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Der Generalbundesanwalt beim  
Bundesgerichtshof  
Brauerstrasse 30  
76137 Karlsruhe

## **Affidavit of Professor Jordan J. Paust**

Betr. : Strafanzeige des Rechtsanwalt Kaleck vom 14.11. 2006 gegen den Verteidigungsminister der Vereinigten Staaten von Amerika, Donald Rumsfeld, den ehemaligen CIA-Direktor George Tenet, den Generalleutnant Ricardo Sanchez und andere Mitglieder der Regierung und der Streitkräfte der Vereinigten Staaten von Amerika wegen Kriegsverbrechen und Folter zum Nachteil Internierter im Gefängnis Abu Ghraib/ Irak (2003/2004) und in Camp Delta in Guantánamo Bay.

**AFFIDAVIT OF JORDAN J. PAUST**

BEFORE ME, the undersigned authority, on this day personally appeared *Jordan J. Paust* known to me to be the person whose name is subscribed to the following instrument and, having been duly sworn, upon his oath, deposes and states the following:

I, JORDAN J. PAUST, hereby declare and state that the following Affidavit is true and correct to the best of my knowledge, based on my knowledge, education, training, and professional experience:

I am the Mike and Teresa Baker Law Center Professor at the University of Houston Law Center. I have also been a Captain, U.S. Army and member of the faculty and International Law Division of the U.S. Department of Army Judge Advocate General's School (1969-1973) and mobilization designee at TJAG School (1973-1975), and I have taught international criminal law, including especially the laws of war, human rights law, and lawful responses to terrorism for some 35 years. I have also been a Visiting Edward Ball Eminent Scholar University Chair in International Law at Florida State University (spring, 1997); and a Fulbright Professor at the University of Salzburg (1978-1979), Austria, teaching jurisprudence, international and comparative law. I have served on several committees on international law, laws of war (including the Lieber Society of the ASIL), human rights, terrorism, and the use of force in the American Society of International Law, the American Branch of the International Law Association, and the American Bar Association. I am Co-Chair of the American Society's International Criminal Law Interest Group. I was also the Chair of the Section on International Law of the Association of American Law Schools, and I was on the Executive Council and the

President's Committee of the American Society of International Law. Among relevant books are: PAUST, VAN DYKE, MALONE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* (Thomson-West American Casebook Series, 2 ed. 2005); PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* (2 ed. 2003) (1<sup>st</sup> ed. 1996); PAUST, BASSIOUNI, *ET AL.*, *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* (3 ed. 2006). I have also published over 150 articles, book chapters, papers and essays in law journals in Belgium, Canada, China, England, Germany, Greece, Israel, Japan, the Netherlands, and the U.S. at Yale, Harvard, Columbia, Stanford, Michigan, Virginia, Cornell, Texas, Duke, the American Journal of International Law, and elsewhere – many of which address the laws of war, human rights, treaties, customary international law, jurisdiction, and the incorporation of international law into U.S. domestic law.

In the following pages I will briefly address the question whether it is at all likely that there will be criminal prosecutions in the United States of President Bush, Secretary of Defense Donald Rumsfeld, and various other high-level members or past members of the Bush administration for alleged authorizations or abetments of violations of the 1949 Geneva Conventions and other treaty-based and customary international law concerning unlawful treatment of detainees and secret detention and rendition of detainees. I will also provide evidence of certain revelations concerning alleged violations of international law that have occurred since the publication of one of my law journal articles in 2005, since they are relevant to the question whether criminal prosecutions of high-level members and former members of the Bush administration are at all likely. Much of what follows is borrowed from a forthcoming article in the Utah Law Review. Because of the need to document some points in detail, I will also supply endnotes in an Appendix attached to this Affidavit.

**1. It is extremely unlikely that present and former high-level members of the Bush administration will be prosecuted in the United States for alleged violations of international law.**

As documented in a law journal published in 2005, whether or not they constitute “torture” or “violence to life and person,” it is quite clear that what we saw in photos from Abu Ghraib, for example, the stripping of persons naked and hooding for interrogation purposes and the use of dogs for interrogation and even terroristic purposes, are among patently illegal interrogation tactics and treatment of detainees of any status covered by various treaty-based and customary international legal prohibitions of cruel, inhuman, degrading, and humiliating treatment, physical coercion, threats of violence, measures of intimidation, and terrorism during any armed conflict and regardless of purpose or feigned excuses on the basis of reciprocity, reprisals, or alleged necessity.<sup>1</sup> President George Bush, Attorney General Alberto Gonzales,<sup>2</sup> Secretary of Defense Donald Rumsfeld, various other high-level members and former members of the Bush administration, and others within the U.S. Executive branch have been reasonably accused of having authorized or abetted these and other violations of international law and/or having been derelict in duty with respect to crimes of actual or effective subordinates. Yet, there have been no criminal investigations, indictments, or prosecutions of such persons in the United States for more than five years. Moreover, as the U.S. Attorney General in charge of prosecutions in the U.S., it is evident that Alberto Gonzales is less than interested in investigating and prosecuting all persons within or who had previously served in the U.S. Executive branch who are reasonably accused of authorizing or directly perpetrating war crimes, abetting war crimes, being derelict in duty with respect to war crimes, or directly participating in a common

plan to deny protections under the laws of war. As Attorney General it is his duty to do so and in a normal criminal justice system all apparent criminal activity would be investigated. But this has not happened and is not at all likely to happen in the near future in the United States, given the fact that he and President Bush are unwilling to investigate and prosecute such persons.

When interpreting Article 7 of the International Covenant on Civil and Political Rights, the Human Rights Committee created by the Covenant provided an important recognition concerning related responsibilities of states: "Complaints about ill-treatment must be investigated.... Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation."<sup>3</sup> In a later admonition, the Committee reminded parties to the treaty that "it is not sufficient" merely to make violations "a crime."<sup>4</sup> States should report "the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons ... [and t]hose who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible"; States have a duty to afford protection against such acts "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity"; and "States must not deprive individuals of the right to an effective remedy..."<sup>5</sup>

More recently, the United Nations Security Council has reaffirmed "its condemnation in the strongest terms of all acts of violence or abuses committed against civilians in situations of armed conflict ... in particular ... torture and other prohibited treatment."<sup>6</sup> The Security Council also demanded that all parties to an armed conflict "comply strictly with the obligations

applicable to them under international law, in particular those contained in the Hague Conventions of 1899 and 1907 and in the Geneva Conventions of 1949”<sup>7</sup> and emphasized “the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law.”<sup>8</sup>

Despite such requirements, for the last five years the Bush administration has refused to prosecute any person of any nationality under the U.S. War Crimes Act or alternative legislation allowing prosecution of war crimes of any sort in U.S. federal courts,<sup>9</sup> the U.S. torture statute,<sup>10</sup> U.S. genocide legislation,<sup>11</sup> and U.S. legislation permitting prosecution of certain civilians employed by or accompanying U.S. military forces abroad.<sup>12</sup> Further, there has been no known criminal investigation during the last five years of U.S. military personnel or persons of any other status for authorizing or participating in the illegal transfer of non-prisoner of war detainees from occupied territory in violation of the Geneva Conventions;<sup>13</sup> illegal rendition in violation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and other international law; or the crime against humanity known as forced disappearance of individuals that President Bush admitted has been and will continue to be engaged in at least under a CIA program of secret detention and what President Bush cryptically refers to as “tough” interrogation.<sup>14</sup> Thus, it is extremely unlikely that there will be any relevant criminal investigations or prosecutions of high-level members of the Bush administration for these or related crimes in the years to come.

**II. Further revelations and evidence relevant to the fact that criminal investigations of high-level members and former members of the Bush administration are extremely**

**unlikely.**

It is now well-known that Secretary of Defense Donald Rumsfeld had expressly authorized the stripping of persons naked, use of dogs, and hooding as interrogation tactics, among other unlawful tactics, in an action memo on December 2, 2002<sup>15</sup> and in another memo on April 16, 2003,<sup>16</sup> the Secretary adding that if additional interrogation techniques for a particular detainee were required he might approve them upon written request.<sup>17</sup> There is no public evidence that the 2003 illegal authorization had been withdrawn before adoption of a necessarily inconsistent Department of Defense directive in September 2006 and there is no evidence that the patently illegal tactics have been completely ruled out by the Bush administration – especially since President Bush has publicly announced that his “program” of secret detention, secret rendition, and “tough” treatment will continue. Further, there is no known criminal investigation of Donald Rumsfeld in the United States with respect to any criminal liability regarding such authorizations or for dereliction of duty, abetting war crimes, or for participation in a common plan to deny rights and protections under the Geneva Conventions.

