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# The Relevance of International Law to the Domestic Decision on Prosecutions for Past Torture

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# THE RELEVANCE OF INTERNATIONAL LAW TO THE DOMESTIC DECISION ON PROSECUTIONS FOR PAST TORTURE

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## INTRODUCTION: U.S. TORTURE POLICY AT A CROSSROADS

The newly elected Obama Administration faced the difficult decision of whether to pursue the investigation and prosecution of torture committed during the previous Administration. The Central Intelligence Agency's (CIA) own internal review<sup>1</sup> has confirmed that between 2001 and 2003 the United States used shocking enhanced interrogation techniques such as revving a power drill beside a naked and hooded detainee,<sup>2</sup> threatening to kill a detainee and his children,<sup>3</sup> and using an especially "poignant and convincing" form of waterboarding.<sup>4</sup> That internal review also makes it clear that use of these enhanced interrogation techniques was authorized and approved both by the CIA and by official legal opinions from the Office of Legal Counsel (OLC) of the United States Department of Justice (DOJ).<sup>5</sup> Those legal opinions have been severely criticized as inconsistent with the law and with standards of professional integrity,<sup>6</sup> and even under the Bush Administration, the OLC ultimately repudiated the worst of

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1. CENTRAL INTELLIGENCE AGENCY INSPECTOR GENERAL, SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPT. 2001–OCT. 2003) (2003-7123-IG) (2004), available at <http://graphics8.nytimes.com/packages/pdf/politics/20090825-DETAIN/2004 CIAIG.pdf> [hereinafter INSPECTOR GENERAL REVIEW].

2. *Id.* ¶ 92. Some of the other especially shocking interrogation techniques used by the United States, according to the CIA Inspector General, included threats of execution, threats to sexually abuse a detainee's female relatives in front of him, "buttstroking" with rifles, and knee kicks to the torso. *Id.* ¶¶ 94, 169, 196.

3. *Id.* ¶ 95.

4. *Id.* ¶ 79.

5. *Id.* ¶ 6.

6. See *Confirmation Hearing on the Nomination of Alberto R. Gonzales to Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 158 (2005) (statement of Harold Hongju Koh, Dean of Yale Law School) [hereinafter *Koh Testimony*] (referring to the Bybee Memorandum—which offered "a definition of torture that would have exculpated Saddam Hussein"—as "perhaps the most clearly legally erroneous opinion I have ever heard," and as "a stunning failure of lawyerly craft").

them.<sup>7</sup> But however flawed these official legal opinions may have been, any attempt to prosecute CIA interrogators who relied upon them would raise issues of fairness.

The United States, as a champion of human rights abroad, has at times been skeptical and even critical when other states have granted de facto amnesty, thereby allowing impunity for gross violations of human rights. Nonetheless, some now argue that the United States should turn a blind eye to the mounting evidence suggesting that U.S. government officials formulated and implemented a policy of torture.<sup>8</sup>

This difficult situation raises fundamental issues on many levels, including legal and political concerns, both internal and external. The internal political dynamic, recognized and endorsed by President Obama,<sup>9</sup> argues against investigation and prosecution. This viewpoint stresses the need to look ahead and deal with new problems, such as national healthcare, instead of looking back at the difficult and potentially divisive issue of prosecuting past acts of torture. Another internal concern, both legal and political, is that the United States' basic constitutional principles have been undermined, particularly the Eighth Amendment prohibition against the infliction of cruel and unusual punishment.<sup>10</sup> Ultimately at stake are the fundamental checks and balances limiting executive authority that are critical to maintaining the rule of law. A broader external political consideration is the need to limit and repair the damage that mounting evidence of pro-

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7. See Memorandum Opinion from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, to the Deputy Att'y Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), <http://www.usdoj.gov/olc/18usc23402340a2.htm> (superseding an August 1, 2002 memorandum on torture).

8. See Mark Mazzetti & Scott Shane, *Memos Spell Out Brutal C.I.A. Mode of Interrogation*, N.Y. TIMES, Apr. 17, 2009, at A1.

The Justice Department on Thursday made public detailed memos describing brutal interrogation techniques used by the Central Intelligence Agency.

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The A.C.L.U. said the memos clearly describe criminal conduct and underscore the need to appoint a special prosecutor to investigate who authorized and carried out torture.

But Dennis C. Blair, the director of national intelligence, cautioned that the memos were written at a time when C.I.A. officers were frantically working to prevent a repeat of the Sept. 11, 2001, attacks.

"Those methods, read on a bright, sunny, safe day in April 2009, appear graphic and disturbing," said Mr. Blair in a written statement. "But we will absolutely defend those who relied on these memos."

*Id.*

9. As President-elect, Barack Obama said that with regard to torture he had "a belief that we need to look forward as opposed to looking backwards." David Johnston & Charlie Savage, *Obama Signals His Reluctance to Investigate Bush Programs*, N.Y. TIMES, Jan. 12, 2009, at A1.

10. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

torture policies has done to the reputation of the United States. Pursuing legal accountability for those responsible could contribute to that goal.

Naturally, arguments about U.S. national security have been central to the debate. The CIA's own reports insist that enhanced interrogation techniques have been effective in yielding valuable information that was vital to the national security of the United States.<sup>11</sup> The importance of maintaining the morale and effectiveness of U.S. intelligence operations is also cited as a reason not to prosecute.<sup>12</sup> The thicket of issues, interests, and arguments raised is dense indeed.

Complicated though it may be, the debate over whether to prosecute Bush Administration officials for torture is a very important discussion to have. Unfortunately, this debate is being conducted on an unduly narrow basis. It is true that under certain circumstances, torture violates U.S. federal law,<sup>13</sup> and this could therefore be the basis

11. See INSPECTOR GENERAL REVIEW, *supra* note 1, ¶ 250.

12. "[I]f agents were criminally investigated for doing something that top Bush administration officials asked them to do and that they were assured was legal, intelligence officers would be less willing to take risks to protect the country." Johnston & Savage, *supra* note 9.

13. See, for example, the Anti-Torture Statute, 18 U.S.C. §§ 2340–2340A (2006), which designates torture abroad as a crime but does not apply to torture in the U.S.

As used in this chapter—

(1) "torture" means an act committed by a person acting under the color 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;

(2) "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; and

(3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States. 18 U.S.C. § 2340.

(a) Offense. Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction. There is jurisdiction over the activity prohibited in subsection (a) if—

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.



for prosecution. State laws can also be applied to prosecute torture.<sup>14</sup> This might suggest that the decision is a matter solely within the domestic jurisdiction of the United States. But in addition to domestic laws, the United States has obligations under international law regarding the crime of torture. These too are relevant to this important debate, which should encompass, at the very least, four separate bodies of law. The first is U.S. law establishing individual responsibility for the crime of torture.<sup>15</sup> The second is international human rights law, which potentially establishes state responsibility for any violations of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)<sup>16</sup> that are attributable to the United States.<sup>17</sup> The third is international humanitarian law, which establishes standards for the treatment of those detained in the context of armed conflict.<sup>18</sup> This law can be the basis for both state responsibility and for individual criminal responsibility. The fourth is the mandatory enforcement regime of the CAT,<sup>19</sup> which establishes individual criminal responsibility for torture via both international law (defining and prohibiting torture) and national law (relied upon for enforcement).<sup>20</sup>

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18 U.S.C. § 2340A.

14. The United States, in its initial report to the Committee Against Torture after ratifying the Convention Against Torture, stated that

[e]very act of torture within the meaning of the Convention is illegal under existing federal and state law, and any individual who commits such an act is subject to penal sanctions as specified in criminal statutes. Such prosecutions do in fact occur in appropriate circumstances. Torture cannot be justified by exceptional circumstances, nor can it be excused on the basis of an order from a superior officer.

U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Reports of States Parties Due in 1995, Addendum: United States of America*, ¶ 100, U.N. Doc. CAT/C/28/Add.5 (Oct. 15, 1999).

