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## THE INSTITUTIONALIZATION OF TORTURE UNDER THE BUSH ADMINISTRATION

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*"In this decisive year, you and I will make choices that determine both the future and the character of our country. . . . We will renew the defining moral commitments of this land."*<sup>1</sup>

- President George W. Bush  
State of the Union Address,  
January 31, 2006

### INTRODUCTION

The institutionalization of torture became a reality when President Bush authorized the establishment of Camp Delta at Guantanamo Bay, Cuba, concluded that the Geneva Conventions did not apply to combatants seized in Afghanistan (Taliban and Al Qaeda), approved the use of "enhanced interrogation techniques," issued an Executive Order that bypassed Congress, and unilaterally established a new parallel system of justice to deal with "terrorists" through Military Commissions.<sup>2</sup> The above actions were further compounded by the interrogation regulations issued by the Secretary of Defense and the procedures he issued in connection with the

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<sup>1</sup> George W. Bush, Report on the State of the Union (Jan. 31, 2006) [hereinafter Bush, State of the Union Address].

<sup>2</sup> Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001). See also Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325 (2003) [hereinafter Paust, *War and Enemy Status*]; Steven W. Becker, "Mirror, Mirror on the Wall . . .": *Assessing the Aftermath of September 11th*, 37 VAL. U. L. REV. 563, 580-92 (2003) (describing President Bush's Military Order in detail and arguing that it is *ultra vires* because it was issued without Congress first formally declaring war). Arguing that "a common plan to violate customary and treaty-based international law concerning the treatment and interrogation of so-called 'terrorists' and enemy combatant detainees and their supporters captured during the U.S. war in Afghanistan emerged within the Bush Administration in 2002." See Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law*, 43 COLUM. J. TRANSNAT'L L. 811 (2005) [hereinafter Paust, *Executive Plans and Authorizations*].

Military Commissions at Guantanamo.<sup>3</sup> Subsequently the President, the Vice President, and the Secretary of Defense made several official statements on the need for U.S. interrogators to obtain “results,” thus creating a top-down command influence leading subordinates to commit torture, while their superiors felt compelled to look the other way. The practices that followed this policy have resulted to date in the estimated deaths of over 200 detainees in U.S. custody, presumably as a result of torture;<sup>4</sup> probably as many as several thousand persons have been tortured during interrogation at U.S.-controlled detention facilities and at foreign detention facilities where officials acting for and on behalf of the U.S. have engaged in torture. What is known about these policies and practices has been disclosed through the media, Pentagon documents released under the Freedom of Information Act, some autopsy reports, a few investigations and courts martial, and a few officers’ statements, which together offer only a glimpse of what may have actually taken place.<sup>5</sup>

The U.S., pursuant to Article 19 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), submitted on June 29, 2005 a report to the Committee Against Torture.<sup>6</sup> In that report, the position of the U.S. is an expression of conformity with the provisions of the Convention.<sup>7</sup> The official position of the U.S. as expressed in that report, contains the following relevant statements:

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<sup>3</sup> For a collection of the orders and directives, see THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenburg & Joshua L. Dratel eds., 2005) [hereinafter THE TORTURE PAPERS].

<sup>4</sup> Different numbers have surfaced in various media sources. Human Rights Watch recently reported that “[a]t least eighty-six detainees have died in U.S. custody since 2002, and the U.S. government has admitted that at least twenty-seven of these cases were criminal homicides.” HUMAN RIGHTS WATCH, WORLD REPORT 504 (2006), <http://hrw.org/wr2k6/wr2006.pdf>. Furthermore, of the 98 deaths arising out of interrogations, including allegations of torture, only 12 resulted in punishment. Hina Shamsi, *Command Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan*, HUMAN RIGHTS FIRST REPORT 103 (Feb. 2006).

<sup>5</sup> See LILA RAJIVA, THE LANGUAGE OF EMPIRE: ABU GHRAIB AND THE AMERICAN MEDIA 11-19, 35-54 (2005); MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004); SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004); ERIK SAAR & VIVECA NOVAK, INSIDE THE WIRE: A MILITARY INTELLIGENCE SOLDIER’S EYEWITNESS ACCOUNT OF LIFE AT GUANTANAMO (2005). See also Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005).

<sup>6</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 19, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; U.N. Comm. Against Torture, *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, Second Periodic Reports of States Parties Due in 1999*, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005), available at <http://hei.unige.ch/~clapham/hrdoc/docs/USCATreport2005.pdf> [hereinafter *Article 19 Reports*].

<sup>7</sup> See *Article 19 Reports*, *supra* note 6.

In fighting terrorism, the U.S. remains committed to respecting the rule of law, including the U.S. Constitution, federal statutes, and international treaty obligations, including the Torture Convention.<sup>8</sup>

The President of the United States has made clear that the United States stands against and will not tolerate torture under any circumstances. . . . [T]he President confirmed the continued importance of these protections and of U.S. obligations under the Torture Convention, stating:

[T]he United States reaffirms its commitment to the worldwide elimination of torture . . . . To help fulfill this commitment, the U.S. has joined 135 other nations in ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction . . . .<sup>9</sup>

The report goes on to further emphasize the position of the U.S., affirming its obligations under CAT and the applicability of the CAT to U.S. Armed Forces in Afghanistan and Guantanamo Bay, Cuba, reiterating legal obligations under the United States Constitution and U.S. laws, including awareness of the need to apply both the CAT and U.S. legislation extraterritorially, and investigating and prosecuting violations.<sup>10</sup>

What is described above is either a deliberate attempt on the part of the Administration to mislead the U.N. Committee Against Torture as well as the 135 member states, or it represents a case of political schizophrenia where one side of the Administration is telling the world that it is in conformity with its international obligations, which it well understands, while another side of the same Administration takes the opposite position.

How has a nation dedicated to the upholding of its constitution and to the rule of law and that has been the world's leader in championing international human rights protection come to institutionalize torture? How has a constitutional system of government that offers itself to the world as a model lost its ability to maintain "checks and balances" and effective oversight over abuses of law by the Executive Branch? Why is it that the American people have remained muted in their indignation against the commission of crimes under international law as well as U.S. law?<sup>11</sup>

<sup>8</sup> *Id.* ¶ 4.

<sup>9</sup> *Id.* ¶ 5 (citing George W. Bush, Statement on the United Nations International Day in Support of Victims of Torture (June 26, 2004)).

<sup>10</sup> *Id.* ¶¶ 19, 51.

<sup>11</sup> On the question of the state of American values in foreign affairs, see JIMMY CARTER, *OUR ENDANGERED VALUES: AMERICA'S MORAL CRISIS* (2005). See also M. Cherif Bassiouni, *Great Nations and Torture*, in *THE TORTURE DEBATE IN AMERICA* 256 (Karen J. Greenberg ed., 2006) (discussing the United States' failure to live up to its status as a "great nation" in

The day may come when these disturbing questions will be answered. For now, we must establish a record that may be useful in the future or, at the very least, to remind us not to repeat the same mistakes.

#### THE PROHIBITION OF TORTURE UNDER INTERNATIONAL LAW

For over half a century, the U.S. led the effort to prohibit torture under international law. The U.S. was the most active supporter in the drafting and adoption of the Universal Declaration of Human Rights ("UDHR") in 1948, whose Article 5 contains a prohibition against "[C]ruel, inhuman or degrading treatment or punishment."<sup>12</sup> The UDHR was subsequently recognized as part of customary international law. The U.S. then led the efforts at the United Nations for the adoption in 1966 of the International Covenant on Civil and Political Rights ("ICCPR"), whose Article 7 contains the same prohibition as that included in Article 5 of the UDHR.<sup>13</sup> Thereafter, the U.S. was a strong supporter of CAT, which was adopted by the United Nations in 1984.<sup>14</sup>

During the period of time between 1948 and 1984, the U.S. was in the forefront of international efforts to eliminate the practice of torture in countries whose governments still resorted to such a barbaric practice. Thereafter, the U.S. monitored such prohibited practices and denounced them consistently in the congressionally mandated Department of State's Annual Country Reports on Human Rights Practices.

Torture is not only proscribed by the CAT—it has long been prohibited under international humanitarian law, beginning with the 1899 Hague Convention on the Laws and Customs of War on Land,<sup>15</sup> subsequently amended by the 1907 Hague Convention on the Laws and Customs of War on Land, which is still in effect to date.<sup>16</sup> It also became a war crime under conventional international humanitarian law with its embodiment in

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this area) [hereinafter THE TORTURE DEBATE IN AMERICA]. To understand why America is undergoing a moral crisis, see CHALMERS JOHNSON, *THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC* (2004), and DAVID HARVEY, *THE NEW IMPERIALISM* (2003).

<sup>12</sup> Universal Declaration of Human Rights art. 5, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. H/810 (Dec. 12, 1948).

<sup>13</sup> International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>14</sup> CAT, *supra* note 6.

<sup>15</sup> Convention with Respect to the Laws and Customs of War on Land art. 4, July 29, 1899, 32 Stat. 1803, *reprinted in* 1 AM. J. INT'L L. 129 (Supp. 1907).

<sup>16</sup> Convention Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907, 36 Stat. 2277, *reprinted in* 2 AM. J. INT'L L. 90 (Supp. 1908) [hereinafter Hague Convention].

the 1929 Geneva Convention Relating to the Prisoners of War,<sup>17</sup> the Four Geneva Conventions of August 12, 1949,<sup>18</sup> and the two 1977 Additional Protocols to the Geneva Conventions of 1949.<sup>19</sup>

Torture is therefore an international crime under customary and conventional international humanitarian law and international human rights law, and its prohibition applies in times of war and in times of peace. There are no exceptions.

Since the adoption of the CAT and as a result of international monitoring, such as the U.N. Committee Against Torture established under the CAT, and national monitoring, undertaken by individual states such as the U.S., torture has never been openly acknowledged by governments that have secretly engaged in such a practice. The exception has been the implicit institutionalization of torture, which was publicly described in various legal memos as permissible interrogation techniques, a euphemism for torture.<sup>20</sup> This policy and the ensuing practices which have been publicly disclosed are in violation of: the Eighth Amendment of the U.S. Constitution, which prohibits the infliction of "cruel and unusual punishment";<sup>21</sup> the CAT, which the U.S. ratified;<sup>22</sup> the 1907 Hague Convention on the Laws and Customs of War on Land, which is binding on the U.S.;<sup>23</sup> the 1949 Geneva Conventions, which the U.S. ratified;<sup>24</sup> the Uniform Code of Military

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<sup>17</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 2, July 27, 1929 47 Stat. 2021, *reprinted in* 27 AM J. INT'L L. 63 (Supp. 1933).

<sup>18</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

<sup>19</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, *available at* <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>; Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, *available at* <http://icrc.org/ihl.nsf/FULL/475?OpenDocument>.

<sup>20</sup> *See supra* notes 2-3.

<sup>21</sup> U.S. CONST. amend. VIII. For an enlightened commentary on the Administration's double standards, *see* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003); *see generally* THE TORTURE DEBATE IN AMERICA, *supra* note 11.

<sup>22</sup> *See* CAT, *supra* note 6.

<sup>23</sup> Hague Convention, *supra* note 16.

<sup>24</sup> Geneva I, *supra* note 18; Geneva II, *supra* note 18; Geneva III, *supra* note 18; Geneva IV, *supra* note 18.

Justice (“UCMJ”), which in its war crimes provision, as well as in other provisions, prohibits torture by U.S. military personnel and those to whom the UCMJ applies;<sup>25</sup> Title 18 Section 2340, which incorporates the provisions of the CAT in U.S. criminal law;<sup>26</sup> and, the Torture Victim Protection Act, which provides for a civil remedy under the CAT.<sup>27</sup>

Article 1 of the CAT defines torture as follows:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>28</sup>

Article 16 of the CAT is in the nature of a catch-all provision to make sure that anything that does not fall within the meaning of torture is covered by the meaning of “other acts of cruel, inhuman, or degrading treatment or punishment.”<sup>29</sup> It states:

Each state party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are 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.<sup>30</sup>

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<sup>25</sup> Uniform Code of Military Justice, 10 U.S.C. §§ 801-941 (2000).

