PRUNING NON-DEROGATIVE HUMAN RIGHTS VIOLATIONS INTO AN EPHEMERAL SHAME SANCTION

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I. INTRODUCTION

In a 2004 White House Press Briefing, future Bush Administration Attorney General Alberto Gonzales declared:

> [T]he U.S. will treat people in our custody in accordance with all U.S. obligations including federal statutes, the U.S. Constitution and our treaty obligations. The President has said we do not condone or commit torture. Anyone engaged in conduct that constitutes torture will be held accountable. The President has not directed the use of specific interrogation techniques. There has been no presidential determination [of] necessity or self-defense that would allow conduct that constitutes torture. There has been no presidential determination that circumstances warrant the use of torture to protect the mass security of the United States.[1]

1. Alberto Gonzales, White House Counsel, William Haynes, Dep't of Defense General Counsel, Daniel Dell'Orto, Dep't of Defense Deputy General Counsel, & Keith Alexander, Army Deputy Chief of Staff for Intelligence, Press Briefing (June 22, 2004) *available at* http://georgewbush-

Chronologies of detainee abuse at Guantanamo Bay, Afghanistan, and Iraq perdured during the Bush Administration.[2] The United Nations Office of the High Commissioner for Human Rights advised that human rights offenses "might be designated as war crimes by a competent tribunal,"[3] and the United Nations Secretary-General pronounced that international human rights experts were unanimous in determining that "many measures which States are currently adopting to counter terrorism infringe on human rights and fundamental freedoms."[4] Former detainees lined up as plaintiffs in U.S. courts.[5]

Interrogation practices derived from national-level policies.[6] For several years, Americans knew that top government officials authorized controversial interrogation tactics and that President Bush acknowledged sanctioning "tough" techniques and periodically revised the methods, while disavowing that he issued orders permitting the use of torture.[7] Executive branch officials

whitehouse.archives.gov/news/releases/2004/06/20040622-14.html.

2. Maureen Cosgrove, *HRW Urges Probe of Bush Administration Torture Allegations*, JURIST, July 12, 2011, http://jurist.org/paperchase/2011/07/hrw-urges-probe-of-bush-administration-torture-allegations.php.

3. ALFRED W. MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR 147 (2006).

4. Kofi Annan, A Global Strategy for Fighting Terrorism, Keynote Address to the Closing Plenary of the International Summit on Democracy (Mar. 10, 2005), *available at* http://www.un.org/News/Press/docs/2005/sgsm9757.doc.htm.

5. George D. Brown, *"Counter-Counter-Terrorism Via Lawsuit" – The Bivens Impasse*, 82 S. CAL. L. REV. 841, 843-44 (2009) (listing the high profile civil cases brought by Jose Padilla and Maher Arar and referring to human rights abuse cases generally and stating that "[t]hese suits are not about to go away"); *see generally* Yost, *infra* note 162, and accompanying text (referencing recent litigation with seventy-one Iraqi plaintiffs stemming from abuse in U.S. detention facilities).

6. Keith Rohman, *Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study*, 28 PENN. ST. INT'L L. REV. 1, 28 (2009) (discussing how the military intelligence interrogators explain Abu Ghraib abuse).

7. Judith Resnik, *Detention, The War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 608 (2010) (discussing the "horrific treatment of detainees"); Seth F. Kreimer, *Rays of Sunlight in a Shadow "War": FOIA, The Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1185 (2007) (calling the revelations a "divergence between word and deed" in which the administration used "brutally coercive methods" that were secret but "publicly disavowed 'torture'"); 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, 371 (2007) [hereinafter Paust, *Above the Law*] (discussing that Bush acknowledged tough interrogation techniques and stated that they would continue); *Bush Denies Torture of Terror Suspects*, NPR (Oct. 5, 2007), http://www.npr.org/templates/story/story.php?storyId=15037112 (noting that Bush

generally provided limited promises to Congress over detainee treatment.[8] While somewhat more civilized restrictions were placed on military interrogators,[9] Bush authorized the CIA to confine and interrogate detainees with a harshness that markedly violated human rights.[10] The CIA requested assurance from the White House that the directives were legal and has used the authorizations as its defense when subjected to criticism.[11]

Scandals routinely broke for six years, and the paper trail of White House involvement thickened, but not until 2008 was it divulged that there was a National Security Council "Principles Committee" consisting of National Security Advisor Condoleezza Rice, Vice President Dick Cheney, CIA Director George Tenet, Secretary of Defense Donald Rumsfeld, and Secretary of State Colin Powell, and that this committee was explicitly authorizing extreme interrogation techniques for the CIA.[12] Bush

defended "extreme interrogation tactics" as lawful and stated, "[W]e have gotten information from these high-value detainees that have helped protect you").

8. Alan Clarke, *Creating a Torture Culture,* 32 SUFFOLK TRANSNAT'L L. REV. 1, 46 (2008) (stating that Bush's officials could also be prosecuted for lying to Congress); Steven Lee Myers, *Bush Vetoes Bill to Limit CIA Interrogation Methods*, N.Y. TIMES, Mar. 9, 2008, http://www.nytimes.com/2008/03/09/world/americas/09iht-policy.4.10847885.html?_r=0 (reporting that Bush vetoed a congressional bill that would have explicitly forbid enumerated interrogation methods and that Bush contended that the methods in question were "safe and lawful").

9. Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1243-44 (2005) (citing Gonzales, *supra* note 1) (wherein Alberto Gonzales stated that some restrictions that were put on harsher interrogation do "not include CIA activities"); John Barry, Michael Isikoff, & Michael Hirsh, *The Roots of Torture*, NEWSWEEK, May 23, 2004, http://www.thedailybeast.com/newsweek/2004/05/23/the-roots-of-torture.html (noting that "no responsible official of the Department of Defense approved any program that could conceivably have been intended to result in such abuses" at Abu Ghraib).

10. Charles H. Brower, II, *The Lives of Animals, the Lives of Prisoners, and the Revelations of Abu Ghraib,* 37 VAND. J. TRANSNAT'L L. 1353, 1363 (2004) ("[T]he images and descriptions of Abu Ghraib establish that . . . we too have committed the crime of treating people like animals.").

11. Lara Jakes Jordan & Pamela Hess, *Cheney, Others Ok'd Harsh Interrogation*, USA TODAY, Apr. 11, 2008, http://www.usatoday.com/news/washington/2008-04-10-1762869681_x.htm (reporting that "Bush administration officials from Vice President Dick Cheney on down signed off on using harsh interrogation techniques," and that a former senior intelligence official stated that "[n]o one at the agency wanted to operate under a notion of winks and nods . . . . People wanted to be assured that everything that was conducted was understood and approved by the folks in the chain of command.").

12. *The White House Torture Sessions*, N.Y. TIMES, Apr. 20, 2008, http://www.nytimes.com/2008/04/20/opinion/20iht-edtorture.1.12162823.html; Jordan & Hess, *supra* note 11; Jan Crawford Greenburg, Howard L. Rosenberg & Ariane de

acknowledged the meetings of the committee, admitted that they were discussing harsh interrogation tactics, and affirmed that he approved.[13] Despite the fact that Article 2 of the Convention Against Torture obligates government officials of parties to the convention to both proscribe and actively thwart torture,[14] it appears that top Bush Administration officials were affirmatively sanctioning brutal interrogation tactics. Larry Wilkerson, Colin Powell's former Chief of Staff, stated that he investigated the classified and unclassified documents and observed "a visible audit trail from the vice president's office through the Secretary of Defense down to the commanders in the field."[15]

Scholars and human rights groups were appalled that the Bush Administration admitted to ordering interrogation methods that scholars and foreign countries had deemed to be torture. University of London Law Professor Philippe Sands, author of *Torture Team: Rumsfeld's Memo and the Betrayal of American Values,* explained that the revelations in 2008 confirmed the

Vogue, *Sources: Top Bush Advisors Approved 'Enhanced Interrogation'*, ABC NEWS, Apr. 9, 2008, http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256&page=1; Jan Crawford Greenburg, Howard L. Rosenberg & Ariane de Vogue, *Bush Aware of Advisers' Interrogation Talks*, ABC NEWS, Apr. 11, 2008, http://abcnews.go.com/TheLaw/LawPolitics/story?id-4635175&page=1 [hereinafter Greenburg, Rosenberg, & de Vogue, *Bush Aware*]. Secretary of State Colin Powell purportedly dissented about the techniques and the denying detainees prisoner-of-war status, which created internal debate. REED BRODY, HUMAN RIGHTS WATCH, I. THE ROAD TO ABU GHRAIB 4 (2004), *available at* http://www.hrw.org/reports/2004/usa0604/usa0604.pdf (referencing a January 25, 2002 memorandum written by White House counsel Alberto Gonzales that denied Geneva Convention and POW status to those captured in Afghanistan, and noting that Colin Powell's strong objection to that "[denial would] reverse over a century of U.S. policy and practice supporting the Geneva Conventions").

13. Greenburg, Rosenberg & de Vogue, *Bush Aware, supra* note 12; *"Torture Team": British Attorney Philippe Sands on the White House Role in Sanctioning Torture*, DEMOCRACY NOW!, May 8, 2008, http://www.democracynow.org/2008/5/8/torture_team_british_attorney_philippe_sands [hereinafter "*Torture Team*"].

14. J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 123 (1988).

15. *Cheney Pushes Senators for Exemption to CIA Torture Ban*, USA TODAY, Nov. 4, 2005, http://www.usatoday.com/news/washington/2005-11-04-cheneytortureban_x.htm; Marjorie Cohn, *Injustice at Guantanamo: Torture Evidence and the Military Commissions Act*, MONTHLY REVIEW, Feb. 15, 2008, http://mrzine.monthlyreview.org/2008/cohn150208.html (noting that "[t]he federal government is working overtime to try and clean up the legal mess made by the use of illegal interrogation methods. . . . This attempt to wipe the slate clean is a farce and a sham.").

conclusions of his own investigations, which were that the directives to employ torture "came straight from the top," and that the President was, "in effect, owning up to the fact that he . . . committed a war crime" by admitting that he authorized torture.[16] The ACLU requested that an independent counsel investigate the program, and ACLU Executive Director Anthony D. Romero conveyed that "[w]e have always known that the CIA's use of torture was approved from the very top levels of the US government," but the end-of-term revelations also confirmed the President's involvement.[17] ACLU legislative director Caroline Fredrickson stated that "[w]ith each new revelation, it [began] to look like the torture operation was managed and directed out of the White House. This is what we suspected all along."[18] Professor Jordan Paust wrote that the 2001 to 2009 sanctions to use secret detention, forced disappearances, and coercive interrogations involved "serial criminality," war crimes, torture, and cruel, inhumane, and degrading treatment that "implicat[es] universal jurisdiction and a universal responsibility."[19] On national television, George Washington University Law Professor Jonathan Turley reflected:

> These are people sitting around regularly talking about something defined as a crime . . . . It shows this was a program, not just some incident, not just something going too far. It was a torture program . . . approved at the very highest level. And it goes right to the President's desk . . . . It's always been a war crimes tribunal ready to happen. But Congress is like a convention of Claude Rains actors. Everyone's saying, we're shocked, shocked; there's torture being discussed in the White House. But no one is doing anything about it.[20]

16. *"Torture Team," supra* note 13.

17. Press Release, ACLU, Bush Admits to Knowledge of Torture Authorization by Top Advisers: ACLU Calls for Independent Counsel to Investigation Administration's Approval of Torture and Abuse (Apr. 12, 2008), *available at* http://www.aclu.org/national-security/bush-admits-knowledge-torture-authorization-top-advisers.

18. *Top Officials OK'd Harsh Interrogation Tactics,* ASSOC. PRESS, Apr. 10, 2008, http://www.msnbc.msn.com/id/24055778/ns/us_news-security/t/top-officials-okd-harsh-interrogation-tactics/.

19. 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 (2009) [hereinafter Paust, *Civil Liability*].

20. *'Countdown with Keith Olberman' for Thursday April 10*, MSNBC, Apr. 10, 2008, http://www.msnbc.msn.com/id/24068197/ns/msnbc_tv-

Professor Linda Keller accentuated that authorizations amounting to torture are non-derogative[21] under all circumstances and are criminal offenses both under international law and United States law.[22] Professor Benjamin Davis itemized a list of nearly fifty top officials at the White House, Pentagon, CIA, and Justice Department who were involved, and he identified potential offenses for which they could be charged, including Common Article 3 War Crimes; non-Common Article 3 war crimes; conspiracy or solicitation to commit crimes of violence; conspiracy to kill, kidnap, maim, or injure others in a foreign country; torture; conspiracy to torture, assault, and maim; deprivation of rights under color of law; conspiracy to deprive of rights; cover-up of crimes; and state law crimes.[23] Advocates and members of Congress demanded that the President be impeached on multiple charges.[24]

The Bush Administration must have known of the violations; it received complaints regarding torture and other illegalities from groups such as Human Rights Watch and the International

countdown_with_keith_olbermann; David Akerson & Natalie Knowlton, *President Obama and the International Criminal Law of Successor Liability*, 37 DENV. J. INT'L L. & POL'Y 615, 639 (2009) ("The secret authorization of brutal interrogations is an outrageous betrayal of our core values, and a grave danger to our security.").

21. Non-derogative rules are those from which no derogation is permitted. This idea is directly related to the concept of "jus cogens," which the Vienna Convention defines as a "peremptory norm of general international law . . . accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, art. 53, May. 23, 1969, 1155 U.N.T.S.; Vienna Colucci, *Denounce Torture: Torture and the Law*, AMNESTY INT'L USA (Nov. 2001), http://www.kintera.org/site/pp.asp?c=fnKNKUOyHqE&b=1196455 (calling the prohibition on torture a "peremptory norm" that prevails over all inconsistent customary laws). For further discussion, *see infra* Section II.

22. Linda M. Keller, *Is Truth Serum Torture?*, 20 AM. U. INT'L L. REV. 521, 545 (2005) (pointing out that the U.S. proclamation to the Committee Against Torture is to not permit torture under any circumstances and stating that the U.S. "has taken only limited steps to implement its commitments under CAT"); ASS'N OF THE BAR OF THE CITY OF NEW YORK, THE COMM. ON INT'L HUMAN RIGHTS AND THE COMM. ON MILITARY AFFAIRS AND JUSTICE, HUMAN RIGHTS STANDARDS APPLICABLE TO THE U.S.'S INTERROGATION OF DETAINEES 72-73 (2005), *available at* http://www.nycbar.org/pdf/HUMANRIGHTS.pdf.

23. Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN'S J. LEGAL COMMENT. 503, 624-28, 641-43 (2008).

24. 153 CONG. REC. E2253 (daily ed. Dec. 27, 2006) (statement of Rep. McKinney); Clarke, *supra* note 8, at 49.

Red Cross, as well as from members of Congress starting in 2002.[25] While under criticism, President Bush was asked whether torture was authorized by the White House, and he remarked: "Maybe I can be more clear. The instructions went out to our people to adhere to law . . . . We're a nation of law. We adhere to laws . . . . And those were the instructions out . . . from me to the government."[26] Yet, eighty-three percent of Americans believed that U.S. officials during the Bush Administration used torture.[27] The White House understood that international law and domestic law forbade such brutality and that the President cannot order torture.[28] However, it is unclear whether Bush's acknowledgement meant that a president could not order torture under the law, or whether a president could not be held responsible for directing the act of torture. Had there been a more cogent understanding of White House involvement as scandals sequentially erupted, perhaps Americans would have demanded legal responsibility. Supermajorities of foreign citizens oppose torture,[29] and fifty-eight percent of Americans polled think that torture is never justified.[30] Instead of being forthcoming, for six years Bush Administration officials largely denied having intricate involvement and watched controversial events pass from public memory.

Why is it that no responsibility was imposed despite the fact that the alleged offenses are universal crimes, which permit all

25. Dave Moniz, *U.S. Misses Chances to Stop Abuses*, USA TODAY, May 13, 2004, http://www.usatoday.com/news/world/iraq/2004-05-13-warnings_x.htm; Human Rights Watch, *A Timeline of Torture & Abuse Allegations and Responses*, COUNTERPUNCH (May 4, 2004), http://www.counterpunch.org/2004/05/04/a-timeline-of-torture-amp-abuse-allegations-and-responses/.

26. Clarke, *supra* note 8, at 1.

27. Harris Interactive, *Poll #93: Majorities of Public Believe that Torture, 'Rendition' and the Use of Secret Prison Camps Outside U.S. are Sometimes Justified*, PRNEWSWIRE, (Dec. 21, 2005), http://www.prnewswire.com/news-releases/majorities-of-public-believe-that-torture-rendition-and-the-use-of-secret-prison-camps-outside-us-are-sometimes-justified-55638482.html.

28. Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 89 n.1 (2007); *Interview with Bob Schieffer*, (CBS News Broadcast Jan. 27, 2006), *available at* http://www.presidency.ucsb.edu/ws/?pid=77365 (Where President Bush stated, "I don't think a president can . . . order torture.").

29. *World Citizens Reject Torture*, BBC, Oct. 19, 2006, http://www.bbc.co.uk/pressoffice/pressreleases/stories/2006/10_october/19/poll.shtml (stating that 59% in 25 countries, 81% of Italians, and 72% of Brits oppose torture).

30. John Cohen, *On Torture*, WASH. POST, Jan. 21, 2009, http://voices.washingtonpost.com/behind-the-numbers/2009/01/on_torture.html.

nations to exercise jurisdiction over wrongdoing, and despite the efforts of whistleblowers, advocates, human rights groups, and scholars who censured those involved as abuses emerged? Section II of this article reviews the law involving non-derogative offenses and the universality of those prohibitions across jurisdictions. Section III describes the weaknesses that candidate tribunals face in asserting jurisdiction over such offenses, and Sections IV and V explain how the use of public diplomacy results in an ephemeral shame sanction for offenders rather than the application of mandatory criminal law.[31]

II. JUS COGENS AND CUSTOMARY INTERNATIONAL LAW

A. APPLICABLE TREATIES

Humanitarian jurisprudence developed after the end of the eighteenth century, and notable scholars called torture a foremost abuse against humanity.[32] Early scholars conceived of natural rights that could restrict government officials and prevent cruel and capricious conduct.[33] Eventually those forerunning insights evolved into a consensus view of sovereigns being restricted from denying human rights because they "are not rights granted by a state; rather, they are rights that pre-exist the state."[34] Human rights are both positive rights, which states must affirmatively provide to citizens; and negative rights, which states must not

31. Another key causal explanation for the lack of responsibility being assessed is the foolish and politicized advice from sycophantic legal advisors. Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 349, 357, 362-63 (2007) ("[L]awyers are potentially complicit in war crimes when they 'materially contribute' to the commission of crimes like torture."); Harold Hongju Koh, *Friedmann Award Essay: A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 654 (2005) (referencing Bush Administration legal memos and noting that "if a client asks a lawyer how to break the law and escape liability, a good lawyer should not say, 'Here's how.' The lawyer's ethical duty is to say no."); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1687 (2005) (noting that the legal opinions to commit human rights abuses are a disgrace to the legal profession).

32. Waldron, *supra* note 31, at 1719 (citing EDWARD PETERS, TORTURE 75 (1996 ed.)).

33. Judith N. Shklar, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 2 (Allan C. Hutchinson & Patrick Monahan eds., 1987) (referencing Montesquieu).

34. Jackson Maogoto & Benedict Sheehy, *Torturing the Rule of Law: USA and the Post 9-11 Legal World,* 21 ST. JOHN'S J.LEGAL COMMENT. 689, 689 (2007).

contravene.[35] States have historically ratified these principles in conventions.

Applicable to military combat, all four Geneva Conventions state in Article 1: "The High Contracting Parties undertake to respect and ensure respect for the present Convention in *all* circumstances."[36] The Geneva Conventions apply to "the whole of the populations of the countries in conflict,"[37] and require that people be humanely treated and protected against violence or threats of violence.[38] Specifically, the Geneva Conventions prohibit parties from administering coercive interrogations on combatants, and entitle all persons to personal respect, honor, religion, and family rights.[39]

The U.N. General Assembly unanimously affirmed that "no one shall be subjected to torture or to other cruel, inhuman or degrading treatment or punishment."[40] The Universal Declaration of Human Rights is a universally adopted General Assembly resolution that promotes a range of individual liberties and prohibits torture.[41] On December 10, 1984, the United Nations adopted the Convention Against Torture, which affirms that any government official who engages in torture or knowingly orders torture to occur is subject to criminal punishment.[42] The

35. Under international human rights law, states must fulfill three different obligations—to ensure, protect, and respect rights. Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 283-84 (2010).

36. Geneva Convention Relative to the Treatment of Prisoners of War, art. I, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Geneva I] (emphasis added); Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, art. I, Oct. 18, 1907, 36 Stat. 2371; The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. I, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Geneva II]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. I, June 8, 1977, 1125 U.N.T.S. 3 (emphasis added).

37. Geneva II, *supra* note 36, art. 13.

38. *Id.*, art. 16.

39. *Id.*, art. 27(a).

40. Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 62/148, (pmbl.), U.N. Doc. A/RES/62/148 (Mar. 4, 2008) [hereinafter TCID] *available at*

http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/62/148&Lang=E.

41. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., art. 5, U.N. Doc. A/810 (1948) [hereinafter UDHR].

42. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 2, *opened for signature* Dec. 10. 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; MICHAEL JOHN GARCIA, THE U.N. CONVENTION AGAINST

International Covenant on Civil and Political Rights (ICCPR) prohibits torture and ensures human rights protections akin to those found in the United States Bill of Rights.[43]

All of these agreements are binding on the United States. The U.S voted for the Universal Declaration of Human Rights and ratified the Convention Against Torture,[44] the ICCPR (along with 166 other countries),[45] and other treaties that prohibit torture and discrimination.[46] The Geneva Conventions have been ratified by all of the prime countries involved in recent atrocities—including Afghanistan, Iraq, the United States, and the United Kingdom—and by 190 other countries,[47] which means that treaty ratification is immaterial because rules are obligatory in all sovereign territories as customary international law.[48]

TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 2, CONG. RESEARCH SERV. REPORT FOR CONGRESS (2004), *available at* http://fpc.state.gov/documents/organization/31351.pdf ("[A]ttempts to commit torture and complicity or participation in torture, are criminal offenses subject to penalty."); Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 955-72 (2006).

43. United Nations International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see id.* art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); *see id.* arts 8-17 (prohibiting slavery, "arbitrary arrest or detention," punishing acts that are not enumerated as crimes, and unlawful interference with privacy; and requiring notice of criminal charges for arrest, public and fair hearings for detentions, freedom of movement, and the right to be presumed innocent).

44. ICCPR, Dec. 16, 1996, arts. 7, 10, 999 U.N.T.S. 171, Dec. 10, 1984, 23 I.L.M. 1027.

45. *International Covenant on Civil and Political Rights,* UNITED NATIONS TREATIES DATABASE, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Jan. 7, 2012).

46. Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263, 299 (2004). The U.S. is a party to the ICCPR, but did not become a party until twenty-sixty years after the U.N. General Assembly adopted it and fifteen years after President Carter signed it. Major Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 MIL. L. REV. 1, 1-2 (2007).

47. *International Humanitarian Law – Treaties and Documents*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/ihl.nsf/CONVPRES?OpenView (last visited Jan. 7, 2012) (linking to lists of states parties to the aforementioned agreements); Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT'L L. 309, 310 (2006); Srividhya Ragavan & Michael S. Mireles, Jr., *The Status of Detainees from the Iraq and Afghanistan Conflicts*, 2005 UTAH L. REV. 619, 624 (2005).

48. U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 35, *delivered to the General Assembly,* U.N. Doc. S/25704 (May 3, 1993); S.C. Res. 827, ¶ 1, U.N. Doc. S/RES/827

B. JURISDICTIONAL APPLICABILITY OF RULES

For the Bush Administration, directives for harsh interrogations predominately involved orders to be applied to foreigners outside U.S. territory, while actions inside U.S. territory were not extensively abusive.[49] Conventions create a system of humanitarian rights and domestic human rights for times of war and occupation, and treaties are comprised of congruous and progressively merging standards.[50] The International Committee of the Red Cross (ICRC) explains that human rights law fulfills a pivotal role "to support, strengthen and clarify analogous principles of international humanitarian law."[51] The U.N. Human Rights Committee regards human rights law and humanitarian law as "complementary, not mutually exclusive."[52] The merging standards, overwhelming acceptance of human rights rules, policy intentions to restrict

(May 25, 1993). The Geneva Convention Relative to the Treatment of Prisoners of War states that it:

> shall apply in all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Geneva I, *supra* note 36, art. 2. Furthermore, the Convention states that "[a]lthough one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations." Geneva I, *supra* note 36, art. 2.

49. While the Bush Administration engendered a threat aura inside the U.S., there are no threats to the established order or insurrections that governments have previously used as justifications for abuses on citizens. Robert Bejesky, *From Marginalizing Economic Discourse with Security Threats to Approbating Corporate Lobbies and Campaign Contributions*, 12(1) CONN. PUB. INT. L.J. at 5-38 (forthcoming Fall 2012) (describing crackdowns against war protestors that occurred during World War I, World War II, Red Scare I, and Red Scare II); Robert Bejesky, *Precedent Supporting the Constitutionality of Section 5(b) of the War Powers Resolution*, 49 WILLAMETTE L. REV. 1, 6-7 (2012) (discussing the denial of habeas corpus during the U.S. Civil War); Robert Bejesky, *A Rational Choice Reflection on the Balance Among Individual Rights, Collective Security, and Threat Portrayals Between 9/11 and the Invasion of Iraq*, 18 BARRY L. REV. 1, 5-6, 13-17 (2012) [hereinafter Bejesky, *Rational Choice*] (noting that the post 9/11 warnings of threats to impose dragnet sweeps of suspects were not clearly substantiated).

50. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 22-23 (2004); JEAN PICTET, HUMANITARIAN LAW AND PROTECTIONS OF WAR VICTIMS 15 (1975).

51. LOUISE DOSWALD-BECK ET AL., 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxxi (2005).

52. U.N. Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1Add.13 (May 26, 2004).

government actors from instilling fear and terrorizing citizens, and analogous statutory rules that prohibit assault and battery at the domestic level, make a government's espoused exceptions to justify or decriminalize torture unpersuasive. The universality of the substantive rights endowed to individuals bypasses jurisdictional anomalies and levels of sovereign assent.

Normative ideological disputes over whether states can or should transgress international law as a rational choice are inapplicable to non-derogative human rights because affording these rights are customary rules to which all governments must adhere.[53] The ICRC affirms that customary international law consists of "namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinion juris sive necessitatis*)."[54] Domestic laws throughout the civilized world criminalize torture as a universally condemned wrong, and international law denounces torture with peremptory rules and as a jus cogens norm[55] with extraterritorial application.[56] The

53. Oona A. Hathaway, *The Promise of Limits of the International Law of Torture*, *in* TORTURE: A COLLECTION 200-12 (Sanford Levinson ed., 2004); Theodore Meron, *On a Hierarchy of International Human Rights,* 80 AM. J. INT'L L. 1, 6-18 (1986).

54. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict,* 87 INT'L REV. RED CROSS 175, 178 (2005).

55. Rome Statute of the International Criminal Court, arts. 7(f)(k), 33(2), July 17, 1998, 37 I.L.M. 1002, 1003 (entered into force July 1, 2002), *available at* http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf [hereinafter Rome Statute] ("[C]rimes against humanity are manifestly unlawful" and torture and "[o]ther inhumane acts . . . intentionally causing great suffering, or serious injury to body or to mental or physical health" are crimes against humanity.); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, cmt. n (1987); Regina v. Bartle & the Comm'r of Police for the Metropolis & others *Ex Parte* Pinochet, 38 I.L.M. 581, 589 (H.L. 1999); JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 96 (1992) ("[T]hese rights are so fundamental that they are considered to be not only customary international law but also norms of jus cogens."); Ragavan & Mireles, *supra* note 47, at 621.

56. Theodor Meron, *Extraterritoriality of Human Rights Treaties,* 89 AM. J. INT'L L. 78, 78 (1995) (stating that "[i]t is axiomatic that the law of war or international humanitarian law obligates members of the armed forces of a state regardless of whether they operate in or outside the territory of that state" to abide by those rules and listing additional human rights treaties that similarly operate outside the territory of the state); STEPHEN MACEDO, ET AL., THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 16 (2001), *available at* http://lapa.princeton.edu/hosteddocs/unive_jur.pdf (noting that "[t]he principle of universal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime or the

Supreme Court of the United States calls the prohibition of human rights violations "specific, universal, and obligatory."[57]

Torture is a universally denounced and forbidden crime against humanity[58] that cannot be derogated under any circumstance.[59] Amnesty International states: "The law is unequivocal – torture is absolutely prohibited in all circumstances . . . . The right to be free from torture is absolute. It cannot be denied to anyone in any circumstances."[60] Professor Sands explains that the consummate prohibition on torture "is the one area in which the rules of international law are clear."[61] Professor Benjamin Davis comments that when U.S. officials "torture[] or cruelly, inhumanly or degradingly treat persons, [the U.S.] violates its international law obligations that are frequently described as of the highest order (peremptory norms)."[62] Professor Jordan Paust wrote that "[t]orture is a form of treatment . . . [that] constitutes a violation of peremptory rights and prohibitions *jus cogens* that trumps any inconsistent portion of an international agreement and more ordinary forms of customary international law."[63]

Analogous human rights protections exist during wartime. The U.N. General Assembly expounded that freedom from torture is a "non-derogable right that must be protected under all circumstances."[64] War and public emergencies do not provide

nationality of the perpetrator or the victim.").

57. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

58. Rome Statute, *supra* note 55, at 93.

59. David A. Wallace, *Torture v. the Basic Principles of the U.S. Military,* ICJ 6 2 (309), May 2008 (explaining that "no possible loophole is left; there can be no excuse, no attending circumstances"); Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 188 (2006); Maogoto & Sheehy, *supra* note 34, at 690-91 ("Torture is forbidden universally" as a "peremptory (jus cogens) norm . . . . [N]o situation permits a government to suspend or curtail this fundamental right, not even a state of emergency."); Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1210 (2005) ("[O]bjectors cannot deviate.").

60. Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstance in Which Torture Is Morally Justifiable*, 39 U.S.F. L. REV. 581, 587 (2005) (citing AMNESTY INTERNATIONAL TORTURE WORLDWIDE: AN AFFRONT TO HUMAN DIGNITY 10 (2000)).

61. PHILIPPE SANDS, LAWLESS WORLD 207 (2005).

62. Davis, *supra* note 23, at 574.

63. Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1535 (2009) [hereinafter Paust, *Absolute Prohibition*].

64. TCID, *supra* note 40, pmbl.

exceptions.[65] The ICCPR states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," and that no derogation is permitted.[66] The Convention on Torture states that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency, may be invoked as a justification of torture."[67]

U.S. Military regulations affirm "that all persons, 'captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care.'"[68] Military necessity only authorizes a state to use "measures not prohibited by international law which are indispensible for securing the complete submission of the enemy as soon as possible,"[69] and the Geneva Conventions entirely prohibit torture and affirm that military necessity is no exception to permit torture.[70] The U.N. completed a report, directed specifically at the Bush Administration, and asserted that the so-called "war on terror" was no justification to permit torture.[71] These condemnations of torture, applicable to domestic and foreign jurisdictions, embody clear substantive laws, but viable

65. CAT, *supra* note 42, art. 2; GARCIA, *supra* note 42, at 1.

66. ICCPR, *supra* note 43, arts. 4(2), 7. From the ICCPR and the European Convention, violations of human rights can only occur as "strictly required by the exigencies of the situation" for other rights. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15(1), *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221.

67. CAT, *supra* note 42, art. 2(2); Manfred Nowak, Moritz Birk & Tiphanie Crittin, *The Obama Administration and Obligations Under the Convention Against Torture*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 33, 36 (2011); Wallace, *supra* note 59, at 319.

68. Geoffrey S. Corn & Michael L. Smidt, *"To Be or Not to Be, That Is the Question" Contemporary Military Operations and the Status of Captured Personnel*, 1999 ARMY L. 1, 8 (quoting U.S. Dep't of the Army, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Reg. 190-8 (1997)); 10 U.S.C. §§ 892-893 (2000) (stating the federal law prohibiting abuse of detainees).

69. John B. Bellinger, III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L. L. 201, 213 (2011) (citing U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, art. 3 (1956)).

70. IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 37-39, 219-20, 228 (Jean S. Pictet ed., 1958).

71. Thalif Deen, *U.N. Report Slams Use of Torture to Beat Terror,* COMMONDREAMS.ORG, (Nov. 12, 2004)
http://www.commondreams.org/headlines04/1112-01.htm.

tribunals are still required to enforce the law. The next section addresses the involvement of courts in the United States, the International Criminal Court, and courts in other nations on the issue of asserting jurisdiction over purported cases of torture.

III. POTENTIAL TRIBUNALS

A. UNITED STATES COURTS

There is dissonance inside the U.S. legal system over enforcing international and domestic human rights protections. On the one hand, U.S. courts have an obligation to uphold self-executing treaties and binding international law as the law of the land and perpetration of torture and war crimes have been criminalized under U.S. law. Moreover, theories of culpability under international law, U.S. military law, and U.S. domestic law could impose criminal liability beyond the immediate perpetrator of human rights abuse. On the other hand, it may not be possible to apply these rules to acts committed by a U.S. administration if prosecutors are uninterested in pursuing members of the executive branch and if the executive branch uses authority over national security to classify relevant government directives and to veil evidence of wrongdoing. Likewise, if foreign plaintiffs initiate civil actions against U.S. officials in U.S. courts for human rights abuses, there are limitations to attaining remedial relief.

1. RESPONSIBILITY OF COURTS TO APPLY THE LAW OF THE LAND

The American Bar Association, the U.S. Agency for International Development (USAID), other U.S. government agencies, the United Nations, and non-governmental organizations have exhibited extraordinary enthusiasm for promoting "rule of law" projects, notably to instill human rights. These organizations have bolstered this goal with widespread training of court personnel, by providing legal advice and by drafting codes in over one hundred countries.[72] USAID, the Department of Defense, and the Department of State recently issued a joint report, in which they explained: "Rule of law is a principle under which all persons, institutions and entities, public and private, including the State itself, are accountable to laws

72. Shannon M. Roesler, *The Ethics of Global Justice Lawyering,* 13 YALE HUM. RTS. & DEV. L.J. 185, 186-87, 190, 193, 210, 213-14 (2010).

that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights law."[73] Professor Jules Lobel wrote that it is "important to ensure that officials are held accountable for their actions. Even in wartime, government officials should not be unaccountable."[74] Professor Benjamin Davis commented that if Americans are unable "in our domestic system of prosecuting and punishing our own citizens who are high-level civilian or military generals for these crimes, then this . . . demonstrate[s] discontinuity between what we support abroad and what we are capable of doing at home."[75]

U.S. courts have jurisdiction over, and are obligated to enforce, international human rights law and applicable U.S. statutes. The U.S. Constitution's Supremacy Clause states that "[a]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[76] In *The Paquete Habana*, the Supreme Court held: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . ."[77] In *Sosa v. Alvarez-Machain*, the Court explained: "For two centuries we have affirmed that the domestic law of the United States recognized the law of nations."[78]

International human rights and humanitarian law have mostly been codified in treaties and ratified by the U.S., which means they are the law of the land in equivalent statutes.[79] Self-

73. U.S. AGENCY FOR INT'L DEV., U.S. DEP'T OF STATE, U.S. DEP'T OF DEF., SECURITY SECTOR REFORM 4 (Feb. 2009), *available at* http://www.state.gov/documents/organization/115810.pdf.

74. *Presidential Power: Article and Poetry: A Forum on Presidential Authority*, 6 SEATTLE J. SOC. JUST. 23, 65 (2007).

75. Davis, *supra* note 23, at 516.

76. U.S. CONST. art. VI, cl. 2.

77. The Paquete Habana, 175 U.S. 677, 700 (1900); Hilton v. Guyot, 159 U.S. 113, 163, 228 (1895) (discussing sources of international law and noting that "the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is," and that the judiciary must also decide whether to enforce a foreign court's judgment); Paust, *Above the Law*, *supra* note 7, at 388 ("[N]umerous cases throughout our history clearly affirm that the judiciary has constitutionally based power to interpret international law and to review various decisions and actions taken by the Executive during war.").

78. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

79. David J. Gottlieb, *How We Came to Torture,* 14 KAN. J.L. & PUB. POL'Y 449, 449 (2005).

executing treaties are equivalent to federal legislation,[80] and binding international law is enforceable in U.S. courts,[81] while nonbinding international law has been referred to by the Supreme Court as evidence of a norm or practice.[82] The United States Constitution specifies that ratified treaties have the status of federal law, that presidents must "faithfully execute" the law, that it is imperative to "check" and restrain government authority, and that presidential authority derives from the "people."[83] Ergo, a president who does not uphold the

80. Foster v. Neilson, 27 U.S. 253 (1829).

81. Art. VI of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In 1900, the Supreme Court ruled that "[i]nternational law is part of our law[,]" but "customs and usages of civilized nations" should only be given effect if "there is no treaty, and no controlling executive or legislative act or judicial decision" to the contrary. *The Paquete Habana*, 175 U.S. at 700; JORDAN PAUST, INTERNATIONAL LAW AS THE LAW OF THE UNITED STATES 7-11, 67-70, 169-75, 488-94 (2d ed. 2003). International law can be referred to as federal common law. *Sosa*, 542 U.S. at 692; Filartiga v. Pena-Irala, 630 F.3d at 885 (2d Cir. 1980).

82. The Supreme Court has consulted international and foreign law as a type of "community standard." Harold Hongju Koh, *International Law as Part of Our Law,* 98 AM. J. INT'L L. 43, 45 (2004); Roper v. Simmons, 543 U.S. 551, 567, 576 (2005) (citing the International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), and the Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468-1470 (entered into force Sept. 2, 1990)) (stating that the U.S. made a reservation to the death penalty provision in the ICCPR and the U.S. is not a party to the latter when addressing the issue of most countries banning the execution of juveniles).

83. U.S. democracy is grounded in the power of the People. U.S. CONST. pmbl. ("We the people . . . ."); U.S. CONST. art. I, § 4 (stating that the People elect the lawmakers); U.S. CONST. art. II, § 1, 3 (noting that the People "elect" the president, who executes the law and provides information to Congress); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men . . . . [W]henever any Form of Government becomes destructive . . . it is the Right of the People to alter or abolish it . . . ."); Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *available at* http://avalon.law.yale.edu/19th_century/gettyb.asp ("[G]overnment of the people, by the people, for the people."). International law does not invariably involve norms that the executive can selectively enforce. U.S. CONST. art. VI, cl. 2 ("[L]aws of the United States . . . and all treaties made . . . shall be the supreme law of the land"); *The Paquete Habana*, 175 U.S. at 700 ("International law is part of our law."); Vienna Convention, *supra* note 21, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); Vienna Convention, *supra* note 21, art. 53 (noting that there are "peremptory norm[s] of general international law"); Michael D. Ramsey, *Torturing Executive Power,* 93 GEO. L.J. 1213, 1232 (2005) ("Laws . . . must be faithfully executed, and terminating or suspending a treaty in violation of its terms is not faithful

Constitution and the laws of the land is acting unconstitutionally and in dereliction of duty. The President is required to abide by both international law[84] and domestic law.

Prosecutions can be brought under U.S. statutes that criminalize torture, as well as under war crimes frameworks for offenses committed outside the U.S.[85] For example, the U.S. ratified the Convention Against Torture (CAT) in October 1994, and federal legislation, the Torture Convention Implementation Act, was enacted to codify the prohibitions in the criminal code that same year.[86] Federal courts have enforced restrictions on extraterritorial acts of torture.[87] Pursuant to 18 U.S.C. § 3231, federal courts have original or concurrent jurisdiction over any violation of U.S. law; 10 U.S.C. § 818 can be used to prosecute war crimes as violations of U.S. law, and 18 U.S.C. § 2441 can be employed to prosecute grave breaches of the Geneva Conventions.[88] Indeed, 18 U.S.C. § 2441 states: "Whoever, whether inside or outside the United States commits, a war crime . . . shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death."[89]

execution."); Meron, *supra* note 53, at 6-18 (stating that certain customary international law norms are said to incorporate a non-derogation quality). The general public prefers compliance with international law. *See generally* DAVID MALONE, DECISION-MAKING IN THE UN SECURITY COUNCIL: THE CASE OF HAITI 1990-1997, at 98-118 (1998); Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS 49, 71 (Volker Rittberger & Peter Mayer eds., 1993).

84. Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees,* 43 COLUM. J. TRANSNAT'L L. 811, 855-56 (2005) ("The plan and authorizations to violate international law were not only illegal but were also unconstitutional. Under the Constitution, the President is expressly bound to faithfully execute the laws, which include treaty law and customary law.").

85. Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and Accountability Under International Law*, 47 WM. AND MARY L. REV. 135, 185 (2005).

86. 18 U.S.C. § 2340A (2001). President Reagan signed the CAT on April 18, 1988, and the Senate ratified the agreement with conditions on October 21, 1994. Pub. L. No. 103-36 § 2340, 108 Stat. 463 (1994); GARCIA, *supra* note 42, at 4.

87. Filartiga v. Pena-Irala, 630 F.2d 876, 876 (2d Cir. 1980); John B. Bellinger, III, Legal Adviser, Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches *(*Apr. 11, 2008), *available at* http://2001-2009.state.gov/s/l/rls/103506.htm.

88. Jordan J. Paust, *Will Prosecution and Cashiering of Few Soldiers and Resignations Comply with International Law?*, JURIST, May 10, 2004, http://www.nimj.com/documents/AbuGhraib.doc.

89. 18 U.S.C § 2441 (1997). Both the anti-torture statute and the War Crimes

Not only is punishment mandatory for offenders of human rights law, but international law also requires civil relief for victims of torture. Article 8 of the Universal Declaration on Human Rights states that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[90] Article 14 of the CAT provides: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible."[91] Addressing Article 7 of the CAT, the Human Rights Committee construed that "[c]omplaints about ill-treatment [of detainees] must be investigated . . . . Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation."[92] In 2007 and 2008, the U.N. General Assembly stated that "national legal systems must ensure that victims of torture and other cruel, inhuman or degrading treatment or punishment obtain redress, are awarded fair and adequate compensation and receive appropriate social and medical rehabilitation."[93] In *Sosa v. Alvarez-Machain*, Justice Breyer held that "torture, genocide, crimes against humanity, and war crimes" should give rise to civil tort recovery.[94] In *Sosa,* the Bush Administration offered an amicus brief that departed from the Carter Administration's position by contending that Congress must assent to permit Alien Tort Claims Act cases, but the Court rejected this argument.[95]

Act provide for the death penalty when the wrongdoer's conduct results in death to the victim. Major Mynda G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice,* 57 A.F. L. REV. 1, 49 (2005).

90. UDHR, *supra* note 41, art. 8.

91. CAT, *supra* note 42, art. 14.

92. Paust, *Above the Law*, *supra* note 7, at 365 (citing Human Rights Commission, Report of the Human Rights Commission, 37 U.N. GAOR Supp. (No. 7) at 1, P 1, U.N. Doc. E/CN.4/Sub.2/Add.1/963 (1982)).