15. See *id.*; see also U.S. CONST. amend. VIII.

16. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. 100-20, 1465 U.N.T.S. 113 [hereinafter CAT].

17. "Every internationally wrongful act of a State entails the international responsibility of that State." Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art. 1, in *Report of the ILC on the Work of Its Fifty-Third Session*, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc A/56/10 (2001).

18. See Int'l Comm. of the Red Cross, What Is International Humanitarian Law?, <http://www.icrc.org/web/eng/siteeng0.nsf/html/humanitarian-law-factsheet>.

International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict.

19. See CAT, *supra* note 16.

20. See *id.* arts. 1(1), 2(2), 4(1). The CAT's mandatory enforcement regime is discussed in detail *infra* notes 82-93 and accompanying text.

Enlarging this important internal debate to include relevant aspects of international law should not be objectionable because international torture norms are essentially core U.S. norms. Their application to the United States helps to reinforce the values and processes of the U.S. Constitution. The prohibition of torture under international law mirrors the prohibition of cruel or unusual punishment under the Eighth Amendment, while the Torture Convention's enforcement regime complements the rule of law under the Constitution by requiring the investigation and prosecution of those who commit torture.

The shocking history of U.S. torture policy during the Bush Administration demonstrates that sometimes even the United States needs external pressure to respect its own values. Had international legal perspectives been more honestly factored into the response to 9/11 from the beginning, the shocking excesses of U.S. torture policy could have at least been moderated. As it is, the reputation of the United States has been seriously damaged, as has the cause of torture prevention in general. Successful prosecution of U.S. officials may now be difficult due to reliance upon OLC opinions, but the failure of the United States to pursue the option of prosecution would only compound any previous violations of the CAT. If the United States is seen as shielding its officials from individual criminal accountability for torture, this itself could constitute a violation of international law, thus raising additional questions of state responsibility.

## II. TORTURE AND THE CHALLENGE OF THE RULE OF LAW POST-9/11

The horrors of 9/11 precipitated a national security crisis that strained the nation and raised fundamental questions regarding the commitment to a limited government, a key foundation of all human rights. It has been a difficult test for the American legal system and American political institutions. It is in the context of this pressing security crisis that the Bush Administration felt the need to alter the balance between security and civil liberties when pursuing the aggressive interrogation of detainees. Part of this effort included contacting the OLC of the DOJ for legal guidance.

### A. *The Permissive Approach to Interrogation and Torture Endorsed by the Office of Legal Counsel*

The OLC is a small but important bureau within the DOJ that issues written legal opinions about the proper interpretation of constitutional provisions and statutes in response to requests by officials

within the Executive Branch.<sup>21</sup> According to a former head of the OLC, it “is, and views itself as, the frontline institution responsible for ensuring that the executive branch charged with executing the law is itself bound by law.”<sup>22</sup> This is a vitally important job that calls for superior skills, and many top judges and legal academics have served in the OLC.<sup>23</sup>

The Bush Administration, faced with the grave security crisis that followed the 9/11 attacks on the United States, sought guidance from the OLC on several issues, including advice about the legality of its interrogation policies. The OLC responded by issuing some of the most controversial opinions in its history. These opinions seem, in retrospect, to have been geared not towards ensuring that the Executive was bound by legal rules prohibiting torture, but towards freeing the United States from any effective legal limit to the coercive interrogation of detainees. Perhaps most notorious in this regard was the August 1, 2002 opinion, which narrowly defined torture as follows:

[T]orture is not the mere infliction of pain or suffering on another, but is instead a step well removed. The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant bodily function will likely result. If that pain or suffering is psychological, that suffering must result from one of the acts set forth in the statute. In addition, these acts must cause long-term mental harm. Indeed, this view of the criminal act of torture is consistent with the term’s common meaning. Torture is generally understood to involve “intense pain” or “excruciating pain,” or put another way, “extreme anguish of body or mind.” In short, reading

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21. See Douglas W. Kmiec, *Yoo’s Labour’s Lost: Jack Goldsmith’s Nine-Month Saga in the Office of Legal Counsel*, 31 HARV. J.L. & PUB. POL’Y 795, 796 (2008) (reviewing JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007)).

Compared to other divisions of the Department of Justice, OLC is tiny. It consists of only a handful of lawyers, but its influence is disproportionate to its size. It was the one place in government where one expected—or at least received, whether wanted or not—objective, candid advice on the interpretation of the law.

Kmiec, *supra*, at 796. According to Jack Goldsmith,

The head of OLC must be a careful lawyer, must exercise good judgment, must make clear his independence, must maintain the confidence of his superiors, and must help the President find legal ways to achieve his ends, especially in connection with national security. OLC’s success over the years has depended on its ability to balance these competing considerations—to preserve its fidelity to law while at the same time finding a way, if possible, to approve presidential actions.

GOLDSMITH, *supra*, at 38–39 (2007), quoted in Kmiec, *supra*, at 796.

22. GOLDSMITH, *supra* note 21, at 33.

23. See Kmiec, *supra* note 21, at 796 & n.7.

the definition of torture as a whole, it is plain that the term encompasses only extreme acts.<sup>24</sup>

That opinion also set out a radical view of executive authority, asserting that “[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the commander-in-chief authority in the President.”<sup>25</sup> This opinion has come under scathing criticism since it became public.<sup>26</sup> Although it was signed by Assistant Attorney General Jay Bybee, who was then the head of the OLC, this opinion reflects the perspective of Deputy Assistant Attorney General John Yoo, who to this day continues to defend its reasoning and conclusions.<sup>27</sup> Yoo was also the author of another opinion that discussed the extremely narrow concept of torture set out in the quotation above,<sup>28</sup> and which elaborated upon his correspondingly expansive notion of how the President’s commander

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24. Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, at 13 (Aug. 1, 2002) [hereinafter OLC Torture Opinion] (emphasis added) (citations omitted), <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

25. *Id.* at 39.

26. According to Jeremy Waldron,

The quality of Bybee’s legal work here is a disgrace when one considers the service to which this analysis is being put. Bybee is an intelligent man, these are obvious errors, and the Department of Justice—as the executive department charged with special responsibility for the integrity of the legal system—had a duty to take special care with this most important of issues. Bybee’s mistakes distort the character of the legal prohibition on torture and create an impression that there is more room for the lawful infliction of pain in interrogation than a casual acquaintance with the antitorture statute might suggest.

Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1708 (2005); see *Koh Testimony*, *supra* note 6, at 158; Michael Traynor, *Citizenship in a Time of Repression*, 2005 WIS. L. REV. 1, 5 n.18 (cataloging criticisms of the Bybee memorandum). Louis-Philippe F. Rouillard has stated,

The prohibition against torture has been made absolute in universal and regional instruments. It is further prohibited in all circumstances by both treaty law and customary law. . . . [T]he interpretation of what amounts to torture must be made in accordance with the times, and the courts in our contemporary era have lowered the threshold from what would have been considered “ill treatment” twenty-five years ago to qualify as “torture” today. The selective reading of treaties and case law by the Office of Legal Counsel will not change these facts.

Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT’L L. REV. 9, 40–41 (2005).

27. See Carol J. Williams, *Dealing with the “Torture Memos;” As John Yoo Strongly Defends His Legal Rationale, Jay Bybee Stays Under the Radar*, L.A. TIMES, Apr. 22, 2009, at A1.

28. Memorandum from John Yoo, Deputy Assistant Att’y Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Def. 43 (Jan. 9, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 43 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Yoo Memorandum].



in chief authority precludes legal limits upon his right to interrogate enemy combatants.<sup>29</sup>

Abu Zubaydah was the first person captured and detained by the United States who was believed to be a high ranking member of al Qaeda. The CIA believed he was withholding vital information that could not be obtained via previously authorized interrogation techniques, but it faced the challenge of determining how far it could go in interrogating him. It was in this context that the OLC issued an opinion that authorized ten enhanced interrogation techniques—including waterboarding—that supposedly would not violate the prohibition of torture under U.S. federal law, as codified in 18 U.S.C. § 2340A.<sup>30</sup> Subsequent OLC memos concluded that the United States' use of enhanced interrogation techniques abroad would not violate U.S. obligations under applicable treaties or customary international law.<sup>31</sup> One of the principal reasons offered for this conclusion was that "U.S. reservations, understandings, and declarations [to the CAT] ensure that our international obligations mirror the standards of 18 U.S.C. Sec. 2340A."<sup>32</sup>

The radical approach taken by Bybee and Yoo did not survive to the end of President Bush's two terms in office. Soon after he took over as head of the OLC in 2003, Jack Goldsmith withdrew the worst of these opinions,<sup>33</sup> although the OLC continued to issue extremely

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29. *Id.* at 47.

