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FOREWORD: AFTER GUANTÁNAMO

Michael P. Scharf^{*} & *Sonia Vohra*[†]

I. INTRODUCTION

“Guantánamo Bay.” To many around the world those two words conjure up haunting images of orange jumpsuit-clad detainees imprisoned behind barbed-wire fences, subjected to the cruelest imaginable interrogation techniques, and held indefinitely without trial, or awaiting trial before military commissions whose procedures violate international law. It is no surprise, then, that the new U.S. administration perceived the Guantánamo Bay detention center and associated detainee policies as an indelible stain on America’s moral authority and an impediment to the success of future U.S. foreign policy.

Thus, on the first Monday of his presidency, January 22, 2009, President Barak Obama signed Executive Orders requiring the closure of the Guantánamo Bay facility within twelve months,¹ the dismantling of the CIA’s network of secret prisons around the globe, and the prohibition on the CIA’s use of coercive interrogation methods that deviate from the requirements of the Army Field Manual.² The Executive Order on Interrogations specifically prohibits U.S. government personnel or agents from relying on the Bush Administration Office of Legal Counsel Memoranda in interpreting Federal criminal laws, the Convention Against Torture, or the requirements of Common Article 3 of the Geneva Conventions.

In his first speech to the U.N. on September 23, 2009, President Obama observed, “I took office at a time when many around the world had come to view America with skepticism and distrust.” To sustained applause he said,

On my first day in office, I prohibited—without exception or equivocation—the use of torture by the United States of America. I ordered the prison at Guantanamo Bay closed, and we are doing the hard work of forg-

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¹ See Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009).

² See Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009).

ing a framework to combat extremism within the rule of law. Every nation must know: America will live its values . . . together to demonstrate that international law is not an empty promise, and that treaties will be enforced.³

A month later, the Norwegian Nobel Committee announced their selection of President Obama for the 2009 Nobel Peace Prize, stressing Obama's commitment to international law and diplomacy: "For 108 years, the Norwegian Nobel Committee has sought to stimulate precisely that international policy and those attitudes for which Obama is now the world's leading spokesman."⁴

Even President Obama acknowledged that the Nobel Peace Prize spoke more about what he pledged to do than what he had accomplished to date. To implement the President's new policies concerning Guantánamo, administration officials face daunting questions about what to do with the detainees as well as the former officials behind the torture policies and memos. In an effort to bring expert insights to these questions, on September 11, 2009 (the eighth anniversary of 9/11), the Frederick K. Cox International Law Center and its co-sponsors,⁵ with the support of a generous grant from the Wolf Family Foundation, convened two dozen of the world's leading academics, practitioners, former government officials, and NGO representatives with specialized knowledge and experience in this area to participate in a day-long symposium at Case Western Reserve University School of Law. The assembled experts focused on such questions as: Who must be released from U.S. detention? Where should they be sent? Where should the remaining detainees be held? What procedures should govern their continued detention? Which of the remaining detainees should face trial? What venue and form of trial should be used? And should the architects of the U.S. torture policies and memos face justice?⁶

³ *Obama's Speech to the United Nations General Assembly*, N.Y. TIMES, Sept. 23, 2009, available at http://www.nytimes.com/2009/09/24/us/politics/24prexy.text.html?_r=1&pagewanted=all.

⁴ Announcement, The Norwegian Nobel Committee, The Nobel Peace Prize for 2009, Oct. 9, 2009, http://nobelpeaceprize.org/en_GB/home/announce-2009/ (last visited Nov. 22, 2009).

⁵ The Conference was co-sponsored by the American Society of International Law, the American Branch of the International Law Association, the American National Section of the International Association of Penal Law, the American Bar Association's International Legal Education Committee, the Case Western Reserve Institute for Global Security Law and Policy, the Inamori International Center for Ethics and Excellence, the International Criminal Law Network, the Maltz Museum of Jewish Heritage, and the Public International Law and Policy Group.

⁶ Things are moving quickly and the administration has already answered some of these questions. On August 24, 2009, for example, the Obama administration named a special prosecutor to investigate whether CIA officers or contractors violated the Bush administra-

The symposium began with a keynote speech by Major General John D. Altenburg, former Convening Authority of the al-Qaeda Military Commissions. This was followed by four panels in roundtable “cross-fire” format: (1) A Retrospective on the Military Commissions; (2) Dismantling Guantánamo: Facing the Challenges of Continued Detention and Repatriation; (3) The Appropriate Venue for Trying Terrorist Cases; and (4) Accountability for the Torture Memos. The symposium was webcast live, and the speeches and panel discussions are available for viewing anytime at: http://law.case.edu/Lectures/tabid/120/Default.aspx?lec_id=201.

