

# Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture

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Jamie Mayerfeld\*

James Harding (Financial Times): “Mr. President, I want to return to the question of torture. What we’ve learned from these memos this week is that the Department of Justice lawyers and the Pentagon lawyers have essentially worked out a way that United States officials can torture detainees without running afoul of the law. So when you say you want the United States to adhere to international and United States laws, that’s not very comforting. This is a moral question: Is torture ever justified?”

President Bush: “Look, I’m going to say it one more time. . . . Maybe I can be more clear. The instructions went out to our people to adhere to law. That ought to comfort you. We’re a nation of law. We adhere to laws. We have laws on the books. You might look at these laws, and that might provide comfort for you. And those were the instructions . . . from me to the government.”<sup>1</sup>

In evading the reporter’s question, President Bush gave the impression that he believed himself legally permitted to order torture.<sup>2</sup> It is puzzling that the President might hold or even suggest such a view, but his remarks

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\* Associate Professor of Political Science, University of Washington. For valuable criticisms and suggestions, I wish to thank Gad Barzilai, Rachel Cichowski, Angelina Godoy, Frank Heneghan, Steven Herbert, Peter Hovde, George Kateb, Robert Keohane, Clark Lombardi, Bharat Malkani, Michael McCann, Jacqueline McMurtrie, Julie Novkov, Deborah Pearlstein, Brad Roth, Margaret Satterthwaite, Kim Scheppele, Eric Schnapper, Christi Siver, and Louis Wolcher. My greatest debts are to Roni Amit, George Lovell, Darius Rejali, and Stuart Streichler. For research assistance I wish to thank Lindsay Jenkins, Jorge Ramos, and Melissa Robe. Since all these people worked valiantly to improve this Article, they should not be held accountable for its errors and shortcomings. Finally, I wish to thank Charles B. Gittings, Jr., for the updates posted at his website, Project to Enforce the Geneva Conventions, <http://www.pgc.us/index.html>, without which I could not have written this Article.

1. President George W. Bush, News Conference at Sea Island, Georgia (June 10, 2004), *reprinted in* MARK DANNER, *TORTURE AND TRUTH* 45–46 (2004).

2. He also seemed to suggest that he sometimes condones torture. Twelve days later he corrected this impression. Tim Harper, “*We Do Not Condone Torture*,” *Bush Says*, *TORONTO STAR*, June 23, 2004, at A11. Administration officials recognize that international law and domestic legislation prohibit torture, but they have carefully refrained from saying that the President is legally barred from ordering torture. See *infra* text accompanying notes 65–67.

call attention to an even greater mystery. The United States considers itself, as the President says, a “nation of law,” yet over the past several years, it has engaged in the systematic use of torture. How was this possible? Why did the U.S. legal system fail to block the use of torture?

That the United States has instituted a policy of coercive interrogation as part of the “Global War on Terror” is no longer in dispute. Beginning after September 11, coercive interrogation techniques were authorized at the highest levels of the Administration, legally certified by attorneys in the White House and Department of Justice, conveyed to the Pentagon and Central Intelligence Agency (“CIA”), and communicated down the ranks to prison guards and interrogators. These methods have been used by the U.S. military, the CIA, private contractors employed by the Pentagon, and foreign security services to which the United States has sent captives under a policy known as “extraordinary rendition.”<sup>3</sup>

The government, though it balks at the word “torture,” has acknowledged the use of coercive methods. In a highly publicized speech on September 6, 2006, President Bush defended what he called “an alternative set of procedures” used in a “CIA program for questioning terrorists.”<sup>4</sup> He refused to describe the authorized techniques, but several of them are common knowledge: waterboarding (or near-drowning), sleep deprivation, forced standing, stress positions, hypothermia, slapping, light and noise bombardment, and extreme isolation.<sup>5</sup>

These methods have been used by the armed forces as well as the CIA. They are not the only methods known to have been used. As the American Civil Liberties Union (“ACLU”) reports, “[D]etainees have been beaten; forced into painful stress positions; threatened with death; sexually humiliated; subjected to racial and religious insults; stripped naked; hooded and

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3. There are many excellent accounts of these developments. Amnesty International (“AI”) reports include AMNESTY INT’L, HUMAN DIGNITY DENIED: TORTURE AND ACCOUNTABILITY IN THE “WAR ON TERROR” (Oct. 27, 2004); AMNESTY INT’L, GUANTANAMO AND BEYOND: THE CONTINUING PURSUIT OF UNCHECKED EXECUTIVE POWER (May 13, 2005); Amnesty International’s Supplementary Briefing to the UN Committee Against Torture, May 3, 2006. These and other AI reports on the same issue are collected at AI Documents on Torture in the “War on Terror,” <http://web.amnesty.org/pages/stoptorture-background-alldocuments-eng> (last visited Dec. 24, 2006). Equally important reports by Human Rights Watch include HUMAN RIGHTS WATCH, THE ROAD TO ABU GHRAIB (June 2004); HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES (April 2005); and HUMAN RIGHTS WATCH, “NO BLOOD, NO FOUL”: SOLDIERS’ ACCOUNTS OF DETAINEE ABUSE IN IRAQ (July 2006). These and other reports on the same issue can be found at U.S. Torture and Abuse of Detainees, <http://hrw.org/campaigns/torture.htm> (last visited Dec. 24, 2006). See also DANNER, *supra* note 1.

4. Press Release, President George W. Bush, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

5. CIA officials, speaking off the record, have identified these as officially authorized methods. See Brian Ross & Richard Esposito, *CIA’s Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1322866>; Dana Priest, *Covert CIA Program Withstands New Furor: Anti-Terror Effort Continues to Grow*, WASH. POST, Dec. 30, 2005, at A1; Dana Priest, *Officials Relieved Secret Is Shared*, WASH. POST, Sept. 7, 2006, at A17.

blindfolded; exposed to extreme heat and cold; denied food and water; deprived of sleep; isolated for prolonged periods; subjected to mock drownings; and intimidated by dogs.”<sup>6</sup> Detainees transferred to foreign security services have been treated even more cruelly.<sup>7</sup> For some prisoners, the abuse has lasted years.<sup>8</sup>

Much of this abuse is rightly called torture. By torture, I mean the intentional infliction of severe physical or mental pain or suffering. This language comes from the canonical first article of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”).<sup>9</sup> The claim that the interrogation methods include forms of torture will strike many readers as obvious. Others will be persuaded if they read testimonies of the victims and learn more about the methods used. One has to get past the generic descriptions that have become the standard currency of media reports. These descriptions, often taken from the officials who authorized the methods, can be misleadingly benign, and leave readers in ignorance about the methods’ real effects.<sup>10</sup> That the techniques are intended to cause severe pain or suffering is suggested by the Administration’s own insistence that tough measures are needed to obtain information from detainees, especially those purportedly trained to resist interrogation.<sup>11</sup> Several of the techniques—including sleep deprivation, forced standing, and waterboarding—are infamously associated

6. AMERICAN CIVIL LIBERTIES UNION [ACLU], ENDURING ABUSE: TORTURE AND CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD 1 (2006), available at [http://www.aclu.org/safe/free/torture/torture\\_report.pdf](http://www.aclu.org/safe/free/torture/torture_report.pdf).

7. See David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123; STEPHEN GREY, GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM (2006); Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, NEW YORKER, Feb. 14, 2005, at 106; AMNESTY INT’L, BELOW THE RADAR: SECRET FLIGHTS TO TORTURE AND “DISAPPEARANCE,” Apr. 5, 2006; Gordon Thomas, *Torture Flights: The Shocking Facts*, CAN. FREE PRESS, May 25, 2006, available at <http://www.canadafreepress.com/2006/thomas052506.htm>.

8. This is true of several prisoners at Guantanamo Bay. See Jeff Tietz, *The Unending Torture of Omar Khadr*, ROLLING STONE, Aug. 24, 2006, at 60; David Rose, *Inside Guantanamo: How We Survived Jail Hell*, OBSERVER, Mar. 14, 2004, at 5.

9. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention] (defining torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”).

10. See Darius Rejali, Op-Ed., *A Longstanding Trick of the Torturer’s Art*, SEATTLE TIMES, May 14, 2004, at B9; Tom Malinowski, Op-Ed., *The Logic of Torture*, WASH. POST, June 27, 2004, at B7. For example, the now-familiar phrase learned from CIA officials to describe waterboarding may seriously understate the cruelty of this procedure. The media has described waterboarding as a technique in which “the prisoner is made to believe he will drown.” See James Risen, David Johnson & Neil Lewis, *Harsh CIA Methods Cited in Top Qaeda Interrogations*, N.Y. TIMES, May 13, 2004, at A1. Yet prisoners who suffered this technique in South American prisons “had been held under water until they had in fact begun to drown and lost consciousness, only to be revived by their torturers and submerged again. It is one of their worst memories.” JENNIFER K. HARBURY, TRUTH, TORTURE, AND THE AMERICAN WAY 15–16 (2005).

11. Press Release, President George W. Bush, *supra* note 4.

with the Gestapo, Stalin's secret police, and the Inquisition.<sup>12</sup> Many detainees in U.S. custody have died as a result of their treatment.<sup>13</sup>

The government insists that it does not torture, yet it uses methods that it calls torture when practiced by other governments. In Jordan, for example, the State Department observes that "the most frequently alleged methods of torture are sleep deprivation, beatings, and extended solitary confinement."<sup>14</sup> In State Department reports on other countries, sleep deprivation, waterboarding, forced standing, hypothermia, blindfolding, and deprivation of food and water are specifically referred to as torture.<sup>15</sup> The refusal to associate the United States with "torture" is reinforced by the mainstream U.S. media, which carefully avoids the word when reporting on U.S. interrogation and abuse.<sup>16</sup> The euphemistic language of the government and the media is one reason why it still seems bold to refer to U.S. practices as torture.

It is sometimes claimed that these interrogation methods (or many of them) constitute cruel, inhuman, or degrading treatment without rising to the level of torture.<sup>17</sup> Such a claim seems, as a general rule, to be unwarranted: reports of actual interrogation and prisoner treatment clearly reveal the intentional infliction of severe pain or suffering.<sup>18</sup> The claim has tended to rely on narrow definitions of torture in combination with sanitized descriptions of the methods used.<sup>19</sup> Moreover, this claim can hardly be consid-

12. See Adam Hochschild, Op-Ed., *What's in a Word? Torture*, N.Y. TIMES, May 23, 2004, § 4, at 11; Tom Malinowski, *Call Cruelty What It Is*, WASH. POST, Sept. 18, 2006, at A17; Dan Eggen, *Cboney's Remarks Fuel Torture Debate: Critics Say He Backed Waterboarding*, WASH. POST, Oct. 27, 2006, at A9.

13. In a February 2006 report, Human Rights First estimated that nearly one hundred detainees had died in U.S. custody since August 2002, and had identified eight detainees who were tortured to death. HUMAN RIGHTS FIRST, *COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN 1* (Feb. 2006). The U.S. government classifies thirty-four detainee deaths as confirmed or suspected homicides. *Id.*

14. DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: JORDAN 2125 (2000).

15. See DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAN (2000); DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: LIBYA (1999); DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: TUNISIA (1999); DEP'T OF STATE, 2005 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EGYPT (2006).

16. See Timothy Jones & Chuck Rowling, *Abuse vs. Torture: How Social Identity, Strategic Framing, and Indexing Explain U.S. Media Coverage of Abu Gbraib* (Nov. 3, 2005) (unpublished paper presented to the Southern Political Science Association, on file with author).

17. Memorandum from Jay Bybee, Office of Legal Counsel ("OLC") Dir. and Asst. Att'y Gen., to Alberto Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), reprinted in DANNER, *supra* note 1 [hereinafter OLC Torture Memo].

18. See *supra* note 3.

19. See *id.* In *Ireland v. United Kingdom*, the European Court of Human Rights ruled that the "Five Techniques" used by British security forces in Northern Ireland constituted inhuman and degrading treatment, but not torture. 25 Eur. Ct. H.R. (ser. B) at 41 (1978). It is difficult to sustain this judgment if one reads the victims' own accounts. See JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE chs. 1, 4 (2000). The European Court of Human Rights has since moved to a broader understanding of torture, thereby hinting that it might define the "Five Techniques" as torture if a similar case were brought today. See *Selmouni v. France*, 1999-V Eur. Ct. H.R. at 16. Note that in *Ireland v. United Kingdom*, the Court's classification of the "Five Techniques" as inhuman and degrading treatment was sufficient to prohibit them.

ered a *defense* of the interrogation methods. The more one insists that the word “torture” should be reserved for the most extreme forms of ill treatment, the more one is obliged to condemn ill treatment that does not rise to the level of torture. It seems perverse to excuse ill treatment that is *merely* cruel, inhuman, or degrading. One might even argue that there are circumstances in which cruel, inhuman, or degrading treatment not rising to the level of torture is *worse* than torture. Some forms of torture, such as waterboarding, last only for seconds. When ill treatment less severe than torture is extended for months and years, one could argue that such treatment is worse than very brief torture.<sup>20</sup> In any event, cruel, inhuman, or degrading treatment is, like torture, absolutely prohibited by international law.<sup>21</sup>

I take it for granted that torture is wrong: no one should be subjected to the pain and terror that torture entails. In any event, U.S. policy has exacted a terrible moral and practical cost—inflicting horrendous suffering, shattering lives, loosening the international taboo against torture, fueling hatred of the United States, inhibiting the collection of sound intelligence, and producing dangerously false information.<sup>22</sup> Every case of torture is a tragedy. The United States’ experiment with “coercive interrogation” is a tragedy many times over.

Americans need to ask themselves how the United States could adopt a policy of torture, and why, in particular, our legal system failed to prevent it. We all know that the terrorist threat made coercive interrogation newly respectable in the eyes of some public officials, that a general climate of fear and anger following the attacks of September 11 weakened public opposition to torture, and that the Republican majority that controlled Congress until January 2007 chose, for both strategic and ideological reasons, to keep loose reins on the executive branch. However, we expect the law to protect fundamental human rights against bureaucratic zeal, partisan calculations, and shifts in public sentiment. The terrorist attacks of September 11 may have increased the temptation to authorize torture, but an effective legal regime is one that prevents torture precisely when its use becomes most tempting. Since we normally expect the law to erect impregnable barriers against the use of torture, we must ask why, in this case, the barriers gave

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20. I use this example with trepidation. Waterboarding is often inflicted on a prisoner repeatedly, and it can cause lasting psychological damage. See Cristián Correa, *Waterboarding Prisoners and Torture: A Lesson from the Chilean Experience*, HUM. RTS. BRIEF (forthcoming Feb. 2007). My point is that the evil of ill treatment is compounded when its duration is extended.

21. See *infra* text accompanying notes 116–25.

22. The danger of eliciting information by torture is well illustrated by the case of Ibn al-Shaykh al-Libi, who “revealed” under torture that Sadaam Hussein trained al Qaeda in the use of weapons of mass destruction. His statement, since recanted, was prominently cited by Bush Administration officials to justify a war that has not only created a mounting spiral of human misery, but has also given, as is now generally conceded, a major stimulus to international terrorism. See Douglas Jehl, *Qaeda-Iraq Link U.S. Cited Is Tied to Coercion Claim*, N.Y. TIMES, Dec. 9, 2005, at A1; Mark Mazzetti, *Spy Agencies Say Iraq War Worsens Terrorism Threat*, N.Y. TIMES, Sept. 24, 2006, at A1.

way so easily. What makes the question even more acute is the emphatic prohibition of torture in both domestic and international law.

Coverage of the torture outbreak has rightly focused attention on decisions by President Bush and his advisors. The Administration authorized physical and psychological coercion to extract information from prisoners, defending its policy with novel legal doctrines and tactics. Its choices, which break with decades of official U.S. policy and have provoked widespread shock and dismay among legal scholars and practitioners, are the proximate cause of the torture epidemic.

Yet a full explanation of the problem must extend beyond the choices of Administration officials. The American philosophy of government is premised on the Madisonian truth that fundamental rights, beginning with the right against government brutality, must not depend on the individual rectitude of public officials.<sup>23</sup> Fundamental rights must be insulated from the misguided impulses of political leaders by strong institutional protections. The much-vaunted virtue of the American political system is not the moral infallibility of its public officials, but their voluntary submission to the discipline of wise institutions. This is the familiar theory that former Secretary of Defense Donald Rumsfeld invoked when he told the Congressional Armed Services Committees, shortly after the Abu Ghraib revelations: "Mr. Chairman, I know you join me today in saying to the world, judge us by our actions, watch how Americans, watch how a democracy deals with the wrongdoing and with scandal and the pain of acknowledging and correcting our own mistakes and our own weaknesses."<sup>24</sup> Yet our political institutions have not performed as expected: the ability of the Bush Administration to adopt torture, and to maintain its policy in the face of explosive revelations, defies the story Americans tell about themselves as members of a rights-protecting democracy. It is essential that we understand why the American legal and political system failed.

I shall argue that a principal (though not sole) cause of the failure was the longstanding refusal of the United States to incorporate international human rights law into its legal system. Well before the inauguration of George W. Bush and the events of September 11, the United States chose to loosen the binding force of its international human rights agreements. This choice had fateful consequences when the United States declared a "Global War on Terror" following the September 11 attacks. The U.S. marginalization of international human rights law made it far easier for Bush Administration officials to institutionalize abusive treatment. Major legal obstacles that would otherwise have confronted the Bush Administration had been removed by previous congresses and administrations.

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23. THE FEDERALIST NOS. 10, 47–51 (James Madison) (Isaac Kramnick ed., 1987).

