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Accountability of the United States for Alleged Acts of Torture Committed after 9/11/01

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**Accountability of the United States for Alleged Acts of Torture Committed after
9/11/2001
in the Context of the War on Terror**

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Introduction:

The prohibition of torture has been an important and deeply-rooted part of International Law for over 100 years.¹ The Hague Convention on the Laws and Customs of War on Land of 1899 and 1907, both still in effect today, prohibited torture under International Humanitarian Law.² The Geneva Convention Relating to Prisoners of War of 1929, and the Four Geneva Conventions of 1949 (which the United States has ratified) each list the use of torture as a war crime.³ In addition, the use of torture in general has been an international crime for decades under international law, both customary and conventional (treaty-based), and as such is prohibited not only in times of war but also in peacetime.⁴ In addition, torture has been specifically prohibited by the Universal Declaration of Human Rights (UDHR) of 1948, the International Covenant on Civil and Political Rights (ICCPR) of 1966, and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) of 1984. As the United States was instrumental in seeing these latter two documents drafted and adopted, the U.S. clearly

¹ The Institutionalization of Torture by the Bush Administration, M. Cherif Bassiouni, Chapter One, pp. 13-44.

² *Ibid.*, p. 14.

³ *Ibid.*

⁴ *Ibid.*, p. 15.

has been a leader in the worldwide effort to outlaw torture under international law. The use of torture is also prohibited in the United States under the U.S. Constitution by the Fourth, Fifth, Sixth, and Eighth Amendments.⁵ In addition, as a result of the longstanding battle for civil rights in the United States by African American citizens, the Civil Rights Act of 1964 gives rise to a separate cause of action in the guarantee of U.S. Constitutional rights.⁶ Though these protections apply to alien criminal suspects only insofar as they are held within a U.S. territory,⁷ their existence reveals what was prevailing U.S. thought on the use of torture in general, until the aftermath of the attacks on the World Trade Center in New York City and the Pentagon in Washington, DC on September 11, 2001.

Facts:

Almost immediately following these attacks, the administration of the Presidency of George W. Bush, concerned about potentially imminent future attacks by al Qaeda, the extremist group to which responsibility for the first attack on U.S. soil since 1941 had been assigned, began to consider the use of more aggressive interrogation techniques than the U.S. had used previously.⁸ During the ensuing months U.S. Military and CIA officials engaged in consultation with trainers and psychologists associated with the military's Survival, Evasion, Resistance, and Escape (SERE) program, which prepares military personnel to resist giving information, if captured, while under the effects of torture and other abusive interrogation techniques possibly used by the enemy.⁹ SERE training, which includes "stripping students of their clothing, placing them in stress positions,

⁵ Ibid., p. 38.

⁶ Ibid.

⁷ Ibid.

⁸ The Torture Memos, Rationalizing the Unthinkable, Ed. by David Cole, Introductory Commentary, p. 13.

⁹ Ibid.

putting hoods over their heads, disrupting their sleep, treating them like animals, subjecting them to loud music and flashing lights, and exposing them to extreme temperatures,”¹⁰ and which has, until recently, also included waterboarding,¹¹ was designed using the illegal interrogation techniques, including torture, that U.S. enemies have used against U.S. personnel over the years, including the Chinese during the Korean War.¹² Shortly thereafter, both the CIA and the U.S. military began to reverse engineer SERE into a different program and it not to teach U.S. troops to withstand its interrogation techniques, but to teach U.S. interrogators how to use them against the enemy.

The first example of the reverse SERE program occurred in late March of 2002, after the capture of a senior al Qaeda operative, Abu Zubaydah.¹³ After Zubaydah was transferred to a secret CIA prison, a senior FBI interrogator was dispatched to question him.¹⁴ Although this FBI interrogator later testified to Congress that under traditional and non-coercive interrogation techniques Zubaydah offered key and accurate intelligence about the attacks of 9/11 and about planned terrorist activity on U.S. soil, CIA officials were certain that Zubaydah knew more.¹⁵ Thereafter, in April and May of 2002, meetings were convened between lawyers for the CIA and the White House, and officials from the U.S. Justice Department, for the purpose of discussing the use of “alternative interrogation methods” on Zubaydah.¹⁶ A key aspect of these meetings was the fact that, as long as the Justice Department’s Office of Legal Counsel (OLC) gave a legal blessing to the CIA’s

¹⁰ Ibid.

¹¹ Ibid., p. 14.

¹² Ibid., p. 13.

¹³ Ibid., p. 14.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

proposed interrogation tactics, the CIA could not be prosecuted for engaging in them under U.S. law, regardless of whether or not these interrogation tactics were correctly or incorrectly deemed legal.¹⁷ The result was that in two memos issued by the OLC in August of 2002, the CIA was authorized to engage in every “enhanced interrogation tactic” it had proposed.¹⁸ The CIA then acted on the authority of the memos, and applied the enhanced interrogation techniques to Zubaydah and up to 27 other so-labeled “high valued detainees” held at the time in secret CIA prisons.¹⁹ According to George W. Bush, then President of the United States, the use by the CIA of the enhanced interrogation techniques induced Zubaydah to reveal significant new information about al Qaeda’s operations and structures, and about the location of the man who was the logistical planner of the attacks of 9/11, Ramzi bin al Shibh.²⁰ Mr. Bush, by his own admission, approved the use of these enhanced interrogation techniques.²¹

The authorization of the enhanced interrogation techniques by George W. Bush had immediate widespread effects. Starting in September of 2002, the U.S. Military began to proceed as if it knew of the legal blessing that the OLC had given to the use of the interrogation tactics that the SERE program was designed to combat.²² Later that month, two U.S. behavioral scientists connected with the U.S. Guantanamo Bay operation drafted a memo that advocated tougher interrogation techniques there.²³ In October of 2002, the CIA’s Counterterrorism Center’s chief counsel, Jonathan Friedman, visited the Guantanamo Bay site to engage in discussions regarding interrogation techniques such as

¹⁷ Ibid.

¹⁸ Ibid., p. 15

¹⁹ Ibid.

²⁰ Decision Points, George W. Bush, Chapter 6, p. 169. Decision Points, George W. Bush, Chapter 6, p. 169.

²¹ Ibid.

²² The Torture Memos, Rationalizing the Unthinkable, Ed. by David Cole, Introductory Commentary, p. 16.

