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Responding to Torture

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I. INTRODUCTION: THE 1984 TORTURE CONVENTION

Policies must operate within the bounds of law. No exemptions are allowed for war, terrorism, or torture.

Effective military operations require the gathering of information on the enemy. The means, particularly with respect to prisoners of war, are not unlimited. The Third Geneva Convention of 1949, in Articles 3, 13, and 17 imposes constraints.[1] In Article 3(c) there is a prohibition against "outrages upon personal dignity and degrading treatment". Article 13 states that prisoners of war "must at all times be humanely treated", their health not be"seriously endangered" and they must be "protected against acts of violence and intimidation." Article 17 recites that "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever." Refusals to answer questions must not result in threats, insults or exposure to unpleasant or disadvantageous "treatment of any kind".

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[1] *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 U.N.T.S. 135 (entered into force 21 October 1950). It entered into force for the United States on 2 February 1956.

The 1984 *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* refined the acts constituting torture.[2] The Convention defined torture in Article 1 as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ..." This Article identifies the purposes for which the torture is applied, by whom, what is excluded, and limitations.

In the words of Article 1, the purpose of a wrongful act is to obtain from the person "or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind ...". This applies "when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Excluded from torture is "pain or suffering arising only from, inherent in or incidental to lawful sanctions." Article 1 also provides if both operative international instruments and instances of national legislation exist, that the terms having "wider application" are to prevail.

Pursuant to Article 4, every party is obliged to make all acts of torture, including an attempt to commit torture, offences under its criminal law.

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[2] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature on 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987). The Convention stems from the General Assembly *Resolution on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. G.A.O.R., 39th Sess., 93rd mtg., U.N. Doc. A/RES/39/46 (1984). In draft form it appeared in (1984) 23 I.L.M. 1027 and in final form in (1985) 24 I.L.M. 535 (1985). For U.S. legislative actions see Library of Congress, <http://thomas.loc.gov/home/treaties/treaties.htm>, at 9 August 2005. The subject of torture was of concern to the U.S. Congress in 1984. The Subcommittee on Human Rights and International Organisations of the House Committee on Foreign Affairs conducted hearings in May and September and the Committee on Foreign Relations of the Senate held hearings in June: see C.I.S. No. 84-H381-76 and C.I.S. No. 84-S381-21. Important studies on torture include Nigel S. Rodley, *The Treatment of Prisoners under International Law* (1987) and Herman Burgess and Hans Danielius, *The United Nations Convention against Torture* (1988). Treaties and United Nations resolutions on this subject may be consulted in Rodley and in Ian Brownlie and Guy S. Goodwin-Gill (eds.), *Basic Documents on Human Rights* (4th ed., 2002). The American Society of International Law maintains a service at *Electronic Information System for International Law*, American Society of International Law, <www.eisil.org>, at 9 August 2005. The coverage involving torture is extensive.

Article 5 requires parties to take all measures as may be necessary to establish jurisdiction over Article 5 offences in the following cases:

(a) when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State; and

(c) when the victim is a national of that State if that State considers it appropriate.

Further, a party is obliged to take all necessary measures to establish "its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 ..." to any State compliant with Article 5. Article 5 also stated that the Convention "does not exclude any criminal jurisdiction exercised in accordance with internal law".

The Convention was signed by the United States on 18 April 1988. Following ratification by the President, it entered into force for the United States on 24 November 1994. By mid-2004, it had been signed by 131 countries. However, 17 States had attached reservations. These include Afghanistan, France, Israel, Ukraine, and the United States. Thirty-four States had filed declarations identifying special views. These include Australia, Bulgaria, Canada, Cuba, France, Turkey, Ukraine, United Kingdom and the United States. States accepting the original document without qualifications include Belgium, Brazil, Germany, Japan, the Russian Federation, and Sweden. The United States in 1988 added a series of "understandings" further qualifying the original agreement. Iraq is not a party.

The United States enacted Title 18, Section 2340, 2340A, and 2340B to implement the Convention on 30 April 1994.[3] The legislation became effective on 25 November 1994. Section 2340 of Title 18 restricted its application to U.S. territory, established penalties for the crime, and granted to states and their subdivisions the right to enact their own criminal statutes.

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[3] *Crimes and Criminal Procedure (Part I)* 18 U.S.C. §§ 2340, 2340A and 2340B.

Section 2340(1) identifies persons subject to prosecution. They are those who are outside the United States if that person is a United States national or if the "alleged offender is present in the United States irrespective of the nationality of the victim or alleged offender."

It also contains critical definitions. "Torture" is defined to mean "an act committed by a person acting under the colour of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." Severe mental pain or suffering means "the prolonged mental harm caused by or resulting from:

(a) the intentional infliction or threatened infliction of severe physical pain or suffering;

(b) 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;

(c) the threat of imminent death; or

(d) 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."

The United States is defined to include "all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501(2) of title 49."

Section 5 of Title 18, Part I, Chapter 1 defines the United States in a territorial sense. Included are "all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone." Section 7 spells out the "special maritime and territorial jurisdiction of the United States". Included in this category are ocean areas, vessels registered in the United States, guano islands, government and citizen owned aircraft operating in specified offshore areas, spacecraft registered in the United States, places outside the jurisdiction of any nation, foreign naval vessels scheduled to depart from or arrive in the United States when the offence is committed against a U.S. national, and U.S. diplomatic, consular, and military missions or entities. The Section also stipulates that jurisdiction extend to "any lands reserved or acquired

for the use of the United States, and under the exclusive or concurrent jurisdiction thereof ..." This would seem to include the U.S.-Cuban leasehold relating to the Guantanamo Naval Station. Section 46501(2) refers to aircraft. Section 46502 governs aerial piracy. The statute does not refer to areas under the "control" of the United States.

The jurisdictional status of the Guantanamo Bay Base was clarified in the Supreme Court case of *Rasul v. Bush* on 28 June 2004.[4] The petitioners, non-U.S. nationals, alleged they were being detained unlawfully following their capture in Afghanistan. They contended they had not been combatants and had not committed terrorist acts. They pointed to the fact they had been in custody since early 2002 and argued that they were entitled to the guarantees set out in the U.S. Constitution.

