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NOT JUST A FEW BAD APPLES: THE PROSECUTION OF COLLECTIVE VIOLENCE

INTRODUCTION

The manifestation of mass atrocities throughout the world requires that their collective nature be understood and that criminal jurisprudence evolve to recognize the criminal accountability of groups as well as the individual perpetrators.¹ Collective violence is especially problematic when it involves government and military leaders; thus, “leaders and those in superior positions in the chain of command are, owing to their positive governance obligations, more deserving of prosecution and weightier punishment for their involvement in mass atrocity.”² International criminal law has begun to develop methods of accounting for collective liability by utilizing the theories of command responsibility and joint criminal enterprise—theories that prove beneficial when attempting to prosecute crimes involving “difficulties in establishing precise facts and evidentiary linkages . . . [and a] complex sequencing of administrative directives. . . .”³ The recent atrocities that have occurred in U.S. detention facilities in Guantanamo, Afghanistan, and Iraq provide a situation in which the theories of command responsibility and joint criminal enterprise could be utilized to achieve convictions not possible with more traditional theories of liability—convictions that are necessary to counter the rise of collective violence in the world.⁴

Many allegations, ranging from inhumane treatment to torture, have arisen from the U.S. detainee operations following “Operation Enduring

1. For an excellent discussion, see generally Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539 (2005).

2. *Id.* at 568 (citing Richard J. Goldstone, *The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action*, 6 DUKE J. COMP. & INT’L L. 5, 7 (1995)).

3. *Id.* at 574.

4. Leaders hold a power of persuasion over lower ranking members of the military hierarchy. It is necessary to hold them accountable for their actions so that this power of persuasion is limited to the appropriate use of the military. In the words of one commentator:

Just as dynamic military commanders can induce their subordinates to accomplish heroic acts beyond the pale of traditional human limitations, they also, unfortunately, possess the power and means of ordering, encouraging, or acquiescing to, acts that are inhuman in the extreme. Through an abuse of legitimate military leadership and authority, a commander may condone, or even direct, conduct that goes far beyond even the relaxed standards of acceptable violence associated with warfare. Under the direction of persuasive leadership, soldiers have committed acts so atrocious as to exceed any possible rational application of military force.

Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 157–58 (2000).

Freedom” in Afghanistan and “Operation Iraqi Freedom.”⁵ Distinguishing between torture and inhuman treatment is a matter of degree⁶ and much of the existing body of law applies to both. This Note does not discuss the distinction between torture and inhuman treatment; rather, it assumes that U.S. practice during detainee interrogations has, on occasion, risen to the level of torture.⁷ While the policy of President Bush to hold disciplinary proceedings for the “aberrant individuals” who participated in flagrant violations of international law is commendable, liability extends far beyond the low-ranking personnel working the late-shift at Abu Ghraib prison.⁸ In fact, the individual actions were sponsored, condoned, acquiesced to, or ignored by high-ranking members of the U.S. military and government.⁹ Such activity cannot be ignored.

This Note first focuses upon the international and domestic prohibitions on torture. A discussion of the use of torture and attempted justifications for such use will then follow. This Note will conclude with

5. See generally REED BRODY, HUMAN RIGHTS WATCH, THE ROAD TO ABU GHRAIB (June 2004), <http://www.hrw.org/reports/2004/usa0604/usa0604.pdf> (last visited Jan. 26, 2006) [hereinafter “ROAD TO ABU GHRAIB”]; JOHN SIFTON, HUMAN RIGHTS WATCH, ENDURING FREEDOM: ABUSES BY U.S. FORCES IN AFGHANISTAN (Mar. 2004), <http://www.hrw.org/reports/2004/afghanistan0304/afghanistan0304.pdf> (last visited Jan. 20, 2006) [hereinafter “ENDURING FREEDOM”]; INT’L COMM. OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (Feb. 2004), <http://www.stopwar.org.uk/new/news/articles/icrc.pdf> (last visited Sept. 24, 2005) [hereinafter “ICRC REPORT”].

6. The General Assembly of the United Nations has defined torture as “an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.” Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GAOR, 30th Sess., Annex, art. 1(2), U.N. Doc. A/10408 (Dec. 9, 1975), reprinted in U.N.Y.B. 624, U.N. Sales No. E.76.IV.2. The European Court of Human Rights has defined torture as “deliberate inhuman treatment causing very serious and cruel suffering.” *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) 25, 66 (1976); *Aksoy v. Turkey*, 26 Eur. Ct. H.R. Rep. on Judgments & Decisions, 1996–VI, 2260, 2279 (1997); *Aydin v. Turkey*, 50 Eur. Ct. H.R. Rep. on Judgments & Decisions 1997–VI, 1866, 1891 (1998).

7. Even if the actions of U.S. military and civilian personnel did not rise to the level of torture, the actions would still constitute cruel, inhuman, or degrading treatment and, thus, would still be banned by international and national law. See *infra* notes 68–91 and accompanying text (discussing the applicability of domestic and international law banning torture, which also bans cruel, inhuman, or degrading treatment).

8. See Beth Potter, *Reservist Pleads Guilty in Prison Scandal*, Oct. 21, 2004, USA TODAY, at A1 (“the Bush administration sought to blame the abuse on a small number of low ranking ‘bad apples’”); *Remember Abu Ghraib?*, Oct. 15, 2004, WASH. POST, at A22 (stating that “the president maintained that the abuse was the responsibility of a few low-ranking soldiers working the night shift”).

9. “[A] pentagon appointed panel has found responsibility at senior levels of the Pentagon, the Justice Department and the White House.” *Remember Abu Ghraib?*, *supra* note 8, at A22. A discussion of this evidence and the governmental policy it supports will occur in Parts III and IV.

an analysis of the utility of the theories of command responsibility and joint criminal enterprise to the allegations that have been asserted.¹⁰

I. INTERNATIONAL AND DOMESTIC PROHIBITIONS ON TORTURE

A. *International Humanitarian Law*

International humanitarian law, also known as the law of armed conflict, arose from two bodies of law that are interrelated: the 1907 Hague Conventions¹¹ and the 1949 Geneva Conventions.¹² Hague Convention IV governs the modalities of armed conflict,¹³ while four of the Geneva Conventions focus upon the treatment of persons during armed conflict.¹⁴ This Note will focus upon the provisions of the Geneva Conventions that protect persons¹⁵ from torture.¹⁶ Each of the four Geneva

10. While the jurisdictional issues involved in such a prosecution would constitute a fascinating study of international and domestic law, such a study is beyond the scope of this Note.

11. For the relevant Hague Convention, see *infra* note 13.

12. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8), para. 75, at 256. See *infra* note 14.

13. Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, and Annex: Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 (*entered into force* Jan. 26, 1910) [hereinafter "Hague Convention IV"]. Violations of Hague Convention IV were subject to reparation payments by the State Party that violated the convention. *Id.* art. 3.

14. The four relevant Geneva Conventions are: Geneva Convention for the Amelioration of the Condition of Wounded and Sick in the Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31 (*entered into force* Oct. 21, 1950), available at <http://www.genevaconventions.org/> (last visited Sept. 24, 2005) [hereinafter "Geneva Convention I"]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85 (*entered into force* Oct. 21, 1950), available at <http://www.genevaconventions.org/> (last visited Nov. 14, 2004) [hereinafter "Geneva Convention II"]; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 135 (*entered into force* Oct. 21, 1950), available at <http://www.genevaconventions.org/> (last visited Sept. 24, 2005) [hereinafter "Geneva Convention III"]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287 (*entered into force* Oct. 21, 1950), available at <http://www.genevaconventions.org/> (last visited Sept. 24, 2005) [hereinafter "Geneva Convention IV"].

15. Geneva Conventions I through IV protect the following persons: the wounded and sick in the armed forces in the field, Geneva Convention I, *supra* note 14, art. 3(1)(a); the wounded, sick, and shipwrecked members of the armed forces at sea, Geneva Convention II, *supra* note 14, arts. 3, 12, and 51; prisoners of war, Geneva Convention III, *supra* note 14, arts. 3, 17 and 87; and civilians, Geneva Convention IV, *supra* note 14, arts. 3 and 32. For the purposes of this Note, only the provisions relative to prisoners of war and civilians present in Geneva Convention III and Geneva Convention IV will be discussed.

16. Geneva Convention III mandates that "[n]o 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." Geneva Convention III, *supra* note 14, art. 17. In addition, "prisoners of war who refuse to answer may not be threatened, insulted or exposed to unpleasant or disadvantageous treatment of any kind."

Conventions holds that torture is a grave breach of the Conventions and is subject to universal jurisdiction.¹⁷ Geneva Convention III applies to prisoners of war¹⁸ and Geneva Convention IV applies to persons “who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”¹⁹ When the status of individuals is uncertain, they must be afforded the protections of the Geneva Conventions until such time as their status can be determined.²⁰ Therefore, all persons initially detained during a conflict, or occupation, are to be afforded the protections of the Geneva Conventions and must not be subjected to torture.²¹ The international community further affirmed the

Id. Furthermore, Geneva Convention III states, “[p]risoners of war must at all times be humanely treated” and that “any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.” *Id.* art. 13. Additionally, “prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.” *Id.* While Geneva Convention III only explicitly accounts for a prohibition on physical and mental torture during the pursuit of information, the humane treatment required by article 13 prohibits torture as torture necessarily involves inhumane treatment. Geneva Convention IV does not specifically limit the prohibition on torture to the pursuit of information. Rather, article 32 prohibits parties to the convention from “taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands . . . [including] torture, corporal punishment, mutilation . . . [and] any other measures of brutality whether applied by civilian or military agents.” Geneva Convention IV, *supra* note 14, art. 32.