²³ Ibid.

death threats, sleep deprivation, and waterboarding,²⁴ a process in which a subject endures simulated drowning.²⁵ In December of that year, Defense Secretary Donald Rumsfeld personally authorized the use of similar coercive interrogation tactics at Guantanamo. That order was used to justify a brutal interrogation of an individual who was thought at the time to possibly be the never-materialized 20th hijacker on 9/11/01, Mohammed al-Qahtani. The brutality of this interrogation eventually led Guantanamo's head of military prosecutions, Susan Crawford, to drop all war-crime charges against him because in her view at least some of the evidence obtained against him had come about through his torture.²⁶

Despite the fact that Rumsfeld, after objections to the enhanced interrogation techniques on the basis that they "could rise to the level of torture" by Navy general counsel Alberto Mora (who also threatened to issue his own memo on the subject), rescinded his authorization of the enhanced interrogation techniques in January of 2003, a copy of his authorization had already been sent to Afghanistan, where it remained a continued influence on military interrogation practices for any months after its rescission.²⁷ Soon word of the order approving the enhanced interrogation techniques made its way to Iraq, where the techniques eventually became Standard Operating Procedure for all U.S. military forces there.²⁸ Once the line of use of physical coercion was seen to have been officially breached, a culture of general abuse of prisoners by U.S. soldiers in Iraq was

²⁴ Ibid.

²⁵ Decision Points, George W. Bush, Chapter 6, p. 169.

²⁶ Ibid.

²⁷ Ibid., p. 17.

²⁸ Ibid.

born.²⁹ When a series of photographs was released to the world in June of 2004 depicting depraved and deeply degrading treatment of prisoners held at Abu Ghraib,³⁰ in a prison replete with torture chambers that had been a symbol of repression under the reign of Saddam Hussein and which was renovated by U.S. forces after Hussein's fall,³¹ the world became aware of a new philosophy being deployed as to treatment of prisoners of war by the United States of America, a nation that had once spearheaded attempts at bringing about the demise of such behavior.

The worst abuses at Abu Ghraib occurred between October and December of 2003, almost a year after Rumsfeld's memo retracting his authorization of the enhanced interrogation techniques.³² An investigation of the practices at Abu Ghraib headed by Major General Antonio Tuguba began in January of 2004, after Specialist John Darby, a military police reservist, showed a compact disc containing the infamous torture pictures to superiors.³³ However, Tuguba's investigative mandate was a narrow one, focusing only on the actions and practices of low-level soldiers.³⁴ Thus, although Tuguba's investigation concluded that torture had taken place at Abu Ghraib that was both physical and psychological, it did not inquire as to whether the practices were the result of U.S. Government policy.³⁵

After the June 2004 revelation to the world of the abusive treatment of prisoners at Abu Ghraib by U.S. soldiers, a memo of August 2002 authorizing the enhanced interrogation

²⁹ Ibid.

³⁰ Ibid.

³¹ American Torture, from the Cold War to Abu Ghraib and Beyond, Michael Otterman, pp.164-165.

³² Ibid., p. 168.

³³ Ibid.

³⁴ Ibid., p. 169.

³⁵ Ibid.

techniques was leaked to the Washington Post.³⁶ While the leaked memo did not reference specific techniques, it did offer a narrow definition of torture, confining it to acts specifically intended to lead to organ failure or death.³⁷ The subsequent public scrutiny and condemnation of this narrow interpretation resulted in a replacement memo issued by the OLC on December 30, 2004,³⁸ rejecting the earlier definition of torture as being associated only with actions designed to cause organ failure or death, a definition apparently based on a federal health benefit statute, but offered no specific alternative definition.³⁹ Furthermore, as the memo offered examples of torture such as Russian roulette and argued that death threats and beatings did not necessarily constitute torture, it paved the way for the OLC to essentially reach the same legal conclusions as to what enhanced interrogation techniques were legally allowable in memos of May 10 and 30, 2005, while at the same time confirming that all legal conclusions reached as to treatment of detainees in the August 2002 memos were still sound.⁴⁰

By the time the memos of May 2005 were issued, the CIA's medical office had concluded that one of the practices used in the enhanced interrogation techniques, waterboarding, was neither efficacious nor medically safe, after it had been used 83 times against Abu Zubaydah and 183 times against another detainee.⁴¹ Yet these memos assessed whether each of the techniques used by the CIA, including waterboarding, constituted torture under U.S. law, and concluded that they did not.⁴²

³⁶ The Torture Memos, *Rationalizing the Unthinkable*, Ed. by David Cole, Introductory Commentary, p. 17.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*, p. 25.

⁴⁰ *Ibid.*, pp. 18-26.

⁴¹ *Ibid.*, p. 26.

⁴² *Ibid.*, p. 27.

From August 31 to September 9 of 2006, a team headed by the then commander of Guantanamo Bay, General Geoffrey Miller, was sent to tour a half-dozen prisons in Iraq, including Abu Ghraib, with a charter of suggesting ways of obtaining greater yields of actionable intelligence.⁴³ In determining that detention operations were not yet set for successful operation, Miller issued a recommendation that the Military Police and Military Intelligence unify, an arrangement already in place for years in Guantanamo, concluding that the guard force must be actively engaged in creating conditions for “the successful exploitation of the internees.”⁴⁴ Thereafter, throughout 2007 and 2008, reports of the use of the enhanced interrogation techniques continued, increasing the level of visibility and controversy on both U.S. and international fronts.⁴⁵

On January 22, 2009, two days after taking office as the 44th President of the United States, Barack Obama issued an order requiring that interrogations by U.S. officials meet Geneva Convention requirements.⁴⁶ Nearly three months later, on April 16, 2009, President Obama announced that his administration would undertake no prosecutions for practices used during the Bush Administration’s war on terror.⁴⁷

Indeed, President Bush later asserted, in November of 2010, over a year-and-a-half after he left office, that he knew the use of waterboarding and other controversial interrogation techniques authorized by his administration would lead to criticism that the U.S. had comprised its moral values, but that he believed had he not authorized them, the country would have been under greater risk of attack, stating that the techniques proved highly

⁴³ American Torture, from the Cold War to Abu Ghraib and Beyond, Michael Otterman, p. 167.

⁴⁴ Ibid., p. 167-168.

⁴⁵ The Institutionalization of Torture by the Bush Administration, M. Cherif Bassiouni, Chronology of Events, pp. xlvii-xlviii.

⁴⁶ Ibid., p. xlviii.

⁴⁷ Ibid., p. xlvix.

effective,⁴⁸ disputing the earlier findings of the CIA's medical office. Given his view of the effectiveness and legality of the enhanced interrogation techniques, and his approval of them, versus the prevailing counterarguments against their use, it is easy to see how the CIA's and U.S. Military's implementation of these enhanced interrogation techniques spring-boarded the citizens and scholars of the United States and those around the world into a discussion of the issue that today we debate: Was the Bush Administration guilty of authorizing the use of illegal interrogation methods, including torture, in the pursuit of the interests of the United States in the war on terror?