This special double issue of the *Case Western Reserve Journal of International Law* contains twenty articles generated from the “After Guantánamo” symposium. We have worked extra hard to expedite the publication of this issue in order to get it into the hands of policy makers, members of Congress, jurists, academics and practitioners who will play an important role in the formation and implementation of the new policies toward the Guantánamo Bay detainees and those responsible for the abuses at Guantánamo.

II. AFTER GUANTÁNAMO: A PREVIEW OF THE ISSUE

As a scene-setter, the issue begins with an article by Major General John D. Altenburg, Jr., a former career Army Judge Advocate and Convening Authority for the Bush Administration’s al-Qaeda Military Commissions. In *Just Three Mistakes!*,⁷ General Altenburg describes what he considers to be the Bush Administration’s three major mistakes in 2001 and 2002, explaining how these three fundamental errors created the groundwork for the misunderstanding of international humanitarian law and military authority and how discussion of these mistakes can help inform the Obama Administration on its critical decisions and policies regarding combat operations, detention policy, detention location, and war crime trial venues. Next, in *The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of Its Victims*,⁸ Dr. Johannes van Agge-

tion’s interrogation policies. Critics have pointed out, however, that the investigation is designed to focus on a few low level interrogators, rather than the architects of policies that contravened both international and U.S. law. See Margaret Taley, *Picking Special Prosecutor on CIA May Cause Discord*, PLAIN DEALER, Aug. 25, 2009, at A3. On November 14, 2009, the Obama administration announced that Khalid Sheikh Mohammed and four other Guantánamo detainees would be tried in federal court in New York City for the role they played in the 9/11 attacks, while five others would be prosecuted in the al-Qaeda Military Commissions. See Eric Lichtblau & Benjamin Weiser, *U.S. to Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1.

⁷ John D. Altenburg, Jr., *Just Three Mistakes!*, 42 CASE W. RES. J. INT’L L. 11 (2009).

⁸ Johannes van Aggelen, *The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of Its Victims*, 42 CASE W. RES. J. INT’L L. 21 (2009).

len, a former official of the U.N. Office of High Commissioner for Human Rights, undertakes a wide-ranging exploration of the Bush Administration policies and tactics in the war on terror, as well as related human rights consequences, U.S. Supreme Court cases, and lower court jurisprudence. It is noteworthy that van Aggelen concludes from this survey of law that the Bush Administration's "hegemonic interpretation" did not in fact shake the foundations of international law.

The second group of articles focuses on the past and future of the al-Qaeda Military Commissions. In *Magna Carta, the Interstices of Procedure, and Guantánamo*,⁹ Vanderbilt Philosophy Professor Larry May examines the procedural rights found in the Magna Carta and explores the abridgment of these rights in Guantánamo. He maintains that the Magna Carta's gradual impact on the development of English law is a useful model for the construction of an international legal agreement protecting these Magna Carta procedural rights, rights ultimately denied to detainees in Guantánamo. In *Historical Perspective on Guantánamo Bay: The Arrival of the High Value Detainees*,¹⁰ Col. (ret.) Morris Davis, the former Chief Prosecutor for the Military Commissions at Guantánamo Bay, details from his personal perspective the challenge of constructing a credible criminal case against high-value detainees triggered by the torture methods which were employed to elicit intelligence information. Col. Davis discusses the decision to use a "clean team" of law enforcement personnel to question the high-value detainees recently transferred to Guantánamo Bay in order to gather "clean" admissions to introduce at trial. Professor Gregory McNeal of Penn State School of Law discusses, in his article *Organizational Culture, Professional Ethics and Guantánamo—Legal Policy*,¹¹ how organizational theory is helpful in understanding legal ethics and political control of the military and bureaucracies. As an example of organizational culture and its impact, he describes the Bush Administration's attempt to control military culture through its interrogation policy and the military's efforts to successfully fend off the Bush Administration's attempts to modify the military's organizational culture. In *Some Observations on the Future of U.S. Military Commissions*,¹² Professor Michael Newton of Vanderbilt Law School (formerly Deputy to the U.S. Ambassador at Large for War Crimes Issues) debunks the myth of military inadequacy and observes that

⁹ Larry May, *Magna Carta, the Interstices of Procedure, and Guantánamo*, 42 CASE W. RES. J. INT'L L. 91 (2009).