The 23 February 1903 Lease Agreement between the United States and Cuba states that "the United States recognises the continuance of the ultimate sovereignty of the Republic of Cuba over [the leased areas]" while "the Republic of Cuba consents that during the period of occupation by the United States ... the United States shall exercise complete jurisdiction and control over and within said areas." The majority opinion relied on a 1973 Supreme Court holding that "the prisoner's presence within the territorial jurisdiction of the district court is not an 'invariable prerequisite' to the exercise of district court jurisdiction under the federal *habeas corpus* statute". Thus, a *habeas corpus* hearing became available to foreign nationals captured by United States military forces.

In a concurring opinion, Justice Kennedy observed that the Naval Base "is in every practical respect a United States territory, and it is one far removed from hostilities." In their dissent, Justices Scalia and Thomas urged that access to the writ of *habeas corpus* was available to persons within the territorial borders of the United States. They concluded that Congress would have to amend 28 U.S.C. § 2241 in order for the Court to expand the scope of jurisdiction beyond U.S. territory.

If Justice Kennedy's position is accepted, the 1994 Torture Statute would apply to U.S. military personnel stationed at the Guantanamo Bay Naval Station charged with violating the rights of victims irrespective of their

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[4] 159 L. Ed. 2d. 548; 72 U.S.L.W. 4596 (2004). For a comprehensive review of the situation see Diane M. Amann, "Guantanamo" (2004) 42 Colum. J. Transnat'l. L. 263.

nationality. In any event, it makes U.S. nationals subject to prosecution for torture occurring outside the United States.

This case and those of *Hamdi v. Rumsfeld* decided on June 28, 2004[5] and *Sosa v. Alvarez-Machain* decided on June 29, 2004,[6] mentioned below, were based on the government's view it had unreviewable authority to hold persons in detention as enemy combatants resulting from the war on terrorism. This was rejected. Courts can review the detention of those persons engaged in terrorist activities.

While the facts in the *Rasul* case relate to the status of the detainee petitioners as either combatants claiming prisoner of war status or "unlawful non-combatants" and alleged terrorists, it is probable that it has application to U.S. military personnel practicing acts of torture against aliens held captive at the Guantanamo Naval Base. For U.S. citizens either the sections of the U.S. criminal code recited above and the federal Bill of Rights, notably the Fifth and the Eighth Amendments, as extended to state prosecutions by the 14th Amendment, or the Articles of War applicable to military personnel, are relevant to possible prosecutions.

Section 2340A, added on 30 April 1994,[7] limits penalties to events taking place "outside the United States." Were it not for extensive criminal laws adopted by both the federal and state governments, this restriction would not be acceptable. Nonetheless, there are many reasons why the statute should also govern torture occurring within the United States. As written, the crime consists of torture or "attempts" to commit torture. Upon conviction, there are fines or imprisonment of not more than 20 years or both. If death were to result from torture there could be the death penalty or imprisonment for any term of years up to life.

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[5] 159 L. Ed. 2d. 578; 72 U.S.L.W. 4607 (2004). Following the Court's decision the government decided not to continue with the prosecution. A deal was struck in which in which Mr. Hamdi agreed to return to Saudi Arabia after renouncing his U.S. citizenship, promised not to sue the United States, agreed not to return to the United States for 10 years, agreed to remain in Saudi Arabia for the next five years, and promised to advise the United States of any foreign travels for 15 years.

[6] 542 U.S. 692 (2004).

[7] Title V, Sec. 506(a), Pub. L. 103-236, 108 Stat. 464.

Section 2340B, which was also added on 30 April 1994,[8] is entitled "exclusive remedies". It provides that "Nothing in this chapter shall be construed as precluding the application of state or local laws on the same subject, nor shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law in any civil proceeding."

II. OTHER KEY PROVISIONS OF THE 1984 CONVENTION

Among the important provisions of the agreement is the duty, set forth in Article 10, of a party to provide training on torture to all persons who may be involved in the holding of individuals for treatment or interrogation for involvement in torture. Under Article 11, each party is to engage in a systematic review of its rules and practices in order to prevent torture. Article 12 calls for all parties to engage in prompt and impartial investigations of acts of torture. Article 13 requires parties to hear claims of persons who assert they have been tortured. Article 14 obliges a party to establish within its legal system means for rehabilitation and compensation when torture has been practiced against a victim. In these articles, reference is made to territory under the "jurisdiction" of a party. The same is true for Article 16 dealing with the critical role of a party to prevent torture. If the term "jurisdiction" is to be construed as not also extending to "control," which would enlarge the territorial area in which a signatory would be allowed to impose its authority, including the application of relevant sanctions, the utility of the agreement will have been diminished.

III. THE SENATE AND THE 1984 CONVENTION

The members of the Senate Committee on Foreign Relations traditionally have taken a deep and abiding interest in proposals for international agreements submitted by the executive. This has resulted often in extensive hearings in which affected interests make careful presentations. Members of the Committee make a public record of their preconceptions and preferences. While unable to rewrite the terms of an agreement they are able to record partisan outlooks through the adoption of reservations

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[8] Ibid.

and declarations as identified in the 1969 *Vienna Convention on the Law of Treaties* and through the further employment of understandings pursuant to customary international law. When a President ratifies an international agreement containing Senate-inspired preferences or interpretations he adopts the conditions sponsored by the Senate.

The Committee's prerogative, subject to the approval of the Senate, has often resulted in a considerable modification of the force of the agreement, as happened, for example, to the 1948 Genocide Convention. In both agreements, some Senators feared that via the treaty process, the federal government would usurp functions reserved by the Constitution to the states and that U.S. sovereignty would be constrained.

IV. SENATE RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS

On 20 May 1988, three reservations to the Torture Convention were set forth.[9] The first, which allowed for U.S. implementation only to the extent that it "exercises legislative and judicial jurisdiction over matters covered ..." Further, taking into account the federal system of states, referred to as "constituent units", the Committee conditioned its acceptance for such units only to the extent that they "exercise jurisdiction over such matters," and subject to the announced purpose of the federal government to take action allowing state and subordinate governments to "take appropriate measures for the fulfilment" of the Convention. This formulation was rejected by the full Senate on 27 October 1990 when in reviewing the federal-state relationship it determined that "this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of

[9] See Library of Congress, above n. 2.

the United States of America may take appropriate measures for the fulfilment of the Convention."[10]

This reservation was addressed to the possibility that prosecutions in the United States might be addressed in both Federal and state courts to the extent they possessed jurisdiction. This concern was based on the possibility that both levels of government in a torture case might attempt to prosecute a given defendant under their own laws.