Justice:

Legal Analysis:

In order to determine the legality of the actions of the United States in its use of the controversial enhanced interrogation techniques, the relevant legal definitions of torture must be examined. On the international level, Article I of the CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...”⁴⁹ The pain or suffering involved must have been inflicted for such purposes as extracting information or a confession, or punishing for an act committed by the subject or a third person, or coercing or intimidating someone, or for any reason founded on discrimination of any kind.⁵⁰ The United States Criminal Code, under section 2340, defines torture almost identically to that of Article 1 of the CAT,

⁴⁸ Decision Points, George W. Bush, Chapter 6, p. 169.

⁴⁹ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, hereinafter CAT.

⁵⁰ Id. art. 1, P. 1.

stating that torture is “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering...”⁵¹

On the surface, under these definitions, the U.S. authorities who authorized the enhanced interrogation techniques in 2002, and those who directly implemented the techniques, could be viewed as guilty of violating both International and U.S. law for their actions in Afghanistan, Guantanamo Bay, and Iraq since September 11, 2001. Apparently no argument exists as to U.S. guilt with reference to international law. However, some debate is warranted as to whether the U.S. is guilty of violating its own domestic laws regarding the use of torture. In the 2002 Memos, the OLC narrowly defined the words *specifically intended* as having the same meaning as the term “specific intent” as applied in U.S. criminal law.⁵² This means that an act could only be viewed as torture if the actor intended to commit the precise criminal act with which the actor is later charged.⁵³ Specifically, therefore, under the 2002 Torture Memos a U.S. interrogator would only be guilty of torture in committing acts causing the infliction of pain as referenced in Section 2340 if infliction of pain was the interrogator’s precise objective.⁵⁴ An interrogator’s mere knowledge that the infliction of pain rising to the level of torture was reasonably likely to occur as a result of the interrogator’s actions would constitute only general intent and would thus be insufficient to establish criminal liability for the actions.⁵⁵ In other words, the OLC essentially offered the opinion that as long as an interrogator’s goal was

⁵¹ 18 U.S.C. Section 2340(1) 2000.

⁵² Symposium: Constitutional Implications of the War on Terror Defining “Torture”; the Collateral Effect on Immigration Law of the Attorney General’s Narrow Interpretation of “Specifically Intended” when applied to United States Interrogators, 62 N.Y.U. Ann. Surv. Am. L. 466.

⁵³ Memorandum from Jay Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (August 1, 2002), in Mark Danner, *Torture and Truth: America, Abu Graib and the War on Terror* 115 (Mark Danner ed., 2004), available at <http://www.gwu.edu/nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>.

⁵⁴ Id.

⁵⁵ Id.

to extract information, that interrogator could engage in whatever behavior he or she wanted to toward a subject, *carte blanche*, short of, perhaps, murder.

The OLC may have been influenced in the formulating of its opinion in the 2002 memos by the issuance of a prior opinion by the Board of Immigration Appeals in March of 2002. In this ruling, the Board held that the deportation of a of a Haitian citizen back to his home state, regardless of whether or not this was done with the knowledge that he would certainly be imprisoned and also likely subjected to torture while imprisoned, did not violate United States obligations under Article 3 of the CAT.⁵⁶ In issuing this ruling, the Board, while finding that the U.S. could not return an alien to a state where substantial grounds exist for believing that the alien would be subjected to torture, held that, in the specific case, deporting the individual in question did not amount to directly torturing the subject because Haitian authorities, who would imprison the subject upon deportation, did not have specific intent to torture because they did not create the conditions inherent in the prison system with a precise objective of causing the type of severe pain and suffering that might rise to the level of torture.⁵⁷ The OLC used the same logic wheel in stating, in its August 2002 memos, that as long as an interrogator's goal in conducting a torturous interrogation was not the torture itself, but the outcome of the torture, i.e., the revealing of desired information, the torturous interrogation would not be

⁵⁶ Symposium: Constitutional Implications of the War on Terror Defining "Torture"; the Collateral Effect on Immigration Law of the Attorney General's Narrow Interpretation of "Specifically Intended" when applied to United States Interrogators, 62 N.Y.U. Ann. Surv. Am. L. 467.

⁵⁷ *Id.*

a crime.⁵⁸ This was the OLC's attempted logic path to the desired outcome on behalf of the Bush Administration. What are the obvious holes in this train of thought?

First of all, the OLC issued its opinion based upon a premise that an act has only one desired end or one consequent result—in this case, that of a confession or the revealing of information by a subject about a planned harm to the United States. In so doing, the OLC appeared to be attempting to extract a bit of advantageous logic from the legal concept of proximate cause, by stating, in effect, that the ends sought were the result of the acts of savagery perpetrated on the subject but that the effect on the subject of the savagery should merely be viewed as a link in the chain of events that led to the desired result—the information gained—and not a result in itself.

Secondly, the Bush Administration clearly wanted a legal opinion that conveniently fit its desires and goals. It might be important to remember that, in the earliest aftermath of the attacks on the U.S. on September 11, 2001, President George W. Bush, already prepared to assign blame and responsibility for the attacks, issued an edict: “We want Osama bin Laden, *dead or alive*.” In issuing this proclamation as if performing a line from a U.S. Western movie, was the President also saying that he wanted to bring bin Laden to justice by whatever means necessary? Was he stipulating that bringing bin Laden to justice in any fashion overrode the concept of bringing a wanted man to justice under the law? Was he also stating something to the same effect regarding bin Laden's lieutenants and deputies and disciples, and regarding anyone else who might be deemed a co-conspirator in the September 2001 terrorist attacks on the United States? Based on the actions of the

⁵⁸ Memorandum from Jay Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (August 1, 2002), in Mark Danner, *Torture and Truth: America, Abu Graib and the War on Terror* 115 (Mark Danner ed., 2004), available at <http://www.gwu.edu/nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>.