30. See Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel of the Central Intelligence Agency, Interrogation of al Qaeda Operative 2, 11, 16, 18 (Aug. 1, 2002).

31. Memorandum from John Yoo, Deputy Assistant Att'y Gen., to William J. Haynes II, Gen. Counsel, Dep't of Def., Military Interrogation of Alien Unlawful Combatants Held Outside the United States 2 (Mar. 14, 2003).

32. *Id.*

33. For example, Goldsmith withdrew the legal standards memo drafted by Daniel Levin. See Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to the Deputy Att'y Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), <http://www.usdoj.gov/olc/18usc23402340a2.htm> (superseding the August 1, 2002 OLC memorandum on torture). See also Jeffrey Rosen, *Conscience of a Conservative: Inside the Secret Legal Battle over the War on Terror*, N.Y. TIMES MAG., Sept. 9, 2007, at 41, 42, stating that

[d]uring his first weeks on the job, Goldsmith had discovered that the Office of Legal Counsel had written two legal opinions—both drafted by Goldsmith's friend Yoo, who served as a deputy in the office—about the authority of the executive branch to conduct coercive interrogations. Goldsmith considered these opinions, now known as the "torture memos," to be tendentious, overly broad and legally flawed, and he fought to change them. He also found himself challenging the White House on a variety of other issues, ranging from surveillance to the trial of suspected terrorists. His efforts succeeded in bringing the Bush administration somewhat closer to what Goldsmith considered the rule of law—although at considerable cost to Goldsmith himself. By the end of his tenure, he was worn out.



permissive and highly questionable guidance on torture throughout the years of the Bush Administration. In June of 2009, the OLC declared in a memo to the Attorney General that, pursuant to an Executive Order from President Barack Obama, "Officers, employees, and other agents of the United States Government may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation . . . issued by the Department of Justice between September 11, 2001, and January 20, 2009."<sup>34</sup> Thus, the contorted logic of these OLC opinions was rejected as an inaccurate statement of both U.S. and international law.<sup>35</sup>

### B. *The Current Political Debate on Torture*

Many sectors of society participate in the political debate on possible accountability for past acts of torture. This Section will briefly consider some of the principal political and legal arguments formulated by participants in that debate.

#### 1. *Should a Necessity Defense Apply?*

Some, such as Senator Lindsey Graham, have argued that the actions of the Bush Administration officials were justifiable because they did what was necessary to defend the United States. This is the "necessity defense." Senator Graham contends that with an ongoing military threat like al Qaeda, "[t]he only way we're going to stop [the] enemy from attacking us is to find good information and hit them before they hit us."<sup>36</sup> These techniques have survived for about five hundred years, he argues, because they work.<sup>37</sup> He further argues that we should move forward so that we do not "unnecessarily impede the ability of this country to defend itself against an enemy who is . . . thinking and plotting their way back into America."<sup>38</sup> Senator Graham's argument compliments what has been called the "ticking time bomb" scenario,<sup>39</sup> which is based on the premise that if people knew that a nuclear bomb was hidden in an American city, most people

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34. Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to the Att'y Gen., Withdrawal of Office of Legal Counsel Opinion (June 11, 2009), <http://www.usdoj.gov/olc/2009/memo-barron2009.pdf> (last visited Jan. 30, 2010).

35. See Rosen, *supra* note 33.

36. *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *What Went Wrong*] (statement of Sen. Graham), available at 2009 WL 1317264.

37. *Id.*

38. *Id.*

39. See David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1426 (2005).

would be willing to use any means, even acts constituting torture, to find it before it goes off.<sup>40</sup>

## 2. Alternatives to Torture

Some do not find the necessity defense or the ticking time bomb argument to be particularly convincing.<sup>41</sup> For one thing, they question whether torture techniques are faster or more efficient than other, legal techniques that are set out in the U.S. Army Manual. Senator Russell Feingold, a member of the Senate Intelligence Committee, stated, "I can tell you that nothing I have seen . . . indicates that the torture techniques authorized by the last administration were necessary or that they were the best way to get information out of detainees."<sup>42</sup> Matthew Alexander,<sup>43</sup> an experienced interrogator, maintained that in his experience, torture techniques "served only to harden the resolve of the detainee and made them more resistant to

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40. See *id.* (noting that when Alan Dershowitz asked for a show of hands as to how many would support use of nonlethal torture in a ticking time bomb scenario, virtually all members of the audience raised a hand). The argument remains controversial. See Editorial, *Keeps on Ticking; Bush Continues to Invoke the Time Bomb Rationale for Torture. Congress Should Defuse It*, L.A. TIMES, Nov. 13, 2007, at A18, which states,

It's time that Bush was challenged not only on the mixed message he is sending about the propriety of torture but on its underlying rationale: the so-called Ticking Time Bomb Scenario. . . . Former President Clinton . . . observed that if there were a formal exception to laws against torture, "people [will] just drive a truck through it, and they'll say, [they] thought it was covered by the exception."

Maintaining the prohibition of torture and accountability for torture, even under the ticking bomb scenario, is a key point. See Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145, 1167 (2005), which states,

In short, my answer to the Ticking Time Bomb scenario is simple. We should never preauthorize torture. If the President believes he must for the good of the country order torture, and if that order is carried out by a lower official, that official must be prepared to face the legal, political, and moral consequences of his actions. Perhaps they will not be impeached, prosecuted, convicted, or morally condemned. . . . Anyone, even the President of the United States, who decides he must torture or order torture, because he feels it is absolutely imperative, should do so at his own peril.

But see Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193, 218–226, arguing, based on distinctions from the German penal code, that torture can never be *justified*, even by the ticking bomb scenario, but that it might nonetheless provide an *excuse*, after the fact, that could preclude prosecution or conviction.

41. See 155 CONG. REC. S6360 (daily ed. June 9, 2009) (statement of Sen. Whitehouse) ("[W]e were told that torturing detainees was justified by American lives saved—saved as a result of actionable intelligence produced on the waterboard. That is the clincher, they stay [sic]—lives saved at the price of a little unpleasantness. But is it true? That is far from clear.").

42. Bobby Ghosh, *Why the CIA Turned Down Dick Cheney*, TIME, May 14, 2009, <http://www.time.com/time/nation/article/0,8599,1898385,00.html>.

