Ending the U.S. Program of Torture and Impunity: President Obama's First Steps and the Path Forward

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I. INTRODUCTION

During an admitted "program" of serial criminality designed to use secret detention and coercive interrogation of human beings, former President Bush, former Vice President Cheney, Alberto Gonzales, Condoleezza Rice, and several other members of the Bush Administration authorized, ordered, and/or abetted the forced disappearance of persons (a crime against humanity and a war crime), other war crimes (including torture and cruel, inhumane, and degrading treatment of human beings), and other serious international crimes implicating universal jurisdiction and a universal responsibility *aut dedere aut judicare* (that is, to hand over or to initiate prosecution of those reasonably accused).[1]

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1. *See, e.g.*, JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR (2007); Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535 (2009) [hereinafter Paust, *Torture*]. *See generally* CHRISTOPHER L. BLAKESLEY, TERRORISM AND ANTI-TERRORISM: A NORMATIVE AND PRACTICAL ASSESSMENT (2006); MARJORIE COHN, COWBOY REPUBLIC: SIX WAYS THE BUSH GANG HAS DEFIED THE LAW (2007); PHILIPPE SANDS, TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES (2008); M. CHERIF BASSIOUNI, THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION—IS ANYONE

When President Barack Obama took office, he announced that the United States will no longer engage in practices of torture. Has the Obama Administration fully changed the illegal practices of the prior Administration? Are treaty-based and customary international legal prohibitions of ill-treatment and rendition to other countries for mistreatment fully guaranteed by the United States or is there more for the Obama Administration to accomplish in order to assure full

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RESPONSIBLE? (2010); José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 (2006); Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005); M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389 (2006); Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN'S J. LEGAL COMMENT. 503 (2008); David E. Graham, *The Dual U.S. Standard for the Treatment and Interrogation of Detainees: Unlawful and Unworkable*, 48 WASHBURN L.J. 325 (2009); Aya Gruber, *Who's Afraid of Geneva Law?*, 39 ARIZ. ST. L.J. 1017 (2007); Scott Horton, Kriegsraison *or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War*, 30 FORDHAM INT'L L.J. 576 (2007); Peter Margulies, *Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939 (2006); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1 (2008); Jamie Mayerfeld, *Playing By Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89 (2007); Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT'L L. & POL'Y 33 (2006); Ved P. Nanda, Introductory Essay, *International Law Implications of the United States' "War on Terror,"* 37 DENV. J. INT'L L. & POL'Y 513 (2009); Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231 (2005); Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193 (2010); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200 (2007); Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT'L L. 309 (2005); David Scheffer, *For Love of Country and International Criminal Law, Further Reflections*, 24 AM. U. INT'L L. REV. 665 (2009); Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468 (2007); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L. 585 (2006); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005); W. Bradley Wendel, *The Torture Memos and the Demands of Legality*, 12 LEGAL ETHICS 107 (2009); Marlise Simons, *Spanish Court Weighs Criminal Inquiry on Torture for 6 Bush-Era Officials*, N.Y. TIMES, Mar. 29, 2009, at A6 (possible indictments of Gonzales, Yoo, Addington, Feith, Bybee, and Haynes); Jordan J. Paust, Op-Ed., *The Complicity of Dick Cheney: No 'Necessity' Defense*, JURIST, May 18, 2009, http://jurist.law.pitt.edu/forumy/2009/05/complicity-of-dick-cheney-no-necessity.php; Jordan J. Paust, Op-Ed., *Rice, Waterboarding and Accountability*, JURIST, May 8, 2009, http://jurist.law.pitt.edu/forumy/2009/05/rice-waterboarding-and-accountability.php; Jordan J. Paust, Op-ed., *The Second Bybee Memo: A Smoking Gun*, JURIST, Apr. 22, 2009, http://jurist.law.pitt.edu/forumy/2009/04/second-bybee-memo-smoking-gun.php; *All Things Considered: Did White House OK Earliest Detainee Abuse?* (NPR radio broadcast May 20, 2009), *available at* 2009 WLNR 9628215 (reporting that Gonzales "signed off" several times on the use of a number of harsh tactics several months prior to the August 2001 Bybee torture memo). Even after the Supreme Court affirmed in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that at a minimum common article 3 of the Geneva Conventions applies, President Bush admitted in September 2006 that his "program" involved secret detention and "tough" treatment and that it would continue. *See, e.g.*, PAUST, *supra*, at 29-30, 32, 35.

compliance with the law and that what had been an admitted Bush program of serial and cascading criminality will never occur again? Is President Obama bound under the United States Constitution to faithfully execute the laws, including treaty-based and customary international legal obligations regarding humane treatment and the duty of the United States either to initiate prosecution of or to extradite all persons who are reasonably accused of international crimes? Are U.S. international legal obligations to provide fair compensation to victims of unlawful treatment being met? If not, what must be done on the path forward? These and related questions are explored below.