In an August, 2005 interview, Brigadier General Janis Karpinski has confirmed that Major General Geoffrey Miller was sent to Iraq in 2003 to assure that Secretary Rumsfeld’s authorized interrogation tactics were used in Iraq. As Karpinski stated, “he said that he was going to use a template from Guantanamo Bay to ‘Gitm-oize’ the operations out at Abu Ghraib” and that a Rumsfeld memo was posted on a pole outside at Abu Ghraib:

It was a memorandum signed by Secretary of Defense Rumsfeld, authorizing a short list, maybe 6 or 8 techniques: use of dogs; stress positions; loud music; deprivation of food; keeping the lights on, those kinds of things. And then a handwritten message over to the side that appeared to be the same handwriting as the signature, and that signature was Secretary Rumsfeld’s. And it said, ‘Make sure this happens’ with two exclamation

points.<sup>18</sup>

In another interview, she stated that at her first meeting with Major General Miller

he used the expression that he was going to “Gitmoize” the operation. And military intelligence, they were all listening and pay[ing] attention and taking notes.... “It’s going to change ... we’re going to change the nature of interrogation at Abu Ghraib.” ... Every day, there’s more people arriving out at Abu Ghraib to be interrogators, and they either had experience in Afghanistan or down at Guantanamo Bay. Many of them were personally selected by Gen. Miller and sent to Iraq.... Many of them were contractors.<sup>19</sup>

There is no known criminal investigation of Geoffrey Miller in the United States for dereliction of duty, unlawful authorizations of or complicity with respect to violations of the laws of war or other relevant treaty-based and customary international law.

In November, 2005, David Addington, who has been Vice President Cheney’s top lawyer and is now his chief of staff, openly advocated that the Bush administration continue its illegal policy of not complying with the minimal and absolute requirements concerning treatment of detainees of any status that are reflected in common Article 3 of the Geneva Conventions, a policy that he helped orchestrate in several ways.<sup>20</sup> Colonel Larry Wilkerson, former Chief of Staff to former Secretary of State Colin Powell, has explained that

the Secretary of Defense, under the cover of the vice president’s office, began to create an environment – and this started from the very beginning when David Addington ... was a staunch advocate of allowing the president ... to deviate from the Geneva Conventions.... [T]hey began to authorize procedures within the armed forces that led to ... what we’ve seen.... [S]ome of the ways that they detailed were not in accordance with the spirit of the Geneva Conventions and the laws of war.<sup>21</sup>

Addington’s unlawful policy received continued support from Under-Secretary of Defense Stephen A. Cambone and DOD General Counsel William J. Haynes.<sup>22</sup> Moreover, President Bush expressly authorized the denial of absolute rights and protections contained in the Geneva Conventions and, thus, authorized violations of the Geneva Conventions in a February 7, 2002



memorandum that apparently has not been withdrawn.<sup>23</sup> The authorization of violations of the Geneva Conventions is a war crime.<sup>24</sup>

In October, 2005, the United States Senate voted 90 to 9 to approve an amendment to a defense appropriations bill offered by Senator John McCain (the McCain amendment) that merely reaffirmed the absolute ban on use of torture and cruel, inhuman, and degrading treatment of any detainee in U.S. custody or control, but Vice President Cheney openly opposed any congressional reiteration of the prohibition.<sup>25</sup> The evident message from the Vice President and several of his associates in the administration has been that such forms of illegal treatment should continue under the Cheney-Bush-Addington-Gonzales plan and President Bush's earlier illegal authorizations and orders which have still not been withdrawn.<sup>26</sup> In fact, CIA Director Porter Goss has admitted that Agency techniques of interrogation would be restricted under Senator McCain's amendment.<sup>27</sup> Moreover, some CIA personnel have reported that approved Agency techniques include "striking detainees in an effort to cause pain and fear," "the 'cold cell'... [where d]etainees are held naked in a cell cooled to 50 degrees and periodically doused with cold water," and "'waterboarding' ... [which produces] a terrifying fear of drowning,"<sup>28</sup> each of which is manifestly illegal under the laws of war and human rights law and can result in criminal and civil sanctions for war crimes.<sup>29</sup>

With respect to CIA interrogation tactics, it has been reported that Alberto Gonzales "convened his colleagues in his ... office in the White House," including "top Justice Department and Defense Department lawyers" in July 2002, just before the creation of the infamous Bybee torture memo, to approve illegal interrogation tactics such as "waterboarding."<sup>30</sup> It was also reported that "current and former CIA officers ... [stated that] there is a presidential finding,

signed in 2002, by President Bush, Condoleezza Rice and then-Attorney General John Ashcroft approving the techniques, including water boarding.”<sup>31</sup> There is no indication that the presidential finding has been withdrawn. In fact, during a speech in early September, 2006, President Bush admitted that a CIA program has been implemented “to move ... [high-value] individuals to ... where they can be held in secret” and interrogated using “tough” forms of treatment and he stated that the CIA program will continue.<sup>32</sup> Clearly, it is extremely unlikely that members of the Bush administration authorizing, abetting, or engaging in such conduct will be prosecuted in the United States.

Portions of a previously secret December 2002 CIA memo have also been disclosed during prosecution of a CIA civilian contractor in August 2006. The CIA memo notes that the Bush administration allowed three exceptions to prohibited restraints during interrogation of detainees by CIA personnel, although Geneva Convention and human rights prohibitions, for example, of torture, cruel, inhuman, degrading, or humiliating treatment are patently preemptory. The December 2002 memo prohibits:

any significant physiological aspects (e.g., direct physical contacts, unusual mental duress, unusual physical restraints or deliberate environmental deprivations) – beyond those reasonably required [1] to ensure the safety and security of our officers and [2] to prevent the escape of the detainee – [3] without prior and specific headquarters guidance.<sup>33</sup>

When asked why President Bush would prefer that Geneva law strictures not apply, John Yoo, who had been a Deputy Assistant Attorney General in the Bush administration and primary author of the infamous Yoo-Delahunty 2002 memo, responded:

Think about what you want to do when you have captured people from the Taliban and Al Qaeda. You want to interrogate them.... [T]he most reliable source of information comes from the people in Al Qaeda you captured.... [I]t seems to me that if something is

necessary for self-defense, it's permissible to deviate from the principles of Geneva [including the prohibition of torture].<sup>34</sup>

Of course, it is widely known that alleged necessity does not permit violations of relevant Geneva law (such as common Article 3), the customary laws of war reflected therein, and nonderogable treaty-based, customary, and peremptory human rights.<sup>35</sup> John Yoo has also admitted that “some of the worst possible interrogation methods we’ve heard of in the press have been reserved for the leaders of al-Qaeda that we’ve captured”<sup>36</sup> and, with remarkable candor and abandonment, “I’ve defended the administration’s legal approach to the treatment of al-Qaida suspects and detainees,” including the use of torture.<sup>37</sup> There is no known criminal investigation of John Yoo by the Bush administration concerning any possible criminal liability for abetting violations of the laws of war while in the administration or after the fact or participating in a common plan to deny rights and protections under the Geneva Conventions.

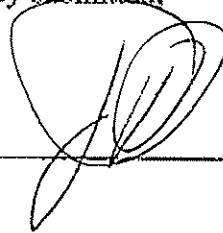
### **III. There are several relevant international laws at stake besides the prohibition of torture.**

Far more than torture is proscribed under relevant international law – for example, under common Article 3 and other provisions of the 1949 Geneva Conventions;<sup>38</sup> Article 7 of the International Covenant on Civil and Political Rights;<sup>39</sup> Articles I and XXV of the American Declaration of the Rights and Duties of Man;<sup>40</sup> Articles 55(c) and 56 of the United Nations Charter;<sup>41</sup> Articles 2, 4, and 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);<sup>42</sup> and the customary, nonderogable, and universally applicable laws of war and human rights reflected therein.<sup>43</sup>

### **IV. Conclusion.**

To summarize, in my opinion the Bush administration has been unwilling for more than five years to prosecute any high-level members and former members of the administration for international crimes and it is extremely unlikely that high-level members and former members of the Bush administration will be prosecuted in the United States for authorizing, abetting, or participating in international criminal activity or for dereliction in duty, although several such persons are reasonably accused of such improprieties.