43. Matthew Alexander was an interrogator in Iraq who has conducted more than 300 interrogations and supervised more than 1,000 others. *What Went Wrong*, *supra* note 36 (statement of Matthew Alexander read for the record by Sen. Sheldon Whitehouse).

interrogation.”<sup>44</sup> Moreover, he argued that torture practices are used as the number one recruiting tools for suicide bombers.<sup>45</sup> “What works best in the ticking time bomb scenario,” he argues, “is relationship building, which is not a time-consuming effort when conducted by a properly trained interrogator [in] non-coercive deception.”<sup>46</sup> Likewise, Ali Soufan, also an experienced interrogator, testified that so-called enhanced interrogation techniques are “ineffective, slow and unreliable, and as a result harmful to our efforts to defeat al Qaeda.”<sup>47</sup> Furthermore, he contends that the techniques are ineffective because terrorists are trained to handle worse.<sup>48</sup> According to Soufan, there are legal approaches that employ intelligent interrogation techniques, which are more effective than torture.<sup>49</sup> Both the Obama Administration and the Senate Intelligence Committee are said to be investigating the effectiveness of different interrogation techniques.<sup>50</sup>

### 3. *Enormous Pressure Excuse*

Others, such as former Attorney General Michael Mukasey, argue that the acts of Bush Administration officials were excusable because, after 9/11, they were reacting to enormous fear and pressure to prevent another attack.<sup>51</sup> Senator Graham adds that it is not fair to judge the prior Administration in hindsight because those who are judging did not have to make the decision.<sup>52</sup> Like Mukasey, Senator Graham argues that after the September 11 attacks, the Bush Administration “went on the offensive,” trying to make sure that a terrorist attack did

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* (testimony of Ali Soufan). Soufan is the Chief Executive Officer of International Strategic Consultancy Firm and a former FBI supervisory special agent. *Id.*

48. *Id.*

49. *Id.*

50. See 155 CONG. REC. S5305 (daily ed. May 11, 2009) (statement of Sen. Alexander), stating that

[t]he President is following his own advice about looking forward by asking the National Security Council to review what tactics would be appropriate when terrorists are captured who might have information about imminent attacks on Americans. The Senate Intelligence Committee is conducting its own review of tactics and is considering expanding the briefing process for interrogation tactics.

51. See *Oversight of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 34 (testimony of Attorney General Mukasey), stating that

[w]e have people demanding that people push the law to the limit, and then we have people saying don't push the law to the limit and that you are subject to criticism and prosecution afterward, that that is a very unwise cycle.

After September 11, there was an enormous amount of pressure to find the maximum that could be done.

52. See *What Went Wrong*, *supra* note 36.

not happen again.<sup>53</sup> Furthermore, he argues that although the officials made mistakes, the fact that they took a very aggressive interpretation of what the law would allow does not constitute a crime.<sup>54</sup> Similarly, Professor Robert Turner, Associate Director of the National Center for Security Law at the University of Virginia School of Law, argues that rather than pursuing prosecution or creating a truth commission, the public should just recognize that “good people, fearful for the safety of their fellow Americans, trying to stop the next attack, made some very bad decisions.”<sup>55</sup> Professor Turner compares the Bush Administration officials to the Roosevelt and Hoover Administration officials who, he says, detained Japanese-Americans during WWII because they were frightened and because they “wanted to prevent another Pearl Harbor.”<sup>56</sup> According to Turner, they all wanted to “save the lives of their fellow Americans.”<sup>57</sup>

#### 4. *The Obama Administration's Views*

Although President Obama has affirmed that no one is above the law, he has also made it clear that he wants to move forward, preferably without criminal prosecutions.<sup>58</sup> His Administration, including Attorney General Eric Holder, has consistently maintained that CIA officials who acted in good faith reliance on OLC opinions should not be prosecuted.<sup>59</sup> His aides have stated that President Obama does not

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53. *Id.*

54. Senator Graham argued,

The nation was rattled. The administration went on the offensive. . . . They were going to make sure this didn't happen again. . . . But they made mistakes. They saw the law many times as a nicety that we couldn't afford, so they took a very aggressive interpretation of what the law would allow. And that came back to bite us. It always does. But that's not a crime.

*Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. See Office of the Press Sec'y, The White House, Press Briefing by Press Secretary Robert Gibbs (July 13, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-7-13-09/](http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-7-13-09/) [hereinafter July 13, 2009 Press Briefing] (explaining that President Obama believes that “our efforts are better focused looking forward”); Office of the Press Sec'y, The White House, Press Briefing by Press Secretary Robert Gibbs (Apr. 20, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-4-20-09/](http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-4-20-09/) [hereinafter Apr. 20, 2009 Press Briefing] (“The President . . . believes that rather than looking backward and fighting this backward, that it's important to move our country forward. That's what he signaled by banning the use of these techniques, and that's where his focus is.”).

59. See July 13, 2009 Press Briefing, *supra* note 58 (“[T]he President, and I think the Attorney General, all agree that anyone who followed the law, that was acting in good faith of the guidance that they were provided within the four corners of the law will not and should not be prosecuted.”).



want CIA officials to be checking over their shoulders as they defend the country.<sup>60</sup> These are all valid points, but they beg the question of whether the United States is subject to any international legal obligation to investigate acts of torture, prosecute acts of torture, or both. This Article will briefly present the history of prohibiting torture, and it will then focus on the relevance of international law to the decision of whether to investigate and prosecute those who are responsible for the use of torture as an interrogation technique.

### III. A BRIEF HISTORY OF THE NORM PROHIBITING TORTURE

The prohibition of torture, like other aspects of the modern international law of human rights, first emerged as a norm at the national level. The notion of human rights developed in philosophy, and it was spread by forces as diffuse as violent revolution and peaceable incorporation into constitutions and legislation. The U.S. Constitution and France's 1789 Declaration of the Rights of Man and of the Citizen are examples of this. From their origins in national law and practice, these norms, including the prohibition of torture, have percolated into the international legal arena via their incorporation into treaties such as the CAT, and through their acceptance, based on state practice, as part of customary international law.

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The President took the extraordinary step of stopping [the enhanced interrogation] techniques from ever being used again as part of his administration. The President does believe and the Attorney General said quite clearly that those that believed in good faith that these techniques had been declared legal by the Department should not be prosecuted.

Apr. 20, 2009 Press Briefing, *supra* note 58. See *Nomination of Stephen W. Preston to Be General Counsel of the CIA and Robert S. Litt to Be General Counsel of the Office of the Director of National Intelligence: Hearing Before the S. Comm. on Intelligence*, 111th Cong. (2009), available at 2009 WLNR 9700487 (testimony of Robert S. Litt, Gen. Counsel of the Office of the Director of Nat'l Intelligence) ("I certainly believe that it is essential to the operation of the government that people be able to rely on opinions from the Justice Department without fear that those opinions will later be pulled back from them and leaving them exposed to criminal liability."). Current Attorney General Eric Holder has stated,

[F]or those people who were involved in the interrogation and relied upon, in good faith and adhered to the memorandum created by the Justice Department's Office of Legal Counsel, it is our intention not to prosecute and not to investigate those people. I have also indicated that we will follow the law and the facts and let that take us wherever it may. A good prosecutor can only say that.

155 CONG. REC. S5305 (daily ed. May 11, 2009) (reprinting *Alexander-Holder Exchange on Investigation of Interrogation Techniques: Hearing Before the S. Subcomm. on Commerce, Justice & Science of the Comm. on Appropriations*, 111th Cong. (2009) (testimony of Att'y Gen. Eric Holder)).

60. See Nat'l Pub. Radio, NPR Talk of the Nation, The Legacy of Bush's "War on Terror" (audio file) (Jan. 12, 2009), <http://www.npr.org/templates/story/story.php?storyId=99253486> (explaining how, although then-President-elect Obama contended that no one is above the law, he did not want those who defend our country to be looking over their shoulders).



### A. *International Humanitarian Law*

The prohibition against the use of torture first gained international status as an aspect of the laws of war, or "international humanitarian law." In 1863, President Abraham Lincoln signed the Lieber Code, the first real codification of the customary laws of war. It set out a broad range of rules, including a prohibition of torture, stressing that "[m]ilitary necessity does not admit of cruelty . . . nor of torture to extort confessions."<sup>61</sup>

Today, the prohibition against torture is codified in international humanitarian law by Article 17 of the 1949 Geneva Prisoner of War Convention,<sup>62</sup> and perhaps most significantly, by Common Article 3<sup>63</sup> of the four Geneva Conventions of 1949. This is especially significant because the International Court of Justice has interpreted Common Article 3 to be a reflection of the customary norm and minimum standard of humanity required in both international and internal armed conflicts.<sup>64</sup> And in an opinion focusing more on detention and trial than upon torture per se, the U.S. Supreme Court has ruled that all noncitizen prisoners, including those classified by the U.S. government as "enemy combatants," have rights under Article 3 of the Geneva Conventions.<sup>65</sup>

The Lieber Code was prepared as a set of *internal* legal guides for the Armies of the United States in the Field, and it was issued under the authority of the President. At the same time, as a codification of the customary law of war, the Lieber Code purported to set out the

61. General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863) [hereinafter Lieber Code], reprinted in 2 FRANCES LIEBER, CONTRIBUTIONS OF POLITICAL SCIENCE 245, 247-74 (1881).