<sup>26</sup> 18 U.S.C. § 2340 (2000).

<sup>27</sup> Torture Victim Protection Act, 28 U.S.C. §1350 (2000).

<sup>28</sup> See CAT, *supra* note 6, at art. 1. Many of the issues involving severe pain and suffering (whether done by a public official or not and the manner in which it is done, etc.) have been addressed in the context of the European Convention on Human Rights and the Inter-American Convention on Human Rights, both of which prohibit torture, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as well as in a number of cases decided by the European Court of Human Rights, the Inter-American Court of Human rights, as well as in criminal and civil cases before U.S. Federal District Courts. See GAIL H. MILLER, *DEFINING TORTURE* (2005).

<sup>29</sup> CAT, *supra* note 6, at art. 16.

<sup>30</sup> *Id.* This provision particularly applies to the practices of extraordinary rendition described below, since even if the government or its relevant agency in this case, the CIA, claims that it did not directly engage in torture, nor specifically know that torture would be carried out on the kidnapped person, they had the legal obligation not to subject such persons to what they had to have known would constitute cruel, inhuman or degrading treatment or punishment. It is noteworthy that in those countries to which the U.S. delivered kidnapped persons for interrogation such as Egypt, Syria, Pakistan, and Indonesia, among those countries reported, that these countries do not have national legislation implementing the CAT,

Article 17 of the Third Geneva Convention on Prisoners of War states specifically that, “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war . . . .”<sup>31</sup>

The prohibition against the infliction of any pain or suffering is absolute and categorical under the Third Geneva Convention and is also so intended by the CAT, though the latter modified “pain and suffering” with the term “severe,” which is not included in the Third Geneva Convention. Because human beings have different thresholds for the tolerance of pain and anguish, the drafters of the CAT were intent on not allowing a loophole in defining pain or suffering that could be exploited by potential torturers. The term “severe” was added simply to distinguish physical contacts of the sort that are sometimes encountered in ordinary arrests.<sup>32</sup>

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nor do they have national laws defining what constitutes torture. Therefore, the Administration’s deniability of knowledge is on its face implausible. None of the memoranda by the government lawyers referred to the 9th Circuit’s decision holding that a sufficient nexus must exist between the U.S. officials and the acts of torture committed by foreign officials. *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004); *Zheng v. Ashcroft*, 332 F.3d 1186, 1194 (9th Cir. 2003); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354-55 (5th Cir. 2002). Interestingly, the Court in *Zheng* cited a U.S. Senate Foreign Relations Committee Report which supports that proposition. *Zheng*, 332 F.3d at 1195 (citing S. EXEC. REP. NO. 101-30, at 9 (1990)). This was also confirmed in *Ontunez-Tursios*. *Ontunez-Tursios*, 303 F.3d at 355.

<sup>31</sup> Geneva III, *supra* note 18, at art. 17. See also Paust, *Executive Plans and Authorizations*, *supra* note 2 (describing the prohibition of torture under international humanitarian law and arguing a “common plan” by the Administration to intentionally commit these violations).

<sup>32</sup> On the history and application of the CAT, see J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* (1988); JOSÉ L. DE LA CUESTA ARZAMENDI, *EL DELITO DE TORTURA* (1990); Daniel H. Derby, *Torture*, in 1 *INTERNATIONAL CRIMINAL LAW* 705 (M. Cherif Bassiouni ed., 2d ed. 1999); Daniel H. Derby, *The Prevention and Suppression of Torture*, in 48 *REVUE INTERNATIONALE DE DROIT PÉNAL* (1977); NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (1999).

As the co-chair of the Drafting Committee which prepared the first text of the Torture Convention, I can attest to what is stated in the text to which this note applies. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. On the Prevention of Discrimination and Protection of Minorities, *Draft Convention for the Prevention and Suppression of Torture*, U.N. Doc. E/CN.4/NGO/213 (February 1, 1978) (prepared by the International Association of Penal Law).

The issue arose first before the European Court of Human Rights in *The Republic of Ireland v. The United Kingdom*, as to whether the distinction between torture and inhuman or degrading treatment was based on the severity of the pain and suffering, as well as the type of treatment to which the detainee was subjected. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978).



THE DEVELOPMENT OF THE U.S. POLICY SUPPORTING TORTURE AND THE  
PRACTICES THAT FOLLOWED THEREFROM

The institutionalization of the crime of torture began when the civilian leadership of the Department of Defense bypassed the Judge Advocates General of the various branches of the military, as well as non-lawyer senior military officers, whose understanding of the law and sense of honor made them oppose such practices by the U.S. military. Surely, these honorable men and women in uniform who opposed torture also considered the consequences of such practices in terms of reciprocal treatment by enemies of the United States against its military personnel, even if such reprisals are prohibited under international humanitarian law. With the military lawyers and others removed from all deliberations and responsibilities, civilian lawyers in the Department of Defense, the Department of Justice, and the White House proceeded to use their legal talent to subvert the law. In so doing, they undermined the ethics of the legal profession and violated the U.S. Constitution and the laws of the U.S., which they were sworn to uphold. Such legal advisors, including Jay S. Bybee (Assistant Attorney General and now federal judge), Alberto Gonzalez (White House Counsel and now Attorney General), William J. Haynes II (General Counsel, Department of Defense, and nominated for a federal judgeship), and John Yoo (Deputy Assistant Attorney General and now a professor at the University of California, Berkeley), used their talents to justify highly questionable positions.<sup>33</sup> These legal opinions and other government memoranda were

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<sup>33</sup> The legal opinions and other government memoranda prepared by these legal advisors appear in *THE TORTURE PAPERS*, *supra* note 3. *See e.g.*, Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., & Robert J. Delahunty, Special Counsel, U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, Dep't of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), *reprinted in THE TORTURE PAPERS*, *supra* note 3, at 38-79 [Yoo/Delahunty Memo]; Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), *reprinted in THE TORTURE PAPERS*, *supra* note 3, at 81; Memorandum from Alberto R. Gonzales, Counsel to the President, to George W. Bush, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), *reprinted in THE TORTURE PAPERS*, *supra* note 3, at 118-21; Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *reprinted in THE TORTURE PAPERS*, *supra* note 3 at 172-217 [hereinafter Bybee Memo]; Letter from John C. Yoo, Deputy Assistant Attorney Gen., Official of Legal Counsel, U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President, *reprinted in THE TORTURE PAPERS*, *supra* note 3, at 218-22 (regarding "the views of our Office concerning the legality, under international law, of interrogation methods to be used . . . on captured al Qaeda operatives."); Memorandum from William J. Haynes, II, Gen. Counsel, U.S. Dep't of Def. to Donald Rumsfeld, Sec'y of Def., U.S. Dep't of Def., Counter-resistance Techniques (Nov. 27, 2002), *reprinted in THE TORTURE PAPERS*,

drafted and presented in order to allow the Administration's leaders to establish a policy that these legal advisors knew or should have known was in violation of U.S. and international law.<sup>34</sup> In an effort to deflect moral and legal opposition, these legal advisers attempted to walk the narrow path that tax lawyers identify as the difference between tax avoidance and tax evasion, the former being legal, and the latter being illegal. At some point arguing that the definition of torture should be reconstructed in a way that permits acts that have otherwise been considered torture, and arguing that the laws of armed conflict do not apply to certain combatants, or that the Geneva conventions do not apply, crossed the line from avoidance to evasion.

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*supra* note 3 at 237; Memorandum from William J. Haynes II, Gen. Counsel, U.S. Dep't of Def. to Mary L. Walker, Gen. Counsel, Dep't of the Air Force, Working Group to Assess (Interrogation Issues) (Jan. 17, 2003), *reprinted in* THE TORTURE PAPERS, *supra* note 3 at 240. It should be noted that the Bybee memo was disregarded by the Administration because it was so obviously flawed and in contradiction with Article 1 of CAT and with Title 18 U.S.C. § 2340. *See* CAT, *supra* note 6, at art. 1. An amended position was developed in the Memorandum from Daniel Levin, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to James B. Comey, Deputy Attorney Gen., U.S. Dep't of Justice, Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), *available at* <http://www.justice.gov/olc/dagmemo.pdf>. In the end, the Bybee and Yoo memoranda are the ones that can be at best described as the most outrageous stretching of the law to a point where it is very difficult to assume that they were acting as reasonable jurists in a good faith search of the law. The authors of the various government memos, particularly the Yoo and Levin memos, dealt with the question of the severity of torture—the first two twisting the meaning of the words beyond recognition. They and others preceding them also interpreted the words in Article 1 of the CAT, “intentional infliction” as requiring specific intent, thus making it more difficult to prove. Interestingly, however, they ignored existing jurisprudence on this subject, such as the Third Circuit’s interpretation of the CAT’s mental element requirement as not being specific intent. *See* *Zubeda v. Ashcroft*, 333 F.3d 463, 473 (3d Cir. 2003); *see also* *Auguste v. Ridge*, 395 F.3d 123, 144 (3d Cir. 2005). Bybee’s position was broader in that it set aside U.S. obligations under international law while ignoring those under U.S. law. More senior government officials, including the President, relied on these memoranda and issued their own directives. *See* Memorandum from Donald Rumsfeld, Sec’y of Def., Dep’t of Def. to Chairman of the Joint Chiefs of Staff, Status of Taliban and Al Qaeda (Jan. 19, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 3, at 80; Letter from John Ashcroft, Attorney Gen., U.S. Dep’t of Justice to George W. Bush, President (Feb. 1, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 3, at 126-27 (discussing the Justice Department’s position on why the Geneva Convention did not apply to al Qaeda and Taliban detainees); Memorandum from George W. Bush, President to Dick Cheney, Vice President, et al, Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 3 at 134; U.S. Dep’t of Def., Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002), *available at* <http://www.cdt.org/security/usapatriot/020321militaryregs.pdf>.

<sup>34</sup> For a comprehensive analysis of these and other official U.S. documents, *see* 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 in Abu Ghraib*, 36 CASE W. RES. J. INT’L L. 541 (2004).

Having crossed that line, questions go to criminal responsibility<sup>35</sup> and ethical breaches.<sup>36</sup>

The pictures of Abu Ghraib and others are a stark reminder of the type of practices that were carried out and exemplify the types of actions that indisputably fall within the prohibition of the Third Geneva Convention, as well as the definition of and prohibition against torture found in the CAT and also in U.S. law.<sup>37</sup> Tragically, over 200 persons have been re-

<sup>35</sup> It should be noted that the jurisprudence of the U.S., particularly with respect to white collar crimes, establishes the criminal responsibility of attorneys for conspiracy. It also precludes reliance by clients on patently wrong advice given by attorneys to be used as a shield from criminal responsibility. Attorneys are also responsible and subject to disciplinary sanctions in every state for breach of the canons of ethics. See generally DONALD NICOLSON & JULIAN WEBB, *PROFESSIONAL LEGAL ETHICS: CRITICAL INVESTIGATIONS* (1999); Barry Sullivan, *Professions of Law*, 9 GEO. J. LEGAL ETHICS 1235 (1996); Jim Edwards, *Answering Ashcroft's Challenge: Lawyers for 9-11 Detainees Meet to Consider Coordinated Strategy*, 166 NEW JERSEY L.J. 961 (2001).

<sup>36</sup> As defined *inter alia* in the ABA's *Model Rules of Professional Conduct*: "A lawyer . . . is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice." MODEL RULES OF PROF'L CONDUCT pmb1. 1 (2004) (emphasis added).

<sup>37</sup> On February 15, 2006, additional photos of abuse at Abu Ghraib were released by Australia's Special Broadcasting Service. See Robert H. Reid, *More Photos Emerge of Abuse*, CHI. TRIB., Feb. 16, 2006; Erich Follath et al., *America's Shame: Torture in the Name of Freedom*, SPIEGEL, Feb. 20, 2006.

They are photos that make your blood run cold. They take your breath away. They turn your stomach. They are photos that make you wonder what kinds of human beings would do these things to other human beings. They trigger anger, disgust and shame.

