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THE BUSH-CHENEY LEGACY: SERIAL TORTURE AND FORCED DISAPPEARANCE IN MANIFEST VIOLATION OF GLOBAL HUMAN RIGHTS LAW

Jordan J. Paust *

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INTRODUCTION

Despite repetition of manifestly unacceptable claims and memo-facilitation of unmistakable criminal behavior that was widespread and systematic, what former President Bush and former Vice President Cheney finally admitted was their Administration’s “program” of “tough” interrogation and secret detention or forced disappearance¹ had actually become a catalyst for reaffirmation of fundamental

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1. See, e.g., GEORGE W. BUSH, DECISION POINTS 170 (2010) (noting that Bush admitted authorizing waterboarding, which is decidedly torture); JANE MAYER, THE DARK SIDE 150 (noting an early 2002 meeting of Yoo, Gonzales, Addington, Flanigan, and Haynes discussing “what sorts of pain” to inflict), 185 (noting conflicts between Addington and Bellinger), 198–99 (noting that Addington, Gonzales, Haynes, Goldsmith, and others had flown to Guantánamo in September 2002 to discuss and observe use of patently unlawful Survival Evasion Resistance and Escape tactics on detainees who were still held in secret detention or forced disappearance), 304, 307, 311–12 (noting the facilitating role of Gonzales) (2008); JOSE RODRIGUEZ, HARD MEASURES (2012) (containing admissions regarding waterboarding and other coercive tactics by former Deputy Director of Operations); Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VALPARAISO U. L. REV. 1535, 1544–45, 1559–69 (2009) [hereinafter Paust, *Absolute Prohibition*] (noting certain facilitating and abetting roles of Cheney, Addington, Gonzales, Rice, Rumsfeld, Tenet, Ashcroft, Yoo, Bybee, Haynes, Bradbury, Rizzo, Feith, Philbin, Flanigan, Goldsmith, and others); Report, *Senate Armed Services Committee Inquiry Into the Treatment of Detainees in U.S. Custody* (Nov. 20, 2008), available at http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf; Majority Staff Rep., House Committee on the Judiciary, *Reining in the Imperial Presidency: Lessons and Recommendations Relating to the Presidency of George W. Bush*, 110–46, 136 (Jan. 13, 2009), <http://judiciary.house.gov/hearings/printers/110th/IPres090113.pdf> (“According to Col. Wilkerson, Secretary Powell had also been troubled by the President’s role in authorizing these harsh interrogation techniques; in Secretary Powell’s view, Mr. Bush was ‘complicit’ in these abuses.”); Julian E. Barnes, *CIA Can Still Get Tough on Detainees*, L.A. TIMES, Sept. 8, 2006, at A1; John Donnelly & Rick Klein, *Bush Admits to CIA Jails; Top Suspects Are Relocated*, BOS. GLOBE, Sept. 7, 2006, at A1; Dan Eggen, *Cheney Defends “Dunk in the Water” Remark*, WASH. POST, Oct. 28, 2006, at A2; Ken Herman, *Bush Confirms Secret Prisons, Denies Torture*,

human rights, as well as basic human protections and duties under the laws of war. One major development with respect to human rights law, and related laws of war, during the last decade has been the continued rejection by various actors in the international community of shameful and outrageous claims of the Bush-Cheney Administration. Various members of their Administration have been reasonably accused of authorizing or facilitating a number of interrogation tactics that were clearly torture and others that were clearly cruel, inhuman, and/or degrading treatment in patent violation of customary and treaty-based international law.² The

ATLANTA J.-CONST., Sept. 7, 2006, at 1A (noting that the CIA secret detention program “had held about 100 detainees”); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; Mark Silva et al., *Bush Confirms Use of CIA Secret Prisons*, CHI. TRIB., Sept. 7, 2006, at 1; R. Jeffrey Smith, *Bush Says in Memoir He Approved Waterboarding*, WASH. POST, Nov. 4, 2010, at A2 (noting that Cheney had also said that he “was a big supporter of waterboarding”); *Bush Unrepentant*, THE NEW ZEALAND HERALD, June 4, 2010, at 10; *Jonathan Karl Hosts ABC’s This Week*, (ABC television broadcast Feb. 14, 2010), available at 2010 WLNR 3128836 (Cheney: “I was a big supporter of waterboarding. I was a big supporter of the enhanced interrogation techniques.”); Marlise Simons, *Spanish Court Weighs Criminal Inquiry on Torture for 6 Bush-Era Officials*, N.Y. TIMES, Mar. 29, 2009, at A6 (describing the possible indictments of Gonzales, Yoo, Addington, Feith, Bybee, and Haynes); NPR: *All Things Considered* (NPR radio broadcast May 20, 2009), available at 2009 WLNR 9628215 (recording of Ari Shapiro stating that Gonzales “signed off” several times on the use of a number of harsh tactics several months prior to the August 2001 Bybee torture memo); Ximena Marinero, *UN Torture Investigator Calls on Obama to Charge Bush for Guantánamo Abuses*, JURIST (Jan. 21, 2009, 8:31 AM), <http://jurist.org/paperchase/2009/01/un-torture-investigator-calls-on-obama.php>; see *infra* Torture Timeline, Appendix.

See JOHN YOO, *WAR BY OTHER MEANS* ix, 18, 35–40, 43–44, 171–72, 187, 190–92, 200, 231 (2006). John Yoo wrote that he had also flown with other lawyers to Guantánamo Bay, Cuba in early January 2002. *Id.* Those lawyers knew that persons transferred to Guantánamo were held in secret detention because their names were not released. Such conduct constitutes a form of forced disappearance, a crime against humanity that during an armed conflict is also a war crime. See, e.g., Paust, *Absolute Prohibition*, *supra*, at 1539 n.21.

2. See, e.g., THE UNITED STATES AND TORTURE (Marjorie Cohn ed. 2011); M. CHERIF BASSIOUNI, THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION (2010); CHRISTOPHER L. BLAKESLEY, TERROR AND ANTI-TERRORISM (2006); MARJORIE COHN, COWBOY REPUBLIC: SIX WAYS THE BUSH GANG HAS DEFIED THE LAW (2007); MARK DANNER, TORTURE AND TRUTH (2004); JOHN W. DEAN, WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH (2004); AMOS N. GUIORA, CONSTITUTIONAL LIMITS ON COERCIVE INTERROGATION (2008); SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004); PETER JAN HONIGSBERG, OUR NATION UNHINGED: THE HUMAN CONSEQUENCES OF THE WAR ON TERROR (2009); JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER (2006); THOMAS MICHAEL McDONNELL, THE UNITED STATES, INTERNATIONAL LAW, AND THE STRUGGLE AGAINST TERRORISM 47–57, 60 (2009); JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR (2007); PHILIPPE SANDS, TORTURE TEAM (2008); MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS 129–30, 181–95 (2010); Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2086, 2094 (2005); Karima Bennouna, “To Respect and to Ensure”: Reconciling International Human Rights Obligations in a Time of Terror, 97 PROC., AM. SOC’Y INT’L L. 23, 24 (2003); Astrid Birgden & Michael Perlin, “Where the Home in the Valley Meets the Damp Dirty Prison”: A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings, 14 AGGRESSION & VIOLENT BEHAVIOR 256, 257–58 (2009); David Brennan, *Torture of Guantánamo Detainees with the Complicity of Medical Health Personnel: The Case for Accountability and Providing a Forum for Redress for These International Wrongs*, 45 U.S.F. L. REV. 1005 (2011); Alan W. Clarke, *Rendition to Torture: A Critical Legal History*, 62 RUTGERS L. REV. 1 (2009); Marjorie Cohn, *Advising Clients to Commit War Crimes With Impunity: An Unethical Practice*, 10 SEATTLE J. SOC. JUST. 249 (2011); Joan Fitzpatrick, *Rendition and Transfer in the War Against Terrorism: Guantánamo and Beyond*, 25 LOY. L.A. INT’L & COMP. L. REV. 457 (2003); Richard Goldstone, *Combating Terrorism: Zero Tolerance for Torture*, 37 CASE W. RES. J. INT’L L. 343 (2006); Amos N. Guiora, *Human Rights and Counterterrorism: A Contradiction or Necessary Bedfellows?*, 46 GA. L. REV. 743, 747–50 (2012); Amos N. Guiora & Erin M. Page, *The Unholy Trinity: Intelligence, Interrogation and Torture*, 37 CASE W. RES. J. INT’L L. 427 (2006); Peter Jan Honigsberg, *Chasing “Enemy Combatants” and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT’L L. & FOREIGN AFF. 1 (2007); Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT’L L. 927, 952–53, 965–66 (2009); David Luban, *The Torture Lawyers of Washington*, in

sordid story of serial criminality that was authorized, aided, and abetted by several members of the Bush Administration (including a number of lawyers) is now generally well known, but certain secretive aspects of the criminal program are still unfolding.

Another major development in the future would involve the imposition of civil and criminal sanctions against those who are reasonably accused of authorizing or

LEGAL ETHICS AND HUMAN DIGNITY 162 (2007); David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005); Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231 (2005); Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 345–73 (2007) [hereinafter, Paust, *Unlawful Authorizations*]; Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 824–51 (2005) [hereinafter Paust, *Executive Plans*]; Jordan J. Paust, *Ending the U.S. Program of Torture and Impunity: President Obama's First Steps and the Path Forward*, 19 TUL. J. INT'L & COMP. L. 151, 152 n.1 (2010) (listing articles of several other text writers, including those of José E. Alvarez, M. Cherif Bassiouni, Benjamin G. Davis, David E. Graham, Aya Gruber, Scott Horton, Peter Margulies, Jamie Mayerfield, Jennifer Moore, Ved P. Nanda, Jens David Ohlin, Leila Sadat, David Scheffer, Evan Wallach, David Weissbrodt & Amy Bergquist, and W. Bradley Wendel); Jordan J. Paust, *Civil Liability of Bush, Cheney, et al. for Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT'L L. 359, 359–61 n.1 (2009) [hereinafter Paust, *Civil Liability*] (listing additional articles of text writers, including those of Aaron R. Jackson, Joseph Lavitt, Manfred Nowak, Gabor Rona, Margaret L. Satterwhite, and Elizabeth Sepper); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007); Michael P. Scharf, Keynote Address at the Michigan State University College of Law Symposium: *The T-Team*, 19 MICH. ST. J. INT'L L. 130, 130–31, 134–35 (2010); Philip Zelikow, *Codes of Conduct for a Twilight War*, 49 HOUS. L. REV. 1 (2012); David Cole, *The Taint of Torture: The Roles of Law and Policy in Our Descent to the Dark Side*, 49 HOUS. L. REV. 53 (2012); Mark Danner, *The Twilight of Responsibility: Torture and the Higher Deniability*, 49 HOUS. L. REV. 71 (2012); World Org. for Human Rights USA, *Indefensible: A Reference for Prosecuting Torture and Other Felonies Committed by U.S. Officials Following September 11th*, at 3–19, 38–156 (Jan. 2012), available at http://www.wcl.american.edu/clinical/documents/Indefensible_A_Reference_for_Prosecuting_Torture.pdf; U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Convention: Concluding Observations of the Human Rights Committee, United States of America*, 87th Sess., July 10–28, 2006, ¶¶ 10, 16, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006), [http://www.unhcr.ch/tbs/doc.nsf/0/34d0a773a44de02bc125725a0034cbdf/\\$FILE/G0645961.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/34d0a773a44de02bc125725a0034cbdf/$FILE/G0645961.pdf); U.N. Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture, United States of America*, 36th sess., May 1–19, 2006, ¶ 14, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006) [hereinafter U.N. CAT Rep.], available at <http://www.state.gov/documents/organization/133838.pdf> (“[The U.S.] should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction . . .”); *id.* ¶ 15 (“[P]rovisions of the Convention . . . apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.”); *id.* ¶ 19 (“[There exists an] absolute prohibition of torture . . . without any possible derogation.”); *id.* ¶ 24 (“[The U.S.] should rescind any interrogation technique, including methods involving sexual humiliation, ‘water boarding,’ ‘short shackling’ and using dogs to induce fear, that constitute[s] torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its *de facto* effective control, in order to comply with its obligation under the Convention.”); Council of Europe Parliamentary Assembly, Res. 1433, *Lawfulness of Detentions by the United States in Guantánamo Bay*, ¶¶ 7(i)–(vi), 8(i)–(iii), (vii)–(viii) (Apr. 26, 2005), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/tA05/ERES1433.htm>; Chairperson of the Working Group on Arbitrary Detention, et al., Rep., *Situation of Detainees at Guantánamo Bay*, U.N. Comm. on Human Rights, 62nd sess., U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) [hereinafter U.N. Experts’ Rep.]; Int’l Comm. of the Red Cross, *ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody* (Feb. 2007) (quoted in Mark Danner, *US Torture: Voices from the Black Sites*, 56 THE N.Y. REV. OF BKS. no. 6 (Apr. 9, 2009), available at <http://www.nybooks.com/articles/22530>), available at http://pegc.us/archive/Organizations/ICRC_rpt_hvd_20070214.pdf; *Torture Victims to Initiate Private Prosecution against George W. Bush on his Arrival in Canada*, CENTER FOR CONST. RTS. (Oct. 19, 2011) (quoting Manfred Nowak, U.N. Special Rapporteur on Torture), available at <http://www.globalresearch.ca/index.php?context=va&aid=27171> (“There is plenty of evidence that President Bush authorized enhanced interrogation methods . . . some of which amount to torture, such as waterboarding.”).