62. See Geneva Convention Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, which states,

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. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.

63. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3(a), Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)], which states,

Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely. . . .

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture[.]

64. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 113-14 (June 27).

65. *Hamdan v. Rumsfeld*, 548 U.S. 557, 570, 631 (2006) (noting that Common Article 3 of the Geneva Conventions protects enemy combatants).

international laws and customs of war that were implicitly accepted by states at that time. Within decades, many other countries adopted guidelines parallel to the Lieber Code, solidifying the status of its rules as part of customary international law. A scant forty-four years after President Lincoln signed the Lieber Code, the 1907 Hague convention and its regulations formally codified a version of those basic rules into a broadly accepted multilateral treaty.<sup>66</sup> This brief history demonstrates the folly of viewing the prohibition of torture under international humanitarian law as an external norm imposed upon the United States. The United States is as much the author of that prohibition as its subject.

### B. International Human Rights Law

The prohibition of torture is not only a fundamental norm of international humanitarian law, it is also part of international human rights law. The Universal Declaration of Human Rights,<sup>67</sup> the International Covenant on Civil and Political Rights,<sup>68</sup> and the CAT<sup>69</sup> all incorporate an unequivocal prohibition of torture. The CAT codifies an agreed-upon definition of torture<sup>70</sup> and establishes obligations for state parties, including the international enforcement regime discussed in greater detail below.<sup>71</sup>

The basic obligation of state parties to the CAT is to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”<sup>72</sup> This obligation is absolute, insofar as it provides both that “[n]o exceptional circum-

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66. See Convention Respecting the Laws and Customs of War on Land art. 4, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277.

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

68. International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

69. See CAT, *supra* note 16.

70. The CAT provides,

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him 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, 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

*Id.* art. 1(1).

71. See *infra* notes 81–89 and accompanying text.

72. See CAT, *supra* note 16, art. 2(1).

stances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture,"<sup>73</sup> and that "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture."<sup>74</sup>

### C. *U.S. Ambivalence Towards International Human Rights Treaties*

Since their emergence after World War II, the United States has had issues with international human rights treaties, generally preferring to apply U.S. constitutional standards, which, in the field of civil and political rights, are generally consistent with and parallel to international human rights standards. After decades of declining to ratify international human rights treaties, the United States broke the logjam by ratifying the Genocide Convention in 1988. Since then, the United States has ratified a number of human rights treaties, but it invariably does so with reservations considered necessary to address U.S. concerns.

In 1990, the United States accepted the CAT with a number of "reservations, understandings, and declarations" (RUDs), only a few of which merit consideration here. The first reservation provides

[t]hat the United States considers itself bound by the obligation under article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.<sup>75</sup>

The most relevant of the "understandings" provides

[t]hat with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administra-

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73. *Id.* art. 2(2).

74. *Id.* art. 2(3).

75. *U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CONG. REC. S17486-01 (daily ed., Oct. 27, 1990), available at <http://www1.umn.edu/humanrts/usdocs/tortres.html>.

tion or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.<sup>76</sup>

Other RUDs rejected the compromissory clause in Article 30(2), which allows disputes between parties to be submitted to the International Court of Justice,<sup>77</sup> and declared that under U.S. law, the CAT is not self-executing.<sup>78</sup> This latter declaration means that, as a matter of U.S. domestic law, the CAT cannot be directly invoked as a legal standard within U.S. courts. Nonetheless, it cannot limit the obligations of the United States under the CAT because non-self-executing treaties bind the United States externally as much as any other treaty.<sup>79</sup>

#### IV. THE MODERN REALITY: OVERLAPPING TORTURE STANDARDS UNDER U.S. AND INTERNATIONAL LAW

It makes little sense to debate U.S. torture policy today without reference to the reality of the overlapping and mutually reinforcing torture standards that presently exist under U.S. and international law. On the issue of torture, the United States is subject to multiple standards, all of which have their origin in the domestic practice of the United States and other liberal democracies. These include the United States' constitutional standard that bans torture as a form of "cruel and unusual punishment,"<sup>80</sup> the rules of international humanitarian law that ban torture of POWs and other non-combatants, and the codified torture convention standard, set out in the U.S. implementing legislation, that defines and criminalizes torture.<sup>81</sup>

As a party to the CAT, the United States has obligations under that treaty as well, although these are subject to the United States' reserva-

76. *Id.*

77. "[P]ursuant to article 30(2) the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case." *Id.* reservation 2.

78. "The Senate's advice and consent is subject to the following declarations: (1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing." *Id.* declaration 1.

79. Whether the U.S. government considers a particular provision of a treaty to be self-executing or non-self-executing is entirely a matter of U.S. domestic law, and therefore such a provision cannot increase or decrease the obligations of the United States under the treaty. See Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 425 (1989) (noting that "[t]he international obligation of the United States under a treaty is immediate, whether a treaty is self-executing or not. . . . [T]he United States has an obligation to enact necessary legislation promptly so as to enable it to carry out its obligations under the treaty"). See also Vienna Convention on the Law of Treaties art. 27, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, which provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

80. See U.S. CONST. amend. VIII.

81. See 18 U.S.C. § 2340A (2006).



tions described above. Interestingly, the United States has made no formal reservations regarding the mandatory criminal enforcement regime established under the CAT.

#### V. INTERNATIONAL CRIMINAL LAW AND THE MANDATORY ENFORCEMENT REGIME APPLICABLE TO TORTURE

After defining torture, the CAT obliges state parties to prevent acts of torture in any territory under their jurisdiction, but it also incorporates a mandatory criminal enforcement regime. All state parties to the CAT accept both the obligation to ensure that acts of torture, as defined by the CAT, are offenses under their national criminal law and also the obligation to make them punishable by appropriate penalties.<sup>82</sup> They further agree to take such measures as may be necessary to establish jurisdiction over those offenses when they occur within the jurisdictional reach of the state, including both acts by nationals and acts by non-nationals within the territory of the state.<sup>83</sup> Each state party is similarly obliged to establish jurisdiction when a person who is alleged to have committed an act of torture is present within its territory,<sup>84</sup> and in such a case, the state party is obliged to take him into custody or to take other legal measures to ensure his presence in court.<sup>85</sup> Then, the state party must immediately make a preliminary inquiry into the facts.<sup>86</sup>

Any time an alleged torturer is present within the territory of a CAT state party, that state party must either submit the case to prosecution or extradite him.<sup>87</sup> The obligation to try or extradite (*aut dedere aut judicare*) is well known in international criminal law, and its inclusion in the CAT comes close to establishing torture as a universal jurisdiction crime. Each state party is also obligated to ensure that its competent authorities conduct a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture has been committed within any territory under its jurisdiction.<sup>88</sup>

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82. See CAT, *supra* note 16, art. 4.

83. See *id.* art. 5.

84. See *id.* art. 5(2).

85. See *id.* art. 6(1).

86. See *id.* art. 6(2).

87. The CAT provides,

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

*Id.* art. 7(1).

88. See *id.* art. 12.



The CAT then sets out two rules that are fundamental to the prevention of torture, which may nonetheless have been violated by the recent detention, interrogation, and trial policies applied by the United States to suspected terrorists. The CAT first obliges state parties to ensure that any statement that is made as a result of torture shall not be invoked as evidence in any proceedings.<sup>89</sup> Procedures for trials before U.S. military commissions have not always required respect for this rule.<sup>90</sup> Equally troubling is the United States' policy of extraordinary rendition, according to which detainees have sometimes been sent to face interrogation in countries (such as Egypt) where they face the real possibility of the most horrific forms of torture.<sup>91</sup> This policy violates the principle of *non-refoulement*, which forbids parties from sending a person to another state when "there are sub-

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89. See *id.* art. 15.