U.S. since that *dead-or-alive* proclamation, this latter interpretation could very well be the case. For sure, the U.S. State Department went to the OLC asking for a legal opinion as to its desired use of a set of enhanced interrogation tactics previously refrained from (at least under the authority of the law; illegal practices of torture may have been engaged in by the CIA prior to the post 2001 terrorist attacks⁵⁹). So the OLC clearly knew the desired opinion was that the acts about which their legality was inquired were legal; the OLC clearly knew what its job was. In ignoring the fact that the commission of the various acts that comprised the new enhanced interrogation techniques was done with the specific intention to inflict severe physical or mental pain or suffering *so that* the subject would then accommodate the ultimate goal of a confession or a revelation of information, the OLC grossly erred, as a minimum, in issuing its legal opinion that the new enhanced interrogation tactics did not constitute torture, and arguably deliberately attempted to perpetrate a hoax on the world in issuing an opinion that had the appearance, and the appearance only, of ruling that these acts did not constitute torture. The U.S. interrogators who used these controversial enhanced interrogation techniques most certainly specifically intended to inflict severe pain or suffering upon their use in the hopes that a confession or the revelation of information would be forthcoming. In fact, however, the only likely or certain result of the enhanced interrogation acts was the torturing of the subjects, as the desired result of a confession or revelation of information was not guaranteed to be forthcoming, and often did not occur, either because the subject could withstand the torture or because the subject had no information to provide.

⁵⁹ American Torture, from the Cold War to Abu Ghraib and Beyond, Michael Otterman, Melbourne University Press, 2007.

That the U.S. under its 2002 Torture Memos argued successfully that its enhanced interrogation techniques did not constitute torture is only one train of thought that attempts to justify U.S. actions on this subject. Another is that torture can be justified as a means to an end in certain circumstances.⁶⁰ This train of thought implies that torture should not always be illegal,⁶¹ despite documents such as the CAT and the U.S. Constitution specifically stating the contrary view. Specifically, some argue that the use of torture is justifiable when it is used to gather information in order to prevent a grave risk, such as the immediate destruction of a large number of lives under a situation in which there are no other means to acquire the information desired from a subject in order to avert the grave outcome.⁶² Other factors cited as necessary to justify torture are the level of wrongdoing of the subject being interrogated, and the likelihood that the subject actually does possess the relevant information.⁶³ This argument can go so far as to justify all forms of torturous harm on a subject, including death.⁶⁴ One major problem with this argument in favor of legalizing torture under certain circumstances is the problem of certainty with respect to the likelihood that the subject of torture has either knowledge of a future grave harm such that its revelation could lead to the avoidance of the harm or guilt in the matter at hand. The difficulty of ascertaining whether knowledge and/or guilt exists in the subject could very easily lead to the torture of otherwise innocent people who neither have the knowledge or the guilt in relation to the grave harm that is under

⁶⁰ Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable, Mirko Bagaric and Julie Clarke, 39 U.S.F. L. Rev. 581.

⁶¹ *Ibid.*, pp. 588-589.

⁶² *Ibid.*, p. 611.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

threat or about to happen.⁶⁵ Those who argue that this difficulty can be overcome cite the use of lie detector exams in order to correct for it.⁶⁶ However, even these legal arguers note that lie detector tests are accurate only have an accuracy rate of eighty to ninety percent.⁶⁷ Is this accuracy rate high enough to justify engaging in a practice that could lead to the torture or murder of a person who has a ten to twenty percent chance of having no information and/or being innocent of suspected crimes and involvement in future crimes?

Despite the efforts of the U.S. in the manipulation of the legal interpretation of its own definition of torture, neither bin Laden nor many in his network known as al Qaeda have been brought to justice by the United States. Thus, the means—the engaging in so-called “enhanced interrogation techniques” such as waterboarding—as grossly connected to the proposed ends as they were, cannot be said to have been justified by the ends. The U.S. is arguably in no better a position on the capture of bin Laden and the dismantling of al Qaeda as it was before the attacks on the World Trade Center and the Pentagon on September 11, 2001. Nor can these means be said to have been effective.⁶⁸ Evidence obtained via torture has been shown to be unreliable, as a result of having been obtained through coercion.⁶⁹ Further, the European Court of Human Rights, in a case involving allegations of torture by the British government of certain detainees, held that evidence potentially induced by torture should be weighed.⁷⁰ This fact clearly indicated that such

⁶⁵ *Ibid.*, p. 612.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, pp. 612-613.

⁶⁸ Examining the Use of Evidence Obtained Under Torture: The Case of the British Detainees May Test the Resolve of the European Convention on the Era of Terrorism. 21 *Am. U. Int'l L. Rev.* 277.

⁶⁹ *Id.* at 299.

⁷⁰ *Id.* at 295 (stating that, on August 11, 2004, the European Court of Appeal, while denying the arguments of detainees that torture-induced evidence violated the Convention Against Torture in an opinion offered by all three

evidence should not hold the same weight as evidence not obtained via torture. So there does not appear to be any justification for legalizing torture, and thus, the Bush Administration's attempt to do so, absent legal grounds as it was, also had no rational basis, despite Mr. Bush's blanket claim in his recently published autobiography, *Decision Points*, that information obtained via the enhanced interrogation techniques was valuable and thus the techniques were effective.⁷¹ Bush's cited example, that Abu Zubaydah, because he was subjected to the enhanced interrogation techniques, revealed critical information that led to the capture of Ramzi bin al Shibh, the alleged logistical planner of terrorist attacks of 9/11/2001,⁷² can never be substantiated because, regardless of the efficacy of Mr. Bush's charge that Ramzi bin al Shibh's information was critical, we'll never know whether or not he would have revealed the information anyway, under legal and non-torturous interrogation techniques.

Conclusion as to Guilt; Forums for Justice:

Regardless of all of the above debate regarding potential justification for the use of torture, the legal reality is that international law is unambiguous as to the fact that the use of torture and other so-called enhanced interrogation tactics that can be characterized as cruel, inhuman, or degrading treatment is illegal.⁷³ Not only is the use of the enhanced interrogation techniques by U.S. interrogators under the Bush Administration consistent with the definitions of torture according to international law as defined by the CAT as noted above, but the use of torture is categorically illegal under the CAT, also as noted

justices of the Court, also offered an opinion by two of the three justices that the weighing of the evidence gave appropriate protection of the detainee's rights under Article 6 of the European Convention).

⁷¹ *Decision Points*, George W. Bush, Chapter 6, p. 169.

⁷² *Ibid.*, pp. 168-169.