93. G.A. Res. 63/166, 18, U.N. Doc. A/RES/63/166 (Feb. 19, 2009); G.A. Res. 62/148, 13, U.N. Doc. A/RES/62/148 (Mar. 4, 2008); *see, e.g.,* G.A. Res. 61/153, pmbl., U.N. Doc. A/RES/61/153 (Feb. 14, 2007); G.A. Res. 60/148, U.N. Doc. A/RES/60/148 (Feb. 21, 2006).

94. Sosa v. Alvarez-Machain, 542 U.S. 692, 762-63 (2004) (Breyer, J., concurring).

95. Atif Rehman, Note, *The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraib Torture Through the Alien Tort Claims Act*, 16 IND. INT'L & COMP. L. REV. 493, 504-05 (2006); Marcia Coyle, *Justices Open Door with Alien Tort Case; What Kind of Claims Remain is Contested*, 26 NAT'L L. J. 1 (July 8, 2004).

2. THEORIES OF CULPABILITY

An act of torture "perpetrated or sanctioned by a nation's authorities" is a substantive criminal offense in violation of the law of nations.[96] Also, the U.S. Torture Victim Protection Act requires that perpetrators act under "color of law,"[97] which generally means that the torturer "acts together with state officials or with significant state aid."[98] Because the White House and Secretary of Defense approved interrogation standards by issuing directives, international, military, and civilian law provide theories of criminal and civil liability that could reach the White House, intermediary officials, and those executing orders, including CIA officers, military officials, and potentially even private contractors.

International war crimes tribunals have explicitly recognized the danger of officials dodging responsibility by craftily obscuring the connection between the direction of war crimes and their execution.[99] Unsanctioned acts can also beget superior responsibility because the U.S. signed the Torture Convention with the understanding that "acquiescence" to a wrong can occur when public officials, "prior to the activity constituting torture, have awareness of such activity and thereafter breach [their] legal responsibility to intervene to prevent such activity."[100] The Uniform Code of Military Justice forbids mistreatment of detainees and conspiring to commit crimes,[101] and a military official can be liable under command responsibility when the leader possesses information that confers notice of the potentially unlawful acts of subordinates.[102] The Army Field Manual states

96. Ramsameachire v. Ashcroft, 357 F.3d 169, 184 (2d Cir. 2004); Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 17, 25 (1999) (noting that the UDHR applies to "every individual and every organ of society").

97. 18 U.S.C. § 2340 (1994 & Supp. 2004).

98. Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995).

99. Akerson & Knowlton, *supra* note 20, at 624 (noting concerns that perpetrators of war crimes can go unpunished by not having effective chain of command, responsibility and disciplinary structures).

100. 8 C.F.R. § 208.18(a)(7) (2010).

101. 10 U.S.C. §§ 881, 893 (2000).

102. Akerson & Knowlton, *supra* note 20, at 631 (stating that "command responsibility is now being litigated in more numerous and diverse fora, including domestic prosecutions invoking universal jurisdiction"). Following WWII, Japanese General Yamashita was convicted by the U.S. military tribunal and sentenced to death for crimes of his soldiers. In re Yamashita, 327 U.S. 1, 4-7, 13-14 (1946).

that an officer is liable when he "has actual knowledge, or should have knowledge . . . that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war."[103] This standard was reaffirmed in the Military Commission Act of 2006.[104] Professor Amy Sepinwall wrote that "the crime of the commanding officer's subordinates would attach to the officer unless he sought to punish his subordinates and ensure that the victims' injuries were redressed."[105] With reference to the recent issues involving detainee treatment, top White House and Department of Defense officials ordered acts that might very well have been torture, and President Bush stated that those orders derived from the Commander-in-Chief authority.[106]

103. U.S. DEP'T OF THE ARMY, ARMY FIELD MANUAL 27-10, ch. 8, § 501 (1956), *available at* http://www.globalsecurity.org/military/library/policy/army/fm/27-10/Ch8.htm; Prosecutor v. Halilovic, Case No. IT-01-48-T, Trial Judgment, ¶ 54 (Nov. 16, 2005), (stating that

> [t]he Trial Chamber finds that under Article 7(3) command responsibility is responsibility for an omission . . . . This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates . . . . A commander is responsible not as though he had committed the crime himself.).

Akerson & Knowlton, *supra* note 20, at 641.

104. Military Commissions Act of 2006, Pub. L. No. 109-366, § 950(q), 120 Stat. 2600 (2006) (Superior commanders can be punished as a principal when a commander "knew, . . . or should have known, that a subordinate was about to commit such acts or had done so and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.").

105. Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. 251, 273 (2009).

106. Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. § 2340-2340A (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf (stating that, "In light of the President's complete authority over the conduct of war . . . the prohibition against torture . . . must be construed as not applying to interrogation undertaken pursuant to his Commander-in-Chief authority."); Evan J. Wallach, *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and al Qaeda and the Mistreatment of Prisoners in Abu Ghraib*, 37 CASE W. RES. J. INT'L L. 541, 582 (2005) (listing the three categories of initially approved interrogation tactics, which involved imposing an uncomfortable environment, yelling, and inflicting stressful conditions on detainees (category I); employing stress positions, constricting breathing, and inducing sensory deprivation (category II); and threatening to kill members of a captive's family, exposing inmates to harshly cold temperatures and water, engaging in daylong interrogations, and inducing perceptions of drowning and suffocation (category III)); Fisher, *supra* note 9, at 1243

There may, at times, be a gap between express orders given by a leader and a subordinate's abuse that exceeds explicit standards of interrogation. However, even where there is no explicit agreement or directive to maltreat detainees beyond approved interrogation methods,[107] leaders can still be held responsible for issuing directives. The doctrine of command responsibility connotes that top officials can be responsible when the actions of other government officials or private contractors reasonably flow from the commanders' directives, or when the top officials do not stop torture when there is an obligation to do so.[108] Mistreatment exceeding approved interrogation standards might be reasonably foreseeable by superior officers and top officials, given the systematic and prolonged nature of psychological and physical harms and even death of more than one hundred detainees across all U.S. detention facilities over a several year period.[109] Moreover, there was a chasm between approved

(citing: Memorandum from the Office of the Sec'y of Defense to the Gen. Counsel of the Dep't of Defense, Re: Detainees Interrogations (Jan. 15, 2003, declassified June 21, 2004) (referencing an additional opinion from legal advisors and noting that the Administration's expansive actions regarding interrogation were premised on the assumption that statutes prohibiting torture were not binding because actions were taken pursuant to the Commander in Chief authority); *see supra* Section I (citing sources complaining that interrogation orders resulted in torture).

107. Military Commissions Act of 2006, 10 § U.S.C. § 950q(3) (2011) (incorporating a negligence standard by making superiors responsible when they knew "or should have known" that a subordinate would commit a crime and failed to prevent it); Prosecutor v. Mucic et al., Case No. IT-96-21-T, Judgment, ¶ 383 (Nov. 16, 1998), *available at* http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf (holding that a leader can be culpable when he "had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates").

108. *In re Yamashita*, 327 U.S. 1, 15 (1946) (superior officers can be liable if they held effective control over subordinates who violated the law of nations, such as by engaging in torture; knew or should have been aware of the subordinates' illegal conduct; and did not undertake reasonable affirmative acts to impede the subordinates' illegal conduct); Prosecutor v. Mucic et al., Case No. IT-96-21-T, Judgment, ¶ 383 (Nov. 16, 1998), *available at*

http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf (holding that a leader can be culpable when:

> (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes [prohibited by binding international law] . . . or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offenses by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.").

109. HINA SHAMSI, HUMAN RIGHTS FIRST, COMMAND'S RESPONSIBILITY: DETAINEE

standards and what Bush Administration legal advisers interpreted would be an indictable crime. Legal advisors opined that interrogators could exert such force on a detainee as was necessary, including reaching the level of organ failure or even death, but as long as the interrogator did not intend the manifested harm, then the interrogator would be acting legally.[110] If there is no credible connection between approved psychological interrogation techniques and punishment for the interrogator, which here ostensibly involved impunity for any act up to murder in the first degree, then enumerating endorsed interrogation standards with a reduced intensity may be pointless. Likewise, it is plausible that a perception of unbounded behavior dominated if there was commingling with Bush's order to authorize the CIA to kill terrorist operatives around the world.[111]

There are also potentially applicable theories of culpability under U.S. criminal law, under which punishment will not normally apply to superiors for the acts of subordinates unless there is some knowledge and complicity on the part of the superior officers.[112] These additional theories of guilt could be relevant to the interpretation of the elements of command responsibility, given the similarities with agent-principal relations and hierarchical directives in corporations,

DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN 1 (Deborah Paearlstein, ed.) (Feb. 2006), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/06221-etn-hrf-dic-rep-web.pdf; Melissa Epstein Mills, *Brass-Collar Crime: A Corporate Model for Command Responsibility*, 47 WILLAMETTE L. REV. 25, 38 (2010) (citing atrocities in Abu Ghraib and Haditha); Stephen N. Xenakis, *More on: "Doctors Must Be Healers,"* 37 SETON HALL L. REV. 703 706 (2007) (noting that at least ninety-eight detainees died in U.S. custody, and Physicians for Human Rights tallied 105 deaths in Iraq and Afghanistan between 2002 and 2005); *Report: 108 Die in U.S. Custody*, CBS NEWS, Mar. 16, 2005, http://www.cbsnews.com/stories/2005/03/16/terror/main680658.shtml.

110. *See generally* Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. § 2340-2340A (Aug. 1, 2002).

111. A. John Radsan, *An Overt Turn on Covert Action*, 53 ST. LOUIS U. L.J. 485, 486 (2009); James Risen & David Johnston, *Threats and Responses: Hunt for al Qaeda; Bush has Widened Authority of CIA to Kill Terrorists*, N.Y. TIMES, Dec. 15, 2002, http://www.nytimes.com/2002/12/15/world/threats-responses-hunt-for-al-qaeda-bush-has-widened-authority-cia-kill.html.

112. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 83-85 (2005) (noting that criminal law is generally premised on punishing individuals when they deliberately commit blameworthy acts and not for "guilt on association").

organizations, and states.[113] The Responsible Corporate Officer Doctrine can hold individuals criminally responsible "for crimes they fail to prevent by neglecting to control the misconduct of those subject to their control,"[114] which obviates a scienter requirement.[115] Additionally, the Conscious Avoidance Doctrine can impose criminal liability on principals who "consciously avoid" or remain "willfully blind" to the acts of agents.[116] A jury can "infer knowledge from proof that a defendant shielded himself from knowledge of an illegal act."[117] Both the Responsible Corporate Officer Doctrine and Conscious Avoidance Doctrine might be pertinent to chain of command reasoning because they are domestic doctrines that propose the need to reduce the mens rea required for holding superiors culpable for the acts of agents or subordinates.

Conspiracy requires two or more people to voluntarily agree to carry out an unlawful objective, and one or more assenters to execute an overt act in furtherance of the conspiracy.[118] Under military law, an individual can be held criminally liable as a conspirator if the conspiracy was known and the conspirator did nothing to prevent the wrong from occurring.[119] Similarly, an accomplice to a criminal act is someone who intentionally encourages or assists in the commission of a crime.[120] The accomplice's assistance need not directly cause the criminal result, but must make it easier for the principal to achieve a

113. Robert Bejesky, *Currency Cooperation and Sovereign Financial Obligations*, 24 FLA. J. INT'L L. 91, 94 (2012).

114. WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS 254 (6th ed. 1998). *See* United States v. Park, 421 U.S. 658, 666-67 (1975); United States v. Dotterweich, 320 U.S. 277, 277, 281-82 (1943).

115. Richard Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 FORDHAM ENVTL. L.J. 861, 874 (1996).

116. United States v. Abreu, 342 F.3d 183, 187-88 (2d. Cir. 2003).

117. Joseph E. Cole, *Environmental Criminal Liability: What Federal Officers Know (or Should Know) Can Hurt Them*, 54 A.F. L. REV. 1, 4 (2004).

118. Model Penal Code § 5.03(1) (2012); United States v. Loe, 262 F.3d 427, 432-33 (5th Cir. 2001) (citing United States v. Dien Duc Huynh, 246 F.3d 734, 745 (5th Cir. 2001)).

119. 10 U.S.C. § 881(b) (2006) ("Any person subject to this chapter who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished . . . .").

120. COMM. ON INT'L HUMAN RIGHTS OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK ET AL., TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" at 109 (2004), *available at* http://www.chrgj.org/docs/TortureByProxy.pdf [hereinafter COMM. ON INT'L HUMAN RIGHTS].

desired result that "in all human probability the end would have been attained without it."[121] President Bush and top appointees issued orders to establish interrogation facilities and permit harsh interrogations. Had it not been for those directives, subordinate-interrogators would have had no facilities or permission with which to capture, imprison, or interrogate detainees.

With many doctrines and theories that can heighten the criminal responsibility of superior and associative actors, it is also true that the nexus among those participants could be diluted by an appropriate factual basis. An extreme case where the association among potentially culpable actors is attenuated is the government's lesser level of involvement with a wrongdoer group that is encountered in *Nicaragua v. United States*.[122] In this International Court of Justice case, the court held that the Reagan Administration's covert actions led to training, equipping, and funding the Contras to overthrow the legitimate Sandinista government of Nicaragua, but that involvement did not make the Reagan Administration liable for the insurgent group's human rights abuses because U.S. officials were not in effective control of the Contras.[123] By contrast, the Bush Administration's orders for interrogations were very explicit and were direct acts of state.

3. REASONS THAT U.S. COURTS HAVE NOT ASSERTED JURISDICTION

With substantive international law that prohibits torture, U.S. courts that are required to enforce the law, and theories of culpability that identify those who can be held liable for transgressing international law, there are still hurdles that prevent U.S. courts from rendering punishment in criminal cases and impede victims of torture from attaining compensation in civil cases.

a. Hurdles to Criminal Liability

Prosecutors have an obligation to bring criminal cases, and

121. COMM. ON INT'L HUMAN RIGHTS, *supra*, note 120, at 172-73 (citing State *ex rel.* Martin v. Tally, 15 So. 722 (Ala. 1894)).

122. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 109-13 (June 27).

123. *Id.*; Gregory Townsend, *State Responsibility for Acts of De Facto Agents*, 14 ARIZ. J. INT'L & COMP. L. 635, 643 (1997).

courts must assert jurisdiction when war crimes have been committed.[124] This has not happened in the U.S. legal system even with binding international and domestic laws[125] and strong bases of culpability, and without sovereign immunity questions that normally surface when adjudicating the acts of foreign leaders.[126] As Professor David Scheffer explains, the "United States remains in large measure a free haven for perpetrators of crimes against humanity [including for] . . . any U.S. citizen who may perpetrate a crime against humanity overseas."[127]

The first hurdle for assessing criminal liability is that a prosecutor must initiate proceedings in a U.S. court. It is unlikely for a prosecutor, who is a member of the executive branch, to indict another member of the executive branch for harsh interrogations when the Justice Department had a significant number of appointed political loyalists and had advisors who approved of the abusive methods in legal memos.[128]

124. Samuel Brenner, *"I am a Bit Sickened": Examining Archetypes of Congressional War Crimes Oversight After My Lai and Abu Ghraib*, 205 MIL L. REV. 1, 10 (2010):

> Where the reputation of the U.S. military, and the United States itself, has been tarnished by war criminals, it is the duty – and the privilege – of those investigators and prosecutors not only to enforce the laws, but also to show the rest of the military, the country, and the world community that the United States will not condone atrocity.

125. There has been interpretive disagreement on the extent that customary international law norms are enforceable in U.S. courts. Foster v. Neilson, 27 U.S. 253, 314 (1829) (noting that treaties, equivalent to legislation, have a binding effect that is clear under the Constitution, but unspecified non-enumerated principles are less clear); Robert Kagan, *A Matter of Record: Security, Not Law, Established American Legitimacy*, FOREIGN AFFAIRS 170, 170-72 (Jan./Feb. 2005); Robert J. Delahunty & John C. Yoo, *Executive Power v. International Law*, 30 HARV. J.L. & PUB. POL'Y 73, 73-75, 112-13 (2006) (contending that customary international law may not be enforceable). However, custom need not be assessed. "Hard" laws are positive enactments requiring enforcement, and "soft" laws are moral and ethical norms, which should be followed but might not be directly enforceable. The case for direct applicability of torture violations under "hard" international law is one of the clearest situations of applicability.

126. 28 U.S.C. § 1605(a)(7) (2000) (stating that, in the US, a 1996 amendment to the Foreign Sovereign Immunity Act pierces the veil of protection for public officials engaging in acts of torture, extrajudicial killing, aircraft sabotage, and hostage-taking for acts occurring outside the US.). No sovereign immunity issues arise in these cases because the wrongdoers are United States citizens.

127. David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. U.J. INT'L HUM. RTS., 30, 24 (2009).

128. Jack Goldsmith, *International Human Rights Law & the United States Double Standard,* 1 GREEN BAG 2d 365, 366 (1998) ("The United States systematically declines to apply international human rights law to its domestic

President Bush's Justice Department issued memos that sanctioned abusive interrogation techniques as legitimate and then granted impunity by refusing to prosecute officials under the War Crimes Act.[129] There was even a scandal involving the Bush White House illegally forcing out members of the Justice Department based on political bias.[130] Other than the use of special prosecutors, who have also been open to political influence,[131] there is no other viable alternative to independently investigate executive branch officials.

The second hurdle that prevents both criminal and civil cases from rendering punishment and remedies in the U.S. involves characteristics of the judiciary. The Supreme Court has long held "that when the President takes official action, the Court has the authority to determine whether he has acted within the law."[132] Also, if the President asserts executive privilege, it is "the [C]ourt, not the Executive that determines whether the state secret privilege has been properly invoked."[133] In practice, these principles are rather formidable for courts to surmount. Courts and Congress defer to executive prerogative when national security is involved.[134] Top officials are frequently capable of blocking investigations and prosecutions,[135] particularly when the judiciary does not request, receive, and examine executive branch documents.[136] The Bush Administration often countered factual bases of wrongdoing by portraying leaks of torture as "rumor, innuendo, and assertions" by "uninformed, misinformed or poorly informed" individuals,[137] which competes with the tremendous amount of evidence assembled by military investigations,

officials."); Davis, *supra* note 23, at 562.

129. Paust, *Above the Law*, *supra* note 7, at 367.

130. Robert Bejesky, *National Security Information Flow: From Source to Reporter's Privilege*, 24 ST. THOMAS L. REV. 399, 426 (2012) [hereinafter Bejesky, *National Security*].

131. Lanny J. Davis, *Spinning Out of Control: The Scandal Machine*, 60 MD. L. REV. 41, 52-53 (2001).

132. Clinton v. Jones, 520 U.S. 681, 703 (1997).

133. El-Masri v. United States, 479 F.3d 296, 312 (4th Cir. 2007) (discussing that El-Masri is an alleged kidnapping and torture case).

134. Robert Bejesky, *Cognitive Foreign Policy: Linking Al Qaeda and Iraq,* 56(1) HOW. L.J. 1, 11-13 (2012) [hereinafter Bejesky, *Cognitive Foreign Policy*]; Bejesky, *National Security*, *supra* note 130, at 402-05.

135. Davis, *supra* note 23, at 517.

136. Louis Fisher, *Extraordinary Rendition: The Price of Secrecy,* 57 AM. U. L. REV. 1405, 1447 (2008).

137. Kreimer, *supra* note 7, at 1209.

congressional hearings, habeas petitions, international sources, individual investigators and researchers,[138] media accounts, and human rights investigations.

b. Hurdles to Civil Liability

U.S. courts refrain from hearing civil cases related to torture for several reasons. Because a private plaintiff is the party who initiates a case, as opposed to a prosecutor within the executive branch, the court will receive pleadings. Nonetheless, there are still weaknesses in gathering evidence that prevent the case from going forward due to the President's national security prerogative. Also, sovereign immunity has historically bestowed U.S. government officials with an absolute defense to actions, including for tortious conduct.[139] However, the Foreign Tort Claims Act (FTCA) permits Congress to provide exceptions to sovereign immunity, and this may be the only federal statute that could provide a civil cause of action for torture victims.[140] If Congress has not provided an exception to sovereign immunity, U.S. officials can dismiss the claim.[141]

The FTCA can waive sovereign immunity for claims committed by U.S. government employees,[142] making them open to suit in a manner similar to a private individual under comparable circumstances.[143] The most likely candidate for remedying acts of torture perpetrated by U.S. officials or employees is a constitutional tort under the Bivens Doctrine[144]

138. Davis, *supra* note 23, at 619, 622, 637, 645-46.

139. Orff v. United States, 545 U.S. 596, 599-603 (2005) (barring suits against the U.S. under sovereign immunity); 1 LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS §2.02 (2005).

140. Richard Henry Seamon, *U.S. Torture as a Tort,* 37 RUTGERS L.J. 715, 719, 722 (2006).

141. Elizabeth A. Wilson, *Is Torture All in a Day's Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J.L. & PUB. POL'Y 175, 181 (2008).

142. 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680 (2000).

143. *Id.* § 2674.