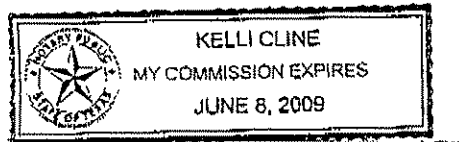
Respectfully submitted,



Jordan J. Paust

Subscribed and sworn to before me by the said Jordan J. Paust on

this 6th day of November, 2006



### Appendix

#### ENDNOTES:

1. See Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUMBIA J. TRANSNAT'L L. 811, 814-22, 835, 838-41, 843-46 (2005), available at

[http://www.columbia.edu/cu/jtl/Vol\\_43\\_3\\_files/Paust.pdf](http://www.columbia.edu/cu/jtl/Vol_43_3_files/Paust.pdf). See also U.N. Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture, United States of America*, 36<sup>th</sup> sess., U.N. Doc. CAT/C/USA/CO/2 (18 May 2006), paras. 14 (the U.S. “should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction...”), 15 (“provisions of the Convention ... apply to, and are fully enjoyed by, all persons under the effective control of its authorities, of whichever type, wherever located in the world”), 19 (there exists an “absolute prohibition of torture ... without any possible derogation”), 24 (the U.S. “should rescind any interrogation technique – including methods involving sexual humiliation, ‘water boarding,’ ‘short shackling,’ and using dogs to induce fear, that constitute torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its *de facto* effective control, in order to comply with the Convention.”) [hereinafter U.N. CAT Report], available at <http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf>; Leila Zerrougui, *et al.*, Report, *Situation of Detainees at Guantanamo Bay*, Commission on Human Rights, 62<sup>nd</sup> sess., items 10 and 11 of the provisional agenda, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006), at 9-10, paras. 12-14, 21-22, paras. 41-45, 24-25, paras. 51-52, 37, para. 87 [hereinafter U.N. Experts’ Report]; Council of Europe, Parliamentary Assembly, Res. 1433, *Lawfulness of Detentions by the United States in Guantanamo Bay*, paras. 7(i)-(vi), 8(i)-(iii), (vii) (Apr. 26, 2005), available at <http://assembly.coe.int/Documents/AdoptedText/ta05/RFS1433.htm>; Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175 (2006); M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389 (2006); Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT’L L. & POL’Y 33, 55-56 (2006); Mary Ellen O’Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231 (2005); Mark Brzezinski, *Torture Reports Tarnish US Image*, BOSTON GLOBE, Nov. 22, 2005, at A11; Douglas Jehl, *Report Warned C.I.A. on Tactics In Interrogation*, N.Y. TIMES, Nov. 9, 2005, at 1; Josh White, *Military Lawyers Say Tactics Broke Rules*, WASH. POST, Mar. 16, 2006, at A13 (“top lawyers for the Army, Navy and Marine Corps have told Congress that a number of aggressive techniques used by military interrogators ... were not consistent with the guidelines in the Army field manual on interrogation, which ‘provides that the Geneva Convention provisions ... be strictly adhered to in the quest to identify legitimate threats and gain needed intelligence.... Among those provisions are the prohibition on physical or moral coercion and the prohibition on subjecting individuals to humiliating or degrading treatment.’”); text *infra* notes 16, 18 (use of dogs, etc.); *infra* note 18 (use of dogs, etc.). Nearly all that follows in the Affidavit is borrowed from my forthcoming article, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2006 UTAH L. REV. (2007).

2. Concerning the role of Alberto Gonzales in the denial of rights and protections under the Geneva Conventions, see, e.g., Paust, *supra* note 1, at 824-26, 830, 834 n.89, 848 n.138; *infra* note 20; text *infra* note 31; see also Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2086 (“self-conscious creation of the Executive” and “deliberate executive construction” more generally of a process of interrogation violative of law), 2094 (Gonzales advice to Bush that

- “Geneva’s strict limitations” should not be observed) (2005). Concerning such forms of criminal liability, nonimmunity (civil and criminal), and two sets of federal legislation that allow prosecution of civilian or military persons for war crimes in federal district courts, *see, e.g.*, Paust, *supra* note 1, at 824 n.47, 836 n.94, 852-55.
3. General Comment No. 7, para. 1, Report of the H.R. Comm., 37 U.N. GAOR, Supp. No. 40, Annex V, U.N. Doc. E/CN.4/Sub.2/Add.1/963 (1982). The same types of obligation were reiterated by the U.N. Committee Against Torture in connection with the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (10 Dec. 1984) [hereinafter CAT]. *See, e.g.*, U.N. CAT Report, *supra* note 1, at paras. 18 (must “prosecute and punish perpetrators” of “enforced disappearance”), 19 (“ensure that perpetrators of acts of torture are prosecuted and punished”; “ensure that ... no doctrine under domestic law impedes the full criminal responsibility of perpetrators”; and “promptly, thoroughly, and impartially investigate any responsibility of senior military and civilian officials authorizing, acquiescing or consenting, in any way, to acts of torture committed by their subordinates”), 25 (“promptly, thoroughly and impartially investigate all allegations of torture or cruel, inhuman or degrading treatment or punishment ... and bring perpetrators to justice”), 26 (“promptly and thoroughly investigate such acts and prosecute all those responsible”), 27 (“The Committee is concerned that the Detainee Treatment Act of 2005 aims to withdraw the jurisdiction of the State party’s federal courts with respect to *habeas corpus* petitions, or other claims by or on behalf of Guantanamo Bay detainees, except under limited circumstances. The Committee is also concerned that detainees in Afghanistan and Iraq, under the control of the Department of Defence, have their status determined and reviewed by an administrative process of that Department.... The State party should ensure that independent, prompt and thorough procedures to review the circumstances of detention and the status of detainees are available to all detainees as required by article 13 of the Convention.”), 28 (“The State party should ensure, in accordance with the Convention, that mechanisms to obtain full redress, compensation and rehabilitation are accessible to all victims of acts of torture or abuse, including sexual violence, perpetrated by its officials.”), 32 (“ensure that all allegations of violence in detention centres are investigated promptly and independently, perpetrators are prosecuted and appropriately sentenced and victims can seek redress, including appropriate compensation.”).
4. General Comment No. 20, para. 8 (1992), in International Human Rights Instruments, U.N. Doc. HRI/GEN/1 (4 Sept. 1992), at 29-32.
5. *Id.* paras. 2, 13, 15.
6. U.N. S.C. Res. 1674, para. 5, U.N. Doc. S/RES/1674 (28 Apr. 2006).
7. *Id.* para. 6. *See also* U.N. S.C. Res. 1566, prmb. (8 Oct. 2004) (States must “ensure that any measures taken to combat terrorism comply with all their obligations under international law ..., in particular international human rights, refugee, and humanitarian law”). Decisions of the Security Council are binding on the United States and other members of the U.N. under Articles 25 and 48 of the U.N. Charter.

8. *Id.* para. 8. Concerning the customary international legal responsibility *aut dedere aut judicare* to either initiate prosecution of or to extradite all persons reasonably accused of such crimes, *see, e.g.*, JORDAN J. PAUST, M. CHERIF BASSIOUNI, *ET AL.*, *INTERNATIONAL CRIMINAL LAW* 9, 132-46, 844 (2 ed. 2000). Article 7 of the CAT mirrors this general customary legal duty. *Supra* note 3, art. 7(1). The same duty is reflected in the Geneva Conventions, *see, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S., art. 146 (12 Aug. 1949) [hereinafter GC].
9. War Crimes Act, 18 U.S.C. § 2441. The alternative legislation for prosecution of all war crimes in federal district courts is 10 U.S.C. § 818 as supplemented with 18 U.S.C. § 3231. *See* Paust, *supra* note 1, at 824 n.47. *See also* Bassiouni, *supra* note 1, at 407, 412.
10. 18 U.S.C. §§ 2340-2340A.
11. 18 U.S.C. §§ 1091-1093.
12. The Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261. *See also* Bassiouni, *supra* note 1, at 415-16; Heather Carney, Note, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 328 (2006) (“The Coalition Provisional Authority in Iraq declared that ‘disciplining contractor personnel is the contractor’s responsibility.’ This lack of accountability is disturbing,” using a quotation of remarks from Ait’y Scott Horton); Robin M. Donnelly, Note, *Civilian Control of the Military: Accountability for Military Contractors Supporting the U.S. Armed Forces Overseas*, 4 GEO. J.L. & PUB. POL’Y 237 (2006). *Cf.* Andrea Weigl, *Jury Finds Passaro Guilty of Assault*, [Raleigh] NEWS & OBSERVER, Aug. 17, 2006 (conviction of a CIA civilian contractor, David Passaro, of assault resulting in bodily injury of a detainee on a U.S. military base in Afghanistan under the Patriot Act [Pub. L. No. 107-56, § 804, 115 Stat. 272, 377 (2001), codified at 18 U.S.C. § 7(9)(A)], which was found to be applicable to conduct of U.S. nationals on U.S. facilities abroad); *CIA Contractor Guilty in Beating of Detainee*, L.A. TIMES, Aug. 18, 2006, at A18 (also noting that the Afghan detainee later died in custody and that human rights organizations have been critical of the lack of other indictments of CIA personnel or “contractors”).
13. Concerning the illegal Bush policy and practice of transferring persons from occupied territory and relevant Geneva law, *see, e.g.*, Alvarez, *supra* note 1, at 199-208; Paust, *supra* note 1, at 850-51 & nn.147-151; Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 57 CASE W. RES. J. INT’L L. 309, 325-31 (2006).
14. *See, e.g., infra* note 33. The Bush administration policy has been to detain numerous individuals in Afghanistan and Iraq; at Guantanamo Bay, Cuba; and in many other places without disclosing the whereabouts of all persons detained or their names whether or not secret detention was under the control of CIA or (until September 7, 2006) military personnel. Such forms of secret detention are violations of the customary prohibition of forced disappearance. *See, e.g.*, Rome Statute of the International Criminal Court, art. 7(2)(i) (forced disappearance is a crime against humanity); Inter-American Convention on the Forced Disappearance of Persons, art. II;