⁷³ USA: Torture Black and White, but Impunity Continues; Department of Justice Releases Interrogation Memorandums, Amnesty International, 17 April 2009, p. 1.

above, and it is also illegal under the Hague Convention on the Laws and Customs of War on Land of 1899 and of 1907, the Geneva Convention Relating to Prisoners of War of 1929, and the Four Geneva Conventions of 1949 (which the United States has ratified).⁷⁴ Other noteworthy international documents which declare the use of torture illegal are the UDHR of 1948 and the ICCPR of 1966.⁷⁵ In addition, customary international law, created when nation-states engage in a consistent and general practice according to a sense of legal obligation,⁷⁶ also makes illegal the use of torture, as almost every nation, if not all, acknowledges, at least publically, that the use of torture in any situation is to be denounced. Thus, the United States and the Bush Administration are clearly vulnerable to a charge of the use of torture under international law, and thus are vulnerable to an international tribunal or other inquiry as to whether or not its use of enhanced interrogation tactics constituted torture. Notwithstanding the fact that the available forums for bringing an action against the United States amount to only two—an ad hoc international criminal tribunal acting under the authority of the United Nations Security Council, and the International Criminal Court, also acting under the authority of the UN Security Council,⁷⁷ neither of which are likely scenarios for reasons explained below—the U.S. and the Bush Administration are at least in theory in jeopardy of a prosecution on an international level.

Further, under an interpretation of the U.S. Constitution, the politicians from the executive branch of the U.S. Government who authorized the enhanced interrogation techniques, along with those who support those politicians and advised them on legal

⁷⁴ The Institutionalization of Torture by the Bush Administration, M. Cherif Bassiouni, Chapter One, p. 14.

⁷⁵ *Ibid.*, p. 15.

⁷⁶ Public International Law, 4th Edition, Thomas Buergenthal and Sean D. Murphy, Thomson West, 2007.

⁷⁷ *Ibid.*, pp. 96-99.

grounds, perhaps grossly in error, could be guilty of the crime of torture, a category of cruel and unusual punishment which is prohibited under the Eighth Amendment,⁷⁸ and thus should be the subject of an investigation in order to sort out the truth. The U.S. Supreme Court has held in Eighth Amendment cases involving cruel and unusual punishment that such punishments entail those that are without penological justification, that involve unnecessary infliction of pain, and that are not consistent with the evolution of standards of decency.⁷⁹ In the core of its definition, the infliction of unjustified suffering amounts to being cruel.⁸⁰ Given the viewpoint that the infliction of pain could not have been justified in the case of the use of the enhanced interrogation techniques because information obtained as a result of these treatments is unreliable and therefore no justification could possibly exist, even under the grave harm argument, the infliction of pain by U.S. interrogators who used the disputed techniques would have to be viewed as unnecessary. Likewise, given the lack of knowledge of guilt or innocence of the subjects of the enhanced interrogation tactics—because none of them had been convicted of the crimes of which they were suspected, the treatment would also have to be viewed as without penological justification. Thus, various members of the Bush Administration, including George W. Bush, who had the final decision-making authority in the matter and who gave the final authorization to the interrogators to proceed with inflicting this unjustified suffering, in addition to those who actually implemented it, could and should be brought to justice under the Eighth Amendment to the Constitution of the United States in U.S. federal court.

⁷⁸ Cruelty, Prison Conditions, and the Eighth Amendment, Sharon Dolovich, 84 N.Y.U.L. Rev. 881, October 2009, p. 882.

⁷⁹ Ibid.

⁸⁰ Ibid., p. 883-884.

The Search for the Truth:

The right to the truth is a principle of international human rights law that has gained strength in recent years. The right to the truth has been asserted in the Report of the Office of the United Nations High Commissioner for Human Rights in 2005,⁸¹ and the Annual Report of the United Nations High Commissioner for Human Rights and the Secretary General in 2009.⁸² Prior to those assertions, the ICCPR⁸³ and the CAT⁸⁴ each included articles which called for appropriate remedies for any victim of human rights violations under their respective covenants. Among those potential remedies is an investigation designed to uncover the truth of what happened in a given circumstance.⁸⁵

In order to facilitate the process of obtaining justice as discussed in the legal analysis section above, and of making reparations and guaranteeing non-repetition of the acts upon the determination of guilt, if any, a concerted and diligent search for the truth must take place. In order to achieve this result in the case of the use of the enhanced interrogation techniques by the Bush Administration and others under its authorization, during the so-called war on terror in the aftermath of the terrorist attacks of 9/11/2001, the United States itself must launch a comprehensive inquiry. This inquiry must delve into the allegations of illegal acts of interrogation, including torture, with the intent of

⁸¹ Promotion and Protection of Human Rights: Study of the Right to the Truth, Report of the Office of the High Commissioner for Human Rights, 2005.

⁸² Promotion and Protection of Human Rights: The Right to the Truth, Annual Report of the United Nations High Commissioner for Human Rights and the Secretary General, 2009.

⁸³ International Covenant on Civil and Political Rights, Article 2, 1992.

⁸⁴ Covenant Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Article 14, 1994.

⁸⁵ International Covenant on Civil and Political Rights, Article 2, 1992; and Covenant Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Article 14, 1994.

identifying their causes and the responsible parties, if illegality is confirmed.⁸⁶ In the pursuit of this goal, care must be taken to safeguard any evidence from being destroyed, and this evidence must be declassified and disclosed.⁸⁷ In the case at hand, the United States must also take measures to conduct impartial and independent investigations into allegations of the use of torture, so that anyone found to be responsible for such actions, including President George W. Bush, can be brought to justice.⁸⁸

However, the realities associated with the investigation and the prosecution of a former President of the United States by a current President of the United States, given all of the legal and political implications of such an endeavor, will likely prevent this prosecution from taking place. On the international front, the chief reason is that, even though the International Criminal Court (ICC) in The Hague, The Netherlands, was created by the United Nations in 2002 to prosecute war crimes such as genocide and mass torture and other crimes against humanity, the ICC has jurisdiction only over nations which are members of the ICC treaty, and the United States never ratified the ICC treaty, thus it has no jurisdiction over the United States.⁸⁹

While it is possible for the ICC to bring a charge of crimes against humanity against the United States under the Authority of the UN Security Council as mentioned above, such a referral by the UN would for all practical purposes be prevented.⁹⁰ The reason is that any of the four permanent members of the UN Security Council other than the United States

⁸⁶ Submission to the Universal Periodic Review of the United Nations Human Rights Council Ninth Session: November 22 – December 3, 2010, International Center for Transitional Justice (ICTJ), April 16, 2010, p. 2-3.

⁸⁷ Ibid.

⁸⁸ USA: Torture Black and White, but Impunity Continues; Department of Justice Releases Interrogation Memorandums, Amnesty International, 17 April 2009, p. 1.

⁸⁹ The Prosecution of George W. Bush for Murder, Vincent Bugliosi, Vanguard Press, 2008, pp. 269-270.