144. *Id.* § 2679(b)(2)(A) (2012); Bivens v. Six Unknown Named Agents Federal Bureau Narcotics, 403 U.S. 388, 391-97 (1971); Seamon, *supra* note 140, at 723. For example, in a case in which a former DEA agent filed suit against the CIA for allegedly spying on him in violation of his Fourth Amendment rights while on mission in Burma, the court initially dismissed the case under the state secrets privilege. In re Sealed Case, 494 F.3d 139, 141-45 (D.C. Cir. 2007). The court overruled the state secrets privilege assertion and would not grant the CIA "a high degree of deference because of its prior misrepresentations regarding the state

because acts of physical torture and unreasonable psychological pressure could fall within the Eighth Amendment's "cruel and unusual" punishment provision.[145] The suit can be brought against the United States when government officials or employees commit torts, such as torture, while acting within the "scope of employment," which permits substituting the United States as the defendant.[146] The Attorney General decides if the official was acting within the scope of employment, and this determination is subject to judicial review.[147] Thus, unlike a criminal action in which the Attorney General would prosecute a state actor, in a civil case, the Attorney General will defend the government actor. If the case proceeds, courts must determine if a constitutional tort resulted from the government employee's official conduct.[148] However, since 1983, the Supreme Court has rejected the past seven attempts to apply Bivens actions in new factual scenarios, based generally on political question grounds.[149]

Other limitations are that the FTCA excludes cases involving military activities during wartime or "combatant activities,"[150] which might assimilate with operations purportedly to gather intelligence. There are exclusions for all claims arising in a foreign country, for many intentional torts, and for officials making discretionary policy decisions.[151] For an aggrieved victim of torture to succeed would ostensibly require an amendment to overcome the "discretionary function" exception.[152] Also, the Supreme Court affirmed that the FTCA's "exception bars all

secrets privilege in this case." Horn v. Huddle, 647 F. Supp. 2d 55, 58 (D. D.C. Aug. 26, 2009).

145. Hope v. Pelzer, 536 U.S. 728, 741, 750-51 (2002); 136 CONG. REC. S17, 486-01 (daily ed., Oct. 27, 1990) (stating that the U.S. reservation provides that Article 16 of the ICCPR is only binding on the U.S. to the extent that "'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States").

146. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (2008); Wilson, *supra* note 141, at 176.

147. 28 U.S.C. § 1346(b)(1) (2011); 28 C.F.R. §§ 15.1-15.4 (2005); Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 423-35 (1995).

148. Brousseau v. Haugen, 543 U.S. 194, 197-98 (2004).

149. Brown, *supra* note 5, at 845.

150. Federal Tort Claims Act, 28 U.S.C. § 2680(j) (2008); Koohi v. United States, 976 F.2d 1328, 1333 n.5 (9th Cir. 1992) (stating that combatant activities are those "activities both necessary to and in direct connection with actual hostilities").

151. 28 U.S.C. § 2680(a)(k)(h) (2008).

152. *Id.* § 2680(a).

claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."[153]

Sovereign immunity and the list of FTCA exclusions do not impede plaintiffs from suing government actors in a "personal capacity" suit.[154] However, official immunity provides protection from money damage suits for claims arising from government actors' official conduct.[155] The Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act) accords absolute immunity for U.S. government officials in civil suits for claims arising under international law,[156] or based on omissions, negligent, or wrongful acts they commit "while acting within the scope of [their] employment."[157] Consequently, the typical challenge under the Westfall Act is to assert that the defendants were acting outside the scope of their employment.[158] In an amicus curiae brief, Congressman Barney Frank wrote that the Westfall Act was intended to make federal employees immune from suit by making the United States defend the case, unless the government defendant is accused of egregious misconduct.[159] Ergo, the Westfall Act was designed to protect government employees when they act negligently within the scope of their employment, but not to provide shelter for intentional torts or criminal acts.[160] Likewise, private contractors for the government normally do not have this immunity because they are not employees of a federal agency, but private contractors could have

153. Sosa v. Alvarez-Machain, 542 U.S. 692, 711 (2004).

154. Seamon, *supra* note 140, at 722-23.

155. *Id.* at 723-24.

156. Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified in 28 U.S.C. § 2680k(2012)) (noting that exceptions to liability include "[a]ny claim arising in a foreign country").

157. 28 U.S.C. § 2679(b)(1) (2012); In re Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 107-09 (D. D.C. 2007) (noting that qualified immunity is granted to employees and officials accused of torture).

158. In re Iraq & Afg. Detainees Litig., 479 F. Supp. 2d at 110; Harbury v. Hayden, 522 F.3d 413, 416 n.1, 418 (D.C. Cir. 2008); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 105, 108 (D. D.C. 2010) (dismissing suit against employees and U.S. government).

159. *See generally* Brief for United States Representative Barney Frank as Amicus Curiae Supporting Appellant Jennifer K. Harbury at 3-4, Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2007) (No. 06-5282); H.R. REP. NO. 100-700, at 5 (1988).

160. BETH STEPHENS, JUDITH CHOMSKY, JENNIFER GREEN, PAUL HOFFMAN & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURT 291-95 (2d. ed. 2008).

immunity if a federal agency entirely controls their work.[161] L-3 Services, a private military contractor accused of abusing Iraqi prisoners, had maintained during four years of litigation that it was immune from suit because the same claims could not be brought in U.S. courts against the federal government, but, in January 2013, the firm settled with 71 former detainee-plaintiffs by paying $5.28 million while explaining to the federal court that "[n]o court in the United States has allowed aliens – detained on the battlefield or in the course of postwar occupation and military operations by the U.S. military – to seek damages for their detention."[162]

Consider an example of how U.S. courts have protected U.S. government officials while opening liability for a foe. When the ACLU and Human Rights First filed a civil lawsuit against Secretary of Defense Donald Rumsfeld on behalf of eight men previously detained in Iraq, Afghanistan, and Guantanamo Bay, alleging that Rumsfeld violated the U.S. Constitution, federal law, and international law, the court dismissed the case.[163] Yet, plaintiffs could sue Iraqis in U.S. courts under an amendment that eliminated sovereign immunity for any state that is designated a state sponsor of terrorism.[164] Individuals sued Iraq in U.S. courts in 2003,[165] but Iraq could not suitably appear before the court.[166] It would not be realistic for former Iraqi

161. 28 U.S.C. § 2671 (2010); STEPHENS, CHOMSKY, GREEN, HOFFMAN & RATNER, *supra* note 160, at 328; United States v. Orleans, 425 U.S. 807, 814-15 (1976) (discussing the possibility of contractor immunity).

162. Pete Yost, *Iraqis Held at Abu Ghraib, Other Sites Get $5M,* ASSOC. PRESS, Jan. 9, 2013, *available at* http://www.armytimes.com/news/2013/01/ap-iraqis-held-at-abu-ghraib-receive-5-million-010913/.

163. Ali et al. v. Rumsfeld, 649 F.3d 762 (D.C. Cir. 2011); ACLU, *The Case Against Rumsfeld* (May 23, 2006), http://www.aclu.org/national-security/case-against-rumsfeld.

164. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602-1611 (2006)). In April 2003, Congress passed the Emergency Wartime Supplemental Appropriations which allowed the President to "make inapplicable with respect to Iraq [any] provision of law that applies to countries that have supported terrorism." Pub. L. No. 108-011, § 1503, 117 Stat. 559 (2003).

165. Vine v. Republic of Iraq, 459 F. Supp. 2d 10, 14-15 (D. D.C. 2006), *rev'd sub nom*. Simon v. Republic of Iraq, 529 F.3d 1187 (D.C. Cir. 2008); Republic of Iraq v. Beaty, 556 U.S. 848 (2009) (discussing terrorism exception to sovereign immunity and reversing with a finding that U.S. courts cannot exercise jurisdiction after the president made legal provisions that apply to terror-sponsoring countries inoperative as to Iraq).

166. After Hussein's regime was replaced following the March 2003 invasion, Iraq had no government in power and therefore would have had no authorized agent to

officials, who were removed from power, to be in a position to assert rights in U.S. courts even though Iraq was attacked without international authorization.[167] Moreover, Iraqis were barred from suing in their own domestic courts because Coalition Provisional Authority Order No. 17 afforded coalition forces with immunity from prosecution for human rights abuses in Iraq.[168] International courts were equally ineffective in addressing human rights abuses.

B. INTERNATIONAL CRIMINAL COURT (ICC)

1. THE U.S. ABSENCE FROM THE ICC

The ICC's mission is to "guarantee lasting respect for . . . the enforcement of international justice"[169] by asserting jurisdiction only over "the most serious crimes of concern to the international community as a whole."[170] The ICC Statute enumerates a list of crimes over which it will accept jurisdiction, including "[g]rave breaches of the Geneva Conventions," twenty-six other "serious violations" of the law of international armed conflict, four "serious violations" of general armed conflict, and twelve more "serious violations of the laws and customs applicable in armed conflict not of an international character."[171]

The Clinton Administration contributed to the diplomatic negotiations for the ICC in 1998, and offered a code of offenses for the ICC Statute.[172] Clinton signed the Rome Statute, but did not

represent Iraq in U.S. courts. After occupation began, the U.S. and Britain were the occupying authority in Iraq. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003); Richard Willing, *Former POWs Could Get Payback for Abuse,* USA TODAY, Mar. 30, 2003, http://usatoday30.usatoday.com/news/world/iraq/2003-03-30-pow-court_x.htm (reporting that the original case involved 17 American POWs suing for $910 million for allegedly being "beaten, starved, hit with electric shocks, threatened with execution and tortured" during the 1991 Gulf War and further noting that if the jurisdictional basis is met, the plaintiffs would win the case by default because Iraq was served with papers and did not respond).

167. Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT'L L. & COM. 295, 334-50 (2011) [hereinafter Bejesky, *Weapon Inspections*].

168. Coalition Provisional Authority, L. Paul Bremer, Order No. 17 sec 2(1) and sec 18; M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT'L L.J. 327, 355-56 (2005).

169. Rome Statute, *supra* note 55, pmbl.

170. *Id.*, art. 5.

171. *Id.*, art. 8(2)(a)(b)(c)(e).

172. Stephen Eliot Smith, *Defining Maybe: The Outlook for U.S. Relations with the*

recommend that the Senate ratify the treaty.[173] In April 2002, the ICC became the first permanent international court,[174] and the following year, its eighteen judges and one prosecutor were elected and took office.[175] The Bush Administration patently rejected U.S. participation in the ICC, revoked Clinton's signature,[176] and went to war against Iraq without Security Council authorization and without a viable justification.[177] President Obama expressed that he would review U.S. relations with the ICC.[178]

There are reasons to oppose U.S. membership in the ICC. First, the ICC could impede peace agreements because parties engaged in conflict might be hesitant to cease fighting when they could be prosecuted in the ICC.[179] However, a rebuttal position is that the ICC's existence might curtail fighting by preventing vengeance and private justice when victims perceive that the ICC will impose punishment on perpetrators.[180] Second, the ICC

International Criminal Court During the Obama Administration, 22 FLA. J. INT'L L. 155, 160-61 (2010); Anne K. Heindel, *International Human Rights & U.S. Foreign Policy: The Counterproductive Bush Administration Policy Toward the International Criminal Court*, 2 SEATTLE J. SOC. JUST. 345, 356 (2004) (noting that Clinton favors internal armed conflict crimes to be included in the Statute).

173. Heindel, *supra* note 172, at 356; *Clinton's Statement on War Crimes Court*, BBC, Dec. 31, 2000, http://news.bbc.co.uk/2/hi/1095580.stm.

174. Barbara Crossette, *War Crimes Tribunal Becomes Reality, Without U.S. Role*, N.Y. TIMES, Apr. 12, 2002, at A3.

175. Heindel, *supra* note 172, at 349.

176. Smith, *supra* note 172, at 161-62.

177. *See* Bejesky, *Weapon Inspections*, *supra* note 167, at 370-75 (noting that many states and commentators called the invasion illegal; the UN inspection teams did not encounter evidence in Iraq of prohibited weapons that could have justified invasion during four months of searching; the Bush Administration repeatedly alleged publicly that inspectors were wrong and that secretive intelligence information proved that Iraq was in breach;, and the Bush Administration went to war without Security Council approval); *see generally* Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards,* 44 CREIGHTON L. REV. 811, 811-12, 875-82 (2011) [hereinafter Bejesky, *Intelligence Information*] (citing commentators who contended that the intelligence information that supposedly proved Iraq possessed weapons of mass destruction or was a security threat to the U.S. was unsubstantiated, itemizing the claims and intelligence reports that indicated the intelligence claims were virtually baseless, and noting that it is highly probable that the faulty National Intelligence Estimate for Iraq derived from politicization of intelligence).

178. James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact,* 54 VILL. L. REV. 1, 6 (2009).

179. *Id.* at 4.

180. *Id.* at 24.

could prevent dominant countries from intervening militarily to prevent atrocities for fear that soldiers could be threatened with prosecution for war crimes, or from becoming involved in diplomacy because the prospect of prosecution could provide political cover for inaction.[181] However, most countries could actually be opposed to the dominant power's bellicosity if it is not conspicuously warranted. In this case, hauling officials before the ICC may be just. Third, signatory countries are generally not states at risk of prosecution because they do not have a substantial military presence in foreign countries. The Pentagon, however, has the most significant extraterritorial military contingency in the world, has stationed hundreds of thousands of soldiers outside U.S. borders,[182] and has been the principal participant in recent wars. There is a difference between deploying U.S. soldiers to foreign countries and directing them into the use of force.

The Bush Administration's rejection of U.S. membership was inconsistent with the opinion of most Americans because sixty-five percent of the American public support participation when ICC goals and intentions are explained to them.[183] Also, there is a political divide on this issue; none of the aforementioned justifications for opposing U.S. membership can account for Democrats favoring human rights protections more broadly than Republicans.[184] Republicans have been more hawkish, willing to use force, and more likely to disfavor constitutional checks on the Commander-in-Chief authority.[185] Democrats might view ICC membership as a political advantage. The ICC could corral unilateralist U.S. presidents who conduct military actions against the preferences of Americans and the global community. For

181. Alexander, *supra* note 178, at 36.

182. Smith, *supra* note 172, at 186 n.208.

183. Heindel, *supra* note 172, at 345-46.

184. Harold Hongju Koh, *Restoring America's Human Rights Reputation,* 40 CORNELL INT'L L.J. 635, 638 (2007) ("The Bush Administration has regularly opposed efforts to redress human rights abuses through civil liability under the Alien Tort Claims Act, although both the Carter and Clinton Administrations had filed briefs in support of victims' claims."); Cohen, *supra* note 30 (noting that 71% of Democrats, 72% of liberals, 42% of Republicans and 47% of conservatives oppose torture).

185. Bejesky, *Cognitive Foreign Policy*, *supra* note 134, at 43-44 (noting that the "rally around the flag" phenomenon frequently avails Republicans, military conflict may divert attention from social issues, and Republican presidents have received short-term increases in approval ratings during periods of military success); Robert Bejesky, *Politico-International Law,* 57 LOY. L. REV. 29, 38-43, 91 (2011) [hereinafter Bejesky, *Politico*].

example, with ICC membership, a President may be less likely to engage in incessant marketing of security threats, to misrepresent the basis for military action, or to use military force when there would not be clear support from Americans without false statements about security peril.[186] The threat of punishment for initiating illegitimate use of force could prevent a hawkish president from taking attention off of concerns more pressing to dovish members of Congress.

Rejecting ICC membership also seems inconsistent with U.S. history. After World War II, the U.S. was at the forefront of controlling investigations, bankrolling, and holding war crimes tribunals.[187] The Bush Administration countenanced compelling the Yugoslav government to cooperate with the ICC to prosecute Slobodan Milosevic and other top officials,[188] and bankrolled, constituted, gathered evidence for, and impelled the Iraqi High Tribunal to convict former Iraqi officials.[189]

186. *See generally* Bejesky, *Cognitive Foreign Policy*, *supra* note 134 (describing the Bush Administration's marketing and linking of al-Qaeda and Iraq); Robert Bejesky, *Press Clause Aspirations and the Iraq War,* 48 WILLAMETTE L. REV. 343, 348-66, 388-92 (2012); Robert Bejesky, *Congressional Oversight of the "Marketplace of Ideas": Defectors as Sources of War Rhetoric*, 63 SYRACUSE L. REV. 1, 5, 17-28 (2012) (noting that Iraqi defectors also provided public stories about threats directly to the media, to the American intelligence services, and to government agencies, and defectors were being supported by the Bush Administration).

187. GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 150 (2000) ("Nuremberg was largely an American creation."); *A World Criminal Court: Give it a Welcome*, ECONOMIST, Apr. 11, 2002, at 14.

188. Ian Fischer, *Yugoslavia To Cooperate with War Tribunal*, N.Y. TIMES, Apr. 2, 2002, at A6; *A World Criminal Court*, *supra* note 187, at 14; Mayerfeld, *supra* note 28, at 137 (stating that "if the United States had been a party to the Rome Statute . . . [l]eading government officials, including the President, who have authorized or knowingly or negligently" allowed the systematic use of torture and ill treatment would be vulnerable to indictment, prosecution, and punishment by the ICC).

189. Coalition Provision Authority, Order 48: Delegation of Authority Regarding Establishment of an Iraqi Special Tribunal with Appendix A, Dec. 10, 2003, *available at*
http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf (discussing the CPA as constituting the special tribunal and setting forth the rules); Michael A. Newton, *A Near Term Retrospective on the Al-Dujail Trial & the Death of Saddam Hussein*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 31, 46 (2008) (noting that without a legitimate Iraqi government, the Iraqi High Tribunal that convicted Hussein had no legal basis); Miranda Sissons, *Was the Dujail Trial Fair?*, I.C.J. 5 2 (2007) (contending that the Hussein trial was not free from political inference but procedures); Michael J. Frank, *Justice For Iraq, Justice For All*, 57 OKLA. L. REV. 303, 323 (2004) (citing critics who contended that Hussein would "not

2. THE BUSH ADMINISTRATION'S TRUE CONSTERNATION WITH THE ICC

The Bush Administration expressed concern that foreign and international tribunals could subject "American officials and military personnel in operations abroad to unjustified, frivolous or politically motivated suits,"[190] or punishment for using military force that is unpopular in world opinion.[191] There would be some reason for concern. The Rome Statute defines the crime of aggression as "the planning, preparation, initiation or execution" of "the use of armed force by a State against . . . another State."[192] Professor Stephen Eliot Smith raises a possibility when he notes that "American acts of alleged aggression in places such as Nicaragua, Serbia, and Iraq are precisely the types of situations that could be captured by the Statute's definition of the crime of aggression."[193]

U.S. membership in the ICC is not necessarily required for purposes of bringing Bush Administration officials to justice for war crimes or torture. The ICC can exercise jurisdiction over an American if the crime occurs in the territory of an ICC member state.[194] The ICC conducted initial inquiries to gather information about high-ranking U.S. civilians and military generals to document detainee abuse.[195] To address concerns

receive a fair trial because of American involvement in the process of gathering evidence and the discussion of Saddam's conviction and execution as a fait accompli."). *Id.* at 347 n.57 (referencing that the U.S. provided $75 million to fund the Iraqi Special Tribunal).

190. Crossette, *supra* note 174, at A3; Heindel, *supra* note 172, at 353, 357 (stating that opponents of U.S. ratification maintain that global U.S. military operations are vulnerable to politically motivated prosecutions).

191. Michael D. Mysak, *Judging the Giant: An Examination of American Opposition to the Rome Statute of the International Criminal Court*, 63 SASK. L. REV. 275, 285-86 (2000).

192. Rome Statute, *supra* note 55, art. 8.

193. Smith, *supra* note 172, at 175-76.

194. Rome Statute, *supra* note 55, art. 12(2)(a). Thus, when Bush and top officials met with other foreign leaders in European countries on Iraq, there was planning for war, or when the military uses other members' jurisdiction for war preparation or the use of force, there may be acts subject to ICC jurisdiction.

195. Davis, *supra* note 23, at 511; David Kaye, *Don't Fear the International Criminal Court*, FOR. POLICY, Feb. 22, 2006, http://www.foreignpolicy.com/articles/2006/02/21/dont_fear_the_international_criminal_court (noting that despite more than 240 separate requests, many from NGOs, the ICC decided that it would not investigate reported abuses committed by U.S. nationals due to the lack of jurisdiction).

involving the jurisdiction of international tribunals, the Bush Administration entered into approximately one hundred Article 98 agreements[196] to attain bilateral guarantees from other countries to not extradite U.S. citizens to countries that could result in indictments in the ICC.[197] Assuredly, it is also easier to consummate bilateral agreements with countries that are amenable and use the aggregation of assent as leverage on more reluctant countries. However, if the elements of torture are met, Article 98 agreements may not be enforceable because every nation has an obligation to indict perpetrators of torture based on a non-derogative rule and jus cogens norms.[198] The question is whether the Article 98 Agreement would be a valid exception to prevent an individual signatory from waving ICC obligations vis-à-vis other ICC members when the signatory has a more dominant obligation that precludes a refusal to respect the jus cogens norm. There were also multilateral pressures present in that the Bush Administration induced the Security Council to adopt annual resolutions that prohibited the ICC from investigating or prosecuting U.S. officials for war crimes committed during U.N. missions in exchange for not withholding U.S. funding for United Nations peacekeeping missions.[199] After the Abu Ghraib scandal surfaced, which was on the third year of waiver resolutions, Secretary-General Kofi Annan demanded that the exemption be rejected, and the U.S. withdrew the resolution.[200]

196. Juan Forero, *Bush's Aid Cuts on Court Issue Roil Neighbors*, N.Y. TIMES, Aug. 19, 2005, at A1.

197. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291, 334 (2006) (noting that the Bush administration's "attempt to secure Article 98 agreements with many countries has led to a perception . . . [of] affirmatively acting to undermine the ICC"); Jeffrey S. Dietz, *Protecting the Protectors: Can the United States Successfully Exempt U.S. Persons from the International Criminal Court with U.S. Article 98 Agreements?*, 27 HOUS. J. INT'L L. 137, 138-39 (2004); Benjamin B. Ferencz, *Misguided Fears About The International Criminal Court*, 15 PACE INT'L L. REV. 223, 236 (2003) (stating that the Bush administration carried out a "worldwide campaign . . . to obtain bilateral agreements to block all assistance to the ICC and guarantee that no Americans would ever be handed over to the international court").

