Barry Law Review

Volume 18
Issue 1 *Fall 2012*

Article 4

2012

The United States' Enhanced Impunity for Its International Obligations: The Continued Unlawful Treatment of Captives and Detainees Following the Attack of September 11, 2001

David Brennan

THE UNITED STATES' ENHANCED IMPUNITY FOR ITS INTERNATIONAL OBLIGATIONS: THE CONTINUED UNLAWFUL TREATMENT OF CAPTIVES AND DETAINEES FOLLOWING THE ATTACK OF SEPTEMBER 11, 2001

David Brennan *

This paper addresses the issue of United States government officials' impunity during the Bush Administration in actions taken after the September 11, 2001 (9/11) attack and during the "war on terrorism." The footnoted "Principle 1. General Obligations of States to Take Effective Action to Combat Impunity" is part of the framework for this inquiry.[1] The focus is on the actors, practices and the possible consequences of acting with impunity respecting the United States international obligations for the detention and treatment of captives. This takes the considerations of that activity beyond the armed conflict situations in Afghanistan and Iraq. The two major practices to be considered are: (1) torture, which includes other cruel, inhumane and degrading treatment (torture); and (2) extraordinary rendition that involves a forced transfer of a captive or detainee from one detention facility to another in a different country where the primary intent is administering extreme, harsh interrogations and mistreatment in locations where the host-country officials will not interfere with the practices. This secret and opportunistic use of remote facilities in foreign states bypasses the essential fact that they violate recognized norms of the international laws of war and humanitarian and human rights law, to which the United States ascribes.

This paper considers the deliberate steps taken by the current administration since January 2009 to continue this pattern of impunity by providing forms of near-amnesty for those who ordered, planned and implemented the practices of torture or rendition in the post-9/11 era.[2] Further, none of the detainees who were subjected to prolonged detention, torture or rendition were afforded the required redress or compensation for the violations of international law, despite the United

* David Brennan is a Professor of Law at the University of San Diego School of Law, http://www.sandiego.edu/law/academics/faculty/bio.php?id=854.

1. U.N. Commission on Human Rights, Report on the Sixty-First Session, U.N. ESCOR, 61st Sess., Doc. E/CN.4/2005/102/Add.1 (2005), *available at* http://daccess-dds ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement.

> Arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about the violations; and to take other necessary steps to prevent a recurrence of violations.

Id.

2. *See* LEVIN, *infra* note 133.

States' obligations to provide it.[3] The U.S. courts rejected the claims or grounds for redress in some cases while the Justice Department has vigorously, albeit successfully, opposed remedies for the detainees who were victims of rendition or torture.[4] I argue that this pattern of conduct, if continued, undermines the United States' attempt to regain its position as the *de facto* leader of the free world in advocating for the rule of law and adherence by other states to their international obligations.

I. INTRODUCTION

The unprecedented September 11, 2001 attack resulted in dramatic and profound changes in the government's approach to fighting in a new conflict that was declared a "war on terrorism," which profoundly impacted the day-to-day activities of everyone from the President of the United States to all of its citizens.[5] The attack's scope of destruction of humans and property inflicted a catastrophic effect not only on the citizens of the United States, but also on the entire global community.[6] It was unique because a non-state group, the followers of Al Qaeda, rather than a government or other legitimately recognized international entity, perpetrated the attack, which required entirely different responses and strategies to address the perpetrators and followers to prevent another attack.[7] In contrast to the December 7, 1941 surprise attack on Pearl Harbor by Japanese military forces,[8] neither the Taliban nor Al Qaeda were acting with recognized uniform military forces in carrying out their attacks; 9/11 did not provide the United States with a defined enemy to engage against on a field of battle with traditional military forces.[9]

The 9/11 event was not the first protracted engagement by the United States military forces with insurgencies, the most recent being the Viet Cong during the

3. *See* Laura N. Pennelle, *The Guantánamo Gap: Can Foreign Nationals Obtain Redress for Prolonged Arbitrary Detention and Torture Suffered Outside the United States?*, 36 CAL. W. INT'L L.J. 303, 309 (2006) (concluding that "no clear avenue currently exists by which innocent foreign national detainees may obtain adequate redress for their alleged human rights violations").

4. *See* H. R. REP. NO. 110-844 (September 18, 2008) [hereinafter HOUSE REPORT OF 2008].

5. THE 9/11 COMM. REPORT—FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 39, 330-34 (2004) [hereinafter THE 9/11 COMMISSION REPORT], *available at* http://govinfo.library.unt.edu/911/report/911Report.pdf.

6. *Id.*

7. *See* EXEC. OFFICE OF THE PRESIDENT, NATIONAL STRATEGY FOR COUNTERTERRORISM (2011), *available at* http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf. President Obama confirmed that ten years later "[d]espite our successes, we continue to face a significant terrorist threat from [Al Qaeda], its affiliates and its adherents . . . [who] have shown themselves to be agile and adaptive . . . [requiring] that we develop and pursue a strategy" . . . to meet that capacity. *Id.* at *foreword.*

8. *Remembering Pearl Harbor*, U.S. DEPT. OF DEF., http://www.defense.gov/home/features/pearl_harbor/ (last visited Mar. 1, 2013).

9. *See* U.S. ARMY & U.S. MARINE CORPS, The U.S. Army/Marine Corps Counterinsurgency Field Manual 6-8 (2007) [hereinafter COUNTERINSURGENCY FIELD MANUAL] ("Today's operational environment . . . includes a new kind of insurgency, one that seeks to impose revolutionary change worldwide. Al Qaeda is a well known example of such an insurgency.").

Vietnam War which ended in 1975.[10] Following the brief Spanish–American war of 1898, the United States military battled an insurgency in the Philippines, where insurgency leaders opposed the United States.[11] The United States military remained as an occupier of the country, resulting in several years of conflict between the two forces.[12] Unfortunately, the conflict was marked by significant atrocities by United States military forces that were perpetrated on the country's civilian population during the military's efforts to identify and eliminate the insurgency, and included a practice called "waterboarding."[13] This practice, later outlawed by President Theodore Roosevelt, would become a form of torture administered to detainees at Guantánamo a century later.[14] The frequency of the application of waterboarding in the Philippines resulted in numerous deaths, and accompanied other brutality inflicted on the civilian populations during the conflicts.[15] The brutalities resulted in lengthy Congressional hearings to determine the nature of the practices and the responsibility for them.[16] Decades later, waterboarding was sporadically applied to suspected Viet Cong insurgents by United States military forces, but the practice violated United States military law, so perpetrators who were reported were subject to prosecution under the Uniform Code of Military Justice (UCMJ).[17]

10. Maddy Sauer, Vic Walter & Rich Esposito, *History of an Interrogation Technique: Waterboarding*, ABC NEWS, (Nov. 29, 2005) [hereinafter Sauer], http://abcnews.go.com/WNT/Investigation/story?id=1356870; *see* Richard Schultz, *The Limits of Terrorism in Insurgency Warfare: The Case of the Viet Cong*, 11 POLITY 79–82 (No. 1, Autumn, 1978); *see* Robert F. Turner, *Myths of the Vietnam War—The Pentagon Papers Reconsidered*, 7 SOUTHEAST ASIAN PERSPECTIVES 48–52 (Sept. 1972).

11. Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in the U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468, 495–501 (2007).

12. *Id.*

13. *Id.*

14. *See* Sauer, *supra* note 10; Court-Martial of Major Edwin F. Glenn, Samar, P.I. (reprinted in LEON FRIEDMAN, THE LAW OF WAR: A DOCUMENTARY HISTORY 814 (1972)). This practice was seemingly administered to hundreds if not thousands of suspected insurgents with resulting severe injuries and many deaths. *See generally* Frank Schumacher, *"Marked Severities": The Debate over Torture during America's Conquest of the Philippines, 1899–1902*, 51 AMERIKASTUDIEN/AM. STUD. 475 (2006) (Ger.); *see also* Jeffrey B. Sacco, *Waterboarding: An American Dilemma* 3 (U. Neb. Unpublished article, 2010) *available at* http://144.216.1.137/uploadedFiles/academics/gradstudies/ssrp/Sacco.pdf ("Water boarding was outlawed by President Theodore Roosevelt after its media disclosure following the Spanish-American War in 1901. . . . "); Leonard Doyle, *CIA Waterboarding 'Broke Suspect after 35 Seconds'*, INDEP. (Dec. 12, 2007) *available at* http://www.independent.co.uk/news/world/americas/cia-waterboarding-broke-suspect-after-35-seconds-764595.html (reporting by a former CIA agent of the breaking of Abu Zubaida by waterboarding at Guantánamo); *see* Memorandum from Lieutenant Colonel Diane E. Beaver for Commander, Joint Task Force 170, Legal Brief on Proposed Counter-Resistance Strategies (Oct. 11, 2002) [hereinafter Lt. Col. Beaver Memo of Oct. 11, 2002], *available at* http://www.defense.gov/news/jun2004/d20040622doc3.pdf (confirming the legal authorization for the use of "wet towels for inducing a sensation of suffocating in interrogations" as permissible at Guantánamo).

15. *See* Sauer, *supra* note 10.

16. *See* Wallach, *supra* note 12.

17. *See generally* Uniform Code of Military Justice (UCMJ) art. 18, 10 U.S.C. § 886 (2008).

II. RESPONSES TO THE TERRORIST ATTACKS OF 9/11

On September 12, 2001, President Bush sought Congressional approval for the use of military force against the attackers.[18] He presented a draft of an authorization for the use of military force (AUMF) that was quickly approved by Congress.[19] Two weeks later, military actions commenced in Afghanistan—Operation Enduring Freedom—based on that country being the source of some of the Al Qaeda operatives who planned and executed the 9/11 attack.[20] President Bush then issued a new military order—The Detention, Treatment and Trial of Certain Non-Citizens in The War Against Terrorism (DTA)—which is germane here because of its recognized disregard for accepted norms of humanitarian law that formed part of existing United States military policy and law governing the armed forces' conduct involving captives.[21] These and other steps by the administration's top officials were precursors to more actions that sidestepped the United States international humanitarian law obligations embodied in recognized conventions and agreements to which it was a party, and thereby manifested a significant degree of impunity towards those obligations.

III. INTERNATIONAL LAW FRAMEWORKS AT THE TIME OF THE 9/11 ATTACK

A. Required Treatment for Detainees and Captives

The United States' first published set of rules for the conduct of war was the Civil War era Lieber Code, which embodied basic principles for the treatment of captives and detainees.[22] The Lieber Code stated that: "Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge . . . nor of torture to exhort confessions."[23] Four decades after The Lieber Code's introduction in the United States, the international community meetings at

18. Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001) [hereinafter AUMF], *available at* http://www.fas.org/sgp/crs/natsec/RS22357.pdf.

19. *Id.* (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons [linked to the September 11, 2001 attacks on the United States] . . . ."). It would be later argued that the authorization provided him with absolute blanket authority "to deter and prevent acts of terrorism against United States," a somewhat broader interpretation of the actual language of the AUMF. *See* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS22357, AUTHORIZATION FOR THE USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACK (P.L.107-40): LEGISLATIVE HISTORY 4–5 (2007), *available at* http://www.fas.org/sgp/crs/natsec/RS22357.pdf.

20. President George W. Bush, Address to the Nation to Mark the Beginning of Allied Attacks on Terrorist Targets in Afghanistan (Oct. 7, 2001), *available at* http://www.pbs.org/newshour/terrorism/combating/bush_10-7.html.

21. Military Order of Nov. 13, 2001, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918, *reprinted in* 10 U.S.C. § 801 (Supp. IV, 2001) (subjecting the Al Qaeda members and other foreign nationals to "military tribunals," while simultaneously depriving the captives from any relief or remedy available to them in the courts the of United States). This unprecedented order's intent was to deprive the Article III Courts of their constitutional jurisdiction over the cases involving *any* detainees. Subsequent U.S. Supreme Court decisions would nullify this unauthorized exercise of executive power despite the claims of war or crisis to justify the measures. *See* Rasul v. Bush, 542 U.S. 466, 476 (2004).

22. Military Order of Nov. 13, 2001, *supra* note 21

23. THE LIEBER CODE: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, GENERAL ORDERS, NO. 100, art. 16 (1863).

The Hague, in which the United States military representatives participated, drafted the Hague Convention (No. IV) 1907 (Hague IV) that modernized the core principle of the laws of war on the subject of captives and stated "that [p]risoners of war[,] . . . combatants and noncombatants[,] . . . must be humanely treated."[24] Many of Hague IV's principles were not adhered to by some of the major powers during the four years of World War I—a fact that is not surprising considering the historical war paradigms' disregard for the rule of law during crises.[25]

The next important instrument relative to the treatment of detainees was the 1929 Geneva Convention's provisions addressing the treatment of prisoners of war by the obligation: (1) to have respect for their persons; and (2) to understand that prisoners were not required to give their captors information beyond "his true names and rank, or his regimental number[,]" after capture.[26] Additionally, prisoners could not be "[pressured] to obtain information regarding the situation in their armed forces[;]"[27] all lawful obligations that were not provided to the detainees at Guantánamo or other United States controlled facilities during the war on terror.

IV. UNITED STATES OBLIGATIONS RE: DETAINEES POST 9/11

In 2001, the United States was a signatory and bound to other major post-World War II international instruments that obligated State parties to refrain from certain acts, and to provide captives, whether prisoners of war or civilians, with certain protections. These were delineated in major instruments that included: The Geneva Conventions of August 12, 1949 (I–IV) (Geneva Conventions of 1949),[28] the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment 1984 (CAT),[29] and the International Convention on Civil and Political Rights of 1967 (ICCPR).[30] Each of these three instruments addressed the treatment of captives and detainees who would be held by the United States

24. Hague Convention of 1907 No. IV, Respecting the Laws and Customs of War on Land, and Annex, arts. 3–4, Oct. 18, 1907, 36 Stat. 2277, T.S. 539.

25. OMER BARTOV, ATINA GROSSMANN & MARY NOLAN, CRIMES OF WAR: GUILT AND DENIAL IN THE TWENTIETH CENTURY (2002), *available at* http://tiwanakuarcheo.net/KwMsGr2011/2%20-%20Neier%20Crimes%20of%20War%20War%20and%20War%20Crimes%20A%20Brief%20History%201-7.pdf (quoting John Keegan); *see generally* L.C. Green, *Cicero and Clausewitz or Quincy Wright: The Interplay of Law and War*, 9 J. LEGAL STUD. 59 (1998), *available at* http://www.usafa.edu/df/dfl/documents/JLS%20Volume%209/greenpdf (on the Cicero maxim "*silent enim leges inter armes*" (the law is silent during war)).

26. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, 5, Jan. 27, 1929 [hereinafter Geneva Conventions 1929], *available at* http://www.icrc.org/ihl.nsf/FULL/305?OpenDocument.

27. *Id.* at art. 60–62. Standing alone these three articles describe a required process for prisoners' notification of any charges against them and adequate representation, none of which was available during the early stages of Guantánamo or at other military detention facilities. *Id.*

28. The 1949 Geneva Conventions I–IV, 75 U.N.T.S. 35–417 (Eng. Fr.) [hereinafter Geneva Conventions of 1949]; 999 U.N. T.S. 171; 6 I.L.M. 368 (1967).

29. Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (1984) [hereinafter CAT]; G.A. Res. 46 (XXXIX) (1984) (Annex); 23 I.L.M. 1027 (1985) (as modified, 24 I.L.M. 535) (1985);

30. International Convention on Civil and Political Rights in 1967, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR].

forces.[31] The Geneva Conventions of 1949 III & IV (Geneva III and Geneva IV) principles were directly incorporated into the US military's Law of Land Warfare in 1956 in the United States' Department of the Army Field Manual, (FM 27-10).[32] Geneva IV includes special provisions for protecting civilians, including those who did not qualify for treatment under the "prisoner of war" status.[33] FM 27-10's mandate from Geneva III and IV was: "no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever."[34] The United States Army's Intelligence Interrogation Field Manual (FM 34-52) was introduced in 1992 for use by military personnel during interrogations.[35] It was directed to the treatment of both prisoners of war and captured insurgents and invoked the same prohibitions under the Geneva Conventions of 1949 against unlawful treatment by specifically defining physical torture as "infliction of intense pain to body or mind to extract a confession or information, or for sadistic pleasure."[36]

This paper addresses the fact that President Bush and other senior officials would refuse to accept these international law prohibitions delineated above, but instead would employ the designation of "unlawful combatant" or "unlawful enemy combatant" for Al Qaeda and Taliban detainees to justify modifying the United States' obligations under Geneva III and IV and the Laws of War—a decision and expression of considerable impunity towards lawful and binding obligations.[37] If the treatment of detainees reached the level of torture under the CAT, any claimed "exception" would likewise be ineffective because the prohibitions in the CAT and the Geneva Conventions of 1949 are recognized under principles of international law as norms of a *jus cogens* nature, meaning that *no* state party may derogate from them under general principles of international law.[38]

In *The Shape of Modern Torture,* Parry notes the folly of practicing this kind of *exceptionalism* to preemptive norms, because "[t]he danger is that the state of

31. Geneva Conventions of 1949, *supra* note 28; CAT, *supra* note 29; ICCPR, *supra* note 30.

32. *See generally* THE LAW OF LAND WARFARE, FM 27-10, July 1956 [hereinafter FM 27-10].

33. Geneva Conventions of 1949 IV, *supra* note 28, at art. 246–48.

34. *Id.* at art. 93.

35. U.S. ARMY INTELLIGENCE INTERROGATION, FM 34-52, 28, Sept. 1992 [hereinafter FM 34-52].

36. *Id.* at 1.7–1.9. The army interrogation methods did not reduce the applications of the Geneva Conventions to "other categories" of detainees. *Id.*

37. Memorandum from the President on the Humane Treatment of Taliban and Al Qaeda Detainees, (Feb. 7, 2002) [hereinafter Bush Memo of Feb. 7, 2002], *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf. This decision was predicated on memorandums from his White House Counsel, Alberto Gonzales. *See* Memorandum for the President by Alberto Gonzales, Re: Decision re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002) [hereinafter Gonzales Memo to President of Jan. 25, 2002], *available* at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf.

38. CAT, *supra* note 29, art. 2.1, 2.2; Geneva Conventions of 1949 IV, *supra* note 28, at art. 32, 147; ANTONIO CASSESE, INTERNATIONAL LAW 445–46 (2d ed. 2005); INGRID DETTER, THE LAW OF WAR 71 (2d ed. 2000); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 329, 331, 537–38 (7th ed. 2003). Brownlee recognizes that the "State violates international law, if, as a matter of state policy it practices, encourages or condones . . . torture or other cruel, inhuman or degrading treatment or punishment." *Id.*

exception will become the norm."[39] Likewise, he also recognizes the difficulty in "finding an absolute purely *constitutional* right to not be tortured."[40] The Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution do not expressly prohibit *torture*.[41] The Eighth Amendment prevents only the "infliction of cruel and unusual punishment," but without a clear definition provided with the prohibition.[42]

In contemporary international law, the ICCPR's Article 7 incorporates the CAT's prohibition of torture for acts constituting "torture, cruel, inhuman or degrading treatment or punishment."[43] Article 4 of the ICCPR permits State parties, "[i]n times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed . . . [to] take measures derogating from their obligations under the [convention]"; however, the permission is limited "to the extent strictly required by the exigencies of the situation[.]"[44] Based on the examination of the international instruments in this paper coupled with the measures that were inflicted on many detainees, the practices of the United States grossly exceeded the "strictly required" language of the ICCPR's Article 4.[45] The described unlawful treatment amounted to torture on hundreds of detainees, including the practice of frequent and repetitive waterboarding.[46] The Director of the United States Defense Intelligence Agency, Lieutenant General Michael D. Maples, testified before the United States Senate Armed Services Committee in 2008 that "in his view, waterboarding violated the laws of war."[47] After World War II, Japanese officers and enlisted men were tried and severely punished before the International Military Tribunal Far East (IMTFE) for crimes against humanity related to ordering or conducting waterboarding on captives.[48] Illegal and clearly a

39. John T Parry, *The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees*, MELB. J. INT'L. 516, 523 (2005) (pointing to "Weimar Republic's proclamation of a state of emergency, more than 250 times over a period of 13 years").

40. *Id.* at 527–28. Parry focuses on the fact that the Fourth, Fifth, Eighth and Fourteenth amendments to the U.S. Constitution do not provide a bright line rule on the question of torture. *Id.* However, the doctrine from *Washington v. Gluksburg* relating to treatment that "shocks the conscience" allows for too much leeway and the likelihood of coercive interrogation. *Id.* at 527–28; *see* Washington v. Gluksburg, 521 US 83, 849 (1998).

41. U.S. CONST. amends. IV, V, VIII & XIV.

42. *Id.*

43. ICCPR, *supra* note 30, art. 7. Article 9 prohibits arbitrary arrest or detention and includes the obligation to promptly inform anyone arrested of the charges against him. *Id.* at art. 9.

44. *Id.* at art. 4. This permissive language is tempered with the constraint on State parties that "such measures are not inconsistent with their other obligations under international law. . . ." *Id.* Furthermore, article 4, section 2 prohibits any derogation from articles 6, 7 and 8. *Id.*

45. *Id.*

46. Office of the U.N. High Comm. on Human Rights, The Istanbul Protocol: Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2004) (a prominent set of international guidelines for the documentation of torture and its consequences); Office of the U.N. High Comm. on Human Rights, E.01XIV, Training Manual on Human Rights Monitoring, E.01XIV (1999) ("[N]ear asphyxiation by suffocation is an increasingly common method of torture."). The protocol goes on to describe its wide use in Latin America under the name "submarino." *Id.*

47. Testimony of LTG Michael Maples, Director of the Defense Intelligence Agency, before the U.S. Senate armed services committee, "annual threat assessment," Feb. 27, 2008, at 31, *available at* http://www.dni.gov/testimonies/2-0080227_transcript.pdf.

48. Wallach, *supra* note 12, at 472, 478–94.

war crime long before the 9/11attack, it remained so regardless of the aggressive efforts to repudiate the prohibition against it.[49]

The obligations of State parties to prisoners of war under the Geneva Convention of 1949 require, during times of war or conflict, that State parties refrain from all forms of violence or mistreatment of prisoners of war and civilian captives.[50] Each of the four Geneva Conventions included a "Common Article 3" (Common Article 3) that binds parties to provide certain minimum protections for captives, and specifically, "prohibits at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life . . . cruel treatment and torture; . . . (c) outrages upon personal dignity, in particular, humiliating and degrading treatment."[51] Common Article 3's similar language applicable to those who are neither prisoners of war nor civilians states: "[T]he following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons," creating another obligation of State parties that would be violated by engaging in overt acts "of violence to life and person . . . cruel treatment and torture."[52]

The CAT's Article 1 defines "torture" in part as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . intimidating or coercing him or a third person, or for any reason based on discrimination of any kind. . . ."[53] The proscriptive language in Geneva III and IV and the CAT's section 2 (2) voids the ability of a state to resort to exceptionalism to justify forms of torture, irrespective of the fact that it is based on the nature of the conflict, or the source of the authority or orders for the administration of torture to any captives.[54] The United States became a party to the CAT in 1994, after Congress enacted a domestic statute that criminalized violations of the CAT and made it applicable to "all persons, military, civilian or others who violate its prohibitions."[55] This domestic statute has yet to be invoked by the Department of

49. CAT, *supra* note 29, at art. 1.

50. Geneva Conventions of 1949 III, *supra* note 28. Article 3, section 1 requires that "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely. . . ." This includes the prohibitions in Article 3 under subsection (a) "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment. . . ." *Id.* Likewise Geneva Convention IV's article 3, sections (a) and (c) contain identical provisions. *Id.* Conv. IV, art. 3.

51. *Id.* at Common art. 3.

52. *Id.* at Common art. 3, § 1 and 1(a).

53. CAT, *supra* note 29, at art. 1.

54. *Id.* at art. 2, § 2. The article applies the "no [exceptionalism]" rule regardless of "whether a state of war or a threat of war, internal political [instability] or any other public emergency, may be invoked as a justification of torture." *Id.* Further, article 2, section 3 avoids the use of superior authority or orders as a justification for torture. *Id.* at art. 2, § 3.

55. 18 U.S.C. §§ 2340–40B. Under section 2340A(a) any person

> outside the United States who commits or attempts to commit torture [is subject to a fine or imprisonment] . . . (b) [establishes the] jurisdiction over the activity . . . if (1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or the alleged offender.

Justice in charges or for the prosecution of any individuals responsible for violating its provisions for the treatment of detainees. There have been few military actions taken under the UCMJ against military personnel for violations of that military law.[56]

V. PROHIBITIONS ON THE PRACTICE OF EXTRAORDINARY RENDITION

The recognized process of extraditing offenders to and from foreign countries by the United States is governed generally by 18 U.S.C. section 3181.[57] The processes required for conducting extraditions are found in section 3184; none of which were utilized by officials for the transfer of any detainees during the war on terrorism.[58] According to a Congressional Research Service Report (CRS Report 2010), extradition "is triggered by a request submitted through diplomatic channels."[59] The request "proceeds to the Department of Justice and State and may be presented to a federal magistrate to order a hearing to determine whether the request is in compliance with an applicable treaty. . . ."[60] Although this process has a required transparency and judicial oversight to protect the individual subject to it, there is no place in the process for "secret extraordinary rendition." The CRS Report 2010 states that the provisions of the CAT are applicable and require that its provisions must also be taken into consideration because of its prohibition that "no State Party 'shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'"[61] After the ratification of the CAT in 1994, Congress enacted specific legislation "which required all relevant federal agencies to adopt appropriate regulations to implement this policy" in the Foreign Affairs and Reform and Restructuring Act (FARRA).[62] The United States military and Central Intelligence Agency (CIA) would have been obvious "agencies" under this enactment obligated to comply with it.[63]

CAT's Article 3 language absolutely prohibits transferring captives or prisoners to other locations where they may be subjected to harsher interrogations

---

Id. The domestic statute did not create a specific 'private right of action' for individuals who were victims of the prohibited practices. *See* 18 U.S.C. § 2340B.

56. *See* Office of the Secretary of Defense, Detainee Files/SASC Church Hearing—Review of the Dep't of Defense Detention Operations and Detainee Interrogation Techniques, VADM A.T. Church, III, U.S. Navy, *available at* http://www.aclu.org/images/torture/asset_upload_file625_26068.pdf [hereinafter Church Report].

57. Extradition: Scope and Limitation of Chapter, 18 U.S.C. § 3181 (2006).

58. Fugitives from Foreign Country to United States, 18 U.S.C. § 3184 (2006).

59. MICHAEL JOHN GARCIA AND CHARLES DOYLE, EXTRADITION TO AND FROM THE UNITED STATES: OVERVIEW OF THE LAW AND RECENT TREATIES, CONG. RESEARCH SERVICE, Summary 19–25 (Mar. 17, 2010) [hereinafter CRS REPORT OF 2010], *available at* http://www.fas.org/sgp/crs/misc/98-958.pdf.

60. *Id.* at 24.

61. CAT, *supra* note 29, at art. 3; CRS REPORT OF 2010, *supra* note 59, at 24.

62. CRS REPORT OF 2010, *supra* note 59, at 24; *see* Foreign Affairs and Reform and Restructuring Act of 1998 P.L. 105–277 § 2422; 112 Stat. 2681–822 (1998) [hereinafter Foreign Affairs & Reform Act].

63. Foreign Affairs & Reform Act, *supra* note 62.

than would occur in a domestic setting.[64] This prohibition is echoed in the Geneva Conventions of 1949 and the ICCPR so we need to determine whether or not United States officials used the practice of extraordinary rendition where it "was likely to result in severe violence to the detainee incidental to his interrogation at the other location."[65] It is already apparent that the government avoided using 18 U.S.C. section 3181 processes for any detainee.[66]

The Bush Administration did not originate the practice of rendition.[67] It was already being practiced by the United States during the Clinton administration, and was authorized for "the rendition of seventy or more terrorist[s] to other jurisdictions around the world" according to CIA Director George Tenet's testimony before Congress in October 2002.[68] The CRS Report of 2010 acknowledges that "Irregular Rendition/Abduction," a practice supposedly "not frequently employed by the United States, is at the lowest level" for obtaining fugitives or offenders.[69] The Report's comment is interesting given their documentation of the "controversy over the use of renditions by the United States" during the recent Bush administration, but the CRS researchers found "little publicly available information from government sources" regarding the actual rendition practices."[70] The United States is a party to extradition treaties with a majority of foreign states.[71] The United States has no comparable extradition treaty, however, with either Syria or Libya, both of which may have provided interrogation sites for rendition detainees.[72]

VI. THE LAWS OF WAR APPLICABLE TO TORTURE & RENDITION

Ingrid Detter's seminal work on the laws of war describes laws as "the body of rules which govern relationships in war."[73] These rules include the applications of humanitarian law—which regulate the conduct of war together with human rights

64. CAT, *supra* note 29, at art. 3. This article's language using the terms "expel, return, *refouler*, or extradite" precludes any legality for the United States or other States practices of *rendition* of detainees that were conducted during the Bush era presidency. *Id.* (emphasis added).

65. Geneva Conventions of 1949, Conv. III, *supra* note 28; CAT, *supra* note 29, at art. 3; ICCPR, *supra* note 30.

66. 28 U.S.C. § 3181.

67. John C. Duncan, Jr., *A Hypothetical Postulate for the Polemic of Extraordinary Rendition Vis-à-Vis the Paradigm of Asymmetrical Warfare*, 27 CONN. J. INT'L L. 77, 80, 87 (chronicling the steps taken by Michael Scheuer, a CIA official, to establish a new policy during the Clinton administration); *see also* Jane Mayer, *Outsourcing Torture: The Secret History of America's Extraordinary Rendition Program*, THE NEW YORKER (Feb. 14, 2005), at 106, *available at* http://www.newyorker.com/archive/2006/10/30/061030ta_talk_mayer.

68. Joint Investigation into September 11: Ninth Public Hearing, Statement for the Record of the Director of Central Intelligence before the J. Inquiry Comm. 107th Cong. (2002) (statement of George J. Tenet, CIA Director), *available at* http://www.fas.org/irp/congress/2002_hr/101702tenet.html.

69. CRS REPORT OF 2010, *supra* note 59.

70. *Id.* at 33–34. Despite this benign comment in the CRS report, the authors concede that the practice would constitute "violation[s] of both CAT and U.S. criminal law for a U.S. official to conspire to commit torture via rendition." *Id.* at 34. CRS authors also cite to the domestic statute implementing the CAT, 18 U.S.C. § 2340A(a) (which criminalizes an offense to conspire to commit torture outside the United States). *Id.* at 34 n.168.

71. CRS REPORT OF 2010, *supra* note 59, at 35–42.

72. *Id.* at app. B.