Council of Europe Parliamentary Assembly, Res. 1433, *supra* note 1, at paras. 7(vi), 8(vii)-(viii); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(c) (1987); Maureen R. Berman, & Roger C. Clark, *State Terrorism: Disappearances*, 13 RUTGERS L.J. 531 (1982); Paust, *supra* note 15, at 1352-56; Sadat, *supra* note 13, at 322-23; *In re Marcos*, Human Rights Litigation, 25 F.3d 1467, 1475 (9<sup>th</sup> Cir. 1994); *Tachiona v. Mugabe*, 234 F. Supp.2d 401, 416, 426 (S.D.N.Y. 2002); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass. 1995); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 710-12 (N.D. Cal. 1988); see also U.N. CAT Report, *supra* note 1, at paras. 17-18; 22 U.S.C. § 2151n(a) (2000); S. REP. NO. 102-249, at 9 (1991), quoted in *Xuncax*, 886 F. Supp. at 172. In the context of wars in Afghanistan and Iraq, the policy also creates violations of the Geneva Conventions and the violations can be prosecuted as war crimes. See GC, *supra* note 8, arts. 5, 25, 71, 106-07; IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF CIVILIAN PERSONS IN TIME OF WAR 56-58 (ICRC, J. Pictet ed. 1958) [hereinafter IV COMMENTARY]; Paust, *supra* note 1, at 836-37 n.96; Jordan J. Paust, *Post 9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, The Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1355 n.84 (2004)

In addition to other customary and treaty-based international law concerning illegal rendition and forced disappearance of persons, European countries have relevant regional obligations. Article 8(2) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment requires signatories to provide the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment full information on all places where persons deprived of their liberty are held. Eur. T.S. No. 126 (1987), art. 8(2). The European Court of Human Rights has held that a state violates Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, Eur. T.S. No. 5 (1950), if the authorities fail to take reasonable measures to prevent the disappearance of a person with respect to whom there is a particular risk of disappearance. See *Mahmut Kaya v. Turkey*, 28 EHRR 1 (28 Mar. 2000); *Gongadze v. Ukraine*, judgment of (8 Nov. 2005). Further, Articles 2 and 13 are violated by the failure of authorities to carry out an investigation of disappearances. See *Cyprus v. Turkey*, 35 EHRR 30 (10 May 2001); *Kurt v. Turkey*, 27 EHRR 373 (25 May 1998), adding that Article 5 requires the authorities to take effective measures to safeguard against a risk of disappearance and to conduct prompt and effective investigations.

15. Paust, *supra* note 1, at 840-41.

16. *Id.* at 843-44 & nn.120, 122. See also O'Connell, *supra* note 1, at 1245; Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, THE NEW YORKER, Feb. 27, 2006, addressing a memo from General Counsel of the Navy Alberto J. Mora to Inspector General, Dep't of Navy, Vice Admiral Albert Church, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues, July 7, 2004 [hereinafter *Mora Memo*], available at <http://www.newyorker.com/images/pdfs/moramemo.pdf>, and the memos of Rumsfeld, the role of others in approving and abetting unlawful interrogation tactics, and abuse at Guantanamo.



17. Paust, *supra* note 1, at 843-44.
18. Interview of General Janis Karpinski by Professor Marjorie Cohn, Aug. 3, 2005, available at [http://www.truthout.org/docs\\_2005/082405z.shtml](http://www.truthout.org/docs_2005/082405z.shtml). See also O'Connell, *supra* note 1, at 1245 (regarding the role of Lt. Gen. Sanchez); Paust, *supra* note 1, at 843 (regarding testimony of DOD officials in 2004 that use of dogs, "fear up harsh," and humiliating treatment, among other tactics, were approved for use in Iraq), 847-48 & nn.135, 138 (regarding well-publicized authorizations by Lt. Gen. Sanchez and others for use of "Fear Up Harsh: Significantly increasing the fear level in a detainee," "Presence of Military Working Dog: Exploits fear of dogs," "Yelling ...: Used to create fear," and similar tactics in Iraq); Bryan Bender, *Prison Rules "Not Humane": Iraq Interrogation Guidelines Possibly Illegal, Officials Concede*, BOSTON GLOBE, May 14, 2004, at A1 (tactics of stripping naked, hooding, use of dogs were approved); Michael Hirsh, "Gaps and Discrepancies," NEWSWEEK, Web Exclusive, May 24, 2004 (Major General Miller brought tactics from GITMO to Iraq, including use of dogs); Esther Schrader & Greg Miller, *U.S. Officials Defend Interrogation Tactics*, L.A. TIMES, May 13, 2004, at A11 ("Top U.S. defense officials," including General Richard B. Myers, Chairman of the Joint Chiefs of Staff, testified that use of dogs, fear up harsh, and humiliating treatment were authorized for use in Iraq). During a court-martial of Sgt. Michael J. Smith, Colonel Thomas M. Pappas (who controlled military intelligence at Abu Ghraib) testified that General Miller had authorized use of dogs to exploit "Arab fear of dogs." See, e.g., Eric Schmitt, *Judge Orders A Top Officer to Attend Abuse Trial*, N.Y. TIMES, Apr. 19, 2006, at A16; Josh White, *Memo Shows Officer's Shift on Use of Dogs*, WASH. POST, Apr. 15, 2006, at A11; but see Neil A. Lewis, *Court in Iraq Prisoner Abuse Case Hears Testimony of General*, N.Y. TIMES, May 25, 2006, at A19 (General Miller testified during a court-martial of dog-handler Sgt. Santos A. Cardona that he did not recommend to Lt. Gen. Sanchez that dogs be used for intimidation during interrogation, but for "custody and control" of detainees).
19. The Torture Question: Interview with Janis Karpinski, Frontline, Aug. 5, 2005, available at <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/karpinski.html>. Compare Paust, *supra* note 1, at 847. See also Evan Thomas & Michael Hirsh, *The Debate Over Torture*, NEWSWEEK, Nov. 21, 2005, at 26 ("Rumsfeld sent ... Lt. Gen. Geoffrey Miller - to 'Gitmoize' the interrogation techniques in Iraq."); Josh White, *General Asserts Right on Self-Incrimination in Iraq Abuse Cases*, WASH. POST, Jan. 12, 2006, at 1.
20. See, e.g., Tim Golden & Eric Schmitt, *Detainee Policy Sharply Divides Bush Officials*, N.Y. TIMES, Nov. 2, 2005, at 1, adding: "Another official said Mr. Addington and others also argued that Mr. Bush had specifically rejected the Article 3 standard in 2002 ... when he ordered that military detainees 'be treated humanely and [merely], to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.'" *Id.* See also Thomas & Hirsh, *supra* note 19 (Addington "has strongly attacked a draft directive from DOD's [Deputy Secretary of Defense Gordon] England that would require detainees to be treated in accordance with language drawn from Article Three of the Geneva Conventions."); David Ignatius, *Cheney's Cheney*, WASH. POST, Jan. 5, 2006, at A19; *infra* notes 22-23. Concerning the role played by Addington, see also Paust, *supra* note 1, at 816-18, 834 n.89; David Klaidman,

*et al.*, *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, at 34; Jane Mayer, *The Hidden Power*, THE NEW YORKER, July 3, 2006, at 44 (Addington “played a central role in shaping the Administration’s legal strategy ... that the President, as Commander-in-Chief, has the authority to disregard virtually all previously known legal boundaries.... Under this framework, statutes prohibiting torture, secret detention, and warrantless surveillance have been set aside.” Addington either drafted or provided advice for the Bybee torture memo and another memo that claimed the right to violate “legal prohibitions against the inhumane treatment of foreign prisoners held by the C.I.A.” And Addington reportedly berated Matthew Waxman (*see infra* note 22) for seeking compliance with humane treatment requirements under the Geneva Conventions “rather than the President’s way.”); Mayer, *supra* note 16; Chitra Ragavan, *Cheney’s Guy*, U.S. NEWS & WORLD RPT., May 29, 2006, at 32 (Addington helped draft the 2002 Gonzales memo abetting denials of Geneva law protections to detainees; and, with John Yoo, he helped draft the infamous Bybee torture memo).