198. *See generally supra* Section II.B.

199. *Secretary-General's Press Encounter Upon Arrival at UNHQ (unofficial transcript)*, UN.ORG (June 17, 2004), http://www.un.org/apps/sg/offthecuff.asp?nid=596.

200. *Id.*; *US War Crimes Immunity Bid Fails,* BBC, June 24, 2004, http://news.bbc.co.uk/2/hi/americas/3834089.stm.

The American Servicemembers Protection Act of 2002 was adopted to forbid U.S. federal and state agencies from cooperating with the ICC and authorized the U.S. military to use force to rescue any U.S. soldier being held by the ICC.[201] Hypothetically, the Bush Administration could have directed U.S. interrogators or soldiers to commit acts amounting to war crimes, but instead of the ICC carrying out its mission, the Administration could supposedly use the U.S. military to attack ICC members. If this statutory scheme was taken seriously, perhaps other countries signed Article 98 Agreements out of duress to avoid being attacked. If there were no war crimes or human rights abuses, and if there was a broad "Coalition" in Iraq, why did the Bush Administration execute such extraordinary measures to protect against ICC indictments? There are two potential reasons.

First, the ICC will not accept jurisdiction over a case when it "is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."[202] However, if war crimes fall within the ICC jurisdiction, and the U.S. Justice Department and judiciary are ineffective, then the ICC would have the right to assert jurisdiction.[203] Second, the

201. American Servicemembers Protection Act of 2002, § 2008, Pub. L. No. 107-206, 116 Stat. 820 (2002); 22 U.S.C. § 7427 (2002) (stating that

> The President is authorized to use all means necessary and appropriate to bring about the release of any person[, which includes U.S. persons, allied persons, and covered persons,] . . . who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.").

202. Rome Statute, *supra* note 55, art. 17 ¶ 1(a); Heindel, *supra* note 172, at 359 (remarking that democratic countries with functional court systems should not have cases come before the ICC).

203. Rome Statute, *supra* note 55, arts. 5, 12 (referencing the substantive crimes and jurisdictional requirement based upon membership, acceptance of jurisdiction over the offense, and the location of the act being within a member's territory). Consummating assent with other countries and persuading participation might be viewed as part of a later illegal act. *E.g.* Bejesky, *Weapons Inspections*, *supra* note 167, at 344-50 (noting that the U.S. and U.K. built a "Coalition of the Willing" to attack Iraq, and commentators called the invasion illegal). In the case of abductions and renditions that resulted in torture, during what the Bush Administration called a "war on terror," it seems likely that ICC member territory was crossed. Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, para. 36, Eur. Parl. Doc. A6-0020/2007 (2007) (stating that extraordinary rendition is "an extra-judicial practice which contravenes established international human rights standards and whereby an individual suspected of involvement in terrorism is illegally abducted, arrested and/or transferred into the custody of US officials and/or transported to another country for interrogation which, in the majority of cases, involves incommunicado detention and torture."); Press

Bush Administration's global campaign was to ensure that no American troops would be brought before the ICC.[204] However, this anxiety seems misplaced given that the Pre-Trial Chamber of the ICC provided preliminary jurisdiction inquiries that must be answered affirmatively before the ICC accepts jurisdiction of a case. Under the Pre-Trial Chamber, the ICC will ask:

> [I]s the conduct which is the object of a case systematic or large-scale?; is the accused person in the category of most senior leaders of the situation under investigation?; and is the accused a person in the category of most senior leaders suspected of being most responsible for the commission of the alleged ICC crimes?[205]

These standards indicate that there was minimal risk that an American soldier carrying out orders would be subject to ICC jurisdiction. The ICC is unconcerned with prosecuting low-level soldiers but rather endeavors to prosecute high-level leaders.[206] Bush was not safeguarding U.S. troops, but was protecting himself and those appointees who would qualify as senior leaders or would be in positions to direct widespread and systematic abuses. A State Department official recognized this when noting that "[t]he exposure faced by the United States goes well beyond people on active duty and it includes decision-makers in our government."[207] That is precisely right. And that is exactly as it should be.[208] It could be unconscionable to hold a U.S. soldier responsible for crimes directed by government officials in

Release, EU Justice and Home Affairs, CIA Activities in Europe: European Parliament Adopts Final Report Deploring Passivity From Some Member States (Feb. 14, 2007), *available at* http://www.europarl.europa.eu/sides/getDoc.do?type=IMPRESS&reference=20070209IPR02947&language=EN (noting that as many as 1,245 flights through European airspace for operations relating to renditions).

204. Ferencz, *supra* note 197, at 236 (noting that the Bush administration carried out a "worldwide campaign . . . to obtain bilateral agreements to block all assistance to the ICC and guarantee that no Americans would ever be handed over to the international court").

205. Smith, *supra* note 172, at 168.

206. Heindel, *supra* note 172, at 358. The ICC was also focused on Africa. HUMAN RIGHTS WATCH, COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEARS 44-45 (2008).

207. Forero, *supra* note 196, at A1.

208. J. Joseph Miller, *Jus ad Bellum and an Officer's Moral Obligations: Invincible Ignorance, the Constitution, and Iraq,* 30 SOC. THEORY & PRAC. 457, 484 (2004) (disagreeing by noting that "every officer who participated in the 2003 Gulf War is guilty of having violated his or her Oath to defend the Constitution").

Washington if it is unreasonable to assume that the soldier cannot exercise impartial discretion over whether to execute the order. Soldiers can face criminal punishment for disobeying orders.[209] The Manual for Courts-Martial presumes that all orders are legal at the time that they are issued, including if they are in fact illegal,[210] which places a soldier in jeopardy of punishment for not following a directive of the superior.

C. OTHER NATIONS' ATTEMPTS TO ASSERT JURISDICTION

1. GENERAL RULES OF FOREIGN JURISDICTION

An ICC assertion of jurisdiction over former Bush Administration officials would not be the sole avenue for imposing responsibility. There are other models of adjudication that can provide compensation to those wronged,[211] but there are practical difficulties. The domestic courts of other states normally assert jurisdiction under international law on four bases: (1) when a punishable act occurred within a state's territory or causes harm to that territory; (2) when the alleged perpetrator is a national of the state asserting jurisdiction; (3) when the victim is a national of the state asserting jurisdiction; and (4) when a state asserts jurisdiction to protect its own interests.[212] It is often presumed that territorial jurisdiction is the primary basis.[213] However, sovereign immunity, based in reciprocity and comity, has been a long-existing defense to domestic courts judging the acts of another state. The Act of State doctrine states:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of

209. 10 U.S.C. § 47, §§ 890, 891, 892, 815 (2012); 10 U.S.C. § 892, art. 92 (2010).

210. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 14(c)(2)(a) (2008); U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP ¶ 4-75 (Oct. 12, 2006).

211. *See generally* Arturo J. Carrillo & Jason S. Palmer, *Transnational Mass Claim Processes (TMCPs) in International Law and Practice*, 28 BERKELEY J. INT'L L. 343 (2010). For example, one possible means of remedying the torture claims would have been for Iraq to bring a state versus state action against the U.S. before the U.N. or another international tribunal, but any such claim would be rare and undermine Iraq's financial dependence on the U.S. Laura A. Dickinson, *Filartiga's Legacy in an Era of Military Privatization*, 37 RUTGERS L.J. 703, 706-07 (2006).

212. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 299-302 (6th ed. 2003).

213. *Id.* at 106; 1 OPPENHEIM'S INTERNATIONAL LAW 458 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

> another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[214]

Nonetheless, if the state breaches international law, norms substantiate the right to a remedy. In 2001, the International Law Commission adopted Articles of State Responsibility and affirmed that state legal responsibility is incurred when an act "(a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."[215] The legal responsibility is incurred irrespective of territorial limitations.[216] Moreover, any state can assert prescriptive jurisdiction over universal jurisdiction crimes for extraterritorial conduct.[217] Universal jurisdiction crimes predate the Treaty of Westphalia and were utilized in distant history to combat piracy.[218] War crimes that violate the Geneva Conventions or protocols,[219] and crimes against humanity,[220] such as genocide, torture, terrorism, slavery, sexual offenses against children, and grave environmental harms,[221] are universal

214. Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

215. U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, at 68 (Sept. 6, 2001); Areas Where the European Convention on Human Rights Cannot be Implemented, EUR. PARL. DOC. 9730 (2003) ("[C]onduct that is 'attributable to the State under international law . . . constitutes a breach of an international obligation of the State.'").

216. Articles on the Responsibility of States for Internationally Wrongful Acts, arts. 1, 32, 50, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 49, U.N. Doc. A/56/49 (Dec. 12, 2001) (covering *internationally* wrongful acts, the breach of which cannot be justified by internal law, and providing that fundamental human rights abuses, humanitarian obligations, and peremptory norms are not grounds for countermeasures). Hypothetically, if a state is accused of not abiding by international humanitarian or human rights rules, it could not contend that internal law or a need to harshly interrogate detainees, due to the existence of alleged security threats, would be justifications for not adhering to the rules.

217. Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 1 (2011); Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 269-70 (2005). *See generally* Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383 (2001).

218. Dubinsky, *supra* note 217, at 272.

219. 18 U.S.C. § 2441(c)(1)-(3) (2006); BROWNLIE, *supra* note 212, at 304.

220. BROWNLIE, *supra* note 212, at 304.

221. K. Elizabeth Waits, *Avoiding the "Legal Bermuda Triangle": The Military Extraterritorial Jurisdiction Act's Unprecedented Expansion of U.S. Criminal Jurisdiction Over Foreign Nationals*, 23 ARIZ. J. INT'L & COMP. L. 493, 532-33 (2006);

jurisdiction crimes.[222]

Every state has an obligation to bring war criminals to justice. In a concurring opinion, Justice Breyer wrote that courts can address "torture, genocide, crimes against humanity, and war crimes" because they are universal jurisdiction crimes.[223] In the past fifteen years, courts in Austria, Belgium, Denmark, France, Germany, Israel, Senegal, Spain, Switzerland, and the United States have exercised universal jurisdiction over foreign nationals.[224]

2. JURISDICTION OF FOREIGN COURTS OVER THE BUSH ADMINISTRATION

Top Bush Administration officials *did* authorize intense interrogation practices arguably constituting torture, and prosecutors in Italy, Germany, and Switzerland investigated allegations of detainee abuse occurring in U.S. facilities and extraordinary renditions,[225] but cases did not proceed. For example, after prosecutors initiated a universal jurisdiction war crimes case in Belgium against General Tommy Franks and Donald Rumsfeld for actions taken during the Iraq War in the spring of 2003, the Bush Administration exhorted Belgium to modify its law, which it did, and the case was dismissed.[226] In November 2004, the Center for Constitutional Rights urged a criminal case in a German court on behalf of four Iraqi nationals against Rumsfeld, Tenet, and other top U.S. officials.[227] The case

Dubinsky, *supra* note 217, at 273-74; M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice,* 42 VA. J. INT'L L. 81, 156 (2001).

222. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987); Roberta Arnold, *The Abu Ghraib Misdeeds – Will There Be Justice In The Name Of The Geneva Conventions?,* J. INT'L CRIM. JUST. 2(4) (1000-1001) (Dec. 2004) ("[T]he most serious war crimes, are subject to the principle of mandatory universal jurisdiction," and "[b]oth torture and inhuman treatment constitute a grave breach under all four GCs [Geneva Conventions].").

223. Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004) (Breyer, J., concurring).

224. Dubinsky, *supra* note 217, at 281.

225. Davis, *supra* note 23, at 513.

226. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 61 (2007); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation,* 45 HARV. INT'L L.J. 183, 189 n.28 (2004).

227. IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND 79, 119-25 (Jeremy Brecher, Jill Cutler, & Brendan Smith, eds.) (2005); Sandra Coliver, Jennie Green, & Paul Hoffman, *Holding Human Rights Violators*

was brought under Germany's recently enacted Code of Crimes Against International Law, which criminalizes war crimes committed by soldiers, military commanders, and civilian commanders.[228] In February 2005, the German prosecutor dismissed the case, which purportedly involved universal jurisdiction crimes, but did not discard the case on the merits but pursuant to the assumption that the U.S. would be the more appropriate forum to investigate.[229]

Plaintiffs brought civil cases in foreign courts. In November 2006, the Center for Constitutional Rights, NGOs, and twelve purported torture victims filed a civil action in a German court based on universal jurisdiction crimes against Donald Rumsfeld and others, but the case was dismissed because the defendants were not present in Germany and it would be formidable for a German court to procure the assistance required to carry out investigations in Iraq and the United States.[230] At least nineteen complaints based on universal jurisdiction were filed and dismissed in German Courts over the war in Iraq, and for torture at Abu Ghraib and Guantanamo.[231] With these results, enacting a domestic law designed to address specific offenses, such as those that were committed, and then refusing to hear cases, makes little sense, and may impart the impression that the cases were not merited. Dismissing the cases may make other states unlikely to assert jurisdiction, even though cases may have been warranted.

One of the cases involved Ahmed Shehab Ahmed. Ahmed contended that U.S. armed forces broke into his home, shot and killed his eighty-year-old, handicapped father, and vandalized the house.[232] The soldier arrested Ahmed and brought him to Rehidwaniya, where Ahmed was stripped naked, deprived of food and sleep for three days, threatened with rape, beaten until he

Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies, 19 EMORY INT'L L. REV. 169, 206 (2005).

228. Act to Introduce the Code of Crimes Against International Law of 26 June 2002 (BT), §§ 3, 4, 8, *available at* http://www.iuscomp.org/gla/statutes/VoeStGB.pdf.

229. IN THE NAME OF DEMOCRACY, *supra* note 227, at 206.

230. Langer, *supra* note 217, at 14-15; David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation,* 47 VA. J. INT'L L. 295, 354-55 (2007).

231. Langer, *supra* note 217, at 14.

232. Katherine Gallagher, *Universal Jurisdiction Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture,* 7 J. INT'L CRIM. JUST. 1087, 1101 (2009) (describing Mr. Ahmed's allegations).

was unconscious, had substances injected into his genitalia, and lost hearing because an American officer was screaming into a loudspeaker near his ear.[233] When Ahmed was finally released, interrogators purportedly apologized and stated that they had "false information."[234] Another three Iraqi plaintiffs relayed accounts of having electrical shocks on their genitalia and being beaten, subjected to sensory deprivation, treated like dogs, and witnessing a female prisoner being assaulted by military personnel.[235]

In March 2009, another case was filed in a Spanish court by the Organization for the Dignity of Spanish Prisoners, a nongovernmental organization, against six former Bush Administration legal advisors:[236] Alberto Gonzales; John Yoo, a legal advisor in the Office of Legal Counsel (OLC) at the Department of Justice; Douglas J. Feith, former under-secretary of defense for policy; William J. Haynes, former general counsel for the Department of Defense; Jay S. Bybee, the head of the OLC; and David S. Addington, chief of staff to Dick Cheney.[237] The case was going forward, but Article 23 of the universal jurisdiction provision was amended to require the accused to be in Spanish territory or have a relevant link to Spain.[238] Another problem with bringing cases was that when other countries voiced concerns and inquired about interrogation orders, the directives and methods were held secret as classified information,[239] making the level of involvement of top-level

233. IN THE NAME OF DEMOCRACY, *supra* note 227, at 79 (citing CTR. FOR CONSTITUTIONAL RIGHTS, INDIVIDUAL ACCOUNTS OF TORTURE (2005)).

234. *Id.* (citing CTR. FOR CONSTITUTIONAL RIGHTS, INDIVIDUAL ACCOUNTS OF TORTURE (2005)).

235. *Al Shimari v. CACI et al.*, CTR. FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/ourcases/current-cases/al-shimari-v-caci-et-al (last visited Feb. 11, 2013).

236. Langer, *supra* note 217, at 39; Gallagher, *supra* note 232, at 1089 (noting the lack of strong prosecutions and even investigations for what some have called a "torture conspiracy" among top Bush Administration officials, and the fact that suit was filed in Spain); Marlise Simons, *Spanish Court Weighs Inquiry on Torture for 6 Bush-Era Officials,* N.Y. TIMES, Mar. 28, 2009, http://www.nytimes.com/2009/03/29/world/europe/29spain.html.

237. Simons, *supra* note 236.

238. Langer, *supra* note 217, at 40.

239. Letter from William J. Hanes II, General Counsel, U.S. Dep't of Def., to Senator Patrick J. Leahy, at 2 (June 25, 2003) (noting that, when asked whether the U.S. used interrogation methods that were condemned in other countries, Haynes remarked that "it would not be appropriate to catalogue the interrogation techniques used by U.S. personnel in fighting international terrorism . . . we cannot comment on

officials less clear and obfuscating causal influences that might otherwise connect authorizations with the time period of specific instances of abuse.

IV. SURMOUNTING MYTHS

This section discusses the myths the Bush Administration used to avoid the application of mandatory punishment for transgressing non-derogative human rights violations. By invoking rhetoric that substitutes the state for the actions of individual government leaders, publicly supporting global agendas that elevate the same human rights that are being violated, and emphasizing irreparable harm to the global image of the United States, the Bush Administration constructed myths that resulted in an ephemeral shame sanction. Moreover, with the integrity of the substantive law displaced, oversimplified specters of dire harm provided a sufficiently puissant rationalization to further persuade those who demanded accountability for human rights violations.

A. THE "STATE AS ACTOR"

1. SUBSTITUTING STATE ACTS FOR INDIVIDUAL ACTS

In addition to the lack of a viable tribunal to prosecute state officials or even accept jurisdiction over civil cases, the Bush Administration championed the legal fiction that these specific, domestically-issued orders on interrogation were tantamount to a national action under international law.[240] For example, it is wholly accordant with international law and official sources to attribute the "state" as the actor in statements, such as "the international community may question the legitimacy of the United States' actions in Iraq"; "the United States takes the position"; "the United States argues"; and the "United States must persistently object to human rights norms to exempt from

specific cases or practices").

240. Moreover, some commentators have interpreted the war on terrorism as a figurative war that should have more appropriately been classified as a police action. Bejesky, *Cognitive Foreign Policy, supra* note 134, at 9-11 (listing scholars and government officials who have espoused alternative interpretations of the "war on terrorism"). If law enforcement is at stake, then human rights law and domestic law restrictions may be more applicable than laws governing state conflict or international relations. This is not to contend that law enforcement action is not taken under "color of law," but that public discourse might further obfuscate the initiator-cause of state action and the chain of command for that order.

particular standards." Indeed, even the Restatement of Foreign Relations Law of the United States explains: "A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (g) a consistent pattern of gross violations of internationally recognized human rights."[241] Indeed, "states" are affirmatively obliged to guarantee human rights,[242] and a country that breaches an international obligation is subject to international responsibility for that breach.[243]

The quandary is that states exclusively act through representatives, leaders, and authorized agents.[244] Professor John Cerone emphasizes that "[h]uman rights law . . . generally binds states and states alone. At the same time, states are abstract entities, incapable of acting as such."[245] The appraisal of whether there is an international law violation necessarily hinges on whether there is a state actor because only states must respect human rights law, and international law is breached only when acts are attributable to the state, such as when individuals or agencies represent the state or are part of the government.[246] This assessment is foremost a preliminary inquiry to determine if the body of substantive international law is applicable. In a civil case, identifying the specific government actor will probably be inconsequential for assessing individual responsibility because funds would normally be paid from the public treasury as a form of compensation for the state actor's breach of international obligations.

Likewise, to assess whether international law has been contravened by officials who ordered or engaged in a crime of

241. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 cmt. m (1987).

242. Karima Bennoune, *Terror/Torture*, 26 BERKELEY J. INT'L L. 1, 12-13 (2008); U.N. Human Rights Committee, *supra* note 52, ¶ 5, 8.

243. U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, Art. 1 (Sept. 6, 2001) (stating that "[e]very internationally wrongful act of a State entails the international responsibility of the State"); Antonio Cassese, *Are International Human Rights Treaties and Customary Rules on Torture Binding Upon US Troops in Iraq?*, J. INT'L CRIM. JUST. 2 (3) (872) (Sept. 2004).

244. *See generally* U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, Art. 4(2) (Sept. 6, 2001) (stating that "a [State] organ includes any person or entity which has the status in accordance with the internal law of the State").

245. John Cerone, *Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, 39 VAND. J. TRANSNAT'L L. 1447, 1447 (2006).

246. U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, at 43 (Sept. 6, 2001); Cerone, *supra* note 245, at 1455.

torture, the "conduct of any State organ shall be considered an act of that State under international law."[247] However, the entire state is not responsible for criminal human rights violations. To imagine that the state can be substituted as the party for criminal acts is inconsistent with international law.[248] War crimes and human rights abuses pierce the veil of sovereign immunity and pursue the leader.[249] There are *leaders* who direct state actions, such as interrogation methods, that may amount to torture.[250]

U.S. officials supported prosecuting German and Japanese leaders after World War II, top Baathist officials in Iraq, and Milosovich and over a dozen other officials in Yugoslavia.[251] Additionally, the international community pursued officials in East Timor, Kosovo, and Sierra Leone for war crimes and serious human rights abuses.[252] Germany, Yugoslavia, and Iraq were not

247. The COMM. ON INT'L HUMAN RIGHTS, *supra* note 120, at 97.

248. To be consistent with the Supreme Court's *Charming Betsy* rule, which is that courts must interpret federal law consistent with international law,

> federal statutes that might otherwise allow substitution of the U.S. as a defendant in lawsuits brought in U.S. federal courts against former Bush Administration officials for ordinary violations of domestic law should be interpreted consistently with international law to avoid substitution of the U.S. with respect to acts that are criminal under international law and beyond the lawful authority of any government.