24. *Testimony on Allegations of Mistreatment of Iraqi Prisoners: Hearing Before the S. and H. Armed Services Comms.*, 108th Cong. 6 (2004) (statement of former Secretary of Defense Donald Rumsfeld).

The error of the traditional policy should now be manifest. International human rights law anticipates, and can help block, maneuvers like those used by the Bush Administration to violate human rights norms. The lesson of recent experience is that domestic human rights protections need international reinforcement. International human rights law helps fulfill the promises to individual freedom and dignity enshrined in our own Constitution. Only through the full adoption of international human rights law can the United States make a genuine commitment to human rights and be held to that commitment.

This Article focuses primarily on the reservations, understandings, and declarations (“RUDs”) that the United States attached to its ratification in the early 1990s of two major human rights treaties: the International Covenant on Civil and Political Rights (“ICCPR”) and the Torture Convention. The RUDs had two main effects. First, they watered down several treaty obligations, including those regarding the prohibition, prevention, and punishment of torture and other forms of ill treatment. Second, they prevented U.S. courts from enforcing the treaties’ provisions.

The danger of the RUDs should have been obvious at the time of their adoption. The problem was obvious to human rights groups, who criticized them strongly.<sup>25</sup> Torture has hardly been absent from U.S. history. Both history and common sense indicate the folly of carving out loopholes in the international prohibition against torture and ill treatment. The experience of the last five years, when torture has received a level of concerted official support from the U.S. government not seen since the days of slavery, has made the danger of the RUDs fully manifest. As we shall see, the RUDs became a main pillar of the Bush Administration’s torture policy.

My argument is that the United States’ previous marginalization of international human rights law weakened the institutional barriers to torture after September 11. I make two caveats at the outset. First, I do not claim that the domestic incorporation of international human rights law is sufficient to create an effective anti-torture regime. Other steps are needed, and the blackletter text of international human rights law leaves some of these steps under-specified. Second, I do not claim that even a comprehensive program of legal reform, one that goes beyond the domestic incorporation of international human rights law, is foolproof. When a sufficient number of public officials are united in their determination to use torture, even the strongest legal protections might prove ineffective. Though Madison believed that virtuous government depended on wise institutions, he also understood that no set of institutions, however well designed, can be safe from determined subversion by a large and strategically placed group of state officials.<sup>26</sup>

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25. See *infra* text accompanying note 219.

26. THE FEDERALIST NO. 55, at 339 (James Madison).

Because of these two caveats, I do not claim that the domestic incorporation of international anti-torture obligations prior to September 11 would necessarily have prevented the institutional use of torture after September 11. I only claim that the United States' failure to incorporate international human rights law prior to September 11 *made it significantly easier* for this policy to become institutionalized. If U.S. citizens want to prevent the further use of torture by their government, they must adopt legal reforms that include, but go beyond, the domestic incorporation of international human rights law, and they must elect leaders with a strong enough commitment to the legal prohibition and prevention of torture that they will not subvert such reforms.

Part I of this Article briefly discusses U.S. involvement in torture before September 11. This involvement does not approach the systematic and concerted character of current policy, but it should be acknowledged so that we can better understand the origins of current policy and avoid an illusion of pre-September 11 innocence. Part II reviews the emergence of a centralized policy of torture since September 11 and the legal strategies used to support it. Part III argues that most of the principal legal measures needed to prevent torture are part of contemporary international law. Part IV (the core of the discussion) shows how the United States' previous choice to weaken the domestic force of international human rights law facilitated the institutionalization of torture after September 11. This section of the Article also reflects on the implications of *Hamdan v. Rumsfeld*<sup>27</sup> and the Military Commissions Act of 2006.<sup>28</sup> Part V explains why ratification of the treaty establishing the International Criminal Court is among the steps that the United States should take to prevent torture in the future.

## I. UNITED STATES INVOLVEMENT IN TORTURE BEFORE SEPTEMBER 11

There is an understandable impulse to say that the United States' current use of torture is something entirely new, that before September 11 the United States did not involve itself with torture. Unfortunately, the truth is otherwise. At various times in its history, the United States has allowed, encouraged, and even participated in torture. Moreover, the abuses in the "Global War on Terror" can be linked, in part, to a specific history of CIA research into coercive interrogation and complicity in torture that predated September 11.

Torture is part of America's domestic past. It was integral to the institution of slavery and continued in the practices surrounding lynching. Local police forces used torture to elicit confessions through the first third of the twentieth century, and forty years ago wardens in southern prisons still

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27. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

28. Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b), 120 Stat. 2600 (2006).

tortured inmates.<sup>29</sup> Although there have been significant improvements, police brutality and the mistreatment of prisoners remain grave problems today.<sup>30</sup>

At various times the United States has used torture as a counter-insurgency tactic abroad. U.S. troops tortured Philippine insurgents during the rebellion of 1899-1902.<sup>31</sup> In Vietnam, South Vietnamese troops tortured many suspected Viet Cong members, sometimes with the assistance and direct participation of U.S. personnel.<sup>32</sup> During the Cold War, the United States adopted a policy of "torture by proxy," supporting military regimes in Asia and Latin America that it knew practiced torture.<sup>33</sup> The CIA kept on its payroll some officials from these regimes who it knew practiced or ordered torture, in effect paying them for information extracted by torture.<sup>34</sup> We now know that the CIA instructed Latin American security officials in the use of certain torture methods, and even sent U.S. employees to supervise torture.<sup>35</sup>

In the meantime, the CIA was developing theories of interrogation that would give subsequent encouragement to torture. Early in the Cold War, it sponsored a series of exotic psychological studies that eventually made their way into the 1963 *KUBARK Counterintelligence Interrogation* handbook (KUBARK is the code name for the CIA).<sup>36</sup> The KUBARK manual (now declassified in redacted form) provides detailed instructions for the interro-

29. See Jerome H. Skolnick, *American Interrogation: From Torture to Trickery*, in *TORTURE: A COLLECTION* 105 (Sanford Levinson ed., 2004). As late as the 1960s, Arkansas prison officials whipped inmates, cracked their knuckles with pliers, and electrically shocked their genitals. MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 79 (1998). Police torture was largely curtailed in response to the 1931 Wickersham Report on Lawlessness in Law Enforcement. See JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* ch. 3 (1993). However, in the 1970s and 80s, dozens of detainees in the Area 2 Police Station in Chicago were subjected to beatings, burnings, electric shocks, suffocation, and mock execution. None of the perpetrators was ever prosecuted. CONROY, *supra* note 19, chs. 3, 7, 11, 15.

30. See HUMAN RIGHTS WATCH, *SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES* (1998); JAMIE FELLNER, HUMAN RIGHTS WATCH, *PRISONER ABUSE: HOW DIFFERENT ARE U.S. PRISONS?* (2004), available at <http://hrw.org/english/docs/2004/05/14/usdom8583.htm>.

31. See STUART MILLER, "BENEVOLENT ASSOCIATION": THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899-1903 213, 225-26 (1982); Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 *COL. J. TRANSNAT'L L.* (forthcoming 2007).

32. CONROY, *supra* note 19, at 113-20; ALFRED W. MCCOY, *A QUESTION OF TORTURE: CIA INTERROGATION FROM THE COLD WAR TO THE WAR ON TERROR* 60-71 (2006); Jennifer Van Bergen & Douglas Valentine, *The Dangerous World of Indefinite Detentions: Vietnam to Abu Ghraib*, 37 *CASE W. RES. J. INT'L L.* 449, 460 (2006).

33. MCCOY, *supra* note 32, ch. 2; HARBURY, *supra* note 10, chs. 2-3.

34. HARBURY, *supra* note 10, chs. 2-3.

35. *Id.*

36. Experiments to observe the effects of sensory deprivation, many of them conducted on mental patients without their consent, demonstrated the considerable power of such techniques to disturb the human psyche. In addition, lysergic acid diethylamide ("LSD") was given to unsuspecting mental patients, prostitutes' clients, and even government scientists, with disastrous effects. MCCOY, *supra* note 32, ch. 2.

gation of individuals detained against their will. It seems to recognize few outer limits on interrogation techniques: one paragraph mentions the possibility of obtaining headquarters' approval for techniques that involve infliction of "bodily harm"; the use of "medical, chemical, or electrical methods or materials"; and a third category redacted from the declassified document.<sup>37</sup>

Drawing on psychological studies from the previous decade, the manual recommends "methods of inducing regression of the personality to whatever earlier and weaker level is required for the dissolution of resistance and the inculcation of dependence."<sup>38</sup> In a lengthy section on "Coercive Counterintelligence Interrogation of Resistant Subjects," it discusses the possibility of inducing psychological regression through "arrest, detention, the deprivation of sensory stimuli, threats and fear, debility, pain, heightened suggestibility and hypnosis, and drugs."<sup>39</sup>

Themes of the KUBARK manual resurfaced in CIA training of Latin American officials and later in the post-September 11 era: the exploitation of psychological weaknesses, withholding of food and drink, disruption of sleep, sensory deprivation (hooding, prolonged isolation), and self-inflicted pain (forced standing, stress positions). A CIA manual used for training Honduran officers, titled *Human Resource Exploitation Training Manual—1983*, states that the interrogator should be in a position to "manipulate the subject's environment, to create unpleasant or intolerable situations, to disrupt patterns of time, space, and sensory perception."<sup>40</sup>

Both the KUBARK and Honduran manuals profess a preference for psychological duress over physical assault. But the goal is to break down the subject's psyche, if necessary by creating "unpleasant or intolerable situations." What the manuals depict as psychological methods are often, in fact, indistinguishable from physical torture. In 1988, a member of the Honduran intelligence unit known as Battalion 316 reported what he and his colleagues learned from U.S. Army and CIA instructors at a training camp in Texas:

[T]he Americans taught me interrogation, in order to end physical torture in Honduras. They taught us psychological methods—to study the fears and weaknesses of a prisoner. Make him stand up, don't let him sleep, keep him naked and isolated, put rats and cockroaches in his cell, give him bad food, serve him

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37. CENT. INTELLIGENCE AGENCY [CIA], KUBARK COUNTER-INTELLIGENCE INTERROGATION 8 (1963), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/CIA%20Kubark%201-60.pdf>.

38. *Id.* at 41.

39. *Id.* at 85.

40. *Id.* at 89; CIA, HUMAN RESOURCE EXPLOITATION MANUAL—1983, K1.F (1983), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/index.htm#hre>.

dead animals, throw cold water on him, change the temperature.<sup>41</sup>

As cruel as these tactics were, members of Battalion 316 went on to commit far more extreme methods of torture with the knowledge of the U.S. Embassy and close involvement of the CIA.<sup>42</sup>

Techniques approved by the CIA and Pentagon before September 11 resemble many of the practices subsequently used in Iraq, Afghanistan, and Guantanamo Bay. To be clear, the U.S. interrogation manuals discussed above are not the only, and perhaps not even the principal, sources of current practices. We have learned, for instance, that the Survival, Evasion, Resistance, and Escape (SERE) program of the U.S. military, in which U.S. personnel undergo extreme abuse to prepare for possible mistreatment by the enemy, has inspired interrogation techniques at Guantanamo Bay and elsewhere.<sup>43</sup>

U.S. involvement in torture during the Cold War showed that something was broken in our legal system. The current policy has brought this failure into the open light of day.

## II. TORTURE AS UNITED STATES POLICY AFTER SEPTEMBER 11

Although current policy has antecedents in the Cold War, the post-September 11 period marks a new chapter in how the United States relates to torture. Today torture by the United States has become centralized, systematized, and rationalized as never before. What distinguishes current policy from the Cold War era is the direct authorization and close monitoring of torture by the highest officials of government; the creation of an international network of U.S. interrogation centers where detainees are brought to be tortured and often are held for long periods of time; the large-scale enlistment of U.S. military and CIA personnel, not just foreign intermediaries, to carry out torture; the frequent shipment of prisoners across international borders to be tortured; the greater frankness about torture on the part of public officials (who use transparent euphemisms such as “questioning” and “alternative procedures”); the elaborate new legal rationalizations of torture; and the insistence on using torture in defiance of what has become, over the past few decades, a much stronger international legal prohibition against torture and other forms of ill treatment.

Though there is still much to learn, we know a significant part of the story. After September 11, interrogation became a subject of intense discus-

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41. James LeMoyné, *Testifying to Torture*, N.Y. TIMES MAG., June 5, 1988, at 45.

42. See Gary Cohn & Ginger Thompson, *Unearthed: Fatal Secrets*, BALTIMORE SUN, June 11, 1995, at A1.

43. Jane Mayer, *The Experiment*, NEW YORKER, July 11, 2005, at 60.

sion at the highest levels of the Administration.<sup>44</sup> The decision to use coercive methods appears to have been taken by early 2002.<sup>45</sup> A March 2002 Presidential finding signed by President Bush, National Security Advisor Condoleezza Rice, and Attorney General John Ashcroft authorized CIA use of waterboarding, forced standing, hypothermia, and other harsh techniques.<sup>46</sup>

Secret memos drawn up in the White House and Department of Justice cleared a legal path for the use of extreme tactics.<sup>47</sup> On January 25, 2002, White House Counsel Alberto Gonzales advised President Bush that the current war on terrorism “render[ed] obsolete Geneva’s strict limitations on questioning of enemy prisoners.”<sup>48</sup> He also determined that the Taliban and al Qaeda prisoners were not entitled to prisoner-of-war status under the Geneva Conventions, a finding he noted was necessary to shield U.S. officials from being prosecuted under the War Crimes Act<sup>49</sup> for inflicting inhuman treatment.<sup>50</sup> Gonzales’ memo provided the legal blessing for President Bush’s secret policy-setting memo of February 7, 2002,<sup>51</sup> which determined that al Qaeda and Taliban prisoners were entitled neither to POW status nor to the minimum standards of humane treatment required by Common Article 3 of the Geneva Conventions. The memos contravened the prevailing view in international law that Common Article 3, having acquired the status of customary international law, protects all individuals

44. See RON SUSKIND, *THE ONE PERCENT DOCTRINE* 52–56, 75–76, 85–87 (2006); Priest, *supra* note 5; Dana Priest, *CIA Puts Harsh Tactics On Hold; Memo on Methods of Interrogation Had Wide Review*, WASH. POST, June 27, 2004, at A1.

45. See sources cited *supra* note 44. The decision may have been taken earlier. A directive from President Bush outlining approved methods of interrogation “is thought to have been issued shortly after the attacks of Sept. 11, 2001.” David Johnston, *C.I.A. Tells of Bush’s Directive on the Handling of Detainees*, N.Y. TIMES, Nov. 15, 2006, at A14. This memo has not been seen by the public.

46. Ross & Esposito, *supra* note 5; see also Brian Ross, *History of an Interrogation Technique: Water Boarding*, ABC NEWS, Nov. 29, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1356870>.

47. See DANNER, *supra* note 1; see also *THE TORTURE PAPERS* (Karen J. Greenberg and Joshua L. Dratel eds., 2005). Indispensable analysis of the Administration’s legal strategies and positions is provided in a continuing series of posts by Marty Lederman, Jack Balkin, Scott Horton, David Luban, and others, hosted at the web-log of Yale law professor Joel Balkin. *The Anti-Torture Memos: Balkinization Posts on Torture, Interrogation, Detention, War Powers, Executive Authority, and OLC*, <http://balkin.blogspot.com/2005/09/anti-torture-memos-balkinization-posts.html>. I am heavily indebted to these discussions.

48. Memorandum from White House Counsel Alberto Gonzales to President George Bush, *Decision Re Application of the Geneva Conventions on Prisoners of War to the Conflict with Al Qaeda and the Taliban* (Jan. 25, 2002) *reprinted in* DANNER, *supra* note 1, at 84 [hereinafter the *Gonzales Memo*]. Though signed by Alberto Gonzales, the memo was written by David S. Addington, then legal counsel to Vice President Cheney. See Daniel Klaidman with Tamara Lipper, *Homesick for Texas*, NEWSWEEK, July 12, 2004, at 32.

49. 18 U.S.C. § 2441 (West. Supp. 2004).

50. Gonzales Memo, *supra* note 48, at 83–87.

51. Memorandum from President George W. Bush to the Vice President, the Sec’y of State, the Sec’y of Defense, the Att’y Gen., Chief of Staff to the President, Dir. of Central Intelligence, Asst. to the President for Nat’l Security Affairs, and Chairman of the Joint Chiefs of Staff, *Humane Treatment of al Qaeda and Taliban Detainees*, Feb. 7, 2002, *reprinted in* DANNER, *supra* note 1, at 105.

caught up in armed conflicts.<sup>52</sup> (In June 2006, the Supreme Court ruled that Common Article 3 governs treatment of al Qaeda prisoners, thus overruling a crucial element of the Gonzales memo.)<sup>53</sup>

To make these harsh findings seem less ominous, Bush added the following paragraph:

Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, *including those who are not legally entitled to such treatment*. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the *United States Armed Forces* shall continue to treat detainees humanely and, *to the extent appropriate and consistent with military necessity*, in a manner consistent with the *principles* of Geneva.<sup>54</sup>

As the emphasized passages show, the commitment to provide humane treatment is less than initially appears. The paragraph leaves understood that al Qaeda and Taliban prisoners “are not legally entitled” to humane treatment. It addresses the humane treatment directive only to the armed forces, and not to other agents of the U.S. government, such as the CIA.<sup>55</sup> Its promise to honor the “principles of Geneva” (an undefined term with no currency in international law) frees the United States from compliance with the actual requirements of the Geneva Conventions. And even this promise is to be waived when reasons of “military necessity” so dictate.