One photo shows a prisoner being sandwiched between two stretchers, like some perverse ad for a burger. In another, a disoriented detainee, his body smeared with an unidentified substance, stumbles down a prison corridor. A third image depicts a hooded man waiting helplessly on a stool, with electric cables attached to his body. There are many more—and they all show prisoners being deliberately humiliated for their captors' amusement, men stripped naked and forced into submission. But it's not just humiliation—the photos also depict physical pain. In one photo, an American soldier kneels on the back of a naked Iraqi prisoner, a puddle of blood indicating rough treatment. In another, a prisoner bows deeply, servant-like, in front of an American military officer: Uncle Tom's Cabin in the Middle East.

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The crimes committed by US soldiers in the name of freedom and human rights, documented in unalterable photographs, appear to confirm the suspicion that America's true aim is something entirely different—that the US is primarily interested in imposing its own world order and preserving its dominance.

In short, for the United States, the most powerful and influential global power ever, the images from Abu Ghraib—and the ongoing debate over the legality of its prison camp at Guantanamo—have produced a moral catastrophe that's likely to endure for a very long time.

ported to have died in U.S. custody as a result of interrogation techniques ensuing from the policy and practices approved by the government lawyers working for the Administration.<sup>38</sup> Among some examples that may illustrate what was deemed permissible and which were actually carried out are: forcing a father to watch the mock execution of his 14-year old son; placing a lit cigarette in the ear of a detainee to burn his eardrum; bathing a person's hand in alcohol and then lighting it on fire; shackling persons to the floor for 18-24 hours; shackling persons from the top of a door frame to dislocate the shoulders, and gagging persons in order to create the effect of drowning in one's own saliva; "waterboarding," which is placing a cloth on a person's head and dousing it with water to create the effect of drowning; forcing a person to squat for periods up to and beyond 24 hours; crushing a person's bare hands and feet with boots, producing bleeding and severe hematoma; inflicting beatings with bare knuckles and hard objects, producing broken bones and lacerations; beating heads against walls; striking with the knees and boots in body locations known to cause severe pain and suffering; withholding medical treatment of the injured; and so on.<sup>39</sup>

These practices sanctioned by the Administration are exactly what Article 17 of the Third Geneva Convention prohibits, and what the CAT drafters of Article 1 wanted to avoid. The Administration's legal advisors preposterously claimed that the infliction of severe pain and suffering, as defined in Article 1 of the CAT, "[M]ust be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death" in order to constitute torture.<sup>40</sup> With respect to psychological techniques, Bybee argued that psychological harm

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<sup>38</sup> For a review of these documents, see *THE TORTURE PAPERS*, *supra* note 3. For an analysis of these documents, see Wallach, *supra* note 34. For reports on the torture victims and investigative outcomes, see Shamsi, *supra* note 4.

<sup>39</sup> Many accounts in the media, as well as the official reports released under the Freedom of Information Act request of Human Rights First and the ACLU, describe these and other practices. See e.g. Shamsi, *supra* note 4; Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, *NEW YORKER*, Feb. 27, 2006.

Qahtani had been subjected to a hundred and sixty days of isolation in a pen perpetually flooded with artificial light. He was interrogated on forty-eight of fifty-four days, for eighteen to twenty hours at a stretch. He had been stripped naked; straddled by taunting female guards, in an exercise called "invasion of space by a female"; forced to wear women's underwear on his head, and to put on a bra; threatened by dogs; placed on a leash; and told that his mother was a whore. By December, Qahtani had been subjected to a phony kidnapping, deprived of heat, given large quantities of intravenous liquids without access to a toilet, and deprived of sleep for three days. Ten days before Brant and Mora met, Qahtani's heart rate had dropped so precipitately, to thirty-five beats a minute, that he required cardiac monitoring.

*Id.*

<sup>40</sup> See Bybee Memo, *supra* note 33, at 172.

must last “months or even years,” to constitute torture.<sup>41</sup> Moreover, they argued that the Geneva Conventions and customary international humanitarian law did not apply to combatants who fought the U.S. when it attacked Afghanistan,<sup>42</sup> even though an explicit Department of Defense directive dating back to 1979 requires that the United States Armed Forces “shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are recognized.”<sup>43</sup> Consequently, combatants who fought for the Taliban were arbitrarily deemed not to benefit from the Third Geneva Convention Relative to the Treatment of Prisoners of War, in direct contradiction to Article 5 of that Geneva Convention.<sup>44</sup> These legal constructions by competent government lawyers, who knew that the JAG lawyers and others deemed them in contradiction to international humanitarian law and to U.S. law, raise serious questions about their legal and ethical responsibility.

This is not new in history. The Subsequent Proceedings held at Nuremberg in *The Justice Case* made clear that jurists must uphold their moral, ethical, and legal obligations and must not allow their efforts to serve as a shield for the commission of crimes.<sup>45</sup> The movie *Judgment at Nurem-*

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<sup>41</sup> *Id.*

<sup>42</sup> Yoo/Delahunty Memo, *supra* note 33.

<sup>43</sup> Department of Defense Directive 5100.77, DOD Law of War Program, para. E(1)(a)(10) (July 10, 1979). The same requirements are also included in U.S. DEP'T OF THE ARMY, INTELLIGENCE INTERROGATIONS, FIELD MANUAL 34-52 (1992). For a scholarly and expert description of the Geneva Conventions' applicability and the Administration's plain error, see Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503 (2003); Paust, *War and Enemy Status*, *supra* note 2.

<sup>44</sup> Yoo/Delahunty Memo, *supra* note 33; Geneva III, *supra* note 18, at art. 5; Article 5 of the CAT states:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

- (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

CAT, *supra* note 6, art. 5.

<sup>45</sup> United States v. Altstoetter (The Justice Case), in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1063-81

berg popularized these proceedings and presented Spencer Tracy playing the role of the Iowa judge confronting otherwise distinguished and learned German judges and jurists charged with conspiring and aiding and abetting in the commission of “crimes against humanity.”<sup>46</sup> The American judge from Iowa was bewildered and perplexed as to how it was possible for such distinguished German jurists to sidestep the law and overlook their moral, ethical, and legal obligations in order to do the bidding of a repressive regime.<sup>47</sup> Was career advancement that much of an inducement? Was ambition that powerful? Were their consciences that flawed? Was their regime so wicked and vengeful that they dared not oppose its morally and legally wrongful wishes? Was intimidation so pervasive that no one dared to oppose?<sup>48</sup>

Standards for the conduct of medical and healthcare professionals in the context of military service were similarly established during the trials of Nazi doctors following World War II.<sup>49</sup> These ethical, professional, and legal guidelines prohibited doctors and nurses from aiding and abetting in torture. Just as military lawyers in the U.S. have opposed the practice of

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(1951) [hereinafter *The Justice Case*]. As described by one scholar, a former JAG officer, “not since the Nazi era have so many lawyers been so clearly involved in international crime concerning the treatment and interrogation of persons detained during war.” Paust, *Executive Plans and Authorizations*, *supra* note 2 at 811.

<sup>46</sup> JUDGMENT AT NUREMBERG (Metro-Goldwyn-Mayer Inc. 1961).

<sup>47</sup> *Id.*

<sup>48</sup> In the movie *Judgment at Nuremberg* Spencer Tracy’s character says while rendering his judgment from the Bench:

[The Defendant’s] record and his fate illuminate the most shattering truth that has emerged from this trial. If he and all of the other defendants had been degraded perverts; if all of the leaders of the Third Reich had been sadistic monsters, then these events would have no more moral significance than an earthquake or any other natural catastrophe. But this trial has shown that under a national crisis, ordinary, even able and extraordinary men, can delude themselves into the commission of crimes so vast and heinous that they beggar the imagination. How easily it can happen. There are those in our own country too that today speak of the protection of country, of survival. A decision must be made in the life of every nation, at the very moment when the grasp of the enemy is at its throat; then it seems that the only way to survive is to use the means of the enemy, to wrest survival on what is expedient, to look the other way. Only, the answer to that is survival as what? A country isn’t a rock; it’s not an extension of one’s self. It’s what it stands for. It’s what it stands for when standing for something is the most difficult.

*Id.* I am indebted to Professor Michael Scharf for this quote.

<sup>49</sup> U.S. v. Brandt (The Medical Case), in 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 171-297 (1947); see also THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION (George J. Annas & Michael A. Grodin eds., 1992); ROBERT JAY LIFTON, THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE (1986).

torture within the context of the Department of Defense,<sup>50</sup> U.S. military

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<sup>50</sup> As reported by Daniel Klaidman et al., *Palace Revolt*, NEWSWEEK, Feb. 6, 2006 at 35, a number of government lawyers “fought a quiet battle” and “paid a price for it”. They include James Comey, Deputy Attorney General, and former Acting Attorney General and Jack Goldsmith, former Assistant Attorney General, who at that time that he was the head of the Justice Department’s Office of Legal Counsel was able to have the Yoo memorandum changed by Daniel Levin. While at the White House, the former NSC Legal Advisor John Bellinger (now Legal Advisor, Department of State) also took a position against denying the applicability of the Geneva Conventions to the Guantanamo detainees. Goldsmith was also supported by Patrick Philbin, who worked with the Attorney General. The Newsweek story also reveals the manipulative interventions of David Addington, former General Counsel for the Department of Defense and former Counsel for Vice President Cheney, now his Chief of Staff. *Id.* Apparently it was Addington who bypassed the JAG officers, as well as used Yoo, to obtain the legal opinion justifying torture. Comey and Goldsmith have since been pushed out of their positions by Addington. As explained by Lea Anne McBride, a spokesman for Vice President Cheney, “This administration is united in its commitment to protect Americans, defeat terrorism, and grow democracy,” meaning that honest and legitimate dissenting views are not permitted. *Id.* at 36. She further adds about Addington, “[H]e’s committed to the President’s agenda,” meaning both the Vice President and the President have an agenda on the subject which Addington carried out irrespective of the legality involved, and notwithstanding any contrary legal opinions which were either sidestepped or brushed aside. *Id.* at 37. Jane Mayer chronicles the extraordinary story of Alberto J. Mora, General Counsel of the Navy, who opposed the torture policy. Mayer, *supra* note 39. In Mora’s detailed declassified memorandum he shows how “enhanced interrogation techniques” skirting the CAT and Geneva legal limitations was a policy pushed by Addington and his former subordinate William Haynes, then General Counsel for the Department of Defense. Memorandum from Alberto J. Mora, Gen. Counsel, U.S. Dep’t of the Navy to Vice Admiral Albert Church, Inspector Gen., U.S. Dep’t of the Navy, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues (July 7, 2004) [hereinafter Mora Memo].

The memo is a chronological account, submitted on July 7, 2004, to Vice Admiral Albert Church, who led a Pentagon investigation into abuses at the U.S. detention facility at Guantánamo Bay, Cuba. It reveals that Mora’s criticisms of Administration policy were unequivocal, wide-ranging, and persistent. Well before the exposure of prisoner abuse in Iraq’s Abu Ghraib prison, in April, 2004, Mora warned his superiors at the Pentagon about the consequences of President Bush’s decision, in February, 2002, to circumvent the Geneva conventions, which prohibit both torture and “outrages upon personal dignity, in particular humiliating and degrading treatment.” He argued that a refusal to outlaw cruelty toward U.S.-held terrorist suspects was an implicit invitation to abuse. Mora also challenged the legal framework that the Bush Administration has constructed to justify an expansion of executive power, in matters ranging from interrogations to wiretapping. He described as “unlawful,” “dangerous,” and “erroneous” novel legal theories granting the President the right to authorize abuse. Mora warned that these precepts could leave U.S. personnel open to criminal prosecution.

. . . Top Administration officials have stressed that the interrogation policy was reviewed and sanctioned by government lawyers; last November, President Bush said, “Any activity we conduct is within the law. We do not torture.” Mora’s memo, however, shows that almost from the start of the Administration’s war on terror the White House, the Justice Department, and the Department of Defense, intent upon having greater flexibility, charted a legally questionable course despite sustained objections from some of its own lawyers.

doctors have also upheld their professional oaths by signing death certificates evidencing torture as the cause of death when such instances have arisen in Afghanistan and Iraq.<sup>51</sup> To their credit, these and other members of the military are the heroes of this tragic episode in our contemporary history. Regrettably, many others have turned a blind eye, looked the other way, and violated their oath by going along with the political wishes of the Pentagon's civilian leadership.