V. PROSECUTIONS UNDER STATE LAWS: THE 1963 VIENNA CONVENTION ON CONSULAR RELATIONS

In the event of a prosecution of an alien, the 1963 Vienna Convention requires that notice of this fact be given by prosecutors to consular officials of the alien's nationality.[11] On 27 June 2001, a case was decided by the World Court brought by Germany alleging that Arizona had failed to provide notice, as required by Article 36(1) of the Convention, of the prosecution of German nationals who were subject to a death sentence.[12] Finding that the notice of the prosecution had not been made, the Court directed the United States to comply with the terms of the treaty and to pay compensation to the families of the prisoners. The Court held both Arizona and the United States to be at fault. The United States was deemed responsible for Arizona's non-compliance with the treaty.

A second case, *Avena and Other Mexican Nationals*, involving the failure of the U.S. to give notice to Mexican consular officials of the prosecution of 54 Mexican nationals on death row, was decided by the Court on 31 March 2004.[13] It involved state court proceedings in nine different cases between 1979 and 2004. The Court held that the United States "by means of its own choosing" should engage in a "review and reconsideration of the convictions and sentences of the Mexican nationals ..." Further, the Court accepted "the commitment undertaken by the United States of

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[10] Amendment No. 3201, 27 October 1990, as found at the Library of Congress, <http://thomas.loc.gov/cgi-bin/query/D?r101:3:./temp/-r101ltSfM4>, at 9 August 2005.

[11] *Vienna Convention on Consular Relations*, opened for signature on 24 April 1963, 596 U.N.T.S. 261 (entered into force on 19 March 1967).

[12] *LaGrand (Germany v. U.S.A.) (Merits)* (2001) 40 I.L.M. 1069.

[13] *Avena and Other Mexican Nationals (Mexico v. U.S.A.) (Merits)* (2004) 43 I.L.M. 581.

America to ensure implementation of the specific measures adopted in performance of its obligations" and found "that this commitment must be regarded as meeting the request of the United States of Mexico for guarantees and assurances of non-repetition."[14]

On May 13, 2004, a decision by the Oklahoma Court of Appeals in the case of *Torres v. Oklahoma* offers a constructive approach.[15] Following the application of the accused for post-conviction relief, the Court of Criminal Appeals ordered that the execution date be stayed pending the Court's order. It granted the request for an evidentiary hearing before the trial court. The hearing was to consider two issues. The first was whether Torres had been prejudiced by the violation by the state of his rights under the Vienna Convention because of the failure to advise him, after he was detained, of his right to contact the Mexican consulate. The second dealt with the alleged ineffectiveness of counsel.

Justice Chapel in a special concurring opinion referred to principles of international law, the U.S. Constitution, the role of the Department of State, the World Court's holding in the *LaGrand* case, which in his view had authority "to provide a binding resolution of disputes under the Vienna Convention", and the holding in the *Avena* case.

Two members dissented. They noted that the *Avena* decision was not that of the U.S. Supreme Court, which had denied an application for a writ of *certiorari*. The dissenters urged that post-conviction relief was barred by *res judicata* and waiver and that the holding in *Avena* could not "revive a stale claim". In their view, even in the absence of conformity to the Convention, the accused had been represented by "competent lawyers at each stage of these proceedings and afforded all the rights guaranteed to citizens of the United States".

The majority opinion suggests that if an alien were prosecuted for torture in a state tribunal, the state must conform to the notice provisions set forth in the Vienna Convention. One way to overcome the prospect of

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[14] Ibid., at 624.

[15] . On 29 September 2004, California enacted legislation requiring obligatory advisement of consular rights upon incarceration of aliens and to provide lists of imprisoned foreign nationals to consulates upon request.

violations of the Vienna Convention would be for the United States to act promptly to bring the first prosecution, if that were possible, thus pre-empting the states from the consequences of failing to conform to the Convention. Another would be for the U.S. to monitor more closely the manner in which the states engage in the administration of justice.

The second Senate reservation applied to Article 16 which created the duty of a party 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, when such acts are committed by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity. The United States conditioned this Article so that it would have application only to the "cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States".

The Senate's third reservation applied to Article 30(2) which dealt with procedures for disposing of interpretations of the agreement, including a referral to the World Court. The United States rejected the jurisdiction of that tribunal but stated it would consider on a case-by-case basis a reference of a matter to arbitration or to the Court.

In the eight understandings announced by the Senate one dealt with the meaning to be assigned to torture as set forth in Article 1. "Torture" had to be "specifically intended to inflict severe physical or mental pain or suffering", as set forth in the agreement, and further that such pain or suffering referred to "prolonged mental harm caused by or resulting from:

1. the intentional 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."[16]

This understanding was adopted in Title 18, Section 2340 of the United States Code.

This understanding was implemented by the statement that such acts of torture must apply only to acts "directed against persons in the offender's custody or control", that the tem "sanctions" included "judicially imposed sanctions and other enforcement actions authorised by United States law or by judicial interpretation of such law provided that such sanctions or actions are not clearly prohibited under international law." On 27 October 1990, the Senate added: "Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture."[17]

In an abundance of caution, the Senate attached additional understandings to the agreement.[18] In number four the term "acquiescence" appearing in Article 1 was interpreted to require "that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity".

Number 5 referred again to Article 1 where the United States indicated, "Non-compliance with applicable legal procedural standards does not per se constitute torture". The sixth understanding referred to the terms of Article 3 which provided "where there are substantial grounds for believing that he would be in danger of being subjected to torture" to depend on whether "it is more likely than not that he would be tortured".

The seventh responded to the terms of Article 14 relating to rehabilitation and reimbursement. It requires "a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party". The last of the understandings related to the imposition of the death penalty. It stated that the United States "understands that international law does not prohibit the United

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[16] Library of Congress, above n. 2.
[17] Amendment No. 3202, above n. 10.
[18] Library of Congress, above n. 2.

States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty."

Two declarations were added to the foregoing.[19] The first stated that Articles 1-16 inclusive were not self-executing. A significant provision of the Convention called for the creation of a Committee consisting of impartial persons to receive complaints respecting the existence of torture. On this subject, the United States declared pursuant to Article 21(1) that it "recognises the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State which has made a similar declaration."