II. PRESIDENT OBAMA'S IMPORTANT FIRST STEPS TOWARD COMPLIANCE WITH INTERNATIONAL LAW

While denouncing torture soon after he took office, President Obama issued an Executive Order mandating that all U.S. interrogation practices comply with requirements under treaty-based and customary international law reflected in common article 3 of the 1949 Geneva Conventions[2] and, necessarily therefore, that all persons of any status "shall in all circumstances be treated humanely" and, in particular, that no one shall be subjected to torture, cruel treatment, outrages upon personal dignity, humiliating treatment, or degrading treatment "at any time and in any place whatsoever."[3] Importantly with respect to the requirement of humane treatment, the Executive Order refers to common article 3 "as a [m]inimum [b]aseline" and declares that treatment must also be consistent with the requirements of the Convention Against

2. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC].

3. *Id.*; *see* Exec. Order No. 13,491, 74 Fed. Reg. 4893, 4894 (Jan. 27, 2009); Nanda, *supra* note 1, at 522-24; *see also* Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm ("This Administration [seeks] to ensure . . . full compliance with domestic and international law . . . by unequivocally guaranteeing *humane treatment* for all individuals in U.S. custody as a result of armed conflict. . . . An interagency review of U.S. interrogation practices later advised—and the President agreed—that no techniques beyond those in the Army Field Manual (and traditional noncoercive FBI techniques) are necessary to conduct effective interrogations."). *But see* MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS 198 (2010) (claiming that subsequently some within the Obama Administration have "refus[ed] to rule out the ticking time bomb justification for some forms of extraordinary interrogation in the future—so long as a sound legal basis can be found" (citations omitted)). Of course, there is absolutely no legal basis for any use of torture or cruel, inhuman, or degrading treatment against any human being anywhere under any circumstances. *See, e.g.*, GC, *supra* note 2, art. 3; PAUST, *supra* note 1, at 2-5, 30-33; Paust, *Torture*, *supra* note 1, at 1535-37. Legal advice to the contrary would be seriously unprofessional and can amount to criminal complicity. *See, e.g.*, PAUST, *supra* note 1.

Torture[4] (CAT) "and other laws regulating the treatment and interrogation of individuals detained in any armed conflict," among others.[5]

The Executive Order also stated that all U.S. interrogations shall comply with a 2006 United States Army interrogation manual.[6] The Army manual affirms that the handling and treatment of detainees "must be accomplished in accordance with all applicable law and policy," which includes "US law; the law of war; relevant international law; [and] relevant directives."[7] The manual also affirms that common article 3 of the Geneva Conventions provides a minimum standard of treatment.[8] Additionally, the manual lists specific tactics that must not be used, such as waterboarding, use of extreme cold, use of dogs, stripping persons naked, and hooding.[9] Contrary to the myth shared by some critics of President Obama, professional interrogators warn that inhumane treatment does not produce reliable intelligence and will often harm efforts to obtain needed intelligence, whereas lawful interrogation techniques can produce needed information, even within a relatively short time.[10]

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4. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]. The CAT applies in time of war or in time of peace. *See, e.g.*, PAUST, *supra* note 1, at 5, 11, 31; Paust, *Torture*, *supra* note 1, at 1553 & n.67; sources cited *infra* notes 24-26; CAT, *supra*, art. 2(2).

5. Exec. Order No. 13,491, 74 Fed. Reg. at 4894. Several of these international legal requirements and laws, including human rights law applicable in all circumstances, are addressed in PAUST, *supra* note 1, at 2-5, 30-31, 35-41, 67-71; Paust, *Torture*, *supra* note 1, at 1535-37, 1552-53.

6. Exec. Order No. 13,491, 74 Fed. Reg. at 4894.

7. U.S. DEP'T OF THE ARMY, FM 2-22.3 (FM 34-52), HUMAN INTELLIGENCE COLLECTOR OPERATIONS, at vii (Sept. 6, 2006) [hereinafter ARMY MANUAL], *available at* http://www.army.mil/institution/armypublicaffairs/pdf/FM2-22-3.pdf.

8. *Id.* § M-4; *see also* PAUST, *supra* note 1, at 43.