The government lawyers whose work product is mentioned above did so to allow their clients to rely on their advice, and thus eventually avoid responsibility. These clients are primarily: President George W. Bush, Vice President Dick Cheney, Defense Secretary Donald Rumsfeld, and former Attorney General John Ashcroft. One day, perhaps, if this is ever brought to the bar of justice, judges will probably ask the same questions as the Iowa judge portrayed by Spencer Tracy. They will likely ask these government lawyers such questions as: were they experts on the subjects on which they opined; did they ask the advice of other experts; did they submit their advice to expert input or critique; did they assess any margin of error or appreciation between their views and those of others; could jurists of average, not to say superior, intellectual capabilities have reached in good faith the same conclusions that these government lawyers reached in their legal opinions? Surely it will not be easy to prove that they acted with "malice aforethought," as the Common Law calls it, or specific intent, as some crimes under the UCMJ and Title 18 require.<sup>52</sup> But general intent based on the standard of the reasonable lawyer in like circumstances? Considering also that they are more than average lawyers as one because a federal judge, another one awaits Senate confirmation for a federal judgeship and one is a University professor at a prestigious law school. Moreover, how much of a defense will their opinions be for the senior officials who solicited that advice and pressed for it, particularly if it was clear that this was the outcome they sought? Will these senior officials be able to hide behind such thinly transparent legal opinions?

The military, all the way through the chain of command, will also have to face similar legal questions but with the difference that under both the laws of armed conflict and the UCMJ they have the duty to refuse to

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Mayer, *supra* note 39.

Once again reminiscing on The Justice Case, the judgment exonerated four jurists who had the courage of taking a different path. If the time ever comes to judge the government lawyers mentioned above and elsewhere in this article, there will surely be those who stood out for their intellectual and professional integrity in the face of their superiors' political pressures. The Justice Case, *supra* note 45.

<sup>51</sup> See *supra* notes 4-5.

<sup>52</sup> Uniform Code of Military Justice, 10 U.S.C. §§ 801-941 (2000).



obey an order that is “manifestly unlawful.”<sup>53</sup> Their defense counsels, like those of the senior administration officials, will argue that the orders their clients’ followed were not manifestly unlawful and that these military personnel could reasonably rely on the legal opinions of such government lawyers as those mentioned above.

As more pieces of the jigsaw puzzle are discovered over time, transparent arguments will be difficult to maintain. If nothing else, the consistent elimination of the Judge Advocate General officers from the process of shaping the governing legal opinions will weigh heavily against those who will seek to use the fig leaf defense of the Administration’s talented civilian lawyers’ legal memoranda. Another factor will be the reports of general officers’ investigations of Abu Ghraib, Bagram, and Guantanamo, which have so far been classified, as well as other internal reports and memoranda by military officers, Central Intelligence Agency (“CIA”) officers and staffers, and Federal Bureau of Investigation (“FBI”) agents, some of which decried or denounced interrogation practices, while others raised questions about their utility and highlighted their counter-productivity.

Like many Judge Advocate General (“JAG”) officers and other officers who disapproved of the policy and practices of torture, some senior officials, including then Secretary of State Colin Powell, probably because of his military background, raised serious questions about the various legal

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<sup>53</sup> For history of command responsibility, see M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 423-447 (1992) [hereinafter BASSIOUNI, *CRIMES AGAINST HUMANITY*]; see also Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973). Linda A. Malone, *The Kahan Report, Ariel Sharon, and the Sabra-Shatila Massacres in Lebanon: Responsibility Under International Law for Massacres of Civilian Populations*, 1985 UTAH L. REV. 373 (1985); Shamsi, *supra* note 4. Article 28 of the Statute of the International Criminal Court establishes the responsibility of commanders and other superiors. Rome Statute of the International Criminal Court, *Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, art. 31, U.N. Doc. A/Conf.183/9 (July 1, 2002). For the legislative history of the ICC, see 1 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT (M. Cherif Bassiouni ed., 2005). For the non-applicability of the defense of “obedience to superior orders,” see BASSIOUNI, *CRIMES AGAINST HUMANITY*, *supra* note 53, at 449-83. It must be noted that the defense of “obedience to superior orders” was rejected in Article 7 of the IMT’s charter and Article 6 of the IMTFE’s charter, but it can be considered in mitigation of punishment. See generally, NICO KEIJZER, *MILITARY OBEDIENCE* (1978); LESLIE C. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* (1976); YORAM DINSTEIN, *THE DEFENSE OF “OBEDIENCE TO SUPERIOR ORDERS” IN INTERNATIONAL LAW* (1965); EKKEHART MÜLLER-RAPPARD, *L’ORDER SUPERIEUR MILITAIRE ET LA RESPONSABILITE DU SUBORDINNE* (1965); Jordan J. Paust, *Superior Orders and Command Responsibility*, in 1 INTERNATIONAL CRIMINAL LAW 223 (1999). It was also specifically eliminated in the statutes of the International Criminal Tribunal for the former Yugoslavia and the International Tribunal for Rwanda. S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

memoranda and the push from the top in the direction of torture.<sup>54</sup> Other government lawyers including Alberto Mora, General Counsel for the Department of the Navy<sup>55</sup> and William H. Taft IV, Legal Advisor to the Department of State, also opposed these legal propositions.<sup>56</sup> All these critical opinions were set aside. Last but not least, a number of honorable former JAG officers, led by Navy JAG Admiral John Hutson, filed an *amicus curiae* brief with the Supreme Court of the United States in *Rasul v. Bush*<sup>57</sup> arguing in opposition to the President's Executive Order establishing Military Commissions to prosecute the Guantanamo detainees outside the framework of the UCMJ and without the benefit of the protections of the Third Geneva Convention.<sup>58</sup>

When many of the pieces of the jigsaw puzzle are assembled under a new era of government transparency, the picture will be clearer. Certainly when many of the officers who either explicitly or silently opposed the practice have retired and are freed from command influence, new disclosures will cast greater light on the present situation.<sup>59</sup>

Shortly after this Administration institutionalized a policy of permissible torture in violation of the above-mentioned legal obligations, torture was practiced in various international arenas such as: the U.S. military bases at Guantanamo Bay, Cuba; Bagram, Kandahar and other locations in

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<sup>54</sup> See Memorandum from Colin L. Powell, Sec'y of State, U.S. Dep't of State to Alberto R. Gonzales, Counsel to the President, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), reprinted in THE TORTURE PAPERS, *supra* note 3, at 122.

<sup>55</sup> See Mora Memo, *supra* note 50.

<sup>56</sup> See Memorandum from William H. Taft IV, Legal Advisor, U.S. Dep't of State to Alberto R. Gonzales, Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002), reprinted in THE TORTURE PAPERS, *supra* note 3, at 129.

<sup>57</sup> Brief for Law Professors et al. as Amici Curiae Supporting Respondents, *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>58</sup> *Id.* See Military Order of Nov. 13, 2001, *supra* note 2.

<sup>59</sup> For example, Sergeant Anthony Lagouranis, who left the service July 2005, writes in a New York Times Op-Ed piece that he and other interrogators have been placed in the position of using dogs to "enhance" interrogation, as well as using hypothermia. He lays the blame on Col. Thomas Pappas, the senior intelligence officer at Abu Ghraib, working under the command of Major General Jeffrey Miller, who was transferred to Abu Ghraib from Guantanamo. Lagouranis clearly says that his superiors purposely made the rules muddy and unclear, and that they did so with a way to avoiding responsibility. He points to the trial of two other army sergeants, namely Santos Cardona and Michael Smith, who also used dogs to intimidate and who are now facing court martial. General Miller, according to Lagouranis, took the Fifth Amendment in refusing to appear as a witness in the case of the two sergeants who claim that they were acting under superior orders, which they apparently also did not feel were "manifestly unlawful." If that were the case under the UCMJ and international humanitarian law, they would have the obligation to refuse to carry out such an order. See Anthony Lagouranis, *Tortured Logic*, N.Y. TIMES, Feb. 28, 2006; Stephen Grey, *CIA Prisoners "Tortured" in Arab Jails*, BBC NEWS, Feb. 8, 2005.

Afghanistan; Abu Ghraib and other location in Iraq; and through proxies in a number of countries, including Egypt, Syria, Pakistan, Romania, and Poland (based on publicly available information as of now).<sup>60</sup> The latter subterfuge, namely, using the CIA to kidnap non-U.S. nationals for delivery to other governments' secret services for torture, assurances and denials notwithstanding, are nonetheless crimes under any one or more of the sources of law mentioned above that prohibit torture.<sup>61</sup>

It should be noted that the official justification for the above-described policy and practices is the so-called "War on Terrorism"—a term developed and given content by the Administration. It became the backdrop against which these domestic and international crimes were committed with impunity.<sup>62</sup> However, international law does not provide any exception to the applicability of the Third Geneva Convention or the CAT, and neither do relevant U.S. laws under the UCMJ and Title 18.<sup>63</sup>

Many of the 200 persons estimated to have died in U.S. military custody have purposely not been autopsied by the military<sup>64</sup>—some even died several months ago—presumably so as not to require investigations into their deaths and further proceedings in accordance with the UCMJ if such an autopsy report confirmed the conclusions of those death certificates that indicated death as a result of physical mistreatment. Even though the word torture is not specifically used in these death certificates, by inference, sometimes more clearly stated than in others, the deaths were attributed to trauma caused by severe beatings and organ failures.<sup>65</sup> So far, not a single case has been charged under the war crimes provisions of the UCMJ, and to this writer's knowledge, not a single case has been investigated, charged, or prosecuted as torture or as a homicide resulting from intentional infliction of serious bodily harm amounting to torture. A court martial of a Non-Commissioned Officer ("NCO") for the killing of an Iraqi general at Abu Ghraib by means of stuffing him in a sleeping bag and sitting on his chest during interrogation, resulted in the conviction of the Chief Warrant Officer, who committed the act.<sup>66</sup> Notwithstanding the charges of negligent homicide and negligent dereliction of duty, which carries a modest penalty of up

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<sup>60</sup> See *infra* notes 59 and 84.

<sup>61</sup> See *supra* notes 19-21.

<sup>62</sup> See the various contributions by noted jurists contained in Symposium, *Terrorism on Trial*, 36 CASE W. RES. U. J. INT'L L. 1 (2004).

<sup>63</sup> See Geneva III, *supra* note 18 (particularly Article 17); CAT, *supra* note 6; Uniform Code of Military Justice, 10 U.S.C. §§ 801-941 (2000).

<sup>64</sup> See *supra* note 4.

<sup>65</sup> See Bybee Memo, *supra* note 33; see also *supra* note 33.

<sup>66</sup> See Eric Schmitt, *Army Interrogator is Convicted of Negligent Homicide in 2003 Death of Iraqi General*, N.Y. TIMES, Jan. 23, 2006, at A16; see also Josh White, *U.S. Army Officer Convicted in Death of Iraqi Detainee*, WASH. POST, Jan. 23, 2006, at A2.

to three years and three months in prison, the NCO faced no jail time, was restricted to his barracks for sixty days, or payment of \$6,000 in fines.<sup>67</sup> Lest it is not obvious from the above description, the Chief Warrant Officer was found guilty of negligent homicide, a charge much less severe than what he should have been charged with under the UCMJ's articles of war, for having killed a prisoner of war in his custody. Even so, the guilty NCO basically walked out of Fort Carlson, Colorado a free man.

The number of inquiries and courts martial remains sparse, and tracking these cases is difficult because none of the branches of the military record the statistics regarding the grounds for courts martial and other forms of disciplinary proceedings, thus making it difficult to follow the specific reasons for the inquiry, investigation, or disciplinary action.

The relatively limited number of inquiries, investigations, disciplinary proceedings and courts martial, estimated at over 120 cases, could well be intended to present to the public what is tantamount to yet another fig leaf of plausible deniability by the highest level of civilian and military leadership to protect them from future criminal responsibility. These limited actions are intended to show that when the facts are discovered, the civilian and military leadership carry out their legal obligations to investigate and prosecute where the facts so require. But in none of these cases, except for some disciplinary actions, did these investigations and inquiries go above those immediately involved and upwards into the chain of command. Those who got caught were usually enlisted personnel and NCOs. They are at the bottom of the ladder. There is no known case where an officer was court martialed for dereliction of duty or on the basis of command responsibility. Certainly those in the upper levels of the chain of command were spared the ignominy of investigation and discipline.<sup>68</sup>

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<sup>67</sup> See Schmitt, *supra* note 66; White, *supra* note 66.