As a further reflection of the Senate's involvement and participation in the treaty process it directed the President not to "deposit [with the U.N. Secretary-General] the instrument of ratification until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or authorises legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States".[20] This condition has resulted from U.S. membership in international organisations vested with taking administrative decisions, having universal operation, by a majority vote. This procedure is considered by the United States to violate the treaty-making process set forth in the Constitution. The foregoing directive was to be included in the instrument deposited with the United Nations. The "as interpreted by the United States" provision reflects the longevity of the Senate's concern, voiced after World War II at the time of the debate over America's acceptance of the compulsory jurisdiction of the International Court of Justice respecting the authority of that international tribunal. At that time, the Connally Reservation or amendment was adopted to prevent the United States from being subject to the entire jurisdiction of the Court.

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[19] Ibid.

[20] Amendment No. 3202, above n. 10.

Treaty subjects that do not excite differences between the negotiating parties may not call for national reservations, interpretations, or declarations. On some topics, States have agreed that there are to be no exceptions or qualifications. But, where States intent on preserving patterns of conduct imposed by their own laws, or where their concerns for national sovereignty are considered to be non-negotiable, in order to obtain the maximum amount of agreement, it is practical to allow for identified exceptions. When viewed in this light the conditions set forth by the United States may be considered reasonable. They tied the treaty terms to existing Federal legislation thereby clarifying the meaning to be given to critical provisions. In light of America's federal system of government, it was particularly important to identify the responsibilities of the constituent units with both the central government and the units supportive of the death penalty. These considerations were not allowed to produce an inconsequential agreement. Though short on procedures to prevent the practice of torture, this was soon to be corrected.

VI. THE OPTIONAL PROTOCOL OF DECEMBER 18, 2002

Resonating demands for the protection of Human Rights have emphasised the need for effective procedures to maximise this goal. The 1993 World Conference on Human Rights declared if torture is to be eliminated the first objective of States must be its prevention. On December 18, 2002, the U.N. General Assembly adopted Resolution 57/199 entitled "Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." Protection of persons, would, in the terms of the Resolution, be "strengthened by non-judicial means of a preventive nature, based on regular visits to places of detention."

The Resolution, drafted as an international agreement, made provision for a Subcommittee to carry out the Protocol's objectives. To achieve these goals each signatory is to create a national preventive mechanism consisting of one or more visiting bodies. They are to inspect places of detention in signatory States to ascertain if detainees are or may be deprived of their liberty by an official act, by the instigation of a public authority, or "with its consent or acquiescence."

The Protocol in Article 3(2) defines deprivation of liberty. It "means any form of detention or imprisonment or the placement of a person in a

public or private custodial setting which that person is not permitted to leave at will or by order of any judicial, administrative or other authority."

The agreement makes provision for the composition of the Subcommittee, method of selection, and terms of office. It is authorised to act on behalf of the UN General Assembly. It will visit places where persons are believed to have been deprived of liberty under the above circumstances. It is empowered to publish restricted private and public annual reports. Parties must create one or more independent national preventive mechanisms. Federal systems of government may establish "decentralised units" to implement the national mechanisms.

Only those States that are parties to the 1984 Convention can become signatories. No reservations may be made. Twenty ratifications are required for the agreement to enter into force. At the end of April 2004, it had been ratified by three countries and signed by an additional twenty-two. They consist principally of English speaking and Nordic countries.

The agreement failed to identify the source for the funding of the Subcommittee. On September 8, 1992, the Conference of States Parties adopted an amendment providing that the members were to "receive emoluments from United Nations resources..." as decided by the General Assembly. The amendment, which contained the request that the Secretary-General "take appropriate measures to provide for the funding" of Subcommittee costs from the "regular budget" of the U.N. was adopted by General Assembly Resolution 47/111 on December 16, 1992.

VII. CIVIL ACTIONS FOR HARMS RESULTING FROM TORTURE: THE TORTURE VICTIM PROTECTION ACT OF 1991

Concern over acts of torture led to the adoption of the *Torture Victim Protection Act* of 1991.[21] Section 1350 allows for civil actions for damages against "an individual who, under actual or apparent authority, or colour of law, of any foreign nation..." engages either in the torture of an "individual" or an "extrajudicial killing." In the event of torture, the claim

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[21] Pub. L. 102-256, March 12, 1992, 106 Stat. 73. Its history can be traced back to 1911. Ch. 231, Sec. 24, Par. 17, 36 Stat. 1093.

is that of the tortured individual. In the event of an extrajudicial killing the action must be brought by the legal representative or by any person "who may be a claimant in an action for wrongful death." The statute requires the exhaustion of the "adequate and available remedies in the place in which the conduct giving rise to the claim occurred." There is a ten-year statute of limitations.

For the purposes of this statute, the term "extrajudicial killing" means: "a deliberated killing not authorised by a previous judgment pronounced by a regularly constituted court affording all judicial guarantees which are recognised as indispensable by civilised peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation."

The term "torture" also for the purposes of the statute is defined but in somewhat different terms than those used in Section 2340 of Title 18.[22] Section 2340 refers to "persons," while Section 1350 uses "individuals." Section 2340 requires that the severe mental pain or suffering be "specifically intended" to produce that result. Section 1350 says that this condition need only be "intentionally inflicted." Conviction under Section 2340 depends on the accused having acted "under the colour or law." Section 1350 dealing with damages employs "under actual or apparent authority or colour of law." A claimant must demonstrate he/she was "in the offender's custody or physical control." This Section in dealing with extrajudicial killing exempts from its coverage an act that "is lawfully carried out under the authority of a foreign nation."

Section 2340 conditions a conviction on "severe mental pain or suffering." Section 1350 merely requires "mental pain or suffering," but both provide that it must be "prolonged mental harm." Paragraphs (A) through (D) of each of the sections are identical, except, as noted, Section 1350 refers to "individuals" rather than a "person."

VIII. THE TORTURE VICTIMS RELIEF ACT OF 1998

America's concern about torture and extrajudicial killing has extended beyond criminal prosecutions and provision for civil actions for damages.

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[22] Above n. 3.