Since the Bush Administration has viewed the provision of humane treatment as a choice rather than a legal obligation, it does not come as a surprise that it employs a very permissive understanding of “humane treatment.” A Defense Department investigation into alleged abuses at Guantanamo Bay cleared the Pentagon of the charge of subjecting detainees to inhumane treatment.<sup>56</sup> Addressing the case of the detainee Mohamed Al-Qahtani, who had been stripped naked, forced to wear women’s underwear, sexually accosted by female guards, led around the room by a leash, forced

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52. The universal applicability of Common Article 3 as a norm of customary international law has been upheld by the International Court of Justice, the Inter-American Court of Human Rights, and the International Criminal Tribunal for the Former Yugoslavia. See Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 814 n.9, 816 (2005).

53. See *infra* note 77.

54. Memorandum from President George W. Bush, *supra* note 51 (emphasis added).

55. That the instruction does not extend beyond the military is reflected in Gonzales’ self-correction during his Senate testimony: “It has always been the case that everyone should be treated—that the military would treat detainees humanely, consistent with the president’s February order.” *Confirmation Hearing on the Nomination of Alberto R. Gonzales To Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 63 (2006) (statement by Att’y Gen. Alberto Gonzales) [hereinafter *Gonzales Hearing*].

56. Int’l Info. Programs, Dep’t of State, Charges of Guantanamo Detainee Torture Unfounded, General Says, <http://usinfo.state.gov/dhr/Archive/2005/Jul/15-641403.html> (last accessed April 6, 2007).

to perform dog tricks, and doused with water while being interrogated twenty hours a day for over two months, the report concluded that while Qahtani's treatment might be considered abusive or degrading, it was not "inhumane."<sup>57</sup>

Gonzales also asked the Office of Legal Counsel of the Department of Justice ("OLC") to clarify which methods of interrogation were and were not in compliance with the U.S. Torture Act.<sup>58</sup> The OLC responded on August 1, 2002 with a long memo ("OLC torture memo"), stating that interrogation methods constituted torture only if the inflicted pain was equivalent to that accompanying crippling injury, organ failure, or death; that torturers might seek acquittal by arguing they inflicted torture in defense of the nation; and that, in any event, neither congressional statutes (i.e., the U.S. Torture Act) nor international treaties (i.e., the Torture Convention) could deprive the President of his constitutional authority as Commander-in-Chief to order torture in the interests of national security.<sup>59</sup> The OLC torture memo provided the legal authority for the extreme interrogation tactics used by the CIA, and large portions of the memo appeared verbatim in Pentagon memos used to justify harsh interrogation methods by the armed forces.<sup>60</sup>

The OLC torture memo was leaked to the press in June 2004, causing a public outcry.<sup>61</sup> Although in December 2004 the Administration released a new memo that retracted some of the more extreme findings of the August 2002 memo,<sup>62</sup> it appeared determined to continue its previous policy. The Administration claimed that international law did not bar the CIA from

57. *Id.*

58. 18 U.S.C. §§ 2340–2340A (West, 2000 & West, Supp. 2004); David A. Johnston & Neil A. Lewis, *Bush's Counsel Sought Ruling About Torture*, N.Y. TIMES, Jan. 4, 2005, at A1.

59. OLC Torture Memo, *supra* note 17, at 115–66. The memo was signed by Jay Bybee, then OLC Director and Assistant Attorney General and now Federal Appeals Court Judge for the Ninth Circuit. It was largely written by Deputy Assistant Attorney General John Yoo. See Michael Hirsh, John Barry & David Klaidman, *A Tortured Debate*, NEWSWEEK, June 21, 2004, at 50.

60. R. Jeffrey Smith & Dan Eggen, *Gonzales Helped Set the Course for Detainees*, WASH. POST, Jan. 5, 2005, at A1. Several Pentagon memos drawing on the OLC's analysis circulated between October 2002 and April 2003 and led to the approval of extreme tactics, some of which required the Secretary of Defense's approval on a case-by-case basis. The memos are collected in THE TORTURE PAPERS, *supra* note 47, at 223–365.

61. See Edward Alden, *Dismay at Attempt to Find Legal Justification for Torture: International Lawyers Call for Government Advisers Behind Interrogation Memo to Face Professional Sanctions*, FINANCIAL TIMES, June 10, 2004, at 7. Condemnation of the OLC torture memo and a subsequent Pentagon memo restating its findings appeared swiftly in newspaper editorials throughout North America. See, e.g., Editorial, *Rationalizing Torture*, BOSTON GLOBE, June 13, 2004, at H10; Editorial, *The Torture Memos*, ST. PETERSBURG TIMES, June 13, 2004, at 2P; Editorial, *Justifying Torture Brings Shame to U.S.*, TORONTO STAR, June 10, 2004, at A28; Editorial, *Legalizing Torture*, WASH. POST, June 9, 2004, at A20; Editorial, *A Darker Ethic Surfaces*, DENVER POST, June 12, 2004, at C11; Editorial, *The Roots of Abu Gbraib*, N.Y. TIMES, June 9, 2004, at A22; Editorial, *Tortured Logic: Legal Spin Does Not Exempt U.S. from Rule of Law*, HOUSTON CHRONICLE, June 10, 2004, at A28; Editorial, *Twisting American Values*, L.A. TIMES, June 9, 2004, at B12; Editorial, *Tortured Reasoning*, OREGONIAN, June 10, 2004, at C10.

62. Memorandum from Acting Asst. Att'y Gen. Daniel Levin to Deputy Att'y Gen. James B. Comey, Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004) [hereinafter Levin Memo], available at <http://www.usdoj.gov/olc/dagmemo.pdf>.

imposing cruel, inhuman, or degrading treatment on overseas aliens so long as the treatment fell short of torture; however, it refused to state which techniques it viewed as crossing the line into torture.<sup>63</sup> According to anonymous intelligence officials, the CIA was secretly authorized to use the very same methods as before (such as waterboarding, stress positions, hard slapping, and sleep deprivation).<sup>64</sup>

The OLC torture memo had stated that the President was not bound by any treaty or congressional legislation forbidding the use of torture. After December 2004, the Administration no longer put forth this position, but it did not disown it either.<sup>65</sup> Though pressed repeatedly at his confirmation hearings, Gonzales refused to state that the President is legally forbidden to order torture.<sup>66</sup> He sought to reassure senators by noting that the President has a clear policy of opposing torture. However, Gonzales' unwillingness to state an express legal prohibition implies that the President would be free to change his mind any day. When Senator Patrick Leahy asked whether it would be contrary to international law for a foreign leader to order the torture of a U.S. citizen in the interests of national security, Gonzales declined to answer the question.<sup>67</sup>

In the meantime, the Administration strongly resisted efforts by Congress to enact a firm ban on cruel, inhuman, or degrading treatment. In late 2004, Congress twice voted to forbid the CIA from inflicting cruel, inhuman, or degrading treatment, but on both occasions the legislation was deleted in conference committee under pressure from the Administration.<sup>68</sup> Congress succeeded in passing such legislation on May 10, 2005, but the fine print allowed the Administration to claim that the act did not apply to the treatment of overseas aliens.<sup>69</sup> To close this loophole, Senator John Mc-

63. Eric Lichtblau, *Gonzales Says Humane Policy Doesn't Bind CIA*, N.Y. TIMES, Jan. 19, 2005, at A17.

64. Douglas Jehl & David Johnston, *White House Fought New Curbs on Interrogation, Officials Say*, N.Y. TIMES, Jan. 13, 2005, at A1; and Priest, *Covert CIA Program Withstands New Furor*, *supra* note 5.

65. Levin Memo, *supra* note 62, at 2.

66. The question was pressed by Senators Patrick Leahy, Dick Durbin, and Russ Feingold. The senators spent considerable time in unsuccessful attempts to elicit an answer from Gonzales. *Gonzales Hearing*, *supra* note 55, at 58–59, 96–98, 102–04, 115–17.

67. *Gonzales Hearing*, *supra* note 55, at 59:

Sen. Leahy: How about putting it this way: Do you think that other world leaders would have authority to authorize the torture of U.S. citizens, if they deemed it necessary for their national security?

Mr. Gonzales: Senator, I don't know what laws other world leaders would be bound by, and I think it would—I'm not in a position to answer that question.

68. Jehl & Johnston, *supra* note 64.

69. The law forbade "cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States," and added that "the term 'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the fifth amendment, eighth amendment, or fourteenth amendment to the Constitution of the United States." Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, § 1031, 119 Stat. 231 (2005). In the Administration's view, neither statutory, treaty, nor constitutional law (including the Fifth, Eighth, and Fourteenth Amendments) prohibited the infliction of inhuman treatment short of torture on overseas aliens.

Cain introduced legislation to prohibit the “cruel, inhuman, or degrading treatment” of any person in the custody of the U.S. government.<sup>70</sup> The Administration strenuously resisted the proposal: Vice President Cheney met repeatedly with members of Congress to seek either the deletion of the legislation or an amendment exempting the CIA, and President Bush threatened to veto the annual defense authorization measure if it included the McCain amendment.<sup>71</sup>

The Bush Administration could not prevent the McCain amendment from passing with veto-proof majorities in December 2005.<sup>72</sup> However, it succeeded in attaching provisions that narrowed the legal remedies available to victims of torture, thereby undercutting the amendment’s practical effect. One provision states that a U.S. government agent is shielded from criminal and civil liability for mistreating terrorist suspects if the treatments used “were officially authorized and determined to be lawful at the time that they were conducted” and the agent “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.”<sup>73</sup> Another provision, known as the Graham-Levin amendment, limits the right of Guantanamo Bay inmates to challenge conditions of their detention by means of habeas corpus petitions.<sup>74</sup> The Bush Administration soon invoked the Graham-Levin amendment to block complaints of torture from being heard in U.S. courts.<sup>75</sup>

In any event, President Bush, when signing the ban, appended a statement implying that he did not consider it binding on his actions. He would construe the provision

in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the

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See Eric Lichtblau, *Congress Adopts Restriction on Treatment of Detainees*, N.Y. TIMES, May 11, 2005, at A16. I discuss below how the Administration was able to assert this view.

70. S. Amendment 1977 to H.R. 2863 Relating to Persons under the Detention, Custody, or Control of the United States Government § 1031(a)(1), 109th Cong. (2005).

71. Josh White & R. Jeffrey Smith, *White House Aims to Block Legislation on Detainees*, WASH. POST, July 23, 2005, at A1; Eric Schmitt, *Senate Moves to Protect Military Prisoners Despite Veto Threat*, N.Y. TIMES, Oct. 6, 2005, at A22; Dana Priest & Robin Wright, *Cheney Fights for Detainee Policy*, WASH. POST, Nov. 7, 2005, at A1.

72. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2739.

73. *Id.* § 1004.

74. *Id.* § 1005.

75. See Josh White & Carol D. Leonnig, *U.S. Cites Exception in Torture Ban*, WASH. POST, Mar. 3, 2006, at A4. The complaint was filed by Mohammed Bawazir, a Guantanamo Bay detainee who had been subjected to forced feeding as a result of his hunger strike. Officials had strapped him in a chair, forced a thick feeding tube down his nose, and left him to sit in his own feces.

shared objective of the Congress and the President . . . of protecting the American people from further terrorist attacks.<sup>76</sup>

The statement echoes the claim in the OLC torture memo that Congress is constitutionally barred from restricting the President's conduct in matters relating to war and national security. It remains to be seen if the Administration will abandon this doctrine after its firm rejection in June 2006 by the Supreme Court.<sup>77</sup>

The Administration had still another card to play. It developed the position that the McCain amendment, even on its own terms, did not ban the use of CIA interrogation techniques such as waterboarding and stress positions.<sup>78</sup> Because this counter-intuitive interpretation of the McCain amendment is linked to the history of U.S. reservations, understandings, and declarations to international human rights treaties, I will explain the reasoning behind it in Part IV.

The Bush Administration has also continued its policy of "extraordinary rendition," sending prisoners to be tortured by foreign governments in countries such as Egypt, Morocco, Syria, and Jordan.<sup>79</sup> Through extraordinary renditions, "black sites," and cooperation from foreign security services, the CIA has created an unknown number of "disappeared" persons who are shuttled from one clandestine torture center to another and who are cut off from any protection of the law.<sup>80</sup> The Torture Convention prohibits states from sending an individual to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." However, the Bush Administration claims that this obligation does not extend to individuals seized outside U.S. territory. In its words, "Article 3 of the [Torture Convention] does not impose obligations on the United States with respect to an individual who is outside the territory of the United States."<sup>81</sup>

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76. Press Release, President George W. Bush, President's Statement on Signing of H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

77. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (ruling that the new military commissions authorized by the Bush Administration to try terrorist suspects constituted an illegal violation of Congressional statutes). The Court observed that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." *Id.* at 2774 n.23.

78. See *infra* text accompanying notes 206–08.

79. See *supra* note 7.

80. *Id.*; see also CENT. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, FATE AND WHEREABOUTS UNKNOWN: DETAINEES IN THE "WAR ON TERROR" (2005), available at <http://www.nyuh.org/docs/Whereabouts%20Unknown%20Final.pdf>; Douglas Jehl & David Johnston, *Rule Change Lets CIA Freely Send Suspects Abroad to Jails*, N.Y. TIMES, Mar. 6, 2005, at A1.

81. Response of the United States to the U.N. Comm. Against Torture, List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America, 32, May 5, 2006, available at <http://www.us-mission.ch/Press2006/CAT-May5.pdf>.

The Administration has also fought to limit detainees' access to the federal court system, and thus to deprive them of effective legal remedies against torture and ill treatment. It long argued that the federal courts lacked jurisdiction over detainees held in Guantanamo Bay.<sup>82</sup> After the Supreme Court rejected this position in *Rasul v. Bush*,<sup>83</sup> the Administration argued that the detainees had no justiciable rights once they entered the courtroom, one of its arguments being that the Geneva Conventions do not confer judicially enforceable rights.<sup>84</sup> It also sought legislation that would restrict the detainees' access to the courts, thereby superseding *Rasul*. The Graham-Levin amendment<sup>85</sup> was an early fruit of these efforts.

In June 2006, the Supreme Court delivered a major setback to the Administration's coercive interrogation policy when it ruled in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Conventions protects members of al Qaeda and other terrorist organizations.<sup>86</sup> Common Article 3 not only requires the basic elements of a fair trial (the immediate issue facing the Court), but also prohibits "cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment."<sup>87</sup> As the media soon reminded the public, violations of Common Article 3 not only contravened international law, but constituted domestic crimes under the U.S. War Crimes Act of 1996.<sup>88</sup>

The ultimate impact of *Hamdan* remains uncertain. Shortly after the ruling was announced, the Pentagon announced that it would abide strictly by Common Article 3 in its treatment of detainees.<sup>89</sup> Its claim that its past treatment of detainees was already in compliance with Common Article 3 cast some doubt on the significance of the announcement.<sup>90</sup> Nonetheless, in September 2006, the Pentagon published a *Revised Army Field Manual*<sup>91</sup> and accompanying Directive<sup>92</sup> affirming that all detainees are protected by

82. Brief for the Respondents, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

83. 542 U.S. 466 (2004).

84. Reply Brief of the United States at 2, *Hamdan v. Rumsfeld*, No. 04-5393 (Jan. 10, 2005).

85. Detainee Treatment Act § 1005.

86. *Hamdan*, 126 S. Ct. at 2795-96.

87. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 3(1)(a), (c), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 3(1)(a), (c), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War 3(1)(a), (c), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War 3(1)(a), (c), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

88. See 18 U.S.C. § 2441(c)(3); see also Rosa Brooks, *The Geneva Convention "Catch,"* L.A. TIMES, June 30, 2006, at B13.

89. *US Vows To Comply with Geneva Conventions*, AGENCE FRANCE PRESSE, July 12, 2006.

90. *Id.*

91. DEP'T OF THE ARMY, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, FIELD MANUAL 2-22-3 (2006) [hereinafter HUMAN INTELLIGENCE COLLECTOR MANUAL], available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/armyfm2223humanintel.pdf>.

92. Dep't of Defense, *The Department of Defense Detainee Program*, Directive No. 2310.01E (Sept. 5, 2006), available at [http://www.fas.org/irp/doddir/dod/d2310\\_01e.pdf](http://www.fas.org/irp/doddir/dod/d2310_01e.pdf).

Common Article 3 and specifically prohibiting waterboarding, hooding, forced nudity, hypothermia, and the use of threatening dogs, among other cruel and inhuman techniques.<sup>93</sup>

However, the Administration took measures to undercut *Hamdan's* impact. In the fall of 2006, it waged an intense campaign to win passage of a law that appeared designed to salvage core elements of the coercive interrogation policy. The Military Commissions Act of 2006 (signed into law on October 17, 2006) rewrote the War Crimes Act to no longer cover all violations, but only "grave breaches," of Common Article 3.<sup>94</sup> "Grave breaches" still include "cruel or inhuman treatment," but the definition of "cruel or inhuman treatment" under the new law is so convoluted that it is no longer clear whether waterboarding, stress positions, hypothermia, sleep deprivation, and beating are war crimes under federal law.<sup>95</sup>

The Act furthermore uses various devices to deny judicial remedies to detainees at risk of ill treatment or torture. The Geneva Conventions may not be invoked "as a source of rights in any court of the United States or its States or territories."<sup>96</sup> Habeas corpus rights are eliminated for foreign detainees who are either determined to be or *suspected* of being enemy combatants.<sup>97</sup> Moreover, "no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, *treatment*, trial or *conditions of confinement* of an alien"<sup>98</sup> detained as a possible enemy combatant. The only exception is that detainees may appeal the verdicts of combatant status review tribunals and of military commissions that impose a sentence of death or a prison term lasting ten or more years.<sup>99</sup> No permission is granted to seek judicial protection against torture or ill treatment. In other words, foreign detainees subjected to torture cannot ask any "court, justice, or judge" to stop their torture.<sup>100</sup>

The Bush Administration has defended the policy of coercive interrogation with remarkable vigor. To review: It argued that certain categories of

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93. See HUMAN INTELLIGENCE COLLECTOR MANUAL, *supra* note 91, at vii, 5-21, 5-22, M-1, M-2. Under the revised manual, when considering an interrogation technique, soldiers are obliged to ask themselves, "If the proposed approach technique were used by the enemy against one of your fellow soldiers, would you believe the soldier had been abused?" *Id.* at 5-22.