<sup>68</sup> With the death of an estimated 200 persons as a likely result of torture and a well-established and documented pattern of institutionalized practice of torture in Camp Delta in Guantanamo Bay and in various detention facilities in Afghanistan and Iraq, the command influence of the civilian leadership in the Department of Defense and also, presumably, emanating from the White House, could amount to a cover-up of crimes in violation of U.S. laws. If this were to be true, then it would justify articles of impeachment against the President and the Vice President for what the Constitution refers to as "high crimes and misdemeanors." U.S. CONST. art. II, § 4.

A lawsuit by the ACLU and Human Rights First charge Secretary of Defense Donald Rumsfeld with direct responsibility for torture and abuse of detainees, in particular of eight persons. See Complaint, *Ali v. Rumsfeld*, No. 05-CV-01201, 2005 WL 922428 (N.D.Ill. Mar. 1, 2005), available at [http://humanrightsfirst.com/usa\\_law/etn/lawsuit/PDF/rums-complaint-022805.pdf](http://humanrightsfirst.com/usa_law/etn/lawsuit/PDF/rums-complaint-022805.pdf). Because Rumsfeld is directly under the chain of command of the President, his responsibility could be imputed to his Commander in Chief. The ACLU has also filed suit against the CIA for the kidnapping and torture of a person based on so-called extraordinary rendition. See Complaint, *El-Masri v. Tenet* (E.D. Va. 2005), available at [http://www.aclu.org/images/extraordinaryrendition/asset\\_upload\\_file829\\_22211.pdf](http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf). If the CIA Director is

Perhaps if the military justice system had been more thorough in *United States v. Calley* during the Vietnam era this would not have happened.<sup>69</sup> The 1968 My Lai Massacre of over 500 innocent civilians resulted only in Lieutenant Calley's prosecution and conviction, which was followed by a Presidential pardon by President Richard Nixon.<sup>70</sup> Calley's immediate superior, Captain Medina, was acquitted,<sup>71</sup> and the regimental Commander, Colonel Henderson, was only administratively disciplined.<sup>72</sup> However, even in Calley's case, the court martial charges were not under the UCMJ's Articles of War.

The law of command responsibility brooks no question that when military commanders in the chain of command issue orders or are aware of the practices of torture and fail to prevent the commission of such a crime, they are personally responsible.<sup>73</sup> The same applies when they discover these crimes and fail to investigate them and prosecute those responsible for the deeds, including those in the chain of command if the evidence warrants it.<sup>74</sup> Moreover, it imposes upon these commanders the obligation to prevent the recurrences of these violations. Lastly, the obligation to investigate and prosecute is not conditioned upon the public's discovery of violations. As seen clearly in the Abu Ghraib case, no charges were brought against any known violators within the military prior to the horrifying pictures becom-

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found responsible, his actions could also be attributed to his Commander in Chief. For more information about the first set of lawsuits against the Secretary of Defense, Lt. General Ricardo Sanchez, Brigadier General Karpinski, and Thomas Pappas, all filed in U.S. District Court the District of Columbia, see ACLU, <http://www.aclu.org/safefree/rumsfeld/index.html>. For more information about the ACLU suit against former CIA Director George Tenet, filed in the U.S. District for the Eastern District of Virginia, Alexandria Division, see ACLU, <http://www.aclu.org/safefree/extraordinaryrendition/index.html>.

<sup>69</sup> *United States v. Calley*, 48 C.M.R. 19 (1973); *Calley vs. Callaway*, 519 F.2d 184 (5th Cir. 1975). See also *THE MY LAI MASSACRE AND ITS COVER-UP: BEYOND THE REACH OF THE LAW* (Joseph Goldstein et al. eds., 1976); Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99 (1972) [hereinafter Paust, *My Lai and Vietnam*].

<sup>70</sup> See *THE MY LAI MASSACRE AND ITS COVER-UP: BEYOND THE REACH OF THE LAW*, *supra* note 69; see also Paust, *My Lai and Vietnam*, *supra* note 69.

<sup>71</sup> *Medina v. Resor*, 43 CMR 243 (1971).

<sup>72</sup> See Paust, *My Lai and Vietnam*, *supra* note 69.

<sup>73</sup> See *supra* note 53 on command responsibility.

<sup>74</sup> Mark Swanner, a CIA official who interrogated an Iraqi detainee at Abu Ghraib, is believed to have been charged with homicide by a confidential report of the CIA Inspector General. See Jane Mayer, *A Deadly Interrogation: Can the C.I.A. Legally Kill a Prisoner?*, NEW YORKER, Nov. 14, 2005. It is reported that this information was sent for possible criminal charges to Paul McNulty, the U.S. Attorney for the Eastern District of Virginia—the location of CIA headquarters—but for over a year, nothing has been acted upon. In October, 2005, President Bush nominated McNulty to the position of Deputy Attorney General. It has now been more than two years since the Iraqi detainee in question was killed. See *id.*

ing public on American television. In fact, it appears that senior officers who investigated prison conditions in Guantanamo Bay, Afghanistan, and Iraq, like General Taguba, all reported in one way or another that torture or something similar was taking place.<sup>75</sup> These reports were mostly classified. The civilian and military commanders who ordered the classifying of these reports therefore had notice of the violations, and are themselves responsible, first, for failure to act in the face of these reports, and second, for concealing these reports to prevent legal action in keeping with the requirements of the law.

The command influence from the highest echelons of the Department of Defense not only appears to have allowed the practice of torture but encouraged it through laxity of command oversight. It has also permeated the military establishment in the form of disincentives for those officers

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<sup>75</sup> See ANTHONY R. JONES & GEORGE R. FAY, INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB (2004), available at <http://news.findlaw.com/nytimes/docs/dod/fay82504rpt.pdf>; INSPECTOR GEN., U.S. DEP'T OF THE ARMY, DETAINEE OPERATIONS INSPECTION, THE MIKOLASHEK REPORT (July 21, 2004) at <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf>; ANTONIO M. TAGUBA, MAJOR GEN., U.S. DEP'T OF THE ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, reprinted in THE TORTURE PAPERS, *supra* note 3, at 405; JAMES R. SCHLESINGER, U.S. DEP'T OF DEFENSE, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 80 (2004) at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>; See generally DANNER, *supra* note 5. For another detailed study of the paper trail on illegal interrogation tactics and involvement of both military and civilians starting in October 2002 through the memorandum of Major General Michael B. Dunlavey, Commander of Joint Task Force 170, Guantanamo Bay, Cuba, parts of which were ultimately approved by the Chairman of the Joint Chiefs of Staff and the Secretary of Defense, see Paust, *Executive Plans and Authorizations*, *supra* note 2 at 838-55. More recently, it was disclosed by the Boston Globe:

Defense Secretary Donald H. Rumsfeld closely monitored the late 2002 interrogation of a key Guantanamo Bay prison detainee at the same time that the prisoner was subjected to treatment that a military investigator later called "degrading and abusive," according to newly released documents

The documents, portions of a December 2005 Army inspector general report, disclosed for the first time that Rumsfeld spoke weekly with the Guantanamo commander, Major Geoffrey Miller, about the progress of the interrogation of a Saudi man suspected of a connection to the Sept. 11, 2001, attacks.

The intense attention Rumsfeld and Miller were paying to the interrogation raises new questions about their later claims that they knew nothing about the tactics interrogators used, which included a range of physically intense and sexually humiliating techniques similar to those in the Abu Ghraib torture scandal in Iraq.

Over a six-week period, according to subsequent investigations, the detainee was subjected to sleep deprivation, stripped naked, forced to wear women's underwear on his head, denied bathroom access until he urinated on himself, threatened with snarling dogs, and forced to perform tricks on a dog leash, among other things.

who would not allow or encourage such illegal practices.<sup>76</sup> Conversely, those who did were incentivized, as in the case of now Major General Jacoby, whose report on Afghanistan was made at the time he was Brigadier General.<sup>77</sup> It is believed that his originally drafted report was at least critical of the interrogation techniques conducted there, but that he subsequently amended it. The report was classified and never released, and the author was promoted to Major General and assigned to a post in Alaska. The command influence has also taken a more blatant turn with the Secretary of Defense recently inserting himself between promotion boards and Congress, which makes such appointments.<sup>78</sup> This had not been the case until now.

Some active military personnel, like Captain Ian Fishback, have demonstrated courage in revealing the existence of these practices to their superiors, and, in the case of Fishback, when these superiors failed to act, he went public with his knowledge and revealed it to Congress.<sup>79</sup> Regrettably, there are too few officers who have done so.

By the standards of command responsibility, either under international humanitarian law or under the UCMJ, those in the chain of command up to and including the Secretary of Defense, or, for that matter, possibly also the President, may have committed international crimes as well as crimes under the laws of the United States. Whether they are responsible or not is a question that may never be answered unless justice establishes it.

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<sup>76</sup> When the Abu Ghraib story broke, the commanding officer was Brigadier General Jane Karpinski, a reserve Army officer who was then demoted to Colonel. For all practical purposes, she took the fall for General Ricardo Sanchez, who was the senior U.S. Field Commander. General Karpinski in several interviews reported that she was targeted to take the fall not only because she was a reserve officer, but also because she was a woman. While it is not possible to make the connection between Karpinski's demotion and its impact on other women in the military, it is nonetheless noteworthy as reported in the Alberto Mora memorandum that Captain Jane Dalton, Legal Advisor to the Chairman of the Joint Chiefs of Staff, and Lt. Col. Diane Beaver, apparently failed to take positions opposing torture and/or practices similar to torture. A pattern of command influence and/or intimidation can therefore be seen at different levels. See Mora Memo, *supra* note 50; see also *Abu Ghraib Whistleblower Testifies About Government Retaliation Before Congress*, 84 U.S. LAW AND SECURITY DIGEST, Feb. 17, 2006. See also *supra* note 59.

<sup>77</sup> A United Nations report refers to the Jacoby report. See U.N. Econ. & Soc. Council [ECOSOC], Comm. On Human Rights, *Report of the Independent Expert on the Situation of Human Rights in Afghanistan*, M. Cherif Bassiouni, ¶ 45, U.N. Doc. E/CN.4/2005/122 (Mar. 11, 2005) [hereinafter *Report of the Independent Expert*]. Jacoby's promotion to Major General and command assignment in Alaska was not publicized in the same way as other promotions. See DOD News: General Officer Announcements (Oct. 29, 2004), <http://www.defense.link.mil/releases/2004/nr20041029-1453.html>.

<sup>78</sup> It was recently announced that all board recommendations for general officers from Major General and above must first secure the Secretary of Defense's approval before being sent to Congress.

<sup>79</sup> Letter From Ian Fishback, Captain, U.S. Dep't of the Army to Senator John McCain (Sept. 16, 2005), reprinted in *A Matter of Honor*, WASH. POST, Sept. 28, 2005, at A21.

However, there are surely enough questions by now that any further action in support of the policy and practices leading to torture cannot be answered by claims of ignorance. The fig leaf is off.

#### TORTURE INVOLVING OTHER U.S. OFFICIALS AND PRIVATE CONTRACTORS

Institutionalized torture has not only taken place in a military context or at the hands of the military, but has also been carried out by two additional categories of operatives: members of the CIA and civilian contractors of the Department of Defense. These operatives have been reported to have engaged directly or indirectly in torture.<sup>80</sup> They engaged directly in torture by performing the acts themselves, and indirectly, by having others engage in acts of torture, either at their behest or for their benefit and with knowledge or foreseeability. At the outset, it should be noted that neither the CIA, FBI, or any other person working for the U.S. government is exempt from the CAT. The same applies to Department of Defense (“DoD”) civilian contractors.