aiding and abetting international crimes, as is required under customary and treaty-based international law.³ Those who are subsequently prosecuted would join the increasing number of former heads of state and other governmental officials that have been prosecuted either in international criminal tribunals or in various domestic courts for authorizing or aiding and abetting conduct in violation of international law.⁴ There is a continuing need to end impunity and, as recognized by the International Military Tribunal at Nuremberg, there can be no immunity under international law⁵ for those who authorize, aid and abet, or perpetrate international crimes and such criminal conduct is *ultra vires* and, therefore, beyond the lawful authority of any state or public official.⁶

I. REJECTION OF NINE FALSE BUSH-CHENEY CLAIMS

Interconnected with the international community's rejection of Bush-Cheney claims that torture, cruel treatment, and inhumane treatment of other human beings can be lawful has been the rejection of a number of specific claims made during their Administration. These claims, made by Bush, Cheney, and their entourage, concerned the reach of human rights laws and the laws of war. For example, there has been notable rejection of their false claims that: (1) relevant human rights laws that are binding on the United States and its citizens do not apply outside United States territory;⁷ (2) human rights laws do not apply during war or armed conflict;⁸

3. See, e.g., JORDAN J. PAUST ET AL., *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 642, 654–55 (3d ed. 2009) [hereinafter PAUST, *LAW AND LITIGATION*] (U.N. G.A. and S.C. resolutions); Paust, *Unlawful Authorizations*, *supra* note 2, at 365–67; Paust, *Executive Plans*, *supra* note 2, at 852–55; Paust, *Absolute Prohibition*, *supra* note 1, at 1537–43, 1553–58 (addressing several specific and manifestly unlawful tactics such as waterboarding, the cold-cell, use of dogs for terroristic purposes, and death threats); Paust, *Civil Liability*, *supra* note 2, at 359–61.

4. See, e.g., ELLEN L. LUTZ & CAITLIN REIGER, *PROSECUTING HEADS OF STATE* (2009); Jordan J. Paust, *Genocide in Rwanda, State Responsibility to Prosecute or Extradite, and Nonimmunity for Heads of State and Other Public Officials*, 34 *HOUS. J. INT'L L.* 57, 74–80 (2011).

5. See Judgment and Opinion, International Military Tribunal (Nuremberg) (Oct. 1, 1946).

6. See *id.* (quoted *infra* note 35); see, e.g., JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW* 29, 33–43, 131–34, 138–42, 168–70 (3d ed. 2007) (noting the lack of immunity under international law for international crimes and violations of human rights law); PAUST, *supra* note 2, at 37–38, 55, 166–67, 174, 196, 258, 261–62; Paust, *Executive Plans*, *supra* note 2, at 853 n.154, 854 n.158; Paust, *Absolute Prohibition*, *supra* note 1, at 1537–43; Paust, *Civil Liability*, *supra* note 2, at 364–74; see Rome Statute of the International Criminal Court, pmbl., 2187 U.N.T.S. 90 (1998). When 160 states met in Rome in 1998 to create the International Criminal Court, they recognized the determination of the international community “to put an end to impunity for the perpetrators” of core crimes under international law. *Id.*

7. See, e.g., Oona A. Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 *ARIZ. ST. L.J.* 389, 390, 393–95, *passim* (2011); Paust, *Executive Plans*, *supra* note 2, at 823 n.43; Paust, *Unlawful Authorizations*, *supra* note 2, at 360 n.40, 371–72, & n.60 (erroneous claim of Gonzales); Paust, *Absolute Prohibition*, *supra* note 1, at 1568 n.97; Johannes van Aggelen, *The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of its Victims*, 42 *CASE. W. RES. J. INT'L L.* 21, 65–68 (2009); U.N. CAT Rep., *supra* note 2, ¶¶ 14–15 (quoted *supra* note 2); *id.* ¶ 18 (“[The U.S. should] prohibit and prevent enforced disappearance in any territory under its jurisdiction . . .”); *id.* ¶ 24 (quoted *supra* note 2); Human Rights Comm. U.S. Rep., *supra* note 2; U.N. Experts’ Rep., *supra* note 2, ¶ 11 (“[O]bligations of the United States under international human rights law extend to the persons detained at Guantánamo Bay.”); *id.* ¶ 83 (“International human rights law is applicable to the analysis of the situation of detainees in Guantánamo Bay.”); Council of Europe Parliamentary Assembly, Res. 1433, *supra* note 2, ¶ 4 (“At no time have detentions at Guantánamo Bay been within a ‘legal black hole.’ International human rights law has at all times been fully applicable to all detainees. For those captured during the international armed conflict in Afghanistan, protection of

(3) alleged necessity can allow deviation from the absolute prohibitions of torture and cruel, inhuman, and degrading treatment under the laws of war and human rights law;⁹ (4) certain detained persons have no rights under applicable laws of war;¹⁰ (5) attempted U.S. reservations to two human rights treaties (which were

certain rights may have been complemented by the provisions of international humanitarian law (IHL) for the duration of that conflict.”); *see infra* note 11; *see infra* Part II.A–C; *but see* Memorandum from Philip D. Zelikow, Counselor to Sec’y of State Rice, The McCain Amendment and U.S. Obligations under Article 16 of the Convention Against Torture 1 (Feb. 15, 2006) [hereinafter Zelikow Memo], *available at* <http://www.gwu.edu/~nsarchiv/news/20120403/docs/Zelikow%20Feb%2015%202006.pdf> (stating that in May 2005, State and Justice Departments thought that the CAT did not apply outside the U.S.).

8. *See, e.g.,* LOUISE DOSWALD-BECK, *HUMAN RIGHTS IN TIMES OF CONFLICT AND TERRORISM* (2011); Paust, *Executive Plans*, *supra* note 2, at 820–23; van Aggelen, *supra* note 7; U.N. CAT Rep., *supra* note 2, ¶ 14 (quoted *supra* note 2); Human Rights Comm. U.S. Rep., *supra* note 2; U.N. Experts’ Rep., *supra* note 2, ¶¶ 15–16 (“The application of international humanitarian law and of international human rights law are not mutually exclusive, but are complementary.”); *id.* ¶ 83; Council of Europe Parliamentary Assembly, Res. 1433, *supra* note 2, at ¶ 4 (quoted *supra* note 7); *see infra* notes 43, 48, Part II.A (there is no contextual limit regarding the reach of U.N. Charter Article 56 duties). The new approach of the Obama Administration is reflected in a recent U.S. Report to the Human Rights Committee of the ICCPR. *See* Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, ¶ 506 (Dec. 30, 2011), *available at* <http://www.state.gov/g/drl/rls/179781.htm> (“[T]he United States has not taken the position that the Covenant does not apply ‘in time of war.’ Indeed, a time of war does not suspend the operation of the Covenant to matters within its scope of application.”); *id.* ¶ 507 (“[I]t is important to bear in mind that international human rights law and the law of armed conflict are in many respects complementary and mutually reinforcing. These two bodies of law contain many similar protections. For example, prohibitions on torture and cruel treatment exist in both . . .”). It should also be noted that despite the fact that some are fond of Latinized phrases as a substitute for law, under customary international law, there is no so-called *lex specialis* substitution of the laws of war for human rights law in the context of war and no treaty contains such a Latinized phrase. *See, e.g.,* Jordan J. Paust, *The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity*, 51 HARV. INT’L L.J. 1 (2010) [hereinafter Paust, *Bound by Human Rights*], *available at* <http://www.Harvardilj.org/online>.

9. *See, e.g.,* Paust, *Executive Plans*, *supra* note 2, at 824, 828, 835–36, 840 n.110; Paust, *Unlawful Authorizations*, *supra* note 2, at 356–58; Paust, *Absolute Prohibition*, *supra* note 1, at 1566; U.N. CAT Rep., *supra* note 2, ¶ 19 (quoted *supra* note 2); U.N. Experts’ Rep., *supra* note 2, ¶ 42.