94. Military Commissions Act § 6(b).

95. Senator John McCain, who supported the final version of the Act, says that most of these acts are indeed federal crimes. Administration officials, however, have said that they are not. See R. Jeffrey Smith, *McCain Names Practices Detainee Bill Would Bar; Senator Says 3 Interrogation Methods Are Among the "Extreme Measures" the Plan Would Outlaw*, WASH. POST, Sept. 25, 2006, at A5; R. Jeffrey Smith & Charles Babington, *White House, Senators Near Pact on Interrogation Rules: President Would Have a Voice in How Detainees are Questioned*, WASH. POST, Sept. 22, 2006, at A1.

96. Military Commissions Act § 5(a).

97. *Id.* § 7(a).

98. *Id.* (emphasis added).

99. *Id.* (referencing Detainee Treatment Act § 1005(e)(2)-(3)).

100. *Id.* § 7(e)(1).

detainees are not legally entitled to humane treatment.<sup>101</sup> It redefined “torture” to exclude forms of treatment that most people would consider torture.<sup>102</sup> It asserted that the CIA is not legally barred from inflicting cruel, inhuman, or degrading treatment on overseas aliens.<sup>103</sup> It tenaciously fought attempts by Congress to prohibit the CIA from such activity,<sup>104</sup> and, when Congress passed such legislation anyway, interpreted the statute to permit the existing coercive interrogation policy.<sup>105</sup> It asserted that no treaty or congressional statute can limit the President’s choice of tactics, including torture, deemed necessary for fighting a war.<sup>106</sup> It fought to deny victims of coercive interrogation any access to the courts by arguing that habeas corpus rights did not extend to overseas aliens and that the Geneva Conventions did not confer judicially enforceable rights.<sup>107</sup> When courts rejected these arguments, it convinced Congress to enact them into law.<sup>108</sup> And it persuaded Congress to rewrite the War Crimes Act so that it is no longer clear whether coercive interrogation methods authorized for the CIA are federal war crimes.<sup>109</sup>

One must not lose sight of the impact of this policy on the lives of real people. The victims include Maher Arar, a communications engineer from Canada seized by U.S. authorities and sent to Syria, where he was severely beaten and kept in a grave-like cell (three by six by seven feet) for ten months.<sup>110</sup> They include Omar Khadr, a teenager at Guantanamo Bay who was kept in extreme isolation for long periods of time, repeatedly beaten, deprived of food, subjected to hypothermia, forced into stress positions, and once dragged as a human mop, wrists and ankles tied behind his back, through a puddle of urine and pine-oil solvent.<sup>111</sup> They include Ameen Sa’eed Al-Sheikh, a former prisoner at Abu Ghraib, who described his experience as follows:

The guards started to hit me on my broken leg several times with a solid plastic stick. He told me he got shot in his leg and he showed me the scar and he would retaliate from me for this. They stripped me naked. One of them told me he would rape me. He drew a picture of a woman to my back and makes me stand in shameful position holding my buttocks. Someone else asked me, “Do you believe in anything?” I said to him, “I believe in Al-

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101. *See supra* notes 48–55 and accompanying text.

102. *See supra* note 59 and accompanying text.

103. *See supra* note 51 and accompanying text.

104. *See supra* notes 68–71 and accompanying text.

105. *See infra* notes 207–09 and accompanying text.

106. *See supra* note 59, 76, and accompanying text.

107. *See supra* notes 82–85 and accompanying text.

108. *See supra* notes 96–100 and accompanying text.

109. *See supra* note 95 and accompanying text.

110. Doug Struck, *Canadian Was Falsely Accused, Panel Says*, WASH. POST, Sept. 19, 2006, at A1. The Canadian government later cleared Arar of all ties to terrorism. *Id.*

111. *See Tietz, supra* note 8, at 60.

lah.” So he said, “But I believe in torture and I will torture you. When I go home to my country, I will ask whoever comes after me to torture you.” Then they handcuffed me and hung me to the bed. They ordered me to curse Islam and because they started to hit my broken leg, I cursed my religion. They ordered me to thank Jesus that I’m alive. And I did what they ordered me. This is against my belief. They left me hang from the bed and after a little while I lost consciousness . . . .”<sup>112</sup>

Another victim is Binyam Mohamed, here describing a visit from three masked men to his Moroccan prison cell, where he had been sent by the CIA:

That day I ceased really knowing I was alive. One stood on each of my shoulders and a third punched me in the stomach. It seemed to go on for hours. I was meant to stand, but I was in so much pain I’d fall to my knees. They’d pull me back up and hit me again. They’d kick me in the thighs as I got up. I could see the hands that were hitting me . . . like the hands of someone who’d worked as a mechanic or chopped with an axe.<sup>113</sup>

On another occasion:

They took a scalpel to my right chest. It was only a small cut. Then they cut my left chest. One of them took my penis in his hand and began to make cuts. He did it once, and they stood still for maybe a minute watching. I was in agony, crying, trying desperately to suppress myself, but I was screaming . . . . They must have done this 20 to 30 times in maybe two hours. There was blood all over.<sup>114</sup>

Here are the words of Sami Al-Laithi, detained at Guantanamo Bay and permanently crippled from the beatings he received there: “I am in constant pain. I would prefer to be buried alive than continue to receive the treatment I receive. At least I would suffer less and die.”<sup>115</sup>

The institutionalization of torture signifies a spectacular failure of the U.S. legal regime. A well-functioning legal regime prevents torture from occurring in the first place. Under such a regime, torture is inconceivable to those holding detainees, because the duty not to torture is internalized through education, training, monitoring, inspections, and publicly known,

112. DANNER, *supra* note 1, at 227.

113. David Rose, *MI6 and CIA ‘Sent Student to Morocco to Be Tortured’: An Ethiopian Claims That His Confession to al-Qaeda Bomb Plot was Signed after Beatings*, OBSERVER, Dec. 11, 2005, at 20.

114. *Id.*

115. CTR. FOR CONSTITUTIONAL RIGHTS, REPORT ON TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT OF PRISONERS AT GUANTANAMO BAY, CUBA 20 (July 2006), available at [http://www.ccr-ny.org/v2/reports/docs/Torture\\_Report\\_Final\\_version.pdf](http://www.ccr-ny.org/v2/reports/docs/Torture_Report_Final_version.pdf). Al-Laithi was subsequently released from Guantanamo Bay.

rigorously enforced penalties for those who inflict torture or fail to prevent it from occurring on their watch. These practices represent what might be called the first level of deterrence. Lying behind them is a second level of deterrence: procedures that allow prisoners to complain of ill treatment and courts to intercede on their behalf. A third level of deterrence resides in the power of the state's chief legislative, executive, and judicial officers, by recourse to clearly binding legal obligations, to take comprehensive corrective measures when the first two levels of deterrence have failed. When the system functions properly, the second and third levels of deterrence are not actually triggered.

In the United States, all three levels of deterrence have failed. The institutions that ostensibly prevent state brutality proved to be remarkably hollow. Part of the reason, as we shall see, is the peculiar U.S. relationship to international human rights law. Before taking up that story, however, I look at some of the general legal measures that are needed to prevent torture.

### III. HOW TO PREVENT TORTURE

The first step to preventing torture is to establish an absolute legal prohibition. Such a prohibition has long been in place under international law. The charters of the Nuremberg and Tokyo Tribunals, along with the 1949 Geneva Conventions, re-affirmed that torture is an international crime for which individuals can be punished.<sup>116</sup> The Universal Declaration of Human Rights of 1948 announces simply, "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."<sup>117</sup> This language was deliberately crafted to block any resort to a narrow definition of torture as a means of justifying inhumane treatment.<sup>118</sup> It reappears verbatim in Article 7 of the International Covenant on Civil and Political Rights ("ICCPR"), and forms the complete title of the Torture Convention.<sup>119</sup> Torture is prohibited in the European, African, and Inter-American human rights systems.<sup>120</sup> The ICCPR, Torture Convention, American Convention

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116. First Geneva Convention, *supra* note 87, arts. 3, 12, 49–50; Second Geneva Convention, *supra* note 87, arts. 3, 12, 50–51; Third Geneva Convention, *supra* note 87, arts. 3, 13, 129–30; Fourth Geneva Convention, *supra* note 87, arts. 3, 5, 27, 31, 32, 37, 146–47; Charter of the International Military Tribunal for the Far East art. 5(c), Jan. 19, 1946, 4 Bevans 20, TIAS No. 1589 [hereinafter Tokyo Charter]; Charter of the International Military Tribunal, arts. 6(b), (c), Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

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

118. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 42–43 (1999).

119. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Torture Convention, *supra* note 9.

120. African Charter on Human and Peoples' Rights art. 5, June 27, 1981, 21 I.L.M. 58; American Convention on Human Rights art. 5(2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 [here-

on Human Rights (“American Convention”), and European Convention on Human Rights (“European Convention”) declare that the prohibition against torture may not be suspended, even in an emergency that threatens the life of the nation.<sup>121</sup> In 1975, the U.N. General Assembly unanimously adopted a resolution condemning torture.<sup>122</sup> In the *Pinochet* decision of 1999, the British House of Lords held torture to be an inherently criminal act incapable of official legitimation.<sup>123</sup> In the same year, the Israeli Supreme Court barred security services from engaging in torture or any other form of cruel, inhuman, or degrading treatment or punishment, even for the purpose of combating terrorism.<sup>124</sup> Torture continues to be prosecuted as a war crime and crime against humanity in the International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Tribunal for the Former Yugoslavia (“ICTY”).<sup>125</sup> Today the prohibition against torture is widely recognized as a *jus cogens* norm that cannot be overridden by treaty or international custom.<sup>126</sup> The prohibition against torture is one of the clearest and strongest obligations in international law.

Moreover, international law unequivocally prohibits *all* forms of cruel, inhuman, or degrading treatment or punishment, even those that might be alleged not to rise to the level of torture. Like the prohibition against torture, it may not be suspended even during the direst emergencies. This non-derogability requirement appears in the ICCPR, the American and European Conventions, and the 1975 U.N. General Assembly Resolution.<sup>127</sup> The non-derogability of provisions prohibiting cruel, inhuman, and degrading treatment—“ill treatment” for short—was also affirmed by the 1999

inafter American Convention]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

121. ICCPR, *supra* note 119, art. 4; Torture Convention, *supra* note 9, art. 2; European Convention, *supra* note 120, art. 15; American Convention, *supra* note 120, art. 27.

122. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3542 (XXX), Supp. No. 34, at 91, U.N. Doc. A/10034 (Dec. 9, 1976) [hereinafter Torture Declaration].

123. *R. v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Q.B.).

124. H.C.J. 5100/94 Pub. Comm. Against Torture v. Israel [1999], 38 I.L.M. 1471, *reprinted in* TORTURE: A COLLECTION, *supra* note 29, at 165. Though holding that ill treatment was always contrary to law, the court added that a plea of necessity of the “ticking time bomb” variety could in exceptional and unpredictable cases furnish the possible basis of a criminal defense. *See id.* ¶¶ 33–38.

125. Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 2, 5, May 25, 1993, 32 I.L.M. 1192; Statute of the International Criminal Tribunal for Rwanda arts. 3, 4, Nov. 8, 1994, 33 I.L.M. 1598.

126. *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 717 (9th Cir. 1992).

127. ICCPR, *supra* note 119, art. 4(2); European Convention, *supra* note 120, art. 15(2); American Convention, *supra* note 120, art. 27(2); Torture Declaration, *supra* note 122, art. 3. It does not appear in the Torture Convention, which attaches the non-derogability requirement only to the prohibition against torture. However, the Torture Convention makes a point of stating that nothing in its text may be construed to weaken or narrow pre-existing prohibitions against ill treatment. Torture Convention, *supra* note 9, art. 16(2) (“The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.”).

Israeli Supreme Court case mentioned above. The prohibition on ill treatment is widely regarded as a requirement of customary international law.<sup>128</sup>

Inhuman treatment is utterly forbidden in the law of armed conflict. Both the Nuremberg Charter and the Tokyo Charter classify inhuman treatment as a crime against humanity, with the Nuremberg Charter further labeling such treatment a war crime.<sup>129</sup> The prohibition against inhuman treatment permeates the Geneva Conventions, and reappears in the statutes for the ICTY and ICTR, as well as the Rome Statute of the International Criminal Court (“Rome Statute”).<sup>130</sup> Conservative international law experts concur. An amicus brief submitted by leading conservative law scholars *in support* of the Bush Administration position in the Guantanamo case of *Rasul v. Bush* cited the Martens Clause, customary international law, and the Geneva Conventions, to note: “Without dispute, all detainees are entitled to humane treatment.”<sup>131</sup>

The prohibition of all forms of ill treatment in the law of armed conflict is significant. War allows forms of violence permitted nowhere else. Nations fight wars only when they perceive vital interests to be at stake; indeed, today’s wars are almost always fought in the name of national security. If international law forbids ill treatment in the context of armed conflict, we may reasonably infer that it is forbidden in all circumstances.

A total ban on ill treatment is morally appropriate. Torture is our word for cruel treatment of the most severe kind, but treatment short of torture still constitutes deliberate cruelty. Simply put, governments should not practice deliberate cruelty. To license deliberate cruelty by governments is to alter the relation between governments and people. It associates governments with brutality, and makes people permissible targets of brutality.<sup>132</sup> It lowers people to a status beneath that of humans, beneath that of animals. Given our natural revulsion to cruelty, it is not surprising that withdrawal of a ban on deliberate cruelty should produce a morally dizzying effect. The slippery slope problem is acute. If deliberate cruelty is not forbidden, on what principle is torture forbidden? And what strikes the external observer as “mere ill treatment” will often be experienced as torture by

128. See *De Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(b) (1987); Pub. Comm. Against Torture v. Israel [1999], *supra* note 124. See also the numerous judgments of the ICTY cited in Paust, *supra* note 52, at 816 n.17, 821 n.40.

129. Nuremberg Charter, *supra* note 116, arts. 6(b)–(c); Tokyo Charter, *supra* note 116, art. 5(c).

130. First Geneva Convention, *supra* note 87, arts. 3, 12, 49–50; Second Geneva Convention, *supra* note 87, arts. 3, 12, 50–51; Third Geneva Convention, *supra* note 87, arts. 3, 13, 129–30; Fourth Geneva Convention, *supra* note 87, arts. 3, 5, 27, 31–32, 37, 146–47; Rome Statute of the International Criminal Court arts. 7(1)(k), 8(2)(a)(ii), 8(2)(b)(xxi), 8(2)(c)(ii), July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute].

131. Brief for Law Professors et al. as Amici Curiae Supporting Respondents at 12–13 & n.19, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

132. See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1695-1703 (2005).

the defenseless and disoriented prisoner on whom it is inflicted.<sup>133</sup> It is hard to imagine that license to inflict ill treatment will not, in practice, lead to torture. (Israel and the United States, two countries that have claimed to honor the distinction, have notably failed to do so.)<sup>134</sup>

For this reason, many people find the effort to distinguish torture from lesser forms of ill treatment intellectually misbegotten and morally indecent. In its 1999 judgment, the Israeli Supreme Court understandably declined to determine which of the coercive interrogation techniques of the security services rose to the level of torture, ruling simply that all were cruel, inhuman, and degrading treatment constituting impermissible offenses against human dignity.<sup>135</sup>

It is common today to hear torture and inhuman treatment justified by reference to the ticking bomb scenario: if a terrorist in our custody knew of a bomb set to kill a large number of civilians yet refused to tell us its location, we would be justified, it is claimed, in forcing the information out of him by torture or inhuman treatment. Though many people, when confronted with this hypothetical dilemma, give such an answer, it is not clear that this answer is correct. Torture or inhuman treatment, even in this extreme scenario, may not be morally allowable. But there is another reason, decisive in its own right, why the ticking bomb scenario fails to justify torture or inhuman treatment, which is that the scenario bears almost no conceivable connection to the world we inhabit. The scenario partakes of fantasy to imagine a kind of certain knowledge that is available usually only to God or to the readers of fictional novels: the certain knowledge that there *is* such a bomb; that, with the information we hope to extract the bomb can be defused; that the detainee will speak fully and truthfully when subjected to coercive interrogation; and, most crucially, that the detainee *has* the information we are seeking. The occasions in which we falsely think ourselves to be in possession of such knowledge will vastly outnumber the occasions in which we think so correctly.<sup>136</sup> Anti-terrorist campaigns in Algeria,

133. Too often, journalists, commentators, public officials, and judges discuss methods of coercive interrogation in sanitized and euphemistic terms. See CONROY, *supra* note 19.