CIA personnel have been engaged in interrogations in Guantanamo Bay, Iraq (Abu Ghraib and other detention facilities), and Afghanistan (Bagram, Kandahar, and other free-fire bases).<sup>81</sup> A legalistic interpretation of U.S. law would be that they are not subject to the UCMJ, although they accompanied U.S. military forces and operated on U.S. bases. However, under the PATRIOT Act, Federal criminal law applies to U.S. bases abroad and to actions by U.S. citizens abroad.<sup>82</sup> Violations of the CAT also apply to acts committed outside the territorial jurisdiction of the U.S.<sup>83</sup>

Another artful technique employed by the CIA is the resort to the euphemistically termed practice of “extraordinary rendition.” This apparently means the kidnapping, sequestration, and transfer of non-U.S. nationals and their physical delivery to governments whose secret services engage in the torture of these individuals in order to obtain information of interest

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<sup>80</sup> See *Report of the Independent Expert*, *supra* note 77, at 16-17.

<sup>81</sup> The CIA’s Inspector General, John L. Helgeson, is reported to have issued a classified report in 2004. The New York Times reported: “A classified report issued last year by the Central Intelligence Agency’s inspector general warned that interrogation procedures approved by the C.I.A. after the Sept. 11 attacks might violate some provisions of the international Convention Against Torture, current and former intelligence officials say. The previously undisclosed findings from the report, which was completed in the spring of 2004, reflected deep unease within the C.I.A. about the interrogation procedures, the officials said.” Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, N.Y. TIMES, Nov. 9, 2005, at A1.

<sup>82</sup> See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, § 804, 115 Stat. 272, 377 (2001) (codified at 18 U.S.C.A. § 7(9)(A) (2001)).

<sup>83</sup> CAT, *supra* note 6.



to the CIA.<sup>84</sup> Like the techniques described above, this one is intended to take advantage of the jurisdictional loopholes in Title 18 criminal violations by selecting victims who are not U.S. citizens, kidnapping them outside the territory of the U.S., and delivering them to yet another state. Moreover, by not directly involving any U.S. official in the torture, plausible deniability is advanced by the CIA. If it is possible to establish a connection in terms of knowledge or reasonable foreseeability between the CIA agents who deliver such victims to foreign government agents and the subsequent torture by these governments, then clearly these CIA agents have committed an international crime under the CAT and can be prosecuted under this convention in any country that can exercise jurisdiction over them. They could also be prosecuted under the UCMJ. As early as 1994, Congress, pursuant to the CAT, criminalized torture even when committed outside the territory of the United States.<sup>85</sup> How the government lawyers mentioned above were able to simply argue that the Guantanamo Bay Naval Station is under Cuban sovereignty and therefore outside the jurisdiction of the U.S. was at best a fantastic argument, particularly when the position of the U.S. for years has been that Cuba does not have sovereignty over that base, so long as the U.S. occupies it.<sup>86</sup>

It should also be noted that kidnapping and transferring of persons from one country to another, even though occurring outside the territorial jurisdiction of the U.S., is almost always likely to occur within the territorial jurisdiction of another state. Since kidnapping is a crime under the laws of all countries of the world, and since many countries have ratified the CAT or have provisions within their criminal laws criminalizing torture, actions by CIA operatives, as well as by private contractors, would constitute a crime under the laws of the state where the kidnapping or torture took place. This was the case in Italy where CIA agents kidnapped an Egyptian cleric in the city of Milan, and surrendered him to Egyptian police authorities where

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<sup>84</sup> See Grey, *supra* note 59 (providing comments by Michael Scheuer, a twenty-two year veteran of the CIA, on the rendition practices of the CIA). In February, 2006, the House International Relations Committee of Congress defeated three resolutions which would have required investigations into these practices. JAMES RISEN, *STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION* (2006).

For kidnapping as a substitute to lawful extradition, see M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 217-93 (3d ed. 1996). *But see* *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (upholding the notion of *mala captus bene detentus*). The Supreme Court, however, subsequently upheld Alvarez-Machain's right to file an action under the Alien Tort Claims Act, and to obtain damages for the kidnapping. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>85</sup> 18 U.S.C. § 2340A(a) (2000) (originally enacted as Act of Apr. 30, 1994, § 506(a), 108 Stat. 382, 463).

<sup>86</sup> That argument was rejected by the United States Supreme Court in *Rasul. v. Bush*, 542 U.S. 466 (2004).

he has been detained and tortured for over a year.<sup>87</sup> When these actions were discovered, the Milan Prosecutors indicted thirteen CIA operatives who worked out of Italy.<sup>88</sup> An international arrest warrant was issued against them, and an extradition request to the U.S. for their surrender is pending.<sup>89</sup> There are also investigations being conducted by the Council of Europe, which referred to the practice of the U.S. as the “outsourcing’ of torture,”<sup>90</sup> as well as by several governments in connection with the unauthorized use of their territory for purposes of “extraordinary rendition,” as well as possibly for locations where interrogations with torture may have taken place. Surely all of this evidences the unlawful nature of the activity, placing the United States in the embarrassing position of being caught in the commission of officially-sanctioned criminal activity that may also be tantamount to the infringement of the sovereignty of other states. In any event, it exposes CIA agents to criminal responsibility under the laws of foreign countries when they were acting pursuant to orders from their own government, believing them to be lawful. If such agents are prosecuted in a foreign country, their defense will be that they followed the orders of their superiors, which were based on the legal advice of U.S. government lawyers. If the legal opinions of these government lawyers were to be presented to a foreign criminal court, it would hardly withstand the scrutiny of an average judge or prosecutor. For this advice to induce the CIA to send its agents to engage in kidnappings overseas, landing in different countries for refueling, holding kidnapped persons on foreign soil, using force and possibly even torture, and delivering them to an ultimate destination country for the ostensible purpose of coercive interrogation, including torture, is irresponsible, to say the least. How can any legal advisor opine that a member of the CIA can engage in a crime in the territory of another country and not be subject to its criminal jurisdiction? If that was not part of the explicit legal advice given to the CIA, then it is unimaginable how senior officials in that agency would put their agents, U.S. citizens serving their country, in harm’s

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<sup>87</sup> John Crewdson of the Chicago Tribune was the most thorough journalist investigating this story. See John Crewdson, *Italy: CIA Email Ties Agents to Abduction*, CHI. TRIB., Jan. 20, 2006; John Crewdson & Alessandra Maggiorani, *Italians Press for Extradition of CIA Agents*, CHI. TRIB., Nov. 11, 2005; see also *Italy Seeks Arrests in Kidnapping Case*, N.Y. TIMES, Dec. 24, 2005, at A5.

<sup>88</sup> Crewdson, *supra* note 87; Crewdson & Maggiorani, *supra* note 87; *Italy Seeks Arrests in Kidnapping Case*, *supra* note 87.

<sup>89</sup> Crewdson, *supra* note 87; Crewdson & Maggiorani, *supra* note 87; *Italy Seeks Arrests in Kidnapping Case*, *supra* note 87.

<sup>90</sup> Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions in Council of Europe Member States*, (Jan. 22, 2006), available at [http://assembly.coe.int/CommitteeDocs/2006/20060124\\_Jdoc032006\\_E.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf). See also Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

way. Not only were the providers of legal advice in this case misleading their superiors, but they have as a result of it placed CIA agents in positions of having violated the laws of other countries, as well as their own.<sup>91</sup>

The other category of possible violators of U.S. and international law is DoD private contractors doing paramilitary work. Private contracting for paramilitary work is a recent invention of the U.S. that seems to fly in the face of the United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which prohibits the use of mercenaries whenever private contractors are used in a military, pa-

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<sup>91</sup> For example, 18 U.S.C. § 114 states: "Whoever, within the special maritime and territorial jurisdiction of the United States and with the intent to torture [as defined in § 2340], maim, disfigure, bite, cuts or slits the nose, ear, or lip or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb, or any member of another person; or [w]hoever . . . with like intent, throws or pours upon another person any scalding water, corrosive acid, or caustic substance [s]hall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 114 (2000). *See also* 18 U.S.C. § 1111(c)(6) (2000). There is also civil liability for torture under the Torture Victim Protection Act of 1991, which also defines torture in a manner consistent with the CAT and with 18 U.S.C. § 2340. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992). There have been a number of cases under the Torture Victim Protection Act establishing liability for its perpetrators. It should also be noted that the Alien Tort Claims Act provides for a civil remedy. *See* 28 U.S.C. § 1350 (2000). Importantly, the Foreign Sovereign Immunities Act of 1976 as amended in 1996, specifically states that torture is an exception to the immunity of a foreign state from prosecution or adjudication before a U.S. Court. 28 U.S.C. § 1605(a)(7) (2000). Lastly, the Foreign Affairs Reform and Restructuring Act of 1988 grants the Secretary of State the power not to surrender by means of extradition or by other means a person to a country where he/she is likely to be tortured in violation of the CAT. Foreign Affairs Reform and Restructuring Act of 1988, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 822 (1998). *See also* Department of State regulations on the subject which include a definition of torture at 8 C.F.R. § 208.18(a)(1) (2006). There have been a number of cases by several circuits dealing with that issue, all of which have the former Attorney General Ashcroft as a defendant. *See e.g.*, Wang v. Ashcroft, 320 F.3d 130 (3d Cir. 2003); Al-Najjar v. Ashcroft, 257 F.3d 1262 (11th Cir. 2001); Sackie v. Ashcroft, 270 F.Supp. 2d 596 (E.D. Pa. 2003). Lastly, the Torture Victim Relief Act of 1998 defines torture in much the same terms as Title 18 U.S.C. § 2340, and authorizes the president to provide grants for the rehabilitation for the victims of torture. 22 U.S.C. § 2152 (2000).

Further evidencing the President and the administration's awareness of the prohibition of torture even in connection with other matters, as if intending to prepare an eventual defense against institutionalized torture, is the inclusion of a specific provision on torture in U.S. legislation signed by the President on May 11, 2005: It is the bill for emergency supplemental appropriations for defense, the global war on terror, and tsunami relief for the fiscal year ending Sept. 20, 2005, in which s 6057(a)(1) provides "None of the funds appropriated or otherwise made available by this Act shall be obligated or expended to subject any person in the custody or under physical control of the United States to torture, or cruel, inhuman or degrading treatment or punishment, that is prohibited by the Constitution, laws, or treaties of the United States." Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, H.R. Res. 1268, 109th Cong. § 6057(a)(1) (2005). Section 6057(b)(1) further refers to the definition of torture as contained in 18 U.S.C. § 2340.

ramilitary, or supportive military capacity.<sup>92</sup> Thus, in and of itself, the use of such personnel in these capacities may also be a violation of international law. Because such personnel operate on U.S. military bases abroad and alongside the military, it is hard to maintain that there is no agency relationship to DoD. It is also possible that they may be deemed accompanying personnel for purposes of UCMJ applicability. In order to prevent that result, the contracts between the Department of Defense and such private enterprises are couched in clever legal terms that define the latter as independent contractors not subject to the military. This also means that they are not subject to the command and control structure of the military on a given base nor are they part of the structure of the Department of Defense. They operate pursuant to contracts administered by a special office under civilian control and answerable to the civilian Secretary of Defense and the civilian Under-Secretary of Defense. Thus, by an artful use of contract law, a new category of operatives who may engage in military and paramilitary activities remain outside military command and control and also beyond the reach of the UCMJ.

Under Title 18, there is no general extra-territorial criminal provision, and the principle of nationality in respect to criminal jurisdiction does not exist except with respect to some limited provisions such as treason, espionage, and tax evasion.<sup>93</sup> This legal stratagem is akin to that of the corporate veil in business law. However, jurisprudence in corporate criminal responsibility has established that the corporate veil cannot be used to conceal conspiracies and crimes.<sup>94</sup> If the appropriate case were to be brought before a conscientious and courageous judge, it would be likely that this corporate veil would be lifted, and those belonging to the offending private contractors could be found subject to the UCMJ's jurisdiction or alternatively subject to Title 18 criminal jurisdiction for torture and conspiracy to commit torture.