Paust, *Civil Liability*, *supra* note 19, at 375.

249. Consider a statement made in the ICTY Tadic Appeal:

> It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.

Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 58 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

250. Rudiger Wolfrum, *State Responsibility for Private Actors: An Old Problem of Renewed Relevance*, *in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 427 (Maurizio Ragazzi ed., 2005).

251. *See, e.g.,* Prosecutor v. Miloslevic, Case No. IT-01-50-I, Indictment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 22, 2001); *Remarks of the Department of State Legal Adviser, "The Importance of the Rule of Law in Preventing Conflict and Rebuilding Societies*," U.S. DEP'T OF STATE, http://www.state.gov/s/l/2005/87200.htm (last updated Feb. 11, 2013) (noting that the U.S. assistance for the ICTY has included providing about one quarter of the financial cost, providing technical expertise and sharing information, and applying political pressure to assure regional and Serbian cooperation). *See supra* note 188-89; *infra* notes 253, 286 (discussing U.S. pursuit of Japanese, German, and Iraqi war criminals).

252. Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What*

held responsible for human rights violations; rather, individual German leaders, Milosovic, Hussein, and other top leaders were held responsible. Similarly, U.S. law holds individual foreign leaders civilly responsible under the Alien Tort Statute for international law offenses and abuses,[253] not the state. In fact, there is no justifiable legal basis for officials to hide behind "state" immunity to avoid criminal responsibility.[254] The U.S. precedent is compelling, but the point is also expressly stated in the Charter of the Nurnberg Tribunal, which affirms that government officials cannot hide behind their position to avoid liability because state sovereignty "cannot be applied to acts which are condemned as criminal by international law . . . . He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State in authorizing action moves outside its competence under international law."[255]

2. REPLACING THEORIES OF INDIVIDUAL CULPABILITY WITH ACTIONS OF INANIMATE OBJECTS

When an opportunity arose to take credit for apparent positive policy achievements, President Bush was the actor, but when controversy erupted, sentiments of patriotic nationalism were frequently invoked to suggest that the "United States" was the bona fide actor[256] that could not conceivably inflict illegal

Impact on Building the Rule of Law?, 38 GEO. J. INT'L L. 251, 280, 297-98 (2007).

253. Kadic v. Karadzic, 70 F.3d 232, 239-40 (2d Cir. 1995).

254. Wilson, *supra* note 141, at 255-56 (stating that "Congress has not created an enforceable cause of action for civil damages, [but] it has criminalized torture and prohibited the cruel and inhuman treatment of detainees in U.S. custody;" and that there is no justification for immunizing such barbarous crimes); *id.* at 189 (noting that there is "an unseemly hypocrisy in jurisprudence . . . as foreign officials who violate human rights norms are not infrequently held liable for their acts in U.S. courts, but U.S. officials are not"); *id.* at 222-23 (stating that "[t]he U.S. military is prohibited from torturing detainees in its custody by military regulations, the Uniform Code of Military Justice, the Geneva Conventions, U.S. criminal law and the CAT.").

255. Charter of the International Military Tribunal (Nuremberg Charter), Principle 3, 1950, 59 Stat. 1544, 1546, *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf.

256. Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 51 (2009) ("It is difficult to dispute that the United States deliberately tortured some detainees in its custody."). Torture was assuredly not the only controversy for which the Bush Administration used "state as actor" rhetoric. For example, there were no weapons of mass destruction in Iraq and the intelligence to back the claims was baseless. Bejesky, *Intelligence Information*, *supra* note 177, at 811-12, 875-82. Nearly four months before the invasion of Iraq, Donald Rumsfeld declared: "The

human rights abuses. Top officials ordered interrogation methods that may have been torture and rhetorically dove under the flag for cover by calling the "United States" the actor, ostensibly to invoke American patriotism to generate a societal defense mechanism.

Professor W. Michael Reisman recognized this practice during the Cold War when he wrote: "Though we often say 'The United States believes this' or 'The Soviet Union believes that,' states don't have minds. Elites who manipulate the symbols of states do, but they are rarely accessible and even more rarely cooperative."[257] U.S. officials have skirted accessibility by rejecting the jurisdiction of the ICJ, human rights committees, and other judicial bodies[258] by offering spurious interpretations of treaties and international law[259] and by using "censorship,

United States knows Iraq has weapons of mass destruction. . . . *[A]ny country* on the face of the earth that has an active intelligence program knows that Iraq has weapons of mass destruction." *U.S. to Weigh Iraqi Weapons Lists With Own Intelligence,* FOX NEWS (Dec. 4, 2002), http://www.foxnews.com/story/0,2933,72053,00.html (emphasis added); ANTHONY PRATKANIS & ELLIOT ARONSON, AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION 51 (2001) (discussing a well-known marketing strategy of asserting "what everyone knows" or takes for granted). In November 2006, after Democrats won back both houses of Congress for the first time in twelve years (significantly because Americans demanded the withdrawal of U.S. forces from Iraq), Bush employed the "support the troops" slogan. Robert Bejesky, *Political Penumbras of Taxes and War Powers for the 2012 Election*, 14 LOY. J. PUB. INT. L. 1, 48-52 (2012) [hereafter Bejesky, *Political Penumbras*]. Responsibility was addressed by assigning "benchmarks" of progress to the Iraqi government, and Bush stated that "America will change our approach to help the Iraqi government as it moves to meet these benchmarks," and the Administration was eventually able to increase the number of soldiers. Darin E. W. Johnson, *2007 in Iraq: The Surge and Benchmarks – A Way Forward?*, 24 AM. U. INT'L L. REV. 249, 250-55 (2009).

257. W. Michael Reisman, *International Law-making: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101, 103 (1981).

258. *E.g.* ALAN W. CLARKE & LAURELYN WHITT, THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY 2, 51, 53 (2007) (noting that the U.S. and the most severe human rights violating countries are the only states that favor the death penalty in international forums and suggesting there is hypocrisy for not respecting the position of the international community).

259. *See generally* Joan Fitzpatrick, *The Unreality of International Law in the United States and the LaGrand Case*, 27 YALE J. INT'L L. 427, 428 (2002); U.S. DEP'T OF DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (2005), *available at* http://www.defenselink.mil/news/Mar2005/d20050318nds2.pdf ("Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak, using international fora, judicial process, and terrorism."); David Cole, *What Bush Wants to Hear*, 52 N.Y. REV. BOOKS 11, 18 (Nov. 17, 2005) (pointing out that something is awry when "judicial processes – the very essence of

disinformation and propaganda."[260]

Responding to criticism at a time when several parties were purportedly responsible for human rights abuses in U.S. detention facilities and the depth of White House involvement was unknown, Bush remarked: "Let me make very clear the position of my government and our country: We do not condone torture . . . I have never ordered torture. I will never order torture."[261] Bush affirmed that "the actions of those folks in Iraq [at Abu Ghraib] do not represent the values of the United States of America."[262] On May 31, 2005, amid more accusations of torture, Bush specified that "[i]t's an absurd allegation. The United States is a country that promotes freedom around the world."[263] In September 2006, Bush declared: "I want to be absolutely clear with our people and the world. The United States does not torture. It's against our laws, and it's against our values. I have not authorized it, and I will not authorize it."[264]

Other top officials articulated comparable statements. Secretary of State Condoleezza Rice certified: "The United States does not permit, tolerate, or condone torture under any circumstances."[265] Rice observed that "the United States is quite clear and quite determined to carry out the President's policy, which he articulated clearly, that the United States does not

the rule of law – are to be dismissed as a strategy of the weak, akin to terrorism").

260. Jennifer Van Bergen & Douglas Valentine, *The Dangerous World of Indefinite Detentions: Vietnam to Abu Ghraib*, 37 CASE W. RES. J. INT'L L. 449, 455 (2006).

261. Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed: Justice Document Had Said Torture May Be Defensible*, WASH. POST, June 23, 2004, at A01.

262. Sean Murphy, *U.S. Abuse of Iraqi Detainees at Abu Ghraib Prison*, 98 AM. J. INT'L L. 591, 596 (2004).

263. Terrence Hunt, *Bush Calls Human Rights Report Absurd,* ASSOC. PRESS, May 31, 2005.

264. *President's Speech on Terrorism*, N.Y. TIMES, Sept. 6, 2006, http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all. Nicholas Rostow, former Chief Counsel on the National Security Council for George H.W. Bush, stated that

> [c]riticism of the United States on international law grounds is especially notable because of the very nature of the United States as a country . . . . Its oaths of citizenship and office holding are pledges to the Constitution . . . . The law defines who an American is.

Michael P. Scharf, *Accountability for the Torture Memo: International Law and the Torture Memos,* 42 CASE W. RES. J. INT'L L. 321, 334 (2009).

265. *U.S. Prisoner Policy*, PBS NEWSHOUR (PBS television broadcast Dec. 9, 2005), *available at* http://www.pbs.org/newshour/bb/terrorism/july-dec05/policy_12-9.html.

engage in torture, doesn't condone it, doesn't expect its employees to engage in it."[266] Rice further added: "With respect to detainees, the United States Government complies with its Constitution, its laws, and its treaty obligations. Acts of physical or mental torture are expressly prohibited."[267] Likewise, in signing an Article 98 agreement with Romania, the U.S. Department of State explained that the United States is "among the most forceful advocates for the principle of accountability for war crimes, genocide and crimes against humanity."[268] This seems discrepant with the elevated threshold requirement for assessing accountability on interrogators in the Bybee memo and from all of the human rights investigations.[269]

Vice President Dick Cheney affirmed that "the United States is a country that takes human rights seriously. We do not torture – it's against our laws and against our values."[270] The Principal Deputy Assistant Secretary for European and Eurasian Affairs explained: "First off, the United Stated does not torture people. We don't condone torture."[271] In 2005, the U.S. State Department submitted a compliance report and stated: "The U.S. Government does not permit, tolerate, or condone torture, or other unlawful practices, by its personnel or employees under any circumstances. U.S. laws prohibiting such practices apply both when the employees are operating in the United States and in other parts of the world."[272] Professor Elizabeth Wilson interpreted this genre of statement by observing that "the state itself, as an

266. *Foreign Ministers Meeting*, NATO (Dec. 8, 2005), http://www.nato.int/docu/speech/2005/s051208m.htm (adding that "we recognize our obligations, our policy recognizes our obligations, whether activities are undertaken inside the United Sates or outside the United States").

267. *Full Text: Rice Defends US Policy*, BBC (Dec. 5, 2005), http://news.bbc.co.uk/2/hi/americas/4500630.stm.

268. Press Release, Philip T. Reeker, Deputy Spokesman, U.S. and Romania Sign Article 98 Agreement (Aug. 1, 2002), *available at* http://2001-2009.state.gov/r/pa/prs/ps/2002/12393.htm.

269. Fisher, *supra* note 136, at 1406-07, 1426.

270. David Stout & Scott Shane, *Cheney Defends Use of Harsh Interrogation,* N.Y. TIMES, Feb. 7, 2008, http://www.nytimes.com/2008/02/07/washington/07cnd-intel.html.

271. *Interview by Capital Cities with Kurt Volker*, *Principal Deputy Assistant Secretary for European and Eurasian Affairs*, U.S. DEP'T OF STATE (Sept. 10, 2006), http://2001-2009.state.gov/p/eur/rls/rm/73261.htm.

272. U.S. Dep't of State, *Second Periodic Report of the United States of America to the U.N. Committee Against Torture*, ¶ 7, U.N. Doc. No. CAT/C/48/Add.3 (June 29, 2005).

entity," can adduce "sophisticated rationales for engaging in torture," and goes to tremendous lengths to "legitimate" torture, while contemporaneously assessing responsibility solely on low-level individuals.[273]

3. PUBLICLY CONDEMNING HUMAN RIGHTS VIOLATIONS

Another effectual mode of distracting attention from one's own misdeeds is to support the opposite of the misdeed. In a speech made prior to any major scandal on interrogation practices, and long before it was known that top officials sanctioned atrocious interrogation methods, Bush stated at the 2003 United Nations International Day in Support of Victims of Torture:

> I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment . . . . I further urge governments to join America and others in supporting torture victims' treatment centers, contributing to the UN Fund for Victims of Torture, and supporting the efforts of non-governmental organisations to end torture and assist its victims . . . . Notorious human rights abusers, including, among others, Burma, Cuba, North Korea, Iran, and Zimbabwe, have long sought to shield their abuses from the eyes of the world by staging elaborate deceptions and denying access to international human rights monitors.[274]

In 2003, the State Department's Country Reports on Human Rights Practices condemned countries for subjecting prisoners to beatings; stripping them nude; using electric shock, bindings, solitary confinement, suffocation, and sexual assaults; forcing painful positions; and employing threats, sleep deprivation, dog attacks, blindfolding, and mock executions.[275] Pentagon and nongovernmental organization investigations confirm that many of the same offenses occurred at Guantanamo Bay, Afghanistan, and Iraq, and some of the practices were expressly authorized by

273. Wilson, *supra* note 141, at 248.

274. Statement, President of the United States, Bush Calls Torture "an Affront to Human Dignity Everywhere", June 26, 2003, *available at* http://www.usembassy.it/file2003_06/alia/A3062613.htm.

275. U.S. DEP'T OF STATE, 2003 COUNTRY REPORTS (2003), *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/index.htm.

the White House and Secretary of Defense.[276]

On October 18, 2003, Bush stated: "We don't torture people in America. And people who make that claim just don't know anything about our country."[277] On the same day that Bush made this statement, Amnesty International pointed out that eight soldiers were charged with acts of brutality against prisoners in Iraq and that one of the prisoners died.[278] In fact, over one hundred prisoners died in U.S. custody, and hundreds more were seriously abused.[279] In a high percentage of the instances of prisoner death, physical abuse was the cause of death.[280] Orwellian discourse ran amok on the 2004 Support of Victims of Torture Day when Bush remarked:

> [T]he United States reaffirms its commitment to the worldwide elimination of torture . . . . To help fulfill this commitment, the U.S. has joined 135 other nations in ratifying the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction . . . . Despite international efforts to protect human rights around the world, repressive regimes continue to victimize people through torture . . . . America supports accountability.[281]

Immediately prior to departing office, Bush was still pushing

276. Ragavan & Mireles, *supra* note 47, at 670-75; Waldron, *supra* note 31, at 1683; *Getting Away with Torture,* HUMAN RIGHTS WATCH (July 12, 2011), http://www.hrw.org/en/embargo/node/100262?signature=6c3cff6c545a5dee6598d4f25d78d989&suid=6.

277. *Interview of the President by Laurence Oakes, Channel 9 TV*, WHITE HOUSE (Oct. 14, 2003), http://georgewbush-whitehouse.archives.gov/news/releases/2003/10/20031018-4.html.

278. *Id.*

279. *Report: 108 Died in U.S. Custody,* CBS NEWS (Mar. 16, 2005), http://www.cbsnews.com/stories/2005/03/16/terror/main680658.shtml.

280. HUMAN RIGHTS FIRST, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN 1 (Feb. 2006), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/06221-etn-hrf-dic-rep-web.pdf (noting thirty-four confirmed or suspected homicides out of nearly one hundred deaths).

281. *President's Statement on the United Nations International Day in Support of Victims of Torture,* WHITE HOUSE (June 26, 2004), http://georgewbush-whitehouse.archives.gov/news/releases/2004/06/20040626-19.html.

for a global ban on torture.[282] This is something that is already enshrined in international law obligations, but may not always be guaranteed in practice. In response to defectors who affirmed that waterboarding was torture, Bush retorted: "And whatever we have done is legal. That's what I'm saying. It's in the law."[283] In May 2005, the Bush Administration provided a report to the U.N. Committee Against Torture and stated that "[t]he definition of torture accepted by the United States upon ratification of the Convention . . . remains unchanged."[284] Manfred Nowak, the U.N. Special Rapporteur on Torture, remarked: "I'm not willing any more to discuss these questions with the U.S. government, when they say [waterboarding] is allowed. It's not allowed."[285] After World War II, the U.S. prosecuted Japanese officials for using waterboarding, and U.S. courts have customarily classified waterboarding as a form of torture.[286] Against the order of Congress, the CIA destroyed the interrogation tapes of detainees who were subject to waterboarding.[287]

Professor M. Cherif Bassiouni wonders whether the gap between action and statements opposing torture "represent[s] a case of political schizophrenia where one side of the Administration is telling the world that it is in conformity with

282. Clarke, *supra* note 8, at 2.

283. *'Countdown with Keith Olbermann' for Sept. 11 [2006],* NBC News, http://www.msnbc.msn.com/id/14800218/ns/msnbc-countdown_with_keith_olbermann/t/countdown-keith-olbermann-sept/ (excerpting Interview by Matt Lauer with President George W. Bush).

284. U.S. Dep't of State, *supra* note 272, at ¶ 11.

285. Martin Hodgson, *US Censored for Waterboarding,* GUARDIAN (Feb. 6, 2008), http://www.guardian.co.uk/world/2008/feb/07/humanrights.usa.

286. Paust, *Absolute Prohibition*, *supra* note 63, at 1554 (stating that water-boarding "manifestly and unavoidably constitute[s] torture"); *McCain: Japanese Hanged For Waterboarding,* CBS NEWS (June 18, 2009), http://www.cbsnews.com/2100-250_162-3554687.html (reminding that Japanese were indicted and hanged for using torture and waterboarding during World II, and quoting Senator John McCain who remarked: "There should be little doubt from American history that we consider that as torture otherwise we wouldn't have tried and convicted Japanese for doing that same thing to Americans."); Evan Wallach, *Waterboarding Used to Be a Crime*, WASH. POST (Nov. 4, 2007) http://www.washingtonpost.com/wp-dyn/content/article/2007/11/02/AR2007110201170.html (noting that waterboarding was considered a war crime and called a human rights violation by the U.S. military, and stating that U.S. district courts called waterboarding torture and awarded plaintiffs $766 million in damages against the estate of Ferdinand Marcos, the former president of the Philippines).

287. Scott Shane, *Prosecutor to Review Official Handling of C.I.A. Tapes*, N.Y. TIMES, Feb. 10, 2008, at A23.

its international obligations, which it well understands, while another side of the same Administration takes the opposite position."[288] With China recently being scrutinized for its human rights record, in March 2007, China's Premier Wen Jiabao commented: "We urge the U.S. government to acknowledge its own human rights problems and stop interfering in other countries' internal affairs under the pretext of human rights."[289] Professor Dershowitz explained:

> Abu Ghraib occurred precisely because US policy consisted of rampant hypocrisy: our President and Secretary of Defense publicly announced an absolute prohibition on all torture, and then with a wink and a nod sent a clear message to soldiers to do what you have to do to get information and to soften up suspects for interrogation.[290]

U.S. officials have lectured other countries and urged them to ratify human rights conventions,[291] but, as is consistent with historical experience, political leadership within the most powerful countries may not always observe the rules to which they expect other states to adhere.[292] Amnesty International

288. M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration,* 37 CASE W. RES. J. INT'L L. 389, 391 (2006); Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror,* 34 DENV. J. INT'L L. & POL'Y 33, 40-41 (2006) (noting the Bush administration's hypocrisy); Vincent-Joel Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 853 (2005) (exhibiting a flagrant double standard in the treatment of prisoners).

289. Koh, *supra* note 184, at 651.

290. Alan Dershowitz, *When Torture is the Least Evil of Terrible Options*, TIMES HIGHER EDUC. SUPP., June 11, 2004, at 20.

291. *See generally* U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT OF THE UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM 89, 92 (2003). There is "American exceptionalism" with the U.S. "practice of unilaterally exempting itself from participation in international organizations and human rights treaties while simultaneously insisting that the rest of the world comply with international norms." Natsu Taylor Saito, *Human Rights, American Exceptionalism, and the Stories We Tell*, 23 EMORY INT'L L. REV. 41, 42 (2009).

292. STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 67-69 (1999) (calling the failure of the most powerful countries to adhere to international rules an "organized hypocrisy"); James Thuo Gathii, *Torture, Extraterritoriality, Terrorism and International Law*, 67 ALB. L. REV. 335, 338, 360 (2003). Human Rights Watch wrote: "The U.S. government's use of torture at Abu Ghraib prison in Iraq poses a different kind of challenge . . . because the abuser is so powerful." Sandeep Gopalan, *Alternative Sanctions and Social Norms in International Law: The Case of Abu Ghraib,* 2007 MICH. ST. L. REV. 785, 829 (2007) (citing Kenneth Roth, *Darfur and Abu Ghraib*, *in* HUM. RTS. WATCH WORLD REPORT 2005 (Jan. 14, 2005)).

explained that "[w]hen the most powerful country in the world thumbs its nose at the rule of law and human rights, it grants a license to others to commit abuses with impunity."[293] Amnesty International is absolutely correct about the ramifications, and when one dissects causal elements, it is the political leaders of the "most powerful country in the world" that established policy, made decisions, and tasked subordinates with implementing the orders that garnered public attention for these condemnable events.

4. USING RHETORIC ABOUT IRREPARABLE HARM TO THE GLOBAL IMAGE OF THE UNITED STATES

An additional portrayal that was frequently encountered in political and legal discourse that skirted the issues, deflected attention, and obfuscated the tension between state action and leader action was rhetoric emphasizing that policy actions caused irreparable harm to America's image or stature in the world. Logically, such commentary might either make citizens feel partially culpable for "America's" action, engendering a defense mechanism, or induce the U.S. public to criticize foreigners for being unreasonable and unable to commiserate amid the implementation of mechanisms to contravene purported threats. There is a stimulus for unified American nationalism. For example, Karl Rove, Bush's top advisor, construed that, due to exposure of U.S. interrogations, "it will take a generation to repair the damage to America's image in the Middle East."[294]

293. Press Release, Human Rights Education Associates, Amnesty International Launches its Annual Assessment of Global Human Rights (May 25, 2005), *available at* http://www.hrea.org/lists2/display.php?language_id=1&id=47f3fff8f31ea740577afe1936555c81@hrea.org. However, some assessments contend that very few play by the rules. Amnesty International explained that between 1997 and mid-2000, torture had been committed by state officials in over 150 countries and it was "widespread or persistent" in over 70 countries. Bagaric & Clarke, *supra* note 60, at 589-90.