In the "Torture Victims Relief Act of 1998",[23] extensive provision was made for identifying victims, their rehabilitation, and for worldwide prevention. Funding was authorised for foreign and domestic treatment centres and for the U.N. Voluntary Fund for the Victims of Torture, including the work of the Special Rapporteur on Torture and the Committee against Torture established by the 1984 Convention. U.S. support was to be accorded to mechanisms in countries where there was a need to investigate Human Rights violations when these indicated that a "systematic practice of torture" was present. The Secretary of State must provide training to Foreign Service officers with a wide-ranging curriculum so they will be sensitised to the problem.

Torture was defined by reference to Section 2340(1) of Title 18 of the U.S. Code.[24] To this was added "the use of rape and other forms of sexual violence by a person acting under the colour of law upon another person under his custody or physical control." This provision adopts the recently promulgated view that rape constitutes a major violation of Human Rights as indicated in Article 5 entitled "crimes against humanity" of the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia where both torture and rape are listed.[25] In the 1998 Statute of the International Criminal Court rape is included in Article 8.2(e) (vi) as a violation of the laws or customs of war applicable in armed conflicts not of an international character.[26]

Congressional findings used to support the 1988 statute identified torture as a means to "destroy individual personality and terrorise society." It declared that torture is used by "repressive governments ... as a weapon against democracy." A major goal is to "help to heal the effects of torture and prevent its use around the world."

The statute also made provision for "assistance for victims of torture." Rehabilitation is to be advanced through grants to treatment centres and

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[23] Title 22, Section 2152, Foreign Relations and Intercourse, Chapter 22, Foreign Assistance, Subchapter I, International Development, Part I, Declaration of Policy; Development Assistance Authorizations, Pub. L. 105-320, October 30, 1998, 112 Stat. 3016, as amended.Pub. L. 106-87, Section 6(b), 113 Stat. 1302, November 3, 1996.

[24] Above n. 3.

[25] U.N. Doc. S/RES/827, May 14, 1993.

[26] U. N. Doc. A/CONF. 183/9, July 17, 1998.

programs in foreign countries, which are "carrying out projects or activities specifically designed to treat victims of torture for the physical and psychological effects of the torture." U.S. funds will not be paid to the harmed person. Victims will receive "direct services" at treatment centres. Health care providers may also obtain funding for research and training purposes.

Private organisations and individuals have also supported the psychological repair of individuals who have been tortured. It is interesting to note that worldwide support of this cause has not received the same attention as that given to the removal of anti-personnel land mines and the rehabilitation of those suffering casualties from these weapons.

IX. TORTURE AND THE FEDERAL ALIEN TORT CLAIMS ACT OF 1789

The foregoing international agreements, the several Federal statutes dealing with torture, and the statutes of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda in establishing crimes for which the courts have jurisdiction in which reference is made to torture, identify the importance of the crime, the availability of civil actions and signal significant attention in the future. Particular focus is placed on events occurring during armed conflict.

The statute of the Yugoslavian tribunal in which Article 2 dealt with grave breaches of the Geneva Conventions of 1949 made reference to torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health. Article 5 set forth a long list of crimes against humanity including murder, torture, and other inhuman acts. The jurisdiction of the Rwanda tribunal was more restricted, but it included crimes against humanity. It was not given jurisdiction respecting violations of the laws or customs of war.

One of the most pressing and sustained questions confronting American international lawyers is the meaning to be accorded to the 1789 statute. It allows claimants to sue in U.S. federal courts "for a tort only committed in

violation of the law of nations or a treaty of the United States."[27] Much of the debate has centred on the term "law of nations," and whether this applies only to the status of international law in 1789, or whether it can include the expansion of international law since that date via customary processes and procedures. The Human Rights movement, with the incorporation into international law of many Human Rights principles and concepts, has resulted in legal proceedings on the part of individuals who contend that governmental action may constitute a tort as well as being criminal.

In the *Sosa v. Alvarez-Machain* case[28] decided by the United States Supreme Court on June 29, 2004 involving a claim for damages resulting from an extraterritorial kidnapping the Court refused to extend the statute to cover this conduct since Congress had not adopted a statute or endorsed a procedure allowing for damages for such conduct. The relatively brief detention was not equated to the type of offence that would have been actionable at the time the statute was enacted. The holding has been construed by government lawyers as allowing for a valid cause of action if the crime had been clearly identified by Congress.

Opposing this outlook there is substantial support for the view that 18th century violations of customary international law, such as slave trading or torture, do meet the tests set forth in the opinion. These proponents also have included genocide, apartheid, and other serious violations of Human Rights as within the scope of the opinion. On the other hand, Justice Souter opined that the practical implications of the 1789 statute would allow only for a "modest" number of actions where the violations of international law are most evident. He stated, "Other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant door keeping, and thus open to a narrow class of international norms today." He also stated in the narrow area of international relations "federal common law continues to exist." By this statement, he intended to convey that Federal district courts could identify new causes of action under the statute. This was addressed to the view of Justice Scalia that courts were not well equipped to perform judicial functions in such matters.

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[27] 28 U.S.C. 1350.
[28] No. 03-339. Above, n. 6.

The "door ajar" approach received further support from Justice Souter when he stated: "It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals." In short, he urged that the Supreme Court should not "shut the door to the law of nations entirely." In addition, more specifically: "For purposes of civil liability...torture has become like the pirate and slave trader before him – *hostes humani generis*, an enemy of all mankind."

Since proof of torture and other inhuman acts has not presented difficulties to the Yugoslav and Rwanda courts, it should not constitute a problem in the U. S. Federal courts.

With respect to tort claims stemming from torture, it is evident that they may be filed in United States federal courts based on the Torture Victim Protection Act of 1991. Whether complaints based on the 1789 statute are to be allowed remains to be seen. Torture is a more serious crime than kidnapping and piracy and the 1984 Convention could be read as confirming pre-existing customary international law dating back to 1789. Litigation will provide the answer on how far ajar the door really is in suits brought under the 1789 statute. This statute, unlike Section 1350 of the 1991 Torture Victim Protection Act, does place limits on where to wrongful conduct occurs. It does not require that the conduct be under the public authority or colour of law of a foreign state.

In these circumstances persons, including both U. S. citizens and aliens, held as detainees by the United States following their capture in Afghanistan or their arrest in the United States as terrorists, if they can state a cause of action for torture, will undoubtedly sue the perpetrators and the U. S. government under existing tort law.