It should be noted that the UCMJ would apply to civilian contractors if Congress declared war and if such contractors would operate alongside the U.S. military overseas.<sup>95</sup> However, it should also be noted that the Department of Justice may proceed under Title 18 pursuant to the Military Extraterritorial Jurisdiction Act ("MEJA"), which was adopted in 2000 to

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<sup>92</sup> International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res. 44/34, U.N. GAOR, 44th Sess., 72nd plen. mtg., U.N. Doc. A/RES/44/34 (Dec. 4, 1989).

<sup>93</sup> 18 U.S.C. (2000).

<sup>94</sup> See Note, *Developments in the Law: Corporate Crime: Regulating Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979); CORPORATE AND WHITE COLLAR CRIME: AN ANTHOLOGY (Leonard Orland ed., 1995). For state law see JOHN F. DECKER, ILLINOIS CRIMINAL LAW: A SURVEY OF CRIMES AND DEFENSES §§ 3.25-3.27 (3d ed. 2000).

<sup>95</sup> Uniform Code of Military Justice, 10 U.S.C. §§ 801-941 (2000).

close the jurisdictional gap over civilians operating alongside military forces outside the United States.<sup>96</sup> However, MEJA is dependent for its application on the procedural guidelines issued by the Department of Defense in 2005.<sup>97</sup> Under these purposefully drawn complex procedures, it has been impossible for the Department of Justice to prosecute any civilian contractor irrespective of what the crime may have been. Part of the legal evasion scheme has also been to assign the interrogation of detainees, which includes the use of torture, to contractors operating under an award by a federal agency other than the Department of Defense. As a result, MEJA and the Department of Defense regulations mentioned above would not apply to such non- Department of Defense contractors. It should also be noted that MEJA only applies to crimes committed outside the special maritime and territorial jurisdiction of the U.S.,<sup>98</sup> which, presumably, would make it applicable to such locations as Guantanamo Bay, Afghanistan, Iraq and anywhere else that interrogations are conducted in a manner that may be deemed torture. It should be noted that the PATRIOT Act expanded the special maritime and territorial jurisdiction of the U.S. to include, "premises of any diplomatic, consular, *military*, or other United States government missions or entities in foreign states, including the buildings, part of the buildings, and land appurtenant or ancillary thereto, or used for the purposes of these missions or entities, irrespective of ownership."<sup>99</sup> This means that all the locations mentioned above can be deemed part of the territorial jurisdiction of the U.S., and, thus, these locations are no longer outside the territorial jurisdiction of the U.S. for purposes of MEJA's jurisdictional application. Through this jurisdictional gimmick, civilian contractors evade any and all forms of criminal responsibility for their conduct abroad, no matter what crimes they may commit.

#### NOTICE OF TORTURE

Congress, at the urging of many leading Senators, including Senators John McCain and Richard Durbin, adopted a resolution which the House of Representatives endorsed, urging enforcement of U.S. law prohib-

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<sup>96</sup> See Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261 (2000).

<sup>97</sup> See U.S. DEP'T OF DEF., INSTRUCTION 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (Mar. 3, 2005).

<sup>98</sup> 18 U.S.C. § 3261 (2000).

<sup>99</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 804, 115 Stat. 272, 377 (2001) (emphasis added). I am grateful to Lt. Col. Michael Newton for his views to me on MEJA.

iting torture.<sup>100</sup> The seemingly innocuous resolution urged no more than following U.S. law, more particularly, requiring the military to follow their own field manuals and other regulations and procedures, and closes the jurisdictional gap with respect to private contractors and CIA operatives in respect to overseas torture.<sup>101</sup> One would think that no congressional action is needed to remind the Administration, particularly the civilian leadership in the Department of Defense, that they should apply U.S. law and military regulations. Surprisingly, this simple re-statement of existing law was challenged. The President at first threatened to veto a bill containing such language, the Vice President lobbied strongly against it, and the Administration and the Congressional Republican leadership also sought to eliminate or change that language.<sup>102</sup> When in the end the text was adopted, the President, in a brazen and insensitive manner, announced that, in essence, he would continue to do what he is doing if he felt that it was in the best interests of the United States.<sup>103</sup> If there is anything indicating notice that there

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<sup>100</sup> President Bush signed into law H.R. 2863, the Department of Defense Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza Act of 2006, Pub L. No. 109-148, 119 Stat. 2680 (2005). Title 10 of Division A of the Act is the detainee Treatment Act of 2005, commonly referred to as the "McCain Amendment." §§ 1001-1006. That text does not use the term torture. It merely provides that those in the custody or control of the Department of Defense shall be subject only to interrogation techniques included in the U.S. Army Field Manual. § 1002(a). Section 1003(a) specifically states that no individual in the custody of the U.S. government shall be subject to cruel, inhuman or degrading treatment or punishment. Quite clearly, the government lawyers whose opinions the Administration relied upon had disregarded or ignored the plain language and meaning of that U.S. Army Field Manual. In signing the Bill, President Bush issued a statement calling into question the legislation's binding effect. The statement says that the Administration will construe the Detainee Treatment Act "in a manner consistent with the Constitutional authority of the President to supervise the unitary Executive Branch and as Commander in Chief, and consistent with the Constitutional limitations on the judicial power." Press Release, White House, President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>. In that statement, the President not only challenges the binding effect of the legislation, but also challenges the judicial branch in questioning his interpretation. *Id.* In short, the President clearly indicates that he is neither bound by legislation, nor by judicial decision, irrespective of what the Constitution provides. *See id.* The President, obviously on the advice of government lawyers, that Presidential powers in time of war, as defined by the President and not by virtue of a Congressional Declaration of War as provided for by the Constitution, has absolute powers which neither Congress nor the Supreme Court can limit.

<sup>101</sup> Department of Defense Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza Act of 2006, Pub L. No. 109-148, 119 Stat. 2680 (2005).

<sup>102</sup> *See* Eric Schmitt, *House Defies Bush and Backs McCain on Detainee Torture*, N.Y. TIMES, Dec. 15, 2005.

<sup>103</sup> "The executive branch shall construe provisions in the Act . . . in a manner consistent with the President's constitutional authority . . ." *See* Press Release, White House, Presi-

is a practice that violates both U.S. law and international law, and that such a practice should be discontinued, one would think of nothing more public than the adoption of this language as part of the Defense Appropriation Bill, as well as the debates and lobbying efforts surrounding it.

It is hard to believe that if the senior officials of this Administration were ever to be called to the Bar of justice for the policy and practices of torture that they could argue lack of notice or that they did not know that what they were doing was deemed by many to be unlawful.

The patterns of deceit, command influence, concealment, dereliction of duty to investigate and prosecute, intentional disregard of legal obligations, as well as elaborate schemes to evade the application of the law, have been recognized in many cases of criminal responsibility under Title 18 with respect to conspiracy to commit white collar crimes and violent crimes. Why the legal subterfuges discussed above have escaped legal scrutiny, both within the military and civilian systems of justice, has no other explanation except for the fact that the operators of these two systems of justice have looked the other way. Admittedly, it is not easy for military or civilian prosecutors to go against their superiors all the way up the chain of command to the Attorney General, the Secretary of Defense, or, for that matter, the President to carry out legal and ethical obligations. The day may come when additional facts will become public knowledge, and when those who were intimidated or who felt their career interests were too much at stake to fulfill their moral and legal obligations will feel safe in revealing what happened—what then? One word first comes to mind, and it is shame.

#### THE MORAL IMPERATIVE OVERLOOKED

This country, which has long struggled for the establishment of the rule of law and has long sought to be a model for other nations in observing the rule of law, will perhaps one day find itself faced with these abhorrent practices that it could never have imagined having taken place within such a climate of public indifference. Time and again, observers of tragic historic events reveal that it is not so much the evil doing of a few that allows the worst atrocities to occur but that it is the indifference of the many. In time, when all of the facts are disclosed, future generations of Americans, and certainly non-Americans who have historically regarded America as a moral leader beating the pathway for human rights, will wonder why the organized Bar failed to rise up in arms against institutionalized torture, why the organized Bar failed to even investigate for possible ethical violations those law-

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dent's Statement on H.R. 3010, the "Department of Labor, Heath and Human Services, and Education, and Related Agencies Appropriations Act, 2006" (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-6.html>; Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006.

yers who have written memos justifying torture, why the defenders of human and civil rights did not demonstrate against these practices as they did in the 1960s, and why the media failed to show greater indignation and pursue these stories with more determination as they have done so frequently in the past. Lastly, what has happened to America in the last few years for its people to turn a blind eye to institutional torture, worse yet, to tolerate it and be indifferent to it? To their credit, organizations like Human Rights Watch, Human Rights First, and the ACLU have been at the forefront of raising the issues contained in this essay as evidenced by their reports and the legal action brought by Human Rights First and the ACLU.<sup>104</sup>

Martin Niemoller, a Protestant minister who lived through the Nazi period, wrote this personal confession:

First they came for the Communists, but I was not a Communist, so I said nothing. Then they came for the Social Democrats, but I was not a Social Democrat, so I did nothing. Then came the trade unionists, but I was not a trade unionist. And then they came for the Jews, but I was not a Jew, so I did little. Then when they came for me, there was no one left who could stand up for me.<sup>105</sup>

Today, Americans are in the same position as the Reverend Niemoller was at one time, but have not reached the point of admission. For most Americans, the claim is that they came for the alleged terrorists, and I was not a terrorist, so I did nothing. Little did they know that so many among the alleged terrorists were not terrorists and that, potentially, so many innocent persons, both Americans and non-Americans, wound up being arbitrarily arrested and detained, as well as tortured, in violation of everything that we have held secularly sacred in our legal system, namely, our Constitution, our treaties, and our laws.

The history of dictatorships has always started with a slippery slope, where one erosion of the rule of law leads to another and where the general public accepts these erosions because of the motivation of fear that such governments have mastered. For sure, we are not at that point, but if we are to avoid slipping, we must stay away from the slope's edge. Early on in the history of this republic, Benjamin Franklin noted that "those who would give up essential liberty to purchase a little temporary safety, deserve nei-

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<sup>104</sup> See *supra* note 68. A most significant contribution was made by an online magazine, Salon.com, which obtained through the Freedom of Information Act information going back to late 2002, and which continues to consistently disclose reports, pictures, and documents on this issue. *The New York Times*, the *Washington Post* and the *New Yorker* magazine have also been consistent in continuing to cover this unfolding story.

<sup>105</sup> The Quotations Page, Quotations Details: Martin Niemoller, <http://www.quotationspage.com/quote/29611.html>. "This quote is most often attributed to Niemoller, but its exact source and wording is varied." Frank Dunham, *Where Hamdi Meets Moussaoui in the War on Terror*, 53 *DRAKE L. REV.* 839, 839 n.3 (2005).



ther liberty nor safety.”<sup>106</sup> In a similar vein, Thomas Paine, another great American patriot of our founding period, reminded us that “those who expect to reap the blessing of freedom must, like men, undergo the fatigue of supporting it.”<sup>107</sup> By that he meant that they must also undergo the sacrifices that are necessary to uphold our values.

### *A Personal Testimony*

In 1957, I was placed in house arrest in Egypt, in part for having stepped up to government officials against the deportation of one of my former professors and his family, who was Jewish, as well as another Jewish family friend. In addition, I had stood up against the expropriation of a Jewish family's property.<sup>108</sup> What may have been the last straw was my vocal and forceful denunciation of torture when I saw the picture of a member of the Muslim Brotherhood who had been tortured to death. Even though I was a young man, my voice carried because of my prominent family background, but also because I had fought in the 1956 War and received the medal of military valor, a fact that was publicized by the media. At the age of 20, the self-deluding belief of youthful invincibility carried me to do things that good judgment would have prevented. Having raised too much protest with too many officials I was placed in house arrest with the explicit threat that I would likely either be tortured or killed. During house arrest in my apartment in Cairo the shutters were nailed, telephone and radio cut off, and food delivered once a day. I had no contact with the outside world, and lived with the constant fear of being taken to an interrogation center where I would be subject to the types of torture that I had protested. My living space shrank to my bedroom and then to my bed, where I spent most of my time in a fetal position, jumping at the slightest noise. I understood firsthand what psychological torture meant. Some seven months later I was released and tried to resume normal life, but lived with this trauma for a long time, and even today I have to admit to its lingering effects. I am grateful to God for having spared me the experience of physical torture, and have vowed since then to do everything I could to eliminate this inhuman and abhorrent practice. From 1977-1978, I was given this opportunity when I was named co-chair, along with the late Niall MacDermott of the International Commission of Jurists, of the Committee of Experts which prepared the first draft of the Convention Against Torture. That text, which I had the honor of

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<sup>106</sup> Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor, Nov. 11, 1755, in 6 THE PAPERS OF BENJAMIN FRANKLIN 242 (Leonard W. Labaree ed., 1963). This quote is inscribed on the pedestal of the Statue of Liberty.