17. Torture and inhuman treatment are included in the list of grave breaches. Geneva Convention I, *supra* note 14, art. 50; Geneva Convention II, *supra* note 14, art. 51; Geneva Convention III, *supra* note 14, art. 130; Geneva Convention IV, *supra* note 14, art. 147. Penal sanctions and mandatory universal jurisdiction are also established. Geneva Convention I, *supra* note 14, art. 49; Geneva Convention II, *supra* note 14, art. 50; Geneva Convention III, *supra* note 14, art. 129; Geneva Convention IV, *supra* note 14, art. 146.

18. The issue of who may be classified as a prisoner of war is a complicated one. Geneva Convention III states that prisoners of war are “members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such forces.” Geneva Convention III, *supra* note 14, art. 4(A)(1). Additionally, organized resistance movements and other militias or volunteer corps who are captured may be classified as prisoners of war and be covered by the conventions if they are have a commander, have a group insignia, are “carrying arms openly,” and are “conducting their operations in accordance with the laws and customs of war”. *Id.* art. 4(A)(2). Furthermore, if the combatants’ government is not recognized by another Party to the conflict they are still accorded prisoner of war status under the convention. *Id.* art. 4(A)(3). Finally, persons not belonging to the armed forces, but who accompany them, are also protected under this convention. *Id.* art. 4(A)(4).

19. Geneva Convention IV, *supra* note 14, art. 4. However, the convention also states that “nationals of a State which is not bound by the Convention are not protected by it.” *Id.*

20. Geneva Convention III, *supra* note 14, art. 5. “Should any doubt arise as to whether persons . . . belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” *Id.*

21. When the status of an individual has been determined and it has been found that the Geneva Convention protections apply, the protections are in force until “the general close of military

principles enumerated in the Geneva Conventions by codifying the 1977 Protocols Additional to the Geneva Conventions of 1949.²²

B. *International Human Rights Law*

While international humanitarian law is the *lex specialis* that governs the law of armed conflicts, international human rights law continues to apply in wartime; therefore, the difficulties in applying the Geneva Conventions are overcome by the prohibition of torture explicit in international human rights law. The principles of international human rights law can be best seen by looking to the treaties and agreements that have been entered into relating to the practice of torture.²³ In 1984, the international community strengthened the prohibition on torture by

operations.” Geneva Convention IV, *supra* note 14, art. 6. Furthermore, the protection afforded during an armed conflict shall continue for “one year after the general close of military operations” in the case of an occupation. *Id.* Additionally, “protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.” *Id.*

22. Protocol I Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* June 8, 1977, 1125 U.N.T.S. 3 (*entered into force* Dec. 7, 1978), *available at* <http://www.genevaconventions.org/>, (last visited Sept. 24, 2005) [hereinafter “Protocol I”]. This Protocol builds upon Common Article II of the Geneva Conventions and applies in times of international armed conflict. Protocol I states that “[t]he physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by an unjustified act or omission.” *Id.* art. 11(1). Protocol II Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-international Armed Conflicts, *opened for signature* June 8, 1977, 1125 U.N.T.S. 609 (*entered into force* Dec. 7, 1978), *available at* <http://www.genevaconventions.org/> (last visited Sept. 24, 2005) [hereinafter “Protocol II”]. This Protocol builds upon Common Article III of the Geneva Conventions and applies in times of non-international armed conflict. In fact, Protocol II applies to “all persons affected by an armed conflict,” not just members of the armed forces. *Id.* art. 2(1). While Protocols I and II are approaching the status of customary international law, the United States is not a Party to the Protocols and, therefore, for the purposes of this Note, their applicability will not be discussed. It should, however, be observed that, if their status as customary international law is solidified, the United States would be bound to the Protocols and this discussion would need to be expanded.

23. The applicability of principles of international human rights law is evidenced by the Martens Clause of Hague Convention IV, which states that “in cases not included in the Regulations . . . the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” Hague Convention IV, *supra* note 13, pmbl., para. 8. The Martens Clause indicates that the fundamental principles of international humanitarian law and international human rights law do not cease to apply merely because codified international humanitarian law does not cover a specific situation.

Furthermore, a modern interpretation of the Martens Clause was included in Protocol I, which stated that “[i]n cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.” Protocol I, *supra* note 22, art. 1, para. 2.

implementing the Convention Against Torture.²⁴ This Convention, to which the United States is party, addresses the actions and obligations of States and condemns the use of torture under any and all circumstances.²⁵ In addition to providing for territorial and personal jurisdiction, the Convention Against Torture also mandates jurisdiction whenever the accused is within a State's territory.²⁶ Other important aspects of the Convention include: a State Party may not extradite a person when there are grounds to believe that person may be subjected to torture,²⁷ the Convention serves as an extradition treaty,²⁸ there is no defense of superior orders,²⁹ due process considerations are evidenced,³⁰ evidence obtained through torture is inadmissible,³¹ and there is an obligation to raise awareness of the prohibition of torture.³² In addition to this prohibition, the Universal Declaration of Human Rights,³³ the International Covenant on

24. Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/39/51 (*entered into force* June 26, 1987), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/NR0/760/92/img/NR076092.pdf> (last visited Oct. 31, 2005) [hereinafter "Convention Against Torture"].

25. The primary responsibility of State Parties is to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Convention Against Torture, *supra* note 24, art. 2(1). Furthermore, "[n]o exceptional circumstances 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." *Id.* art. 2(2). Additionally, State Parties must "prevent . . . other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture . . . when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.* art. 16(1). In a European Court of Human Rights case, the court espoused its awareness "of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence" but cautioned that "however, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct." *Chahal v. United Kingdom*, 22 Eur. Ct. H.R. Rep. 1996-V 1855, para. 79 (1996). Furthermore, the Committee Against Torture "acknowledges the terrible dilemma that Israel confronts in dealing with terrorist threats to its security, but as a State party to the Convention Israel is precluded from raising before this Committee exceptional circumstances as justification for acts prohibited by article 1 of the Convention." Office of the High Commissioner for Human Rights, Committee Against Torture, *Concluding Observations of the Committee Against Torture: Israel 09/05/97*, U.N. Doc. No. A/52/44, para. 258, available at <http://documents-dds-ny.un.org/UNDOC/GEN/N97/235/57/img/N9723557.pdf> (last visited Oct. 31, 2005).

26. A State Party is required "to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction. . . ." Convention Against Torture, *supra* note 24, art. 5(2).

27. *Id.* art. 3.

28. *Id.* art. 8(2).

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

30. *Id.* arts. 6, 7, 13, 14.

31. *Id.* art. 15.

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

33. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc. A/810 (1948), art. 5, available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/NR00/752/35/img/>

Civil and Political Rights,³⁴ the Declaration on the Protection of all Persons from Enforced Disappearances,³⁵ and various regional agreements³⁶ also hold that no one shall be subjected to torture. Furthermore, customary international law prohibits torture and has expanded the application of the prohibition to include individual as well as state responsibility.³⁷ The Supreme Court has held that customary international law is part of U.S. law.³⁸

NR075235.pdf (last visited Oct. 31, 2005) [hereinafter "UDHR"] (No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

34. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, U.N. Doc. A/6316 (1996), 999 U.N.T.S. 171, art. 7 (entered into force Mar. 23, 1976), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/NR0732/59/img/NR073259.pdf> (last visited Oct. 31, 2005) [hereinafter "ICCPR"] (stating that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"). Furthermore, article 4 of the ICCPR bars derogation from the prohibition on torture expressed in article 7 of the ICCPR even "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed." ICCPR, art. 4.

35. Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, 47 U.N. GAOR Supp. No. 49, U.N. Doc. A/47/49 (1992), adopted by General Assembly resolution 47/133 of Dec. 18, 1992, art. 1(2), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/NR0751/35/img/NR0735135.pdf> (last visited Oct. 31, 2005) [hereinafter "DPAPED"] (recognizing "the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment").

36. See also regional agreements such as [European] Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4 1950, 213 U.N.T.S. 222, Eur. T.S. No. 5 (entered into force Sept. 3, 1953); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogota, 1948, OEA/Ser. L/V/I.4 Rev. (1965); African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (1981) (entered into force Oct. 21, 1986).

37. While individual responsibility for violations of the law of war and crimes against humanity will be discussed further in Part V of this Note, for now, it is sufficient to note that the Rome Statute of the International Criminal Court allows for individual criminal responsibility, removes head-of-state immunity, incorporates responsibility of commanders and other superiors, and provides for a joint criminal enterprise theory of liability. Rome Statute for the International Criminal Court, adopted by the U.N. Diplomatic Conference, opened for signature July 17, 1998, U.N. Doc. A/CONF.183/9*, arts. 25, 27, 28 (entered into force July 1, 2002) [hereinafter "Rome Statute"], reprinted in LEILA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM app. 1 (2002). This codification is considered "the culmination of almost fifty years of debate, discussion and judicial decisions concerning the principle of command responsibility." Matthew Lippman, *The Evolution and Scope of Command Responsibility*, 13 LEIDEN J. INT'L L. 139 (2000). Article 10 of the Rome Statute states that "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules in international law for purposes other than this statute." Rome Statute, art. 10. In essence, while the Rome Statute has codified existing international law, it is recognizing the fact that customary law may continue to develop in a manner inconsistent with the statute.