134. See generally U.N. Comm. Against Torture, *Concluding Observations of the Committee Against Torture*, ¶¶ 232–42, U.N. Doc. A/53/44 (May 18, 1998); AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 1998: ISRAEL (THE STATE OF) AND THE OCCUPIED TERRITORIES (1998); and the following reports by the Israeli human rights organization B’Tselem: ROUTINE TORTURE: INTERROGATION METHODS OF THE GENERAL SECURITY SERVICE (1998), POLICY OF DESTRUCTION (2002), TRIGGER HAPPY (2002), and STANDARD ROUTINE: BEATINGS AND ABUSE OF PALESTINIANS BY ISRAELI SECURITY FORCES DURING THE AL AQSA INTIFADA (2001).

135. See *Pub. Comm. Against Torture v. Israel*, ¶¶ 23–32. From now on, I will generally refer to “torture,” but I intend most of my remarks to apply to all forms of ill treatment, not just torture.

136. Alan Dershowitz is the most well-known proponent of the ticking time bomb argument. His favorite example of the ticking bomb is a story reported by the *Washington Post* of the use of torture by Philippine agents in 1995. The Filipinos, Dershowitz says, “probably under our direction, tortured somebody and stopped 13 or 11 airplanes from being exploded over the Pacific Ocean and may have saved the life of the pope.” Interview by Aaron Brown with Alan Dershowitz, *CNN Newsnight* (CNN television broadcast, May 28, 2004). See also ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 137 (2002). But Dershowitz has manipu-

Northern Ireland, Israel-Palestine, and the current “War on Terror” that systematically used torture to try and extract information have yielded not one single credible report of the ticking bomb torture-room scenario. Israeli security officials like to claim that methods they call “moderate physical pressure,” but are more properly described as torture, have yielded information that prevented terrorist attacks.<sup>137</sup> Even if we believe these claims, what goes unstated is that the extracted information resulted from a general policy of torturing thousands of Palestinian captives, the vast majority of whom had no knowledge of any planned attacks.<sup>138</sup>

In truth, torture is more likely to stimulate terrorism than to prevent it, more likely to inhibit than facilitate effective intelligence-gathering.<sup>139</sup> The argument is frequently and persuasively made, yet regularly falls on deaf ears. There seems to be an unconscious conviction that the most extreme responses to terrorism, such as torture, must be the most effective. In the real world, as Darius Rejali has shown, torture becomes a crutch; it gives bureaucrats and security officials the reassuring sensation that they are doing *something*, whether or not their activity really achieves the end in view.<sup>140</sup> Governments disciplined to avoid torture will be constrained to follow more genuinely effective anti-terrorist methods. One suspects that the rush to torture is driven more by anger than by a rational intention to prevent terrorism.<sup>141</sup>

A categorical prohibition on torture and ill treatment, while necessary, is not sufficient. The objective of the anti-torture movement is not to put

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lated the story. According to the article he cites, Matthew Brzezinski, *Bust and Boom*, WASH. POST, Dec. 30, 2001, at W9, all the relevant information about these two plots was contained in the prisoner’s computer files already available to Philippine investigators. It is not clear whether the sixty-seven days of savage torture added any reliable or useful information. We may assume that many other innocent people were uselessly tortured under this rubric. This flawed example is the best that has been brought forward by proponents of the ticking time bomb argument. See also Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in *TORTURE: A COLLECTION*, *supra* note 29, at 281.

137. Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES MAG., June 12, 2005, at 36.

138. In 1998, the Israeli human rights organization B’Tselem reported that at least 850 Palestinians were tortured by the Israeli General Security Service each year. See B’TSELEM, *ROUTINE TORTURE: INTERROGATION METHODS OF THE GENERAL SECURITY SERVICE 5* (Feb. 1998), available at [http://www.btsalem.org/English/Publications/Summaries/199802\\_Routine\\_Torture.asp](http://www.btsalem.org/English/Publications/Summaries/199802_Routine_Torture.asp). For a thorough analysis and rejection of the ticking bomb argument, see Kim Lane Scheppele, *Hypothetical Torture in the “War on Terrorism,”* 1 J. NAT’L SECURITY L. & POL’Y 1 (2005); Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE W. RES. J. INT’L L. 231 (2006); Darius Rejali, *Torture’s Dark Allure*, SALON, June 18, 2004, available at [http://dir.salon.com/story/opinion/feature/2004/06/18/torture\\_1/index\\_np.html](http://dir.salon.com/story/opinion/feature/2004/06/18/torture_1/index_np.html); David Luban, *Liberalism, Torture, and the Ticking Bomb*, in *THE TORTURE DEBATE IN AMERICA* 35 (Karen J. Greenberg ed., 2006).

139. For evidence that torture can motivate its victims to adopt or escalate terrorism, see Owen Bowcott, *Torture Trail to September 11*, GUARDIAN (London), Jan. 24, 2003, at 19; and Lawrence Wright, *The Man Behind Bin Laden*, NEW YORKER, Sept. 16, 2002. For the self-defeating character of torture as a method of gathering information, see Darius Rejali, *The Lesson of July 21*, HUFFINGTON POST, July 20, 2006; Rejali, *Torture’s Dark Allure*, *supra* note 138; and Darius Rejali, *Does Torture Work?*, SALON, June 21, 2004.

140. See Rejali, *Torture’s Dark Allure*, *supra* note 138.

141. See Stephen Holmes, *Is Defiance of Law a Proof of Success? Magical Thinking in the War on Terror*, in *THE TORTURE DEBATE IN AMERICA*, *supra* note 138, at 118.

legal prohibitions on the books, but to ensure that every person in the world is safe from torture. Abolitionists have long understood that they must move beyond the formal prohibition against torture to institute practices that will guarantee that torture is never carried out.

Many traditional due process protections are essential to the prevention of torture. These include the right against compulsory confessions or self-incriminating testimony, the right against arbitrary detention, the right to a fair trial, and the right to habeas corpus. Other familiar civil and political rights play a crucial role in preventing torture: the prohibition of slavery, the right to equality before the law, the right to a remedy for the violation of one's rights, and various rights designed to protect people from disenfranchisement and systematic disempowerment. These rights are enshrined in the U.S. Constitution, the Universal Declaration of Human Rights, the ICCPR, and the European Convention, among other rights charters. The drafters of these documents understood how important these protections were in shielding individuals from state brutality.

To prevent torture, however, more is required. Police, military, and other public officials who exercise authority over confined individuals must be made "torture proof." They must be taught that torture and ill treatment are against the law and trained in methods of interrogation and confinement that preclude the use of such treatment. Superiors and independent inspectors must regularly monitor and enforce compliance with required procedures, and any individuals who allege they have been subjected to torture or ill treatment must be granted the right to prompt investigation of their complaints by impartial officials. These obligations are common-sense means of preventing abuse, and are included among the binding clauses of the Torture Convention.<sup>142</sup> Other measures could be added, such as a requirement that all military and criminal interrogations be videotaped.<sup>143</sup>

These obligations are attached in the first instance to national officials. But an entire state can become corrupt; an entire state can become complicit in torture, and either omit or systematically subvert the measures designed to prevent abuse. For this reason, states must allow international monitors to visit detention centers and interview detainees. The Third Geneva Convention requires that the International Committee of the Red Cross be given full access to all facilities where war captives are kept.<sup>144</sup> Two recent treaties—the Optional Protocol to the Torture Convention and the European Convention for the Prevention of Torture—establish interna-

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142. Torture Convention, *supra* note 9, arts. 10–16.

143. One reason for emphasizing these bureaucratic reforms is that the mere act of ratifying the Torture Convention is not sufficient to stop and prevent torture. All too often, ratification is a cynical act by abusive non-democratic governments seeking a cheap way to burnish their international image. See Oona A. Hathaway, *The Promise and Limits of the International Law of Torture*, in TORTURE: A COLLECTION, *supra* note 29, at 199.

144. Third Geneva Convention, *supra* note 87, art. 126.

tional committees with the right to visit all detention centers operated by ratifying countries.<sup>145</sup>

In addition, states must enact, publicize, and execute criminal penalties for all individuals who inflict, order, aid, abet, or knowingly contribute to torture and ill treatment, and for all officials who allow their subordinates to inflict torture or ill treatment. The obligation to criminalize torture is the centerpiece of the Torture Convention.<sup>146</sup>

Effective criminalization of torture and ill treatment is the indispensable backbone of the anti-torture regime. Criminal penalties concentrate the minds of officials who might otherwise flirt with abuse. They remind officials of the need to vigorously maintain the bureaucratic disincentives described in the previous paragraphs. Finally, criminalization prevents the guilty from ducking responsibility: under principles of individual responsibility made famous at Nuremberg, perpetrators can no longer shift blame to the state, superiors, or unruly subordinates.<sup>147</sup>

Effective civil remedies are also necessary. Victims of torture and ill treatment must be able to sue not only perpetrators but also public officials who fail to implement or abide by laws designed to prevent torture. The great value of civil actions is that they can be initiated by ordinary individuals, whereas in many countries, including the United States, criminal prosecutions can be initiated only by governments. Governments should not be allowed to block anti-torture lawsuits merely by invoking national security or sovereign immunity. The ICCPR obliges governments to ensure that victims of human rights violations, including torture and ill treatment, "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."<sup>148</sup>

As the above discussion shows, many of the legal measures needed to prevent torture are already present in international law. The United States, however, has blocked the incorporation of several of these measures into its domestic legal system.

#### IV. THE UNITED STATES' SELF-EXEMPTION POLICY AND ITS CONSEQUENCES

The U.S. attitude towards international human rights law has long been ambivalent. On the one hand, the United States has made important contributions to the development of international human rights law; on the other hand, it has taken careful and concerted actions to minimize its own obliga-

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145. For a comprehensive study of the European Convention, see MALCOLM D. EVANS & ROD MORGAN, *PREVENTING TORTURE: A STUDY OF THE EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* (1998).

146. Torture Convention, *supra* note 9, arts. 4-9.

147. Nuremberg Charter, *supra* note 116, arts. 7-8; *see also* Rome Statute, *supra* note 130, arts. 27-28, 33.

148. ICCPR, *supra* note 119, art. 2(3).

tions under such law.<sup>149</sup> Underlying the policy of self-exemption is an assumption that the United States does not need human rights law. Our constitutional tradition and culturally ingrained respect for rights and liberties, it is believed, render the adoption of such law superfluous.<sup>150</sup>

U.S. reluctance to ratify human rights treaties is well documented. It has not ratified the American Convention;<sup>151</sup> the International Covenant on Economic, Social and Cultural Rights;<sup>152</sup> the Convention on the Elimination of All Forms of Discrimination Against Women;<sup>153</sup> or the Convention on the Rights of the Child.<sup>154</sup> It has ratified other human rights treaties only after considerable delay: the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”) after forty years,<sup>155</sup> the ICCPR after twenty-six years,<sup>156</sup> and the Convention on the Elimination of All Forms of Racial Discrimination after twenty-five years.<sup>157</sup> Its ratification of the Torture Convention took a comparatively swift ten years.<sup>158</sup>

But late is better than never, and the treaties ratified by the United States (however tardily) are important. The problem on which I shall focus is the *manner* of U.S. ratification. Its ratifications are accompanied by conditions that greatly dilute the significance of ratification. The “reservations, understandings, and declarations,” or RUDs for short, cancel many of the most important legal effects intended by the treaties. They give the ratifications a misleading aspect: the United States makes a show of binding itself, but does not bind itself nearly as much as appears.

The RUDs are deliberately crafted to accomplish two main goals: first, to prevent the United States from acquiring any human rights obligations not previously recognized in U.S. law; and second, to prevent the human rights treaties from being incorporated into domestic U.S. law (more precisely, to bar U.S. courts from enforcing provisions of the treaties).

149. For a recent discussion of the phenomenon, see generally the articles collected in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* (Michael Ignatieff ed., 2005). Andrew Moravcsik comments: “[T]he United States stands nearly alone among Western democracies in that it fails to acknowledge and implement domestically the global system of interlocking multilateral human rights enforcement that has emerged and expanded since 1945.” Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, *id.* at 148.

150. See Michael Ignatieff, *Introduction*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS*, *supra* note 149, at 13–16.

151. American Convention, *supra* note 120.

152. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

153. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

154. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 44.

155. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278 (ratified by the United States Feb. 23, 1989).

156. ICCPR, *supra* note 119 (ratified by the United States Sept. 8, 1992).

157. Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD] (ratified by the United States Nov. 20, 1994).

158. Torture Convention, *supra* note 9 (ratified by the United States Nov. 20, 1994).

The first goal is met by attaching self-exempting reservations to every substantive obligation in the treaty that potentially exceeds human rights protections already provided under U.S. law (usually meaning the U.S. Constitution as interpreted by the Supreme Court). This policy is revealed both by the content of the reservations and by the public justifications that accompanied their adoption. Richard Schifter, the Assistant Secretary of State for Human Rights and Humanitarian Affairs under the first President Bush, testified during Senate hearings on the ratification of the ICCPR that “[i]f the Congress desires to change existing domestic laws, it will undoubtedly want to do so by statute, in the customary legislative process. Accordingly we should reserve on those few provisions of the covenant which are not in accord with existing law.”<sup>159</sup> Some of the more famous reservations deal with the death penalty and the prohibition against inhuman treatment. Because the ICCPR prohibits the death penalty for crimes committed by children under the age of eighteen,<sup>160</sup> and because at the time of U.S. ratification the Supreme Court still allowed the juvenile death penalty,<sup>161</sup> the Senate attached a reservation to its consent to ratification stating that the United States retains the right to execute “any person” except for pregnant mothers.<sup>162</sup> In ratifying both the ICCPR and the Torture Convention, the United States declared itself bound by the prohibition on “cruel, inhuman, or degrading treatment or punishment” only to the extent that such treatment or punishment is “prohibited by the Fifth, Eighth and/or Fourteenth Amendments.”<sup>163</sup>

The second goal is met by appending to each human rights treaty (except the Genocide Convention and the Geneva Conventions) a declaration announcing that the treaty’s substantive clauses are not self-executing. The non-self-executing clause means that the treaty’s human rights obligations (even those left untouched by the Senate’s reservations) do not join the body of domestic U.S. law enforceable by U.S. judges until and unless Congress enacts them in separate legislation.<sup>164</sup>

159. *International Covenant on Civil and Political Rights: Hearing Before the S. Comm. on Foreign Relations*, 102nd Cong. 18 (1991) (statement of Richard Schifter, Asst. Sec’y of State for Human Rights and Humanitarian Affairs).

160. ICCPR, *supra* note 119, art. 6(5).

161. In 1989, the Supreme Court had upheld the constitutionality of the death penalty for murders committed by children aged sixteen and seventeen. *See* *Stanford v. Kentucky*, 492 U.S. 361 (1989). The Court did not declare the juvenile death penalty unconstitutional until 2005. *See* *Roper v. Simmons*, 543 U.S. 551 (2005).

162. 138 CONG. REC. S4781-01 (daily ed. April 2, 1992) (U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights) [hereinafter U.S. RUDs to the ICCPR].

163. This language is taken from the first reservation to the Torture Convention. 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) (U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) [hereinafter U.S. RUDs to the Torture Convention]. The wording of the equivalent first reservation to the ICCPR is almost identical. *See* U.S. RUDs to the ICCPR, *supra* note 162.

164. *See* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–35 (2004); *see also* U.S. Comm. Against Torture, *United States of America, Consideration of Reports Submitted by States Parties under Article 19 of the*

Under international law, treaty obligations are automatically binding between states.<sup>165</sup> Whether they automatically form part of *domestic* law varies from country to country. In some countries, treaties are “self-executing”: they automatically become part of domestic law. In other countries, they are “non-self-executing”: they do not become part of domestic law until the legislative branch enacts their terms through separate legislation.<sup>166</sup> The United States is an intermediate case. Even though Article VI of the Constitution states that all U.S. treaties form part of the “supreme Law of the Land,” the Supreme Court has ruled that some treaties are self-executing while others are not.<sup>167</sup> The Senate has declared that the ICCPR, the Torture Convention, and CERD are not self-executing.<sup>168</sup>

This practice is deeply troubling, and makes ratification seem an exercise in bad faith. One can defend the idea of making treaties non-self-executing when they take the form of peace agreements, military alliances, and trade pacts; since treaties of this type have as their purpose the creation of interstate obligations, domestic obligations carry secondary importance. But the primary purpose of human rights treaties is to create domestic obligations, to restrict the ways in which governments may treat individuals under their power. When the Senate declares human rights treaties non-self-executing, it therefore defeats the purpose of ratification. The practice would be less objectionable if Congress moved punctually to pass implementing legislation, but Congress has not passed any implementing legislation for the ICCPR or CERD, and it has incorporated the Torture Convention only to a limited extent.<sup>169</sup> The all-important practical consequence of the non-self-executing declarations is to block judges from applying human rights treaties in private causes of action.<sup>170</sup> With rare exceptions, U.S. judges do not refer to the ICCPR, the Torture Convention, or CERD.

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*Convention*, ¶ 60, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000) [hereinafter Torture Committee Report] (“[T]he United States declared the substantive provisions of the [Torture] Convention . . . to be ‘non-self-executing.’ Thus, as a matter of domestic law, the treaty in and of itself does not accord individuals a right to seek judicial enforcement of its provisions.”).

165. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

166. MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 97–102 (4th ed. 2003).

167. See JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 67 (2nd ed. 2003).

168. U.S. RUDs to the Torture Convention, *supra* note 163; U.S. RUDs to the ICCPR, *supra* note 162; 140 CONG. REC. S7634-02 (daily ed., June 24, 1994) (United States Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination) [hereinafter U.S. RUDs to CERD].