<sup>107</sup> Attributed to Thomas Paine, Sept. 12, 1777.

<sup>108</sup> See M. Cherif Bassiouni, *Bearing Witness*, in PIONEERS OF GENOCIDE STUDIES 315, 355 (Samuel Totten & Steven Leonard Jacobs eds., 2002).

drafting, was first submitted in 1978 to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which in turn forwarded it to the Commission on Human Rights.<sup>109</sup> The text was then re-introduced by Sweden, whose representative served as a member of the Committee of Experts, as did representatives from The Netherlands and Austria who were the principal governments supporting the adoption of a convention. To my great satisfaction, many of the provisions of the text I prepared in 1977, including the definition of torture, were embodied in the 1984 CAT. Again, God was gracious to me when he allowed the circle to close by allowing me to contribute to the world's anti-torture effort.

During the Committee of Experts' work at the International Institute for Higher Studies in Criminal Sciences (Siracusa, Italy), a member of the Committee of Experts from one of the Permanent Five asked me privately one late evening what would I do, since I urged an absolute prohibition against all forms of infliction of physical harm, if I knew that a bomb was about to go off in a building with the potential of killing 10,000 persons. Would I torture the person who knew where the bomb had been placed? Since he was not from the Common Law system, I brought to his attention a well-known American legal maxim that "hard facts make bad law." The facts in this hypothetical, I told him, were hard, and they should not be relied upon to make a law which addresses a wide variety of factual patterns that cannot be based exclusively on extreme possibilities or highly improbable ones. He pressed me for an answer, and I admitted to him that if I knew for a fact that this person could, with reasonable certainty, help in discovering the whereabouts of the bomb, and, thus, that I could save 10,000 lives, that I would either acquiesce to or do whatever was necessary, up to and including torture, to obtain the information. He smiled as if having scored a victory, at which point I added that I would then write a full report and turn myself in to the authorities for having committed a crime. Hopefully, I added, the judge would be lenient and take into account my motive, even though I had broken the law and committed a crime.<sup>110</sup>

When I took the oath of citizenship in 1967, I fervently believed that the Constitution was the greatest barrier against tyranny and that nothing like what I endured in my beloved native country could happen in the U.S. because of its adherence to the rule of law. That evening, a special ceremony was held for the some 1,200 newly-naturalized citizens and their

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<sup>109</sup> See *supra* note 32.

<sup>110</sup> This represents the theory of just desert, and also reflects the philosophy of natural law. See generally LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* (1987). This view has also been represented in connection with civil disobedience and other forms of breaches of the law whereby the person who violates the law has to assume responsibility. For a discussion of the moral considerations in the "ticking bomb" scenario, see David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005).

families. The Citizenship Council of Metropolitan Chicago had selected me as the "Outstanding New Citizen of the Year," and I was to deliver a speech before this gathering of some 5,000 persons, including the city's civic leaders and many members of the Bench and Bar. My speech was on the rule of law, the difference between democracy and tyranny, and between civilization and barbarism. That is what America meant to me.

The problem with this Administration is that it assumes neither moral nor legal responsibility, and in the end, it is hard-put to show what positive results it may have obtained for so many transgressions.

So far we know that at least 200 people may have died under torture, and that, cumulatively, thousands of persons may have been tortured in Guantanamo, Iraq, Afghanistan, and elsewhere.<sup>111</sup> Yet it seems that none of these cases resemble the extreme hypothetical posed to me in the example above. And yet, I cannot help but think of another highly-regarded academic, Alan Dershowitz, who advocates torture only because some extreme case might justify the means.<sup>112</sup> The history of law and legal institutions has

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<sup>111</sup> The Department of Defense and other government agencies have purposely not kept cumulative records of numbers of persons detained in publicly known facilities, as well as in secret detention facilities. There have been periodic media reports based on publicly available information of numbers of detainees held in some facilities such as Abu Ghraib and Guantanamo. Sometimes the numbers have been consistent over a period of times, such as Guantanamo. At others, such as Abu Ghraib, the numbers related to a certain period of time. No one has ever put together the bits and pieces of information released by the government, however, by collecting numbers from various media reports, it appears that in Iraq the number of persons detained for a period of over 24 hours may well have exceeded 100,000. Since physical mistreatment has been common, if one accepts the definition of torture under Article 17 of the Geneva Conventions and Article 1 of the CAT, then it is reasonable to conservatively extrapolate a projected number of no fewer than 10,000 persons tortured in Iraq.

<sup>112</sup> See ALAN DERSHOWITZ, *WHY TERRORISM WORKS* (2002); Alan Dershowitz, *Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 8, 2001, at M4; Alan Dershowitz, *Want to Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19. This represents a primal retributive view, whereby justification for torture is found in retribution for the acts of the perpetrator. This, of course, presupposes having certainty that the person tortured is the perpetrator of a particularly heinous crime which is likely to cause harm to a large number of persons. This view also combines the utilitarian approach which is devoid of social moral significance, that is, the social moral significance of torture in the name of a society purporting to uphold higher values. Taken to its logical extent, this view would re-introduce torture as a form of punishment for abhorrent crimes as was practiced in the middle ages. See JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF* (1977). Dershowitz does not, however, address the implications of such a practice on the character of the society engaging in it, nor in the consequences that it would have on perpetrators of terrorism who could then find legitimacy in the acts of torture as a way of further perpetrating such crimes. See M. Cherif Bassiouni, *Terrorism: The Persistent Dilemma of Legitimacy*, 36 CASE W. RES. J. INT'L L. 299, 303 (2004). A different view is taken by Judge Richard Posner, who considers that torture under some conditions may benefit from the defense of necessity, even though necessity in criminal law has never been a defense for the acts of another. Moreover, he departs from an objective definition of torture to make it a subjective one. He states that torture begins at "the point along a continuum at which the observers' queasiness turns to revulsion."

for all too long proven to us the error of accepting the Machiavellian principle that the ends justify the means.

I will conclude this presentation with a related personal story that happened in Egypt in 1956 during the so-called "Sinai War." I was a second lieutenant assigned to a camp in downtown Cairo, and on that night I was the duty officer with a small detail of ten men within the camp and a few guards. Sometime around 23:00, I heard a commotion on the street outside the camp and went out to check, asking the two guards on duty what was happening. They told me that an Israeli pilot had parachuted behind the camp, his white chute having been observed by persons who then cried out to others, and a crowd was gathering to capture him. Knowing that this meant that he would be hacked to death, I instinctively rushed back inside, gathered the ten men under my command, ordered them to carry weapons, and ran out to try and find the pilot before the crowd did. Fortunately, it turned out to be a rumor. The parachute was a white bed sheet that had been left on a rooftop to dry, and had flown off appearing at a distance to be a parachute. As I ended my duty the next morning, I found myself in trouble for having left my post and had to plead with my commanding officer that if his son were in that same situation in Tel Aviv, he would have wanted a unit of the Israeli army to save him. It was not only a matter of humanity, but for the military it was also a matter of honor. Many years later, after the Camp David Accords of 1978, in which I had some involvement, I recounted the story to the late general Abrasha Tamir, then Director General of Prime Minister Menachen Begin's office, who became a friend and with whom I subsequently worked with on Middle East affairs for several years. General Tamir's reply was that one of the reasons why it had been so easy for Israel to make peace with Egypt was because none of its POWs had been tortured or killed by the Egyptian military. Of all the utilitarian arguments in favor of humanitarian treatment of POWs, this one struck me the most.

I shudder at the thought that American military personnel may fall in the hands of someone like Abu Musab al-Zarqawi and his violent jihadists in Iraq, or in the hands of some violent Taliban group in Afghanistan, or, for that matter, in the hands of any Al Qaeda-affiliated group anywhere in the world, who would torture them. Will their answer to pleas not to torture our detainees be that they are doing nothing more than what the U.S. has been doing? What to say then? That they are barbarians and that we are not?

Torture is a crime under the Geneva Conventions, the CAT, and under U.S. law.<sup>113</sup> It is an outrage on human decency. Its institutionalized

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Richard A. Posner, *Torture, Terrorism, and Interrogation*, in *TORTURE: A COLLECTION* 291 (Sanford Levinson ed., 2004).

<sup>113</sup> Geneva I, *supra* note 18; Geneva II, *supra* note 18; Geneva III, *supra* note 18; Geneva IV, *supra* note 18; CAT, *supra* note 6; 18 U.S.C. § 2340 (2000).

practice undermines the integrity of the American legal process and our system of law, and its depravity undermines our moral leadership in the world. It lends credibility, if not legitimacy, to the violent acts of the anti-American jihadists. Moreover, it seldom produces reliable information. Under torture, most people would say anything the interrogators wanted. Lastly, each person tortured, as well as his/her family, are likely to become enemies of the U.S. and seek revenge for their treatment, thus generating more potential enemies likely to threaten the security of this country and its people.

The fact that so much of what has happened was the result of a few jurists using their talents to serve the political interests of those whose legal and moral sensitivities were not strong enough to resist the temptation of resorting to torture will surely discredit our legal profession. As stated above, when the full scope of what has happened is revealed, how will we as a nation explain our indifference to such an outrage? Shame will be the least of the consequences we will reap from the commission of what will surely prove to be senseless and useless crimes.

Almost on a daily basis, stories about torture are reported which reinforce the element of knowledge that the Administration has, and its obligation to investigate, and where appropriate, to prosecute. Rather than doing that, it contents itself with public relations responses to the effect that these are old stories. Discovery of new facts about what may be an old story has nothing to do with the criminality of what occurred and the obligation to pursue it. To avoid legal obligations by equaling them with media relations responses is not only disingenuous, but it confirms the dereliction of duty.

Torture is not only morally and legally wrong, it is counter-productive. To denounce it is not unpatriotic—it is patriotic, because it is the right thing to do.

As General Douglas MacArthur said in his farewell speech to the corps of cadets at West Point, May 12, 1962:

The code which those words perpetuate embraces the highest moral laws and will stand the test of any ethics or philosophies ever promulgated for the uplift of mankind. Its requirements are for the things that are right, and its restraints are from the things that are wrong.

. . . .

Others will debate the controversial issues, national and international, which divide men's minds; but serene, calm, aloof, you stand as the Nation's war-guardian, as its lifeguard from the raging tides of international conflict, as its gladiator in the arena of battle.

For a century and a half you have defended, guarded and protected its hallowed traditions of liberty and freedom, of right and justice.

. . . These great national problems are not for your professional participation or military solution. Your guidepost stands out like a ten-fold beacon in the night: Duty, Honor, Country.

. . . The Long Gray Line has never failed us. Were you to do so, a million ghosts in olive drab, in brown khaki, in blue and gray, would rise from their white crosses thundering those magic words: Duty, Honor, Country.<sup>114</sup>

If, as stated by the President in his State of the Union message quoted at the top of this article, this Administration is to “determine the character of our country” with the policy and practices described above,<sup>115</sup> then this nation is likely to find itself on the same slippery slope that brought about a decline of democracy and erosion of the rule of law that other countries have experienced before plunging into dictatorship. Before re-determining the character of this country, which hardly needs it, perhaps this Administration should be reminded of the wise words of George Santayana, “those who do not remember the past are condemned to repeat it.”<sup>116</sup>

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<sup>114</sup> Douglas MacArthur, Gen., Thayer Award Acceptance Address (May 12, 1962), *available at* <http://www.americanrhetoric.com/speeches/douglasmacarthurthayeraward.html>.

<sup>115</sup> Bush, State of the Union Address, *supra* note 1.

<sup>116</sup> GEORGE SANTAYANA, *THE LIFE OF REASON* (1905).