294. Mark Bowden, *Lessons of Abu Ghraib*, THE ATLANTIC, July/Aug. 2004, at 37; Memorandum from Jack L. Rives, Major General, Deputy Judge Advocate General, U.S. Air Force, to Gen. Counsel, U.S. Air Force, Final Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism, par. 3 (Feb. 5, 2003), *available at* http://www.torturingdemocracy.org/documents/20030205.pdf (noting that the abuses could negatively impact the U.S. military image and culture). Both Powell and Karl Rove spoke of the Abu Ghraib abuse as having a terrible impact on America's image. Charles D. Weisselberg, *The Detention and Treatment of Aliens Three Years After September 11: A New New World?*, 38 U.C. DAVIS L. REV. 815, 847-48 (2005); Mogane

"America" did not order or commit torture. Members of the Bush Administration ordered interrogation methods that were prima facie condemnable and could reasonably be expected to result in torture. Foreigners are inherently savvy enough to cognize that "America" did not order anything.

In July 2009, six months after the Bush Administration departed from office, Pew Research Center wrote: "The image of the United States has improved markedly . . . reflecting global confidence in Barack Obama . . . . In many countries opinions of the United States are now about as positive as they were at the beginning of the decade before George W. Bush took office."[295] A Gallup International Poll explained that in February, 2008, seventy-one percent of Americans said that "leaders of other countries around the world . . . [d]on't have much respect" for President Bush; and in February 2009, twenty percent of Americans said that "leaders of other countries around the world . . . [d]on't have much respect" for President Obama.[296] President Obama provided addresses to foreign populations and appealed for "a new beginning" between the United States and foreign populations.[297] Eight months into his administration, Obama was awarded a Nobel Peace Prize for "extraordinary efforts to strengthen international diplomacy and cooperation between peoples."[298] Alternatively, Bush departed office with the

Landel, *Proposals for a Truth Commission and Reparations Program for Victims of Torture by US Forces Since 9/11*, 16 ILSA INT'L & COMP. L. 115, 125 (2009) ("[T]he United States has somehow lost its moral standing in the last eight years because of the violations it has perpetrated throughout the world. In order to regain this standing, the United States should investigate itself."); Human Rights Watch explained: "That unlawful conduct [at Abu Ghraib] has also undermined Washington's much-needed credibility as a proponent of human rights and a leader of the campaign against terrorism." Gopalan, *supra* note 292, at 829 (citing Kenneth Roth, *Darfur and Abu Ghraib*, *in* HUM. RTS. WATCH WORLD REPORT 2005 (Jan. 14, 2005)).

295. *Confidence in Obama Lifts U.S. Image Around the World*, PEW RESEARCH CENTER (July 23, 2009), http://pewglobal.org/2009/07/23/confidence-in-obama-lifts-us-image-around-the-world/.

296. Frank Newport, *Obama's Nobel Prize: Public Opinion Context*, GALLUP, Oct. 9, 2009, http://gallup.com/poll/123599/Obama-Nobel-Prize-Public-Opinion-Context.aspx.

297. *A Conversation with Hassan Abbas: Engaging the Muslim World*, 34 FLETCHER F. WORLD AFF. 9, 10 (2010).

298. *Obama: Nobel Peace Prize is 'Call to Action,'* CNN, Oct. 9, 2009, http://articles.cnn.com/2009-10-09/world/nobel.peace.prize_1_norwegian-nobel-committee-international-diplomacy-and-cooperation-nuclear-weapons?_s=PM:WORLD.

lowest presidential approval rating in history at twenty-two percent, which was attributed to the Iraq War and poor economic conditions in the U.S.[299] Note that President Bush, and not the "United States," had an approval rating of twenty-two percent. Americans intrinsically get it, and foreigners presumably get it: they perceive that leaders take policy actions and that the "state" is an instrument for carrying out actions and for providing order to the international system.

Professors Jack Goldsmith and Eric Posner also contend that reputation has little impact on state actions.[300] They may be correct because the aforementioned Gallup Poll results illustrate the fleeting nature of reputation. Many leaders may not perceive that there will be lasting repercussions for their individual actions, such as punishment for not abiding by international law. Moreover, while the self-interest of appealing to voters should frequently constrict the behavior of political leaders in a democracy, even with the possibility that the acute component of democratic accountability may be violated when there are transgressions without punishment, elections provide for one transient regime to replace another.[301] Consequently, if leaders do not anticipate that transgressions will persist as an importunate issue into a new administration and incentives for good behavior are not always apparent, controversy may be short-lived. And, in this case, a new administration designated a fresh start in light of a several-year-long torture scandal.

B. AN OVERSIMPLIFIED SPECTER OF DIRE HARM

Scholars have long appreciated that there are puissant guiding ideological beliefs and presumptions inherent in

299. *Bush's Final Approval Rating: 22 Percent*, CBS NEWS (Feb. 11, 2009, 1:45 PM), http://www.cbsnews.com/stories/2009/01/16/opinion/polls/main4728399_page2.shtml?tag+contentMain;contentBody.

300. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 102 (2005).

301. Certain circumstances may make U.S. political leadership look less like a democracy. George H.W. Bush was Vice President for eight years (1981-88), President for four years (1989-92), and George W. Bush was President for eight years (2001-08). As Bush was leaving office he wanted his younger brother to run for president. Name and image familiarity, the media's role in accentuating the positive and forgetting the negative, and political allegiances that result in voting by heuristics and political party labels limit choices in a country of 300 million people. Bejesky, *Cognitive Foreign Policy*, *supra* note 134, at 49-51.

American national pride, exceptionalism, and ideals that shape foreign policy.[302] If torture did occur and a critical percentage of Americans did not demand accountability, Americans might have either believed that certain directives and actions were not torture, despite evidence to the contrary, or might have been persuaded by oversimplified spiel of threats to entrench national pride and risk perceptions. Leaders may postulate that they possess carte blanche to subdue alleged risks while rationalizing directives and nourishing American pride. Professor Michael Ignatieff remarks that there is a moral narcissism in liberal democratic regimes that "may actually blind democratic agents to the moral reality of their actions," particularly when there are noble means offered as the underlying justification for ruthless action.[303]

Professor Ali Khan contends that the Bush Administration was aided by academics who indirectly set the stage for policy actions by painting a dire, unpredictable, and universal threat. Khan believes that certain named scholars initiated, promoted, and unleashed the so-called "War on Terror," and pooled together dubious research and propaganda that eulogizes each other's work to broadly malign Muslims.[304] The authors paint the terrorist as a monster "driven to violence by its nature . . . . It loathes democracy and liberties and freedoms . . . . [It] lurks in tunnels and airports, wears a belt of explosives, and craves traveling in buses, trains, and airplanes."[305] Some of the themes that manufacture the *modus operandi* for terrorist actions include the notions that Muslim militants are envious of the United States and its lofty achievements, are in search of glory after defeat, aim at committing violence on Christians and Jews, and are fighting against hegemony, colonization, and foreign

302. Michael H. Hunt, *Ideology of National Greatness and Liberty*, *in* MAJOR PROBLEMS IN AMERICAN FOREIGN POLICY 7 (Thomas G. Patterson ed., 1989); MARC TRACHTENBERG, A CONSTRUCTED PEACE: THE MAKING OF THE EUROPEAN SETTLEMENT, 1945-1963 (1999). *See* WILLIAM APPLEMAN WILLIAMS, THE TRAGEDY OF AMERICAN DIPLOMACY (1959).

303. MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN THE AGE OF TERROR 119 (2004).

304. Liaquat Ali Khan, *The Essentialist Terrorist*, 45 WASHBURN L.J. 47, 47-49 (2005). The authors include Bernard Lewis, Bruce Hoffman, Michael Ledeen, Walter Laqueur, Steven Simon, Jessica Stern, Daniel Benjamin, and Richard Perle. *Id.* at 48, 65. For example, Michael Ledeen calls Walter Laqueur "one of the most astute analysts of terror" and "Bernard Lewis . . . the greatest Western expert on Islam." *Id.* at 65 (stating that there is the "perversion of certain religious doctrines").

305. *Id.* at 47.

alien domination.[306]

If the threat is not presented as isolated and inherent to identifiable groups, but as dire and ubiquitous, and directed at American values, accomplishments, and ways of life, perhaps exaggerations and myths can lead other commentators and officials to embrace the perception of such overwhelming danger that it will seem reasonable to employ dragnet sweeps to capture suspected terrorists, use abusive tactics on detainees, and deny adequate judicial process.[307] Oversimplifications may result in emotive heuristics that may make connections back to 9/11.[308]

Indeed, immediately after 9/11, the Bush Administration was able to craft the conflict as not limited to al-Qaeda and promote the perception of a battle that "will not end until every terrorist group of global reach has been found, stopped and defeated."[309] Bush Administration speeches portrayed simplified and sweeping rhetoric of inherent righteousness that defined good versus evil, despite the fact that there are alternative

306. Khan, *supra* note 304, at 53, 55 (providing Bernard Lewis's arguments). David Frum and Richard Perle, "two neoconservative propagandists," contend that "militant Islam is striving 'to overthrow our civilization and remake the nations of the West into Islamic societies, imposing on the whole world its religion and its law.'" *Id.* at 59-60.

307. *Id.* at 50.

308. ANDREW J. BACEVICH, THE LIMITS OF POWER: THE END OF AMERICAN EXCEPTIONALISM 107-08 (2008) (noting that since 1950 many U.S. administrations have treated a change of president as a new beginning but that advisors frequently escalate a militarized environment and hype security threats while ignoring estimates from the national security apparatus); Resnik, *supra* note 7, at 582-83 (using "9/11" over 120 times generally in the context as the "9/11 detainees," "9/11 detention law," and "9/11 case law"). It does appear that this is for simplification purposes, but this may promote a misunderstanding and over-inflammatory effect due to the cognitive impact of 9/11. Bejesky, *Cognitive Foreign Policy*, *supra* note 134, at 14-42 (noting the manner in which top Bush Administration officials emotively framed 9/11 and al-Qaeda with connections to Iraq); Ganesh Sitaraman, *Counterinsurgency, The War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1767 (2009) (calling the U.S. conflict "a campaign to counter a globalised Islamist insurgency"); Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E.L. 121, 147 (2008/09) (noting that Justice O'Connor started the *Hamdi v. Rumsfeld* opinion with a narration of 9/11, which Hamdi had nothing to do with). The acts on 9/11, perpetrated by a small group of individuals, commenced military action against a larger organization with which Hamdi was apparently associated, which, as with alleged connections between al-Qaeda and Iraq, relied on assumptions of expansive authority while actual connections remained questionable. Bejesky, *Cognitive Foreign Policy*, *supra* note 134, at 8-18.

309. President's Address Before a Joint Session of the Congress of the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001).

explanations for actions of militants.[310] Similarly, broad guesses that the U.S. was infiltrated with terrorist sleeper cells suppressed dissent as Attorney General John Ashcroft chastised civil rights advocates: "To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve."[311]

With representations of exigency and omnipresent threat, legal advisors to the Bush Administration discounted the value and need to adhere to international law and congressional assent. For example, to vindicate an expansive interpretation of the September 2001 Authorization for Use of Military Force (AUMF), legal adviser John Yoo advised that neither Congress nor legal sources, such as the AUMF or the War Powers Resolution, "can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response."[312] At a congressional hearing, Professor Jane Stromseth clarified that, by adopting the AUMF, Congress did not acquiesce to a "blank check" on War Powers, but precisely stipulated that the use of force was exclusive to actors connected to 9/11.[313] To rationalize going to war with Iraq, John Yoo wrote that Resolution 1441 *revived* Resolution 678's condemnation of Iraq's 1990 invasion of Kuwait, and reinvigorated a right of self-defense against Iraq.[314] Yet President George Bush, Sr. explained: "Our stated mission, as codified in U.N. resolutions, was a simple one -

310. Khan, *supra* note 304, at 68-70.

311. Dan Eggen, *Ashcroft Defends Anti-Terrorism Steps*, WASH. POST, Dec. 7, 2001, at A1.

312. Memorandum from John Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto Gonzales, Deputy Counsel to the President (Sep. 25, 2001), *available at* http://www.justice.gov/olc/warpowers925.htm.

313. *Applying the War Powers Resolution to the War on Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 47 (2002), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1079&context=cong (statement of Jane E. Stromseth, Professor, Georgetown University Law Center); Paust, *Above the Law*, *supra* note 7, at 400 (noting that Congress's authorization was narrow, only applied to the past tense act of 9/11 (and no act in the future), and only applied to those with a facilitative connection to 9/11 and not to those who were supposedly "'affiliated,' 'associated' or hav[ing] 'links' with al-Qaeda'").

314. John Yoo, Deputy Assistant Attorney General, Dep't of Justice, Effect of a Recent United Nations Security Council Resolution on the Authority of the President Under International Law to Use Military Force Against Iraq 2-4 (Nov. 8, 2002), *available at* http://www.justice.gov/olc/2002/iraq-unscr-final.pdf.

end the aggression, knock Iraq's forces out of Kuwait, and restore Kuwait's leaders."[315] To aggrandize the Commander-in-Chief authority, Yoo made misrepresentations about the history of war powers and the Framers' intent.[316]

Professor Michael Scharf critiqued Professor Jack Goldsmith, a legal adviser who wrote opinions that slightly remodeled Yoo's memos, and explained that Goldsmith used rational choice analysis in his book as a tool to treat international law as mere nonbinding politics and acknowledged that his intention was "to free the President from the shackles of international law in shaping a response to terrorism in the aftermath of the 9/11 attacks."[317] Goldsmith further contended that critics are incorrect when stating that the Bush Administration was not conscientious about respecting international law. Goldsmith maintained: "[T]he administration has been strangled by law, and since September 11, 2001, this war has been lawyered to death. The administration has paid attention to law not necessarily because it wanted to, but rather because it had no choice."[318] This statement is debatable.

Because predisposed advisors developed loophole arguments to rationalize frequent violations of international law, doubt was cast on the question of whether the Bush Administration was ever truly bridled by law. Critiquing Professors Eric Posner and Jack Goldsmith's realist-oriented book on international law, Professor Scharf wrote that their positions are not far off from George Orwell's "Newspeak concept of 'Blackwhite,'" which is the "loyal willingness to say black is white when Party discipline demands this. But it means also the ability to believe black is white, and more, to know black is white, and to forget that one has ever believed the contrary."[319]

V. THE RESULT: HEURISTICS PREVAIL OVER JUS COGENS VIOLATIONS

The Bush Administration's use of oratory reduced the

315. GEORGE BUSH & BRENT SCOWCROFT, A WORLD TRANSFORMED 464 (1998).

316. Robert Bejesky, *War Powers Pursuant to False Perceptions and Asymmetric Information in the "Zone of Twilight,"* 44 ST. MARY'S L.J. 1, 68-84 (2012).

317. Scharf, *supra* note 264, at 321-22 (interpreting GOLDSMITH, *supra* note 226).

318. GOLDSMITH, *supra* note 226, at 69.

319. Scharf, *supra* note 264, at 341 (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949)).

possibility of prosecutors conducting serious investigations and Americans from demanding accountability for human rights violations. Consequently, criticism at the domestic and international level intrinsically resulted in a shame sanction being imposed on the Bush Administration. Subsection A explores the shame sanction in international relations, Subsection B describes the perpetuation of the shame sanction by the Republican majority in Congress, and Subsection C explains how the Obama Administration accepted the shame sanction while attempting to undo damage done to America's image.

A. THE SHAME SANCTION

The Bush Administration proved uninterested in investigating itself, and it rhetorically implanted a "state as actor" theme. It had the political power to commandeer the prospect that foreign or international courts might accept jurisdiction, and it used the specter of perceived catastrophic security threats to inherently rationalize severe interrogation. The result was that foreigners and critics were only successful in subjecting the Bush Administration to an ephemeral "shame sanction" for alleged jus cogens violations. The shame sanction in international relations involves a state's transgression of obligations for breach of international law that would normally mandate a tangible remedy, but instead of imposing a palpable punishment, other states express vituperation, withhold cooperation, shun, vote against the offending state's interests in international organizations, or withhold esteem.[320] A corollary to the shame sanction is that the guilty state frequently apologizes to informally accept fault, heal humiliations and grudges, generate forgiveness, and thwart penchants for vengeance.[321] However, sometimes the leaders of the culpable state may not apologize and instead may only offer insincere statements or a pseudo-apology.[322] Such states may refuse to acknowledge that

320. Gopalan, *supra* note 292, at 789. For example, after the looting of the Iraq National Museum in April 2003, a combination of demands to fix a problem with application of shame was encountered when the international media demanded that "the United States [should] . . . take affirmative steps to remedy the Iraqi antiquity situation in order to regain international respect." Karin E. Borke, *Searching for a Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of 2003*, 13 DEPAUL-LCA J. ART & ENT. L. & POL'Y 381, 404-05 (2003).

321. Richard B. Bilder, *The Role of Apology in International Law and Diplomacy,* 46 VA. J. INT'L L. 433, 437 (2006).

322. *Id.* at 439.

there was an offense, deny or minimize the seriousness of the act, disclaim that there was damage, or express regret to the wrong party or for the incorrect offense.[323]

Shame sanctions have customarily been employed in international relations for highlighting injustices related to colonialism, discrimination and humanitarian abuse, violating sovereign territory, and contravening the rights, property, or interests of foreigners. Examples of apologies being used in international law as a substitute for a true remedy include the U.S. infringement of Soviet airspace in 1960, which resulted in an American U-2 spy plane being shot down; the attack on the U.S. Ambassador to Japan in 1964; Israel's attack on the USS Liberty in 1967; North Korea's capture of the USS Pueblo that was spying on North Korea in 1968; the French agents who attacked and sunk Greenpeace's Rainbow Warrior in 1985; NATO's bombing of China's Belgrade Embassy in 1999; and the Chinese fighter jet collision with the U.S. reconnaissance plane that landed on Hainan Island in 2001.[324]

Other cases that depict minimal punishment for wrongs can be found in colonial abuses. Thomas Jefferson spoke of impunity and a double standard when the British returned soldiers to England for heinous crimes in occupied America, only for courts to exonerate the soldiers in "mock trials."[325] To the extent that the indictment of a low-level official conveys tacit, albeit spurious remorse, some shame exists. Perhaps Gandhi's philosophy best epitomized the conception of a victim reaction that makes the wrongdoer's natural and most befitting response a shame sanction. Even with the memory of carnage such as the Amritsar massacre in 1919, in which the British killed 379 Indians and injured 1,000,[326] Gandhi, who was educated in Britain, protested British discrimination of Indians with a nonviolent "Force which is born of Truth and Love."[327] Gandhi's philosophy of loving the enemy may be controversial,[328] and it is not clear that slighting

323. Bilder, *supra* note 321, at 439.

324. *Id.* at 442-46.

325. Major Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, 2010 ARMY L. 12, 26 (2010).

326. RAJMOHAN GANDHI, GANDHI: THE MAN, HIS PEOPLE, AND THE EMPIRE 210 (2007).

327. MAHATMA GANDHI, THE ESSENTIAL GANDHI: AN ANTHOLOGY OF HIS WRITING ON HIS LIFE, WORK, AND IDEAS 77 (Louis Fischer ed., 2d ed. 2002) (1962).

328. *See* Yxta Maya Murray, *A Jurisprudence of Nonviolence*, 9 CONN. PUB. INT.

tangible remedies is always the optimal result. However, due to India's internal situation, Gandhi's philosophy may have been critical to reducing the already-widespread violence that enveloped the Indian subcontinent at the time of independence in the late-1940s.[329]

Advocacy from human rights groups frequently initiates discourse that targets wrongdoing for human rights abuses with embarrassment, scrutinizes actions, modifies behavior, and leads to a shame sanction.[330] In the case of the Bush Administration's human rights abuses, nongovernmental organizations amassed information and documented violations, but human rights groups can only do so much,[331] despite the fact that they have grown in power in recent years.[332]

After the media revealed abuses in Abu Ghraib, the Bush Administration peddled on with the low-level-soldier "bad apples" explanation, but eventually Secretary of Defense Donald Rumsfeld provided an isolated apology for the acts of soldiers, while Bush consistently controverted that there was torture and assuredly denied that top officials ordered interrogation methods tantamount to torture.[333] Speaking of interrogation abuses, Professor Benjamin Davis disagrees with using statements of contrition as sufficient and contends: "Rather than wait 40-50 years for the expiatory moment of apology . . . I am suggesting that we should root out the transgressor and the transgressive act with regard to torture and cruel inhuman and degrading treatment."[334] Similarly, in the case of carrying out a war that cost Americans upwards of $1 trillion in direct expenditures (and up to $3 trillion when including indirect expenditures), and one

L.J. 65, 69-71 (2009).

329. JEFFREY HERBST, STATES AND POWER IN AFRICA 259 (2000).

330. Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices*, THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 14-15 (Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink, eds., 1999).