¹⁰ Morris D. Davis, *Historical Perspective on Guantánamo Bay: The Arrival of the High Value Detainees*, 42 CASE W. RES. J. INT'L L. 115 (2009).

¹¹ Gregory S. McNeal, *Organizational Culture, Professional Ethics and Guantánamo—Legal Policy*, 42 CASE W. RES. J. INT'L L. 125 (2009).

¹² Michael A. Newton, *Some Observations on the Future of U.S. Military Commissions*, 42 CASE W. RES. J. INT'L L. 151 (2009).

military commissions have achieved the goal of military justice and remain a legally valid tool for the Commander-in-Chief. He acknowledges the difficult legal and policy dilemmas the Obama Administration will face in reconsidering the current statutory structure of military commissions and provides his insight on refining the existing commissions system. Captain Keith Petty, a Case Western Reserve University School of Law graduate and current prosecutor at the Office of Military Commissions, rebuts criticism that the reconstituted military commissions fail to adhere to the Geneva Conventions laws of armed conflict in his article, *Are You There, Geneva? It's Me, Guantánamo*.¹³ Captain Petty points to the case of *United States v. Hamdan* as an example of the military commissions' application of the Geneva Conventions through the laws of war, codified in the Military Commissions Act of 2006.

The third group of articles addresses the challenges of continued detention and repatriation in the wake of the dismantling of Guantánamo. Devon Chaffee, Advocacy Counsel of Human Rights First, in her article *The Cost of Indefinitely Kicking the Can: Why Continued "Prolonged" Detention is No Solution to Guantánamo*,¹⁴ disapproves of President Obama's decision to indefinitely detain some prisoners without trial after the closing of the Guantánamo detention facility. She argues that this decision will jeopardize national security and foreign policy objectives, impede the U.S.' ability to advance democracy and counterterrorism, and that it sidesteps difficult issues indefinitely. Former ICRC Legal Advisor Laura Olson, in her article *Guantánamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Internment Standards?*,¹⁵ discusses how courts in habeas proceedings of detainees at the Guantánamo Bay detention facility have delineated the boundaries on the U.S. government's detention authority. Olson analyzes whether the courts' decisions are consistent with the international humanitarian law (IHL) internment standards and examines the Bush and Obama Administrations' definition of "enemy combatant" as compared to the IHL standards. In *Guantánamo, Habeas Corpus, and Standards of Proof: Viewing the Law Through Multiple Lenses*,¹⁶ Columbia Law School Professor and former Assistant Secretary of Defense for Detainee Affairs Matthew Waxman explores questions of competing risks and their distribution evoked by the *Boumediene v. Bush* judicial standard of "proof

¹³ Keith A. Petty, *Are You There, Geneva? It's Me, Guantánamo*, 42 CASE W. RES. J. INT'L L. 171 (2009).

¹⁴ Devon Chaffee, *The Cost of Indefinitely Kicking the Can: Why Continued "Prolonged" Detention is No Solution to Guantánamo*, 42 CASE W. RES. J. INT'L L. 187 (2009).

¹⁵ Laura M. Olson, *Guantánamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Internment Standards?*, 42 CASE W. RES. J. INT'L L. 197 (2009).

¹⁶ Matthew C. Waxman, *Guantánamo, Habeas Corpus, and Standards of Proof: Viewing the Law Through Multiple Lenses*, 42 CASE W. RES. J. INT'L L. 245 (2009).

and related evidentiary principles,” the standard which the habeas court imposed on the government to justify continued detention. Professor Waxman maintains that although answering these policy questions will vary depending on through which lens one views the problem, the executive, legislative, and judicial branches should play a part in answering these questions, as the answers are critical to establishing a sound detention policy.