⁹⁰ Ibid., p. 270.

would have veto power over any resolution that would bring George Bush and other U.S. citizens to justice, and the likelihood that all four of these nations, including and especially Great Britain, would not veto such a resolution is nearly inconceivable.⁹¹

In addition, even if jurisdiction wasn't an issue, the ICC, by its charter, can only be a court of last resort,⁹² meaning that the ICC has no original jurisdiction in such a case and domestic jurisdiction over former President Bush and the members of his administration would have to be exercised to its fullest extent in order to even be able to bring him and any co-conspirators before the ICC. Thus far, the United States has brought no one before a U.S. court regarding the disputed issue of whether or not Commander-in-Chief George W. Bush and his staff committed the domestic crime of torture. This fact, however, could be pointed to by the ICC as giving it jurisdiction over a case against the former president, because Article 17(a) of the ICC Statute gives it jurisdiction over a matter when the courts of a defendant's home state are unwilling or unable to investigate or prosecute the matter,⁹³ thus citing the Obama Administration's unwillingness to take action against George W. Bush, but at this point no nation-state has stepped forward to assert a charge in the ICC against Bush and the U.S. for mass torture. Even if some nation-state did so, the ICC does not have the power to execute an arrest warrant over Bush and his cohorts.⁹⁴ Instead, it relies on governments to surrender citizens to the court, and the question would remain: Would the United States do this? Given that Obama has stated that, specifically regarding the allegations of the use of torture by the Bush Administration, America need

⁹¹ Ibid., p. 271.

⁹² Ibid., p. 270.

⁹³ Ibid.

⁹⁴ Ibid., p. 271.

not focus on laying blame on matters of the past right now,⁹⁵ in the same vein he would likely not surrender Mr. Bush to ICC authorities. But the process of unearthing the truth need not be circumvented by these realities.

The concept of truth commissions, another name for investigatory commissions, is today a firmly entrenched mechanism of the accountability process where gross violations of human rights have taken place in the world.⁹⁶ Among the many ways in which these commissions can make significant contributions is that, given the absence of a threat of prosecution over which they would have no authority, such commissions can more effectively examine the full scope of violations by all perpetrators that may have occurred and thus present a more complete picture of violations of human rights law than would a trial court which focuses only on the ascertaining of guilt of innocence of only a small subset of defendants.⁹⁷ Another contribution of truth commissions is that, once they unearth a fuller truth, they can act as a potentially cathartic psychological healing balm for victims of human rights violations.⁹⁸ In this way the revelation of the truth by the perpetrators of such injustices serves to advance the restorative component of justice, even without a binding verdict in a court of law.⁹⁹ A third contribution of truth commissions is that they can help to promote through the imposition of a more condemnation of the acts charged.¹⁰⁰ Another factor in favor of truth commissions is that, through their use, a successor administration can show its commitment to human rights

⁹⁵ The Institutionalization of Torture by the Bush Administration, M. Cherif Bassiouni, *Chronology of Events*, p. xlvix.

⁹⁶ *Accountability for Human Rights Atrocities in International Law, Beyond the Nuremberg Legacy*, Steven R. Ratner, Jason S. Abrams, James L. Bischoff, Oxford University Press, 2009, p. 270.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, pp. 270-271.

¹⁰⁰ *Ibid.* p. 271.

law.¹⁰¹ Finally, a truth commission can venture beyond the confines of a trial court and make recommendations as to how to deal with past violations and prevent future abuses, advisory opinions which may actually turn out to be its most important its most important contribution.¹⁰² In cases regarding charges against foreign nationals, such recommendations may include those which are designed to bring about some form of reparation for the victims on legal grounds, such as civil suits under the Alien Tort Claims Act (ATCA) of 1789 and/or the Torture Victims Protection Act (TVPA) of 1992.¹⁰³ While these recommendations may ultimately be ignored by the victims, who in the present case are foreigners who may or may not have been a part of a terrorist network working against the United States and the rest of the world, and who could prove difficult to locate or reluctant to pursue damages in U.S. courts against the perpetrators for fear of reprisal or other reasons, such recommendations may still serve as notice to the world that the offending state has been put on notice as a means of lobbying for change in the future,¹⁰⁴ thus acting as a form of guarantee of non-repetition. In the present case, a truth commission could lead to lobbying efforts to bring about the enactment of law that amends both the ACTA and the TVPA to include jurisdiction over defendants acting under U.S. law, including high-ranking government officials and the president.

One notable example where such lobbying efforts led to official change in U.S. law and policy is that of Japanese Americans and other groups, who fought for decades to right the wrong committed by the U.S. Military during World War II of the internment of approximately 120,000 Japanese and Japanese Americans, a practice that was legally

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, pp. 273-275.

¹⁰⁴ *Ibid.*, p. 271.

challenged by these groups but which was upheld by the United States Supreme Court at the time. More than forty years later, in 1988, as a result of these lobbying efforts, President Ronald Reagan authorized the enactment of the Civil Liberties Act, leading to an official apology for the internment and resulting in the payment of reparations to the internees and their survivors.¹⁰⁵ Although no one was prosecuted, the enacted legislation marked a formal repudiation of past acts by the U.S. military that was authorized by the U.S. government at the time, thus providing an important cultural bulwark against this type of occurrence in the future.¹⁰⁶

Another example is the more recent case of Canadian citizen Maher Arar, who was sent by U.S. agents to Syria, where he was imprisoned without charges for a year, and where he was tortured.¹⁰⁷ The U.S. agents had acted in part on information provided by Canadian intelligence.¹⁰⁸ When Arar was finally returned to Canada, Canadian officials established an investigative commission lead by a prominent appellate judge, resulting in a 1,100-page report that fully exonerated Arar and criticized Canadian authorities.¹⁰⁹ Although no one was prosecuted, just as in the case of the Japanese internees in the U.S., Canada's parliament did issue a formal apology to Arar, who was paid \$10 million in damages, an official repudiation that is likely to have a deterrent effect on similar such wrongdoings in the future,¹¹⁰ or at least to force Canadian intelligence authorities to attempt to avoid such shoddy intelligence work henceforward.

¹⁰⁵ The Torture Memos, Rationalizing the Unthinkable, Ed. by David Cole, The New Press 2009, Introductory Commentary, p. 38.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid., p. 38-39.

