaches of neutrality, presidential orders or authorizations are of no excuse. *See, e.g.*, *Little v. Barreme (The Flying Fish)*, 6 U.S. (2 Cranch) 170, 179 (1804); *United States v. Smith*, 27 F. Cas. 1192, 1229-30 (C.C.D.N.Y. 1806) (No. 16,342); *see also* *United States v. The Adriadne*, 24 F. Cas. 851, 856 (D.C.D. Pa. 1812) (No. 14,465) (private citizen is “bound to observe” the law of nations with or without instructions from the Executive).

194. *Dooley v. United States*, 182 U.S. 222, 231 (1901).

195. *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 318 (1936).

196. *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2729 (2004) (Stevens, J., dissenting).

197. *Id.*

plans to violate the Conventions, and violations of the Conventions are war crimes. As such, they were plans to permit war crimes. Various memoranda, authorizations, orders, and actions also abetted the use of illegal interrogation tactics and transfers of detainees. The role that several lawyers played directly in a dreadful process of denial of protections is particularly disturbing. Such a direct role in a process of denial of protections under the laws of war is far more serious than the loss of honor and integrity to power. It can form the basis for a lawyer's civil and criminal responsibility.<sup>198</sup> Whether or not civil and criminal sanctions will actually occur against various high-ranking civilians and military personnel, the plans, authorizations and attempted justifications have degraded our military and left a shameful stain on our country that will not be removed. The resultant crimes have served terrorist ambitions, aided their recruitment of others, and exacerbated the continual armed conflict in Iraq.

I know of no other instance in the long history of the United States of a plan approved by lawyers and at the highest levels of our government systematically to deny human beings protections under the laws of war. I know of no other denial by a President of the United States of the fact that the laws of war apply to an international

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198. See, e.g., United States v. Altstoetter (The Justice Case), 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 983-84, 1010-27, 1031-81, *passim* (1951); United States v. Uchiyama, Case No. 35-46 (trial at Yokohama, Japan, July 18, 1947) cited in Robert W. Miller, *War Crimes Trials at Yokohama*, 15 BROOK. L. REV. 191, 207 (1949); *supra* notes 2, 47, 93, 153. The evident role of some of the lawyers in the process of denial of protections was, as far as is known, not that of a lawyer providing advice to criminals accused after crimes had been committed, but the role of a lawyer directly advising how to deny protections in the future (denials of such protections are violations of the laws of war and war crimes) and how to take presidential actions that allegedly would avoid the restraints of various criminal statutes and their reach to the President and others with respect to future conduct. Several lawyers in the DOD Working Group, among others, did more. They approved and thereby aided and abetted the use of interrogation tactics that were either patently illegal or that clearly could be illegal in given instances. Concerning relevant "ethical and moral" responsibility and the evident lack of professional integrity, see Stephen Gillers, *Tortured Reasoning*, 25 AM. LAWYER No. 7, at 65 (July 2004). See JOHN W. DEAN, WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH 213-17 (2005) ("It would be difficult to imagine a better example of the evil that emanates from secrecy than these memoranda.... the cloistered work was little more than a well-motivated criminal conspiracy."); Bilder & Vagts, *supra* note 157; Lawyers' Statement on Bush Administration Torture Memos (2004) (stressing that the claim that the President can ignore various laws "directly contradicts several major Supreme Court decisions, numerous statutes passed by Congress and signed by Presidents, and specific provisions of the Constitution itself. One of the surprising features of these legal memoranda is their failure to acknowledge the numerous sources of law that contradict their own positions."), available at <http://www.afj.org/spotlight/0804statement.pdf>; see also Horton, *supra* note 133, paras. 34-35, n.4 (quoting the Lawyers' Statement and noting that among its many signatories were "eight living former presidents of the ABA, numerous retired judges, retired Attorneys General, deans of law schools, law professors, attorneys and prosecutors.").

armed conflict during which U.S. armed forces engage an enemy in battle. I know of no other authorization of a President to deny treatment required under the Geneva Conventions. I know of no other instance in our history when a Secretary of Defense, top U.S. Generals, or a DOD Working Group approved such denials of protection or the use of interrogation tactics that were either patently violative of the laws of war or could clearly constitute violations in various circumstances. Perhaps it is not surprising that eight former Generals and Admirals have called upon President Bush “to support the creation of a comprehensive, independent commission to investigate and report on the truth. . . .”<sup>199</sup> It is not likely, however that the Bush Administration will investigate and prosecute all who might be reasonably accused. Civil sanctions, as alternatives, may be more effective in some cases.

The full truth about conspiratorial and complicit involvement and the embrace of what Vice President Cheney correctly described as “the dark side” remains partly hidden. What is evident, however, is that when one walks on the “dark side” with evil one does not walk in the light with God. In this respect, the following recognition made during our Civil War and placed in the 1863 Lieber Code on the laws of war is particularly poignant: “[m]en who take up arms . . . in public war do not cease on this account to be moral beings, responsible to one another and to God.”<sup>200</sup>

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199. Letter of General David M. Brahms (Ret. USMC), et al., to President George W. Bush (Sept. 7, 2004), at 1, *available at* [http://www.humanrightsfirst.org/us\\_law/PDF/detainees/Military\\_Leaders\\_Letter\\_President\\_Bush\\_FINAL.pdf](http://www.humanrightsfirst.org/us_law/PDF/detainees/Military_Leaders_Letter_President_Bush_FINAL.pdf). *See also* Bob Herbert, *We Can't Remain Silent*, N.Y. TIMES, Apr. 1, 2005, at A23 (former Rear Admiral John Hutson and former Brigadier General James Cullen, who were among those who signed the letter, also support the lawsuit in the U.S. against Secretary Rumsfeld noted *supra* note 154).

200. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (1863) (the 1863 Lieber Code), art. 15, *reprinted in* PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 94 (2000).