21. Larry Wilkerson discusses Cheney’s role in Iraq War, Morning Edition of NPR, Nov. 3, 2005. *See also* James Gordon, *Torture’s No Good, Army Cadets Told*, DAILY NEWS (New York), Nov. 13, 2005, at 24 (reporting Wilkerson’s remarks regarding the administration’s so-called prohibition of torture: “That is not what I saw in the paperwork coming out of the vice president’s office and the office of the secretary of defense.”); “Powell Aide: Torture ‘Guidance’ From VP,” CNN, Nov. 20, 2005 (Wilkerson has no doubt that Cheney provided the philosophical guidance and flexibility for torture of detainees); Mayer, *supra* note 16 (“small group of lawyers closely aligned with Vice-President Cheney”); *supra* note 20.

22. *See, e.g.*, Golden & Schmitt, *supra* note 920 Regarding Cambone, *see also* Paust, *supra* note 1, at 846, 847 n.135; Mayer, *supra* note 16 (“Just a few months ago, Mora attended a meeting in Rumsfeld’s private conference room at the Pentagon, called by Gordon England, the Deputy Defense Secretary, to discuss a proposed new directive defining the military’s detention policy. The civilian Secretaries of the Army, the Air Force, and the Navy were present, along with the highest ranking officers of each service and some half-dozen military lawyers. Matthew Waxman, the deputy assistant secretary of defense for detainee affairs, had proposed making it official Pentagon policy to treat detainees in accordance with Common Article Three of the Geneva conventions.... England asked for a consensus on whether the Pentagon should support Waxman’s proposal.... One by one, the military officers argued for returning the U.S. to what they called the high ground. But two people opposed it. One was Stephen Cambone, the under-secretary of defense for intelligence; the other was Haynes.... Their opposition was enough to scuttle the proposal.... Since then, efforts to clarify U.S. detention policy have languished.”). Regarding Haynes, *see also* Paust, *supra* note 1, at 834-35 n.89, 840-41, 847 n.133; Mayer, *supra* note 16 (quoted above); Mayer, *supra* note 20 (Addington reportedly “exerted influence” over Haynes and “runs the whole operation” at the Pentagon’s Office of the General Counsel); Ragavan, *supra* note 20.

23. *See, e.g.*, Paust, *supra* note 1, at 827-28, 854-55 (including related claims of government lawyers in 2005); *see also id.* at 842-43 (2004 views of Bush, Rumsfeld, and DOD officials); Mayer, *supra* note 16 (“in April, 2004, Mora warned his superiors at the Pentagon about the

consequences of President Bush's decision, in February, 2002, to circumvent the Geneva conventions ... [and] described as 'unlawful,' 'dangerous,' and 'erroneous' novel legal theories" underlying the decision); Editorial, N.Y. TIMES, Aug. 14, 2006, at A20 (Bush's plan to violate the Geneva Conventions continues); *supra* notes 16, 20 (regarding interpretations in 2005 and earlier by "Addington and others" of the Bush authorization to deny Geneva protections and Addington's role with respect to the 2002 Gonzales memo, which abetted denials of Geneva law protections). Mora has affirmed that the Bush administration "authorizations rested on three beliefs: that no law prohibited the application of cruelty; that no law should be adopted that would do so; and that our government could choose to apply the cruelty – or not – as a matter of policy depending on the dictates of perceived military necessity." Alberto J. Mora, *An Affront to American Values*, WASH. POST, May 27, 2006, at A25.

24. See, e.g., Paust, *supra* note 1, at 812 & n.2, 854-55, 861-63.

25. See, e.g., Eric Schmitt, *New Army Rules May Snarl Talks With McCain on Detainee Issue*, N.Y. TIMES, Dec. 14, 2005, at 1; Charles Savage, *McCain Fights Exception to Torture Ban*, BOSTON GLOBE, Oct. 26, 2005, at A2; *Vice President for Torture*, WASH. POST, Oct. 26, 2005, at A18. See also Walter Pincus, *McCain Will Not Bend On Detainee Treatment; He Pushes White House to Ban Torture*, WASH. POST, Dec. 5, 2005, at A18; *infra* note 26. On December 14, 2005, the House voted 308-122 to endorse the McCain amendment. See, e.g., Eric Schmitt, *House Defies Bush and Backs McCain on Detainee Torture*, N.Y. TIMES, Dec. 15, 2005, at 14.

26. Concerning the unlawful plan, authorizations, and orders, see, e.g., Paust, *supra* note 1, at 827-29, 836, 848 n.138, 854. See also Thomas & Hirsh, *supra* note 19 ("Cheney, with CIA Director Porter Goss in tow, has been lobbying against McCain.... Cheney remains adamantly opposed to any check on executive power"); *supra* notes 20-25; *infra* note 27; text *infra* notes 30-31.

27. See, e.g., Goss Says CIA "Does Not Do Torture," But Reiterates Need for Interrogation Flexibility, *The Frontrunner*, Nov. 21, 2005. See also R. Jeffrey Smith, *Fired Officer Believed CIA Lied to Congress*, WASH. POST, May 14, 2006, at A1 (there is a "secret Justice Department opinion in 2004 authorizing the agency's creation of 'ghost detainees' – prisoners removed from Iraq for secret interrogations" in violation of Geneva law and CIA officer and former director of intelligence programs of the National Security Agency, Mary O. McCarthy, has stated that CIA policies authorized treatment she "considered cruel, inhumane or degrading."); Toni Locy & John Diamond, *Memo Lists Acceptable "Aggressive" Interrogation Methods*, USA TODAY, June 27, 2004, at 5A (stating that a secret DOJ August 2002 memo apparently exists that is more detailed than the 2002 Bybee torture memo and it "spelled out specific interrogation methods that the CIA" can use, including "waterboarding"); Mayer, *supra* note 20 (memo allows inhumane treatment of persons held by the C.I.A.). Concerning the Bush administration's approval of the secret rendition of persons from Afghanistan, Iraq and elsewhere to other countries in violation of the 1949 Geneva Conventions, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, customary prohibitions of forced disappearance, and other customary and treaty-based international law, see also Alvarez, *supra* note 1, at 199, 210-11, 213; Bassiouni,

*supra* note 1, at 411-13; Paust, *supra* note 1, at 836-37 & n.96, 850-51 & nn.147-151; Paust, *supra* note 14, at 1352-56 (2004); Sadat, *supra* note 13; U.N. Experts' Report, *supra* note 1, at 26-27, para. 55, 37, para. 89 ("The practice of rendition of persons to countries where there is a substantial risk of torture ... amounts to a violation of the principle of non-refoulement and is contrary to article 3 of the Convention against Torture and Article 7 of the ICCPR"); Council of Europe Res., *supra* note 1, at paras. 7(vi) ("the unlawful practice of secret detention"), (vii) ("the United States has, by practicing 'rendition' (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and cruel, inhuman or degrading treatment, in violation of the prohibition of non-refoulement"), 8 (vii), (ix); Diane Marie Amann, *The Committee Against Torture Urges an End to Guantanamo Detention*, ASIL Insight (June 8, 2006), available at <http://www.asil.org/insights/2006/06/insights060608.html>; Christine Spolar, *Ex-spy: CIA, Italians Worked on Abduction; Arrest Warrant Targets 4 Accused Americans*, CHICAGO TRIB., July 9, 2006, at 10; *infra* note 31.