38. The Supreme Court held that

[i]nternational law is part of [American] law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as question of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and

C. U.S. Constitutional Law

For the purposes of this Note, it is important to understand the confluence of international and national law.³⁹ Article VI of the U.S. Constitution states that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .”⁴⁰ The Supreme Court has held that treaties entered into by the U.S. Government hold the same weight as federal legislation as long as they are not repugnant to the Constitution.⁴¹ The President, in the discharge of his duties, must uphold the Constitution and treaties entered into by the United States;⁴² to do otherwise would be a

commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects. . . .

The Paquette Habana, 175 U.S. 677, 700 (1900). See also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728–31 (2004) (affirming that international law is part of U.S. law).

39. This Note will not discuss the extraterritorial applicability of U.S. Constitutional rights, rather it will focus upon the inclusion and subsequent enforceability of international law as a part of U.S. law. For a discussion of the extraterritorial applicability of the U.S. Constitution, see Leah E. Kraft, *The Judiciary’s Opportunity to Protect International Human Rights: Applying the U.S. Constitution Extraterritorially*, 52 KAN. L. REV. 1073 (2004).

40. U.S. CONST. art. VI, cl. 2.

41. *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (holding that “treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land”). Furthermore, “[b]y the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other.” *Ping v. U.S.*, 130 U.S. 581, 600 (1889). In 1829, Chief Justice Marshall stated that “our constitution declares a treaty to be the law of the land, which is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature.” *Foster v. Neilson*, 27 U.S. (1 Pet.) 253, 314 (1829). The Supreme Court has held that “when the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Furthermore

[i]n choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.

Factor v. Laubenheimer, 290 U.S. 276, 293–94 (1933). See also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). “[A] treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of land, and no superior efficacy is given to either over the other.” *Id.*

42. The U.S. Constitution states that the President “shall take Care that the Laws be faithfully executed. . . .” U.S. CONST. art. II, § 3, cl. 1. While this clause of the Constitution seems clear, there is some debate concerning the President’s ability to disregard the law of the land. See Jordan Paust, *Is the*

derelection of his duties.⁴³ Thus, interrogation methods need not only be in accordance with the Constitution and acts of Congress, but also with treaties entered into by the federal government.

The U.S. Constitution does not prohibit torture explicitly, but there is a prohibition on “cruel and unusual punishment,”⁴⁴ guarantees of justice and general welfare,⁴⁵ freedom from unreasonable search and seizure,⁴⁶ freedom from police abuse,⁴⁷ the right against self incrimination,⁴⁸ the right to remain silent,⁴⁹ and the right to due process.⁵⁰ The Supreme Court has held that due process considerations, including freedom from torture and illegal confinement, must be upheld.⁵¹ Furthermore, the Supreme Court has held that, “when the President takes official action, the Court has the authority to determine whether he has acted within the law.”⁵² As the Convention Against Torture has not been challenged on grounds of repugnancy, and because it evidences the basic principles of humanity inherent in the U.S. Constitution,⁵³ it can be assumed that the Convention

President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined, 9 HASTINGS CONST. L.Q. 719, 727 (1982) (stating that “the President of the United States is . . . bound by international law which is part of the supreme law of the land under article VI). See also *id.* at 728 n.24 (stating that “[i]n *The Paquete Habana* . . . the Supreme Court actually voided an executive action involving use of our armed forces in time of war precisely because it was violative of international law”); Richard Faulk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, 76 YALE L.J. 1096, 1150 (1967) (stating that “adherence to international law [is] a matter of Constitutional necessity . . . this is the way the Constitution ought to be authoritatively construed”). See generally Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); Louis Henkin, *The President and International Law*, 80 AM. J. INT’L L. 930 (1986); Michael J. Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Chief Executive Unconstitutional?*, 80 NW. U. L. REV. 321 (1985); John Yoo, *AEI Conference Trends In Global Governance: Do They Threaten American Sovereignty? Article and Response: UN Wars, US War Powers*, 1 CHI. J. INT’L L. 355 (2000).

43. For a discussion of the President’s responsibilities, see Matthew Campbell, *Bombs Over Baghdad: Making the Case for War Crimes Prosecution of a U.S. President*, 5 WASH. U. GLOBAL STUD. L. REV. 235 (2005).

44. U.S. CONST. amend. VIII.

45. U.S. CONST. pmbl.

46. U.S. CONST. amend. IV.

47. See generally U.S. CONST. amend. IV for this implicit guarantee.

48. U.S. CONST. amend. V.

49. U.S. CONST. amend. V.

50. U.S. CONST. amends. V, XIV.

51. The Supreme Court held that

[f]rom the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the “law of the land” evolved the fundamental idea that no man’s life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.

Chambers v. Florida, 309 U.S. 227, 236–37 (1940).

52. *Clinton v. Jones*, 520 U.S. 681, 703 (1997).

53. “[T]he moral reading [of the Constitution] is not revolutionary in practice. Lawyers and

is not repugnant to the Constitution. Keeping in mind the role of international treaties and the provisions of the Constitution, it is now necessary to examine specific acts of Congress.

D. Domestic War Crimes Legislation

In 1994, the Torture Convention Implementation Act⁵⁴ was promulgated in order to bring U.S. law into accordance with the Convention Against Torture,⁵⁵ and to provide universal jurisdiction for U.S. federal courts over acts of torture that occur outside of U.S. territory.⁵⁶ Furthermore, the War Crimes Act⁵⁷ provides universal

judges, in their day-to-day work, instinctively treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments.” RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 3 (Harvard Univ. Press 2003) (1996). Moreover,

the principles set out in the Bill of Rights, taken together, commit the United States to the following political and legal ideals: government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document . . .

Id. at 7–8. “[T]he Bill of Rights sets out a network of principles, some extremely concrete, others more abstract, and some of near limitless abstraction.” *Id.* at 73. Therefore, “the Constitution must be understood not as a list of discrete rules but as a charter of principle that must be interpreted and enforced as a coherent system.” *Id.* at 124.

54. Torture Convention Implementation Act of 1994, Pub. L. No. 103–236, 108 Stat. 463 (1994) (codified at 18 U.S.C.S. § 2340A (2005)) [hereinafter “Torture Convention Implementation Act”].

55. *See supra* note 24.

56. The Torture Convention Implementation Act states that “[w]hoever outside the United States commits or attempts to commit torture shall be fined . . . or imprisoned not more than 20 years, or both, and if death results . . . shall be punished by death or imprisoned for any term of years or for life.” Torture Convention Implementation Act, § 2340A(a). Federal courts have jurisdiction if “the alleged offender is a national of the United States; or the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.” Torture Convention Implementation Act, § 2340A(b). 18 U.S.C.S. § 2340 defines torture for purposes of the Torture Convention Implementation Act; this definition is slightly different from the definition in the Torture Convention. However, this distinction will not be discussed in this Note, as it is assumed that detainee interrogation methods rise to the level of torture regardless of which definition is utilized. *See supra* note 7 and accompanying text (discussing assumption of torture). Furthermore, the Act provides for the prosecution of those who conspire to commit torture. 18 U.S.C.S. § 2340A(c) (stating that “[a] person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy”). The USA Patriot Act amended the Torture Convention Implementation Act to bring Guantanamo within the boundaries of the United States; as such, U.S. courts would not have jurisdiction over events at Guantanamo under the Torture Convention Implementation Act. PENTAGON WORKING GROUP, WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS 7–8 (Apr. 4, 2003), <http://www.washingtonpost.com/wp-srv/nation/documents/040403.pdf> (last visited Jan. 26, 2006) [hereinafter “RUMSFELD TORTURE MEMO”]. Other statutes, however, would apply to Guantanamo. *See infra* notes 57, 58.

jurisdiction in U.S. federal courts over members of the U.S. armed forces or nationals of the United States who commit war crimes or are the victims of war crimes, wherever the acts take place.⁵⁸ Additionally, the Military Extraterritorial Jurisdiction Act⁵⁹ provides for the prosecution of crimes committed by U.S. armed forces outside the United States.⁶⁰

While not an act specifically addressing war crimes, it is also important to note 18 U.S.C. § 242, which provides for the prosecution of any person acting under the color of law who deprives any person in any territory or possession of the United States of any rights accorded by the Constitution and laws (including treaties) of the United States.⁶¹ Finally, the U.S. Uniform Code of Military Justice prohibits cruelty, maltreatment, and maiming.⁶² The result of the above-mentioned acts is to provide U.S.

57. War Crimes Act of 1996, Pub. L. No. 104–192, § 2(a), 110 Stat. 2104 (1996) (codified at 18 U.S.C.S. § 2441 (1996)) [hereinafter “War Crimes Act”].

58. The War Crimes Act holds that “[w]hoever, whether inside or outside the United States, commits a war crime . . . shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.” War Crimes Act, *supra* note 57, § 2441(a). The federal courts will have jurisdiction so long as “the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States. . . .” *Id.* § 2441(b). War crimes are defined for the purposes of this statute as grave breaches of the Geneva Conventions; violations of Hague Convention IV; violations of common article 3 of the Geneva Conventions and Protocols to the Geneva Conventions that the United States is a party to; and violations of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. War Crimes Act, *supra* note 57, § 2441(c).

59. Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106–523, § 2(a), 114 Stat. 2488 (2000) (codified at 18 U.S.C. § 3261 (2000)) [hereinafter “Military Extraterritorial Jurisdiction Act”].