10. *See, e.g.,* Paust, *Executive Plans*, *supra* note 2, at 817–18 & n.20, 824–34, 839, 841–43, 849–52; Paust, *Unlawful Authorizations*, *supra* note 2, at 349–50, 354, 358; Paust, *Absolute Prohibition*, *supra* note 1, at 1568 n.98; William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 321–22 (2003) (“[Terrorists] are not ‘outside the law.’ . . . [they] forfeit any claim to POW status under the laws of armed conflict, but they do not forfeit their right to humane treatment [under the 1949 Geneva Civilian Convention and] . . . customary law . . . [reflected] in Article 75 of Additional Protocol I to the Geneva Conventions. . . . safeguards to which all persons in the hands of an enemy are entitled.”); Council of Europe Parliamentary Assembly, Res. 1433, *supra* note 2, ¶ 4 (quoted *supra* note 7). *See also* Hamdan v. Rumsfeld, 548 U.S. 557, 629–31 & n.63 (2006) (stating that no gaps in coverage exist under the laws of war with respect to detainees of any status and, at a minimum, common Article 3 of the 1949 Geneva Conventions is applicable during an armed conflict); The Prosecutor v. Delalic, ICTY-96-21-T (Trial Chamber Judgment, Nov. 16, 1998) (“[T]here is no gap between the Third and Fourth Geneva Conventions.”); IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51, 595 (ICRC, Jean S. Pictet ed. 1958); III COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 51 n.1, 76, 423 (ICRC, Jean S. Pictet ed. 1960); HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: MODERN DEVELOPMENTS IN THE LIMITATION OF WARFARE 137 (2 ed. 1998); UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 145, 148, 150, 225 (2004); U.S. DEP’T ARMY, FM 27-10, THE LAW OF LAND WARFARE 31, ¶ 73 (1956) (“If a person is determined by a competent tribunal, acting in conformity with Article 5, . . . not to fall within any of the categories listed in Article 4, . . . he is not entitled to be treated as a prisoner of war. He is, however, a ‘protected person’ within the meaning of Article 4 [of the Geneva Civilian Convention]”); *but see* “Legal Principles” Memorandum from Scott W. Muller, General Counsel, CIA (June 16, 2003). The memo was finalized through exchanges of drafts between Muller, John Yoo and others. *Id.*; *see, e.g.,* Memorandum from Scott W. Muller, General Counsel, CIA, to John Yoo, OLC, DOJ (Apr. 28, 2003), *available at* <http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc17.pdf>; Office of Professional Responsibility, DOJ, Rep. 100-04 (Jul. 29, 2009), *available at*

known to be void *ab initio* as a matter of law) precluded their full reach regarding absolute and peremptory prohibitions of all forms of torture, cruel, inhuman, and other unlawful treatment;¹¹ (6) certain interrogation tactics that had already been recognized as torture were not torture;¹² (7) non-prisoners of war could be lawfully

<http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>; see *infra* Torture Timeline, Appendix. It set forth Bush's, Cheney's and their entourage's false claim that because members of al Qaeda were not POWs they allegedly had no rights under the Geneva Conventions, and the War Crimes Act (18 U.S.C. § 2441) allegedly did not apply. See Memorandum from OGC, CIA [name redacted] to Patrick Philbin, *Legal Principles Applicable to CIA Detention and Interrogation of Captured Al-Qa'ida Personnel* (June 16, 2003) [hereinafter CIA Muller memo], available at <http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc19.pdf>. See, e.g., *Hamdan*, 548 U.S. 557, 627 & n.57. A related ploy was to claim that there are no rights of persons under the 1949 Geneva Conventions, but even a cursory look at their text reveals many express rights and a number of rights that are implied from concomitant duties. *Id.*; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 516 n.43 (2003).

11. First, it was known that attempted reservations to the ICCPR and the CAT were void *ab initio* as a matter of law under the test set forth in the Vienna Convention on the Law of Treaties. See, e.g., Vienna Convention on the Law of Treaties, art. 19(c), 1155 U.N.T.S. 331 (May 23, 1969) [hereinafter Vienna Convention] (stating that attempted reservations are void if they are "incompatible with the object and purpose of the treaty"); U.N. Rep. of the Comm. against Torture, 23d & 24th Sess., Nov. 8–19, 1999, May 1–19, 2000, U.N. ¶¶ 179–80, U.N. Doc. A/55/44; GAOR, 55th Sess., Supp. No. 44 (2000) (noting that putative U.S. reservation is "in violation of the Convention" and unacceptable); Human Rights Comm., General Comment No. 24, *General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant and Optional Protocols*, Nov. 2, 1994, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) ("Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. . . . Accordingly, a State may not reserve the right to . . . torture, to subject persons to cruel, inhuman or degrading treatment or punishment . . ."); Paust, *Executive Plans*, *supra* note 2, at 823 & nn.42–43 (demonstrating why the attempted reservations are void *ab initio* as a matter of law because they are incompatible with the object and purpose of the treaties); Paust, *Unlawful Authorizations*, *supra* note 2, at 370, 372; Zelikow Memo, *supra* note 7, at 1 (paying no attention to relevant provisions of the Geneva Conventions, the ICCPR, the American Declaration of the Rights and Duties of Man in conjunction with the O.A.S. Charter, the Universal Declaration of Human Rights, the U.N. Charter, or customary international law); see *infra* note 51. Concerning this ploy and the CAT, see, e.g., CIA Muller memo, *supra* note 10; see *infra* notes 51–52. Second, these absolute prohibitions had already been widely recognized as universally applicable peremptory prohibitions *jus cogens* that obviate any contrary provisions of an international agreement and, necessarily therefore, any contrary putative reservation. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d), cmt. n (3d ed. 1987); Human Rights Comm., General Comment No. 24, *supra*, ¶ 8; Vienna Convention, arts. 53, 64; see *infra* notes 35, 51. Third, it had been well known that what is reflected in the ICCPR's and the CAT's full and absolute prohibitions of torture and cruel, inhuman, and degrading treatment is part of universally binding customary international law that is unavoidably binding whether or not the attempted treaty reservations are void *ab initio* and of no legal effect. See, e.g., RESTATEMENT, § 702(d), cmt. n; Paust, *Executive Plans*, *supra* note 2, at 821–22. Fourth, the same absolute human rights duties under Articles 55, paragraph c and 56 of the U.N. Charter remain in any event.

12. See, e.g., Paust, *Executive Plans*, *supra* note 2, at 834–36, 843; Paust, *Unlawful Authorizations*, *supra* note 2, at 359, 369–73; Paust, *Absolute Prohibition*, *supra* note 1, at 1553–66, 1569; Jordan J. Paust, *Criminal Responsibility of Bush Administration Officials with Respect to Unlawful Interrogation Tactics and the Facilitating Conduct of Lawyers*, in THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE, *supra* note 2, at 285–88 (regarding the second 2002 Bybee memo), 289–92 (regarding the three 2005 Bradbury memos), 294–95 (regarding Rice's conduct and an unintended admission of complicitous action regarding torture); Council of Europe Parliamentary Assembly, Res. 1433, *supra* note 2, ¶ 7(ii) ("[M]any detainees have been subjected to ill-treatment amounting to torture which has occurred systematically and with the knowledge and complicity of the United States Government."); U.N. Experts' Rep., *supra* note 2, ¶ 86 ("Attempts by the United States Administration to redefine 'torture' . . . in order to allow certain interrogation techniques that would not be permitted under the internationally accepted definition of torture are of utmost concern."); see *infra* notes 62–66 and accompanying text; see also Editorial, 'Beyond Debate,' N.Y. TIMES, May 3, 2012, at A28 (describing that "offensive rationalizations" and dishonesty did not change the fact that persons under the direction of Bush "engaged in [activities which] plainly included torture"). Concerning the ploy that waterboarding was not torture, see, e.g., CIA Muller memo, *supra* note 10 (alleging that use of "the water board" is not torture and does not violate law). This ploy ignored the fact that cruel, inhuman, and degrading treatments are also proscribed under

transferred from occupied territory to secret detention sites and to Guantánamo Bay for coercive interrogation, lawful interrogation, or detention;¹³ (8) the President and his entourage are not bound by the laws of war, and more generally, that they were above the law;¹⁴ and (9) through such manifestly unacceptable ploys, members of the Administration could avoid criminal prosecution for authorizing, aiding, and abetting international criminal conduct.¹⁵

John Yoo, former Deputy Assistant Attorney General in the Office of Legal Counsel of the Department of Justice during 2001-2003, provided a revealing admission that demonstrates why some of these impermissible claims arose early during the Bush-Cheney Administration and what drove Bush, Cheney, Addington, Gonzales, Rice, and others to authorize and abet criminal coercive behavior.¹⁶ As he confirmed, detention, denial of Geneva protections, and coercive interrogation “policies were part of a common, unifying approach to the war on terrorism.”¹⁷

customary and treaty-based human rights and humanitarian law in all circumstances. See *supra* note 11; see *infra* notes 56–60, 66 and accompanying text.

13. See, e.g., Paust, *Executive Plans*, *supra* note 2, at 850–51; Paust, *Absolute Prohibition*, *supra* note 1, at 1567–68; Sadat, *supra* note 2, at 1201–05, 1208–11, 1220–25, 1227–38; Council of Europe Parliamentary Assembly, Res. 1433, *supra* note 2, ¶ 7(vi) (“[T]he United States has engaged in the unlawful practice of secret detention.”); *id.* ¶ 7(vii) (“[T]he United States has, by practising [sic] ‘rendition’ (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and to cruel, inhuman or degrading treatment, in violation of the prohibition of *non-refoulement*.”); *id.* ¶ 8(ix) (noting that the U.S. must “cease the practice of ‘rendition’ in violation of the prohibition on *non-refoulement*”).

14. See, e.g., Paust, *Executive Plans*, *supra* note 2, at 856–61; Paust, *Unlawful Authorizations*, *supra* note 2, at 381–99 (stating that the Framers and numerous cited cases uniformly affirm that the President and all members of the Executive branch are bound by treaty-based and customary laws of war); see *infra* note 25. With respect to the fact that constitutionally-based duties of military personnel are duties to the country, and not merely to the President, see, e.g., *United States v. Lee*, 106 U.S. 196, 220 (1882) (“No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.”); DIANE H. MAZUR, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER 113–15 (2011).

15. See, e.g., Paust, *Executive Plans*, *supra* note 2, at 825–27, 830, 852–55; Paust, *Absolute Prohibition*, *supra* note 1, at 1564–66; Council of Europe Parliamentary Assembly, Res. 1433, *supra* note 2, ¶ 8(ii) (“The Assembly . . . calls on the United States Government to ensure respect for the rule of law and human rights by remedying these situations . . . [and seek] to investigate, prosecute and punish all instances of unlawful treatment of detainees, no matter what the status or office of the person responsible.”); see *infra* notes 35, 50; Paust, *Civil Liability*, *supra* note 2, at 361 (“Prosecution of several lawyers within the Bush Administration for complicity would be on firm ground, especially with respect to those who wrote memoranda that facilitated the common, unifying plan devised by an inner circle to use torture and other forms of coercive interrogation. As noted . . . , criminal complicity can occur when a person is aware that his or her conduct (e.g., writing a memo stating that waterboarding is not torture) can or will assist or facilitate conduct of a direct perpetrator. The person who aids and abets need not know that the conduct of the direct perpetrator is criminal or, for example, whether the conduct constitutes ‘torture’ or cruel or inhuman treatment. It suffices that an accused was aware of the relevant factual circumstances, and even a direct perpetrator need not have known that his or her act amounted to an inhumane act either in the legal or moral sense. Furthermore, all acts of assistance, by words or acts and omissions, that lend encouragement or support will suffice if the accused knows or is aware that such conduct can or will facilitate the use of an illegal tactic or form of treatment.”). Concerning aiding and abetting, complicity, or accomplice liability, see, e.g., *id.* at 361 n.2; Paust, *Absolute Prohibition*, *supra* note 1, at 1544–45.

16. See YOO, *supra* note 1, at ix, 30, 35, 39–40, 43, 171–72, 178, 187, 190–92, 202.

17. *Id.* at ix. & 30 (noting that in December 2001 and for months thereafter Gonzales chaired the meetings “to develop [such] policy”); *supra* note 1. Concerning the chairing of meetings by Gonzales, see also Paust, *Executive Plans*, *supra* note 2, at 834 n.89, 848 n.138. The Bush–Cheney common plan was actually not fully

Instead of “following the Geneva Conventions,” the inner-circle decided whether such treaty law “would yield any benefits or act as a hindrance.”¹⁸ The inner circle knew that following Geneva law would “interfere with our ability to . . . interrogate,”¹⁹ since “Geneva bars ‘any form of coercion.’”²⁰ For the inner circle, “[t]his became the central issue.”²¹ Contrary to time-honored methods of lawful interrogation to obtain reliable intelligence, “Geneva’s strict limitations on . . . questioning” supposedly “made no sense.”²² They calculated that “treating the detainees as unlawful combatants would increase flexibility in detention and interrogation,”²³ and the question became merely “what interrogation methods fell short of the torture ban and [allegedly] could be used”²⁴ as “coercive interrogation.”²⁵ These interrogation methods actually included unlawful cruel, inhuman, and degrading treatment.²⁶ John Yoo also admitted that “some of the worst possible interrogation methods we’ve heard of in the press have been reserved for the leaders of al-Qaeda that we’ve captured.”²⁷ He stated, with remarkable candor and abandonment, “I’ve defended the administration’s legal

common or unifying among professional lawyers in the Departments of State and Defense or the military services. See *infra* note 68.