73. DETTER, *supra* note 38, at 159.

law, though humanitarian law is limited in scope to the treatment of civilians, prisoners of war, wounded or other persons, providing certain minimum standards of protection for them and avoiding the aggravation of any already inflicted injuries.[74] On paper, the United States incorporated these general principles of the laws of war in the FM 27-10, and included the required Hague 1907 and Geneva Conventions of 1949 principles to armed conflicts, including those involving insurgencies, by the specific admonition to the military establishment that "soldiers and Marines do not kill or torture enemy prisoners of war" and "treat all civilians humanely."[75]

Independent of the nature of the conflict at the time of the 9/11 attack, the President's AUMF did not propose changing how the United States military forces and its allies should invoke the laws of war obligations under international humanitarian law in the treatment of detainees and prisoners.[76] The AUMF provided no language for Congress or military officials to authorize substantial deviations from the body of humanitarian law accepted by the United States.[77] Neither the President nor top military officials sought to either suspend or modify the FM 27-10 provisions, including the Geneva Conventions of 1949 admonitions and requirements, in the fully operational guide for military personnel in practices under the laws of war and the protections that were to be applied to detainees.[78]

Without considering the FM 27-10 guidelines for the military, or the laws of war expressed in them, the Department of Justice Office of Legal Counsel (DOJ OLC) attorneys Jay S. Bybee and John Yoo, advocated for and provided legal opinions to top government officials in support of extreme interrogation techniques and detainee treatment by contending that the detainees in the war on terrorism were outside the scope of the CAT and the Geneva Conventions of 1949.[79] These and other DOJ OLC officials would provide the legal "cover" for the practices of

74. *Id.* at 160–61. Detter's perspective is that the "human rights" aspect in war would be expressed in the ICCPR, that permits derogation from a focus on human rights during times of emergency, but only when it is on such a scale that it "threatens the life of the nation," adding that it also "express[es] a condition of proportionality" that would be applicable. *Id.* at 161.

75. COUNTERINSURGENCY FIELD MANUAL, *supra* note 9, at 351; DEPARTMENT OF THE ARMY, COUNTERINSURGENCY OPERATIONS FMI 3–07.22 app. J, at J–1 to J–2 (2004), *available at* http://www.fas.org/irp/doddir/army/fmi3-07-22.pdf.

76. AUMF, *supra* note 18. There is no language that expressly or impliedly suggests that the existing laws of war and United States obligations under international law under existing conventions agreements or treaties may be suspended by virtue of the language in the brief congressional enactment. *Id.* Rather, the language invokes the President's power "under the Constitution to deter and prevent acts of international terrorism against the United States." *Id.*

77. *Id.*

78. Church Report, *supra* note 56, at 33–34.

79. Memorandum from Jay S. Bybee, then Assistant Att'y Gen. to John Rizzo, Acting Gen. Counsel for the CIA (Aug. 1, 2002) [hereinafter Bybee Memo to Rizzo of Aug. 1, 2002], *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf. Bybee's memorandum reviewed various interrogation techniques: walling, sleep deprivation, slapping, confinement in a box and others, which he ultimately opined would not violate 18 U.S.C. section 2340 because "an individual must have the specific intent to inflict severe pain or suffering. Because specific intent is an element of the offense, the absence of specific intent negates the charge of torture." *Id.* at 16. Bybee left the Justice Department in 2004 after confirmation of his appointment as an appellate judge in the Ninth Circuit Court of Appeals where he remains today. *The Honorable Jay S. Bybee, Senior Fellow*, U. OF NEV. LAS VEGAS, https://law.unlv.edu/faculty/jay-bybee.html (last visited Sept. 23, 2012).

extraordinary rendition of detainees during the post 9/11 era.[80] Those DOJ OLC opinions were thoroughly discredited more recently in a report by the Office of Inspector General of the Department of Justice (OIG DOJ) and ultimately withdrawn from further legal effect, but not until the opinions had generated almost a decade of legal support for unlawful interrogations and rendition.[81]

VII. ACTING WITH IMPUNITY TO THE UNITED STATES' INTERNATIONAL OBLIGATIONS

A. The President of the United States—George W. Bush

The President of the United States is the highest elected constitutional officer and is bound to uphold both the Constitution and the laws of the United States under the "Take Care Clause" of the Constitution.[82] The laws of the United States include international treaties and agreements to which a country becomes bound.[83] Many treaties and agreements have been recognized as the "Laws of Nations" since the inception of our democracy.[84] After the 9/11 attack, President Bush sought many legal opinions that would enable the administration to ignore the obligations of these international agreements and conventions, including the prevailing "Laws of War" as to the Al Qaeda and the Taliban groups.[85] He secured the desired "legal" opinions based on faulty analysis or incorrect conclusions, which enabled him to issue his February 7, 2002 memo undertaking policies that circumscribed the Geneva Conventions of 1949 obligation to detainees, tempered by his statement to *somehow* "treat detainees humanely and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."[86]

80. Michael Scharf, *The Torture Lawyers*, 20 DUKE J. COMP. & INT'L L. 389, 390–400, 402–03 (2009–2010).

81. U.S. DEP'T OF JUSTICE OFFICE OF PROFESSIONAL RESPONSIBILITY REP. INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 235–36 (July 9, 2010) [hereinafter DOJ-OPR Report], *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf. Jack Goldsmith, who replaced Jay S. Bybee, did not remove the Bybee August 1, 2002 opinion to CIA's Rizzo, but it was eventually withdrawn in 2009 by a Department of Justice Order that withdrew it together with several other similar memos. Memorandum from David J. Barron, Assistant Attorney General, on Withdrawal of Office of Legal Counsel CIA Interrogation Opinions to the Attorney General (Apr. 15, 2009), *available at* http://www.justice.gov/olc/2009/withdrawalofficelegalcounsel.pdf.

82. U.S. CONST. art. II, § 3.

83. *Id.*

84. *Id.*; *see* THE FEDERALIST NO. 3, at 37–38 (John Jay) (Random House ed., 1982). The "Take Care Clause" obligates the president to "take care that the laws be faithfully executed. . . ." U.S. CONST. art. II, § 3; *see* Emmerich deVattel & Joseph Chitty, *The Law of Nations*, *in* THE LAWS OF NATIONS: OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS § 3 (T. & J.W. Johnson & Co. ed., 1883), *available at* http://www.constitution.org/vattel/vattel.htm.

85. Gonzales Memo to President of Jan. 25, 2002, *supra* note 37.

86. *See* Letter from John C. Yoo, Deputy Assistant Att'y Gen. to Alberto B. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Yoo Letter of Aug. 1, 2002], *available at* http://www.justice.gov/olc/docs/memo-gonzales-aug1.pdf; Memorandum from Jay S. Bybee, Assistant Att'y Gen., Re: Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949, to Alberto R. Gonzales, Counsel to the President (Feb. 7, 2002) [hereinafter Bybee Memo to Gonzales of Feb. 7, 2002], *available at* http://www.justice.gov/olc/2002/pub-artc4potusdetermination.pdf. In a final review of the independent panel

The "military necessity" premise for these deviations was untenable under the Geneva Conventions of 1949 or the CAT.[87] Later, the administration took the position that the ICCPR had no application to events occurring outside of the United States.[88] President Bush would repeatedly advise the public after questions about the treatment of the detainees at Guantánamo with his oft-stated, "We do not torture."[89]

In 2006, President Bush would again express a strong defense of the interrogation practices when he ordered a sudden transfer of the fourteen high-level detainees from a foreign "secret site" where they had been subject to substantial torture to Guantánamo, stating "the prisons were a vital tool in the war on terror and the intelligence gathered had saved lives[,] . . . the CIA treated detainees humanely and did not use torture . . . [and] all suspects would be afforded protection under the Geneva conventions."[90] These expressions border on the absurd in light of the reports on their treatment that would emerge after the International Committee of the Red Cross (ICRC) interviews of some of the fourteen detainees.[91]

President Bush never retreated from these positions that were carried out by his Secretary of Defense, CIA Director, and others, and he continued to defend those policies after the release of the previously secret OLC memorandums that approved the practice of waterboarding.[92] His deliberate authorization for harsh

---

addressed to the Vice President, Secretary of State, Secretary of Defense, Attorney General, Presidential Chief of Staff, CIA Director, and National Security Advisor, the President's position was that:

> [N]one of the provisions of Geneva apply to our conflict with Al Qaeda in Afghanistan or elsewhere . . . I have the authority under the Constitution to suspend Geneva . . . common article 3 of Geneva does not apply to either Al Qaeda or Taliban detainees . . . I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under article 4 of Geneva.

Bush Memo of Feb. 7, 2002, *supra* note 37, at 2.

87. Bush Memo of Feb. 7, 2002, *supra* note 37, at 2. The memorandum notes that the United States will "hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law." *Id.* at 2. In the author's opinion, this statement is at odds with the manner in which the detainees would be treated in light of the level of impunity asserted as to Geneva by the President in the case of detainees.

88. Paula Kweskin, Taiyyaba Qureshi & Marianne Two, *The International Legal Landscape of Extraordinary Renditions: U.S. Obligations under ICCPR, CAT, and the Nuremberg Principles*, 20–21, U.N.C. SCH. L. IMMIGR. HUM. RTS. POL'Y CLINIC PUB., *available at* http://www.law.unc.edu/documents/clinicalprograms/theinternationallegallandscapeofextraordinaryrendition.pdf (last visited Nov. 11, 2012) (a careful study in over eight pages by three law students that delineated the applications of the ICCPR and CAT as a clinical program exercise).

89. Diane Shelly, *Why Torture Is Naturally Wrong*, INST. FOR GLOBAL ENGAGEMENT (Apr. 19, 2006), http://www.globalengage.org/issues/articles/security/536-why-torture-is-naturally-wrong.html.

90. *President Bush Admits to CIA's Secret Prisons*, BBC NEWS (Sept. 7, 2006), http://news.bbc.co.uk/2/hi/5321606.stm. The President stated "the CIA had used an alternate set of procedures agreed with the justice department, once the suspects had stopped talking." *Id.*

91. *See* Int'l Comm. of the Red Cross, *ICRC Report On The Treatment Of Fourteen "High Value Detainees" in CIA Custody* 8–20 (2007) [hereinafter ICRC Report of 2007], *available at* http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf.

92. *Bush Defends Detention Policy, Says U.S. 'Does Not Torture'*, PBS NEWS HOUR (Oct. 7, 2007), http://www.pbs.org/newshour/updates/north_america/july-dec07/bush_10-05.html.

interrogations and rendition of detainees amounted to impunity towards multiple treaty obligations of the United States, because they were in conflict with his constitutional obligations under Article II, section 3's Take Care Clause to uphold these binding international obligations.[93]

B. The Secretary of State – Colin Powell

After the President and the Vice President, the United States Secretary of State is next in line for succession to the presidency.[94] Secretary of State Colin Powell should have been the key advisor to the Executive Officer during the post 9/11 era, particularly on matters relating to international law, foreign relations and the undertaking of a multinational war on terrorism.[95] The Department of State's Legal Staff is primarily responsible for furnishing advice on all legal issues, domestic and international, arising in the course of the State Department's efforts.[96] These legal duties include "assisting department principles and policy officers in formulating and implementing the foreign policies of the United States, and promoting the development of international law and its institutions as a fundamental element of these policies."[97] Referred to as the "L," the department was headed by William Howard Taft, IV, who was also an Assistant Secretary of State.[98] Taft held the primary responsibility for advising anyone from the President through the Cabinet on matters of international law and foreign affairs—and his interpretation and advice on the applicability of international law obligations were at considerable odds with the position adopted by the President, Department of Defense, Department of Justice and the CIA.[99]

Taft quickly recognized that suspension of the Geneva Conventions of 1949 and related international obligations of the United State could not be justified by any categorization of the detainees as "unlawful combatants."[100] The confrontation between the State Department and the White House on the subject of the Geneva Conventions of 1949 occurred after Powell had read Alberto Gonzales's proposed memorandum addressed to President Bush of January 25, 2002.[101] Powell initially responded with his own five-page memorandum addressed to both the White House counsel and the Assistant to the President for National Security, Dr.

93. U.S. CONST. art. II, § 3.

94. *See* THE WHITE HOUSE AND CABINET, http://www.whitehouse.gov/administration/cabinet (last visited Sept. 24, 2012).

95. *See Biographies of The Secretaries of State: Colin L. Powell*, Office of the Historian, U.S. DEP'T OF STATE, http://history.state.gov/departmenthistory/people/powell-colin-luther (last visited Nov. 11, 2012).

96. *See* Office of the Legal Advisor, U.S. DEP'T OF STATE, http://www.state.gov/s/l/ (last visited Nov. 11, 2012).

97. *Id.*

98. Memorandum from William H. Taft, IV, Dep't of State Office of The Legal Advisor, Regarding Comments on Your Paper on the Geneva Convention to the Counsel of the President (Feb. 2, 2002) [hereinafter Taft Memo], *available at* http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf.

99. *Id.*

100. *Id.* at 4–5.

101. *See* Memorandum from Colin. L Powell, Sec'y of State, on Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan to the Counsel to the President (Jan. 26, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf.

Condoleezza Rice, cogently delineating the reasons for upholding the Geneva Conventions and the Laws of War.[102] Taft addressed a more comprehensive opinion that strongly affirmed the application of the Geneva Conventions of 1949 to treatment of captives and detainees to prevent the desire of White House counsel, Alberto Gonzales, to advise President Bush of Geneva's non-application to detainees in the war on terrorism.[103] Taft's memorandum was rejected by the President and the growing cabal—Gonzales, Cheney, Rumsfeld, Rumsfeld's later-described "Working Group" and a so-called "War Council"—all who advocated for harsh treatment of captured detainees.[104] The inputs from the War Council and Rumsfeld's Working Group provided President Bush with all of the justifications that enabled him to present his February 7, 2002, memorandum to senior officials, confirming that the Geneva Conventions would not be applicable to Taliban captives.[105]

This would be followed by a number of unprecedented steps by President Bush to continue to circumvent the United States obligations that were of binding character. These decisions were advised by the War Council, a small group of lawyers in the government, less qualified to advise the Executive to take these steps involving international law that conflicted with Taft's advice.[106] Powell and Taft would not be the only major figures intentionally bypassed by this growing cabal in their anti-international law sentiment and their development of policies and practices for the war on terrorism; this pattern of impunity was embedded in a matter of weeks and coalesced with the successful rejection of the Powell–Taft opinions on the laws of war.[107]

102. *Id.* Powell criticized the White House counsel's memorandum because it did not provide the President with options. *Id.* When faced with the "cons" of not applying the Geneva conventions to the conflict in Afghanistan, Powell noted that it could:

> [R]everse a century of U.S. policy and practice in supporting the Geneva conventions[;] . . . [have a] high cost in terms of negative international reaction[;] . . . undermine public support among critical allies[;] . . . .[In addition,] Europeans and others will likely have legal problems with extradition" which could cause "individual foreign prosecutors to investigate and prosecute our officials and troops. . . . [Further, this could cause] challenge[s] in international fora (U.N. Commission on Human Rights; World Court; etc.).

Id. at 2–3. Powell also provided his comments in a bulleted list addressing certain deficiencies of the Gonzales memorandum. *Id.* at 2–4.

103. Taft Memo, *supra* note 98, at 1, 4–5. Taft enumerated the reasons for fully applying the Geneva Conventions to Al Qaeda and the Taliban, including "the unvaried practice of the United States in introducing its forces into conflict over 50 years." *Id.* at 1. He also exhorted the necessity of taking that as a preference in a policy position for the United States international obligations. *Id.*

104. Scharf, *supra* note 80, at 389–91, 402–03.

105. JANE MAYER, THE DARK SIDE 121–22 (First Anchor Books 2008).

106. Scharf, *supra* note 80, at 389, 397. Neither Taft nor his staff had an opportunity to review that effort; in fact they were "unaware that it was being done." *Id.* This attitude of contempt for the Department of State was coupled with the desire to treat its legal advice with impunity. *Id.*

107. MAYER, *supra* note 105, at 68–69 (recounting the establishment of the illegal monitoring of the communications network, a.k.a. "domestic spying," a program desired by the President).