28. See, e.g., Editorial, *Director for Torture*, WASH. POST, Nov. 23, 2005, at A18. See also Paust, *supra* note 1, at 836-37 n.96, 848 n.138; Douglas Jehl & David Johnston, *C.I.A. Expands Its Inquiry Into Interrogation Tactics*, N.Y. TIMES, Aug. 29, 2004, at A10 (there were "some extreme tactics used at those secret [CIA] centers, including 'waterboarding'"); Jonathan S. Landay, *Cheney: Water Torture is OK, Confirms Method Used on al-Qaeda*, THE NEWS & OBSERVER (Raleigh, NC), Oct. 26, 2006, at A4; *supra* note 27.

29. See, e.g., Paust, *supra* note 1, at 836 n.96, 846 ("using cold air to chill"), 852-54; *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1463 (D. Haw. 1995) ("forms of torture" include "[t]he 'water cure,' where a cloth was placed over the detainee's mouth and nose, and water poured over it producing a drowning sensation" and "[f]orcing a detainee while wet and naked to sit before an air conditioner often while sitting on a block of ice," among other interrogation tactics).

30. See Thomas & Hirsh, *supra* note 19; see also W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 75-76 & n.18 (2005); Eric Lichtblau, *Gonzales Says Humane-Policy Order Doesn't Bind C.I.A.*, N.Y. TIMES, Jan. 19, 2005, at A17 (Gonzales still claimed in 2005 that CIA and nonmilitary personnel are outside the reach of any remaining limitations on treatment contained in the Bush Feb. 7, 2002 directive and that a congressional ban on cruel and inhumane treatment does not apply to "aliens overseas"); Editorial, WASH. POST, Apr. 26, 2005, at A14 (the Gonzales meeting approved simulated drowning). Concerning the evident role of Cheney, see also Paust, *supra* note 1, at 837-38 & n.97; *supra* note 21; see also Landay, *supra* note 28; Mayer, *supra* note 20 (regarding Addington's involvement in creation of the C.I.A. interrogation memo and effective control of the White House Counsel's office – one administration lawyer claiming that Gonzales would call the meetings but was weak, "an empty shirt.")). Concerning other relevant conduct by Gonzales, see, e.g., *supra* note 2. Concerning the infamous Bybee torture memo, see, e.g., Paust, *supra* note 1, at 834-35.

31. *History of an Interrogation Technique: Water Boarding*, ABC News, Nov. 29, 2005, available at <http://abcnews.go.com/WNT/print?id=1356870>. See also Landay, *supra* note 28; Paust, *supra* note 1, at 836-37 & n.96 (secret authorization for CIA), 848 n.138; Wendel, *supra* note 30, at 84 & n.60 (secret presidential directive exists for CIA transfer of detainees for interrogation); *supra* note 27. It has also been reported that President Bush authorized the CIA to secretly detain and interrogate persons in a September 17, 2001 directive known as a memorandum of notification. See David Johnson & Douglas Jehl, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. TIMES, Sept. 10, 2006, at 1 (adding that harsh tactics were devised in late 2001 and early 2002).
32. See, e.g., Julian E. Barnes, *CIA Can Still Get Tough on Detainees*, L.A. TIMES, Sept. 8, 2006, at A1; John Donnelly & Rick Klein, *Bush Admits to CIA Jails; Top Suspects Are Relocated*, BOSTON GLOBE, Sept. 7, 2006, at A1; Ken Herman, *Bush Confirms Secret Prisons, Denies Torture*, ATLANTA J.-CONST., Sept. 7, 2006, at 1A (adding that the CIA secret detention program “had held about 100 detainees”); Mark Silva, et al., *Bush Confirms Use of CIA Secret Prisons*, CHICAGO TRIB., Sept. 7, 2006, at 1. See also text *infra* note 36.
33. Quoted in Priti Patel, *A Wider Torture Loophole?*, L.A. TIMES, Aug. 18, 2006, at B11. The numbers in brackets have been added to more easily identify the three exceptions set forth in the CIA memo, the final one being prior specific approval by CIA headquarters of apparently any interrogation tactic or form of treatment.
34. *The Torture Question: Interview with John Yoo*, Frontline, Jul. 19, 2005, available at <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html>. See also Teddy O’Reilly, *Who is watching the watchmen?*, THE DAILY CARDINAL, Dec. 14, 2005 (reporting John Yoo’s outrageous if no longer surprising remarks during a debate: Professor Doug Cassel: “If the President deems that he’s got to torture somebody, including by crushing the testicles of the person’s child, there is no law that can stop him? Yoo: No treaty. Cassel: Also, no law by Congress – that is what you wrote in the August 2002 memo.... Yoo: I think it depends on why the President thinks he needs to do that.” [Yoo also stated during the debate in Chicago: “I don’t think a treaty can constrain the President as commander in chief”]), available at <http://www.dailycardinal.com/article.php?storyid=1028126>; Anne-Marie O’Connor, *In Wartime, This Lawyer Has Got Bush’s Back*, L.A. TIMES, Dec. 12, 2005, at E1 (reporting that Yoo was opposed to the McCain amendment and quoting him: “The real effect of the McCain amendment would be to shut down coercive interrogation.”); *infra* note 37; see also John C. Yoo, Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), at 28 (opining in error that “the President has a variety of constitutional powers with respect to treaties, including powers to ... contravene them ... [P]ower[s] over treaty matters ... are within the President’s plenary authority.”), available at <http://www.msnbc.msn.com/id/5025040/site/newsweek>. But see John Yoo, *Terrorists Are Not POWs*, USA TODAY, Nov. 2, 2005, at 12A (“Physical and mental abuse is clearly illegal.... The Geneva Conventions – which already prohibit the torture or cruel, inhumane or degrading treatment of prisoners – clearly apply in Iraq.”). John Yoo also indicated that among the

members of the 2003 DOD Working Group that approved use of various illegal interrogation tactics were JAGS and “general counsels.” The Torture Question: Interview with John Yoo, *supra*. Nonetheless, several JAG officers did not approve. *See, e.g.*, Paust, *supra* note 1, at 843 & n.119; *see also* Mayer, *supra* note 16 (Alberto Mora had been a member of the DOD Working Group, but openly disapproved. He had not seen the final version of the Report and, thus, was one of those who allegedly did not sign the Report (some reportedly in protest, *see* Paust, *supra* note 1, at 841 n.114)); Mora Memo, *supra* note 16, at 15-19 & n.12.

35. *See, e.g.*, Bassiouni, *supra* note 1, at 392-93, 395, 406; Richard Goldstone, *Combating Terrorism: Zero Tolerance for Torture*, 37 CASE W. RES. J. INT’L L. 343 (2006); Paust, *supra* note 1, at 815-16, 820-21; U.N. Experts’ Report, *supra* note 1, at 21, paras. 42-43; *supra* note 1. *See also* United States v. List, 11 T.W.C. 757, 1255 (1948) (“military necessity or expediency does not justify a violation of positive rules”); U.S. Dep’t of Army Field Manual 27-10, THE LAWS OF LAND WARFARE 4, para. 3(a) (1956) (same) [hereinafter FM 27-10].

36. John Yoo, remarks, on National Public Radio, Dec. 15, 2005. *See also supra* note 32 (Bush admits that “tough” tactics were used against “high-valuc” detainees held in secret detention by the CIA).

37. John Yoo, *President’s Power in Times of War*, TRIBUNE-REVIEW (Greensburg, PA), Dec. 25, 2005. Concerning the role that Yoo played, *see also* Paust, *supra* note 1, at 830-33, 834-35 n.89, 842-43, 856 & n.172, 858, 861-62 & n.198; Klaidman, *et al.*, *supra* note 20 (the infamous 2002 Bybee torture memo was “drafted by Yoo” and a “Yoo memo in March 2003 was even more expansive, authorizing military interrogators ... to ignore many criminal statutes”); Mayer, *supra* note 16 (on Feb. 6, 2003, Alberto Mora asked John Yoo “Are you saying the President has the authority to order torture?” “Yes,” Yoo replied.”); Mora Memo, *supra* note 16, at 19; Ragavan, *supra* note 20 (Yoo was a drafter, with Addington and Bybee, of the Bybee torture memo).