18. YOO, *supra* note 1, at 35.

19. *Id.* at 39.

20. *Id.* (emphasis added).

21. *Id.*

22. *Id.* at 39–40.

23. *Id.* at 43. But see *supra* note 10 and accompanying text.

24. YOO, *supra* note 1, at 171; see also *id.* at ix (by focusing “on what constituted ‘torture’ under the law . . . our agents [supposedly, but erroneously] would know exactly what was prohibited, and what was not”); *id.* at 172 (“OLC addressed this question: what is the meaning of ‘torture.’”). This is an example of manifestly unprofessional advice, leaving unstated, for example, the absolute ban under several treaties of the United States and customary international law of cruel, inhuman, and degrading treatment.

25. See *id.* at 172 (“harsh interrogation short of torture”); *id.* at 177 (“Congress banned torture, but not interrogation techniques short of it . . . coercive interrogation [is permitted].”); *id.* at 178 (“Methods that . . . do not cause severe pain or suffering are permitted.”); *id.* at 187 (“American law prohibits torture but not coercive interrogation,” such as “using ‘excruciating pain.’”); *id.* at 190–91 (coercive interrogation was used); *id.* at 192; *id.* at 202 (“[C]oercive interrogation . . . should not be ruled out.”).

This ploy that only torture was banned under U.S. law was manifestly erroneous. First, for example, since the Supreme Court decision in *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942), it had been well known that all of the laws of war (and not merely prohibitions of torture) have been incorporated by reference for criminal sanction purposes through 10 U.S.C. § 818, that violations are thereby offenses against the laws of the United States, and that federal district courts have jurisdiction over all offenses against the laws of the United States under 18 U.S.C. § 3231. See, e.g., JORDAN J. PAUST, M. CHERIF BASSIOUNI, ET AL., INTERNATIONAL CRIMINAL LAW 242–47 (3rd ed. 2007); Paust, *Executive Plans*, *supra* note 2, at 824 n.47. Second, the War Crimes Act, 18 U.S.C. § 2441, had incorporated all provisions of common Article 3 of the 1949 Geneva Conventions by reference for criminal sanction purposes as well as certain other laws of war. See, e.g., *id.*; Paust, *Executive Plans*, *supra* note 2, at 824. Third, treaty-based and customary laws of war and human rights law are part of the laws of the United States and are binding on all members of the Executive branch. See, e.g., RESTATEMENT, *supra* note 11, § 111 and cmts. c, e; PAUST, LAW AND LITIGATION, *supra* note 3, at 120–532; JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7–16, 67–80, 169–73 (2d ed. 2003); Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT’L L. & POL’Y 205, 231–45 (2008); *supra* note 14.

26. YOO, *supra* note 1, at 200. Noting that such tactics were authorized for use in Iraq, see, e.g., Paust, *Executive Plans*, *supra* note 2, at 843, 847 & n.135.

27. John Yoo, *Agreement Reached on McCain Torture Amendment* (National Public Radio broadcast Dec. 15, 2005); see also YOO, *supra* note 1, at 190–91.

approach to the treatment of al-Qaeda suspects and detainees,” including the use of torture.²⁸

In view of such manifestly erroneous claims, and the serial and cascading criminality that had been either purposely or predictably facilitated by use of such claims, it is worth reiterating why treaty-based and customary human rights laws apply globally and in all social contexts, including in contexts of war or armed conflict, and when responding to non-state actor terrorism.

II. THE GLOBAL REACH OF HUMAN RIGHTS LAW

A. Global Reach Under the United Nations Charter

With respect to the United Nations and its entities, a significant mandate appears in Article 55(c) of the United Nations Charter.²⁹ It expressly requires that “the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all.”³⁰ This Charter-based mandate incorporates customary human rights by reference and requires global respect for and observance of such rights. This express obligation of the United Nations also conditions the authority of its entities, such as the Security Council, the General Assembly, and Secretariat, and even individual U.N. personnel.³¹

Members of the United Nations, such as the United States, are similarly bound under Article 56 of the U.N. Charter “to take joint and separate action . . . for the achievement of the purposes set forth in Article 55.”³² Therefore, the United States has the duty to promote through joint and separate action, “universal respect for, and observance of, human rights and fundamental freedoms for all” in accordance with the Charter.³³ Clearly, there are no geographical limits of such an obligation,

28. John Yoo, *President's Power in Times of War*, TRIBUNE-REVIEW (Greensburg, PA), Dec. 25, 2005. Concerning the role that Yoo played, see also Paust, *Executive Plans*, *supra* note 2, at 830–33, 834–35 n.89, 842–43, 856 & n.172, 858, 861–62 & n.198; Paust, *Unlawful Authorizations*, *supra* note 2, at 358 n.27.

29. U.N. Charter art. 55, para. c; *see also* art. 1, para. 3.

30. *Id.* at art. 55, para. c.

31. *See, e.g.*, MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 332–34 (1980); PAUST, LAW AND LITIGATION, *supra* note 3, at 52 and references cited; 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 920, 923 (Bruno Simma, et al., eds., 2d ed. 2002); Paust, *Bound by Human Rights*, *supra* note 8.

32. U.N. Charter art. 56. Article 103 of the U.N. Charter mandates that, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” U.N. Charter art. 103. For this reason, if a particular human rights treaty does not have a universal reach and there is a clash or inconsistency with respect to the universal obligation of a party under the U.N. Charter, the obligation under the U.N. Charter remains extant and “shall prevail.”

33. *See, e.g.*, U.N. Charter arts. 55, para. c, 56; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance With the Charter of the United Nations, U.N. G.A. Res. 2625 (Oct. 24, 1970) (“Every State has the duty to promote through joint and separate action *universal* respect for and observance of human rights” (emphasis added)), 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971); HURST HANNUM, S. JAMES ANAYA, DINAH L. SHELTON, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 83 (5th ed. 2011) (quoting George Aldrich, Acting Legal Adviser, U.S. Department of State, “members of the United Nations have a legal duty to promote respect for and protection of human rights around the world”). Concerning Charter-based human rights duties of states, *see also* International Covenant on Civil and Political Rights, pmbl., 999 U.N.T.S. 171 (Dec. 9, 1966) [hereinafter ICCPR];

and there are no other limits with respect to social contexts, such as those involving measures of self-defense, terrorism, war, or other social violence. More importantly, the International Court of Justice has recognized that “a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter,”³⁴ a recognition that pertains to conduct engaged in by many members of the Bush-Cheney Administration.

With respect to the limits of state authority, lawful delegations of state authority, and non-immunity of individuals accused of international crimes such as war crimes, the International Military Tribunal at Nuremberg recognized that “[h]e who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.”³⁵ Similarly, states, such as the United States, have no authority to violate customary human rights law that can be lawfully delegated.

B. Global Reach Under the International Covenant on Civil and Political Rights

The reach of one of the major human rights treaties, the International Covenant on Civil and Political Rights (ICCPR),³⁶ is also global. The preamble to the ICCPR expressly refers to “the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.”³⁷

Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 1, 42, ¶ 91 (noting a relevant violation “is . . . manifestly incompatible with the principles of the Charter of the United Nations”); Advisory Opinion on the Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 3, 57 (1970) [hereinafter *Advisory Opinion South West Africa*]; *Filartiga v. Pena-Irala*, 630 F.2d 876, 882–83 (2d Cir. 1980); Memorial of the United States (U.S. v. Iran), 1980 I.C.J. Pleadings 82 (Jan. 12) (“[F]undamental rights for all human beings . . . , and the existence of a corresponding duty on the part of every State to respect and observe them, are now reflected, *inter alia*, in the Charter of the United Nations, the Universal Declaration of Human Rights and corresponding portions of the International Covenant on Civil and Political Rights.”); *see infra* notes 34, 37.

34. *Advisory Opinion South West Africa*, *supra* note 33, at 57, ¶ 131. In 1948, two Justices of the U.S. Supreme Court recognized that a racist California law “stands as a barrier to the fulfillment of” the obligation under Articles 55(c) and 56 of the Charter and “[i]ts inconsistency with the Charter . . . is but one more reason why the statute must be condemned.” *Oyama v. California*, 332 U.S. 633, 672–73 (1948) (Murphy, J., concurring, with whom Rutledge, J., joins); *see also id.* at 649–50 (Black, J., concurring, with whom Douglas, J., joins) (“How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?”).

35. Judgment and Opinion, International Military Tribunal, *supra* note 6. *See also* The Prosecutor v. Furundzija, IT-95-17/1-T (Trial Chamber, International Criminal Tribunal for Former Yugoslavia, Dec. 10, 1998), ¶¶ 153, 155, reprinted in 38 I.L.M. 317, 349 (1999) (“[The prohibition of torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. The most conspicuous consequence of this higher rank is that . . . [the proscription of torture] cannot be derogated from by States through international treaties Treaties or customary rules providing for torture would be null and void *ab initio* . . . [and states cannot take] national measures authorizing or condoning torture or absolving its perpetrators.”). This opinion of the ICTY reflects the fact that internal law is no excuse. Concerning this customary precept, *see* Principles of the Nuremberg Charter and Judgment, Prin. II, 5 U.N. GAOR, Supp. No. 12, at 11–14, ¶ 99, U.N. Doc. A/1316 (1950).

36. ICCPR, *supra* note 33.

37. *Id.* pmbl. *See also id.* art. 16 (“right . . . everywhere”). Importantly, other global human rights treaties contain the same express recognition. *See, e.g.*, International Covenant on Economic, Social, and Cultural Rights,

This preamble provision is a recognition that is highly relevant to proper interpretation of the ICCPR and its reach.³⁸ Additionally, Article 2, paragraph 1, of the ICCPR affirms that each party will respect and “ensure to all individuals within its territory and subject to its jurisdiction the rights recognized” in the International Covenant.³⁹

Although the ICCPR is a global treaty and generally applies universally, the Human Rights Committee that operates under the ICCPR has formally recognized

pmb., 993 U.N.T.S. 3 (1966); International Convention for the Protection of All Persons from Enforced Disappearance, pmb., adopted by G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pmb., 1465 U.N.T.S. 85 (Dec. 10, 1984) [hereinafter CAT]; *see also* Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, G.A. Res. 61/171, U.N. Doc. A/RES/61/171 (Dec. 19, 2006), pmb. (“Reaffirming that States are under the obligation to protect all human rights and fundamental freedoms of all persons. . . .”); 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 5, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) (“[A]ll human rights are universal . . . [and] all States . . . have the duty to promote and protect human rights”); Promotion of a Democratic and Equitable International Order, G.A. Res. 55/107, ¶ 5 (“[The resolution] stresses that all human rights are universal . . . and that the international community must treat human rights globally in a fair and equal manner.”); U.N. GAOR 55th Sess., at 3, U.N. Doc. A/RES/55/107 (Dec. 4, 2000); World Conference on Human Rights, Final Declaration and Programme of Action, June 14–25, 1993, § 1, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993) (“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally [and] . . . it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”); Declaration on Principles of International Law, *supra* note 33; Universal Declaration of Human Rights, pmb. (describing the “universal respect for and observance of human rights”), G.A. Res. 217A (III), U.N. GAOR, U.N. Doc. A/810, at 71 (1948).