The fourth group of articles discusses the appropriate venue for prosecuting terrorist cases. In his article, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts 2009 Update and Recent Developments*,¹⁷ James J. Benjamin, Jr., co-author of a series of influential Human Rights First reports on this topic, addresses the question of where and under what set of rules the government’s prosecution of accused terrorists should occur. Benjamin argues that the federal criminal justice system is well equipped to handle prosecuting terrorism cases, and there is no need for a national security court. To prove these propositions, he provides, in detail, the findings of his co-authored Report, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, and his co-authored supplement to *In Pursuit of Justice*, entitled *2009 Update and Recent Developments*, which are grounded in actual data and experience. In *Not “By All Means Necessary”: A Comparative Framework for Post-9/11 Approaches to Counterterrorism*,¹⁸ Amos Guiora, University of Utah Law Professor and a former senior lawyer for the Israeli Defense Force, delves into a comparativist approach between Israel’s policies of targeted killing and administrative detention and the U.S.’ counterterrorism policy. Guiora maintains that Israel’s two policies are relevant and adaptable to the U.S. legal framework while taking into account the influence of judicial, constitutional, societal, and geographical differences on each country’s counterterrorism policy. Next, Duke Law School Professor Scott L. Silliman, in his article *Prosecuting Alleged Terrorists by Military Commission: A Prudent Option*,¹⁹ compares and contrasts prosecuting detainees in federal district courts with prosecuting detainees in the recently revised military commissions. Professor Silliman argues that the recently revised military commissions are a prudent option to prosecute detainees and should be used in combination with the federal district courts. Finally, Professor Glenn Sulmasy and Professor Andrea Katsenes Logman argue in their article *A Hybrid Court for a Hybrid*

¹⁷ James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts 2009 Update and Recent Developments*, 42 CASE W. RES. J. INT’L L. 267 (2009).

¹⁸ Amos N. Guiora, *Not “By All Means Necessary”: A Comparative Framework for Post-9/11 Approaches to Counterterrorism*, 42 CASE W. RES. J. INT’L L. 273 (2009).

¹⁹ Scott L. Silliman, *Prosecuting Alleged Terrorists by Military Commission: A Prudent Option*, 42 CASE W. RES. J. INT’L L. 289 (2009).

*War*²⁰ that the Obama Administration must update the U.S. legal regime to meet the threat of international terror, as the two existing paradigms—the law enforcement model and the military law model—are not properly equipped to handle this hybrid war and to strike the delicate balance of military law, intelligence needs, human rights obligations, and the need for justice. They propose a way out of the Guantánamo fiasco by creating a National Security Court System to hear cases of international terrorism and achieve this required delicate balance.

The fifth group of articles discusses the accountability issues arising out of the torture memos. Cox Center Director Michael P. Scharf, in his article *International Law and the Torture Memos*,²¹ provides background about the internal decision-making process that led to the promulgation of the Torture Memos. Professor Scharf uses the case study of the evolution of the Bush Administration's policies regarding treatment of detainees in the war on terror to explore the extent to which international law influences American foreign policy during times of crisis. In *Civil Liability of Bush, Cheney, et al. for Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance*,²² University of Houston Law Professor Jordan Paust argues that the former officials involved in the Bush Administration's admitted program of serial criminality are subject to civil liability for their violations of treaty-based and customary international law. He explores the duty to provide and the right to fair compensation stipulated in these bodies of law and contends that (1) the U.S. should not be substituted in U.S. civil suits for the former officials; (2) immunity does not pertain to these former officials due to the Military Commissions Act; and (3) that relevant international law has dominance over the Military Commissions Act. Case Western Reserve University Law Professor Cassandra Robertson, in her article *Beyond The Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*,²³ addresses the difficulties the Department of Justice's Office of Professional Responsibility will encounter in holding the lawyers who authored the torture memos accountable for their advice advocating the permissible use of certain interrogation techniques. Professor Robertson argues that it will be difficult for the DOJ to prove the lawyers wrote the memo in bad faith, and the DOJ's decision to hold the lawyers accountable will lack political legitimacy due to a redefinition of cultural

²⁰ Glenn M. Sulmasy & Andrea K. Logman, *A Hybrid Court for a Hybrid War*, 42 CASE W. RES. J. INT'L L. 299 (2009).

²¹ Michael P. Scharf, *International Law and the Torture Memos*, 42 CASE W. RES. J. INT'L L. 321 (2009).

²² Jordan J. Paust, *Civil Liability of Bush, Cheney, et al. for Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT'L L. 359 (2009).