C. The Office of the Vice President—Dick Cheney

The second major figure in the pattern of impunity was the Vice President, Dick Cheney, who assumed quasi-executive authority not seen in prior administrations, by asserting major influences on the decisions to capture and aggressively interrogate captives during the war on terrorism.[108] Cheney's powers under the Constitution were limited to: (1) presiding over the Senate and, (2) casting the tie-breaking vote when necessary in the Senate.[109] As to other constitutional powers, there are none.[110] These limitations did not prevent Cheney's aggressive and persistent efforts to push for harsh interrogations of detainees, albeit unlawful under international law, for which he, Donald Rumsfeld, the War Council and others overrode concerns expressed by other branches of government regarding the Geneva Conventions or the CAT.[111] Cheney stood side-by-side with President Bush on daily briefings on intelligence and other matters.[112] He was instrumental in blocking the Taft opinions from influencing President Bush that the proposed actions against detainees would constitute "grave breaches" of the Geneva Conventions.[113] Cheney's view of the "new paradigm" following the 9/11 attack was expressed in public comments to the press providing the audience with hints about the type of *dark* practices that would have to be undertaken.[114] Once the unlawful practices were ongoing, Cheney expanded his influence over the Justice Department and others in the administration, some of whom admitted being "intimidated" by him and his Chief of Staff, David Addington, member of the War Council.[115] Cheney and Addington established a web of restrictive secrecy over the practices that were ongoing, thereby undermining even a glimmer of "transparency" in governance or allowances of public access to the "inside" information about the ongoing treatment of detainees.[116]

Cheney never retreated from his position on the rendition or torture of the detainees; nor has he expressed any concerns regarding the negative implications of such practices for the United States' status in the global community.[117] His contemporary remarks confirm that he holds no regrets, whatsoever, for the infliction of torture—including waterboarding—on detainees.[118] The measure of

108. *Id.* at 308–09.

109. U.S. CONST. art I, § 3. Under the article II of the Constitution, the Vice President has certain powers in the case of the death or disability of a sitting president. *Id.* at art II. However, none of those are applicable to the subject of this paper.

110. U. S. CONST. art. I, § 3.

111. Scharf, *supra* note 80, at 389–90.

112. MAYER, *supra* note 105, at 296.

113. *Id.* at 121–23 (describing the intense "out of public" fight over the Taft versus Yoo opinions in determining the course of action to take regarding the detainees, with Yoo's position prevailing).

114. Duncan, *supra* note 67, at 81. Cheney's comment was that the "government needed to work through, sort of, the dark side . . . using sources and methods that are available to our intelligence agencies." *Id.*

115. MAYER, *supra* note 105, at 308–09.

116. *Id.* at 268–70.

117. Chris McGreal, *Dick Cheney Defends Use of Torture on al-Qaida Leaders*, THE GUARDIAN (Sept. 9, 2011), http://www.guardian.co.uk/world/2011/sep/09/dick-cheney-defends-torture-al-qaida.

118. *Former US VP Cheney Defends Iraq War, Waterboarding*, VOICE OF AMERICA, http://www.voanews.com/content/former-us-vp-cheney-defends-iraq-war-waterboarding-----

impunity exhibited by him on the subject of United States international obligations relating to captives during his two terms in office would be difficult to compare with that of any other Vice-President and his persistence in defending his stance is now legendary.[119] Cheney expressed it best saying, "the interrogations were used on hard terrorist[s] after other efforts had failed. They were legal, essential, and the right thing to do."[120]

D. The Secretary Of Defense—Donald Rumsfeld

The Secretary of Defense, Donald Rumsfeld, worked closely with Cheney and assumed a commanding role over the military during the war on terrorism, while executing his own prerogatives through the formation of his "Working Group" to block and impede Powell and Taft's positions and advice relating to the decisions to apply harsh treatment to the detainees.[121] The "Working Group" took their advice from the "War Council," headed nominally by Yoo, and consisted of Addington, Cheney's Chief of Staff, Jim Haynes, General Counsel to the Department of Defense Council, and Timothy Flannigan, a former head of the DOJ OLC and the "Working Group" that was formed by the Secretary of Defense.[122] The positions of Powell and Taft on the Geneva Conventions of 1949 and the CAT concerns were argued out of consideration in behind the scenes processes by the War Council.[123] Yoo confirmed that the decision was made to leave the Department of State out of the deliberations on the treatment of detainees as follows: "The State Department and OLC often disagree about international law"; the State Department's position that international law is binding on the President and the United States was contrary to the views held by Yoo and his "War Council."[124] Based on an extensive review of the legal memorandums from the

---

128686908/174827.html (last updated Aug. 29, 2011). Cheney added that "the U.S. would object to another country subjecting an American to the technique [of waterboarding]," but without any rationale for the differentiation if it involved American or foreign citizens. *Id.*

119. MAYER, *supra* note 105, at 304–05. The secrecy and prevention of any CIA detainees being released or having access to lawyers was a significant consideration, due to the concern of allegations that CIA agents were committing prosecutable war crimes. *Id.* at 305.

120. PBS Frontline interview by Martin Smith with FBI agent Ali Soufan, PBS FRONTLINE (Sept. 13, 2011) [hereinafter FRONTLINE INTERVIEW], *available at* http://www.pbs.org/wgbh/pages/frontline/iraq-war-on-terror/the-interrogator/transcript-7/ (including comment by former Vice-President Dick Cheney).

121. MAYER, *supra* note 105, at 228–29.

122. Scharf, *supra* note 80, at 389–90; MAYER, *supra* note 105, at 66–68. The DOJ OLC would become the fountainhead for dozens of legal opinions authored by Yoo, Bybee, Bradbury and others counseling on the methods used during harsh interrogations to circumvent the United States' legal obligations under international law and the previously identified conventions to which the United States is a party. Scharf, *supra* note 80, at 389–91.

123. Gonzales Memo to President of Jan. 25, 2002, *supra* note 37. Scharf confirms the high status of the Legal Advisor: someone who is "appointed by the president of the United States and subject to the advice and consent of the Senate." Scharf, *supra* note 80, at 392. Scharf, a former "L" counsel, reveals that the troubling international implications of the decision to ignore the authenticity and credibility of memos on international law from the highest source expose the impunity with which government officials collectively regarded the international conventions to which the United States was a party. *Id.*

124. Scharf, *supra* note 80, at 392. Yoo confirmed this position in his 2006 book, in public presentations and debates, one of which was moderated by this author at the Chapman University College of Law in 2007. *See* JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006).

OLC beginning in 2002 through 2009, the authors of those legal opinions were unequivocally opposed to the application of the Geneva Conventions of 1949, the CAT and the Laws Of War in any context that conflicted with the determinations by the President, Cheney, Rumsfeld, and other senior officials to use the harshest possible methods to extract information from detainees.[125] In essence, this created a Defense Department hierarchy at virtual odds with its own governing doctrines expressed in FM 27-10 and FM 34-52 as well as the body of international humanitarian law by which it should have been bound.

As an example, Rumsfeld's purpose in acquiring legal memorandums from the DOJ OLC through his General Counsel, Haynes, was to fully justify harsh interrogation techniques that would be administered to detainees.[126] These thirty-four techniques were later reduced to twenty-four that were documented in various memoranda and directives by Rumsfeld and his Working Group, and which were eventually approved on April 16, 2003, for Guantánamo.[127] The techniques included the practices of dietary manipulation, environmental manipulation (cold, heat, and other factors), sleep adjustment, isolation, and others, along with Rumsfeld's admonition that "the United States Armed Forces shall continue to treat detainees humanely, and to the extent appropriate and consistent with military necessity in a manner consistent with the principles of the Geneva Conventions."[128] Rumsfeld was actually far behind the loop in his memo because an earlier draft of it in received full authorization from a senior Army JAG Lieutenant Colonel, Diane Beaver in 2002, who admonished senior Army officials at Guantánamo to fully apply the practices, including waterboarding, which may have even been beyond Rumsfeld's intent.[129] According to Jameel Jaffer and Amrit Singh, Rumsfeld already "verbally" authorized so-called special interrogation methods for detainees at Guantánamo in November 2002, and by December of that year issued a written directive allowing the prisoners at that location to be subjected to a variety of techniques that were contained in a specific memorandum by him.[130]

Before the explosive disclosures about Abu Ghraib, there had been numerous reports regarding detainee abuse by 2005.[131] Once his interrogation practices were implemented at Guantánamo, they were exported to detention facilities in Iraq and Afghanistan, resulting in the later exposure of the outrageous practices performed by military personnel at Abu Ghraib.[132] Those practices resulted in Senate hearings

125. Scharf, *supra* note 80, at 391–402.

126. *Id.*; *see* JAMEEL JAFFER & AMRIT SINGH, ADMINISTRATION OF TORTURE 46–47 (2007).

127. JAFFER & SINGH, *supra* note 126, at 47–49.

128. Memorandum from Donald Rumsfeld, Sec'y of Def., Regarding Counter-Resistance Techniques in the War on Terrorism, to Commander, U.S. Southern Command (April 16, 2003) [hereinafter Rumsfeld Memo of Apr. 16, 2003], *available at* http://www.washingtonpost.com/wp-srv/nation/documents/041603rumsfeld.pdf.

129. Lt. Col. Beaver Memo of Oct. 11, 2002, *supra* note 14, at 6–7.

130. JAFFER & SINGH, *supra* note 126, at 47.

131. Church Report, *supra* note 56, at 49–76 (identifying various levels of mistreatment of detainees and the application of techniques substantially outside of Rumsfeld's "approved" interrogation techniques).

132. *Id.*

that would eventually end Rumsfeld's career as Defense Secretary in 2006.[133] Rumsfeld echoed Cheney in the same PBS interview by stating: "[A]nyone who suggests that the enhanced techniques—let's be blunt, waterboarding—did not produce certain amounts of valuable intelligence just isn't facing the truth."[134]

E. The Central Intelligence Agency—George Tenet

The Central Intelligence Agency was created during World War II by the establishment of the Office of Secret Services (OSS).[135] The CIA is not part of the United States military forces, and therefore not subject to military command structures or the FM 27-10.[136] The CIA's mission is forming part of the nation's "first line of defense" under the core value of integrity.[137] The CIA's mission statement declares: "Integrity: we uphold the highest standards of conduct. We seek and speak the truth—to our colleagues and to our customers."[138] The agency's task is "collecting information that reveals the plans, intentions and capabilities of our adversaries and provides the basis for decision and action."[139] George Tenet, a Clinton presidency holdover, was the United States CIA director on September 11, 2001, though he was not necessarily considered to have been an effective leader of the CIA in their efforts to uncover information or analysis of available intelligence that might have prevented the 9/11 attack.[140] This caused Tenet considerable insecurity for his continued position as CIA director and spurred his efforts to prove the CIA's capacity to President Bush and other senior officials to effectively gather intelligence that would prevent further attacks.[141]

However ineffective the agency may have been in *preventing* the calamitous 9/11 attack, Tenet was almost too eager to undertake *any* assignments in the post

133. *Rumsfeld Leaves Office in Finest Military Fashion*, WASH. POST (Dec. 15, 2006), *available at* http://www.washingtontimes.com/news/2006/dec/15/20061215-103351-4011r/; CARL LEVIN, COMM. CHAIR, S. ARMED SERV. COMM. REP. OF ITS INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (Dec. 11, 2008), *available at* http://www.levin.senate.gov/newsroom/speeches/speech/statement-of-senator-carl-levin-on-senate-armed-services-committee-report-of-its-inquiry-into-the-treatment-of-detainees-in-us-custody/?section=speeches.

134. FRONTLINE INTERVIEW, *supra* note 120.

135. *History of the CIA*, CIA.GOV, https://www.cia.gov/about-cia/history-of-the-cia/index.html (last updated Dec. 30, 2011, 12:48 PM).

136. *Id.*

137. *CIA Vision, Mission, and Values*, CIA.GOV (Dec. 30, 2011, 12:45 PM) [hereinafter *CIA Vision*], *available at* https://www.cia.gov/about-cia/cia-vision-mission-values/index.html.

138. *Id.*

139. *History of the CIA*, *supra* note 135. It also includes the mission of "conducting covert action at the direction of the President to preempt threats are achieved US policy objectives." *CIA Vision*, *supra* note 138.

140. THE 9/11 COMMISSION REPORT, *supra* note 5, at 266–71, 274–77. The Report cast considerable doubt on the effectiveness of the CIA. *Id.* This would appear to be at odds with the CIA's published mission statement noted above. *Compare id.*, *with CIA Vision*, *supra* note 138. Tenet is reported to have been so concerned about the failures of the CIA and his operatives that he secured President Bush's promise to prevent any investigation into the CIA's record on Al Qaeda and the 9/11 attack. THE 9/11 COMMISSION REPORT, *supra* note 5; MAYER, *supra* note 105, at 24–25.

141. MAYER, *supra* note 105, at 23–25. Mayer catalogued the "missed opportunities" to have intercepted the Al Qaeda operatives responsible for 9/11; however, President Bush rebuffed congressional criticism of Tenet's performance, perhaps as a result of Tenet transferring his noted propensity for "pleasing bosses" to his new boss, President Bush. *Id.* A former CIA officer described Tenet as a "puppy dog wagging his tail and tagging along" which was consistent with his desire to keep his job in the Bush administration. *Id.*

9/11 era, including the administration of harsh interrogations authorized by the Yoo and other OLC memorandums.[142] The use of secret or "black sites" for the interrogation of high-value detainees resulted in the recovery of some valuable intelligence and the ability to boast the capture of Khalid Sheikh Mohammad, alias "KSM," the chief planner of the 9/11 attack.[143] KSM would be subjected to the most extreme interrogation methods by the CIA interrogators, including frequent waterboarding and much worse practices than any of his companion detainees experienced.[144]

The legal authority for the CIA to engage in such practices was provided in legal opinions generated by the DOJ OLC attorneys' Yoo and Bybee addressed to John Rizzo, a CIA counsel and provided the legal "cover" for the CIA to engage in a variety of harsh interrogation practices that included: administration of waterboarding, shackling in contorted positions for extended periods, extremes of heat, cold, loud noise, light and darkness, forced nakedness, water dousing, sleep and food deprivation and other extreme measures.[145] A number of these techniques were found in the Rumsfeld memorandum on techniques for interrogating detainees, but they were significantly enhanced once in the hands of the CIA and without any effective constraints from the FM 27-10, FM 34-52, or international humanitarian law to curb the grossly unlawful practices on detainees.[146]

The OLC's memorandums to the CIA's General Counsel that supported the increased level of torture that could be applied to detainees without running afoul of any provisions of domestic or international law are enlightening because they also demonstrate a palpable level of impunity to the Geneva Conventions of 1949, the CAT and ICCPR.[147] Steven G. Bradbury's May 10, 2005 memorandum deliberately sidestepped the United States Torture Statute on grounds that the practices would be observed by CIA's Office of Medical Services (OMS),[148] adding that the observations from representatives of OMS to the OLC are "that the waterboard technique is not physically painful."[149] Bradbury neglected to advise

142. MAYER, *supra* note 105, at 145–48. Drumheller questioned Tenet's role in the CIA undertaking the interrogations saying, "This is really the legacy of a director who never said no to anybody." *Id.*

143. *Id.*

144. *Id.* at 270–72. KSM was deemed a "high-value" detainee who would be subjected to the worst methods of interrogation on a prolonged basis to a point where even CIA officials were compelled to pull back on the applications of torture to KSM at the risk of causing his demise and/or perhaps acquiring incorrect intelligence information. *Id.* at 273–75. Mayer notes that even CIA officials agreed that KSM and others were being tortured. *Id.* One same official responded to issues of the application of laws to the interrogation and treatment of detainees with the following: "Who the F . . . Cares?" *Id.*

145. Bybee Memo to Rizzo of Aug. 1, 2002, *supra* note 79; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., DOJ OLC, Regarding Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees to John A. Rizzo, Acting Gen. Counsel, CIA (May 10, 2005) [hereinafter Bradbury Memo to Rizzo of May 10, 2005], *available at* http://media.luxmedia.com/aclu/olc_05102005_bradbury_20pg.pdf.