60. The Military Extraterritorial Jurisdiction Act covers actions “that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States.” Military Extraterritorial Jurisdiction Act, *supra* note 59, § 3261(a).

61. 18 U.S.C.S. § 242 states

whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Id. This statute is applicable to occurrences at Guantanamo. *See infra* note 83.

62. 10 U.S.C. § 893, art. 93 (1956) (“[a]ny person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct”); 10 U.S.C. § 924, art. 124 (1956) (creating liability for the act of maiming).

federal courts with jurisdiction over incidents of torture committed by U.S. military and civilian personnel wherever the act occurred.⁶³ Furthermore, military courts hold concurrent jurisdiction over U.S. military personnel who commit actions of cruelty and mistreat prisoners under their control regardless of whether the actions arise to the level of torture.⁶⁴ This Note will not discuss the Alien Tort Clams Act,⁶⁵ the Torture Victim Protection Act,⁶⁶ or 18 U.S.C. § 1983,⁶⁷ as these are foundations for civil actions as opposed to criminal actions, and thus are beyond the scope of this Note.

II. OCCURRENCES IN GUANTANAMO, AFGHANISTAN, AND IRAQ

It must be understood that the events in Guantanamo, Afghanistan, and Iraq cannot be looked at in isolation, and that, together, they point to an encompassing U.S. governmental policy of approved torture techniques in detainee interrogations.⁶⁸ Once an understanding of the overarching U.S.

63. This jurisdiction is in accordance with both international law and the provisions of the U.S. Constitution.

64. Uniform Code of Military Justice, 10 U.S.C. §§ 801, 802, 893, and 924 (1956).

65. Alien Tort Clams Act, 62 Stat. 934 (1948) (codified at 28 U.S.C. § 1350 (1948)) (stating that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”).

66. Torture Victim Protection Act of 1991, Pub. L. No. 102–256 2(a)(1), 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1992)) (allowing aliens who have been tortured by officials of a foreign nation to claim civil damages).

67. 42 U.S.C. § 1983 (2004) states

every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

Id.

68. For a more detailed analysis of the events that occurred, see ROAD TO ABU GHRAIB, *supra* note 5; ENDURING FREEDOM, *supra* note 5; ICRC REPORT, *supra* note 5; U.S. ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (Mar. 9, 2004), http://www.npr.org/iraq/2004/prison_abuse_report.pdf (last visited Sept. 24, 2005) [hereinafter “TAGUBA REPORT”]; CT.-GEN. ANTHONY R. JONES, ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE, *in* INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB, 6; MAJ.-GEN. GEORGE R. FAY, ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE, *in* INVESTIGATION OF INTELLIGENCE ACTIVITIES AT ABU GHRAIB 34 (Aug. 23, 2004), <http://www.c-span.org/pdf/armyabughraib.pdf> (last visited Sept. 24, 2005); DEPARTMENT OF THE ARMY INSPECTOR GENERAL, DETAINEE OPERATIONS INSPECTION (July 21, 2004), <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/> (last visited Sept. 24, 2005); and FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS (Aug. 2004), <http://news.findlaw.com/wp/docs/dod/abughraibrpt.pdf> (last visited Sept. 24, 2005) [hereinafter “SCHLESINGER REPORT”]. A complete analysis of the establishment and operation of the detention facilities is beyond the scope of this Note—a recent judgment of the ICTY in a case involving the establishment and operation of detention facilities was 241 pages long and included eighty-five paragraphs concerning the establishment and operation of the detention facilities.

policy is laid out, there will be a short examination of the events that occurred in Afghanistan and Iraq.⁶⁹ While there have been four areas of potential U.S. violations of international law with respect to detention operations and interrogations, for purposes of this Note, the focus will be upon the treatment of detainees.⁷⁰

Guantanamo is important not just because it has become a detention center for Afghan detainees, but also because the interrogation techniques utilized in Afghanistan and Iraq were developed by the U.S. government for use in Guantanamo.⁷¹ The U.S. policy evinces a willingness to hold international humanitarian and human rights law inapplicable to members of al Qaeda and the Taliban in clear violation of the international laws discussed in Part II.⁷² Furthermore, those involved in developing this policy ignored the principles behind the Constitution and determined domestic law provided no protections to al Qaeda and Taliban members from the actions of U.S. military and intelligence personnel.⁷³ This policy was developed at the highest levels of the U.S. government with coordination between the Department of Justice, Department of Defense, and the White House before being communicated to military commanders

See generally Prosecutor v. Kvočka, Case No. IT-98-30/1, paras. 23–108 (Nov. 2, 2001), available at <http://www.un.org/icty/kvočka/trialc/judgment/kvo-tj011002e.pdf> (last visited Sept. 24, 2005) [hereinafter “Kvočka”].

69. *See infra* notes 71–91 and accompanying text (detailing the events).

70. Three areas identified are: “use of excessive force by U.S. forces during arrests; arbitrary arrests and indefinite detention; and mistreatment in detention.” ENDURING FREEDOM, *supra* note 5, at 10. The fourth area is the U.S. practice of transferring detainees to the control of a third party state that utilizes torture during the interrogation of detainees (with or without U.S. involvement in the interrogation). *See* ROAD TO ABU GHRAIB, *supra* note 5, at 10–12. This practice is in clear violation of the prohibition on such transfers by the Convention Against Torture. Jess Bravin & Gary Fields, *How do U.S. Interrogators Make a Captured Terrorist Talk?*, WALL ST. J., Mar. 4, 2003, at B1.

71. For a discussion of the U.S. government’s position regarding the applicability of the Geneva Conventions and U.S. detainee interrogation techniques, see generally Department of Justice, Memo to White House and Pentagon Counsels Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), <http://www.qwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf> (last visited Sept. 24, 2005); Presidential Memorandum to National Security Team of February 7, 2002, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> (last visited Sept. 24, 2005); Department of Justice, Memo to the White House Counsel Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf> (last visited Sept. 24, 2005); Department of Defense, Memo Re: Counter-Resistance Techniques (Nov. 27, 2002), <http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf> (last visited Sept. 24, 2005); RUMSFELD TORTURE MEMO, *supra* note 56; Donald Rumsfeld, Memo to Commander of U.S. Southern Command Re: Guantanamo Interrogation Techniques (Apr. 16, 2003), <http://www.gwu.edu/~nsarchiv/NSAEBB127/03.04.16.pdf> (last visited Sept. 24, 2005).

72. *See supra* note 71.

73. *Id.*

in the field.⁷⁴ In short, the policy was grounded in the belief “that the new war against terrorism rendered ‘obsolete’ long-standing legal restrictions on the treatment and interrogation of detainees.”⁷⁵

The Afghanistan conflict began as an international armed conflict, but has since converted to an internal armed conflict with U.S. forces operating in Afghanistan under the auspices of the Afghan government; however, this nuance does not change the fact that torture is prohibited.⁷⁶ Numerous Afghan detainees were transferred from Afghanistan to the U.S. military base in Guantanamo, Cuba.⁷⁷ Interrogators in Afghanistan, and Guantanamo to an undisclosed extent,⁷⁸ utilized the newly-approved interrogation techniques that amounted to torture and violated numerous international and domestic prohibitions on torture.⁷⁹ It is apparent that Afghan civilians, members of the Taliban armed forces and al Qaeda operatives were subjected to torture during their detention by U.S. and Afghani forces.⁸⁰ Considering Human Rights Watch filed reports detailing the abuse,⁸¹ and numerous news articles alleging mistreatment were published in early 2002,⁸² the mistreatment of prisoners was certainly known to high level military and civilian leaders. Therefore, illegal interrogation techniques not only were used in a territory under U.S.

74. *Id.*

75. ROAD TO ABU GHRAIB, *supra* note 5, at 1. The U.S. justifications for the inapplicability of the Geneva Conventions and other international and domestic law will be discussed in Part IV.

76. See Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, Bonn, Germany, Dec. 5, 2001, http://www.ifes.org/searchable/ifes_site/PDF/reg_activities/Afghan_BonnAgreement.pdf (last visited Sept. 24, 2005) [hereinafter “Bonn Agreement”]. This conversion will affect the applicable law, but the principles remain the same. Whether termed an international armed conflict or an internal armed conflict, international human rights and humanitarian law still apply; only the precedential effect changes. Under an international armed conflict, international human rights law takes precedence, whereas international humanitarian law takes precedence during an internal armed conflict. See ENDURING FREEDOM, *supra* note 5, at 47–48.

77. See *Inside Guantanamo* (BBC-One radio broadcast Oct. 5, 2003), <http://fairgofordavid.org/pwodocs/bbctranscript.pdf> (last visited Sept. 24, 2005).

78. “The United States has carefully controlled information about detainees at Guantanamo, barring them from most contact with the outside world. As a result, little is publicly known [those] . . . held at Guantanamo.” ROAD TO ABU GHRAIB, *supra* note 5, at 13.

79. See generally ROAD TO ABU GHRAIB, *supra* note 5 and ENDURING FREEDOM, *supra* note 5.

80. See ENDURING FREEDOM, *supra* note 5.

81. In 2003, Human Rights Watch sent requests to Defense Secretary Donald Rumsfeld, General John Abizaid (commander of Central Command) and George Tenet (then-Director of the Central Intelligence Agency) seeking to hold meetings to discuss reports of abuse suffered by detainees in Afghanistan. ENDURING FREEDOM, *supra* note 5, at 3 n.3.