9. ARMY MANUAL, *supra* note 7, § 5-75. Concerning the manifest illegality of these tactics under various forms of customary and treaty-based international law, see, for example, PAUST, *supra* note 1, *passim*; Paust, *Torture*, *supra* note 1, at 1553-59 (documenting many U.S. cases and U.S. Executive Reports on Human Rights Practices of other countries that had recognized that waterboarding and related forms of inducement of suffocation, use of dogs to create intense fear, threatening to kill a detainee or family members, and the cold cell and related forms of inducement of hypothermia are decidedly torture).

10. *See, e.g.*, *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. 22-23 (2009) (statement of Ali Soufan, CEO, Soufan Group, LLC); 154 CONG. REC. S941 (daily ed. Feb. 13, 2008) (statement of Sen. Rockefeller); MATTHEW ALEXANDER WITH JOHN R. BRUNING, HOW TO BREAK A TERRORIST: THE U.S. INTERROGATORS WHO USED BRAINS, NOT BRUTALITY, TO TAKE DOWN THE DEADLIEST MAN IN IRAQ, at xi-xiii (2008); JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 330-31 (2008); Steven M. Kleinman, *The Promise of Interrogation v. the Problem of Torture*, 43 VAL. U. L. REV. 1577, 1578-79, 1585-88 (2009); Jordan J. Paust, *Serial War Crimes in Response to Terrorism Can Pose Threats to National Security*, 35 WM. MITCHELL L. REV. 5201, 5209-10 (2009); Peter Finn & Joby Warrick, *In 2002,*

III. FURTHER STEPS ARE NEEDED FOR FAITHFUL EXECUTION OF THE LAWS

President Obama's dramatic changes with respect to illegal interrogation practices and unlawful treatment of detained persons are helpful, but they do not lessen the need for new legislation to cover all forms of participation in torture and cruel, inhuman, and degrading treatment. Present federal legislation is conspicuously inadequate and will not allow the United States to fulfill its obligations under treaty-based and customary international law. As noted in another writing:

> It is time for new legislation regarding torture and cruel, inhuman and degrading treatment to reach all forms of such unlawful treatment in order to comply with the CAT, human rights law (customary and treaty-based), the laws of war (customary and treaty-based), and, more generally, to comply with what the United Nations Security Council and General Assembly have recognized as the duty of all states to end any form of impunity for and to prosecute international crime. Full coverage would also allow the United States to exercise a greater flexibility to request extradition of U.S. and foreign nationals for prosecution in the United States.[11]

President Obama's first efforts are also insufficient as long as the United States fails to withdraw its attempted reservation to the CAT, which had declared erroneously "[t]hat the United States considers itself bound by the obligation under Article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."[12] The Committee Against Torture that operates under the auspices of the CAT has rightly recognized that, if operative, the putative reservation would result in a failure to cover all violations of the Convention and that, therefore, the attempted reservation is "in violation of the Convention."[13] As in the case of any attempted reservation that is

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Military Agency Warned Against 'Torture,*'* WASH. POST, Apr. 25, 2009, at A1 (reporting that a 2002 military report to DOD General Counsel Haynes warned that extreme duress can yield unreliable information); Jeff Zeleny & Charlie Savage, *Officials Say Jet Plot Suspect Is Cooperating*, N.Y. TIMES, Feb. 3, 2010, at A11.

11. Paust, *Torture*, *supra* note 1, at 1570-71.

12. 136 CONG. REC. 36,192 (1990).

13. *See, e.g.*, PAUST, *supra* note 1, at 190 n.59 (addressing also a U.N. Experts' Report that agreed with the decision of the CAT Committee). From another perspective, the word "considers" indicates that what was labeled a reservation is technically phrased merely as a

inconsistent with the object and purpose of a treaty, the attempted reservation is void *ab initio* as a matter of law and has no legal effect.[14] As such, the putative reservation cannot protect the United States or any U.S. national with respect to the reach of the Convention and criminal and civil liability that attaches for its violation, but it communicates a lack of meaningful commitment to human rights that can be harmful to foreign policy interests of the United States and might confuse judges and others who are not sufficiently familiar with international law and the test concerning the validity of attempted reservations to treaties. It is also ultimately legally irrelevant because the attempted limitation or false understanding with respect to the CAT is incompatible with well-recognized and universally applicable U.N. Charter, customary, and *jus cogens* obligations regarding cruel, inhuman, and degrading treatment that pertain in any event.[15]

Since the attempted reservation is void as a matter of law, President Obama can notify the Secretary-General of the United Nations (as the depository for the treaty) that the United States formally withdraws its attempted reservation. Such an act by the President would help to end an embarrassment for the United States and restore U.S. integrity and respect as a nation committed to human dignity and human rights. Presidential withdrawal of the void reservation can also more adequately assure a full and faithful execution of the law, especially since some of the members of the former Bush Administration had tried to argue that the putative reservation could limit the reach of the treaty and provide cover for patently illegal interrogation practices.[16]

The same problem regarding void reservations exists with respect to an attempted reservation to article 7 of the International Covenant on Civil and Political Rights (ICCPR).[17] Article 7 of the ICCPR expressly mandates that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment,"[18] but the putative reservation, in language

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unilateral understanding that happens to be in plain error and can be withdrawn by President Obama.