146. *Id; see* Rumsfeld Memo of Apr. 16, 2003, *supra* note 128.

147. Yoo Letter of Aug. 1, 2002, *supra* note 86; Bybee Memo to Rizzo of Aug. 1, 2002, *supra* note 79; Bybee Memo to Gonzales of Feb. 7, 2002, *supra* note 86; Bradbury Memo Rizzo of May 10, 2005, *supra* note 145.

148. Bradbury Memo to Rizzo of May 10, 2005, *supra* note 145, at 29–30.

149. *Id.* at 42. Bradbury assured the CIA's General Counsel that CIA's Office of Medical Services [OMS] had informed the OLC of that opinion regarding the non-pain associated with waterboarding. *Id.* at 44.

the CIA's General Counsel Rizzo of the trial of twenty-three Nazi-era physicians at Nuremberg, who had engaged in practices of human experimentation that amounted to torture and abuse of detainees, despite their defense claim that it was done in the interest of saving the lives of German soldiers.[150] Many of the physicians were convicted and some sentenced to life terms, confirming the rejection of that kind of defense by state officials or other actors of "national interest or security" to justify torture or inhuman treatment of any captives.[151]

Independent of the Nuremberg Principles that were used to determine the responsibility of physicians in 1946, the Geneva Conventions, CAT, and ICCPR presented even greater legal obstacles to claims that the practice of torture used for "intelligence gathering purposes," somehow provided immunity for those who planned, designed or implemented it.[152] But the CIA advocates for waterboarding or other techniques remain unrepentant as evidenced by comments from José Rodriguez, head of the CIA's Counterterrorist Center, whose idea ten years ago was for the use of harsh interrogation techniques.[153] Rodriguez continually and publicly defends his ideas today.[154]

After the 9/11 attack, the practice of waterboarding was taken from the military SERE program—an acronym for "Survival, Evade, Resist, and Escape" training that was used to train thousands of military personnel as part of survival training in case of capture—[155] and administered to the military trainees just once for approximately twenty seconds or less in a closely controlled setting.[156] There is a significant difference between the "training setting" application and the applications of it to KSM and other "high level" detainees in excess of 100 times.[157] Senator Carl Levin's Committee Report recognized the incomparable

150. *See generally* 2 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg (Oct. 1946–Nov. 1949), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-II.pdf.

151. *Id.*

152. Geneva Conventions of 1949 III, *supra* note 28, at art. 12; CAT, *supra* note 29, at art. 1; ICCPR, *supra* note 30, at arts. 7, 14.

153. *60 Minutes Overtime: Hard Measures, Part 1* (CBS News television broadcast Apr. 29, 2012), *available at* http://www.cbsnews.com/8301-18560_162-57423533/hard-measures-ex-cia-head-defends-post-9-11-tactics/.

154. *Id.* Jose Rodriguez defends CIA actions after 9/11 in his interview with Leslie Stahl, stating "we made some Al-Qaeda terrorists with American blood on their hands uncomfortable for a few days, but we did the right thing for the right reason, and the right reason was to protect the homeland and to protect American lives." *Id.*

155. Physicians for Human Rights, *Experiments in Torture: Evidence of Human Subject Research and Experimentation in the "Enhanced" Interrogation Program* at 5 n.4 (June 2010), *available at* http://phrtorturepapers.org.

156. U.S. Senate Committee on Armed Services, Hearing to Receive Testimony on the Origins of Aggressive Interrogation Techniques: Part 1 of the Committee's Inquiry into the Treatment of Detainees in U.S. Custody, June 2008 [hereinafter Senate Hearing Report of 2008], *available at* http://armedservices.senate.gov/Transcripts/2008/06%20Jun/a%20fULL%20cOMMITTEE/08-53%20.%-206-17-08%20-%20am.pdf (noting the obvious: the military schools took extreme care to ensure that no student was injured during the short administration of waterboarding for a period of twenty seconds or less, which was an experience unlikely to be the experience of detainees who were forcibly waterboarded on multiple occasions for much for longer periods).

157. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., DOJ-OLC, Regarding Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees to John A. Rizzo, Acting Gen. Counsel, Central Intelligence Agency, May 30, 2005, *available at* http://s3.amazonaws.com/propublica/assets/missing_memos/28OLCmemofinalredact30May05.pdf.

nature of administering a single twenty seconds application of waterboarding to a military trainee in controlled circumstances versus the administration of the procedures repeatedly and for longer periods to detainees who lack the power or protection from the effects of those practices.[158] It would appear that the more obvious impediment for the defense of "intelligence gathering" is the specific admonition for non-derogation from the three major international instruments' principles addressed in this paper.[159]

Tenet's continued advocacy and support for the harsh interrogation techniques was provided after the end of the Bush Administration when he and several former CIA directors wrote to President Barack Obama in a plea to prevent the Justice Department from going forward with the inquiry into "past abuses during interrogation of terrorism suspects" based on the former CIA directors' argument that the inquiry would "seriously damage the nation's ability to protect itself."[160] The Obama Administration's response, described later, blunted the effort to hold CIA senior officials or individuals accountable for any violations of domestic or international law.[161]

VIII. WAS IT TORTURE, CRUEL, INHUMAN OR DEGRADING TREATMENT?

A. The Senate Report

The 2008 United States Senate Report, authored by Senators Carl Levin and John McCain, graphically chronicles many of the deliberate steps taken by the President, Vice President, Rumsfeld, OLC lawyers Yoo and Bybee, and others to implement harsh interrogation techniques and renditions on detainees with secret efforts to ignore the obligations of the United States under the Geneva Conventions of 1949, the CAT, and ICCPR.[162] The Senate Committee heard from General David A. Petraeus in a letter addressed to the Senate Committee on June 10, 2007 that stated:

> We are engaged in combat. We must pursue the enemy relentlessly, and we must be violent at times. What sets us apart from our enemies in this fight, however, is how we behave. In everything we do, we must observe the standards and values that

158. Senate Hearing Report of 2008, *supra* note 156.

159. CAT, *supra* note 29, at art. 2(2); Geneva Conventions of 1949 IV, *supra* note 28, at art. 5; ICCPR, *supra* note 30, at art. 4(3).

160. Peter Baker, *CIA Chiefs Ask Obama to Abandon Abuse Inquiry*, N.Y. TIMES, Sept. 19, 2009, at A6, *available at* http://www.nytimes.com/2009/09/19/world/19intel.html.

161. *Id.* The president left the decision to Attorney General Eric Holder, whose appointment of John Durham to conduct the limited inquiry resulted in no findings or recommendations for criminal or any other charges. *Id*; *see A Missed Chance for Accountability*, Editorial, N.Y. TIMES, Aug. 12, 2011, at A26, *available at* http://travel.nytimes.com/2011/08/12/opinion/hold-the-cia-accountable.html. John Durham "decided against prosecuting any CIA officials," with the backdrop of a failed attempt by the American Civil Liberties Union to obtain a civil contempt remedy against the CIA. *Id.*

162. Senate Hearing Report of 2008, *supra* note 156.

> dictate that we treat noncombatants and detainees with dignity and respect.[163]

The Senate Committee's findings included the fact that by December of 2002 Rumsfeld had already approved the recommendations of his General Counsel Haynes, to "use aggressive techniques," but they were approved without "providing any written guidance as to how they were to be administered."[164] Rumsfeld was already soliciting inputs for methods on exploitation of the detainees by December 2001, months before the President signed his February 7, 2002 memorandum stating that the Geneva Conventions would not apply to the Taliban detainees.[165] The ultimate finding was that Rumsfeld planned and implemented through his Working Group the practices of "aggressive interrogation techniques . . . physical pressures and degradation [as] appropriate treatment for detainees in U.S. military custody . . . [resulting in] an erosion in standards dictating that detainees be treated humanely."[166]

B. U.S. Military Reports

From the military perspective, the basic question is: Did the practices of treatment and interrogation of detainees by the military personnel or its civilian contractor's amount to torture in violation of the Geneva Conventions of 1949 and the CAT?[167] Based on the reports that were issued from the United States military and other government agencies, the answer is a decided "yes."[168] Major General Antonio Tagubu produced a report in 2004 that focused entirely on the abuses at Abu Ghraib, which documented countless incidents of unlawful practices performed on detainees together with photographs taken of the detainees that would later rivet the public's attention on that detention facility.[169] In March 2005, Vice Admiral A. T. Church III, United States Navy, presented his Department of Defense Detention Operations And Detainee Interrogation Techniques (Church Report) for the office of the Secretary of Defense that contained a summary of the previous reports relating to interrogation or detainee abuse.[170] The documentation of a number of previous reports on the subject of mistreatment of detainees covered some thirty-three pages of the Church Report that catalogued a repetition of the

163. *Id.* at 12.

164. Senate Armed Services Committee, Inquiry into the Treatment of Detainees in U.S. Custody, Executive Summary xix (Dec. 11, 2008) [hereinafter Senate Hearing Report of 2008, Executive Summary], *available at* http://www.levin.senate.gov/imo/media/doc/supporting/2008/Detainees.121108.pdf. The interrogation techniques, including waterboarding of detainees, were also to be applied in Afghanistan and Iraq. *Id.* at xxii–xxiii.

165. *Id.* at xiii.

166. *Id.* at xxix.

167. Geneva Conventions of 1949 III, *supra* note 28, at art. 13; CAT, *supra* note 29, at art.1.

168. *See generally* Geneva Conventions of 1949 III, *supra* note 28, at art. 13; CAT, *supra* note 29, at art. 1.

169. United States Central Command, Article 15-6 Investigation of the 800th Military Police Brigade, 2004, 15–20, [hereinafter Tagubu Report], *available at* http://www.npr.org/iraq/2004/prison_abuse_report.pdf.

170. Church Report, *supra* note 56 at 49–83.

practices along with the need for addressing the conditions of treatment of the detainees.[171]

At the time of the Church Report a separate United States military independent panel determined that some 50,000 detainees had been processed through various detention centers and that some 300 allegations of abuse had been formally made, of which sixty-six had been substantiated.[172] But since all of the investigations were not completed, a set of statistics could point to a more significant number of abuses beyond the detainees who risked making a complaint.[173] Furthermore, the actions attributed to the principals identified in these reports demonstrated that they were done intentionally and with impunity by senior officials respecting the United States' international obligations required by the international instruments, the Laws of War, and our own domestic law.[174]

The Church Report also referred to the earlier Tagubu Report, noting that Major General Tagubu relied on the reports of two other ranking officers to reach his findings that military police personnel had intentionally abused detainees in multiple modes including: punching, slapping, kicking, forced nakedness, forcing groups of detainees to masturbate in groups, placing dog chains or straps around their necks, using military dogs to intimidate and frighten detainees and other unacceptable techniques.[175] The Church Report unmistakably identified specific acts of torture beyond the Rumsfeld "approved techniques" that had been spawned by his authorization of extreme practices.[176] These were not the only major military reports; however, those cited provide convincing evidence of the conditions of detainees that were known in the military establishment as early as 2003 to 2005.

C. The Department of Justice Report of 2009

According to the later Office of Inspector General, Department of Justice Report of 2009 (DOJ OIG Report of 2009), the 2003 Iraq Interrogation Policy by Rumsfeld explicitly authorized the use of sleep deprivation or interruption, which was one of the most frequently reported forms of detainee treatment by military and CIA personnel as reported by FBI agents who served in Iraq.[177] The extensive report graphically identified the following practices that were observed by FBI agents at different locations: beating, choking, strangling, burning, use of electric shock, harsh and prolonged shackling, sexual abuse or contact, waterboarding,

171. *Id.*
172. *Id.* at 78.
173. *Id.*
174. *Id.* at 78–79.
175. *Id.* at 61–65. Major General Tagubu made numerous recommendations to be implemented to eliminate the practices that were described above. *Id.*; Tagubu Report, *supra* note 169, at 17.
176. *See generally* Church Report, *supra* note 56.
177. Office of the Inspector General-Department of Justice Report, A Review of the FBI's Involvement and Observation of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq, Oct. 2009, 255–56, *available at* http://www.thetorturedatabase.org/files/foia_subsite/doj_oig_report_as_reprocessed_for_20091030.pdf.

deprivation of food and water, forced nakedness, and actual or threatened transfer to a third country.[178]

The DOJ OIG Report of 2009 confirmed that FBI agents also observed detainees who were subjected to other forms of mistreatment, which included: extreme temperatures, use of working dogs, isolation, mistreatment of the Koran, use of bright lights and loud music, use of duct tape, withholding medical care, and transfer to another country, which demonstrated that the Rumsfeld authorization for "some" harsh interrogation practices spawned many methods of more extreme torture and inhumane treatment that also violated the CAT, the Geneva Conventions of 1949 and FM 27-10.[179]

An unusual aspect of the treatment of detainees during interrogations were methods that would clearly violate international humanitarian law and may have included the administration of psychoactive drugs for treatment purposes while interrogations were ongoing, but the government has steadfastly denied suggestions in an official report recently released under a Freedom of Information Request that any of the drugs that were administered were for the express purpose of facilitating interrogations.[180]

D. International Committee of the Red Cross Reports

The ICRC is charged under various international conventions with overseeing the condition of detainees (wounded, civilians, prisoners of war, others) during times of war or conflict.[181] The ICRC's mission is to "respond rapidly and efficiently to the humanitarian needs of people affected by armed conflict or by a natural disaster occurring in a conflict area."[182] The ICRC activities are embodied in the principles of humanitarian law under both the Hague 1907 and the Geneva Conventions of 1949 among other instruments, to authorize its activities intended to "limit the effect of armed conflict" by protecting "persons who are not or are no longer taking part in hostilities" and restricting the "methods and means of warfare."[183] This includes ICRC representatives' visits to locations where civilians,

178. *Id.* at 238–50, 258.

179. *Id.* at 182–87, 190–94, 196.

180. World Medical Association, Declaration of Tokyo (1975), *available at* http://www.cirp.org/library/ethics/tokyo/ (in its Declaration stating "the doctor shall not provide any premises, instruments, substances or knowledge to facilitate the practice of torture or other forms of cruel, inhumane or degrading treatment or to diminish the ability of the victim to resist such treatment"). United States Department of Defense Deputy Inspector General For Intelligence, Investigation of Allegations of the Use of Mind-Altering Drugs to Facilitate Interrogations of Detainees, Sept. 23, 2009, 2–5, *available at* http://s3.documentcloud.org/documents/395950/pentagon-inspector-generals-report-investigation.pdf. That OIG report concludes that none of the drugs were administered for the direct purpose of the interrogation. *Id.* However, they were provided during the course of interrogations, including for interrogated persons with "serious mental health conditions and were being treated with psychoactive medications on a continuing basis." *Id.* at i.

181. Geneva Conventions 1949 III & IV, Commentary, *supra* note 28, at arts. 9, 10 (documenting the increasing role of the Red Cross in matters relating to civilians, wounded, and prisoners of war); Geneva Convention 1929, *supra* note 26, at arts. 79, 88.