¹⁰⁸ Ibid., p. 39.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

Neither the citizens of the U.S. nor the world have seen any actions of the kind noted above with respect to the allegations of authorization of torture by the Bush Administration.¹¹¹ None of the lawyers nor the government officials who are responsible for the use of the enhanced interrogation techniques deployed by the Bush Administration have apologized for their actions or even been investigated as to the legality of their actions, nor has any process been undertaken which might lead to the possible payment of damages to the victims.¹¹² The failure to establish and cooperate with a truth commission to examine this matter thoroughly allows for no opportunity to account for what has been done in the past, arguably in violation of U.S. and international law, and potentially leaves the United States in a situation where, when it has a president who does not believe in the use of torture, it won't engage in torture, but when it does have such a president, it will, thus making the use of torture a matter of policy and not law or morality.¹¹³ The Obama Administration's executive order declaring an end to the use of the enhanced interrogation techniques by U.S. officials, and defining waterboarding as torture, is but one step in a process, and by itself falls substantially short of what should be done in addressing the allegations against and policies of the Bush Administration regarding the interrogation of detainees.

The establishment by the Obama Administration of a non-partisan, independent truth commission with subpoena power and necessary security clearances must be done without delay, for the purpose of investigating and assessing responsibility for the adoption of coercive interrogation techniques by the Bush Administration in the

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

aftermath of the terrorist attacks on the United States on 9/11/2001.¹¹⁴ Notwithstanding the possibility of criminal proceedings and/or civil actions, the establishment of such a truth commission will be an important step toward forming an official accountability for what has taken place regarding these alleged violations of human rights.¹¹⁵

Reparations:

Although difficult to bring about, the making of reparations to victims by states found to have violated the human rights of these victims is an obligation cited in various multilateral treaties and which exists in customary international law. Specifically, the ICCPR obliges states which are party to this convention “to ensure that any person whose rights or freedoms are herein recognized are violated shall have an effective remedy.”¹¹⁶

The CAT stipulates that each state that is party to the treaty shall ensure that its legal system provides that victims of an act of torture can obtain redress and have an enforceable right to compensation.¹¹⁷ Under the UDHR, much of which has become customary international law over time,¹¹⁸ people have the right to effective remedy for acts committed in violation of fundamental rights granted by law or the domestic constitution of their state.¹¹⁹ However, the aforementioned executive order issued by the Obama Administration, which required that all future interrogations by U.S. officials meet Geneva Convention requirements by adhering to the practices of non-coercion as specified by the U.S. Army Field Manual, represents the lone material action by the United States in addressing the use of the enhanced interrogation techniques by the Bush

¹¹⁴ Ibid., pp. 39-40.

¹¹⁵ Ibid.

¹¹⁶ International Covenant on Civil and Political Rights, Dec. 16, 1966, Article 2, paragraph 3a.

¹¹⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 14.

¹¹⁸ The International Legal System, Cases and Materials, Sixth Edition, Foundation Press, 2010, p. 439.

¹¹⁹ The Universal Declaration of Human Rights, Article 8.

Administration.¹²⁰ For a variety of reasons, both political and practical, the Obama Administration has failed to proceed against the prior Bush Administration to attempt to extract justice and reparations for the victims of the enhanced interrogation techniques practiced under the Bush Administration, a fact which is inconsistent with its executive order declaring them heretofore unauthorized.¹²¹ Instead, he has taken what could be viewed as an easy way out of the political dilemma, stating in a speech given in April of 2009 that the citizens of the United States “have been through a dark and painful chapter in our history. But at a time of great challenges and disturbing disunity, nothing will be gained by spending our time and energy laying blame for the past.”¹²² However, this statement is not consistent with a subsequent statement he made in June of 2009, on the anniversary of the execution of the CAT, in which he declared that the “United States must never engage in torture, and must stand against it wherever it takes place.”¹²³ How is the U.S. standing against the use of torture wherever it takes place without conducting an investigation of widespread allegations of its use under a prior administration as a start of the process of preparing to make reparations to the victims for its use? Thus far, the Obama Administration, while denouncing the acts of the prior regime, has failed to carry out its obligations under these denouncements,¹²⁴ pointing up the challenges of making proper reparations to victims of international human rights law violations.

Still, though, as illustrated in the examples cited above of the internment of the Japanese Americans and of the case of Maher Arar, reparations can be made through proper and

¹²⁰ The Institutionalization of Torture by the Bush Administration, M. Cherif Bassiouni, Chapter Six, p. 253.

¹²¹ Ibid, pp. 253-264.

¹²² Press Release, The White House, Statement of the President on the Release of OLC Memos, April 16, 2009.

¹²³ Press Release, The White House, Statement by President Barack Obama on United Nations International Day in Support of Torture Victims, June 26, 2009.

¹²⁴ The Institutionalization of Torture by the Bush Administration, M. Cherif Bassiouni, Chapter Six, p. 261.

diligent effort. These examples both show that remedies can be achieved through the domestic courts of the nation charged to have violated the law, whether the violation be under the color of domestic law only or under the color of both international and domestic law.

In the legal system of the United States, reparations mainly come about as a result of civil litigation pursuing monetary damages based on a verdict that a victim's rights were, indeed, violated.¹²⁵ As previously noted, the basis of some of these claims can be the ACTA and the TVPA.

Under the ACTA, district courts in the U.S. have original jurisdiction over civil actions by aliens in tort only, as committed in violation of a treaty to which the United States is a party or in violation of the law of nations.¹²⁶ This means that the ACTA gives U.S. federal courts subject matter jurisdiction over a complaint provided that it meets three basic requirements: 1) any plaintiff is an alien, 2) the defendant is accused of a tort, 3) the tort at issue is in violation of the law of nations or in violation of a convention to which the United States is a party.¹²⁷ Until the landmark case of *Filartiga v. Pena-Iralda*, decided in 1980, the ACTA was an obscure basis for jurisdiction in a U.S. federal court.¹²⁸ In *Filartiga*, the family of a Paraguayan brought a complaint against a person alleged to have tortured the Paraguayan man to death while the alleged perpetrator was physically present in the United States.¹²⁹ Subject matter jurisdiction over the case was

¹²⁵ Accountability of Bush Administration Officials for Gross Violations of Human Rights and Serious Violations of International Humanitarian Law: Progress and Prospects, Douglass Cassel, Preliminary Draft, March 9, 2009, p. 13.

¹²⁶ 28 U.S.C. Section 1350 (2006).

¹²⁷ Accountability for Human Rights Atrocities in International Law, Beyond the Nuremberg Legacy, Steven R. Ratner, Jason S. Abrams, James L. Bischoff, Oxford University Press, 2009, p. 273.

¹²⁸ Ibid.