38. *See, e.g.*, GC, *supra* note 8, art. 3; *see also id.* arts. 5, 27, 31-33, 49 (transfer of non-prisoners of war from occupied territory is a war crime), 147; Paust, *supra* note 1, at 816-20, 850-51; Sadat, *supra* note 13, at 325-31 (transfers from occupied territory violate GC art. 49). Among the absolute rights and duties reflected in common Article 3 are the right to be “treated humanely,” freedom from “violence to life and person,” freedom from “cruel treatment and torture,” and freedom from “outrages upon personal dignity, in particular, humiliating and degrading treatment.” GC, *supra* art. 3. Common Article 3 now reflects minimum and absolute rights and duties under customary laws of war that are directly applicable in any armed conflict whether or not portions of the Conventions as such are self-executing. *See, e.g.*, Paust, *supra* note 1, at 813 n.8, 814 n.10, 816-18 & nn.17, 19; *see also* Hamdan v. Rumsfeld, \_\_ U.S. \_\_, \_\_ n.63 (2006). Moreover, the relevant articles in the treaty contain mandatory, self-executing language. *See, e.g.*, Paust, *supra* note 1, at 814 n.10. The rights and duties reflected in common Article 3 apply “in all circumstances” to any person who is not taking an active part in hostilities, thus including any person detained and regardless of the person’s status (*e.g.*, as a civilian, prisoner of war, unprivileged belligerent, terrorist, state or nonstate actor). *See, e.g., id.* at 816-18.

Because common Article 3 applies with respect to any detainee during an armed conflict,

there is no gap in the reach of some forms of protection even if the detainee is not a prisoner of war. *Id.* at 817-18 n.20; *Hamdan v. Rumsfeld*, \_\_\_ U.S. at \_\_\_ n.63. Nationals of a “neutral State” who are not prisoners of war have additional rights and protections under Part II of the Geneva Civilian Convention. A narrow exception for such persons concerning additional protections under Part III of the treaty (containing, *e.g.*, Articles 27, 31-33, and 49) applies only when they are “in the territory of” the detaining state. *Id.* at 819 & n.28, 851 n.149. Thus, when the U.S. detains non-prisoners of war outside the U.S. they have additional rights and protections under Part III of the treaty.

39. International Covenant on Civil and Political Rights, art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment....”), 999 U.N.T.S. 171 (Dec. 9, 1966) [hereinafter ICCPR]. *See also* Paust, *supra* note 1, at 820-23. Article 50 of the treaty assures that orders, authorizations, conspiracies, complicitous conduct (including memos that abet violations) and other acts within the U.S. in violation of the provisions of the treaty are proscribed “without any limitations or exceptions.” *See* ICCPR, *supra* art. 50 (“The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”). Concerning the unavoidable and direct domestic effects of Article 50’s mandate even in the face of a declaration of partial non-self-execution with respect to other articles, *see, e.g.*, JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 362 (2 ed. 2003).

Contrary to the Administration’s view, the ICCPR also applies wherever a person is subject to the jurisdiction or effective control of a party to the treaty. *See, e.g.*, ICCPR, *supra* art. 2(1); Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. paras. 108-111 (The ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”), *reprinted in* 43 I.L.M. 1009, 1039-40 (2004); Human Rights Committee, General Comment No. 31, para. 10 (applies “to all persons subject to their jurisdiction. This means ... anyone within the power or effective control of that State party, even if not situated within the territory of the State.... [The ICCPR applies] to all individuals ... who may find themselves in the territory or subject to the jurisdiction of a State Party.... [It] also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained”), para. 11 (“the Covenant applies also in the situation of armed conflict to which the rules of international humanitarian law are applicable.”), U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004); General Comment No. 24, at paras. 4, 12 (“all those under a State party’s jurisdiction”), U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994); *Coard, et al. v. United States*, Case No. 10.951, Report No. 109/99, Annual Report of the Inter-Am. Comm. H.R. (Sept. 29, 1999); *Alejandro, et al. v. Cuba*, Case No. 11.589, Annual Report of the Inter-Am. Comm. H.R. (Sept. 29, 1999); Human Rights Comm., *Concluding Observations on Croatia*, 28/12/92, U.N. Doc. CCPR/C/79/Add.15 (1992), § 9; U.N. Experts’ Report, *supra* note 1, at 8-9, para. 11; Paust, *supra* note 1, at 822 n.40. More specifically, there is no territorial limitation set forth with respect to the absolute rights and duties contained in Article 7 of the ICCPR. The authoritative decisions and patterns of *opinio juris* noted above are part of subsequent practice and expectation relevant to proper interpretation of the treaty. *See* Vienna Convention on the Law of Treaties, art. 31(3)(b), 1155 U.N.T.S. 331 (1969) [hereinafter Vienna Convention]. Treaties must also be interpreted in light of their object and purpose (*see, e.g., id.*

art. 31(1)), which in this instance is to assure universal respect for and observance of the human rights set forth in the treaty. See ICCPR, *supra* preamble (recognizing “equal and inalienable rights of all,” recognizing that “everyone ... [should] enjoy” human rights, and “[c]onsidering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights”). The preamble to the treaty must also be used for interpretive purposes (see, e.g., Vienna Convention, *supra* art. 31(2)), which in this instance reflects the object and purpose of the ICCPR to achieve universal respect for and observance of the human rights set forth in the treaty. More generally, human rights treaties are presumptively universal in reach in view of the general and preemptive duty of States under the United Nations Charter to achieve universal respect for and observance of human rights. See, e.g., U.N. Charter, arts. 55(c), 56, 103, T.S. 993, 59 Stat. 1031 (June 26, 1945); ICCPR, *supra* preamble; Vienna Convention, *supra* art. 31(3)(c) (“any relevant rules of international law” (such as the preemptive human rights duties under the U.N. Charter) are to be taken into account when interpreting a treaty (such as the ICCPR); *infra* note 41. Further, the Supreme Court has recognized that treaties are to be interpreted in a broad manner in order to protect express and implied rights. See, e.g., Paust, *supra* note 1, at 832 n.76.

Concerning the invalidity of an attempted reservation to Article 7's reach to *all* forms of torture, cruel, inhuman, and degrading treatment, see, e.g., Paust, *supra* note 1, at 821 n.40, 823 n.42; Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/79/Add.50, para. 14 (1995). Article 7 is also expressly among the nonderogable articles in the treaty. See ICCPR, *supra* art. 4(2). Moreover, the rights and duties reflected in Article 7 are part of customary and *jus cogens* international law of a nonderogable and universal reach regardless of attempted treaty reservations or understandings. See, e.g., Paust, *supra* note 1, at 821-23; U.N. Experts' Report, *supra* note 1, at 8, para. 8, 21, paras. 42-43. More generally, the United States has not “declared a ‘state of emergency’ within the meaning of Article 4” and has not attempted a formal “derogation from [any of] its commitments under the Covenant.” Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights 31-32, paras. 89, 91 (Oct. 21, 2005) (copy on file with the author).

40. O.A.S. Res. XXX (1948), arts. I (“Every human being has the right to life, liberty and the security of person.”), XXV (“... Every individual who has been deprived of his liberty ... has the right to humane treatment”), O.A.S. Off. Rec. OEA/Ser. L/V/I.4, Rev. (1965). As a party to the Charter of the Organization of American States, the U.S. is bound by the American Declaration, which is a legally authoritative indicia of human rights protected through Article 3(k) of the O.A.S. Charter [see also *id.* arts. 44, 111]. See, e.g., Advisory Opinion OC-10/89, I-A, Inter-Am. Court H.R., Ser. A: Judgments and Opinions, No. 10, paras. 45, 47 (1989); Inter-Am. Comm. H.R., Report on the Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities, Chapter VIII (1996), OEA/Ser.L/V/II.96, doc. 10 rev. 1 (Apr. 24, 1977) (“The American Declaration ... continues to serve as a source of international obligation for all member states”); The “Baby Boy” Opinion, Case 2141, Inter-Am. Comm. H.R. 25, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981), at para. 15 (“As a consequence of Article 3j, 16, 51e, 112 and 150 of [the Charter], the provisions of other instruments and resolutions of the OAS on human rights acquired binding force. Those instruments and resolutions of the OAS on human



rights approved with the vote of the U.S. Government” include the American Declaration of the Rights and Duties of Man. That Declaration affirms several human rights, now protected through the O.A.S. Charter, including the right to “resort to the courts to ensure respect for ... [one’s] legal rights” documented in Article XVIII); Roach Case, No. 9647, Inter-Am. Comm. H.R. 147, OEA/Ser.L/V/II.71, doc. 9 rev. 1 (1987), at para. 48; *see also* RICHARD B. LILICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS 802-04 (3 ed. 1995); DAVID WEISSBRODT, JOAN FITZPATRICK, FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS 598-600 (3 ed. 1996); MYRES S. MCDUGAL, HAROLD D. LASSWELL, LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 198, 316 (1980).