In the recently decided U. S. Supreme Court case of *Hamdi v. Rumsfeld*[29] a U.S. citizen fighting for the Taliban in Afghanistan, and held as an enemy combatant, obtained a ruling that due process entitled him to have access to the federal judicial process to challenge his detention. In the face of the President's decision that alleged terrorists could be held for interrogation without fixed time limits, Justice O'Connor held "It would

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[29] No. 03-696. Above n. 5.

turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government." She added that the Constitution "most assuredly envisions a role for the three branches when individual liberties are at stake."

X. TORTURE AND INHUMAN TREATMENT OF DETAINEES AND PRISONERS OF WAR: THE ABU GHRAIB DEBACLE

Following the disclosure in early 2004 of humiliating practices employed by some U.S. military personnel while obtaining intelligence from Iraqi prisoners of war at the Abu Ghraib Joint Interrogation and Debriefing Centre a series of high-level investigations were instituted. Focus was on the behaviour of members of the 205th Military Intelligence Brigade and its 519th Military Intelligence Battalion and on the 800th Military Police Brigade and its 372nd Military Police Company. In August 2004, an article in the journal Lancet disclosed major derelictions on the part of U.S. medical personnel on duty at the Abu Ghraib prison. This revelation is particularly disturbing because medical personnel are expected to be the first to protect against human rights abuses.

Guidance for such personnel was set forth in General Assembly Resolution 37/194 of December 18, 1982 entitled "Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment". Principle 2 states: "It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment." The conduct of medical personnel has been made the subject of inquiry.

The Iraqi prisoners are entitled to the protections of the laws or customs of war as particularly identified in the Third Geneva Convention of 1949 regarding treatment of prisoners, the 1984 Convention against Torture,

and the 1966 International Covenant on Civil and Political Rights.[30] Further, it is "generally accepted that customary international law prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment.'"[31]

To insure compliance with basic principles the U.S. Army issued Field Manual 34-52 entitled "Intelligence Interrogation." It emphasises that the techniques identified do not allow for physical or mental torture or any other form of mental coercion. This basic document has been augmented by Department of the Army orders and regulations.

Compliance with these rules and directives by the Abu Ghraib personnel occurred in a condition of considerable disarray and command uncertainty. This is reflected in high-level reports and testimony. In March 2004, Maj. Gen. Antonio M. Tagabu, following an investigation of the prison, reported that that the commander of the 205th Military Intelligence Brigade and the head of the interrogation centre were "'directly or indirectly responsible' for the detainee abuses because they failed properly to train or supervise soldiers under their command."[32] In testimony before the Senate Armed Services Committee in May 2004, Lt. Gen. Ricardo S. Sanchez, who was the U. S. commander in Iraq at the time, stated that the command structure at the prison was "dysfunctional."[33] Subsequently in July Lt. Gen. Paul T. Mikolashek, the Army Inspector General, reported that the detention operations suffered from poor training, haphazard organisation, and outmoded policies. However, in his view these did not contribute to the abuses at the prison.

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[30] General Assembly Res. 2200, 19 December 1966, (1967) 6 I.L.M. 368. When the United States ratified the 1966 Covenant, it declared the agreement was not self-executing. 138 Cong. Rec. 8071 (1992).

[31] F. L. Kirgis, "Distinctions between International and U. S. Foreign Relations Law Issues Regarding Treatment of Suspected Terrorists," Insights@asil.org, 17 June 2004. He stated that "the quoted language is from the 1977 Protocol I (Art. 75(2)(b) to the Geneva Conventions. The United States is not a party to Protocol I and thus does not have a treaty obligation imposed by that Protocol, but Article 75 of the Protocol is regarded as verbalizing a customary rule that binds nation-states even if they are not parties to the Protocol."

[32] *Los Angeles Times*, 1 August 2004, p. A21.

[33] *Los Angeles Times*, 1 August 2004, p. A20.

With the need for operational guidance for the guards and intelligence personnel at the prison in the late summer of 2003 Captain Carolyn A. Wood, an officer assigned to the 519th Military Intelligence Battalion, prepared a two column chart entitled "Interrogation Rules of Engagement." One column listed approved interrogation techniques based on the Army Field Manual. The second column identified procedures that are more coercive. They were accompanied by the written statement that the latter required special command approval before use. The chart was posted at the interrogation centre.

In the Final Report of the Independent Panel to Review Department of Defence Operations, dated August 24, 2004, which was chaired by former Secretary of Defence, James R. Schlesinger, reference was made to her interrogation rules.[34] They had been based on information contained in Department of Defence Office of General Counsel and Pentagon approved Special Operation Forces Standard Operating Procedures (SOP) and on the Army Field Manual 34-52. Her list was described as a "near copy" of the Pentagon SOP. The Pentagon directive departed from the previously published Field Manual.

It remains unclear whether the Wood memorandum received the express or implied approval of officers at the command level. It bore the logo of the Army's Iraq headquarters. In any event, its use, and the unlawful prison practices, has resulted in high-level military and congressional inquiries into possible deviations from the international and national legal requirements governing these matters.

A senior military lawyer in Iraq, following an interview with Captain Wood, stated that the chart was intended as a "prophylaxis" and that it had been prepared with "good intentions."[35] The uncertain guidance level at the prison, which had resulted in the Wood chart, reflected the absence of controlling guidelines issued by higher authority. There was confusion as to who was ultimately in charge. The unacceptable Abu Ghraib

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[34] Other members of the panel were former Secretary of Defense Harold Brown, former Congresswoman Tillie K. Fowler, and General Charles A. Horner, a retired Air Force officer. The Panel was convened by Secretary of Defense Donald Rumsfeld. The Report appears at <http://www.defenselink.mil/transcripts/2004/tr20040824-secdef1221.html>, last accessed on 12 August 2005.

[35] Above n. 32.

practices serve to emphasise the advice given by General Douglas MacArthur: "In no other profession are the penalties for employing untrained personnel so appalling or so irrevocable as in the military."

The chart was readily observable at a time when legal and policy uncertainties faced the guards and interrogators. It can be assumed that the chart was intended to guide the conduct of these individuals. It appears to have been implemented until General Sanchez issued his first written regulations, which occurred after the posting of the Wood chart.