169. Torture Committee Report, *supra* note 164, ¶¶ 47–48, 59–60.

170. See Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515 (1991); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341 (1995); Frank C. Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures*, 42 DEPAUL L. REV. 1241 (1993); Jordan J. Paust, *Avoiding “Fraudulent” Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257 (1993). For an argument that judges may sometimes apply human rights treaties, notwithstanding the non-self-executing clauses, see David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129 (1999). For the bolder argument that the non-

The RUDs keep the human rights treaties outside our legal system and legal culture, rendering them unenforceable law of little or no practical utility to ordinary people. Because judges do not consult the treaties, lawyers do not invoke them, and law students are not inclined to study them. For the same reasons, public officials do not internalize the treaties, and therefore the public does not learn about them either. The RUDs ensure that international human rights law remains alien territory, unknown and irrelevant, to most American citizens.

Equally as significant as the practical consequences of the RUDs are the underlying attitudes they express and encourage. Two assumptions are made plain: that the understanding of human rights encoded in our Constitution cannot be improved, and that the existing U.S. legal machinery for enforcing constitutionally recognized human rights cannot be improved. The rest of the world can learn from the United States, but not vice versa.

The U.S. RUDs to the ICCPR and Torture Convention have left individuals vulnerable to torture by the U.S. government.<sup>171</sup> I begin by discussing the effect of the non-self-executing declarations. I then turn to the reservations and understandings that restrict the scope of specific rights asserted in the treaties.

#### A. *Effects of the Non-Self-Executing Declarations*

First, the non-self-executing declarations meant that the ICCPR, the Torture Convention, and their unequivocal prohibition against torture and “cruel, inhuman or degrading treatment or punishment,”<sup>172</sup> as well as the obligation that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,”<sup>173</sup> did not become part of our legal culture. Neither legal, political, and media elites nor ordinary citizens internalized these principles and formulas. The obligations are almost unknown, in marked contrast to the familiar rights clauses of the Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution. Recently, lawmakers and legal scholars have been reminded of the treaty prohibition against cruel, inhuman, or degrading treatment, because of the Bush Administration’s practice of legally excusing harsh treatment that falls short of what it calls torture. Yet it was not until December 2005 that Congress enacted a complete ban on “cruel, inhuman, or degrading treatment or punishment.”<sup>174</sup> Meanwhile, the obligation

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self-executing clauses should not inhibit judges from enforcing human rights treaties, see John Lunnroth, *Regulating the Research Enterprise: Use of International Law for U.S. Citizens Injured in Human Subjects Experimentation*, 23 ISSUES IN LAW & MEDICINE (forthcoming 2007).

171. There are credible arguments that the U.S. RUDs regarding torture and ill treatment are legally invalid. See, e.g., Paust, *Executive Plans and Authorizations*, *supra* note 52, at 823 n.43 (arguing that such RUDs are “void *ab initio* as a matter of law”).

172. ICCPR, *supra* note 119, art 7.

173. *Id.* art. 10(1).

174. Detainee Treatment Act § 1003.

under Article 10 of the ICCPR to treat all detainees with humanity and respect remains almost completely forgotten.

Second, the non-self-executing clauses make it difficult for torture victims to invoke the relevant treaty prohibitions in courts. Victims will find it very difficult to bring the government to account in federal courts for violating its obligations under the ICCPR and the Torture Convention. The Bush Administration understands this principle well. When Guantanamo Bay inmates have sought to invoke the ICCPR in federal court proceedings, the Administration has argued, and judges have agreed, that as a non-self-executing treaty, the ICCPR provides no justiciable rights.<sup>175</sup>

Third, because the non-self-executing clauses keep the treaties out of the courts, the executive branch is free to develop its own interpretations of treaty obligations. It is constrained neither by past judicial rulings nor by the anticipation of future ones. It is therefore in a position to formulate very permissive interpretations, a prerogative which the Bush Administration has exploited to the fullest. For example, until the December 2005 passage of the McCain amendment, the Bush Administration asserted that the CIA had legal permission to inflict cruel, inhuman, or degrading treatment on overseas aliens.<sup>176</sup> Although such treatment is banned by Article 7 of the ICCPR<sup>177</sup> and Article 16 of the Torture Convention,<sup>178</sup> the Administration used two separate arguments to claim that these prohibitions do not apply to U.S. treatment of overseas aliens. First, it argued that the prohibition applies only to individuals under U.S. jurisdiction and that non-U.S. citizens held captive by U.S. agents outside U.S. territory are not under the jurisdiction of the United States. Second, it pointed to the Senate's stipulation, when ratifying both treaties, that the prohibition applies only insofar as "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual, and inhuman treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution.<sup>179</sup> Since the Supreme Court has not made a practice of extending protection of the Fifth, Eighth, and Fourteenth Amendments to overseas aliens, the Senate's

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175. See Brief of the Petitioner-Appellee at 28 n.6, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. Jan. 10, 2005) (arguing that the ICCPR "creates no justiciable enforceable rights."). No judges, including those who have ruled in favor of Guantanamo Bay inmates, have applied the ICCPR or the Torture Convention. Until recently, the Bush Administration argued that Guantanamo Bay inmates can present no justiciable rights whatever in federal court. The Supreme Court rejected this claim in *Hamdan v. Rumsfeld*, noting that foreign military detainees are granted certain justiciable rights under the Uniform Code of Military Justice, enacted into law by Congress. I discuss the significance of the *Hamdan* ruling in the text *infra* Part IV(C).

176. See Lichtblau, *supra* note 63.

177. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." ICCPR, *supra* note 119, art. 7.

178. "Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1 . . ." Torture Convention, *supra* note 9, art. 16(1).

179. U.S. RUDs to the ICCPR, *supra* note 162; U.S. RUDs to the Torture Convention, *supra* note 163.

reservation implied that treaty protections against ill treatment similarly did not extend to overseas aliens.<sup>180</sup> However implausible these arguments may be,<sup>181</sup> no U.S. court has authority to overrule them.<sup>182</sup>

As noted, Congress replied to the Bush Administration's arguments by passing the McCain amendment in December 2005.<sup>183</sup> Some might argue that this demonstrates the harmlessness of the non-self-executing declarations: when the need for implementing legislation became clear, Congress passed the requisite law (and used the opportunity to correct the Administration's permissive interpretation of the relevant treaty provisions and reservations). However, a closer look at the McCain amendment demonstrates the lasting damage caused by the non-self-executing declarations. We must remember that the amendment was not adopted until thirteen years after ratification of the Torture Convention, twelve years after ratification of the ICCPR, and twenty months after the Abu Ghraib revelations. It followed the September 11 attacks by more than four years, during which time the Bush Administration was free to apply its permissive interpretation of the relevant treaty provisions, unconstrained by judicial review. Indeed, the Administration succeeded by various maneuvers in delaying passage of the eventual legislation for more than a year.<sup>184</sup> Moreover, passage of the McCain amendment came at a heavy price: to conciliate Administration opposition, negotiators inserted the two provisions we have noted above: one limiting the criminal and civil liability of U.S. agents accused of mistreatment, and another (the Graham-Levin amendment) denying Guantanamo Bay inmates the right to file new petitions challenging the conditions of their detention in U.S. courts.<sup>185</sup> Thus the very same law that banned ill treatment of detainees prevented U.S. judges from enforcing that ban in

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180. See Letter from William E. Moschella, Asst. Att'y Gen., to Sen. Patrick Leahy (Apr. 4, 2005), available at <http://www.scotusblog.com/movabletype/archives/CAT%20Article%2016.Leahy-Feinstein-Feingold%20Letters.pdf>. See also Gonzales' comments to the Senate Judiciary Committee in 2005:

As you know, when the Senate ratified the Convention Against Torture, it took a reservation and said that our requirements under Article 16 were equal to our requirements under the Fifth, Eighth and Fourteenth Amendment. As you also know, it has been a long-time position of the executive branch, and a position that's been recognized and reaffirmed by the Supreme Court of the United States, that aliens interrogated by the U.S. outside the United States enjoy no substantive rights under the Fifth, Eighth and 14th Amendment. So as a legal matter, we are in compliance.

*Gonzales Hearing, supra* note 55.

181. Abraham Sofaer, who as Legal Advisor to the State Department under the first President Bush played a central role in drafting the RUDs to the human rights treaties, has argued vigorously against this interpretation of the reservation concerning ill treatment. See Abraham Sofaer, Editorial, *No Exceptions*, WALL ST. J., Nov. 26, 2005, at A11.

182. The Supreme Court has affirmed the validity of the non-self-executing declarations: "[A]lthough the [ICCPR] does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." *Sosa*, 542 U.S. at 735.

183. See *supra* note 72 and accompanying text.

184. See *supra* notes 68–72 and accompanying text.

185. See Detainee Treatment Act §§ 1004–05. For a description of the bargaining, see William Douglas, *Bush Accepts McCain Measure*, SEATTLE TIMES, Dec. 16, 2005, at A4; Jonathan Weisman, *Sena-*

Guantanamo Bay. Furthermore, as I discuss below, the ban on ill treatment was worded in a manner that opened the door to highly permissive interpretations by some members of the Bush Administration. In brief, the non-self-executing declarations put the burden on Congress to reaffirm the U.S. prohibition of torture and other forms of ill treatment at a time when public support for the rights of terrorists and suspected terrorists was at a low ebb, in the face of determined opposition from the executive branch. It is not surprising under these circumstances that Congress responded in an incomplete and ambiguous manner.

A fourth consequence of the non-self-executing clauses is that they remove an inducement to appropriately generous interpretations of our *constitutional* rights. If judges were in the habit of consulting international human rights treaties, we would expect the treaties to influence their interpretation of constitutional rights, the right against government brutality being one area in which such influence would presumably be felt. The constitutional ban on cruelty and ill treatment derives from the Eighth Amendment's prohibition of cruel and unusual punishment and the Fifth and Fourteenth Amendments' prohibitions against arbitrary deprivation of life and liberty. The language in these clauses is spare; we depend on responsible constructions by humane judges to uphold the clauses' real meaning. That meaning finds fuller elaboration in the formulas of contemporary international human rights law that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,"<sup>186</sup> and that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."<sup>187</sup> Judges used to applying these formulas would be steered toward the full meaning of the Fifth, Eighth, and Fourteenth Amendments.

It is not radical to suggest that familiarity with international human rights law can improve constitutional interpretation. If the framers of the Constitution and its amendments were animated by a vision of natural or human rights—that is, rights that human beings have because they are human—then we keep faith with their vision by consulting international human rights law to seek a deeper understanding of constitutional rights.<sup>188</sup>

Is torture prohibited by the Constitution? It would certainly appear to be, if the Constitution is read correctly.<sup>189</sup> The Fifth and Eighth Amendments, read together, make torture impermissible. Under the Eighth

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*tors Agree on Detainee Rights*, WASH. POST, Nov. 15, 2005, at A1; Dan Eggen, *Senate Approves Plan to Limit Detainee Access to Courts*, WASH. POST, Nov. 11, 2005, at A7.

186. ICCPR, *supra* note 119, art. 7; see also Torture Convention, *supra* note 9, art. 16.

187. ICCPR, *supra* note 119, art. 10.

188. As Gerald L. Neuman writes, "[T]he Supreme Court has reason to examine international human rights norms and decisions interpreting them for the normative and functional insights that they may provide on analogous issues of constitutional right." Gerald Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 88 (2004).

189. See Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003).

Amendment, the government may not inflict torture on duly convicted criminals.<sup>190</sup> Under the Fifth Amendment, it may not torture anyone else, for the Fifth Amendment prohibits the deprivation of liberty without due process of law, and torture obviously constitutes a denial of liberty.<sup>191</sup> As Justice Kennedy notes in a concurring opinion in *Chavez v. Martinez*, “[use] of torture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person.”<sup>192</sup> Despite these encouraging precedents, however, the fact remains that the Supreme Court has not yet directly confronted the question whether torture may be used to extract information deemed necessary for national security. We must hope that it will declare torture constitutionally impermissible in all circumstances. If the Supreme Court were in the habit of consulting the ICCPR and the Torture Convention, it would be more likely to proclaim an absolute constitutional ban on torture, as well as a constitutional requirement to adopt practical measures reinforcing such a ban.<sup>193</sup>

A fifth consequence of the non-self-executing declarations is the exclusion from the body of judicially enforceable U.S. law of several procedural obligations designed to prevent abuse. These include obligations under the Torture Convention to teach government personnel that torture and ill treatment are illegal; to monitor training methods, interrogation protocols, and detention conditions for any signs of abuse; to guarantee that individuals who report suffering torture or ill treatment have their complaints promptly and impartially investigated by competent authorities; and to award fair and adequate compensation to victims of torture.<sup>194</sup>

Finally, the non-self-executing declarations undermine the ability of torture and abuse victims to seek civil remedies in U.S. courts. In an ominous decision handed down in February 2006, a federal district judge blocked a lawsuit by Maher Arar, the Canadian citizen sent by U.S. officials to be tortured in Syria.<sup>195</sup> The judge argued that a public trial posed a threat to national security because the proceedings might release information embarrassing to the Canadian government, thereby harming U.S.-Canadian relations.<sup>196</sup> Arar would have been in a stronger position if he could have invoked the emphatic language of the ICCPR:

Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy,

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190. *See Hudson v. McMillan*, 503 U.S. 1 (1992).

191. *See Rochin v. California*, 342 U.S. 165 (1952).

192. 538 U.S. 760, 796 (2003) (Kennedy, J., concurring in part and dissenting in part).

193. This point assumes greater importance in the wake of the Military Commissions Act. The provisions of the Act which undermine the rights of foreign detainees against torture and ill treatment can be judicially overturned only upon a finding of unconstitutionality.

194. Torture Convention, *supra* note 9, arts. 10–14.

195. For the story of Maher Arar, see *supra* note 110.

196. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 282–83 (E.D.N.Y. 2003).

notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.<sup>197</sup>

The non-self-executing declaration deprives torture victims of this important legal argument for the right to sue U.S. authorities.

### B. *Effects of Reservations and Understandings*

The Senate not only declared that the rights provisions of the ICCPR and Torture Convention would be non-self-executing. It also chipped away at the prohibition of abuse by means of specific reservations and understandings. In one way or another, these conditions created pockets of permissible ill treatment and even torture.

Reservations to both the ICCPR and the Torture Convention state that the United States is bound by the prohibition on “cruel, inhuman or degrading treatment or punishment” only insofar as such treatment or punishment means “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments.”<sup>198</sup> Why was this reservation adopted? The natural inference is that, in the minds of the Senate, some cruel, inhuman, or degrading treatment or punishment *may be permitted* by the Constitution and should therefore remain legally available.

Examination of the ratification hearings confirms that this was indeed the reservation’s intended meaning. Appearing before the Senate Foreign Relations Committee to explain the package of RUDs negotiated between the first Bush Administration and the Senate, Department of State Legal Advisor Abraham D. Sofaer stated:

The reason for this reservation is straightforward. The formulation used by Article 16 [of the Torture Convention] is ambiguous, *particularly in its reference to ‘degrading treatment.’* Of course, our own 8th Amendment to the Constitution protects against cruel and unusual punishment . . . We would expect, therefore, that our Constitution would prohibit *most (if not all)* of the prac-

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197. ICCPR, *supra* note 119, art. 2(3).

198. This language is from the U.S. RUDs to the Torture Convention, *supra* note 163; the wording of the equivalent reservation to the ICCPR is almost identical. *See* U.S. RUDs to the ICCPR, *supra* note 162.

tices covered in Article 16's reference to cruel, inhuman and degrading treatment or punishment.<sup>199</sup>

We can assume that Sofaer's real objection to the language of Article 16 was not its ambiguity but rather its breadth. The prohibition against "cruel, inhuman, or degrading treatment or punishment" is no more ambiguous than the prohibitions laid down in the U.S. Constitution against the denial of liberty without due process, the deprivation of equal protection of the laws, and "cruel and unusual" punishment. As a warning that Article 16 may prohibit too much, Sofaer cited a decision by the European Court of Human Rights that the "death row phenomenon" (whereby condemned prisoners may wait years before executions are carried out) constitutes "inhuman and degrading" punishment, although Sofaer was quick to note that the Torture Convention does not give foreign or international courts any authority over the United States.<sup>200</sup> To judge by Sofaer's statement, the main argument for the reservation to Article 16 was that the United States should not be governed by a prohibition *against degrading treatment*. It is an ignoble—one might say cowardly—argument. Its irresponsible character is underscored by recent revelations of forced nudity, sexual humiliation, and the desecration of religious symbols in U.S. detention centers around the world.<sup>201</sup>

More charitable explanations of the reservation are not persuasive. It may be argued that particular care must be taken where criminal penalties are prescribed. However, neither the ICCPR nor the Torture Convention mandates criminal prosecution for cruel, inhuman, or degrading treatment, as distinct from torture.<sup>202</sup> Or it may be thought that the original treaty prohibition would subject the U.S. government to the rule of foreign or international courts. However, the treaty prohibition does no such thing. The only implementing bodies created by the ICCPR and the Torture Convention are the Human Rights Committee and the Committee against Torture, respectively. These committees lack any authority to deliver legally binding judgments; the most they may do is to issue "views," "comments," and "findings," and their power to do even this is severely limited by procedu-

199. *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Congress 11 (1991) (statement of Abraham D. Sofaer, former Department of State legal advisor) [hereinafter *Torture Convention Hearing*] (emphasis added).

200. Addressing the question whether Article 16 condemns the death penalty itself, Sofaer reminded Senators that a separate "understanding" attached to the Convention preserves the right of the United States to continue this practice. *Id.* at 6, 11. When discussing the parallel reservation to the ICCPR, the Administration also pointed to rulings by the European Court of Human Rights condemning corporal punishment and solitary confinement as inhuman or degrading. *See* the prepared remarks of Asst. Sec. of State Richard Schifter, *Id.* at 10.