Within the Americas, the United States is also bound to take no action inconsistent with the object and purpose of the American Convention on Human Rights, 1144 U.N.T.S. 123 (1969), which would necessarily include orders, authorizations, complicity, and more direct acts in violation of the human rights protected in the Convention. This obligation arises because the U.S. has signed the treaty while awaiting ratification. *See, e.g.*, Vienna Convention, *supra* note 39, art. 18. Article 5 of the American Convention requires:

- (1) Every person has the right to have his physical, mental, and moral integrity respected.
- (2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person....

41. *Supra* note 39, arts. 55(c), 56. The universally applicable duty of states under Articles 55(c) and 56 is to take joint and separate action to achieve “universal respect for, and observance of, human rights” and, thus, not to authorize their violation or to violate them in any location with respect to any person. *See id.* arts. 55(c), 56. *See also* U.N. S.C. Res. 1566, prmb. (8 Oct. 2004) (quoted *supra* note 7); U.N. G.A. Res. 59/195, Human Rights and Terrorism, prmb. (20 Dec. 2004) (“all States have an obligation to promote and protect all human rights..., Reaffirming that all measures to counter terrorism must be in strict conformity with international law, including international human rights”); U.N. G.A. Res. 59/191, Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, prmb. (“States are under the obligation to protect all human rights and freedoms of all persons ... in the context of the fight against terrorism”), para. 1 (“States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular human rights ... and humanitarian law”) (20 Dec. 2004); Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance With the Charter of the United Nations, U.N. G.A. Res. 2625 (Oct. 24, 1970), 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971) (“Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.”); Paust, *supra* note 1, at 822-23 n.41. One uses evidences of the content of customary human rights to identify those rights “guaranteed to all by the Charter.” *See* *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980), adding: “the guarantees include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights... Charter precepts embodied in this Universal Declaration ‘constitute basic principles of international law.’ G.A. Res. 2625 (XXV) (Oct. 24, 1970).” *Id.* In addition to the prohibition of torture, Article 5 of the

Universal Declaration prohibits “cruel, inhuman or degrading treatment or punishment.” U.N. G.A. Res. 217A, art. 5, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948). The more general right to human dignity is mirrored in Article 1. *Id.* art. 1. Concerning the status of the Universal Declaration and its use as an authoritative interpretive aid, *see, e.g.,* MCDUGAL, LASSWELL, CHEN, *supra* note 40, at 274, 302, 325-27; *see also* U.N. G.A. Res. 59/191, *supra* prmb. (“Stressing that everyone is entitled to all the rights and freedoms recognized in the Universal Declaration”); Paust, *supra* note 1, at 822 n.40 (U.S. Executive recognition that rights and duties reflected in Article 5, among others, are customary international law). The same absolute prohibitions are found in the Resolution on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 59/182, U.N. Doc. A/RES/59/182 (2004) (quoted in Paust, *supra* note 1, at 821 n.38), and the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 3452, 30 U.N. GAOR, Supp. No. 34, at 91, U.N. Doc. A/1034 (1976). Article 2 of the 1975 Declaration affirms that each form of prohibited conduct violates human rights under the U.N. Charter. *See id.* art. 2. The 1975 Declaration was also used in *Filartiga* to identify U.N. Charter-based and customary human rights prohibitions. 630 F.2d at 882-83. *See also* Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 499 (9<sup>th</sup> Cir. 1992), *cert. denied*, 508 U.S. 972 (1993).

The 1988 Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment also affirms that “[a]ll persons under any form of detention ... shall be treated in a humane manner and with respect for the inherent dignity of the human person.” U.N. G.A. Res. 43/173, 43 U.N. GAOR, Supp. No. 49, at 297, U.N. Doc. A/43/49 (1988). *See also* Kane v. Winn, 319 F. Supp.2d 162, 197-99 (D. Mass. 2004) (use of the Body of Principles as evidence of customary law).

42. 1465 U.N.T.S. 85. *See also id.*, preamble (“Having regard to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant ..., both of which provide that no one may be subjected to cruel, inhuman or degrading treatment” and “Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment ... throughout the world”); Paust, *supra* note 1, at 823 n.43; U.N. CAT Report, *supra* note 1, at paras. 17 (“The State party should ensure that no one is detained in any secret detention facility under its *de facto* effective control. Detaining persons in such circumstances constitutes, *per se*, a violation of the Convention”), 18 (“The State party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, *per se*, a violation of the Convention”), 22 (“detaining persons indefinitely without charge, constitutes *per se* a violation of the Convention”), 24 (quoted *supra* note 1), 25 (“The State party should promptly, thoroughly and impartially investigate all allegations of torture or cruel, inhuman or degrading treatment and punishment by law enforcement personnel and bring perpetrators to justice, in order to fulfill its obligations under article 12 of the Convention”), 26 (“eradicate all forms of torture and ill-treatment of detainees by its military and civilian personnel, in any territory under its jurisdiction”); U.N. Experts’ Report, *supra* note 1, at 21, paras. 42 (CAT also encompasses the prohibition of cruel, inhuman or degrading treatment), 44 (CAT “also encompasses the principle

of non-refoulement (art. 3) ... [and] the prohibition of incommunicado detention”), 24-25, para. 51, 37, paras. 87 (“degrading treatment” and “inhuman treatment”), 89 (quoted *supra* note 27).

U.S. obligations under the CAT are more extensive than the Bush administration admits, especially in view of the fact that an attempted U.S. reservation that sought to avoid the treaty’s unyielding prohibition of all forms of cruel, inhuman, and degrading treatment and to cover merely those that are prohibited under domestic U.S. law by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution is necessarily incompatible with the object and purpose of the treaty and, as such, is void *ab initio* as a matter of law. See, e.g., Paust, *supra* note 1, at 823 n.43; U.N. Experts’ Report, *supra* note 1, at 22 (regarding the U.S. “obligation to fully respect the prohibitions of torture and ill-treatment” and attempted U.S. reservations to the CAT and the ICCPR, the Experts “recall the concerns of the relevant treaty bodies, which deplored the failure of the United States to include a crime of torture consistent with the Convention definition in its domestic legislation and the broadness of the reservations made by the United States”), 45 n.48, quoting Conclusions and Recommendations of the Committee against Torture: United States of America, 15/05/2000, U.N. Doc. A/55/44, paras. 179-180 (2000) (“The Committee expresses its concern about (a) The failure of the State Party to enact a federal crime of torture in terms consistent with article 1 of the Convention; (b) The reservation lodged to article 16, in violation of the Convention, the effect of which is to limit the application of the Convention....”) and Concluding Observations of the Human Rights Committee: United States of America, 03/10/95, CCPR/C/79/Add.50; A/50/40, paras. 266-304 (para. “279. The Committee regrets the extent of the State party’s reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant....”); Vienna Convention, *supra* note 39, art. 19(c); see also Objections of Finland, the Netherlands, and Sweden to the U.S. reservation, available at <http://www.ohchr.org/english/law/cat-reserve.htm>. An additional U.S. “understanding” that the treaty does not preclude all forms of cruel, inhuman, and degrading treatment is simply erroneous and, therefore, of no legal effect. See Paust, *supra* note 1, at 823 n.43. See also O’Connell, *supra* note 1, at 1251 (“cannot alter ... legal obligations under the CAT”). Moreover, as customary and peremptory rights and prohibitions *jus cogens*, they apply universally and without any limitations attempted in treaty reservations and understandings. See, e.g., Paust, *supra* note 1, at 821-22 & nn.40-41. In *The Prosecutor v. Furundzija*, IT-95-17/1-T, Judgment (Dec. 10, 1998), at paras. 153-155, it was recognized that the prohibition of torture “has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. The most conspicuous consequence of this higher rank is that the principle at issue could not be derogated from by States .... [para. 154] an absolute value from which nobody must deviate. 155. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of

a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principles and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition....”

43. *See, e.g.*, O’Connell, *supra* note 1, at 1233, 1235, 1241, 1243-48; Paust, *supra* note 1, at 816-23, 826. *See also* Resolution of the American Society of International Law, para. 3 (Mar. 30, 2006) (“Torture and cruel, inhuman, or degrading treatment of any person ... are prohibited by international law from which no derogations are permitted.”), available at <http://www.asil.org/events/am06/resolutions.html>.