The situation at Abu Ghraib was influenced by the interrogation procedures employed at the Guantanamo Naval Base whose senior officer was Maj. Gen. Geoffrey Miller between November 2002 until he was assigned to Iraq in April 2004. In August and September 2003, he was detailed to Iraq to provide guidance on the improvement of intelligence gathering procedures there. He urged a policy whereby military police would prepare detainees for interrogation with the expectation that this would "maximise" the effectiveness of interrogation.[36] While this procedure had resulted in the acquisition of information from the alien detainees, who have been held as non-POW captives (unlawful combatants) at Guantanamo, other high-level military officials considered this practice inappropriate in Iraq.

Lt. Gen. Ricardo Sanchez, after receiving the Miller recommendations, stated, "They might have to be modified for use in Iraq where the Geneva Convention was fully applicable."[37] General Miller has stated that the procedures at the Naval Base did not constitute torture. He placed the blame in Iraq on the prison leadership for "implementing only some of his recommendations – on detention and intelligence analysis – but not on others that could have bolstered supervision and prevented abuses."[38]

With the capture of many POWs, with revelations of abuses and disarray at Abu Ghraib, and with a concern respecting command failures, a series of investigations were instituted. Beginning with Army Reports and culminating in the Schlesinger Panel Report failures were identified, blame was assigned, prosecutions were begun, and recommendations for

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[36] *Christian Science Monitor*, 28 June 2004, at p. 5.
[37] Ibid.
[38] Ibid.

changes were made. Both military personnel and civilians were found at fault, including CIA employees and non-military civilian personnel employed by the Army to assist in the interrogation of prisoners.

Investigations have been conducted by the Army, by the Department of Justice, by the CIA, by the Senate Armed Services Committee, by the International Committee of the Red Cross, and by important Human Rights organisations. Other reports are pending including one conducted by the Navy. The inquiries initially focused on the behaviour of military intelligence and military police units in Iraq. They reached into the different levels of the command structure in the field and to officials in the Pentagon.

Department of Defence concerns led to the designation of General Paul Kern to probe the entire situation. His chief investigators were Lt. Gen. Anthony R. Jones and Maj. Gen. George E. Fry. Their inquiries focused on military intelligence, military police, and civilian contract negotiators. General Kern summarised their findings by saying there had been "serious misconduct" coupled with "a loss of moral values."[39] He concluded that the practices amounted in some instances to "torture."[40] He also considered that those who had engaged in such conduct were subject to criminal prosecutions and to civil claims for damages. The prosecutions instituted against Abu Ghraib personnel deal with cruelty, mistreatment, and dereliction of duty for failure to intervene and to report abuses, indecent acts, and conspiracy.

The Report of the Schlesinger Panel covered the period of October through December 2003. It was based on information available up to mid-August 2004. The focus was on operations in the field. It did not condemn the Secretary of Defence. However, he has come under severe criticism for his conduct. In the Report the Panel pointed to "tensions between military necessity" and national security. In its view, there was a need for a "sharper moral compass."[41] It concluded that the "abuses" were "not a part of authorised interrogation nor were they even directed at intelligence targets."[42] Conditions surrounding the abuses were identified.

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[39] *Los Angeles Times*, 26 August 2004, p. 1.
[40] Ibid.
[41] Panel Report, above n. 34, at 1.
[42] Ibid.

These included poor training, insufficient staffing, inadequate oversight, confused lines of authority, the existence of evolving and unclear policies, delays in the arrival of additional troops, hazards resulting from daily attacks, and "a generally poor quality of life."[43] The Report identified the abuses, which had occurred during interrogation sessions. The most serious finding was that the abuses represented "deviant behaviour and a failure of military leadership and discipline."[44]

In July 2004, the Pentagon announced the formation of an "Office of Detainee Affairs." Its charge was to advise the Secretary of Defence on how to deal with enemy combatants and POWs now held in military prisons. The new Office will not inquire into the subject currently vested in another Pentagon group, which is engaged in combat status reviews of prisoners held at the Guantanamo Naval Base to determine if they are being properly characterised as unlawful enemy combatants.

In the meantime about 50 lower level military personnel overall are being held for possible prosecution with the charges being neglect of duty and the physical abuse and humiliation of the captives. One other has pleaded guilty and sentenced to one-year imprisonment with the charges having been the same as those just identified. Investigations leading to possible punishments for several officers are pending.

For these occurrences, the United States government has been severely criticised abroad for its unwillingness or inability to obtain compliance with international law and at home for the violation of its own laws. The efforts of the United States in the Security Council have been undermined as it has sought an extension previously allowed whereby the United States would be exempt from the jurisdiction of the International Criminal Court. That exemption now shields American peacekeeping troops from international prosecutions for war crimes.

The relevance of international law to the "war against terrorism," including the military action being carried out in Afghanistan and Iraq, has been demonstrated at home by attention accorded by the public, in the press, in motion pictures, and most importantly by political leaders, by governmental lawyers, by the private bar, and by members of the academic

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[43] Ibid.
[44] Ibid.

profession. The concern is universal with some of the most cogent comments coming from abroad. The use of American forces in these areas has raised questions relating to the applicability of law dealing with terrorism, with intelligence gathering procedures, and involving the alleged use of torture.

Terrorism merits enormous concerns. In recent months, there have been numerous instances of its effectiveness. The trend seems clear that it will be an expanding force producing a higher degree of national and international anxiety and instability. Whether terrorists can qualify as prisoners of war and claim the benefits of the 1949 Geneva Convention depends on important treaty provisions. The agreement fixes the conditions qualifying an individual for POW status. Terrorists may or may not meet the treaty conditions. At present, the Bush administration has accepted the binding force of treaties governing prisoners of war while seeking to distinguish between treaty-based prisoners and those believed to be outside that class. To the extent that acts of terrorists constitute violations of national statutes, they are subject to prosecution in national tribunals.

However, with regard to the 1984 Convention against Torture a very worrisome argument has been advanced by some executive branch lawyers. The Wall Street Journal early in June 2004, reported that the Secretary of Defence had determined that U. S. military personnel were not subject to the treaty and implementing national legislation. This was based on the view that the President's wartime Commander in Chief status enabled him to determine that the prohibitions against forms of interrogation constituting torture were not applicable.

This quite remarkable claim has been much criticised. It has been viewed as an impermissible unilateral effort to invalidate a treaty commitment of the United States. It would set aside universal efforts to render armed conflict a more humane undertaking. It would also render inapplicable relevant U. S. Supreme Court decisions imposing limitations on executive conduct in time of armed conflict.