82. See generally Carlotta Gall, *Released Afghans Tell of Beatings*, N.Y. TIMES, Feb. 11, 2002, at A1; Molly Moore, *Villagers Released by American Troops Say They Were Beaten, Kept in ‘Cage,’* WASH. POST, Feb. 11, 2002, at A1; Eric Slater, *U.S. Forces Beat Afghans After Deadly Assault, Ex-Prisoners Say*, L.A. TIMES, Feb. 11, 2002, at A1.

jurisdiction,⁸³ but also during the occupation of a sovereign state.⁸⁴ Because international law protects all those detained in Afghanistan (and Guantanamo)—whether civilian, Taliban, or al Qaeda—from torture in both an international armed conflict and a non-international armed conflict,⁸⁵ it is clear that serious violations of that law occurred in Afghanistan.

In Iraq, the situation is different because the detainees in Iraq are either prisoners-of-war or civilians and the protections of international law were to be applied from the outset.⁸⁶ However, military personnel from Guantanamo and Afghanistan were sent to Iraq to train others in interrogation methods and to conduct interrogations.⁸⁷ The utilization of torture during detainee interrogations thus migrated from the detention centers in Guantanamo and Afghanistan to a new conflict, the occupation of Iraq,⁸⁸ and enabled the military personnel in Iraq to feel “empowered to

83. The 1934 Treaty between the United States and Cuba gave the United States jurisdiction over Guantanamo. Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683. The Supreme Court has upheld this interpretation of the treaty, stating that “[b]y the express terms of its agreements with Cuba, the United States exercises ‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.” *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

84. See generally ENDURING FREEDOM, *supra* note 5.

85. All three categories of persons are protected under the Convention Against Torture during either international or non-international armed conflicts. Furthermore, all are protected by Common Article III of the Geneva Conventions and Protocol II (if accepted as customary international law) during non-international armed conflict. During international armed conflicts Geneva Convention III protects the Taliban prisoners of war and Geneva Convention IV protects civilians. The status of al Qaeda operatives is less certain, however, as they seem to fall in a grey area between that of civilians and prisoners of war. Regardless, they must still be afforded the protections of the Geneva Conventions until such time as a competent tribunal determines their status. Furthermore, al Qaeda members fall into two categories: those bearing arms and those who support the organization. Those that bore arms would be afforded prisoner-of-war status under the Geneva Conventions and those that merely supported the organization would have to be protected as civilians. Additionally, the Geneva Conventions do not make an exception for “enemy combatants,” as the United States is attempting to label al Qaeda members. The Geneva Conventions protect all persons; there is only a question of which Convention applies.

86. There has been no attempt by the U.S. government to declare the protections of international law inapplicable to the detainees in Iraq. In fact, the Schlesinger Report found that “[p]olicies approved for use on al Qaeda and Taliban detainees, who were not afforded the protection of the Geneva Conventions, now applied to detainees who did fall under the Geneva Convention protections.” SCHLESINGER REPORT, *supra* note 68, at 14.

87. Douglas Jehl & Andrea Elliot, *Cuba Base Sent Its Interrogators to Iraqi Prison*, May 28, 2004, N.Y. TIMES, at A5; Douglas Jehl & Eric Schmitt, *Afghan Policies on Questioning Landed in Iraq*, May 21, 2004, N.Y. TIMES, at A1; ROAD TO ABU GHRAIB, *supra* note 5, at 23 (stating that “[t]he military intelligence unit that oversaw interrogations at the Bagram detention center . . . was later placed in charge of questioning at Abu Ghraib prison in Iraq”).

88. See generally SCHLESINGER REPORT, *supra* note 68 (detailing the abusive techniques used in Iraq and their migration from Afghanistan).

abuse the detainee.”⁸⁹ The migration of these techniques and the condoning of these techniques by Secretary of Defense Donald Rumsfeld led U.S. military personnel to believe that “if you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.”⁹⁰ Furthermore, there is evidence that those responsible for implementing and running the detention facilities in Iraq failed to operate the facilities in a manner that would facilitate the humane treatment of prisoners.⁹¹ While the U.S. policy may not have been developed with an eye to Iraq, by circumventing international law and utilizing torture in one war, it was conceivable that the dehumanization of detainees, the changing of decades of military policy, and poorly implemented detention methods would lead to a continuing usage of torture.

89. ROAD TO ABU GHRAIB, *supra* note 5, at 34.

90. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; “Stress and Duress” Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1 (quoting an unnamed U.S. official).

91. See TAGUBA REPORT, *supra* note 68, at 16–17; SCHLESINGER REPORT, *supra* note 68. “[I]n Iraq and particularly in Abu Ghraib the ratio of military police to repeatedly unruly detainees was . . . at one point 1 to about 75 at Abu Ghraib, making it difficult to even keep track of prisoners.” SCHLESINGER REPORT, *supra* note 68, at 10. “Of the 17 detention facilities in Iraq, the largest, Abu Ghraib, housed up to 7,000 detainees in October 2003, with a guard force of only about 90 personnel from the 800th Military Police Brigade. Abu Ghraib was seriously overcrowded, under-resourced, and under continual attack.” *Id.* at 11. Furthermore, “unit cohesion was lacking because elements of as many as six different units were assigned to the interrogation mission at Abu Ghraib.” *Id.* at 12. “The existence of confusing and inconsistent interrogation technique policies contributed to the belief that additional interrogation techniques [such as those utilized at Guantanamo] were condoned.” *Id.* at 10. The Schlesinger Report determined that “[t]he aberrant behavior on the night shift in Cell Block 1 at Abu Ghraib would have been avoided with proper training, leadership and oversight.” *Id.* at 13. Currently, “[i]ncreased units of Military Police, fully manned and more appropriately equipped, are performing the mission once assigned to a single under-strength, poorly trained, inadequately equipped and weakly-led brigade.” *Id.* at 16.

The requirements for successful detainee operations following major combat operations were known to U.S. forces in Iraq. After Operations Enduring Freedom and earlier phases of Iraqi Freedom, several lessons learned were captured in official reviews and were available on-line to any authorized military user. These lessons included the need for doctrine tailored to enable police and interrogators to work together effectively; the need for keeping MP and MI units manned at levels sufficient to the task; and the need for MP and MI units to belong to the same tactical command. However, there is no evidence that those responsible for planning and executing detainee operations, in the phase of the Iraq campaign following the major combat operations, availed themselves of these “lessons learned” in a timely fashion.

Id. at 30. In addition, “Abu Ghraib was also a questionable facility from a standpoint of conducting interrogations. Its location, next to an urban area, and its large size in relation to the small MP unit tasked to provide law enforcement presence, made it impossible to achieve the necessary degree of security.” *Id.* at 60. Furthermore, “[t]he choice of Abu Ghraib as the facility for detention operations placed a strictly detention mission-driven unit—one designed to operate in a rear area—smack in the middle of a combat environment.” *Id.*

III. U.S. JUSTIFICATIONS

Both international and domestic law prohibit the use of torture, regardless of the need to extract information.⁹² However, the Department of Defense, at the Secretary of Defense's request, has recently attempted to legitimize the application of torture to unlawful or enemy combatants in Guantanamo and Afghanistan.⁹³ The Department of Defense and the Department of Justice have determined that the Geneva Conventions do not apply to either al Qaeda, because they are not a contracting party to the Conventions, or the Taliban, as they are considered unlawful combatants.⁹⁴ Furthermore, the Rumsfeld Torture Memo concluded that the Convention Against Torture and the ICCPR would apply, but only within the bounds of the U.S. Constitution which, it argues, does not restrict U.S. detainee interrogation methods.⁹⁵ Additionally, the Department of Defense determined that customary international law was not federal law and therefore not applicable, as an executive order overrides any obligations under customary international law.⁹⁶ The Department of Defense also determined that the powers vested in the President enable him to conduct a war and that any domestic statutes that might interfere with his constitutional authority to conduct a war must be construed in a manner consistent with that constitutional authority. Therefore, any executive order allowing torture must be upheld as a part of the President's mandate to conduct war.⁹⁷ Furthermore, the working group that prepared the Rumsfeld Torture Memo maintains that aliens do not gain constitutional protections, though the United States also maintains that torture must be construed in light of the restrictions of the Constitution.⁹⁸

None of the justifications legitimize torture.⁹⁹ First, the Geneva Conventions are an accepted part of customary international law, and, as

92. See *supra* Part II and accompanying notes.

93. See generally RUMSFELD TORTURE MEMO, *supra* note 56 (the United States has not attempted to legitimize the use in Iraq). Counsel to the President has stated, "Iraq presents a very different situation and the United States recognizes that [the Geneva Conventions] are binding in the war for the liberation of Iraq", however, "[t]here has never been any suggestion by our government that the conventions do not apply in that conflict." Alberto R. Gonzales, Editorial, *The Rule of Law and the Rules of War*, N.Y. TIMES, May 15, 2004, at A17.

94. RUMSFELD TORTURE MEMO, *supra* note 56, at 4.

95. *Id.* at 6.

96. *Id.*

97. *Id.* at 20–24.

98. *Id.* at 35. For a discussion of the applicability of the U.S. Constitution to aliens, see Kraft, *supra* note 39.