182. ICRC, *What We Do*, ICRC.ORG, http://www.icrc.org/eng/what-we-do/index.jsp (last updated Mar. 25, 2013).

183. ICRC, *War and International Humanitarian Law*, ICRC.ORG, *available at* http://www.icrc.org/eng/war-and-law/overview-war-and-law.htm (last updated May 11, 2012) (providing an overview of international

prisoners of war, or other captives are being detained for the specific purposes of examining the conditions of their detention, health, sanitation, food, water and conditions of their confinement under humanitarian law principles.[184]

As a high contracting party to the Geneva Conventions of 1949, and the applicable laws of armed conflict, the United States was obligated to fully cooperate with the ICRC to allow them to freely conduct visits and inspections at all detention facilities or camps during the post 9/11 conflict, including access to all detainees.[185] The conditions under which the detainees were held at Guantánamo and facilities in Iraq, Afghanistan and other locations often dissuaded United States officials from identifying *all* detainees or allowing ICRC access to the "high value detainees."[186] The ICRC's practice is to provide their reports of an inspection of any contracting parties' detention facilities that document any deficiencies or recommendations for modifications of the conditions of the detainees or any of the humanitarian aspects of it.[187] The reports rarely made public because the ICRC's primary interest is to *improve* the conditions of detention under humanitarian law, so its intent is to avoid publicly embarrassing government officials to accomplish its primary goals.[188]

In the cases of detainees, including those subject to rendition, the Geneva Conventions of 1949 affirmed the long-standing humanitarian role of the ICRC in the protection of prisoners of war—an obligation the ICRC was specifically prevented from carrying out in cases of so-called "high level" detainees taken to secret locations by the Bush Administration's CIA operatives.[189] The blocking of access to the high-level detainees resulted in the intentional leak to the public of the ICRC's report of February 14, 2007, done out of exasperation following multiple failed attempts to identify the location and gain access to the fourteen "high-level detainees" held in detention at a secret foreign location where they were subjected to outrageous levels of interrogation techniques, including waterboarding, which resulted in both physical and mental injuries to the detainees.[190] One of the

---

humanitarian law and stating that "the International Committee of the Red Cross is regarded as the 'guardian' of the Geneva Conventions and various other treaties that constitute international humanitarian law").

184. ICRC, *Respect for the Life and Dignity of the Detainees*, ICRC.ORG, *available at* http://www.icrc.org/eng/what-we-do/visiting-detainees/overview-visiting-detainees.htm (last updated Mar. 31, 2011) (stating that "through regular visits, the ICRC strives to prevent torture, other forms of ill-treatment, forced disappearance and extrajudicial executions, and to ensure that detainees enjoy fundamental judicial guarantees").

185. Geneva Conventions of 1949 IV, *supra* note 28, at art. 30, 143.

186. David P. Forsyth, *The ICRC: A Unique Humanitarian Protagonist*, 89 INT'L REV. RED CROSS 865 (2007) at 63, 82–83, *available at* http://www.icrc.org/eng/assets/files/other/irrc-865-forsythe.pdf.

187. ICRC, *War and International Humanitarian Law*, *supra* note 183.

188. *Id.*

189. Geneva Conventions of 1949 III, *supra* note 28, at art. 9 (affirming the role of the ICRC with regards to the protection of prisoners of war). "The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross . . . may . . . undertake for the protection of prisoners of war and for their relief." *Id.* ICRC Report of 2007, *supra* note 91, at 3.

190. ICRC Report of 2007, *supra* note 91, at 3–4, 7–8, 10–16. The shocking revelations of the treatment of the 14 detainees detailed in the report were facilitated after President Bush summarily transferred the detainees to Guantánamo in response to growing international concern regarding the rendition of detainees to foreign locations for harsh interrogation and treatment. *Id.* at 3. *See* Shirley Gay Stolberg, *President Bush Moves 14 Held in Secret to Guantánamo*, N.Y. TIMES (Sept. 7, 2006), http://www.nytimes.com/2006/09/07/us/07detain.html?pagewanted=all.

detainees subjected to severe mistreatment, KSM, considered the "mastermind" behind the 9/11 attack, is years later undergoing a trial before a military tribunal in Guantánamo for capital crimes related to the 9/11 attack.[191] The trial process at Guantánamo will be complicated by the fact that the defendant has been held in custody for more than five years at Guantánamo, and the government would like to use certain evidence obtained in secret through torture but simultaneously protect the CIA personnel who obtained it from him, thus presenting issues which his military counsel intends to vigorously contest.[192] The loss of transparency or a fair trial in such a process is obvious.

In a 2012 document regarding the United States detainees from the war on terrorism, the ICRC defined its role in the protection of all detainees captured to include visits to various countries where detainees are held, including Afghanistan.[193] These ICRC visits are carried out under a strict set of rules requiring the detaining authorities to provide its delegates (1) access to all detainees, (2) ability to speak to detainees privately, (3) a right to repeated and frequent visits as required, (4) ability to register detainees falling within its authority, and (5) confidential discussions with the authorities before and after each visit.[194] Since the 2009 issuance of three Executive Orders regarding detainees by President Obama, the ICRC has experienced greater cooperation by the United States in allowing visitation of detainees.[195]

E. The Center for Constitutional Rights

The Center for Constitutional Rights (CCR) is a nonprofit organization "dedicated to advancing and protecting the rights guaranteed by the United States Constitution and International Law."[196] CCR filed the first major case in the United States courts, *Rasul v. Bush*, on behalf of Guantánamo detainees in 2002.[197] The CCR's July 2006 Report chronicles the steps taken by the United States government officials for the applications of torture of detainees at Guantánamo and other foreign locations and includes a summary of the legal consequences of those actions based on violations of international law.[198] The CCR authors noted, "[t]he

191. ICRC Report of 2007, *supra* note 91, at 8–20; *see* Stolberg, *supra* note 190; *Khalid Sheikh Mohammed Hearing Gets Chaotic Start*, BBC NEWS U.S. & CANADA (May 6, 2012), http://www.bbc.co.uk/news/world-us-canada-17966362. The government is seeking the death penalty against KSM based on his role as a senior planner of the 9/11 attack. *Id.*

192. *Khalid Sheikh Mohammed (Guantánamo 9/11 Attacks Trial)*, N.Y. TIMES (May 7, 2012), http://topics.nytimes.com/top/reference/timestopics/people/m/khalid_shaikh_mohammed/index.html.

193. ICRC, *Persons detained by the US in Relation to Armed Conflict and the Fight Against Terrorism—The Role of the ICRC*, ICRC.ORG (Sept. 1, 2012), *available at* http://www.icrc.org/eng/resources/documents/misc/united-states-detention.htm.

194. *Id.*

195. *Id.*

196. *Center for Constitutional Rights—Mission and History*, CCRJUSTICE.ORG, (July 2006), http://ccrjustice.org/files/Report_ReportOnTorture.pdf; *see also* Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba, July 2006, 1 [hereinafter CCR Report of July 2006], *available at* http://ccrjustice.org/files/Report_ReportOnTorture.pdf.

197. *Id.*; *see also* Rasul v. Bush, 542 U.S. 466 (2004).

198. *See generally* CCR Report of July 2006, *supra* note 196.

Third [Geneva] Convention, addressing prisoner of war rights, and the Fourth [Geneva] Convention addressing civilian rights, contain numerous protections for persons captured during the military hostilities."[199] The CCR documented the fact that many detainees were subjected to even greater forms of cruel, inhumane or degrading treatment following their capture even before they arrived at Guantánamo, Bagram, Abu Ghraib or other detention centers under United States control.[200] The CCR recommended "an independent commission [to] fully address the nature and extent of the use of torture against Guantánamo prisoners."[201] The creation of such a commission is unlikely this many years after the CCR's Report and it would appear that the work of other governmental and non-governmental agencies noted in this paper that attempted to address some of the issues will not be fruitful; however, the CCR's Report and positions do complement others provided in this paper.

F. The Office of the United Nations Human Rights Commissioner

The United Nations Commission on Human Rights (UNCHR) investigated cases of detainee treatment and documented their determinations in a 2006 report based on the independent findings of five experts, who focused in part on the Guantánamo detainees and assessments of the conditions and treatment to determine the implications under international humanitarian and human rights laws.[202] Section III of the UNCHR Report is devoted specifically to the issue of torture under Article 7 of the ICCPR.[203] UNCHR identified the application of the ICCPR's Article 2 (2) under "limits and derogations" to unauthorized interrogation practices based on the Article's admonition that "[n]o exceptional circumstances whatsoever" are permitted to State parties for deviation from this obligation.[204] This included the prohibitions against using *any* form of torture in recognition of the fact that the prohibition is in the nature of a *jus cogens* norm, meaning one from which no member State may derogate.[205] Antonio Cassese identifies the more recent reasoning of the International Criminal Tribunal of Yugoslavia (ICTY) "emphasized in *Furundzia* (with specific reference to the norm prohibiting torture), [that] peremptory norms produce a 'deterrent effect' in that they signal to all States

199. *Id.* at 10. The report also confirms the inability of a state to utilize forms of "exceptionalism" to rationalize avoiding the obligations of the CAT, a convention equally applicable to the detainees. *Id.* at 32.

200. *Id.* at 28. A prisoner detained in Kandahar before coming to Guantánamo Bay "allege[d] that U.S. soldiers urinated on prisoners and burned them with cigarettes and that he was made to walk barefoot over broken glass and his head was pushed into the ground into the glass." *Id.*

201. *Id.* at 31.

202. *See* U.N. Commission on Human Rights, Economic, Social and Cultural Rights, Civil and Political Rights—Situation of Detainees at Guantánamo Bay: Rep. of the Chairperson of the Working Group on Arbitrary Detention, Future E/CN.4/2006/120 (Feb. 15, 2006) [hereinafter UNCHR Report of 2006], *available at* http://www.nytimes.com/packages/pdf/international/20060216gitmo_report.pdf.

203. *Id.* at 21–22.

204. *Id.* at 21 (discussing the perspectives of the UN Committee Against Torture and the applications of "Common Article 3" of the Geneva Conventions 1949 to the application of torture to detainees).

205. *Id.*; CASSESE, *supra* note 38, at 205–07.

and individuals that their prohibition enshrines absolute values 'from which nobody may deviate.'"[206]

The UNCHR Report of 2006 identified United States law that supported the international law prohibitions on torture based on the fact that it constitutes "cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."[207] Under the category "Use of excessive violence," the Report documents treatment of detainees, that in the authors' collective opinion, "amount[ed] to torture, [because] it inflict[ed] severe pain or suffering on the victims for the purposes of intimidation and/or punishment."[208] Other categories of mistreatment to detainees at Guantánamo and other locations, including forced transfer to countries where detainees would be at serious risk of torture and a lack of impartial investigations, were also given consideration by the experts.[209]

The findings of the UNCHR in 2006 were based on reviews of official documents and interviews of victims and others to substantiate the conclusion that United States authorities authorized the use of the certain interrogation techniques addressed in this paper.[210] It was deemed important that:

> United States . . . [never contacted] the Secretary-General of the United Nations or other States parties to the treaties . . . [regarding its intent to make] . . . official derogation[s] from the International Covenant on Civil and Political Rights or any other international human rights treaty to which it [was] a party.[211]

The interrogation techniques used by the United States at Guantánamo were found to have violated Article 7 of the ICCPR and Article 16 of the CAT.[212] The Report confirmed that "the practice of rendition of persons to countries where there is a substantial risk of torture . . . amounts to a violation of the principle of non-refoulement and is contrary to Article 3 of the Convention against Torture and Article 7 of the ICCPR."[213]

The UNCHR recommended closure of the Guantánamo facility to enable the United States to "expeditiously bring[ ] . . . detainees to trial, in compliance with . . . [provisions] of the ICCPR, or release them without further delay."[214] Not surprisingly, the UNCHR's effort was not well received by the Bush Administration in 2006, nor did it facilitate any substantial compliance with the

206. CASSESE, *supra* note 38, at 207.
207. UNCHR Report of 2006, *supra* note 202, at 22.
208. *Id.* at 26.
209. *Id.* at 26–27.
210. *Id.* at 28–29.
211. *Id.* at 36.
212. UNCHR Report of 2006, *supra* note 202, at 37.
213. *Id.* at 37.
214. *Id.* at 38.

particulars identified in it by the Administration.[215] The United States Ambassador and Permanent Representative to the United Nations' High Commissioner, Kevin Edward Moley, issued a draft on January 31, 2006 that objected to various provisions of the 2006 Report suggesting the reliance on the ICCPR was "flawed" and "without serious analysis of whether the instruments by their terms apply extraterritorially."[216] A White House spokesperson later responded that the Report was based on "disinformation deliberately spread by terror groups" and constituted "a rehash of some of the allegations that have been made by lawyers for some of the detainees."[217] These expressions continued the impunity addressed to any criticism of the practices at Guantánamo or other detention facilities under United States control.

In 2007, the European Union's Rapporteur for Human Rights, Dick Marty, reported to the Committee on Legal Affairs and Human Rights on the issue of detentions and illegal transfers of detainees.[218] His report documented how the United States selected Poland and Romania "to form special partnerships with countries that were economically vulnerable, emerging from difficult transitional periods in their history and dependent upon American support for their strategic development" for these renditions to secret sites.[219] The conditions for renditions to these locations are reconstructed in Marty's report from information he obtained from detainees, that are best described in the McCain Amendment to the US Detainee Treatment Act's language, stating that "if even one single American that were to be held under these conditions, or treated in this manner, and the American population would find it abhorrent or unacceptable, then America should not be practicing the actions in question against detainees whom they hold from other countries."[220]

The two European Union States, Poland and Romania, filed "objections" to the European Union Rapporteur's Report by denying complicity in any rendition or detention of detainees from the United States, leaving a somewhat perplexing note

215. Mary Shaw, *Bush Administration Defies the U.N. Committee on Torture*, OPEDNEWS.COM (Nov. 12, 2007), http://www.opednews.com/articles/opedne_mary_sha_071112_bush_administration.htm. The Bush Administration responded to the 2006 Report in the same manner as the follow-up from the U.N.'s Committee on Torture Inquiry in 2007, a repeat of the denial of wrongdoing. *Id.*

216. UNCHR Report of 2006, *supra* note 202, at 53–54, Annex II (letter from Kevin Edward Moley, Ambassador and Permanent Representative of the United States of America dated January 31, 2006 addressed to the office of the UN High Commissioner).

217. Warren Hoge, *U.N. Report Calls for End to Guantánamo Detentions*, N.Y. TIMES (Feb. 16, 2006), http://www.nytimes.com/2006/02/16/international/16cnd-gitmo.html.

218. *See generally* Eur. Consult. Ass., *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, Doc. No. 11302 (2007) [hereinafter Special Rapporteur's Second Report on Detentions & Illegal Transfers 2007], *available at* http://www.assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf.

219. *Id.* at 25–31. An interesting aspect to calling the relationship with Poland and Romania are the implications to The North Atlantic Treaty Organization, in which the United States plays a key role and upon which certain member states are dependent on inclusion within its framework. *Id.* The other significance to this passage in the Report is the identification of the locations in Poland and Romania as "CIA black sites." *Id.*

220. *Id.* at 48–50. As the special Rapporteur Report notes, the McCain amendment to the Detainee Treatment Act was to be relatively short lived because "President Bush said that his "constitutional authority" as Commander in Chief took precedence in "protecting the American people from further terrorist attacks" thus allowing him to pursue the same practices. *Id.*

to that Report's extensive content, which the complicit European Union member states could not avoid.[221]

The United Nations, however, did not stop with the efforts expressed in their 2006 Report. The recent 2010 effort led by Manfred Nowak, focusing on essential civil, political, economic, social and cultural rights, included the issues of rendition and detention.[222] Central to the theme of the UNCHR 2010 Report was documentation of the significantly increased use of secret detentions with the advent of the global war on terrorism, which caused the study of the United States practices since the attack of September 11, 2001.[223] The Report concludes that the "wide use of states of emergency, international wars in the fight against terrorism" and other similar justifications as predicates for secret detention and "extraordinary powers . . . [are] conferred on authorities including Armed Forces, law enforcement bodies and or intelligence agencies . . . always in 'global war' paradigms."[224]

The 2010 UNCHR Report graphically chronicled the capture and obvious rendition of citizens from: Kuwait, Tanzania, Indonesia, Yemen, Germany, Pakistan, Jordan and Tunis to name a few, to other locations where they were subjected to detention and torture.[225] The report was provided to United States officials, who responded to the Committee's questions regarding the CAT to the effect that:

> The United States does not transfer persons to countries where the United States believes it is "more likely than not" that they will be tortured . . . and United States obtains assurances, as appropriate, from the foreign government to which a detainee is transferred that he will not torture the individual being transferred.[226]

The 2010 UNCHR Report documented Italy's report of the first convictions of CIA and foreign agents—in absentia—for the rendition and secret detention program for the abduction of two Egyptian nationals from the streets of Milan, Italy in 2003.[227] The Italian Court of Appeals ultimately upheld sentences ranging

221. Special Rapporteur's Second Report on Detentions & Illegal Transfers 2007, *supra* note 218, at 2–3.

222. U.N. Human Rights Council, Promotion and Prot. of All Human Rights, Civil, Political, Econ., Social and Cultural Rights, Including The Right To Dev., U.N. Doc. A/HRC/13/42 19 (Feb. 2010) [hereinafter UNCHR Report of 2010], *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf.