38. *See, e.g.*, Vienna Convention, *supra* note 11, art. 31(2) (“The context for the purpose of interpretation of a treaty shall comprise, in addition to the text, including its preamble”). As the preamble notes, the creators of the ICCPR were “[c]onsidering” this universal Charter-based obligation when drafting the ICCPR. ICCPR, *supra* note 33, pmb. The fact that Article 16 is another part of the text and refers to a “right . . . everywhere” adds to recognition that the proper interpretation of the ICCPR is that it reaches beyond the territory of a state party. Obviously also, the object and purpose of the ICCPR is to assure that there exist real rights for human beings, and this also informs the meaning of the treaty. *See* Vienna Convention, *supra* note 11, art. 31(1) (“A treaty shall be interpreted in good faith . . . and in light of its object and purpose.”). *See also* Human Rights Comm., General Comment No. 24, *supra* note 11, ¶¶ 7, 11–12. For the principle of *pacta sunt servanda* (which requires performance of a treaty in good faith), *see* Vienna Convention, *supra* note 11, art. 26 (requires parties to a treaty to adhere to its purpose and shared meaning “in such a manner that its purpose can be realized”); *Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), 1997 I.C.J. 7, ¶ 133. Moreover, while interpreting a treaty “[t]here shall be taken into account . . . any relevant rules of international law applicable.” Vienna Convention, *supra* note 11, art. 31(3)(c). The universal reach of human rights obligations under the United Nations Charter (expressly considered and referred to in the preamble to the ICCPR) obviously is relevant international law concerning the reach of obligations under the ICCPR and so are the other treaties and legally relevant instruments addressed. *See supra* note 37. Moreover, if one could only interpret the ICCPR in a manner that creates an unavoidable clash between the global human rights obligations under the United Nations Charter and those under the ICCPR, U.S. obligations under the U.N. Charter would prevail. *See, e.g.*, U.N. Charter art. 103 (quoted *supra* note 32). Article 5, paragraph 2 of the ICCPR declares that “[t]here shall be no restrictions upon or derogations from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, . . . or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.” ICCPR, *supra* note 33, art. 5(2). Further, Article 46 states: “Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations.” *Id.* art. 46. With respect to derogable rights, the Covenant also requires that states adopting derogating measures must assure that they “are not inconsistent with their other obligations under international law.” *Id.* art. 4, para. 1.

39. ICCPR, *supra* note 33, art. 2(1). The language is read as including all individuals who are “within its territory” and all individuals who are otherwise “subject to its jurisdiction,” partly because individuals within the territory of a state are obviously within its jurisdiction and limiting the word “jurisdiction” to territory of a state would make the phrase “and subject to their jurisdiction” nonsensically redundant, operate contrary to general international law that recognizes forms of extraterritorial jurisdiction and responsibility, and operate contrary to the universal reach of human rights obligations under the United Nations Charter that is expressly referred to in the ICCPR and a necessary aid to its proper interpretation. *See also infra* note 40.

that the persons who are protected, or who have rights under the ICCPR, are those who in a given instance are either: (1) within the territory of a party to the treaty, or (2) within its “power or effective control.”⁴⁰ As noted in an article addressing self-defense targeted killings in a foreign country and whether targeted persons have relevant human rights,

the critical question is whether a person being targeted by a drone flying in the airspace of a foreign country is within the jurisdiction, actual power, or effective control of the state using the drone. Such a person is clearly not within the territorial jurisdiction of the state responding in self-defense (unless the person is within territory that is occupied by the responding state and is, therefore, within a related form of territorial jurisdiction) and such a person does not appear to be within the actual “power or effective control” of the responding state. It is evident, therefore, that human rights protections do not pertain.⁴¹

This recognition is also relevant in the context of war. Contrary to claims of the Bush-Cheney Administration,⁴² treaty-based and customary human rights laws apply globally during war and when fighting terrorism.⁴³ Yet, as noted above, those

40. See, e.g., U.N. Human Rights Comm., *Nature of the Legal Obligation Imposed on States Parties to the Covenant*, 80th sess. ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) (“[The treaty rights apply] to all persons subject to their jurisdiction. This means . . . anyone within the power or effective control of the State party, even if not situated within the territory of the State . . . [It] also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained. . . .”); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *Advisory Opinion*, 2004 I.C.J. 226, ¶¶ 108–11 (“[The ICCPR] is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”); PAUST & BASSIOUNI, *supra* note 25, at 812–13, 816; NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW*, 123–25, 135–36, 139 (2008) (“Lack of physical custody must be determined by reference to the level of control actually exercised over the . . . person.”); Paust, *Unlawful Authorizations*, *supra* note 2, at 361 n.40; *cf* MELZER, *supra*, at 125–28 (regarding practice under the 1948 American Declaration of the Rights and Duties of Man, which “does not have a jurisdiction clause”); *but see id.* at 138 (arguing for a far looser standard of “effective control or . . . directly affected” and claiming that “every targeted killing . . . outside the territorial jurisdiction of the operating State brings the targeted person within the ‘jurisdiction’ of that State” and that all that should be required is that a state exercise “sufficient factual control or power to carry out a targeted killing”). With respect, the power to carry out an attack on a particular target (by drone, aircraft, artillery, or long distance sniper fire) is simply not the same as having actual “power or effective control” over the individual, especially if the person has not been captured, cannot be relatively easily captured or otherwise detained, can attempt to run away, or can fight back.

A similar circumstance exists with respect to application of certain protections for persons under the 1949 Geneva Conventions and Geneva Protocol I if they are not “in the hands of” or “in the power of” a party to the conflict or subject to being “treated” or to “treatment” under common Article 3 of the Geneva Conventions (which assumes some control over the person being treated and who has the right to humane treatment). See, e.g., PAUST & BASSIOUNI, *supra* note 25, at 683.

41. Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 264–65 (2011) [hereinafter Paust, *Self-Defense Targetings*].

42. See *supra* note 8 and accompanying text.

43. See, e.g., THOMAS BUERGENTHAL, DINAH SHELTON & DAVID STEWART, *INTERNATIONAL HUMAN RIGHTS* 331–32 (3d ed. 2002); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES* 299–306 (ICRC 2005); RICHARD B. LILICH, ET AL., *INTERNATIONAL HUMAN RIGHTS* 216 (4th ed. 2006); MELZER, *supra* note 40, at 76–78; PAUST, *supra* note 2, at 4, 140 n.35; PAUST & BASSIOUNI, *supra* note 25, at 640 (quoting Johann Bluntschli’s recognition in 1866 that

persons who have human rights in particular instances must be within either the territorial jurisdiction or the actual power or “effective control” of a state or other actor possessing human rights duties. For this reason, and in view of the relevant human rights at stake and the laws of war concerning lawful killing, detention, and treatment of detained persons during war, application of general human rights law does not inhibit lawful military conduct on the battlefield, or more generally,

“[h]uman rights remain in force during war”; *id.* at 653, 676, 811, 813; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 241, ¶¶ 216–20, 345(3); Legal Consequences of the Construction, *supra* note 40, ¶¶ 104–106; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion 1996 I.C.J. 95, 226, 239–40, ¶ 25 (July 8) (“[Regarding derogable rights,] the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4.”); Philip Alston et al., *The Competence of the UN Human Rights Council and Its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the War on Terror*, 19 EUR. J. INT’L L. 183, 192–97 (2008) (offering an extensive survey of international institutional recognitions); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 184–86 (2005); Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 56 (1996); Paust, *Executive Plans*, *supra* note 2, at 820–23 & n.35; Paust, *Self-Defense Targetings*, *supra* note 41, at 265–66; *see also* Paust, *Absolute Prohibition*, *supra* note 1, at 1535–37 (stating human rights law applies in all social contexts, including contexts in which humanitarian law applies); Alfred de Zayas, *The Status of Guantánamo Bay and the Status of Detainees*, 37 U.B.C. L. REV. 277, 281–82, 309–10 (2004); *Ex parte Milligan*, 71 U.S. 2, 119 (1866) (“By the protection of the law human rights are secured [during the U.S. Civil War].”); *The Julia*, 12 U.S. 181, 193 (1814) (Story, J.) (noting that “rights of humanity” pertain in time of war); *Kadic v. Karadzic*, 70 F.3d 232, 242–44 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); 11 Op. Att’y Gen. 19, 21 (1864) (stating “the most sacred questions of human rights” are at stake concerning war-time courts-martial); Second Optional Protocol, Aiming at the Abolition of the Death Penalty, art. 2 (“in time of war”); S.C. Res. 1738, ¶ 9, U.N. Doc. S/RES/1738 (Dec. 23, 2006) (describing the “violations of international humanitarian and human rights law in situations of armed conflict”); S.C. Res. 1265, ¶ 4, U.N. Doc. S/RES/1265 (Sept. 17, 1999); G.A. Res. 63/166, pmbl., U.N. Doc. A/RES/63/166 (Feb. 19, 2009) (“[F]reedom from torture and other cruel, inhuman or degrading treatment or punishment is a non-derogable right that must be protected under all circumstances, including in times of international or internal armed conflict or disturbance.”); *see also* G.A. Res. 62/148, pmbl., U.N. Doc. A/RES/62/148 (Mar. 4, 2008); *see also* G.A. Res. 60/148, pmbl., U.N. Doc. A/RES/60/148 (Feb. 21, 2006); G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 at 206 (Dec. 15, 1989); American Convention on Human Rights, art. 27(1), O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (Nov. 22, 1969) (“In time of war”); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15(1) (“In time of war”), (2) (“lawful acts of war”), Sept. 3, 1953, 213 U.N.T.S. 221, Eur.T.S. No. 5 (1950); Protocol to the American Convention on Human Rights to Abolish the Death Penalty, art. 2, June 8, 1990, O.A.S. T.S. No. 73, O.A.S. G.A. Res. 1042, 20th Sess. (“in wartime”); Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Eur. T.S. No. 114 (1985) (“in time of war”); S.C. Res. 1199, pmbl., U.N. Doc. S/RES/1199 (Sept. 23, 1998) (describing the “violations of human rights and of international humanitarian law”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 72, June 8, 1977, 1125 U.N.T.S. 3 (noting the “other applicable rules of international law relating to protection of fundamental human rights during international armed conflict”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, pmbl., June 8, 1977, 1125 U.N.T.S. 609; G.A. Res. 59/182, pmbl. & ¶¶ 1–2, U.N. Doc. A/RES/59/182 (Mar. 8, 2005) (“Recalling . . . that international instruments relating to human rights offer a basic protection to the human person . . .”); Human Rights Comm., General Comment No. 31, *supra* note 40, ¶ 11 (“[T]he Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While . . . more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”); Human Rights Comm., General Comment No. 29, ¶¶ 3, 9, 11 & n.6, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); Human Rights Comm. U.S. Rep., *supra* note 2; Council of Europe, Parliamentary Assembly, Res. 1433, *supra* note 2, at ¶ 4 (quoted *supra* note 7); *Coard v. United States*, Inter-Am. Comm. H.R. No. 109/99, ¶ 39 (Sept. 29, 1999) (“[C]ore guarantees apply in all circumstances, including situations of conflict” and regarding the law of war and human rights law, “the potential application of one does not necessarily exclude the other. There is an integral linkage . . . because they share a common nucleus of non-derogable rights and a ‘common purpose of protecting human life and dignity’ and there may be a substantial overlap.”); *see infra* note 47.

during an armed conflict.⁴⁴ For example, once a person is detained, he or she is obviously within the actual power or effective control of the detaining power and is entitled to freedom from torture under the laws of war and human rights law.⁴⁵

C. Global Reach Under the Convention Against Torture

Also contrary to the Bush-Cheney Administration,⁴⁶ the international community has reaffirmed that the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁴⁷ applies globally and in all social contexts, including during war and while responding to terrorism.⁴⁸ Its prohibitions of *all* forms of torture and cruel, inhuman, and degrading treatment of persons of any status are absolute, and therefore are without exception.⁴⁹ Protected persons are those detained by a party to the treaty or who are otherwise under its effective control.⁵⁰ A putative U.S. reservation to the Convention, if operative,

44. See, e.g., Paust, *Self-Defense Targetings*, *supra* note 41, at 272–73 & nn.92–94.

45. See, e.g., *id.* at 369–73; Paust, *Executive Plans*, *supra* note 2, at 816–21.

46. See, e.g., Paust, *Unlawful Authorizations*, *supra* note 2, at 369–73 (also addressing other related ploys of Secretary Rice on behalf of the Administration in an attempt to facilitate unlawful treatment of detainees); Paust, *Absolute Prohibition*, *supra* note 1, at 1568 n.97 (regarding a 2002 memo from Bybee to Haynes); Sadat, *supra* note 2, at 1222 (noting that the CAT applies abroad).