²³ Cassandra Burke Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RES. J. INT'L L. 389 (2009).

commitments associated with partisan identity. Dr. Kai Ambos, a distinguished German Law Professor and judge, in his article *Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the "Torture Memos" Be Held Criminally Responsible on the Basis of Universal Jurisdiction?*,²⁴ analyzes the jurisdictional and procedural requirements in Belgium, Germany, and Spain necessary to prosecute the masterminds of the torture memos in Europe, concluding that the law and practice of these European countries advance a cautious approach to extraterritorial prosecution of international crimes, resulting in the replacement of universal jurisdiction with a subsidiary or cooperative surrogate. Professor Ambos argues for a reassessment of the current strategy of prosecuting international core crimes and advocates for a more comprehensive approach. Finally, in *The Wrongheaded and Dangerous Campaign to Criminalize Good Faith Legal Advice*,²⁵ Associate Dean Julian Ku of Hofstra Law School rejects the argument of scholars and advocates who insist that the lawyers who authored the torture memos should be criminally punished for their advice. Professor Ku contends that a criminal prosecution of an attorney's good-faith interpretation of the law will be unsuccessful under both U.S. and international law, and the prosecution will violate the attorney's First Amendment right and broader norms of free expression by chilling government lawyers from providing legal advice on complex issues raising national security implications.

In addition to the symposium articles contained in this volume, the journal is honored to publish *Sexual Violence: Standing by the Victim*,²⁶ remarks delivered by the Honorable Navanethem Pillay, U.N. High Commissioner for Human Rights, when she received the Frederick K. Cox International Law Center's 2009 Humanitarian Award for Advancing Global Justice at the Case Western Reserve University School of Law the week before our Guantánamo symposium. We were delighted that High Commissioner Pillay attended our event and lectured on an important topic, the prosecution of sexual violence crimes perpetrated against women in international or internal armed conflict situations. In her lecture, she discussed how the current normative framework fails to frame sexual violence from a victim's perspective and, instead, focuses on the presence of consent, resulting in the re-traumatization of the victims who must describe the crime. She described cases that portray rape as a natural and foreseeable consequence of other wartime violations and establish command responsibility. High

²⁴ Kai Ambos, *Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the "Torture Memos" Be Held Criminally Responsible on the Basis of Universal Jurisdiction?*, 42 CASE W. RES. J. INT'L L. 405 (2009).

²⁵ Julian Ku, *The Wrongheaded and Dangerous Campaign to Criminalize Good Faith Legal Advice*, 42 CASE W. RES. J. INT'L L. 449 (2009).

²⁶ Navanethem Pillay, *Sexual Violence: Standing by the Victim*, 42 CASE W. RES. J. INT'L L. 459 (2009).

Commissioner Pillay concluded that drawing on other methodologies—like anti-trafficking protocols—can provide legal processes to strengthen the prosecution of sexual violence.

The issue concludes with an addendum to the recently published Case Western Journal of International Law's *The International Criminal Court and the Crime of Aggression Issue* (volume 41, nos. 2 & 3). In a submission which will be useful to the delegates at the ICC Review Conference in Kampala in May–June 2010, Donald Ferencz, Director of the Plannethood Foundation, recounts the discussion at the Case Western Reserve University School of Law symposium panel in September 2008, entitled *A Roundtable Discussion About the Process by Which Aggression Is Included in the Statute and Its Effect on Non-Party States*, on the differences between various amendment protocols specified within Article 121 of the Rome Statute and how the International Criminal Court's jurisdiction over the crime of aggression depends on the placement of these proposed amendment protocols within the Rome Statute.²⁷ Ferencz also provides his personal observations on how the adoption of provisions on the crime of aggression will bolster the rule of law and the Nuremberg principles.

The articles contained in this symposium issue illustrate the wide range of issues arising from the Bush Administration's War on Terror. The articles highlight the numerous problems and mistakes that have occurred and the lessons to be learned from these policies and decisions. They shine a light on the path the Obama Administration ought to take as it tackles the challenges of closing Guantánamo Bay and responding to Bush era-abuses. We are extremely grateful to the experts who participated in the "After Guantánamo" symposium, the Wolf Family Foundation whose generous support made the conference possible, and to the student editors of this issue who worked diligently on the preparation of this publication.

²⁷ Donald M. Ferencz, *Bringing the Crime of Aggression Within the Active Jurisdiction of the ICC*, 42 CASE W. RES. J. INT'L L. 531 (2009).