223. *Id.* at 2–3. Another surprising finding in the conference report is that "in almost no recent cases have there been any judicial investigations into the allegations of secret detention, and practically no one has been brought to justice." *Id.* at 5. It cannot be seen uniquely as a United States problem, but one of global dimensions given the perception of the fight against global terrorism. *Id.*

224. *Id.* at 4.

225. *Id.* at 60–64. In another case documented in this report, two men were "seized in the former Soviet State of Georgia in early 2002 and *sold* to United States forces" after which they remained in Guantánamo for several years. *Id.* at 65–66.

226. CAT/C/48/Add.3/Ref.1, para. 30 as referenced in UNCHR Report of 2010, *supra* note 222, at 69–70.

227. European Parliament, Directorate-General External Policies, Policy Department, Workshop Torture and Secret Detentions: The U.N. Perspective and the Role of the European Union 2011, at 11–12. Unfortunately the Italian government was able to effectively assert its own state secrets law to prevent the conviction of five Italian security agents who had worked with the CIA operatives in the kidnap and detention. *Id.* at 12.

from seven to nine years for the CIA agents who had participated in this kidnapping of Egyptian citizens in Italy.[228] The full capacity of the EU to investigate the secret detention facilities was most recently reported to be compromised by the fact that a decision by the United States District Court of the District of Columbia ruled in favor of the United States government on the disclosure of documents to the European Union under Freedom Of Information Act request (FOI), a determination based on the government's argument that there was no obligation to accept requests from foreign government entities.[229]

IX. THE MEASURES OF CONTINUED IMPUNITY

A. The Obama Administration

In January 2009, the Obama Administration assumed the presidency with considerable fanfare and pronouncements about adhering to our international obligations and identified one major goal: to "[close] Guantánamo within one year."[230] President Obama issued an executive order in January of 2009 that reaffirmed the United States adherence to the Army Field Manual, Geneva Conventions and other international law as it related to detainees and interrogation.[231] In furtherance of those goals, an April 2009 DOJ order suspended four of the dozens of prior DOJ OLC written opinions that provided the legal authority to the CIA to conduct torture during the Bush Administration.[232] On June 11, 2009 a broader order from the Justice Department invalidated all of the OLC legal opinions from September 11, 2001 to January 20, 2009, formalized in another memorandum for the Attorney General authored by David J. Barron.[233]

President Obama's desire to close Guantánamo was unsuccessful because he did not anticipate the fierce opposition from the House of Representatives to the closure of Guantánamo as it would require the transfer of *terrorist* detainees back to the United States.[234] Congressional refusal to fund the detainees' transfers forced

228. *Id.* at 11–12.

229. All Party Parliamentary Group on Extraordinary Rendition v. U.S. Dept. of Def., 851 F. Supp. 2d 169, 176 (D.D.C. 2012) These FOIA requests were made by the British Parliamentary group seeking to obtain documents showing CIA involvement with the British government in the areas of rendition and perpetration of torture. *See* U.N. News Service, *U.N. Expert Regrets US Court Decision Preventing Oversight of Intelligence Services* (Apr. 12, 2012), *available at* http://www.un.org/apps/news/printnews/Ar.asp?nid=41765.

230. Jeremy Herb, *Obama Promise to Close Guantánamo Prison Unfulfilled*, THE HILL (Jan. 11, 2012), http://thehill.com/homenews/administration/203727-obama-promise-to-close-prison-at-guantanamo-still-unfulfilled (noting unfulfilled pre-election promise to close Guantánamo within one year).

231. Exec. Order No. 13491, 74 FED. REG. 4893 (Jan. 27, 2009), http://www.whitehouse.gov/the-press-office/ensuring-lawful-interrogations.

232. Memorandum for the Att'y Gen. by David J. Barron, Acting Assistant Att'y Gen., Withdrawal of Office of Legal Counsel CIA Interrogation Opinion (Apr. 15, 2009), *available at* http://www.fas.org/irp/agency/doj/olc/withdraw-0409.pdf.

233. Memorandum for Att'y Gen. from David J. Barron, Acting Assistant Att'y Gen., Withdrawal of Office of Legal Counsel Opinions (June 11, 2009), *available at* http://www.fas.org/irp/agency/doj/olc/withdraw-0609.pdf.

234. Peter Landers, *Congress Bars Gitmo Transfers*, WALL ST. J. (Dec. 23, 2010), http://online.wsj.com/article/SB100014.html. Congress initially used rulemaking authority followed by a provision

President Obama to back away from his promise to close Guantánamo, and in March of 2011 he was compelled to resurrect the failed Guantánamo military commissions that had been suspended since he took office in January 2009.[235]

The failure to press for closure of Guantánamo is perplexing. The President was empowered as Commander-In-Chief of the Armed Forces in time of war or conflict and, given the broad parameters of interpretations of that power under the AUMF by his predecessor, he was in a position to assert those powers to close Guantánamo and transfer the prisoners to wherever he desired.[236] He might have pressed the unequivocal jurisdiction of the United States Courts under Article III as a place to bring the charges against terrorists (civilians) for acts that had significant effects in the United States.[237] The prior successful prosecutions of terrorists in the United States in the federal courts included those who were involved in the 1993 attacks on the New York City Twin Towers and other notorious terrorists—successful prosecutions that would tend to blunt congressional criticism of housing suspected terrorists in the United States prison system or using the courts, which had already been successfully accomplished in a number of cases.[238]

Another failure was not pursuing full investigations for determinations of criminal conduct involving those who actually planned, executed, or perpetrated cruel and inhuman torture on any detainees—a step that would have placed the United States in compliance with both domestic and international law addressed here.[239] Instead, early in his administration President Obama essentially immunized the CIA and other personnel with his assurance in the April 27, 2009 statement that "those who carried out their duties in good faith upon legal advice from the Department of Justice . . . would not be subject to prosecution."[240]

---

in the "Defense Authorization Bill" that effectively precluded any funds available for transfers from Guantánamo to the United States. *Id.*

235. Exec. Order No. 13492, 74 Fed. Reg. 4893 (Jan. 22, 2009), *available at* http://www.whitehouse.gov/the-press-office/closure-guantanamo-detention-facilities; *Obama Orders Guantánamo Tribunals to Resume. Is he Abandoning his Pledge?*, CHRISTIAN SCIENTIST MONITOR (Mar. 7, 2011), http://www.csmonitor.com/USA/Justice/2011/0307/Obama-orders-Guantanamo-tribunals-to-resume.-Is-he-abandoning-his-pledge.

236. U.S. CONST. art II, § 2; TODD B. TATELMAN, GONG. RESEARCH SERV., Supreme Court Nominee Elena Kagan: Presidential Authority and the Separation of Powers (2010), *available at* http://www.fas.org/sgp/crs/misc/R41272.pdf.

237. U.S. CONST, art III, §§ 1–2; United States v. Rahman, 189 F. 3d 88 (2d Cir. 1999).

238. U.S. Department of Justice, Fact Sheet: Prosecuting And Detaining Terrorist Suspects In The US Criminal Justice System, Major Historical Cases In SDNY, June 4, 2009, *available at*: http://www.justice.gov/opa/pr/2009/June/09-ag-564.html (confirming the 1996 successful conviction in federal court of *the Blind Sheikh* Rahman and six others for the 1993 bombing attack on the World Trade Center and documenting other successful efforts against other terrorists).

239. Geneva Conventions of 1949, *supra* note 28; ICCPR supra note 30, at art. 2.3 (a–c). In the case of the ICCPR, the signing statement Resolution of Advice and Consent on the ICCPR in 1992 contained this language:

> [T]he US understands the right to compensation referred to in Articles 9(5) and 14(6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or miscarriage of justice of justice may seek and, where justified, obtain compensation from either the responsible or the appropriate government entity.

Id.

240. Mark Benjamin, *Obama Exempts CIA "Torture" Staff*, BBC NEWS (Apr. 17, 2009), http://news.bbc.co.uk/2/hi/8003537.stm (noting that the President did not specifically say it would include those

Attorney General Eric Holder referred the matter of just two detainee deaths occurring in CIA custody to Assistant United States Attorney John Durham to identify those individuals who might be subject to further investigation or considered for possible prosecution, despite the nearly one hundred or so other detainees who died in United States custody or as a result of interrogations or other acts, matters which were foreclosed.[241] Durham was previously appointed during the Bush Administration to investigate the infamous destruction of dozens of seventy-two CIA tape recordings of extreme interrogations, which had been ordered preserved for possible congressional hearings, but were destroyed by a CIA official.[242] In that case, Durham determined that the individual who destroyed the tapes did so contrary to specific orders that they be preserved, but neither he nor Holder found a basis for further discipline or any criminal charges against him.[243] There is no surprise that Durham's much-delayed investigation of the CIA's complicity in the deaths of the two detainees eventually determined—Holder in accord—no basis for further investigations that might lead to prosecution of any CIA officials.[244]

The DOJ's Inspector General's Office of Professional Responsibility (DOJ OPR Report) completed a lengthy investigation into the OLC reports of Yoo and Bybee that resulted in conclusions that strongly discredited those opinions as substantially flawed and failing to reflect an accurate statement of the law or its application to the detainees.[245] Despite the findings, the DOJ OPR Report made no recommendation for any further action against the opinions' authors, even given the consideration that they had legitimized and in some cases encouraged the conduct by military and CIA personnel that amounted to gross violations of both international and domestic law.[246] This provided immunity from responsibility for wrongdoing that would not be addressed beyond the administrative investigations.[247] At other times in history, lawyers and officials in another state's Justice Department did not fare quite so well in post-conflict settings where their actions and opinions had caused serious harm and even death to captives, resulting

---

who "acted outside the boundaries laid out in the memos, or to those non-CIA staff involved in approving interrogation limits").

241. Andrew Ramonas, *Holder To Appoint Torture Prosecutor*, MAIN JUSTICE AND THE LAW (Aug. 24, 2009), http://www.mainjustice.com/2009/08/24/holder-to-bring-on-prosecutor-to-probe-harsh-interrogations/print/ (describing that it would take nearly two years for John Durham to investigate the matter involving nearly one hundred instances of suspected torture to determine that there is no wrongdoing).

242. Alana Goodman, *Topic: Special Prosecutor WH Needs Special Prosecutor Now*, THE DISSENTER (June 29, 2010), http://dissenter.firedoglake.com/2011/08/01/judge-sanctions-cia-for-destruction-of-interrogation-tapes (noting that the DOJ closed the case after his report found no basis for further inquiry).

243. *Id.*; Kevin Goztola, *Judge Sanctions CIA for Destruction of Interrogation Tapes*, THE DISSENTER (Aug. 1, 2011), http://dissenter.firedoglake.com/2011/08/01/judge-sanctions-cia-for-destruction-of-interrogation-tapes.

244. Chris Strohm, *Holder: Justice To Drop Investigations Into CIA Officials Involved In Torture,* THE NATIONAL JOURNAL (June 30, 2011), http://www.nationaljournal.com/holder-justice-to-drop-investigations-into-cia-officials-involved-in-torture-20110630 (noting that Holder informed Congress in 2012 "the investigations had run their course and would be closed very soon"); Josh Gerstein, *Holder: CIA Interrogation Probe Nearing End*, Politico, UNDER THE RADAR BLOG (Feb. 2, 2012), http://www.politico.com/blogs/under-the-radar/2012/02/holder-cia-interrogation-probe-nearing-end-113313.html.

245. DOJ-OPR Report, *supra* note 81, at 235–36.

246. *Id.*

247. *Id.*

in tribunal findings that they were guilty of war crimes and crimes against humanity.[248]

Another step taken by President Obama was his signing of an executive order to create a formal system for indefinite detention for those held at Guantánamo.[249] According to authors Peter Finn and Anne Kornblut, the order applies to forty-eight of the 172 detainees who were at Guantánamo at that time.[250] Conversely, the DOJ is vigorously pursuing the prosecution of John Kiriakou, a former CIA officer and author of his book, *The Reluctant Spy: My Secret Life in the CIA's War on Terror* and articles that appeared in the *New York Times*, for having allegedly disclosed classified information about the interrogation of one of the fourteen high-level detainees and other information, including the identify of a CIA operative.[251]

X. THE CONSEQUENCES OF IMPUNITY PAST

A. The Nuremberg Judgment

World War I ended in 1918 after a conflict of incredible proportions of human and property destruction as a result of degrading conduct perpetrated on both combatants and civilians, but the epoch was marked by the absolute impunity of the most senior officials who both commenced and conducted the hostilities.[252] The difference between ignoring impunity in 1918 by the international community and holding similar actors accountable for it in 1946 under the Nuremberg Principle is quite dramatic.[253] The Nuremberg Judgment defined the responsibility under War Crimes for "violations of the laws or customs of war . . . including ill-treatment of prisoners of war . . . not justified by military necessity" and under Crimes Against Humanity for "deportation, and other inhumane acts committed against any civilian population . . . whether or not in violation of the domestic law of the country where perpetrated."[254] Nuremberg Principle I states "any person who commits an

248. The Nuremberg Trials: The Justice Trial, United States of America v. Alstotter, 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 ANN. DIG. 278 (1948). Conducts amounting to gross violations of human rights were under consideration in these trials with the admonition that "judges should not be eager enlisters in popular movements of the day, or allow themselves to become so immersed in a professional culture that they are oblivious to the human consequences of their decisions." *Id.* at 5 (including the comments by Richard A. Posner).

249. Peter Finn and Anne E. Kornblut, *Obama Creates Indefinite Detention System for Prisoners at Guantánamo Bay*, WASH. POST (Mar. 7, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/03/07/AR2011030704871.html.

250. *Id.*

251. *Former CIA Officer John Kiriakou Charged with Disclosing Covert Officer's Identity and Other Classified Information to Journalists and Lying to CIA's Publications Review Board*, Office of Public Affairs, U.S. DEP'T OF JUSTICE (Jan. 23, 2012), http://www.justice.gov/opa/pr/2012/January/12-ag-083.html.

252. Mary Margaret Penrose, *The Emperor's Clothes: Evaluating Head of State Immunity under International Law*, 7 SANTA CLARA J. INT'L L. 85, 99–101 (2010). The Kaiser escaped despite "the promise in the Treaty of Versailles, unequivocally asserted they would prosecute Kaiser Wilhelm II." *Id.* at 100.