47. CAT, *supra* note 37.

48. *Id.* art. 2(2) (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification . . .”); U.N. CAT Rep., *supra* note 2, ¶ 14 (quoted *supra* note 2); *id.* ¶ 15 (quoted *supra* note 2); *id.* ¶ 19 (quoted *supra* note 2); *id.* ¶ 24 (quoted *supra* note 2); *supra* note 46.

49. See, e.g., CAT, *supra* note 37, art. 4(1) (“[All parties] shall ensure that all acts of torture are offences under its criminal law” and “[t]he same shall apply . . . to an act by any person which constitutes complicity or participation in torture” and, therefore, whether or not such person has custody or control over the victim. See also *id.* art. 1(1) (the crime reaches conduct “inflicted by or at the instigation of or with the consent or acquiescence of” certain persons, thereby demonstrating that such persons need not have custody or control of victims)); U.N. CAT Rep., *supra* note 2, ¶ 13 (“[S]ections 2340 and 2340 A of [title 18 of] the United States Code limit federal criminal jurisdiction over acts of torture to extraterritorial cases. The Committee also regrets that, despite the occurrence of cases of extraterritorial torture of detainees, no prosecutions have been initiated under the extraterritorial criminal torture statute. . . . [The U.S.] should enact a federal crime of torture consistent with article 1 of the Convention . . . to prevent and eliminate acts of torture . . . in all its forms. . . . [The U.S.] should ensure that acts of psychological torture . . . are not limited to ‘prolonged mental harm’ as set out in the State party’s understandings lodged at the time of ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or its duration.”); *id.* ¶ 15 (quoted *supra* note 2); *id.* ¶ 19 (quoted *supra* note 2); Paust, *Absolute Prohibition*, *supra* note 1, at 1569–70, 1573.

50. See, e.g., CAT, *supra* note 37, pmbl. (“Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant . . . , both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment . . . [and] [d]esiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment . . . throughout the world.”); Paust, *Executive Plans*, *supra* note 2, at 823 n.43; U.N. CAT Rep., *supra* note 2, ¶ 15 (quoted *supra* note 2); *id.* ¶ 17 (“The State party should ensure that no one is detained in any secret detention facility under its de facto effective control. Detaining persons in such circumstances constitutes, *per se*, a violation of the Convention.”); *id.* ¶ 18 (“The State party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, *per se*, a violation of the Convention.”); *id.* ¶ 22 (“[D]etaining persons indefinitely without charge, constitutes *per se* a violation of the Convention.”); *id.* ¶ 24 (quoted *supra* note 2); *id.* ¶ 25 (“The State party should promptly, thoroughly and impartially investigate all allegations of torture or cruel, inhuman or degrading treatment and punishment by law enforcement personnel and bring perpetrators to justice, in order to fulfill its obligations under article 12 of the Convention.”); *id.* ¶ 26 (“The State party should . . . eradicate all forms of torture and ill-treatment of detainees by its military and civilian personnel, in any territory under its jurisdiction . . .”).

would result in a failure to cover all violations of the Convention and, therefore, the attempted reservation is unavoidably “in violation of the Convention.”⁵¹ As in the case of any attempted reservation that is incompatible with the purpose of a treaty, the attempted reservation to the Convention is void *ab initio* as a matter of law and can have no legal effect.⁵² Additionally, the putative reservation is inconsistent with peremptory rights and duties *jus cogens*, thus it is legally inoperative.⁵³ Therefore, the attempted reservation cannot protect the United States, or any U.S. national, from criminal, civil, or other appropriate sanctions.

III. RELATIVE AND ABSOLUTE HUMAN RIGHTS OF PERSONS

Once an individual is detained by a member of the United Nations and a party to the International Covenant and the Convention Against Torture, it is obvious that such a person is within the actual power or effective control of the member-state party. Therefore, that person has relevant human rights under the United Nations Charter, the International Covenant, and the Convention Against Torture. In general, his or her rights can either be: (1) those of a relative nature because they have certain express limitations or can be derogated from in certain circumstances, or (2) those of an absolute nature. For example, some human rights are set forth in instruments with express and potentially broad limitations,⁵⁴ and some human rights can be derogated from if necessary in time of public emergency threatening the life of the nation and if the derogations are not inconsistent with other obligations under international law (such as the laws of war) and do not involve impermissible discrimination based solely on certain grounds.⁵⁵ However, as is the case under the Convention Against Torture,⁵⁶ several other human rights instruments,⁵⁷ and the laws of war,⁵⁸ Article 7 of the International Covenant

51. See, e.g., PAUST, *supra* note 2, at 190 n.59 (addressing the 2006 U.N. Experts’ Rep. on the Situation of Detainees at Guantánamo Bay, *supra* note 2, that agreed with the decision of the CAT Committee that the putative reservation was “in violation of the Convention.” Conclusions and Recommendations of the Committee against Torture: United States of America, U.N. Doc. A/55/44, at ¶¶ 179–180 (May, 15, 2000)); O’Connell, *supra* note 2, at 1251 (noting the understanding “cannot alter . . . legal obligations under the CAT”); Paust, *Executive Plans*, *supra* note 2, at 823 & n.43; *supra* note 11. Second, the attempted reservation is inconsistent with and obviated by peremptory rights and duties *jus cogens*. See *supra* note 11. Third, the attempted limitation or false understanding is also incompatible with customary international law and U.N. Charter obligations regarding cruel, inhuman, and degrading treatment that pertain in any event. See U.N. Charter, arts. 55(c), 56, 103; *supra* notes 11, 30–34, 37.

52. See, e.g., Vienna Convention, *supra* note 11, art. 19(c); McDONNELL, *supra* note 2, at 58, 60; PAUST, *supra* note 2, at 143–44 n.43, 189–90 n.59; Paust, *Executive Plans*, *supra* note 2, at 823 n.43; *supra* note 11. An attempted declaration of non-self-execution of Articles 1–16 is also completely inconsistent with the object and purpose of the CAT, since several of the articles are phrased in mandatory “shall” language that is typically self-executing. Therefore, the declaration is void *ab initio* under international law, of no legal effect, and should be withdrawn. Moreover, the rights and duties reflected in the Convention Against Torture are part of universally binding customary international law and peremptory *jus cogens* that pertain in any event. *Supra* notes 8, 11, 51.

53. See *supra* note 11.

54. See, e.g., ICCPR, *supra* note 33, arts. 12(3), 18(3), 19(3), 21, 22(2).

55. See, e.g., *id.* art. 4(1).

56. CAT, *supra* note 37, art. 2(2); *supra* notes 48–50.

57. See, e.g., Paust, *Executive Plans*, *supra* note 2, at 820–23; Paust, *Unlawful Authorizations*, *supra* note 2, at 357, 360–64.

58. See, e.g., Paust, *Unlawful Authorizations*, *supra* note 2, at 357, 360, 366–67; Paust, *Executive Plans*, *supra* note 2, at 816–20.

contains an absolute prohibition of torture and cruel, inhuman, and degrading treatment⁵⁹ that is nonderogable.⁶⁰ The prohibition is also customary *jus cogens* that prevails over any inconsistent treaty, attempted treaty reservations, or any inconsistent ordinary (and non-peremptory) customary international law.⁶¹

Part of the Bush-Cheney “common plan” and “program” of tough and coercive interrogation involved authorized and abetted use of tactics, already recognized as torture, that are proscribed under all circumstances, such as: waterboarding or related inducement of suffocation, the cold-cell or related inducement of hypothermia, use of dogs to create intense fear or to terrorize, and threatening to kill a detainee or family members.⁶² For example, at least twenty-nine U.S. federal and state court cases, and three cases from the European Court of Human Rights and the Inter-American Court of Human Rights, recognized that waterboarding or related inducement of suffocation is torture.⁶³ Remarkably, the same recognition was contained in seven U.S. Department of State Country Reports on Human Rights Practices of other countries prior to and during the Bush-Cheney program.⁶⁴ Additionally, fourteen U.S. federal and state court cases, one case in the European Court of Human Rights, and two U.S. Department of State Country Reports on Human Rights had recognized that the cold-cell or related inducement of hypothermia constitutes torture.⁶⁵ The fact that misuse of dogs and death threats can constitute torture also had prior recognition in U.S. cases and U.S. Department of State Country Reports on Human Rights.⁶⁶

All that an attorney in the Bush-Cheney Administration had to do was to turn on his computer and engage in normal computer-assisted research in order to identify numerous U.S. federal and state court cases, the European and American Courts of Human Rights cases, and the U.S. Country Reports. Moreover, there was additional evidence that a number of tactics were torture and that others were cruel or inhumane, including warnings to high level members of the Bush Administration from the International Committee of the Red Cross,⁶⁷ and warnings from a number of lawyers in the Department of State, the Department of Defense, and professional military services. These lawyers were simply ignored when they claimed that use of coercive interrogation was unlawful.⁶⁸ As noted previously, it is

59. ICCPR, *supra* note 33, art. 7; Paust, *Executive Plans*, *supra* note 2, at 820–22; Paust, *Absolute Prohibition*, *supra* note 1, at 1535–37, 1539–40, 1542; *supra* note 35.

60. ICCPR, *supra* note 33, art. 4; *supra* note 35.

61. *See supra* notes 11, 35.

62. *See, e.g.*, Paust, *Absolute Prohibition*, *supra* note 1, at 1553–57, 1559–61, *passim*; Zelikow Memo, *supra* note 7, at 4 (describing threats to kill); *id.* at 6 (“waterboard[ing], walling, dousing, stress positions, and cramped confinement”).

63. *See, e.g.*, Paust, *Absolute Prohibition*, *supra* note 1, at 1553–55 n.69.

64. *See, e.g.*, Paust, *Absolute Prohibition*, *supra* note 1, at 1555–57 n.69.

65. *Id.* at 1555–57 n.72.

66. *Id.* at 1556 nn.70–71. A number of other unlawful tactics were identified. *Id.* at 1557–58 (including stripping persons naked during interrogation and use of prolonged nudity, sexual humiliation, beating, kicking, prolonged shackling, and confinement in a box to create intense fear).