Following President Truman's order seizing steel mills during the Korean conflict the Court ruled that the president's wartime powers under the Constitution could not support such action. In a concurring opinion, Justice Jackson identified conditions in which the president's power ranged from the most to the least extensive. In the lowest category was the

circumstance in which the "President takes measures incompatible with the expressed or implied will of Congress." It was at this point that "his power is at its lowest ebb..."[45] With the relevant treaties having been approved by the U. S. Senate, and with the supportive legislation enacted by the Congress, most professional opinion would deny the validity of the Rumsfeld position.

While Federal Courts have approached separation of powers issues with caution, often voicing concerns about treading on legitimate executive powers, the Supreme Court ruled against former President Nixon's claims on three occasions when issues of national security were raised. In a slowly moving judicial system, the Supreme Court may be obliged to render decisions only when the white-hot heat of the crisis has passed. However, this need not be the case.

The relevance of the 1949 and the 1984 Conventions to Al Qaeda, Taliban detainees, and to Iraqi prisoners of war has been acknowledged by President Bush. In a February 7, 2002 Memorandum to U. S. officials referring to the situation in Afghanistan he stated: "I hereby reaffirm the order previously issued by the Secretary of Defence to the United States Armed Forces requiring that detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." On June 2, 2004 in a statement to NATO leaders, in which they joined, the promise was made by the President to accord "full respect" to the Geneva Convention for prisoners of war in Iraq.

Against these statements must be weighed the facts and allegations relating to prisoners in U. S. custody in Abu Ghraib, other prisons in Iraq, and at the Guantanamo Naval Base.[46] In order to maximise the amount of information supplied in these places policy memos to offer guidance in the conduct of interrogations were prepared at high levels in Washington. They focused on proposed methods, including "tough procedures," or "harsher methods," which would be both effective and lawful. Conduct was identified considered borderline or which crossed into areas of prohibited conduct.

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[45] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) at 637.

[46] In 98 A.J.I.L. 591-596, there is a detailed report of the Abu Ghraib abuses.

When leaked to the press it became evident that the proposals were ambiguous and contradictory. One White House lawyer called for strict compliance with the Geneva requirements in Iraq because the war was against a traditional State. This was followed by the release on June 22, 2004 by the White House and the Department of Defence of detailed, but not necessarily complete documents relating to current interrogation procedures. It was reported, for example, that a letter from the Department of State legal adviser to the Department of Justice containing highly critical comments on views expressed relating to the relevance of the Geneva Convention was omitted.[47]

One of the released memos, authored in part by John C. Yoo, a Department of Justice lawyer, dated August 1, 2002, dealt with the definition of torture under federal laws. The analysis focused on the different views contained in the position paper and the definition of torture contained in the 1984 Convention. At issue was the meaning to be given to "specific intent" to inflict "severe physical or mental pain or suffering." In his view, there was a need for analysis of these terms since the words were "rare in the federal code, no prosecutions have been brought under it, and it has never been interpreted by a court."[48] Following his research, he concluded that "the United States intentionally [had] defined torture strictly" and that this was consistent with the policies adopted by the Reagan and first Bush administrations.[49]

Despite the need for a strict interpretation Professor Woo observed that Congress had not precluded a country's right to rely on "self-defence and necessity" despite the language of the Torture Convention "to the contrary." Supporting this observation was the assertion of the highly disputed claim that in extreme wartime situations a Chief Executive can take actions going beyond the terms of national statutes. In his view, his memo identified constitutional options open both to the Congress and to the President. His own outlook was expressed: "A lawyer must not read the law to be more restrictive than it is just to satisfy his own moral goals, to prevent diplomatic backlash or to advance the cause of international

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[47] *Washington Post*, 24 June 2004, p. AO7.
[48] *Los Angeles Times*, 6 June 2004, at p. B11.
[49] Ibid.

human rights."[50] Lawyers by their calling are obliged to make judgments, which are controversial. Professionalism and the integrity of the bar require that respect must be given to controversial views. Without this fundamental condition, basic rights and duties would soon disappear.

Concern for interrogation practice was reflected in a Department of Defence draft "Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal Historical, Policy, and Operational Considerations" prepared in 2003.[51] The cumulative effect of the memos prepared by the Departments of Justice and Defence and in the White House created uncertainty as to the meaning of the Geneva and Torture Conventions and federal laws. This led to equivocal statements within the Department of Defence, which in turn produced a less than strict mental framework for the highest and lower level U. S. military personnel.

At the time of the June 22, 2004 release of the governmental memos, President Bush stated: "I have never ordered torture," and that the practice of torture was "inconsistent with American values." Nevertheless, at the bottom of the operational command structure, possibly resulting from a seeming indifference or confusion on the part of higher leaders, and more in evidence in Iraq and in Afghanistan than at Guantanamo, there were more than a few and probably numerous instances of shockingly cruel, degrading and inhumane conduct by Americans acting in official capacities. More difficult to determine is whether such conduct may be characterised as comporting with U.S. policy. If so it was a departure from the Presidential Memorandum entitled "Humane Treatment of Al Qaeda and Taliban Detainees" of February 7, 2002. Hopefully, on-going investigations will disclose that the unlawful conduct at Abu Ghraib resulted from the aberration of a few renegade personnel. This would not be inconsistent with findings of failures within the Army's command structure.

In light of the prosecutions of the personnel who engaged in the prohibited conduct it is evident that their actions have been perceived as contrary to both law and policy. Any climate or culture providing rewards

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[50] Ibid.

[51] <http://wsj.com/public/resources/documents/military_0604.pdg>.

for the use of torture or brutal interrogation procedures to obtain withheld military information, like the "body count" culture of the Vietnam War, having transgressed legal boundaries, inevitably must lead to prosecutions. In the Iraq war, the severe demand for the maintenance of a military climate denying the possibility of abuses by military personnel of the laws or customs of war was not met. Absent a firm commitment to the illegality of torture, however defined, the moral grounds for the prosecution of Saddam Hussein, and all others who entertain similar outlooks and who have engaged in or condoned acts of torture would be significantly imperilled. Prosecutions should be augmented by civil actions for money judgments. Victims of torture and other forms of inhumane treatment must receive meaningful rehabilitation.