¹²⁹ Ibid.

established by the Second Circuit Court of Appeals.¹³⁰ While many civil suits have since been brought successfully under the ACTA against perpetrators who have committed human rights violations in foreign countries, including against presidents and other high-ranking current and former government officials, and the United States Supreme Court has upheld the U.S. federal jurisdiction of the ACTA over such crimes (albeit to a restrained extent),¹³¹ the litigation has only been successful when filed against those acting under the color of foreign law.¹³² As noted above, the same is true of the TVPA, and a change in U.S. law would be necessary to allow these statutes to encompass claims against the Bush Administration in the present case.

However, the recent trend has been a solidifying of protection of U.S. officials, and not vice versa, as the Military Commissions Act (MCA) of 2006 stipulates that the Geneva Conventions cannot be invoked as a source of rights in civil actions in U.S. courts against current or former agents or officers of the U.S.¹³³ Although it can still be argued that the Geneva Conventions still have primacy over the MCA in a U.S. court,¹³⁴ the mere existence of the MCA and its attempt to circumvent the Geneva Conventions represents an astounding step backwards by the United States in the recognition and protection of international human rights.

Although the above-noted obstacles are significant, history—even U.S. history—has shown that reparations can come about against such barriers as where no law exists to

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² Accountability of Bush Administration Officials for Gross Violations of Human Rights and Serious Violations of International Humanitarian Law: Progress and Prospects, Douglass Cassel, Preliminary Draft, March 9, 2009, p. 15.

¹³³ Military Commissions Act of 2006, Pub. L. No. 109-366, Section 5(a) 120 Stat. 2600, 2631-32.

¹³⁴ *Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror*, Jordan J. Paust, Cambridge University Press, 2007, p. 93.

provide for them. However, in the case of the Japanese-American internees and the Native Americans, reparations took a half-century or more to come to fruition. The situation is not without hope, though. Examples of successful reparations exist in other nations. In addition to the Arar case in Canada, the governments of Argentina and Chile have provided compensation and rehabilitation to some victims of the abuses of their military dictatorships, and the United Nations set up compensation plans for victims of human rights and other violations in Kuwait after invasion by Iraq.¹³⁵ Even more hopeful is the example of the Inter-American Court of Human Rights (IACHR), which has pioneered a range of judicial remedies for violations of international human rights law.¹³⁶ In 15 years since issuing its first remedial order in 1989 through 2004, reparations were awarded by the IACHR in 47 cases.¹³⁷ In addition, alternative, non-traditional forms of reparations, may be developed and proposed in the case of the use of the enhanced interrogation techniques, as has been done in cases of human rights abuses resulting from mass conflicts, which can bring about reparations in non-monetary form, such as rehabilitation, community development and services, and access to resources.¹³⁸ Thus, reparations can happen in the case of victims of the enhanced interrogation techniques by the Bush Administration through perseverance and creative thought and persistence.

¹³⁵ Reparations Decisions and Dilemmas, Naomi Roht-Arriaza, 27 *Hastings Int'l & Comp. L. Rev.* 157, Winter, 2004, p. 1.

¹³⁶ The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights, Douglass Cassel, 2004, p. 1.

¹³⁷ *Ibid.*

¹³⁸ Reparations Decisions and Dilemmas, Naomi Roht-Arriaza, 27 *Hastings Int'l & Comp. L. Rev.* 157, Winter, 2004, pp. 10-16.

Guarantees of Non-Repetition:

Apart from the extraction of justice or the pursuit of the truth or the providing of appropriate remedies in cases of human rights violations, perhaps the most important result that need be sought is the guarantee that the violations not be repeated. Without that, we can't advance as a civilization and a society. Regardless of whether or not any U.S. officials are brought to justice in the case of alleged acts of torture committed during the Bush Administration, or reparations are ever made, or even if the truth is ever established as to who committed what crimes, the United States can take steps to guarantee that the use of these techniques does not occur again. Some guarantees have already been put in place, including the aforementioned executive order ensuring that all interrogations by U.S. officials are lawful according to the Geneva Convention requirements and the U.S. Army Field Manual, and that no detainees in the custody of U.S. officials shall be subject to torture or humiliating and degrading treatment, and that the OLC memos authorizing the use of the enhanced interrogation techniques were officially denounced.¹³⁹

However, the Obama Administration, facing political and diplomatic obstacles, has clearly stopped short of bringing the United States in line with its obligations under international law to investigate the allegations of human rights violations committed by the nation under the Bush Administration.¹⁴⁰ An effort that would be advisable in furtherance of what's already been done would be to revise the Army Field Manual to specifically outlaw the enhanced interrogation techniques used by the Bush

¹³⁹ Exec. Order No. 13,491, Ensuring Lawful Interrogations, 74 Fed. Reg. 4893 (Jan. 27, 2009).

¹⁴⁰ The Institutionalization of Torture by the Bush Administration, M. Cherif Bassiouni, Chapter Six, p. 260-262.

Administration, a relatively easy task. A significant and more difficult-to-realize legislative guarantee would be to amend section 2340 of the Eighth Amendment of the Constitution of the United States so as to eliminate any further attempts at defining torture according to U.S. criminal law, as was done in the OLC memos, thereby bringing the constitutional definition in line with that of the CAT. More difficult and more radical actions that should be undertaken are serious legislative changes in the ACTA and the TVPA such that they allow for actors under color of U.S. law to be sued in civil court in the U.S. And finally, as noted above, the truth, complete with all of the facts that can be unearthed, should be established and revealed to the citizenry of the United States and the world, so that the lessons of history can be learned instead of the mistakes of history being repeated.

Conclusion:

The events of 9/11/2001 were so devastating and shocking that they caused presented an uncommon challenge to those elected officials who govern the United States, including President George W. Bush, putting a strain on their moral character and their ability to think rationally and avoid making decisions driven by emotion. Leaders of people, and people in general, have a difficult time maintaining their focus on the purity of their ideals and morals in such situation, and often throughout history leaders have failed under these circumstances. The internment of Japanese Americans during World War II can be said to have been a black mark on the record of one of the greatest of U.S. Presidents, Franklin Delano Roosevelt. However, sometimes great leaders do emerge even stronger from positions of potential moral compromise, as in the case of Abraham Lincoln, who made the difficult decisions regarding the abolishment of slavery that divided this nation

and led the resulting sides to bear arms against each other. It appears that President George W. Bush was one who failed his big test of moral dilemma, by making the easy and apparently convenient choice to authorize the use of enhanced interrogation techniques of dubious international legality. What the United States needs now is a leader who is willing to make the difficult choices to investigate and reveal the truth of what happened under the Bush Administration regarding the allegations of the use of torture against it, in the interest of the preservation of international human rights law.