67. *See, e.g.*, Paust, *Executive Plans*, *supra* note 2, at 849–50; Paust, *Absolute Prohibition*, *supra* note 1, at 1558 n.73.

68. *See, e.g.*, PAUST, *supra* note 2, at 3, 6–8, 14–15, 42–43; Paust, *Executive Plans*, *supra* note 2, at 825–26, 829–30, 843.

difficult to believe that persons who attended meetings of the National Security Council's Principals Committee in the White House during 2002 and 2003 would not have realized that tactics often discussed, and in some cases viewed during such meetings (such as waterboarding, the cold-cell, and use of dogs) were torture. If the tactics did not qualify as torture or cruel treatment, they were, at a minimum, manifestly inhumane.⁶⁹ In any event, criminal responsibility for aiding and abetting torture or cruel, inhuman, or degrading treatment does not require knowledge that conduct being facilitated constitutes one of these unlawful forms of treatment of a human being.⁷⁰

IV. DELETERIOUS CONSEQUENCES OF THE UNLAWFUL PROGRAM

As noted in another writing, several deleterious consequences can occur from use of illegal interrogation tactics and secret detention that have been part of the Bush-Cheney common plan and program. These consequences can include: placing our people in harm's way with regard to criminal liability, civil liability, mental harm and impacts on well-being; denial of POW status and combatant immunity; mission failure with respect to production of faulty intelligence; inhibition of cooperative prevention and responses; degradation of our military; degradation of inter-agency cooperation; contribution to the causes of terrorism; aid to the enemy, including rallying the enemy, unwitting support of enemy status and methods, inhibition of prosecution; and deflation of U.S. authority, law, and U.S. power.⁷¹ Clearly, the Bush-Cheney program and Obama's refusal to prosecute are a threat to the rule of law and our fundamental values.

As Justice Ruth Bader Ginsburg aptly noted, in a different circumstance, with respect to "harsh" and "brutal conditions of . . . confinement" of a person detained for sixteen days as a material witness, "[h]is ordeal is a grim reminder of the need to install safeguards against disrespect for human dignity, constraints that will control officialdom even in perilous times."⁷²

CONCLUSION

Quite clearly, the Bush-Cheney program of widespread and systematic torture and cruel, inhuman, and degrading treatment was a serialized affront to human

69. See Paust, *Absolute Prohibition*, *supra* note 1, at 1559–61 & n.76.

70. See *supra* note 15.

71. Jordan J. Paust, *Serial War Crimes in Response to Terrorism Can Pose Threats to National Security*, 35 WM. MITCHELL L. REV. 5201, 5204–20 (2009).

72. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2087 (2011) (Ginsburg, J., concurring).

dignity, which is itself a fundamental human right⁷³ and a venerable constitutional precept.⁷⁴ As noted in another writing,

[t]he full truth about conspiratorial and complicit involvement and the embrace of what Vice President Cheney has correctly described as “the dark side” remains partly hidden. What is evident, however, is that when one walks on the “dark side” with evil one does not walk in the light with God. In this respect, the following recognition made during our Civil War and placed in the 1863 Lieber Code on the laws of war is particularly poignant: “[m]en who take up arms . . . in public war do not cease on this account to be moral beings, responsible to one another and to God.”⁷⁵

“Verily I say unto you, inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me.”

—Matthew 25:40

APPENDIX

TORTURE TIMELINE SEPTEMBER 2001–2007

- Set. 16, 2001 Cheney admits that the Bush Administration needs to walk on “the dark side.”⁷⁶
- Sept. 17, 2001 It is reported that Bush authored a 12-page directive or Memorandum of Notification to the National Security Council allowing the secret detention (which is a crime against humanity) and interrogation of prisoners.⁷⁷
- Nov. 6, 2001 Philbin sends a memo to Gonzales regarding trial of detainees for war crimes but denial of Geneva protections.
- Dec. 2001 Senior lawyers meet for several months.

73. See, e.g., U.N. Charter, pmbl. (stating the reaffirmation of “fundamental human rights, in the dignity and worth of the human person”); CAT, *supra* note 37, pmbl. (“[The Convention recognizes] that . . . [“equal and inalienable rights of all members of the human family”] derive from the inherent dignity of the human person.”); ICCPR, *supra* note 33, pmbl. (“[The Covenant recogni]zes] . . . the inherent dignity and . . . the equal and inalienable rights of all members of the human family.”); Universal Declaration of Human Rights, *supra* note 37, pmbl. (same), art. 1 (“All human beings are born free and equal in dignity and rights.”).

74. See, e.g., Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 HOW. L.J. 145, 149–83 (1984) (documenting use of human dignity in numerous court opinions up to the early 1980s).

75. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, art. 15 (1863) (the 1863 Lieber Code), *reprinted in* JORDAN J. PAUST, M. CHERIF BASSIOUNI, ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 101, 101–02 (2006).

76. PAUST, *supra* note 2, at 12.

77. *Id.* at 28.

- Late 2001 Secret Joint Personnel Recovery Agency (JPRA) memo warns against use of SERE tactics.
- 2002 Presidential finding signed by Bush, Rice, Ashcroft approving waterboarding.⁷⁸
- Jan. 9, 2002 John Yoo and Robert Delahunty coauthor a memo addressed to Haynes that supports denial of Geneva protections.
- Jan. 11, 2002 First detainees arrive at GTMO.
- Jan. 2002 Yoo and others flew to GTMO.⁷⁹
- Jan. 14, 2002 Secret Yoo-Delahunty memo exists regarding the War Crimes Act's application to interrogation.
- Mid-Jan. 2002 Lawyers meet in the White House, consensus eludes group, and Gonzales summarizes for Bush.
- Jan. 22, 2002 Bybee (and possibly Yoo) memo is sent to Gonzales and Haynes denying Geneva law. In his February 7 memo, Bush says he accepted "the legal conclusion" of Bybee's memo.
- Jan. 24, 2002 Secret Yoo memo exists regarding the obligations of the U.S. under international law.
- Jan. 25, 2002 Gonzales memo sent to Bush to deny Geneva law protections.⁸⁰
- Jan. 26, 2002 Powell memo sent to Gonzales and Assistant to President for National Security Affairs regarding Geneva law.⁸¹
- Jan. 26, 2002 Secret Bybee memo exists regarding options for interpreting the Geneva Conventions.
- Feb. 1, 2002 Ashcroft sent a letter to Bush seeking denial of Geneva protections.
- Feb. 2, 2002 Taft sent a memo to Gonzales.
- Early 2002 Yoo, Gonzales, Addington, Flanigan, and Haynes meet to discuss "pain" to inflict.
- Feb. 7, 2002 Bush authorized the denial of Geneva protections.⁸²
- Feb. 26, 2002 Bybee sent Haynes a memo regarding potential domestic legal constraints and the use of information from coercive interrogation of detainees from Afghanistan.
- Mar. 13, 2002 Bybee sent Haynes a memo regarding the transfer of detainees to other countries.
- Mar. 28, 2002 Abu Zubaydah was captured.⁸³

78. *Id.* at 28, 179 n.19.

79. *See supra* note 1.

80. *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>.

81. *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>.

82. 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), available at <http://www.justice.gov/olc/2002/pub-artc4potusdetermination.pdf>.

- Apr. 2002 CIA General Counsel has discussions with Bellinger, Legal Advisor of NSC, regarding the CIA's proposed interrogation plan for Abu Zubaydah.⁸⁴ Bellinger briefs Rice and Gonzales.⁸⁵
- Apr. 2002 Gonzales approves the use of several tactics several times prior to Bybee's August 2002 memo.⁸⁶
- Apr. 2002 CIA videotapes detainee interrogations.
- May 2002 CIA General Counsel attorneys meet with Ashcroft, Rice, Bellinger, Gonzales and others to discuss particular tactics, including waterboarding.⁸⁷ Subsequently, the CIA's Office of General Counsel asks OLC [DOJ] for an opinion.⁸⁸
- July 2002 Bybee meets with Yoo and Ashcroft to discuss SERE tactics.
- July 2002 JPRA sent a memo to Haynes that warns against use of SERE tactics and that waterboarding is equal to "torture".⁸⁹
- July 13, 2002 Yoo sent a letter to CIA Acting General Counsel Rizzo regarding specific intent as it relates to the crime of torture.
- July 13, 2002 Attorneys from the CIA General Counsel Office meet with Bellinger, possibly with Yoo (a Deputy Assistant AG from OLC), Gonzales, and others to "provide an overview of the proposed interrogation plan for Abu Zubaydah."⁹⁰
- July 17, 2002 Rice "conveyed" Bush's "policy authorization" to use waterboarding if OLC will write an opinion granting approval.⁹¹
- July 24, 2002 Facsimile was sent to Yoo regarding psychological assessment of Abu Zubaydah.
- July 24, 2002 Ashcroft okays certain harsh tactics.⁹²
- July 26, 2002 Ashcroft okays waterboarding.⁹³
- Aug. 1, 2002 Two Bybee memos exist—(1) Bybee to Gonzales, and (2) Bybee to Rizzo (the second memo, Bybee to Rizzo, refers to oral approval of tactics on July 24 & 26 and is a smoking gun regarding complicity).
- Aug. 2002 FBI Director Robert Mueller decides that the FBI will not participate in coercive interrogation with military personnel.

83. Senate Select Intelligence Comm., Declassified Narrative: OLC Opinions on the CIA Detention and Interrogation Program (Apr. 17, 2009) [hereinafter Declassified Narrative], available at <http://www.intelligence.senate.gov/pdfs/olcopinon.pdf>.

84. *Id.*

85. *Id.*

86. NPR: *All things Considered*, *supra* note 1.

87. Declassified Narrative, *supra* note 83.

88. *Id.*

89. Peter Finn & Joby Warrick, *In 2002, Military Agency Warned Against 'Torture,'* WASH. POST, Apr. 25, 2009 (noting that a 2002 military report to DOD General Counsel Haynes warned that extreme duress can yield unreliable information).

90. Declassified Narrative, *supra* note 83; PAUST, *supra* note 2, at 28; see also *id.* at 158 n.89 (meetings of Gonzales, Haynes, Addington regarding waterboarding and other unlawful tactics).

91. Declassified Narrative, *supra* note 83; Secretary of State Condoleezza Rice, Remarks at Stanford University (Apr. 27, 2009).