99. Various arguments have been put forth for the moral justification of the application of torture during the War on Terror. However, as these arguments do not address the illegality of torture and

such, all parties to armed conflict are bound by the Conventions, regardless of their status as contracting parties.¹⁰⁰ Second, the Conventions do not make an exception for militants not recognized by an opposing party; therefore, the Taliban are covered regardless of their definition or lack of recognition by the United States.¹⁰¹ Third, customary international law, which prohibits torture, has been incorporated into federal law and has been used in the interpretation of domestic laws and international obligations governing the United States.¹⁰² The most relevant international laws are the international humanitarian law and human rights law that bind the United States.¹⁰³

While the justification that statutes must be interpreted as being in accordance with the Constitution when there is the possibility of either a constitutional or an unconstitutional interpretation is technically correct, that canon is being incorrectly applied.¹⁰⁴ A statute should be interpreted in accordance with the Constitution, not in accordance with the presidential authority accorded by the Constitution.¹⁰⁵ The rights of humanity inherent in the Constitution, which provide a basis for the rights contained within the Constitution,¹⁰⁶ are intrinsic to all and should not be

have been refuted by preeminent academics and practitioners, this Note will not address the issue of moral justification. For a discussion of whether torture may be justified, see generally Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275 (2003/2004); Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 DENV. J. INT'L L. & POL'Y 58 (2002); Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307 (2003); Jonathan F. Lenzner, *From a Pakistani Stationhouse to the Federal Courthouse: A Confession's Uncertain Journey in the U.S.-Led War on Terror*, 12 CARDOZO J. INT'L & COMP. L. 297 (2004).

100. "The Geneva Conventions which have now been widely recognized as part of customary international law are binding upon all States. . . ." Daphna Shraga & Ralph Zacklin, *The Applicability of International Humanitarian Law to United Nations Peace-keeping: Conceptual, Legal and Practical Issues*, in INTERNATIONAL COMMITTEE OF THE RED CROSS SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS 47 (Umesh Palwankar ed., 1994). Therefore, not only is the United States bound by the Geneva Conventions, so are the opposing militants in Operation Enduring Freedom and Operation Iraqi Freedom.

101. See *supra* note 16. In essence, the Geneva Conventions apply a blanket protection for all people of the world. All parties to an armed conflict are bound by the provisions of the Geneva Conventions and are required to protect all those taking part in, or affected by, an armed conflict. Because there is no need for recognition, the Geneva Conventions essentially prohibit the torture of anyone by a party to an armed conflict.

102. "The current accepted position is that customary international law in the United States is federal law and that its determination by the federal courts is binding on the state courts." MALCOLM N. SHAW, INTERNATIONAL LAW 144 (Cambridge Univ. Press 5th ed. 2003).

103. See *supra* Parts I.A and I.B.

104. See *supra* Part I.C.

105. See *supra* Part I.C.

106. See *supra* note 53.

abrogated by an executive order.¹⁰⁷ Courts have been unwilling to inspect the President's use of the executive war powers; however, the Supreme Court does have this right and an order as blatantly illegal as one ordering the use of torture in detainee interrogations should be struck down.¹⁰⁸ The President has the mandate to conduct war,¹⁰⁹ but the President also has a duty to uphold the Constitution and the laws of the land.¹¹⁰ By mandating the use of torture, the President is in dereliction of his duty.¹¹¹ Furthermore, there is an inherent contradiction in the U.S. policy that Constitutional rights do not apply to aliens but interrogations of aliens must be conducted in accordance with the rights guaranteed by the Constitution.¹¹² Either constitutional rights apply or they do not—if the Constitution is not applicable to aliens, then the Constitution should not be used to restrict the application of international human rights law to aliens.¹¹³ Justifications for the application of torture fail at all levels: on grounds of international humanitarian law, international human rights law,

107. For debate concerning the powers inherent to Executive Orders, see Tara L. Branum, *President or King: The Use and Abuse of Executive Orders in Modern-day America*, 28 J. LEGIS. 1 (2002).

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

109. U.S. CONST. art. II, § 2, cl. 1.

110. U.S. CONST. art. II, § 3, cl. 1.

111. See *supra* note 42 and accompanying text.

112. For a discussion of the applicability of the U.S. Constitution to aliens, see Kraft, *supra* note 39.

113. *Id.* The United States Court of Appeals for the Second Circuit has stated

[t]he government, however, while not denying that American citizens may invoke the Fourth Amendment against unreasonable searches and seizures conducted by our government beyond the continental limits of the United States, contends that such rights are not available to aliens who are the victims of such conduct. We disagree. Like the Fifth Amendment guarantee of due process, the Fourth Amendment refers to and protects “people” rather than “areas,” or “citizens.” “The Constitution of the United States is in force . . . whenever and wherever the sovereign power of that government is exerted.”

United States v. Toscanino, 500 F.2d 267, 280 (2d Cir. 1974) (citations omitted) (quoting *Balzac v. Puerto Rico*, 258 U.S. 298, 312–13 (1922)). While a full discussion of the extraterritorial applicability of the Constitution is beyond the scope of this Note, it should be observed that this is a highly-debated topic. Despite this debate, the inconsistency put forth by the U.S. government cannot be reconciled. The Constitution is either applicable or not applicable; the government may not determine the Constitution's applicability based on its desired action or result. Otherwise, the government is engaging in nothing but utilitarian and self-interested line-drawing. For a discussion of the extraterritorial applicability of the Constitution to aliens, see Roberto Iraola, *A Primer on Legal Issues Surrounding the Extraterritorial Apprehension of Criminals*, 29 AM. J. CRIM. L. 1 (2001); Kraft, *supra* note 39; Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 176 (Louis Henkin et al. eds., 1990). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 722 cmt. m (1987) (“at least some actions by the United States in respect of foreign nationals are also subject to constitutional limitations”).

U.S. Constitutional law and U.S. domestic law.¹¹⁴ Because torture is illegal and unjustifiable, a discussion of applicable theories of liability under international law is now necessary to show that high level officials that ordered the torture can and should be held responsible.¹¹⁵

IV. APPLICABLE THEORIES OF LIABILITY

Because there is no justification for torture, it is necessary to determine who should be held responsible.¹¹⁶ This Note suggests that individuals other than those “aberrant individuals”¹¹⁷ who used torture in the detainee interrogations that occurred in Afghanistan and Iraq can be found liable for failing to fulfill their duties as commanders under the doctrine of command responsibility or for taking part in a joint criminal enterprise.¹¹⁸

A. *Command Responsibility*

The doctrine of command responsibility began its development in modern international law in the 1907 Hague Convention IV,¹¹⁹ the Versailles Treaty,¹²⁰ and the 1929 Red Cross Convention.¹²¹ These three instruments recognized the importance of command responsibility and expressed the willingness of the international community to hold high-level violators of the laws and customs of war criminally liable.¹²²

114. See *supra* Part III and accompanying notes.

115. See *supra* Part I.

116. The Schlesinger Report found that “commanding officers and their staffs at various levels failed in their duties and that such failures contributed directly or indirectly to detainee abuse” and that “military and civilian leaders at the Department of Defense share this burden of responsibility.” SCHLESINGER REPORT, *supra* note 68, at 43. Furthermore, the manner in which Abu Ghraib was operated “had the damaging result that no single individual was responsible for overseeing operations at the prison.” *Id.* at 45. Responsibility includes “the Director for Operations, Combined Joint Task Force 7 (CJTF-7); Deputy Commanding General, CJTF-7; Commander CJTF-7; Deputy Commander for Support, CFLCC; Commander, CFLCC; Director for Operations, Central Command (CENTCOM); Commander, CENTCOMM; Director for Operations, Joint Staff; the Chairman of the Joint Chiefs of Staff; and the Office of the Secretary of Defense.” *Id.* at 47.

117. See *supra* note 9.

118. See *infra* Parts IV.A and IV.B.

119. Hague Convention IV, *supra* note 13.

120. Treaty of Peace Between the Allied and Associated Powers and Germany (June 28, 1919) [hereinafter “Versailles Treaty”], reprinted in THE TREATIES OF PEACE 1919–1923, VOL. I (Carnegie Endowment for Int’l Peace 1924).

121. Red Cross Convention for the Amelioration of the Condition of the Wounded and Sick Armies in the Field, 47 Stat. 2074 [hereinafter “1929 Red Cross Convention”].

122. Hague Convention IV states that the laws of war apply to armies, militia and volunteer corps “commanded by a person responsible for his subordinates,” and that this person, when occupying territory “shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Hague

Following World War II, the Allied powers promulgated laws governing the trial of war criminals.¹²³ The Charter of the International Military Tribunal at Nuremberg addressed command responsibility by stating that “[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.”¹²⁴ The principle of command responsibility was adopted into customary international law with the subsequent affirmation by the United Nations General Assembly.¹²⁵

Following the trials of World War II, little occurred with the doctrine of command responsibility in international courts until the ad hoc tribunals created by the United Nations for the former Yugoslavia and Rwanda.¹²⁶

Convention IV, *supra* note 13, Annex to the Convention, arts. 1, 43. The Versailles Treaty demanded the trial of Kaiser [William II of Hohenzollern] by international tribunal and persons accused of violating the laws of war by international military tribunals. Lippman, *supra* note 37, at 140. Furthermore, commanders have “the duty . . . to provide for the details of the foregoing articles [of the convention].” 1929 Red Cross Convention, *supra* note 121, art. 26.

123. See Charter of the International Military Tribunal at Nuremberg, Annex to the London Agreement, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter “IMT-N Charter”]; Tokyo Charter for the International Military Tribunal for the Far East, as amended by General Orders No. 20, Apr. 26, 1946, T.I.A.S. No. 1589 [hereinafter “IMT-FE Charter”]; Allied Control Council Law no. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity, Dec. 20, 1945 [hereinafter “Allied Control Council Law No. 10”]; United States Armed Forces, Pacific, Regulations Governing the Trial of War Criminals, Sept. 24, 1945, National Archives, Records of SCAP Legal Division Record Group 331, Stack 290, Row 9, Compartment 31, Shelf 1+, Box 1855, File 124, *cited in* Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, ARMY LAW., Nov. 2003, at 35 n.154.