331. Peter Willetts, *The Impact of Promotional Pressure Groups in Global Politics*, *in* PRESSURE GROUPS IN THE GLOBAL SYSTEM: THE TRANSNATIONAL RELATIONS OF ISSUE-ORIENTED NON-GOVERNMENTAL ORGANIZATIONS 187 (Peter Willetts ed., 1982) (noting that human rights groups "cannot afford to make mistakes, because thereafter their . . . mistakes will continually be thrown back at them").

332. P.J. Simmons, *Learning to Live with NGOs*, 112 FOR. POL'Y 82 (1998).

333. Bilder, *supra* note 321, at 448-49 (describing Rumsfeld offering his "deepest apologies"). *See supra* Sections I, IV.A.

334. Davis, *supra* note 23, at 521.

that was without any Security Council authorization for Iraq's supposed weapons of mass destruction, the Bush Administration never offered any apology, but merely offered rationalizations that can be summarized as a shameless "whoops."[335]

Apologizing for wrongs and asking for forgiveness is a wonderful philosophy in daily affairs to exhibit kindness and mend relationships, but in cases such as this, it is inappropriate. An accused in a criminal case cannot apologize and exit the courtroom in the middle of a trial, and a doctor accused of medical malpractice in a wrongful death case probably will not appease the surviving relatives with a mere apology. Apology as a substitute for liability may not be appropriate unless the abused party willingly and voluntarily accepts the apology as adequate. Without a real threat of punishment, wrongdoing may be perpetrated and wrongdoers may be granted impunity[336] in future cases for similar acts.

B. PERPETUATION OF THE SHAME SANCTION BY THE REPUBLICAN MAJORITY IN CONGRESS

Rooting out transgressors within the executive branch via domestic political means was also improbable because there was a unified government with Republicans holding the majority of seats in Congress through 2006.[337] Republicans seem to favor appearing stronger on national security, which may be rational when that focus usurps attention from domestic issues on which Democrats have an advantage.[338] There is an indirect additional

335. *See generally* Bejesky, *Weapon Inspections*, *supra* note 167, at 360-62, 369-75; Linda J. Bilmes & Joseph E. Stiglitz, *The Iraq War Will Cost Us $3 Trillion, and Much More*, WASH. POST, Mar. 9, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/03/07/AR2008030702846.html (noting that direct appropriations are only part of the cost; there are also expenditures for health care for veterans, life insurance payments to soldiers killed in combat, indirect expenses to the economy due to reckless war financing, hidden military expenditures, and oil price spikes).

336. Bilder, *supra* note 321, at 470 ("[W]ith respect to more significant international disputes, particularly those involving substantial harm to another state's nationals, property, or interests, apology alone is rarely enough.").

337. Bejesky, *Political Penumbras, supra* note 256, at 33-37.

338. *See* Bejesky, *Politico, supra* note 185, at 90-100; Bejesky, *Political Penumbras*, *supra* note 256, at 10-11. For example, Republicans have been running on the anti-*Roe v. Wade* platform for well over thirty years, yet they cannot even point to their Republican appointments to the Supreme Court as being willing to overturn *Roe*. M. Cathleen Kaveny, *Donald A. Giannella Memorial Lecture: Prophecy and Casuistry: Abortion, Torture and Moral Discourse*, 51 VILL. L. REV. 499, 531 (2006).

leverage for a president to aggrandize a security threat-laden environment to improve presidential approval ratings.[339] While threat allegations were frequently unsubstantiated, one of the Republicans' common retorts during national security debates was that by not accepting allegations, allegations which were often the precursor to justifying a preferred policy agenda, Democrats were "playing politics with the nation's security."[340] Moreover, liberals and Democrats may generally be more sensitive to treating torture and cruelty as a foremost vice that is closely associated with oppression.[341] This is another arena in which it behooves Americans to distinguish between promise and deed, and between different administrations, rather than referring to a unified "state" as the actor.[342] Presidents Carter, Clinton, and Obama arguably exhibited stronger support for global initiatives to protect human rights than Presidents Reagan and George W. Bush.[343]

339. Bejesky, *Political Penumbras*, *supra* note 256, at 6-7.

340. Sean Loughlin, *Democrats Step Up Criticism of Bush*, CNN, July 10, 2003, http://www.cnn.com/2003/ALLPOLITICS/07/10/democrats.iraq/index.html (noting that after Democrats criticized Bush for poor planning for the Iraq War and problems during occupation, Ed Gillespie, chairman-elect of the Republican National Committee, stated that "[t]he Democrats have been playing politics"); SENATE SELECT COMMITTEE ON INTELLIGENCE, REPORT ON WHETHER PUBLIC STATEMENTS REGARDING IRAQ BY U.S. GOVERNMENT OFFICIALS WERE SUBSTANTIATED BY INTELLIGENCE INFORMATION 100 (June 5, 2008) (stating that "democrats were seeking to politicize deliberately the national security oversight function of the Congress" rather than to protect the country); Bejesky, *Political Penumbras*, *supra* note 256, at 27 (noting that when Democrats sought to postpone the vote to authorize the Iraq War, "Republican members of Congress started accusing them of playing politics with the country's national security"); Bejesky, *Rational Choice, supra* note 49, at 21-23 (noting that when government officials transfix on one societal risk—terrorism—the American public can become overly risk-averse and be manipulated by the fear inherent in the government discourse).

341. David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1438 (2005).

342. In 1998, future Bush administration legal adviser, Jack Goldsmith, wrote that the U.S. "constantly urges nations of the world to embrace international human rights standards," and "uses military and economic leverage to force compliance with these standards," but "does not embrace the international human rights standards that it urges on others." Goldsmith, *supra* note 128, at 366, 371.

343. Carter stated that "human rights 'would be the soul of [his] foreign policy.'" Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 269 (2004). During the Reagan administration, President Reagan's UN Ambassador Jeane Kirkpatrick contended that the Carter administration supported democracies with "fewer freedoms and less personal security" than an autocracy. Jeane Kirkpatrick, *Dictatorships & Double Standards*, COMMENT. MAG. (Nov. 1979), *available at* http://www.commentarymagazine.com/article/dictatorships-double-

Congressional Republicans stymied investigations of the Bush Administration,[344] and they were not eager to check the President with legislation. For example, Republican Representative Duncan Hunter, the chairman of the House Armed Services Committee, contended that investigations of Abu Ghraib would be baneful to U.S. interests and to U.S. military forces.[345] Was it really pernicious to the "United States," which is merely an entity in international law that is incapable of making decisions apart from government leaders, or injurious to "U.S. military forces" that are constitutionally obliged to adhere to government directives, or was it noxious to Bush and Republicans?

After the Administration essentially did whatever it pleased for several years, while ignoring dissent, when the Supreme Court decided against the Bush Administration's denial of habeas corpus for detainees in *Hamdan* in September 2006, Bush finally went to Congress and stated: "I'm asking that Congress make explicit that by following standards of the Detainee Treatment Act, our personnel are fulfilling America's obligations under Common Article Three of the Geneva Conventions."[346] For the 2006 Military Commissions Act, Democrats opposed the President, particularly on the issue of stripping habeas review from the bill.[347] The vote was 253-168, with Republicans voting 219 to 7 in support and Democrats voting 160 to 34 in opposition.[348] The vote in the Senate for the MCA was 53 Republicans in favor and only 12 Democrats in favor.[349] If a

standards/. *See* Section III.B.1 (noting that, for the ICC, Clinton signed the Rome Statute and Bush undid the signature).

344. Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, Torture,* 81 IND. L.J. 1255, 1273 (2005) ("Congress was largely absent from engagement in U.S. policies of detention and interrogation from 2001 through much of 2005."); Carl Hulse, *In New G.O.P. Era, DeLay Drives Agenda for Congress*, N.Y. TIMES, Jan. 5, 2003, http://www.nytimes.com/2003/01/05/us/in-new-gop-era-delay-drives-agenda-for-congress.html.

345. Brenner, *supra* note 124, at 60-61.

346. *Remarks on the War on Terror,* 42 WEEKLY COMP. PRES. DOC. 1569, 1575 (Sept. 6, 2006).

347. Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 317-18 (2008). Republicans were still the majority party during the Military Commissions Act of 2005 and 2006. John J. Gibbons, *Commentary on the Terror on Trial Symposium*, 28 REV. LITIG. 297, 313 (2008).

348. Diller, *supra* note 347, at 319-20.

349. *Id.* at 322. Senators Clinton and Obama both voted against the Military

Congressperson views, or promotes, a security environment with heightened danger, he or she will probably also accept dubious allegations that harsh interrogation methods are necessary, even though the Congressperson generally cannot have privileged knowledge of the threat because the executive branch controls classified information within the national security apparatus.[350] With detainee abuses prevalent in the news, Congress had to place riders on spending allocations to improve detainee treatment.[351]

Similarly, after both the My Lai massacre during the Vietnam War and the Abu Ghraib scandal during the occupation of Iraq, members of Congress who supported the respective Presidents impeded prosecutions of military officials, shifted attention away from scandal, and shirked oversight functions.[352] Much patronage came from a "conservative and hawkish" majority in Congress that was able to marginalize Democrats.[353] Samuel Brenner wrote that "[b]oth after My Lai and after Abu Ghraib those representatives wanting to expand the oversight investigations were stymied by powerful conservative committee chairmen 'loyal' to the U.S. military and interested more in whitewashing or minimizing than in exposing the truth behind allegations of American war crimes."[354]

C. PRESIDENT OBAMA'S ACCEPTANCE OF THE SHAME SANCTION

Unified government cannot explain why President Obama did not investigate the Bush Administration. Instead, Obama's approach was to change course and end detainee processes that purportedly amounted to torture.[355] The new President did maintain some Bush Administration programs,[356] but ended

Commission Act. *The Candidates on Torture,* PBS (Mar. 7, 2008), http://www.pbs.org/now/shows/410/candidates-on-torture.html.

350. Bejesky, *National Security*, *supra* note 130, at 402-20.

351. Charles Tiefer, *Can Appropriation Riders Speed Our Exit from Iraq?*, 42 STAN. J. INT'L L. 291, 291-92 (2006); Detainee Treatment Act of 2005, Pub. L. 109-148, § 801, 119 Stat. 2739, 2744 (2005).

352. Brenner, *supra* note 124, at 55-58.

353. *Id.* at 38.

354. *Id.* at 85.

355. Dana Carver Boehm, *Waterboarding, Counter-Resistance, and the Law of Torture: Articulating the Legal Underpinnings of U.S. Interrogation Policy*, 41 U. TOL. L. REV. 1, 2 (2009).

356. Jeffrey F. Addicott, *Efficacy of the Obama Policies to Combat Al-Qa'eda, the Taliban, and Associated Forces – The First Year*, 30 PACE L. REV. 340, 341 (2010);

extraordinary renditions,[357] required the CIA to close all detention centers, mandated that detainees be treated humanely,[358] and gradually began to reduce the number of detentions at Guantánamo Bay.[359] Obama further adhered to a sense of openness, withdrew legal opinions that sanctioned abuses, and attempted to restore the Justice Department's Office of Legal Counsel's reputation without referring Bush Administration legal advisers for disciplinary procedures.[360] Despite the fact that condemnable interrogation practices were periodically front-page news for several years,[361] neither the Bush Administration nor the Obama Administration undertook any investigations of high-level officials for responsibility at Abu Ghraib, or of any of the other wide-spread reports of torture at other military detention facilities in Iraq, Afghanistan, or Guantánamo Bay, or of any of the secret detention facilities.[362]

In April 2009, President Obama announced that he would not prosecute CIA officials or the former Administration for authorizing interrogation practices that were cruel and unusual punishment and perhaps constituted torture.[363] Failing to prosecute can amount to complicity in violating the Convention Against Torture,[364] and Article 146 of the 1949 Geneva Civilian

Jules Lobel, *Preventative Detention and Preventative Warfare: U.S. National Security Policies Obama Should Abandon*, 3 J. NAT'L SECURITY L. & POL'Y 341, 341 (2009).

357. Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 121-22 (2010).

358. Exec. Order No. 13,491, 74 FED. REG. 4893 (Jan. 27, 2009), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-1885.pdf.

359. *Document – Guantánamo: 11 Years in Numbers,* AMNESTY INT'L (Jan. 8, 2013), *available at*

http://www.amnesty.org/en/library/asset/AMR51/002/2013/en/eb797b7a-30e4-4173-8004-6d996a572dcf/amr510022013en.html (noting that there were 240 detainees in 2010 and 166 in January 2013); Nowak, Birk & Crittin, *supra* note 67, at 34-35; Peter Jan Honigsberg, *Essay Inside Guantanamo*, 10 NEV. L.J. 82, 82-83 (2010); Obama '08: Strengthening Our Common Security By Investing in Our Common Security, at 5 (2008), *available at* http://www.cgdev.org/doc/blog/obama_strengthen_security.pdf (making campaign promises to terminate Bush Administration abuses).

360. Rachael Ward Saltzman, Note, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL'Y REV. 439, 479-80 (2010).

361. Akerson & Knowlton, *supra* note 20, at 639.

362. Gallagher, *supra* note 232, at 1088.

363. *CBS News: Obama Won't Prosecute Bush Officials* (CBS television broadcast Apr. 20, 2009); *CBS News: CIA Off the Hook for Waterboarding* (CBS television broadcast June 18, 2009).

364. Nowak, Birk & Crittin, *supra* note 67, at 50.

Convention, which requires all parties to

> search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches [of the Convention], and . . . bring such persons, regardless of their nationality, before its own courts for 'effective penal sanctions' or if it prefers, . . . hand such persons over for trial to another High Contracting Party.[365]

In August 2012, Amnesty International was still vehement and argued that it "is simply not good enough" that President Obama came to office affirming that he would "turn the page" on abuses perpetrated under the Bush Administration.[366] Amnesty International declared: "The U.S. government is required by international law to respect and ensure human rights . . . and to bring perpetrators to justice, no matter their level of office."[367]

Professor Michael Dorf explained that President Obama "accepted the core of the few-bad-apples narrative,"[368] and "has not offered any non-political rationale for giving Attorney General Holder permission to bring prosecutions against little fish but not big fish."[369] Obama did state that "[w]e have been through a dark and painful chapter in our history. But at a time of great challenges and disturbing disunity, nothing will be gained by spending our time and energy laying blame for the past."[370] Granting immunity does not respect international law, enforce

365. Paust, *Absolute Prohibition*, *supra* note 63, at 1541.

366. *Demand Accountability for Torture and Abuse*, AMNESTY INT'L http://www.amnestyusa.org/our-work/issues/torture/accountability-for-torture (last visited Aug. 25, 2012); HUMAN RIGHTS WATCH, *supra* note 276 (itemizing abuses, identifying several responsible Bush Administration officials, and demanding accountability).

367. *Demand Accountability for Torture and Abuse, supra* note 366; HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES 3 (July 2011), *available at* http://www.hrw.org/sites/default/files/reports/us0711webwcover_1.pdf (arguing that a real investigation should be conducted into the role of those top officials "who authorized, ordered, and oversaw torture and other serious violations of international law, as well as those implicated as a matter of command responsibility, should be investigated and prosecuted if evidence warrants").

368. Michael C. Dorf, *Iqbal and Bad Apples*, 14 LEWIS & CLARK L. REV. 217, 222 (2010).

369. *Id.* at 223.

370. *CIA Off the Hook, supra* note 363; Nowak, Birk & Crittin, *supra* note 67, at 60 (stating that Obama "has thus far only half-heartedly put into place necessary safeguards to prevent torture").

criminal laws, or provide a warning or an incentive for future presidents to abide by laws, but it could preclude negative ramifications from societal sentiment that might coexist with investigating and prosecuting former government officials and grant inter-administration comity so that Republicans might be more reluctant to zealously pursue the Obama Administration, or another future Democratic administration, for wrongdoing or controversy.

Addressing the European audience in the context of the negative view of the Bush Administration,[371] Obama remarked: "[T]here have been times where Americ[a has shown] arrogance and been dismissive, even derisive . . . . So I've come to Europe this week to renew our partnership, one in which America listens and learns from our friends and allies . . . ."[372] Again, "Presidents" and "administrations" are not "America." It is leaders who make and implement decisions. Government leaders may utilize discourse of national unity in a manner that violates democratic principles of political responsibility by deflecting blame and dispersing responsibility, and other government leaders may employ discourse of national pride that endeavors to be diplomatic and repair antecedent impropriety and misconduct by avoiding details of culpability and placing responsibility on the "state" in order to move forward. Unfortunately, confusion between the state and leader can also drift across the general public and be selectively adopted to actuate political sentiment.[373]

371. Before Obama entered office, 49% of foreigners "said the US played a mainly negative role in the world." *View of US's Global Role 'Worse,'* BBC NEWS, Jan. 23, 2007, http://news.bbc.co.uk/2/hi/americas/6286755.stm.

372. *U.S., Europe Need to Drop Attitudes, Obama Says*, CNN (Apr. 3, 2009), http://edition.cnn.com/2009/POLITICS/04/03/obama.town.hall/index.html.

373. In an interview with *Rolling Stone*, Hank Williams, Jr. stated that Obama "is the worst, . . . [and] hates America" because Obama took "a world tour, to apologize for America." Patrick Doyle, *Hank Williams Jr.: 'President Obama Hates America'*, Rolling Stone, July 11, 2012, http://www.rollingstone.com/music/news/hank-williams-jr-president-obama-hates-america-20120711. Williams further responded that Obama hates America because "[w]e have borrowed ourselves into our poor grandchildren." *Id.* Another sentiment is ostensibly captured in Williams' song, "We Don't Apologize For America." *See Hank Williams Jr. – We Don't Apologize For America Lyrics,* SONG LYRICS, http://www.songlyrics.com/hank-williams-jr/we-don-t-apologize-for-america-lyrics/ (last visited March 3, 2013). The lyrics ostensibly equate some forms of anti-war dissent and protest with opposition to American troops, and conclude with, "Hey, Obama, one more time . . . When you're runnin' down our country men You're walkin' on the fightin' side of me." *Id.* Others emphasize that President Bush carried out the Iraq War based on false pretenses (which was the act that placed American troops in harm's way), and it cost American

VI. CONCLUSION

Academics vociferously denounced human rights violations that occurred due to the Bush Administration's directives that sanctioned an itemized list of psychological interrogation techniques. Torture is prohibited as a jus cogens norm, irrespective of the location of the act, and lesser cruel and inhuman punishment standards are also proscribed, but are susceptible to appearing more legitimate when there are purported justifications raised, such as self-defense and necessity. Psychological interrogation practices can rise to the level of torture or might result in foreseeable acts of torture.

U.S. courts are obligated to enforce binding international law, and there are many theories of culpability, such as chain of command responsibility, that can impose criminal and civil liability on top officials for their directives that may have led to torture. However, an administration would be unlikely to exhibit a keen interest in investigating itself for criminal activity, and the legal framework for civilly remedying harm imposed on non-American torture victims is feeble. Despite the fact that torture accords universal jurisdiction, the International Criminal Court and foreign courts have also been unsuccessful in, or unwilling to, investigate top Bush Administration officials.

One of the Bush Administration's foremost mechanisms to downplay wrongs and deflect attention was to inject "state as actor" rhetoric. For the domestic audience, such oratory punctuates the notion that "we Americans are all in this together," while sheer power can impede prosecutions at the international level.[374] It is not evident that Americans would be

taxpayers upwards of $1 to $3 trillion (when including indirect expenses); also, Bush presided over economic conditions that doubled the national debt. Bejesky, *Politico*, *supra* note 185, at 31, 84-90; Robert Bejesky, *Geopolitics, Oil Law Reform, and Commodity Market Expectations,* 63 OKLA. L. REV. 193, 273 (2011); Bilmes & Stiglitz, *supra* note 335. At the Republican National Convention in August 2012, actor Clint Eastwood referred to President Obama as "the greatest hoax ever perpetrated on the American people." Tim Kenneally, *Eastwood: Obama Greatest Hoax Ever Perpetrated on the American People,* REUTERS (Sept. 7, 2012), http://www.thewrap.com/tv/article/clint-eastwood-obama-greatest-hoax-perpetrated-american-people-55286. Other Americans might refer to the Bush Administration as a "hoax."

374. Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 1, 39 (2005) (noting a common belief that

honored to be implicated in directives that could have sanctioned torture, and legal precedent does not substitute the state as the actor if war crimes are committed by government leaders. Some scholars even maintain that ensuring respect for human rights should be a legitimizing criterion for state sovereignty.[375] Denying sovereignty would make no sense with regard to the United States or Americans, but it does seem reasonable to delegitimize a regime.[376]

If scholars are correct in maintaining that the Bush Administration committed torture and war crimes, does this signify that the U.S. currently lacks an impartial criminal justice system? If the Bush Administration did commit torture and war crimes, if America is a country where all citizens are equal before the law and no one is above the law, and if top executive branch officials are not subject to domestic and international laws that prohibit human rights abuse or generally applicable criminal laws, is there selective prosecution that should present a defense to criminal suspects who are charged with assault, battery, and other offenses involving bodily harm? There is an evident theoretical extrapolation from government actor to ordinary citizen in this query, but the substantive offense of torture is a crime that pierces the veil of government immunity for acts of state. One explanatory cynosure for differing treatment and for applying otherwise pertinent *jus cogens* violations is that leaders of dominant states may be capable of utilizing a virtually unchecked and domineering public relations discourse to supplant extensive documentation of wrongdoing and bypass legal prohibitions and penalties. Offenders may only be caught with the most feasible alternative—the imposition of an ephemeral shame sanction.

constitutional democracies can assess internal accountability while power prohibits international punishment, leaving peer and reputational accountability).

375. HERBST, *supra* note 329, at 268.

376. Jackson Maogoto & Benedict Sheehy, *supra* note 34, at 725 (discussing that the Bush Administration made the United States a "rogue state in international law, defying international bodies, breaching international law conventions and their consequent duties, even abandoning the Rule of Law").