90. Referring to the Military Commissions Act of 2006, 10 U.S.C. § 948A (2006), Michael Reisman notes,

Nor does the Act absolutely preclude the admissibility of evidence secured by torture. While section 948r states in subsection (b) that "[a] statement obtained by use of torture shall not be admissible in a military commission," subsection (c) allows the admission of evidence gained before December 30, 2005, when "the degree of coercion is disputed" if the military judge finds it reliable and of probative value and its admission would serve the interests of justice. As for a statement obtained after December 30, 2005, subsection (d) allows its admission when "the degree of coercion is disputed" if the military judge finds it reliable and of probative value, its admission would serve the interests of justice, and, under subsection (d)(3), "the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005." Considering that the congressional battle in 2006 concerned alleged insufficiencies in the 2005 legislation, readers might be excused for feeling that they had been led through a dense forest of legislative verbiage back to the starting point. And led on a fool's errand to boot, for if the prohibition of torture was moved from Part B to Part A, its legal definition ceases to be important. The lawfulness of torture in given instances is then to be governed by the MNPD principles rather than by whether that treatment conforms to a particular national or international legal definition.

W. Michael Reisman, Editorial Comment, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT'L L. 852, 854 (2006).

91. David Johnston, *Terror Suspects Sent to Egypt By the Dozens, Panel Reports*, N.Y. TIMES, May 12, 2005, at A4.

The United States and other countries have forcibly sent dozens of terror suspects to Egypt, according to a report released Wednesday by Human Rights Watch. The rights group and the State Department have both said Egypt regularly uses extreme interrogation methods on detainees. . . . The report said the total number sent to Egypt since the Sept. 11 attacks could be as high as 200 people. American officials have not disputed that people have been sent to countries where detainees are subjected to extreme interrogation tactics but have denied that anyone had been sent to another country for the purpose of torture. Among other countries to which the United States has sent detainees are Jordan, Morocco, Saudi Arabia, Yemen and Syria.

stantial grounds for believing that he would be in danger of being subjected to torture.”<sup>92</sup>

Although the United States’ reservations to the CAT may reduce state responsibility for acts of torture that are condoned by the U.S. government, these reservations can in no way shield those individuals who are responsible for torture from exposure to the international enforcement regime of the CAT. Whatever the domestic legal constraints, torture, as defined by international law, is a crime under international law and potentially punishable under the laws of any of the many states that are parties to the CAT. Despite its reservations to the CAT, any U.S. officials who are responsible for acts of torture are still subject to this standard and could be arrested abroad—as was General Pinochet<sup>93</sup>—to face universal jurisdiction prosecutions.

### A. *Effect of Reliance upon OLC Opinions*

At his nomination hearing, current CIA Director Leon Panetta stressed that CIA employees are required to operate according to the guidelines outlined in OLC opinions, and they should not be punished for doing so.<sup>94</sup> Nevertheless, the Obama Administration has expressed a willingness to prosecute any person who deliberately violated the law and who took action above and beyond the standard in the now-repudiated OLC opinions.<sup>95</sup> Early on, Attorney General

92. CAT, *supra* note 16, art. 3.

93. See Christine M. Chinkin, INTERNATIONAL DECISION, *United Kingdom House of Lords, (Spanish request for extradition). Regina v. Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte (no. 3).* [1999], 2 WLR 827, 93 AM. J. INT’L L. 703 (1999).

94. Leon Panetta stated,

I . . . believe, as the president has indicated, that those individuals who operated pursuant to a legal opinion that indicated that that was proper and legal ought not to be prosecuted or investigated and that they . . . acted pursuant to the law as it was presented to them by the attorney general. . . .

But when you’re an employee at the CIA, you have to operate based on the legal opinions that are provided you from the Justice Department from the attorney general.

If you—you know there has to be some guidelines here. There has to be some standards, and whether you agree or disagree, and I certainly do not agree with . . . that particular opinion, nevertheless when you go out there and . . . take the kind of actions that have to be taken and rely on those opinions, I do not think that you ought to be prosecuted for that.

*Hearing on the Nomination of Leon Panetta to Be Director of the CIA: Hearing Before the S. Comm. on Intelligence (testimony of Leon Panetta), 111th Cong. (2009), available at 2009 WLNR 2318014.*

95. See *id.* (“I also happen to believe with the president that if we find that there were those who deliberately violated the law . . . and deliberately took actions which were above and beyond the standard that were—were presented to them, then obviously in those limited cases there should be a prosecution.”).

Eric Holder promised to follow “the facts and the evidence and the law,”<sup>96</sup> but he stated that reliance on an OLC opinion would be a huge factor in deciding whether to prosecute an official.<sup>97</sup> More recently, he has confirmed that whatever may result from the DOJ’s “preliminary review”<sup>98</sup> of possible violations, those people who followed OLC opinions will not be subject to prosecution.<sup>99</sup>

In the absence of some type of special circumstances, U.S. courts would be unlikely to convict a U.S. government official for actions that were taken pursuant to an OLC opinion. In any event, no such case is likely to be filed because Attorney General Holder has made it clear that “the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees.”<sup>100</sup> Thus, as a practical matter, OLC opinions will provide full legal cover for any CIA interrogators who relied on the OLC’s opinions.

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96. *Hearing on the Nomination of Eric Holder to Be Attorney General Before the S. Comm. on the Judiciary* (testimony of Att’y Gen. Eric Holder), 111th Cong. (2009), available at 2009 WL 106400.

97. *See id.* (“An OLC opinion that gave a person the ability to do something that was reasonably relied on, was appropriate . . . would be something that would obviously have to be taken into account in deciding whether somebody acted appropriately or not. That would be a huge factor.”).

98. Attorney General Holder stated,

I have concluded that the information known to me warrants opening a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations. The Department regularly uses preliminary reviews to gather information to determine whether there is sufficient predication to warrant a full investigation of a matter. I want to emphasize that neither the opening of a preliminary review nor, if evidence warrants it, the commencement of a full investigation, means that charges will necessarily follow.

Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees para. 2 (Aug. 24, 2009) [hereinafter Holder Statement Announcing Preliminary Review], available at <http://www.usdoj.gov/ag/speeches/2009/ag-speech-0908241.html> (last visited Aug. 26, 2009).

99. *Id.*

100. Attorney General Holder stated that

The men and women in our intelligence community perform an incredibly important service to our nation, and they often do so under difficult and dangerous circumstances. . . . [T]hey need to be protected from legal jeopardy when they act in good faith and within the scope of legal guidance. That is why I have made it clear in the past that the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees. I want to reiterate that point today, and to underscore the fact that this preliminary review will not focus on those individuals.

*Id.* para. 4 (emphasis added).

*B. Should the Authors of OLC Opinions on Torture  
Be Held Responsible?*

What of those who wrote or approved of the excessively permissive OLC opinions that opened the door for torture with domestic impunity? If following OLC guidance provides such a strong shield against future prosecution, that guidance should at least accurately reflect the state of the law. But under political pressure to issue opinions that allowed enhanced interrogation techniques, OLC lawyers did not follow the proper standard, once articulated by former Attorney General Mukasey, that they should “adhere to the law and not concern themselves with what might be politically acceptable later on.”<sup>101</sup> Instead, the authors of OLC memos defended torture techniques by relying on “hypertechnical interpretations that disregard[ed] the prohibitions in our laws.”<sup>102</sup> This clearly violated the rule of law, a core American ideal.<sup>103</sup>

So far, the Obama Administration’s position is that Bush Administration lawyers who wrote or approved of the OLC opinions should not be prosecuted. Again, both President Obama and Attorney General Holder have suggested that the focus should be on moving forward.<sup>104</sup> Although they assert that no one is above the law, they do not want to criminalize policy differences between Administrations.<sup>105</sup>

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101. *Oversight of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (testimony of former Att’y Gen. Mukasey), available at 2008 WL 2673974.

102. *What Went Wrong*, *supra* note 36 (statement of Sen. Leahy).