124. IMT-N Charter, *supra* note 123, art. 6. For World War II case law concerning command responsibility, see *United States v. Yamashita*, in LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOL. IV, TRIAL OF GENERAL TOMOYUKI YAMASHITA (United Nations War Commission 1948); *United States v. List*, in LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOL. VIII, THE HOSTAGES TRIAL: TRIAL OF WILHELM LIST AND OTHERS (United Nations War Commission 1949); *United States v. von Leeb*, in LAW REPORTS OF TRIALS OF WAR CRIMINALS, VOL. XII, THE GERMAN HIGH COMMAND TRIAL: TRIAL OF WILHELM VON LEEB AND THIRTEEN OTHERS (United Nations War Commission 1949).

125. Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, at 188, G.A. Res. 95, U.N. Doc A/64/Add.1 (1946), *reprinted in* THE LAWS OF ARMED CONFLICT 833 (Sigthoff & Noordhoff 2d ed. 1981).

126. Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by U.N. Security Council Resolution 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter “ICTY Statute”]; Statute of the International Criminal Tribunal for Rwanda, adopted by U.N. Security Council Resolution 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter “ICTR Statute”]. While little occurred between World War II and the creation of the ad hoc tribunals, command responsibility was dealt with in national courts. See generally Lieutenant Commander Weston D. Burnett, *Contemporary International Legal Issues-Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatilia and Sabra*, 107 MIL. L. REV. 71 (1985); Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973); Smidt, *supra* note 4. Furthermore, international agreements have affirmed the application of the doctrine. See Protocol I, *supra* note 22, arts. 86, 87.

The doctrine has received extensive treatment in the ad hoc tribunals and the modern interpretation of the doctrine allows for the prosecution of military commanders and civilians for the actions of those subordinates over whom they held effective control, when they knew or had reason to know that such subordinates had committed or were planning to commit violations of the law of war and they failed to prevent or punish such violations.¹²⁷ In addition, the doctrine's incorporation into the Rome Statute serves as an indication that the doctrine is now a part of customary international law.¹²⁸ Moreover, the doctrine of command responsibility is an accepted part of U.S. law, as it has been incorporated into the U.S. Army Field Manual.¹²⁹ Accordingly, the U.S. government has been willing to seek prosecutions based on the doctrine.¹³⁰

While this doctrine, on its face, appears to be the best method of holding individuals other than the "bad apples" responsible for the torture that occurred in Guantanamo, Afghanistan, and Iraq, there are difficulties in applying the doctrine. There is a high threshold of knowledge that requires a showing that the commander possessed of information that would either cause him to know that violations of international law were occurring or had occurred, or that would cause the commander to realize that further investigation was required.¹³¹ Establishing who was aware of what and when they were aware could be a very complicated task when attempting to follow the information trail through the military and government agencies. Furthermore, there is an issue of effective control.

127. For a more in-depth treatment of this doctrine, see Damien S. Donnelly-Cole, Application of the Doctrine of Command Responsibility by the International Criminal Tribunal for the Former Yugoslavia: *Prosecutor v. Delalic* (Dec. 17, 2004) (unpublished seminar paper, Wash. Univ. School of Law) (on file with the author). For case law arising from the ad hoc tribunals, see *Prosecutor v. Delalic*, Case No. IT-96-21-T (Nov. 16, 1998), available at <http://www.un.org/icty/cases/jugemindex-e.htm> (last visited Nov. 21, 2004) [hereinafter "Celebici Trial Chamber Judgment"]; *Prosecutor v. Delalic*, Case No. IT-96-21-A (Feb. 20, 2001), available at <http://www.un.org/icty/cases/jugemindex-e.htm> (last visited Nov. 21, 2004) [hereinafter "Celebici Appeals Chamber Judgment"].

128. See *supra* note 37.

129. U.S. Army Field Manual 27-10 states

the commander is . . . responsible if he had actual knowledge or should have had knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to use the means at his disposal to insure compliance with the law of war.

U.S. DEP'T OF ARMY, FIELD MANUAL NO. 27-10, LAW OF LAND WARFARE, ch. 8, § II, para. 501 (1956).

130. See, e.g., Smidt, *supra* note 4, at 186–201 (discussing the court martial of Captain Ernest Medina).

131. The Celebici Appeals Chamber determined that, for the doctrine of command responsibility to be applicable, it is necessary to show "that a superior had some general information in his possession, which would put him on notice of possible unlawful acts." Celebici Appeals Chamber Judgment, *supra* note 127, para. 238.

While control can be either *de jure* or *de facto* in nature, it is an element of command responsibility that is unclear and may hinder its application.¹³² Finally, there is an issue of a changing standard for military and civilian authorities. The Rome Statute, for the first time, codified a bifurcation of the doctrine that holds civilians to a higher mens rea than military commanders.¹³³ This could be problematic when determining whether to consider a government official in the Department of Defense a military commander or a civilian. However, in the case of Guantanamo and Afghanistan, where there is clear evidence of a government and military policy approving the use of torture during detainee interrogations, the doctrine of command responsibility could be an appropriate means of pursuing prosecutions. With regard to Iraq, the application would encounter greater difficulties; therefore, this Note asserts that the theory of liability, arising from a joint criminal enterprise is the most suitable method for pursuing prosecutions in Iraq.

B. Joint Criminal Enterprise

The next and most appropriate method for holding high ranking military and government officials liable for the torture in Iraq is the theory of joint criminal enterprise.¹³⁴ This theory “makes convictions possible where command responsibility or direct individual responsibility might fall short.”¹³⁵ To apply this theory, it must be determined that the accused “entered into a common plan with others to accomplish an illegal objective

132. In the Celebici Appeals Chamber Judgment, the Appeals Chamber of the ICTY held that “effective control has been accepted . . . as a standard for the purposes of determining superior responsibility” and “the showing of effective control is required in cases involving both *de jure* and *de facto* superiors . . .” although “the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts.” *Id.* paras. 196–97.

133. Articles 28(1) and 28(2) of the Rome Statute bifurcate the doctrine of command responsibility. The non-military commander will only be held liable if he “consciously disregarded” information that clearly indicated the possibility of violations, while the military commander will be held liable if he “had reason to know” of the possibility of violations. Rome Statute, *supra* note 37, arts. 28(1), (2).

134. For recent case law on the theory of joint criminal enterprise from the ICTY, see Prosecutor v. Tadic, Case No. IT-94-1 (May 7, 1997), available at <http://www.un.org/icty/cases/jugemindex-e.htm> (last visited Nov. 21, 2004) [hereinafter “Tadic Trial Judgment”]; Prosecutor v. Tadic, Case No. IT-94-1 (July 15, 1999), available at <http://www.un.org/icty/cases/jugemindex-e.htm> (last visited Nov. 21, 2004) [hereinafter “Tadic Appeals Judgment”]; Kvočka, *supra* note 68; Prosecutor v. Krstic, Case No. IT-98-33 (Aug. 2, 2001), available at <http://www.un.org/icty/cases/jugemindex-e.htm> (last visited Nov. 21, 2004) [hereinafter “Krstic”].

135. Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L. REV. 30, 33 (2003).

and could therefore be held responsible for the criminal actions of all other participants in the enterprise advancing that common purpose if he knew or could have reasonably foreseen those actions.”¹³⁶ In other words, it is “a way of imputing guilt to a person who participates in a form of collective criminal activity.”¹³⁷ It may be helpful to consider the theory of joint criminal enterprise liability as akin to more traditional forms of accomplice liability,¹³⁸ and recall that “most jurisdictions have developed at least some principles that cover group-based criminality, even if they do not go so far as the kind of joint criminal enterprise theory”¹³⁹ discussed in this Note.

There is a growing body of case law on joint criminal enterprise coming from the ICTY.¹⁴⁰ The ICTY has determined that “there is no necessity for this plan, design or purpose to have been previously arranged or formulated . . . the common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.”¹⁴¹ Moreover, a defendant’s alleged participation “need not involve commission of a specific crime . . . (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.”¹⁴² Liability for crimes that occur during the execution of a common plan, but which were not agreed to as part of the plan, is only imputed when “(i) it was *foreseeable* that such a crime might

136. Patricia M. Wald, *General Radislav Krstic: A War Crimes Case Study*, 16 GEO. J. LEGAL ETHICS 445, 457 (2003).

137. William A. Schabas, *Symposium: The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade: Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1030 (2003).

138. In the words of one commentator,

in the United States, for example, although traditional notions of common law accomplice liability require an aider and abettor to share the intent of the principal to commit a particular crime, many states have increasingly moved away from this rule even as regards non-group based crimes, holding that an aider and abettor has vicarious liability, not only for the offense he intended to facilitate or encourage, but also for any reasonably foreseeable offense committed by the person he aids and abets. This line of reasoning, which has been widely followed, suggests at least some jurisdictions will impose criminal responsibility where a defendant has set in motion a particular chain of events that takes a bad, but clearly foreseeable, turn.

Leila Nadya Sadat, *The Prosecutor v. Kvočka, et al.* (Trial Chamber Judgment, Nov. 2, 2001) Commentary 22 (June 8, 2005) (unpublished manuscript on file with author) (citing *Hicks v. United States*, 150 U.S. 442 (1893); *People v. Luparello*, 187 Cal. App. 3d 410, 231 Cal. Rpt. 832 (Cal. Ct. App. 1987).