201. *See, e.g.*, James Risen, *G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15 (reporting instances of forced nudity and sexual humiliation); Katharine Q. Seelye, *Red Cross Reported Koran Abuses*, N.Y. TIMES, May 20, 2005, at A22 (reporting desecration of religious symbols).

202. *See* ICCPR, *supra* note 119, art. 7; Torture Convention, *supra* note 9, arts. 4–9, 16.

ral and resource constraints.<sup>203</sup> Moreover, the committees' authority to state views extends to the entire body of the treaties, so fear of their role is no reason to modify the prohibition on cruel, inhuman, or degrading treatment in particular.

The reservation became an important element in the Bush Administration's legal rationalization of torture and ill treatment. As we have seen, the Administration asserted that the Fifth, Eighth, and Fourteenth Amendments do not apply to the U.S. government's treatment of overseas aliens, and consequently that neither the ICCPR nor the Torture Convention protects overseas aliens from cruel, inhuman, or degrading treatment inflicted by the United States, provided that such treatment does not rise to the level of torture.<sup>204</sup> Combined with the Administration's vanishingly narrow definition of torture, this argument allowed it to defend practices that most people would call torture.

The reservation left another damaging legacy. In passing the McCain amendment in December 2005, Congress made the ban on ill treatment apply throughout the world, but also followed the original treaty reservation in stipulating that "the term 'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States."<sup>205</sup> *What is so reckless about this alteration is that the Supreme Court has never ruled whether cruel, inhuman, or degrading treatment (including torture), when used to gather intelligence in the name of national security, is a violation of the Fifth, Eighth, and Fourteenth Amendments.* The Eighth Amendment, which governs the punishment of convicted criminals, does not apply here. The relevant provision of both the Fifth and Fourteenth Amendments is the Due Process Clause, and the test devised by the Supreme Court for determining when rough treatment by government officials violates the Due Process Clause is whether such treatment "shocks the conscience."<sup>206</sup> This is a subjective test (how the treatment affects the conscience of the reasonable onlooker), unlike the objective test prescribed in the original treaty language (what treatment is actually inflicted on the detainee).

Leading Administration officials appear to have taken the view that harsh interrogation methods do not shock the conscience—and therefore do not violate the McCain amendment—when their purpose is preventing terror-

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203. See ICCPR, *supra* note 119, arts. 40–42; Torture Convention, *supra* note 9, arts. 19–21. In addition, the United States has declined to sign the voluntary treaty provisions (Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 302; Torture Convention, *supra* note 9, art. 22) that would allow the committees to hear complaints brought against it from individuals.

204. See *supra* note 180 and accompanying text.

205. Detainee Treatment Act § 1003(d).

206. *Rochin*, 342 U.S. at 172.

ism. This view was strongly hinted by Vice President Cheney, when commenting on the meaning of the McCain amendment:

There's a definition that's based on prior Supreme Court decisions and prior arguments, and it has to do with . . . three specific amendments to the Constitution. And the rule is whether or not it shocks the conscience. If it's something that shocks the conscience, the court has agreed that crosses over the line. Now, you can get into a debate about what shocks the conscience and what is cruel and inhuman. And to some extent, I suppose, that's in the eye of the beholder. But I believe, and we think it's important to remember, that we are in a war against a group of individuals and terrorist organizations that did, in fact, slaughter 3,000 innocent Americans on 9/11, that it's important for us to be able to have effective interrogation of these people when we capture them.<sup>207</sup>

In response to the interviewer's next question, Vice President Cheney refused to say whether U.S. interrogators should use mock executions and waterboarding. When pressed, he confined himself to saying that "we don't engage in torture."<sup>208</sup> Since this interview, it has become the settled doctrine of the Administration that the "shock the conscience" test introduced by the McCain amendment creates a "context-dependent" and "flexible" standard, in which the permissible interrogation techniques vary according to the threat to be averted.<sup>209</sup>

Some of the other reservations and understandings attached to the Torture Convention go further, by watering down obligations to abstain from and to prevent torture itself. The Convention forbids states to send anyone to a foreign country "where there are substantial grounds that he would be in danger of being subjected to torture."<sup>210</sup> The Senate narrowed this prohibition by specifying that it applies only "if it is more likely than not that he would be tortured."<sup>211</sup> Thus an individual who faces a 10 percent or 20 percent or 30 percent risk of torture no longer has a right against deportation. That right is reserved to those whose risk of torture is over 50 percent.

Worst of all, the United States took it upon itself to narrow the meaning of torture, removing the ugly stigma of that word from a range of practices

207. *Nightline: Cheney Roars Back: The Nightline Interview During His Trip To Iraq* (ABC television broadcast Dec. 18, 2005) (transcript on file with author).

208. *Id.*

209. R. Jeffrey Smith, *Behind the Debate, Controversial CIA Techniques; Interrogation Options Seen as Vital*, WASH. POST, Sept. 16, 2006, at A3; see also *A Self-Inflicted Defeat*, Editorial, WALL ST. J., Sep. 14, 2006, at A20 (reporting that Attorney General Gonzales holds the view that "the 'shock' threshold may be higher with the likes of [Khalid Sheikh Mohammad]—who planned 9/11—than for ordinary detainees."). Mohammad is known to have been repeatedly subjected to waterboarding. Ross & Esposito, *supra* note 5.

210. Torture Convention, *supra* note 9, art. 3.

211. U.S. RUDs to the Torture Convention, *supra* note 163, at II(2).

covered by the treaty's original definition.<sup>212</sup> The Convention defines torture as the intentional infliction "of severe pain or suffering, whether physical or mental."<sup>213</sup> Initially, the Reagan Administration had proposed attaching an understanding "that in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering."<sup>214</sup> When the first President Bush resubmitted the treaty for Senate consent to ratification, he discarded this redefinition in favor of another definition, which the Senate adopted:

{T}he United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.<sup>215</sup>

The main effect of the substitute definition is to narrow the cases in which the intentional infliction of severe *mental* pain or suffering qualifies as torture. In his prepared statement to the Senate Foreign Relations Committee, Deputy Assistant Attorney General Mark Richard justified the change as follows: "Mental pain is by its nature subjective. Action that causes one person severe mental suffering may seem inconsequential to another person. Moreover, mental suffering is often transitory, causing no lasting harm."<sup>216</sup> This, he argued, rendered the Convention's definition of mental torture too vague, and since the Convention criminalizes torture, the United States would need to provide a more precise definition to safeguard the rights of the accused.<sup>217</sup> The solution was to specify the methods that constitute mental torture: those appearing as items one through four in the above substitute definition. In addition, the infliction of severe mental pain or

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212. See Sanford Levinson, *Brutal Logic: It's Bad, It's Disgusting, It's Wrong, But Is It Torture? Lawyers Have Some Explaining to Do*, VILLAGE VOICE, May 12–18, 2004, at 27 (calling attention to the significance of this action).

213. Torture Convention, *supra* note 9, art. 1(1).

214. President's Message to Congress Transmitting The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 24 WEEKLY COMP. PRES. DOC. 642 (May 20, 1988).

215. U.S. RUDs to the Torture Convention, *supra* note 163, at II(1)(a).

216. *Torture Convention Hearing*, *supra* note 199, at 17.

217. *Id.* at 12–14.

suffering in the specified ways constitutes torture only if it is intended to produce *prolonged mental harm*.<sup>218</sup>

Richard's rationale depends on an untenable distinction between physical and psychological torment. If mental pain is subjective, so too is physical pain. In the world of torture, the line between the physical and the psychological carries little meaning. All pain is at root psychological—an affliction of feeling whose defining characteristic is that it hurts. The mission of the torturer is to impose extreme hurt on the victim, whether by means of beatings, electric shocks, waterboarding, sleep deprivation, entombment, mock executions, threats against family members, or any other number of ingenious torments. The Torture Convention gets it right: whether the immediate vehicle is "physical pain" is surely not the issue, but rather the intention of the perpetrator to inflict severe pain or suffering on the victim. Unfortunately, the Senate's revision is an invitation to dream up alternate methods of inflicting severe mental pain or suffering not included on the list of prohibited techniques.

At the hearings, Human Rights Watch gave a prophetic warning:

The range of acts that constitute torture is limited only by the imaginations of those who seek to perpetrate them. In recent years governments that practice torture increasingly have sought to devise methods that cause intense pain but leave no marks. The era of psychological torture appears to be ahead of us. It would be a mistake for the U.S. to interfere with the Committee Against Torture's ability to respond effectively to these new and ever more cruel torture techniques.<sup>219</sup>

We are obliged to ask: Does the Senate's revised definition cover waterboarding? Prolonged sleep deprivation? Live entombment or immurement?<sup>220</sup> Exploitation of individual phobias to instill terror? These are not idle questions. The move to exempt psychological techniques, aside from those named in the list, recalls the CIA's historical fascination with using psychological compulsion, including "mind control," as an interrogation strategy. One is led to ask whether the CIA sought this revision of the treaty.<sup>221</sup> Even if the CIA did not directly lobby for the change, its interrogation manuals and the Senate's redefinition of torture seem to emerge from a similar ethos, one which holds that the use of psychological duress to extract information is less reprehensible than the infliction of physical pain.

The alleged distinction between physical and psychological methods bedevils contemporary discussions of torture. According to prominent government officials and some supporters of the Administration, "torture" is an

218. U.S. RUDs to the Torture Convention, *supra* note 163, at II(1)(a).

219. *Torture Convention Hearing*, *supra* note 199, at 94.

220. That is, confining a prisoner in a small space like a coffin without inflicting death.

221. See McCoy, *supra* note 32, at 100–01 (asking the same question).

incorrect label for methods that are merely psychological, and the term “psychological” is made to cover a broad territory. Former CIA Director Porter Goss, who is reported to have approved the use of waterboarding, sleep deprivation, and stress positions,<sup>222</sup> asserted to Charles Gibson of ABC News that the CIA does not practice torture.<sup>223</sup> In the interview, Goss refused to state whether waterboarding constitutes torture, but defined torture as follows:

Well, I define torture probably the way most people would—in the eye of the beholder. What we do does not come close because torture in terms of inflicting pain or something like that, *physical pain or causing a disability*, those kinds of things that probably would be a common definition for most Americans, sort of you know it when you see it, we don’t do that because it doesn’t get what you want.<sup>224</sup>

The editorial page of the *Wall Street Journal* recently stated:

No one has yet come up with any evidence that anyone in the U.S. military or government has officially sanctioned anything close to “torture.” The “stress positions” that have been allowed (such as wearing a hood, exposure to heat and cold, and the rarely authorized “waterboarding,” which induces a feeling of suffocation) are all psychological techniques designed to break a detainee.<sup>225</sup>

The revised definition also stipulates that, to constitute torture, the infliction of severe mental pain or suffering must be intended to cause prolonged mental harm. Therefore, if the damage is excruciating but short, it is not torture. Moreover, the prolonged harm must be intended. Therefore, the intentional infliction of severe mental pain or suffering in one of the specified ways, when it leads to prolonged mental harm not itself intended, is still not torture. The OLC torture memo provides what is unfortunately a correct interpretation of this provision: “[I]f a defendant has a good faith belief that his actions will not result in prolonged mental harm, he lacks the mental state necessary for his actions to constitute torture.”<sup>226</sup>

By redefining torture, the Senate shifted the meaning of several obligations in the Convention. Because creative forms of mental torture are no longer “torture,” the United States is no longer obliged under the Torture

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222. Priest, *Covert CIA Program Withstands New Furor: Anti-Terror Effort Continues to Grow*, *supra* note 5.

223. CIA Director: “Torture is Counterproductive,” (ABC television broadcast Nov. 29, 2005), available at <http://abcnews.go.com/GMA/story?id=1353449>.

224. *Id.*

225. A ‘Tortured’ Debate, Editorial, WALL ST. J., Nov. 12, 2005, at A6.

226. DANNER, *supra* note 1, at 121.

Convention to prosecute individuals who order or inflict such treatment,<sup>227</sup> it is not obliged to award compensation to victims of such treatment,<sup>228</sup> it is free to ship individuals to countries where they will probably suffer such treatment,<sup>229</sup> and it can introduce testimony extracted by such treatment into legal proceedings.<sup>230</sup>

The U.S. redefinition of torture is disturbing on several levels. It perpetrates an Orwellian distortion of language, allowing purveyors of carefully chosen methods of torture to claim that they do not torture, and causing the meaning of torture to become lost in a maze of categories and distinctions. What is thrown out in the Senate's elaborately self-protective language is any sense that torture *as such* is morally unacceptable. The new definition not only wreaks havoc on the English language; it is also legally suspect. Since long before the Senate ratified the Convention, torture has been recognized as a violation of customary international law. The Nuremberg and Tokyo Tribunals and the 1949 Geneva Conventions proclaimed it an international crime;<sup>231</sup> its status as a violation of customary international law was reaffirmed by the 1980 U.S. case of *Filártiga v. Peña-Irala*<sup>232</sup> and many subsequent rulings. The Senate cannot retroactively adjust a customary international law prohibition by substituting a new definition for the prohibited activity. One cannot redefine one's way out of a legal prohibition.

The Senate's redefinition of torture has had practical consequences. The new definition appears in the Torture Victim Protection Act<sup>233</sup> and now in the War Crimes Act as amended by the Military Commissions Act.<sup>234</sup> It is also reproduced in the 1994 Congressional Torture Statute,<sup>235</sup> one of the few steps taken by the United States to incorporate the provisions of the Torture Convention into domestic law. The Torture Statute requires prosecution of any U.S. citizen (or foreigner found on U.S. territory) who commits, attempts to commit, or conspires to commit torture outside the United States.<sup>236</sup> Bush Administration officials were quick to exploit the loopholes in the statutory definition of torture. Prodded by White House Counsel Alberto Gonzales' question, "Are we forward-leaning enough?," officials looked to the statutory definition for any possible arguments that extreme interrogation methods such as waterboarding do not constitute tor-

227. Torture Convention, *supra* note 9, arts. 4–9.

228. *Id.* art. 14.

229. *Id.* art. 3.

230. *Id.* art. 15.

231. Nuremberg Charter, *supra* note 116, art. 6(b), (c); Tokyo Charter, *supra* note 116, art. 5(c); First, Second, Third, and Fourth Geneva Conventions, *supra* note 87.

232. 630 F.2d 876 (2d Cir. 1980).

233. 28 U.S.C. § 1350 (1992).

234. Military Commissions Act § 6(d)(1)(A).

235. 18 U.S.C. §§ 2340–2340A.

236. 18 U.S.C. § 2340A.

ture.<sup>237</sup> These deliberations culminated in the OLC torture memo of August 1, 2002. This memo has merited almost universal condemnation for its blatant distortions of international and U.S. law, including of the Torture Statute itself.<sup>238</sup> But the dirty secret about the memo is that some of its shocking conclusions, especially where psychological torment is concerned, emerge from a straightforward reading of the statute's definition of torture.<sup>239</sup>

Blame for the bulk of the OLC torture memo's arguments and conclusions falls on its authors alone. Most of the analysis does not derive from the Senate's alterations to the treaty definition. But some of it does: the memo finds loopholes that the statutory definition actually contains.<sup>240</sup> The Senate's redefinition also had indirect effects. The memo builds an argument of legislative intent from the clear narrowing of the original treaty definition.<sup>241</sup> Moreover, the Senate, by resorting to a series of strained distinctions, arbitrary exemptions, and elevated thresholds, set an unfortunate precedent that the Bush Administration lawyers all too eagerly followed. The Administration lawyers carried the process of redefinition much farther than the Senate, but the Senate took the first steps.

Not all U.S. RUDs attached to the human rights treaties are objectionable. Some seek to protect rights: for example, the right of free speech against treaty provisions requiring anti-hate speech legislation, and the right of privacy against perhaps overzealous injunctions to combat racial discrimination in the social sphere.<sup>242</sup> Other RUDs, procedural in purpose, appear entirely harmless.<sup>243</sup> My comments have been directed to those RUDs that were obviously inserted to weaken rights protections. Such RUDs form a sorry chapter in the history of the United States. They rest on a combination of moral complacency and moral cowardice that suggests a lack of commitment to human rights. They have succeeded in undermining human rights, and have allowed the United States to engage in the systematic use of torture.

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237. Smith & Eggen, *supra* note 60.

238. For detailed criticisms, see José E. Alvarez, *Torturing the Law*, 37 CASE WESTERN J. INT'L L. 175 (2006); Luban, *supra* note 138; Scheppele, *supra* note 138. For a criticism by two conservative legal scholars, see Ruth Wedgwood & R. James Woolsey, Op-Ed, *Law and Torture*, WALL ST. J., June 28, 2004, at A10.

239. This includes most (though not all) of the analysis in the memo's sections entitled "Prolonged Mental Harm" and "Harm Caused By Or Resulting From Predicate Acts." OLC Torture Memo, *supra* note 17, at 120–25.

240. *Id.*

241. *Id.* at 127–32.

242. See U.S. RUDs to ICCPR, *supra* note 162, at I(1); 140 CONG. REC. S7634-02, at I(1)–(2) (daily ed. June 24, 1994) (U.S. Reservations, Declarations, and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination).

243. I have in mind the declarations that empower the monitoring committees to hear complaints against the United States from other states parties that make a similar declaration. See U.S. RUDs to the ICCPR, *supra* note 162; U.S. RUDs to the Torture Convention, *supra* note 163.