103. See *OLC, National Security Nominations: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (Feb. 25, 2009), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3671&wit\\_id=2629](http://judiciary.senate.gov/hearings/testimony.cfm?id=3671&wit_id=2629) [hereinafter *National Security Nominations*] (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary) (“The costs have been enormous, to our core American ideals, the rule of law, and the principle that in America, no one—not even a President—is above the law.”).

104. See Barack Obama, Press Conference by the President (Feb. 9, 2009), [http://www.whitehouse.gov/the\\_press\\_office/PressConferencebythePresident/](http://www.whitehouse.gov/the_press_office/PressConferencebythePresident/). President Obama stated,

My view is . . . that nobody is above the law, and if there are clear instances of wrongdoing, that people should be prosecuted just like any ordinary citizen; but that generally speaking, I’m more interested in looking forward than I am in looking backwards. I want to pull everybody together, including, by the way, the—all the members of the intelligence community who have done things the right way and have been working hard to protect America, and I think sometimes are painted with a broad brush without adequate information.

*Id.*

105. See *Hearing on the Nomination of Eric Holder to Be Attorney General Before the S. Comm. on the Judiciary*, 111th Cong. (2009), available at 2009 WL 106400 (testimony of Eric Holder) (testifying that although no one is above the law and that although he promises to follow the evidence, the facts, and the law, that he agrees with President Obama that “we don’t want to criminalize policy differences that might exist between the outgoing administration and the administration that is about to take over”). Attorney General Holder also stated,



Attorney General Holder acknowledges that the decisions the Bush Administration had to make were difficult,<sup>106</sup> but respect for the rule of law must limit the compromise of fundamental legal principle in the name of sympathy and political accommodation.

### C. Rule of Law

CIA Director Leon Panetta and others have expressed confidence that the torture dilemma in the United States is a concern of the past,<sup>107</sup> citing President Obama's Executive Order that officially bans torture<sup>108</sup> as a turning point. Likewise, others, such as Senator Charles Schumer and Senator Lamar Alexander, have expressed confidence that President Obama and the Senate Intelligence Committee's investigation into interrogation techniques will end torture in the United States.<sup>109</sup>

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I will look at the [Office of Professional Responsibility's] report and make a determination as to what we wanted to do with it. It deals . . . not only with the attorneys, but people that they interacted with, so I think we will gain some insights by reviewing that report. Our desire is not to do anything that would be perceived as political or partisan. We do want to report, to the extent that we can do that, but as I said, my responsibility is to enforce the laws of this nation and to the extent that we see violations of those laws, we will take the appropriate action.

155 CONG. REC. S5305 (daily ed. May 11, 2009) (reprinting *Alexander-Holder Exchange on Investigation of Interrogation Techniques: Hearing Before the Subcomm. on Commerce, Justice, and Science of the S. Comm. on Appropriations*, 111th Cong. (May 7, 2009) (testimony of Att'y Gen. Holder)).

106. See *Hearing on the Nomination of Eric Holder to Be Attorney General Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (testimony of Eric Holder), available at 2009 WL 106400 ("The decisions that were made by the prior administration were difficult ones. It is an easy thing in some ways to look and in hindsight be critical of the decisions they made.").

107. See *Hearing on the Nomination of Leon Panetta to Be Director of the CIA: Hearings Before the S. Comm. on Intelligence*, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/query/D?r111:56:/temp/~r111LrGhPw::>. Senator Feinstein stated,

President Obama has made clear that his selection of Leon Panetta was intended as a clean break with the past—a break from secret detentions and coercive interrogation, a break from outsourcing its work to a small army of contractors, and a break from analysis that was not only wrong, but the product of bad practice that helped lead our nation to war.

*Id.* (statement of Sen. Feinstein). Attorney General Holder stated,

And yet, having said that, the president-elect and I are, I think, both worried, disturbed, by what we have seen, what we've heard. The pledge that he has made and that I will make is that we will make sure that the interrogation techniques that are sanctioned by the Justice Department are consistent with our treaty obligations, the Geneva Treaty obligations that we have, and will be effective at the same time.

*Id.* (statement of Att'y Gen. Eric Holder).

108. Exec. Order No. 13,491, 74 Fed. Reg. 16 (Jan. 27, 2009) (revoking Exec. Order No. 13,440, 72 Fed. Reg. 141 (July 20, 2007)) (declaring that detainees shall not be subjected to any interrogation technique not authorized by and listed in the Army Field Manual).

109. Senator Schumer stated,



But there is a strong argument to be made that what happened was an institutional problem and that it can happen again, even under a new administration.<sup>110</sup> Accordingly, we cannot simply “move forward.” It is therefore vitally important to investigate and to “get to the bottom of what happened.”<sup>111</sup> After 9/11, the power of the Executive Branch was permitted to grow unchecked under the umbrella of national security. As Senator Patrick Leahy exclaimed, the United States turned from “a nation devoted to the rule of law to one ruled by secret pronouncements of the executive.”<sup>112</sup> Senator Arlen Specter declared, “I believe that historians will look back at this period as the greatest expansion of executive authority that has gone unchecked by Congress, and . . . significantly unchecked by the courts.”<sup>113</sup> Congress and the courts, however, have only limited means at their disposal to check the power of the Executive Branch. Executive Branch officials chose what to disclose.<sup>114</sup> Moreover, intelligence officials no-

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I welcome your nomination, not just because you will be a different kind of attorney general but because Barack Obama will be a different kind of president. So I really want to thank you. I believe that your nomination, should you be approved, will end the rancid politization at the department, because it will mean an end to waterboarding and other shameful forms of torture and because it will mean a full return to the rule of law and our reputation around the world.

*Hearing on the Nomination of Eric Holder to Be Attorney General Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (testimony of Sen. Schumer), available at 2009 WL 106400. Senator Alexander stated,

The CIA has not used the tactics in question for several years. They are not being used today. The Congress has since enacted laws that make clear that interrogation tactics used by the military are limited to those contained in the Army Field Manual. The President extended those same limitations to intelligence agencies this year by executive order. The President is following his own advice about looking forward by asking the National Security Council to review what tactics would be appropriate when terrorists are captured who might have information about imminent attacks on Americans. The Senate Intelligence Committee is conducting its own review of tactics and is considering expanding the briefing process for interrogation tactics.

155 CONG. REC. S5305-04 (daily ed. May 11, 2009) (statement of Sen. Alexander).

110. See 155 CONG. REC. S6359-01 (daily ed. June 9, 2009) (statement of Sen. Whitehouse) (“One can hope the Obama administration will be more honorable. I suspect and believe they will be. But the fact is that a cudgel that so lends itself to abuse will some day again be abused, and we should find a way to correct that imbalance.”).

111. See *National Security Nominations*, *supra* note 103. Senator Leahy stated,

We need to get to the bottom of what happened in those eight years—and why—so we make sure it never happens again. My desire to find a path to reach a reckoning for the actions of the past eight years has led me to suggest a commission of inquiry. We need a fair-minded pursuit of what actually happened. Sometimes the best way of moving forward is getting to the truth, finding out what happened, so we can make sure it does not happen again.

112. *Oversight of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 887 (2009) (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary).

113. *Id.* (statement of Sen. Specter, Member, S. Comm. on the Judiciary).

114. Senator Whitehouse stated,

tified only the Chairman and Vice Chairman of the Senate Intelligence Committee about the enhanced interrogation techniques that they were using, and those legislators were warned not to tell anyone in the name of national security.<sup>115</sup> Besides writing letters, those who were informed could not do anything to show how they disapproved.<sup>116</sup> To make sure this does not happen again, Senator Patrick Leahy has argued that we should go forward by creating a nonpartisan commission.<sup>117</sup> Senator Sheldon Whitehouse and Senator Russell Feingold have expressed confidence that the investigations by the Senate Committee on Intelligence and the Senate Committee on the Judiciary, among others, will lead the nation down the right path.<sup>118</sup>

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At the heart of all [the] falsehoods lies a particular and specific problem: The “declassifiers” in the U.S. Government are all in the executive branch. No Senator can declassify, and the procedure for the Senate as an institution to declassify something is so cumbersome that it has never been used. . . . The executive branch can use, and has used, that one-sided advantage to spread assertions that either aren’t true at all or may be technically true but only on a strained, narrow interpretation that is omitted, leaving a false impression, or that sometimes simply supports one side of an argument that has two sides—but the other side is one they don’t want to face up to and don’t declassify.