139. Sadat, *supra* note 138, at 24.

140. *See supra* note 134.

141. *Tadic Appeals Judgment*, *supra* note 134, para. 227(ii).

142. *Id.* para. 227(iii).

be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.”¹⁴³ Therefore, in order to utilize the theory of joint criminal enterprise to hold individuals other than the “aberrant individuals” liable for the torture that may have occurred in Iraq, it is necessary to show that there was a common plan that was intended to achieve an illegal objective, that the use of torture in detainee interrogations was foreseeable, and that the risk of torture occurring was taken willingly.

In the case of Iraq there are several illegal actions that could conceivably constitute part of a common plan. However, only one of the illegal actions would serve as the basis for a joint criminal enterprise. Yet, an understanding of each action shows the utilization of torture to have been foreseeable.

First, the U.S. invasion of Iraq for the purposes of bringing about a regime change was illegal and prohibited under international law.¹⁴⁴

143. *Id.* para. 228.

144. While many treaties have been instrumental in establishing and developing international law, the focal point of international law that governs the interaction of nations is the U.N. Charter. The United Nations was established at the end of World War II to assist the Member States to “practice tolerance and live together in peace with one another as good neighbours.” U.N. Charter pmbl., para. 2. This was to be done in order to “save succeeding generations from the scourge of war.” U.N. Charter pmbl., para. 1. Thus, all Member States were required to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” U.N. Charter art. 2, para. 3. Therefore, the U.N. Charter mandates that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. Charter art. 2, para. 4. Article 1 of the U.N. Charter espouses that the purposes of the U.N. include:

maintain[ing] international peace and security, and to that end: to take effective *collective* measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

U.N. Charter art. 1, para. 1 (emphasis added).

Moreover, the United Nations is meant “[t]o be a centre for harmonizing the actions of nations in the attainment of [its purposes].” U.N. Charter art. 1, para. 4. By embracing the notion that measures be taken by “collective” action, the international community is holding that threats to the peace and any action taken in response to such threats must be determined as a united body, not by individual nations taking unilateral action. Article 33 of the U.N. Charter is explicit in the duties of member nations, who, in order to settle disputes, must “seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangement, or other peaceful means of their own choice.” U.N. Charter art. 33, para. 1. The United Nations was and is meant to be the means through which the nations of the world reach peaceful resolutions for disputes that arise amongst them.

Only the United Nations, specifically the Security Council, in accordance with chapter VII of the U.N. Charter, may authorize armed force. In requiring that armed force be taken only after the authorization of the Security Council, the United Nations is working to keep its member nations from taking action that would be contrary to international law. Moreover, member nations “agree to accept

Without specific authorization to use force granted by the Security Council of the United Nations,¹⁴⁵ any use of force by the United States against a sovereign state is illegal unless the force is utilized in self-defense.¹⁴⁶ As a result of the invasion, the United States operated understaffed and poorly supervised detention centers in Iraq.¹⁴⁷

The illegal act that provides the basis for a joint criminal enterprise was the operation of detention centers in a manner incapable of providing for the humane treatment of the detainees.¹⁴⁸ Thus, any crimes that were foreseeable and willingly risked and which arose during the operation of the detention centers could be attributed to all involved in the operation of

and carry out the decisions of the Security Council in accordance with the . . . Charter.” U.N. Charter art. 25. Therefore, the U.N. Charter, as the supreme international treaty, carrying the same force as the U.S. Constitution governs the use of any armed force by the United States.

145. The Security Council is the body of the United Nations enabled to determine the existence of threats to, or breaches of, the peace and tasked with shaping the course of action for responding in a manner to preserve or restore peace. U.N. Charter art. 39. The measures to which the Security Council may resort are enumerated in articles 41, and 42 of the U.N. Charter. The Security Council is allowed to “decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Member of the United Nations to give effect to its decisions.” U.N. Charter art. 41. Furthermore, if the Security Council “should . . . consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” U.N. Charter art. 42. Only if preventative measures utilized under article 41 are deemed to be ineffective by the Security Council can the Security Council permit the use of armed force.

The construction of articles 39, 41 and 42 is important. In essence, articles 41 and 42 provide that the Security Council “may” institute measures of either a non-military or military nature to preserve and/or restore peace. These measures are left to the discretion of the Security Council, except for the fact that military measures cannot be utilized until the Security Council determines that non-military measures are ineffective. The use of “should” at the beginning of article 42 emphasizes that, if the use of force is sought, the Security Council must make a decision that article 41 measures have proved to be ineffective. Without such a decision, no resort to armed force may be made. No other body of the United Nations or any other government or international organization is granted the authority to legally authorize the use of force that is provided to the Security Council in article 42.

The wording of article 42 provides for three options. First, the Security Council can determine that the measures instituted in article 41 are effective and therefore no armed force is necessary. Second, the Security Council can find that the measures undertaken through article 41 are ineffective, but the use of force is not yet authorized. Finally, the Security Council can decide that article 41 measures are ineffective and then decide to mandate the use of force as necessary to restore peace. Thus, the use of force requires a preliminary finding by the Security Council that article 41 measures are inadequate followed by an authorization to use force.

146. However, there is one exception to the limits placed on a nation’s ability to use armed force. This single exception is that nations have the “inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, *until* the Security Council has taken measures necessary to maintain international peace and security.” U.N. Charter art. 51 (emphasis added). Therefore, it is apparent from the plain language of the U.N. Charter that the U.S. invasion of Iraq could only be considered a legal use of force if it was authorized to do so by the Security Council or if it was, individually or collectively, attacked by Iraq, which it was not.

147. See *supra* note 91.

148. *Id.* For international criminal case law detailing how the establishment and operation of a detention facility can constitute a joint criminal enterprise, see Kvočka, *supra* note 68.

the detention centers.¹⁴⁹ Therefore, liability would go beyond the soldiers located within the cellblocks of Abu Ghraib prison and would extend up the political and military chain of command to, among others, the Joint Chiefs and the Office of the Secretary of Defense.¹⁵⁰

The remaining illegal action was the development of the illegal interrogation methods utilized by U.S. military and contractors.¹⁵¹ These interrogation techniques were developed in an attempt to contravene international and domestic laws regarding the use of torture.¹⁵² While these techniques were intended solely for use in Guantanamo, they migrated from Guantanamo to Iraq.¹⁵³ The development of illegal interrogation methods causes the use of such methods to be foreseeable. With the flexibility of the modern day army and the ease with which personnel can be transferred from one posting to another, it is entirely foreseeable that detention methods utilized in one locale will be utilized in another locale. This is especially true when soldiers from Guantanamo were transferred to Afghanistan and Iraq for the purpose of training others in interrogation techniques.¹⁵⁴ Furthermore, by developing these techniques in the first place, the Department of Defense showed its willingness to utilize torture and, thus, accepted the risk that they might be utilized elsewhere. Therefore, all persons involved in the operation of Abu Ghraib should be held accountable for the torture that occurred during the operation of this joint criminal enterprise, as the use of torture was foreseeable and willingly risked.

CONCLUSION

The operation of Abu Ghraib was a joint criminal enterprise. Torture is illegal. The utilization of torture in Iraq was foreseeable. The risk of torture being utilized in Iraq was taken willingly as evidenced by the use of government-sanctioned torture in Afghanistan and Guantanamo and the government-ordered transfer of interrogators from Afghanistan and Guantanamo to Iraq for the purposes of conducting interrogations and training others in interrogation techniques. In addition to providing the

149. *See supra* note 134 and accompanying text.

150. *See supra* note 116.

151. Recall that an analysis of the interrogation methods utilized is beyond the scope of the Note and that it is being assumed that certain techniques rise to the level of torture. *See supra* Part I (discussing the illegality of torture).

152. *See supra* Parts I, II, and III.

153. *See supra* notes 88, 89.

154. *Id.*

basis for a joint criminal enterprise, the failure of the U.S. government to ensure that its detention centers were being operated in a manner that prevented over-crowding and facilitated the humane treatment of detainees further accentuates the government's willingness to risk the use of torture by guards trained in torture techniques and were operating in a highly stressful environment.

No credible justification has been proffered for the legitimization of either the use of torture or the invasion of Iraq and the subsequent operation of detention centers.¹⁵⁵ War crimes and crimes against humanity have occurred and the responsibility extends beyond the low level soldiers currently charged with these crimes. With international and domestic law being violated at the highest levels of the military and political hierarchy, the prosecution of only low-ranking soldiers and military police is inexcusable. The doctrine of command responsibility provides a solid theory of individual criminal liability through which prosecutions can be attempted for any torture that may have occurred in Afghanistan and Guantanamo. However, the theory of joint criminal enterprise provides the best means for pursuing prosecutions that arise out of the events in Iraq. The continued development of the theories of command responsibility and joint criminal enterprise is necessary to continue combating the prevalence of collective violence currently occurring around the globe.

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155. An analysis of the proffered justifications for the invasion of Iraq is beyond the scope of this note. Rather, the plain interpretation of the U.N. Charter in notes 116–118, combined with reliance upon the determination of U.N. Secretary General Kofi Annan that the invasion was illegal under the U.N. Charter is sufficient. See *Iraq War Illegal, Says Annan*, BBC NEWS, Sept. 16, 2004, at http://news.bbc.co.uk/1/hi/world/middle_east/3661134.stm (last visited Jan. 2, 2005). For an in-depth analysis, see Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004).

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