92. Declassified Narrative, *supra* note 83.

93. *Id.*

- Sept. 2002 Goldsmith starts to work with Haynes as Special Counsel in DOD Office of General Counsel.
- Sept. 26, 2002 Addington, Gonzales, Haynes, Goldsmith, Rizzo, Philbin, and others flew to Guantánamo Bay to discuss and observe SERE tactics.
- Oct. 11, 2002 Major General Dunlavey sends memo to General Hill, So. Comm., seeks enhanced interrogation tactics for Guantánamo, and Hill forwarded it to Chairman, JCS.⁹⁴
- Nov. 27, 2002 Haynes prepares an action memo for Rumsfeld.
- Dec. 2, 2002 First Rumsfeld memo created for enhanced interrogation at Guantánamo Bay.
- Dec. 4, 2002 Abu Zubaydah reportedly transferred from secret CIA site in Thailand to secret CIA site near Szymany, Poland.⁹⁵
- Dec. 2002 CIA memo prohibits some tactics but not if “reasonably required” or if specifically approved.⁹⁶
- Jan. 15, 2003 Rumsfeld rescinded general approval of illegal tactics and orders Haynes to set up DOD Working Group.
- Jan. 24, 2003 CIA’s Muller and Rizzo meet with Chertoff, Fisher, Yoo, and other DOJ personnel to discuss detainee abuses and possible criminality. Chertoff warns that the use of a weapon to frighten a detainee could violate the law.
- Jan. 28, 2003 George Tenet sets Guidelines on Interrogation (including waterboarding).
- Jan. 28, 2003 George Tenet sets Guidelines on Confinement.
- Feb. 6, 2003 Alberto Mora and John Yoo meet to discuss torture.⁹⁷
- Mar. 3, 2003 Khalid Sheikh Mohammed is captured and reportedly subjected to waterboarding 183 times in March.⁹⁸ After discussions on January 24 and 28 with CIA’s Rizzo and Muller, Yoo has a draft memo sent to CIA General Counsel Scott Muller, which is used for subsequent CIA Legal Principles or Bullet Points memo in April thru June 2003.⁹⁹
- Mar. 14, 2003 Yoo sent a memo to Haynes regarding illegal tactics.
- Apr. 4, 2003 Mary Walker chairs a DOD Working Group, which issues a Report (allegedly not signed by group).¹⁰⁰
- Apr. 2003 JAGS & Mora protest unlawful tactics.¹⁰¹

94. PAUST, *supra* note 2, at 12–13, 154, 158.

95. *Abu Zubaydah Recognized as a Victim in Poland’s CIA Secret Prison Investigation*, HUMAN RIGHTS HOUSE—POLAND (Jan. 28, 2011), <http://humanrightshouse.org/Articles/15842.html>.

96. *Id.* at 29.

97. *Id.* at 181 n.27.

98. Jane Mayer, *Outsourcing Torture: The Secret History of America’s Extraordinary Rendition Program*, THE NEW YORKER, 145 (Feb. 14, 2005), available at http://www.newyorker.com/archive/2006/10/30/061030ta_talk_mayer.

99. “Legal Principles” Memorandum from Scott W. Muller, General Counsel, CIA (June 16, 2003); see *supra* note 10 and accompanying text.

100. *Id.* at 14.

101. *Id.* at 14–15.

- Apr. 16, 2003 Rumsfeld approves 24/25 recommended tactics, some illegal, and says will approve other tactics at request.¹⁰²
- Apr. 28, 2003 CIA Gen. Counsel Muller has draft of Legal Principles memo sent to Yoo for review and reworking.¹⁰³ Jennifer Koester (for Yoo) does so and sends it back.¹⁰⁴ The Muller draft expressly mentions “the water board,” among other tactics.¹⁰⁵
- May 14, 2003 Yoo sent a memo to Haynes regarding Military Interrogation of Alien Unlawful Combatants Held Outside the United States in which he argues that the Commander in Chief is above the law.¹⁰⁶
- May 30, 2003 John Yoo leaves OLC, DOJ, and is replaced by Pat Philbin.
- June 16, 2003 “Final” Bullet Points memo sent from Scott Muller to Philbin.¹⁰⁷ The memo lists claims to be made why laws allegedly do not apply or are not violated and lists several interrogation tactics, including “the water board.”¹⁰⁸ Philbin notes that such is not an OLC, DOJ memo and might disagree on some points.¹⁰⁹
- June 2003 Amnesty International Report exists regarding abuse in Iraq.¹¹⁰
- Aug. 18, 2003 Major General Miller sent to Iraq to upgrade interrogation, with template from GTMO.¹¹¹ Rumsfeld memo exists at Abu Ghraib, Iraq.¹¹²
- Sept. 14, 2003 Lieutenant General Sanchez creates a memo that approved illegal tactics.¹¹³
- Oct. 12, 2003 The Sanchez memo is revised.¹¹⁴
- Oct. 2003 Goldsmith moves from Haynes office in DOD to DOJ’s OLC.
- Nov. 2003 ICRC issues a report on Abu Ghraib and states that ICRC issued warnings of abuse, including “a broad pattern . . . and a system of” abuse, to highest level officials and others since start of war in Iraq in April 2003.¹¹⁵
- Dec. 2003 Goldsmith withdraws the Yoo March 14, 2003 memo but tells DOD that tactics are okay.
- Jan. 2004 ICRC warns Rice, Powell, and Wolfowitz about abuse at Guantánamo Bay and in Iraq.¹¹⁶
- Feb. 2004 ICRC report exists on abuse in Iraq.¹¹⁷

102. *Id.* at 15.

103. Muller memo to Yoo, *supra* note 10.

104. *Id.*

105. *See supra* note 10.

106. Memorandum from John Yoo for William Haynes (Mar. 14, 2003), *available at* http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf.

107. CIA Muller memo, *supra* note 10.

108. *Id.*

109. *Id.*

110. PAUST, *supra* note 2, at 162–63 n.143.

111. *Id.* at 16.

112. *Id.* at 26–27.

113. *Id.* at 16, 27, 174–75 n.7.

114. *Id.* at 16.

115. *Id.* at 17, 162 n.143.

116. PAUST, *supra* note 2, at 17, 162 n.144.

- Feb. 2004 Taguba report is created.¹¹⁸
- Mar. 19, 2004 Goldsmith creates a memo for illegal transfer of non-POWS from Iraq.¹¹⁹
- May 2004 Pictures of abuse at Abu Ghraib are disclosed—Administration says only “a few bad apples” were involved.
- May 2004 Cambone provides admissions before Senator Levin’s Committee.¹²⁰
- May 7, 2004 CIA Inspector General John L. Helgerson’s Report states some tactics criminal; Cheney is irate, calls Helgerson to his office.¹²¹
- June 2004 Goldsmith finally withdraws the second Bybee memo (eight months after learning of it).
- July 2004 ICRC sends a report to Bush regarding the system of torture and the cruel and degrading treatment at Guantánamo Bay.¹²²
- July 7, 2004 Mora memo is sent to IG Navy.¹²³
- July 22, 2004 DOJ “offered the CIA interim assurance that it could use all methods except waterboarding, which Mr. Goldsmith had questioned. On Aug. 6, Mr. [Daniel] Levin issued another interim letter reauthorizing waterboarding.”¹²⁴
- Aug. 2004 Final Report of Independent Panel to Review DOD Detention Operations is issued
- Sept. 24, 2004 Porter Goss becomes DCI.
- Oct. 2004 Congress’ resolution against torture and cruel treatment is passed.¹²⁵
- Dec. 30, 2004 Levin OLC Memo replaces the Bybee memo on torture.
- Jan. 26, 2005 Stephen Hadley becomes Director of NSC (Rice is Sec. State).
- Mar. 8, 2005 Cheney briefs lawmakers on unlawful tactics and made forceful, impassioned defense of the tactics—meetings occur in the White House Situation Room, with CIA officers.¹²⁶
- April 22, 2005 Deputy AG James Comey (ODAG) sends an email to Chief of Staff Chuck Rosenberg stating that at a meeting on April 22 with AG Gonzales, Pat Philbin, and Steve Bradbury, he “expressed . . . concerns, saying the analysis was flawed and that I had grave reservations about the second opinion” [the draft Bradbury memo

117. *Id.* at 162 n.143.

118. *Id.* at 160–61 nn.134 & 138; United States Central Command, Article 15-6 Investigation of the 800th Military Police Brigade, 2004, 15–20, available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf.

119. *Id.* at 18, 163 n.148.

120. *Id.* at 160 n.135.

121. Jordan J. Paust, *The Complicity of Dick Cheney: No ‘Necessity’ Defense*, (May 18, 2009), available at <http://jurist.law.pitt.edu/forumy/2009/05/complicity-of-dick-cheney-no-necessity.php>.

122. PAUST, *supra* note 2, at 17, 163 n.145.

123. *Id.* at 174 n.5, 176 n.12.

124. Scott Shane & David Johnson, *Lawyers Agreed on the Legality of Brutal Tactic*, N.Y. TIMES, June 7, 2009, at A1.

125. PAUST, *supra* note 2, at 177 n.13.

126. Paul Kane & Joby Warrick, *Cheney Led Briefings of Lawmakers to Defend Interrogation Techniques*, WASH. POST, June 3, 2009, at A1.

regarding “combined effects”]: “The AG explained that he was under great pressure from the Vice President to complete both memos. . . . He added that the VP kept telling him ‘we are getting killed on the Hill.’”¹²⁷

- May 10, 2005 Two Bradbury memos sent to CIA Rizzo regarding the illegal tactics and torture statute.
- May 30, 2005 Bradbury memo sent to CIA Rizzo regarding CAT art. 16.
- May 31, 2005 AG Gonzales attends National Security Council’s Principals Committee meeting [of AG Gonzales, Sec. Rice, DCI Goss, Sec. Rumsfeld, Nat. Sec. Adv. Stephen Hadley, etc.] and reports to Deputy AG Comey and others that all Principals approved the full list of tactics in the Bradbury memos.¹²⁸
- Oct. 2005 Cheney conducts more lawmaker briefings and defends tactics.
- Oct. 2005 The Senate approves the McCain Amendment.¹²⁹
- Nov. 2005 Addington and Cheney continue to advocate for illegal tactics.¹³⁰
- Nov. 2005 Cheney conducts another lawmaker briefing and defends tactics.
- Nov. 2005 DCI Goss admits CIA tactics would be restricted under the McCain Amendment.¹³¹
- Dec. 14, 2005 The House approves McCain Amendment.
- Dec. 30, 2005 Detainee Treatment Act becomes a federal statute.
- Feb. 15, 2006 The U.N. Experts’ report is issued.¹³²
- Feb. 16, 2006 The Zelikow Memo is issued on the McCain Amendment and CAT obligations.¹³³
- Mar. 30, 2006 ASIL resolution exists on torture.¹³⁴
- May 8, 2006 Michael Hayden becomes DCI.
- May 18, 2006 CAT Committee issues a Report regarding the United States.¹³⁵
- June 29, 2006 The United States Supreme Court decides *Hamdan* case (and that GC 3 applies as a minimum set of rights and duties).
- July 2006 Bush issues an Executive Order re-authorizing unlawful tactics.¹³⁶
Bradbury had reviewed and approved a draft.¹³⁷
- July 7, 2006 Gordon England memo requires the military to follow Geneva common article 3.¹³⁸
- Sept. 5, 2006 New DOD Directive issued on interrogation.¹³⁹
- Sept. 6, 2006 New Army Field Manual 2–22.3 issued.¹⁴⁰

127. Shane & Johnson, *supra* note 124 (describing Comey email to Rosenberg of April 22, 2005).

128. *Id.* (adding “I explained to him . . . that some of this stuff is simply awful”).

129. PAUST, *supra* note 2, at 28.

130. *Id.* at 27.

131. *Id.* at 28.

132. *Id.* at 173 n.1.

133. Zelikow Memo, *supra* note 7.

134. *Id.* at 187–88 n.44.

135. *Id.* at 173 n.1.

136. Exec. Order No. 13408, 71 Fed. Reg. 37807 (July 3, 2006).

137. Shane & Johnson, *supra* note 124.

138. PAUST, *supra* note 2, at 42.

139. *Id.* at 43, 198 nn.135–38.

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- Sept. 6, 2006 Bush admits having a “program” of “secret” detention (a crime against humanity) and “tough” treatment.¹⁴¹
- Dec. 18, 2006 Robert Gates replaces Rumsfeld as Secretary of Defense.
- Feb. 2007 An ICRC report was issued regarding “High Value Detainees” and illegal tactics.¹⁴²

140. *Id.* at 43, 199 nn.139–40.

141. *Id.* at 29.

142. Paust, *Absolute Prohibition*, *supra* note 1, at 1558 n.73.