155 CONG. REC. S6359-01 (daily ed. June 9, 2009) (statement of Sen. Whitehouse).

115. Senator Durbin stated,

I served on the Intelligence Committee of the Senate for four years, and I found myself constantly in a frustrating position of being told classified information and being warned not to breathe a word of it to the public at large, for fear that it would endanger the lives of people who were helping the United States.

....

And so, there were times when, frankly, I wanted to walk right over to the Senate Intelligence Committee room and call a press conference and say, if America only knew.

*Hearing on “Torture and the Office of Legal Counsel in the Bush Administration” Before the S. Judiciary Subcomm. on Admin. Oversight and the Courts, 111th Cong. (2009) (statement of Sen. Durbin), available at 2009 WL 1317264.*

116. *See id.* (“I mean, there were times when, you know, you wanted to express your disapproval, and there was no means to do it. If you were privy to the most important information, there was no means.”).

117. *See id.*

118. Senator Feingold stated,

While the revelations of the past month are uncomfortable for some, they are absolutely essential if our country is to return to the rule of law. I am pleased that the members of the Judiciary Committee and the Intelligence Committee are moving forward to determine exactly what happened. And I continue to believe that an independent commission of inquiry, as Chairman Leahy has proposed, is needed, so we can fully understand and come to terms with this dark chapter in our recent history.

*Id.* (statement of Sen. Feingold). Senator Whitehouse stated that the

[t]ime will come when it, frankly, becomes inevitable that a nonpartisan, authoritative commission should take a look at the work of Senator Feinstein’s investigations, the OPR opinions, what the Judiciary Committee does under the leadership of Chairman Leahy and other factors, and draw it all together, so that the American people can make the appropriate conclusions.

#### D. Nongovernmental Organization Perspectives

Broad coalitions of advocacy groups have vociferously argued that it would be improper to move forward without criminal investigation and prosecution. These groups want to uphold the rule of law, and they have thus demanded that Bush Administration officials be held accountable. One such coalition, led by the American Civil Liberties Union and the Center for Constitutional Rights, has petitioned Attorney General Holder to appoint an independent prosecutor to investigate and prosecute the Bush Administration officials who authorized and ordered the use of torture. The Center for Constitutional Rights maintains that a truth commission is not enough.<sup>119</sup> It contends that a full investigation and prosecution is necessary for the Obama Administration to meaningfully reassert the rule of law, secure justice for torture victims, and deter future government officials from repeating this conduct.<sup>120</sup>

Another coalition, whose website can be found at [www.DisbarTortureLawyers.com](http://www.DisbarTortureLawyers.com), is not waiting for Attorney General Holder to hold Bush Administration lawyers accountable for authorizing torture. In May 2009, this coalition filed disciplinary complaints with state bar licensing boards against twelve Bush Administration lawyers for violating the rules of professional responsibility by authorizing the torture of detainees.<sup>121</sup> Moreover, the coalition sent a letter to House Judiciary Committee Chairman John Conyers, asking that he initiate impeachment proceedings against current federal judge and former OLC official Jay Bybee, who was responsible for some of the most notorious OLC memos that seemingly authorized torture.<sup>122</sup>

### VI. OBSERVATIONS AND CONCLUSIONS

In formulating the government's response to 9/11, Bush Administration officials saw that they could, with the help of a compliant and

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*Id.* (testimony of Sen. Sheldon Whitehouse, Chairman, S. Comm. on Admin. Oversight and the Courts). Senator Whitehouse also stated,

If American democracy is important, damage to her institutions is important and needs to be understood. Much of this damage was done to one of America's greatest institutions—the U.S. Department of Justice. I am confident the Judiciary Committee, under Chairman Leahy's leadership, will assure that we understand and repair that damage and protect America against it ever happening again.

155 CONG. REC. S6359-01 (daily ed. June 9, 2009) (statement of Sen. Whitehouse).

119. Ctr. for Constitutional Rights, Prosecutions and Accountability, [http://ccrjustice.org/files/CCR\\_Prosecutions\\_Factsheet.pdf](http://ccrjustice.org/files/CCR_Prosecutions_Factsheet.pdf).

120. *Id.*

121. See Velvet Revolution, The Disbar Torture Lawyers Campaign, [http://www.velvetrevolution.us/torture\\_lawyers/index.php](http://www.velvetrevolution.us/torture_lawyers/index.php).

122. *Id.*

politicized OLC, dilute the application of the U.S. standards that prohibit torture. In the aftermath of 9/11, neither the OLC nor key advisors to President Bush gave serious consideration to torture standards under international law. The policies of waterboarding and other forms of torture that resulted from this permissive approach to interrogation have now come to light, damaging as never before the reputation of the United States, a country that has heretofore hailed itself as dedicated to human rights and the rule of law.

The international standards of the CAT help to remind us that torture violates core American values, and that the rule of law requires the investigation of those who were responsible for torture, no matter how politically challenging that prospect may be. This is not "foreign law" interfering with U.S. law. Quite to the contrary, these international standards, at least if given proper consideration by U.S. policy-makers, could act as a needed "failsafe" in promoting the protection of the rule of law within the United States.

Unfortunately, in the aftermath of 9/11, the requirements of international torture norms were dismissed even more easily than those of our domestic legal order. Although the transition to the Obama Administration has led to a vast improvement in torture policy, the residual consequences of the policies of the past Administration remain grave.

Many detainees who were tortured in the past are still in U.S. custody today. Their disposition is complicated by fundamental principles of the CAT. First of all, the CAT obliges the United States to ensure that any statements extracted by the use of torture may not be invoked as evidence in any legal proceedings.<sup>123</sup> In practice, this will make it impossible to try (or at least impossible to try fairly, according to U.S. and international standards) those who have been tortured. If these people cannot be tried, what is the U.S. government to do with them?

The CAT's *non-refoulement* rule<sup>124</sup> also raises the problem of what the U.S. government should do with people who are likely to again face torture if returned to their home countries. Keeping them in the United States is not an attractive option, but the U.S. government will

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123. See CAT, *supra* note 16, art. 15 ("Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.").

124. See CAT, *supra* note 16, art. 3(1) ("No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.").



need its NATO allies and others to share the burden of addressing this problem. This is a difficult matter to sort out now, and it should have been anticipated when the Bush Administration's interrogation policies were formulated.

Subsequent administrations should be careful not to compound past errors by failing to pursue the investigation and possible prosecution of those who may be responsible for torture. For better or worse, it seems likely that the erroneous and now-withdrawn OLC opinions will preclude the prosecution, at least within the United States, of those who committed acts of torture in reliance upon them. OLC opinions cannot, however, excuse the United States from its obligation<sup>125</sup> under the CAT<sup>126</sup> to submit cases of alleged torture to competent national authorities for prosecution.

Attorney General Holder's decision to open a "preliminary review" into allegations of illegal torture<sup>127</sup> is a good beginning. But a preliminary review is only a modest step towards accountability for past torture. Further action by the DOJ will need to follow if the preliminary review reveals that a full investigation is warranted. Given the information that has already been made public about the use of shocking interrogation techniques,<sup>128</sup> it seems quite likely that a full investigation will be warranted. In this case, international standards provide a useful reminder that justice and the rule of law require no less.

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125. See Vienna Convention on the Law of Treaties art. 27, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

126. See CAT, *supra* note 16, art. 7(1) ("The State Party in the territory under whose jurisdiction a person alleged to have committed any [torture] offence . . . is found shall . . . if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.").

127. See Holder Statement Announcing Preliminary Review, *supra* note 98.

128. See INSPECTOR GENERAL REVIEW, *supra* note 1.