253. ADAM ROGERS & RICHARD GUELLF, DOCUMENTS ON THE LAWS OF WAR 175–76 (3d ed. 2005). The authors' prefatory note to the 1946 Judgment of the International Military Tribunal At Nuremberg that stated that "the Nuremberg tribunal focused attention on many issues of central importance to the application of the laws of war, including the responsibility of individuals to observe international laws 'together with' the question of obedience to superior orders." *Id.*

254. *Id.* at 177 (Judgment at Nuremberg extracts, the Charter provisions under article 6 of the Charter).

act that constitutes a crime under international law is responsible therefore liable to punishment" and Principle III declares that "the fact that the person is a head of state to responsible government official does not relieve him from responsibility under international law."[255] Furthermore, under Nuremberg's Principle IV, the fact that an accused was "acting pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."[256]

The Nuremberg Judgment held for an individual's responsibility for war crimes and crimes against humanity applicable equally to cases of torture or rendition, thus its judgment repudiates acting with impunity for these gross violations of international law.[257] The Nuremberg Principles were then embodied in The Universal Declaration of Human Rights (UDHR), The Geneva Conventions of 1949 and its Additional Protocol I, Relating to the Protection of Victims of International Armed Conflicts (Geneva 1949, Protocol I), and the ICCPR.[258] This body of international instruments delineates the obligations for any individual, including the heads of state or other high-level government officials, in cases involving humanitarian or human rights law.[259]

B. The Ongoing European Union Concerns

In July 2006, the Organization For Security And Cooperation In Europe (OSCE) met in Brussels and as part of its resolutions for that meeting, addressed the rise of the unlawful practices of rendition in the wake of the war on terrorism that appeared to "violate most fundamental human rights and freedoms and are contrary to international human rights treaties which form the cornerstone of the post-World War II human rights protection."[260] The earlier referenced UNCHR 2006 Report noted the "consistent reports about the practice of rendition and forcible return of Guantánamo detainees to countries where they were at risk of torture," including European Union member states.[261]

The OSCE's efforts gained momentum at that time, after which the organization went a step further through its Parliamentary Assembly (OSCE PA) and demanded that OSCE member states promptly and thoroughly investigate all

255. *See* PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED IN THE CHARTER OF THE NUREMBERG TRIBUNAL AND IN THE JUDGMENT OF THE TRIBUNAL, 1950 GAOR, 3d Sess. Supp. No 12 (A/1316), Principles I and III.

256. *Id.* at Principle IV.

257. ROGERS & GUELLF, *supra* note 252.

258. Universal Declaration of Human Rights, 1948; U.S. G.A. Res. 217A, 3 U.N. GAOR, U.N. doc. A/810, at 71 (1948), *available at* http://www.un.org/en/documents/udhr; CAT, *supra* note 29; ICCPR, *supra* note 30; Geneva Conventions of 1949, *supra* note 28; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter Protocol I]; 1125 U.N.T.S. (1979) 3–608; 16 I.L.M. 1391–441 (Eng.). The United States is not a party to Protocol I, however its provisions, and particularly article 75, provide the fundamental guarantees that preclude torture of all kinds whether physical or mental and outrages upon personal dignity. *Id.* at art. 75.

259. Protocol I, *supra* note 258.

260. Brussels Declaration of the OSCE Parliamentary Assembly and Resolutions Adopted at the 15th Annual Session, Brussels, Report of July 3–7, 2006, at 40 [hereinafter OSCE Report of July 2006].

261. UNCHR Report of 2006, *supra* note 202, at 18.

allegations that "their territory has been used to assist CIA chartered flights secretly transporting detainees to countries where they may be subject to disappearance, torture or other ill-treatment."[262] The OSCE Report of July 2006, cited earlier, specifically called on the United States to "reconsider its position in relationship to the usefulness of detaining prisoners in this way and the contribution this is making to the common struggle against terrorist acts."[263] These practices were viewed to "violate the most fundamental human rights and freedoms that are contrary to international human rights treaties which form the cornerstone of the Post World War II human rights protections."[264] The United States is one of fifty-six member states of OSCE, participates in its PA and its delegates have held positions as high as the organization's presidency in previous years.[265] In the period following the OSCE Brussels Declaration of July 2006, the United States refused to cooperate with the investigations required by paragraphs twenty-five or twenty-six of the PA's mandate.[266]

The Congressional Research Service report published in May 2012 for Congress confirmed the escalation of ongoing differences between the United States and the EU over "terrorist detainee policies and practices" including the practices of *rendition*, and was coupled with the failure of the Obama Administration to close the Guantánamo detention facility.[267] The efforts to mute the issue on the domestic front by suspending legal opinions, renouncing torture and rendition, closing investigations into deaths of detainees or immunizing the CIA is unlikely to satisfy the United Nations or the European Union communities, including OSCE, because their official organs do not intend to cease the efforts to fully investigate all aspects of rendition involving the United States and the CIA that directly involved their member states. Romania's complicity requires that it may face a European Union High Court challenge over its involvement in detention and torture of a detainee, al-Nashiri, in cooperation with the CIA.[268] This comes on the heels of an EU Committee to Prevent Torture (CPT) November 2011 report that focused in part on Romania's cooperation with the United States CIA in detention and torture of United States captives.[269]

262. OSCE Report of July 2006, *supra* note 260, at 42 ¶ 25.

263. *Id.* at 42 ¶ 26.

264. UNCHR Report of 2006, *supra* note 202, at 18.

265. *Who we are and what we do*, ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE (OSCE), http://www.osce.org/who; http://www.osce.org/what (last visited Feb. 26, 2013).

266. OSCE Report of July 2006, *supra* note 260, at 42, ¶ 25 & 26.

267. Kristen Archick, CONG. RESEARCH SERV., U.S.–E.U. Cooperation Against Terrorism, (2002) 17–18. In a footnote to her paper Ms. Archick identifies multiple problems which are the cause of that friction, which include the "EU Investigation of CIA Flights May Threaten Intelligence Cooperation," which she quoted from an Associated Press, February 28, 2007 article. *Id.* at 18, n.37.

268. *Romania Faces European Court Challenge over CIA Basement Prison*, OPEN SOCIETY FOUNDATION (Aug. 6, 2012), http://www.soros.org/press-releases/romania-faces-european-court-challenge-over-cia-basement-prison. "[T]he EU high court is being asked to address Romania's involvement in the torture and detention," an inquiry that could directly affect Romania's difficulties post-accession to the EU to ensure fulfillment of its human rights obligations. *Id.*

269. *Council of Europe Anti-Torture Committee visits Romania*, Council of Europe, EUROPEAN COMMITTEE TO FOR THE PREVENTION OF TORTURE (CPT) (Sept. 23, 2010), http://www.cpt.coe.int/documents/rom/2010-09-23-eng.htm. "[T]he delegation had a meeting with . . . Vice President of the Senate in order to discuss the issue of the alleged existence . . . of secret detention facilities on Romanian territory operated by the Central Intelligence

The United Nations Special Rapporteur's Report of 2007 similarly documented the infamous case of Khalid El-Masri, a German citizen, who was detained for twenty-three days while on vacation at the Macedonian border in 2006 by its security forces, and then forcibly transferred to the custody of the CIA, where he was then renditioned to Kabul, Afghanistan and held for several months before being released in a remote location in Albania.[270] During this detention at a CIA "black site," El-Masri was subjected to harsh interrogation and torture, despite his protestations that he was not the terrorist the CIA was seeking.[271] His subsequent claims for reparations or compensation were foreclosed in the federal courts and denied a hearing by the United States Supreme Court; however, El-Masri's case was filed against Macedonia for the acts of their security forces and recently heard in Strasbourg by seventeen justices of the European Court Of Human Rights in May, 2012, which resulted in a favorable decision by the justices of this tribunal that awarded him damages for the wrong conduct.[272] The *El-Masri* federal case decision typifies the result in almost all other post 9/11 detainee claims brought before him in the United States federal courts.[273] Most of those cases have been dismissed on multiple grounds that often include the "States Secrets Doctrine," which effectively prevents the pursuit of the claimant's action because it will require disclosure of "state secrets,"[274] but is somewhat surprising because Holder supposedly imposed new limits on the government assertion of the state secrets privilege in September 2009.[275]

This government action thwarting the required action remains incompatible with the obligations of the United States under ICCPR and CAT, together with the generally recognized obligations of "state responsibility" under contemporary

---

Agency (CIA) of the United States." *Id.* The full report of this visit is in published in 2011 French, but could not be translated for this paper.

270. Special Rapporteur's Second Report on Detentions & Illegal Transfers 2007, *supra* note 218, at 49–51. Mr. El Masri's case filed against CIA officials were summarily dismissed in the United States federal court system based primarily on the successful assertion of the "State Secrets Doctrine," which has successfully thwarted the claims of numerous other detainees who were either tortured, rendition or both for which they unsuccessfully attempted to seek compensation or reparations for the wrongs perpetrated by US authorities. *Id.* at 51–55; El-Masri v. United States, 479 F.3d 296, 301 (4th Cir. 2007), *cert. denied* 552 U.S. 947 (2007).

271. Special Rapporteur's Second Report on Detentions & Illegal Transfers 2007, *supra* note 218.

272. Sinisa Jakov Marusic, *Strasbourg Hears Macedonia Rendition Case in Balkan Insight*, (May 5 2012), http://www.balkaninsight.com/en/article/strasbourg-scrutinizes-macadenia-in-rention-case. The United States is not a member of the European Union or a party to the case so will not be affected by the outcome. El-Masri v. the former Yugolslav Republic of Macedonia, Application no. 39630/09 (Eur. Ct., Dec. 13, 2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621#{"itemid":["001-115621"]}.

273. *See* Statement of Jamil Dakwar, Lack Of United States Accountability And Remedy For Tortures And Abuse In The Name Of Counterterrorism, submitted to OSCE Human Dimension Implementation Meeting at Warsaw Poland, (Sept. 28, 2011), 4–6, *available at* http:/www.osce.org/odihr/83140.

274. *Id.*

275. *See* Charlie Savage, *Justice Department to Limit Use of State Secrets Privilege*, N. Y. TIMES (Sept. 23, 2009), *available at* http://www.nytimes.com/2009/09/23/us/politics/23secrets.html?_r=1&pagewanted=print (stating that a Justice Department Official asserted that there would be a "responsible use" of the privilege after the change of policy); *see* Human Rights *First* Report Card January—Assessing the Obama Administration's Record of Compliance with the Rule of Law and Human Rights in National Security Policy, 3.

international law.[276] Ian Brownlee expressed the principal of this obligation of a state referring to the 1927 *Massey* case as follows:

> I believe that it is undoubtedly a sound general principle that wherever there is misconduct on the part of persons in state service, whatever may be their particular status or rank under domestic law, results in the failure of a nation to perform its obligations under international law, then the nation's government is obligated to accept responsibility for the wrongful acts of its servants.[277]

Considering the ILC's Draft Articles on Responsibility of States for International Wrongful Acts, which includes the violations of international treaties, agreements or conventions, provides the confirmation of the internationally recognized responsibility of a state under international law that has been thoroughly addressed in international jurisprudence.[278] The ILC's Article 31 Reparations states "1. The responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act; 2. Injury includes any damage whether material or moral caused by the internationally wrongful act of the state."[279] As a general proposition, if each time a detainee who is a victim of torture or rendition, or a combination of those two and harsh interrogation, files a claim with the United States courts for reparations or compensation based on violations of CAT, ICCPR, or our domestic law, only to find that claim dismissed based on the assertions of the government to prevent the victim from obtaining reparations or compensation, then the government must be seen as continuing to act with impunity as to the enumerated obligations under CAT and ICCPR.[280] When the government of any State, whether by its executive, legislative and judicial branches, acts to systematically prevent the claimant/victim's successful assertion of a rightful claim for reparations or compensation as a consequence of torture or rendition, it expresses an impunity to the basic international norms and obligations that have been repeatedly identified

276. ICCPR, *supra* note 30, at arts. 9, 14; CAT, *supra* note 29; *see* Int'l Law Commission Draft Articles of State Responsibility, 2001.

277. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 432–33 (Oxford, 2003). *Massey* involves a claim by the United States against Mexico "based on their failure to take action to punish the killer of an American citizen who was working in that country." *Id.*; *see* RIAA iv. 153 (1927) (referring to the action on behalf of the widow of the decedent).

278. *See* Simon Olleson, *The Impact of The ILC's Articles on Responsibility of States for International Wrongful Acts*, BRIT. INST. INT'L & COMP. L. 191–93 (2011), *available at* http://www.biicl.org/files/3107_impact ofthearticlesonstate_responsibilitypreliminarydraftfinal.pdf.

279. ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), art. 31(5).

280. ICCPR, *supra* note 30, art. 31; CAT, *supra* note 29, art. 14; Alien's Action for Tort, 28 U.S.C. § 1350, Torture Victim Protection Act of 1991, Pub. L. No. 102–265, 106 Stat. 73 (1992); *see* Eric Engle, *The Torture Victims' Protection Act, The Alien Tort Claims Act, and Foucaults Archaeology of Knowledge*, 67 ALB. L. REV., 501, 504–10 (2004) (delineating the obstacles to presenting a successful claim under either of the latter footnoted U.S. legislation, which has been the case for any detainee who have attempted to invoke these laws or other grounds).

in this paper.[281] The previously referenced "signing statement" by the United States to the ICCPR in 1992 specifically addressed the requirements for "effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or miscarriage of justice may seek, and where justified, obtain compensation," but the current practice amounts to nothing more than a stark repudiation of those obligations—"acting with impunity."[282]

XI. CONCLUSIONS: THE CONTINUED COURSE OF IMPUNITY

The current administration's record confirms that it finds itself unable to detach from at least some of the practices of the prior administration, and is now also obligated to defend them. Providing "immunity" for all officials demonstrates impunity to the requirement for holding individuals responsible for violation of international conventions and treaties to which the United States is a party.[283] The United States Congress has shown no interest to further efforts related to any compensation for torture or rendition of the detainees beyond the Senate Report of 2008.[284] The fact that the Obama Administration avoided its obligation to provide such compensation or reparations to *any* detainees under international law principles or domestic law—aided by United States court decisions closing the door on those claims—continues to conflict with the expressly signed statement to the ICCPR that recognized an obligation.[285] The ongoing conduct of indefinite detention, selective rendition and the military commission trials at Guantánamo remain the benchmarks of this continuum. The actions of the UNCHR, OCSE—and even in other states in the case of trials of CIA operatives in absentia in Italy—may occur, but with no appreciable effect on the current United States practices toward detainees, but may serve as a precursor to change during succeeding administrations with the continuance of the war on terror. The immunity provided for officials and actors in the matter of torture and rendition will stand based on the recognized "function of immunity . . . to privilege certain voices and silence others," suggested by authors Charles and Chinkin.[286] The conclusion here may conflict with the ideas expressed by Epstein and his colleagues regarding the courts and civil liberties in times of crises, but the war on terror is significantly different. The more precise models of the World War II paradigm may be less applicable to post-conflict change in a State's court handling of detainees' reparations cases in cases of detainees during a "war on terror,", but

281. ICCPR, *supra* note 30, at art. 31; CAT, *supra* note 29, at art. 9, at 14; Geneva Conventions of 1949 III, *supra* note 28.

282. ICCPR, *supra* note 30, at art. 31.

283. CAT, *supra* note 29, at art. 12; ICCPR, *supra* note 30, at arts. 2(3)(a–c) (relative to duties to investigate and enforce the instruments obligations in cases of violations).

284. HOUSE REPORT OF 2008, *supra* note 4.

285. ICCPR, *supra* note 30.

286. HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 125 (3d ed. 2000).

this serves as no justification for the United States' continued impunity respecting its core international obligations in during the ongoing conflict.[287]

287. Lee Epstein et al., *The Supreme Silence During War*, at 50–54, NYU.EDU, http://www.nyu.edu/classes/nbeck/q2/king.propensity.pdf (last visited Feb. 10, 2013); *Getting Away with Torture—the Bush Administration and Mistreatment of Detainees*, HUMAN RIGHTS WATCH 67–70 (July, 2011), *available at* http://www.hrw.org/sites/default/files/reports/us0711webwcover.pdf (confirming that no U.S. court case has resulted in an award for any post 9/11 detainee who was a victim of torture).