C. *Reflections on Hamdan and Its Aftermath*

The Supreme Court's decision in *Hamdan v. Rumsfeld* underscores the importance of incorporating international human rights obligations into domestic law. *Hamdan* established that the subjection of any foreign detainee to inhuman treatment, including torture, violates the law of the land. This aspect of the *Hamdan* decision derived entirely from a treaty obligation of the United States, and therefore depended on the Court's willingness and ability to apply treaty law. The Court did not apply the ICCPR or the Torture Convention, the two human rights treaties which have been the focus of this Article, but rather the four 1949 Geneva Conventions for the Protection of Victims of War.<sup>244</sup> Lower courts had divided on the justiciability of the Geneva Conventions. The District Court of the District of Columbia had ruled that, since the Senate did not attach a non-self-executing declaration to its consent to ratification of the Conventions, the rights provisions of the Conventions were judicially enforceable—a holding which allowed it to decide in favor of the plaintiff.<sup>245</sup> The D.C. Circuit Court of Appeals disagreed, appealing to a footnote from a World War II-era Supreme Court opinion which stated that U.S. judges were not authorized to enforce the Geneva Conventions of 1929, the precursor to the 1949 Conventions.<sup>246</sup> The circuit court used this as one of its arguments for reversing the judgment of the lower court.<sup>247</sup> The Supreme Court took no position on whether the Geneva Conventions are self-executing, reasoning that such a determination was unnecessary because the Conventions are incorporated in the Uniform Code of Military Justice (“UCMJ”).<sup>248</sup>

Article 21 of the UCMJ grants permission for military commissions that are authorized by statute or “by the law of war.”<sup>249</sup> These five magic words gave the Court the opening it needed to consult the Geneva Conventions, and thereby to correct the Administration's narrow reading of Common Article 3.<sup>250</sup> If Congress had not invoked the law of war in Article 21 of the UCMJ, and if Salim Ahmed Hamdan had not presented an opportunity to rule on the legality of military commissions, the Supreme Court might

244. *Hamdan*, 126 S. Ct. at 2793–98.

245. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 164–65 (D.D.C. 2004) (“United States courts are bound to give effect to international law and to international agreements of the United States unless such agreements are ‘non-self-executing.’”) (citing *The Paquete Habana*, 175 U.S. 677, 708 (1900)).

246. *Hamdan v. Rumsfeld*, 415 F.3d 33, 38–40 (D.C. Cir. 2005) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950)).

247. *Id.* at 33, 38–40 (noting that although *Rasul v. Bush*, 542 U.S. 466 (2004), did give the court jurisdiction to hear habeas corpus claims, this “had no effect on *Eisentrager*'s interpretation of the 1929 Geneva Convention”).

248. *Hamdan*, 126 S. Ct. at 2749, 2756 (“[R]egardless of the nature of the rights conferred on Hamdan . . . they are indisputably part of the law of war . . . compliance with which is the ‘condition upon which UCMJ Art. 21 authority is granted.’”).

249. 10 U.S.C.A. § 821 (West 1998 & Supp. 2006). See *Hamdan*, 126 S. Ct. at 2780 (Stevens, J., plurality).

250. *Hamdan*, 126 S. Ct. at 2795–96 (explaining that the war with al Qaeda is not an inter-state conflict and is therefore governed by the minimal humanitarian requirements of Common Article 3).

never have been able to clarify the meaning of the Geneva Conventions, and the Administration might still be able to declare that the inhuman treatment of suspected al Qaeda and Taliban members is permitted by international law. The story of the *Hamdan* case is a powerful reminder of the need to protect basic human rights through the domestic incorporation of international human rights obligations.

The Bush Administration has long understood the threat posed by international human rights and humanitarian law to its coercive interrogation policy.<sup>251</sup> For this reason (among others), it fought to prevent courts from interpreting the United States' obligations under the Geneva Conventions. The *Hamdan* ruling placed it in a difficult situation because the only route left for preserving coercive interrogation was legislation authorizing derogation from the Geneva Conventions. The version of the Military Commissions Act first sent by the Administration to Congress would have achieved this objective through language stating that the McCain amendment "shall fully satisfy United States obligations with respect to" the humane treatment provisions of Common Article 3.<sup>252</sup> Because certain senators (including John McCain) whose support was needed for passage of the bill opposed any formal departure from the Geneva Conventions, this language was omitted from the final version of the Act.<sup>253</sup> Common Article 3 thus remains the law of the land, and therefore, in light of *Hamdan*, it remains illegal to subject any detainee, including those captured in the "Global War on Terror" to torture, or cruel or humiliating and degrading treatment.

As we have seen, however, the final version of the Military Commissions Act lends *practical* support to the policy of coercive interrogation. Besides creating potential impunity for officials who engage in cruel and inhuman treatment, including torture, and besides eliminating judicial review for foreign detainees subjected to torture, the bill severely curtails the ability of U.S. courts to enforce international humanitarian law by eliminating habeas corpus rights for foreign detainees,<sup>254</sup> cabining references to the law of war in previously enacted statutes,<sup>255</sup> and stating that "the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions,"<sup>256</sup> that "no person may invoke the Geneva Conventions . . . as a source of rights in any court of the United States or its States or territories,"<sup>257</sup> and that "no foreign or international source of law shall supply a basis for a rule of decision . . . in interpreting" grave breaches

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251. See *supra* notes 47–53, 58–60, 63–67, 82–88, 94–100, and accompanying text.

252. Military Commissions Act, H.R. 6054, 109th Cong. §6(a) (2006).

253. Julian E. Barnes & Richard Simon, *Senators Seek to Meld Detainee Plan, Geneva Treaty*, L.A. TIMES, Sept. 13, 2006, at A19.

254. Military Commissions Act § 7.

255. *Id.* § 4.

256. *Id.* § 6(a)(3)(a).

257. *Id.* § 5(a).

of Common Article 3.<sup>258</sup> Had these provisions been enacted a year earlier, the Supreme Court would have been statutorily (though perhaps not constitutionally) barred from issuing the *Hamdan* decision and indeed from hearing the case at all. The Military Commissions Act is revenge for *Hamdan* in more than one sense. At the time *Hamdan* was handed down, the points of access to international human rights and humanitarian law were few and precarious. They have been dramatically reduced since then.<sup>259</sup>

## V. THE NEED FOR THE INTERNATIONAL CRIMINAL COURT

International law provides resources for strengthening the prohibition on torture beyond the ICCPR, the Torture Convention, and the Geneva Conventions. If the United States were serious about stopping torture, it would commit itself to the criminal prosecution of individuals responsible for torture. One hundred and four countries have made this commitment.<sup>260</sup> By means of treaty ratification, they have given the International Criminal Court (“ICC”) complementary jurisdiction over all their citizens, including high-ranking government officials up to the chief of state, who are credibly accused of genocide, war crimes, or crimes against humanity anywhere in the world.<sup>261</sup> Ratification of the Rome Statute also gives the ICC jurisdiction over any foreigner credibly accused of committing these crimes within the country’s national territory.<sup>262</sup> The ICC may not take action if states of primary jurisdiction launch a bona fide criminal investigation into such crimes. But if states prove unwilling or unable to do so, the ICC is authorized to act as a court of last resort.<sup>263</sup> The decision whether or not to investigate human rights atrocities is thus placed beyond the vicissitudes of domestic party politics.

Torture and ill treatment are crimes under the Rome Statute. Torture, rape, and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” constitute crimes against humanity when they are “committed as part of a widespread or systematic attack directed against any civilian popula-

258. *Id.* § 6(a)(2).

259. After passage of the Military Commissions Act, members of the Administration became less guarded. In an interview on October 24, 2006, Vice President Cheney supported the use of waterboarding in the fight against terror, calling it a “no-brainer.” Interview by Scott Hennen with Richard Cheney, Vice President, in Washington, D.C. (Oct. 24, 2006), available at <http://www.whitehouse.gov/news/releases/2006/10/20061024-7.html>. He seemed to say, too, that waterboarding is not torture and that it is not a violation of international treaties. *Id.* These claims are not plausible, but after the passage of the Military Commissions Act there is little if anything the courts can do to stop the executive branch from acting on them.

260. See International Criminal Court: The States Parties to the Rome Statute, <http://www.icc-cpi.int/asp/statesparties.html> (last visited Jan. 20, 2007).

261. Rome Statute, *supra* note 130, art. 5.

262. For the rules governing the ICC’s jurisdiction, see *id.* arts. 5–8, 11–14.

263. *Id.* art. 17.

tion.”<sup>264</sup> Torture, cruel treatment, and “outrages upon personal dignity, in particular including humiliating and degrading treatment” constitute war crimes in armed conflicts “not of an international character.”<sup>265</sup> In conflicts of an international character, war crimes include “torture or inhuman treatment” when inflicted on persons protected by the Geneva Conventions.<sup>266</sup> Although the Bush Administration has argued that suspected members of al Qaeda and the Taliban are not protected by the Geneva Conventions, these arguments have now been challenged by the Supreme Court,<sup>267</sup> and they may well fail to convince the judges of the ICC.<sup>268</sup>

The torture outbreak shows why the United States should join the International Criminal Court. Imagine the situation if the United States had been a party to the Rome Statute from the date of its entry into force on July 1, 2002. Leading 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.<sup>269</sup> If the United States had ratified the Rome Statute, the *knowledge* that such behavior would make leading government officials vulnerable to prosecution would be a powerful disincentive to engage in the behavior. This awareness would reverberate throughout the public sphere, reminding citizens and elites that torture and ill treatment are crimes under international law and that they had renewed their commitment to such law when they ratified the Rome Statute. It would encourage them to carefully examine serious allegations that leading government officials had committed war crimes and crimes against humanity. The Department of Justice, armed with empowering legislation presumably enacted for the purpose by Congress, would be poised to launch effective investigations into such allegations so as to forestall the complementary jurisdiction of the ICC. All of this would further deter government leaders from authorizing or knowingly or negligently allowing the systematic use of torture and ill treatment.<sup>270</sup> More fundamentally, ratification

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264. *Id.* arts. 7(1), 7(1)(f), 7(1)(g), 7(1)(k).

265. *Id.* art. 8(2)(c).

266. *Id.* art. 8(2)(a)(ii).

267. See *Hamdan*, 126 S. Ct. at 2795–96.

268. See Paust, *Executive Plans and Authorizations*, *supra* note 52 (arguing that the authorization of torture and inhumane treatment by administration officials can be considered war crimes).

269. It is often assumed that a U.S. President must first be impeached and removed from office before he or she can be prosecuted, but whether this sequence is constitutionally required remains an open question. See ELIZABETH B. BAZAN, *IMPEACHMENT: AN OVERVIEW OF CONSTITUTIONAL PROVISIONS, PROCEDURE, AND PRACTICE*, CONGRESSIONAL RESEARCH SERVICE (1998), <http://usinfo.org/ref/house/impeachment.htm>; Jonathan Turley, *From Pillar to Post: The Prosecution of American Presidents*, 37 AM. CRIM. L. REV. 1049 (2000). Note that the ICC prosecutor is not himself bound by the U.S. Constitution.

270. It is, of course, true that the United States, having ratified the Rome Statute, could choose open defiance of the ICC, but such a path would entail significant costs. If, after ratification, a U.S. official commits one of the crimes under the Court’s jurisdiction, and the prosecutor and judges confirm that the United States is unwilling or unable to launch a bona fide investigation and that the country on whose territory the crimes are committed, if different from the United States, is also unwilling or

would reflect and renew a previous commitment to foreswear torture and ill treatment.<sup>271</sup>

The ICC has provoked fierce resistance in the United States, especially in the White House and among congressional Republicans.<sup>272</sup> But the torture outbreak proves the importance of overcoming this resistance. The Bush Administration has always asserted that the United States can be counted on to obey international humanitarian law without help from the ICC. In its principal policy statement to date on the ICC, the Administration declared:

The existence of a functioning ICC will not cause the United States to retreat from its leadership role in the promotion of international justice and the rule of law.

The United States will:

. . .

—continue our longstanding role as an advocate for the principle that there must be accountability for war crimes and other serious violations of international humanitarian law.

—continue to play a leadership role to right these wrongs.

—The armed forces of the United States will obey the law of war, while our international policies are and will remain completely consistent with these norms.

—continue to discipline our own when appropriate.

—we will remain committed to promoting the rule of law and helping to bring violators of humanitarian law to justice, wherever the violations may occur.<sup>273</sup>

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unable to start judicial proceedings, then the prosecutor has authority to investigate the crime and issue an indictment as necessary. She or he does not require U.S. consent. There are many reasons why the United States would be motivated to avoid such indictments by the ICC, and even to avoid the necessity of pressuring the ICC not to issue such indictments.

271. The United Kingdom is a party to the Rome Statute whose leading officials appear well aware of the ICC's potential to prosecute war crimes. On March 7, 2003, two weeks before the Iraqi invasion, Prime Minister Blair was warned by his attorney general, Lord Goldsmith, that "given the controversy surrounding the legal basis for action, it is likely that the [ICC] will scrutinise any allegations of war crimes by U.K. forces very closely." Richard Norton-Taylor, *International Court Hears Anti-war Claims*, GUARDIAN (London), May 6, 2005, at 2. In addition, the United Kingdom's senior military commander feared that he might face ICC prosecution for executing an illegal war. Joshua Rozenberg, *Why Britain's Top Soldier Would not End up in the Dock over Iraq*, DAILY TELEGRAPH (London), May 2, 2005, at 2. Though in fact the ICC lacks jurisdiction to punish the crime of aggressive war, this story shows that senior British officials are anxious to avoid violating the substantive law of the ICC.

272. For a discussion of U.S. opposition to the ICC, see Jamie Mayerfeld, *Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights*, 25 HUM. RTS. Q. 93 (2003).

273. Marc Grossman, U.S. Under Sec'y of State, American Foreign Policy and the International Criminal Court, Address to the Center for Strategic and International Studies (May 6, 2002) (remarks

These fine phrases ring hollow when read today. Despite proclaiming a commitment to international humanitarian law, the United States omitted the salient step that would have demonstrated and solidified its commitment. As we now know, there never was such a commitment.

#### CONCLUSION

The incorporation of international human rights obligations into U.S. domestic law would contribute significantly to the prevention of torture. I do not claim that international human rights law is a panacea. Determined resistance by powerful officials can defeat any legal system, however well designed. Moreover, the protection afforded by international human rights law against torture is incomplete, sometimes because of gaps and sometimes because of generally worded obligations that require further specification. One area in need of strengthening is the law governing civil remedies. To ensure adequate civil remedies against torture and ill treatment, the United States needs to clarify, elaborate, and expand the relevant provisions of the Torture Convention and the ICCPR. Recent U.S. statutes and judicial decisions have restricted the ability of foreigners to sue U.S. personnel for torture and abuse inflicted overseas.<sup>274</sup> Article 2(3) of the ICCPR obligates member states in general terms to institute adequate remedies for human rights violations.<sup>275</sup> However, the precise means of implementing such remedies are partially left open—no doubt to accommodate the varying legal systems of different countries. The provision of adequate civil remedies is one area where U.S. lawmakers must go beyond the domestic incorporation of international human rights obligations. No doubt there are others.

Nonetheless, the incorporation of international human rights law is a necessary step, and a substantial one. The traditional justification for not taking this step is that human rights already enjoy full protection under U.S. law.<sup>276</sup> The torture policy of the United States exposes the fallacy of this argument. As I have argued, the Bush Administration would have

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accompanying U.S. withdrawal of its treaty signature), available at <http://www.state.gov/p/us/rm/9949.htm>.

274. See HARBURY, *supra* note 10, at 106–16, 142–43.

275. “Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity . . . .” ICCPR, *supra* note 119, art. 2(3). Articles 2 and 14 of the Torture Convention do the same for torture, albeit less emphatically. See Torture Convention, *supra* note 9, art. 14(1) (“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 . . . .”).

276. Here is a typical example of this assertion, taken from a textbook on international law as it applies to the United States: “The protective power of U.S. human rights law is enormous. It is perhaps what we treasure most about our Nation . . . . [O]ur Constitution already has in place an extensive and enviable scheme for the protection of human rights.” JOHN M. ROGERS, *INTERNATIONAL LAW AND UNITED STATES LAW* 208, 219 (1999) (arguing that U.S. domestic institutions give such strong protec-

found it significantly more difficult to institute a policy of torture if the United States had previously incorporated, without rights-limiting reservations, the terms of the Torture Convention and the ICCPR.

Since, to a large extent, the international human rights treaties recapitulate promises found in the U.S. Constitution, they may strike some people as redundant. But it is a mistake to believe that because international human rights law is redundant, it is also unnecessary. It has long been understood that rights require multiple, overlapping protections.<sup>277</sup> Against the power of the state, individuals need all the protection they can get. Additional rights guarantees are not mere exercises in repetition, but strengthen protections that previously exist. The United States, its civil rights tradition notwithstanding, can benefit from the incorporation of international human rights law.

Americans generally take great pride in their legal system, believing that it surpasses almost all others in shielding individual liberties from governmental abuse. But pride in our legal institutions has turned into a trap, blocking the adoption of needed reforms. Recent events prove that the U.S. legal system permits widespread and systematic human rights abuses, and in fact genuine atrocities. We need international human rights law to reinforce, supplement, and complete the rights promised in our Constitution. The United States is not so pure that it can place itself above international human rights law. These lessons, though seemingly obvious, have not been absorbed.

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tion to individual rights that the United States is already in effective compliance with international human rights law).

277. For a discussion of this point, see Jamie Mayerfeld, *The Mutual Dependence of External and Internal Justice: The Democratic Achievement of the International Criminal Court*, FINN. Y.B. INT'L L. 71 (2001).