14. *See* Vienna Convention on the Law of Treaties, art. 19(c), May 23, 1969, 1155 U.N.T.S. 331 (noting that reservations are void if they are "incompatible with the object and purpose of the treaty"); PAUST, *supra* note 1, at 143-44 n.43, 189-90 n.59. An attempted declaration of non-self-execution of articles 1-16 is also inconsistent with the object and purpose of the CAT, since several of the articles are phrased in mandatory "shall" language that is typically self-executing. *See* CAT, *supra* note 4. The declaration should also be withdrawn.

15. *See* Paust, *Torture*, *supra* note 1, at 1535-36.

16. *See, e.g.*, PAUST, *supra* note 1, at 5, 32-33, 143-44 n.43, 157 n.114, 189-91 nn.59-63.

17. Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

18. *Id.* art. 7. Concerning the absolute prohibition of each of these forms of ill-treatment under treaty-based and customary international law, including customary *jus cogens* applicable in

mirroring the manifestly void reservation to the CAT, attempted to limit the reach of article 7 merely to what is already prohibited under the United States Constitution.[19] To assure full compliance with our treaty obligations under the ICCPR with respect to future treatment of human beings and faithful execution of the laws, President Obama should notify the U.N. Secretary-General that the United States withdraws the putative but void reservation to article 7 of the International Covenant.[20]

While speaking last December, Secretary of State Hillary Clinton aptly noted that "a commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves," and that human rights are "rights that apply everywhere, to everyone."[21] Earlier in a significant speech before the United Nations, President Obama had declared that we "must stand together to demonstrate that international law is not an empty promise, and that Treaties will be enforced."[22] It is time for the United States to adhere to these recognitions. Secretary Clinton and President Obama can choose to define their legacies on the right side of history by taking needed steps to assure that the United States will effectuate universal human rights standards while enforcing U.S. treaties and customary international law, that human rights will apply to everyone everywhere, and that we will end impermissible impunity and hold our nationals accountable when they violate human rights law. While doing so, President Obama can also withdraw the declaration of partial non-self-execution from the U.S. instrument of ratification for the ICCPR, because it is disingenuous and manifestly void *ab initio* as a matter of law.[23] Additionally, instead of perpetuating a clearly erroneous claim of

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all social contexts, see, for example, PAUST, *supra* note 1, at 3-5, 30-31; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d) & cmt. n (1987).

19. 138 CONG. REC. 8068 (1992).

20. *See* PAUST, *supra* note 1, at 143 n.42, 189-90 n.59 (addressing also a U.N. Experts' Report agreeing with the conclusion of the Human Rights Committee that operates under the auspices of the ICCPR that the attempted reservation is inconsistent with the object and purpose of the treaty and is void *ab initio* as a matter of law).

21. Jaclyn Belczyk, *Obama Administration Human Rights Agenda Outlined*, JURIST, Dec. 15, 2009, http://jurist.law.pitt.edu/paperchase/2009/12/obama-administration-human-rights.php.

22. Barack Obama, President of the United States, Address to the United Nations General Assembly: Responsibility for Our Common Future (Sept. 23, 2009), http://www.unausa.org/Document.Doc?id=471; *see also* Jordan J. Paust, *What Obama Should Have Said: US Compliance with International Law*, JURIST, Oct. 2, 2009, http://jurist.law.pitt.edu/forumy/2009/10/what-obama-should-have-said-us.php.

23. *See, e.g.*, JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 363-66, 368, 376-78 (2d ed. 2003) (quoting Human Rights Comm., General Comment No. 24, U.N. Doc. HRI/GEN/1/REV.9(Vol.I) (Nov. 2, 1994)). Some do not understand that it was only an attempted declaration of partial non-self-execution and never reached article 50 of the ICCPR, which mandates in clear self-executing language that all of "[t]he provisions of the present

the Bush Administration that human rights law does not apply during war and on the battlefield,[24] President Obama can direct Secretary Clinton to formally acknowledge the error and change U.S. policy in order to assure compliance with the United Nations Charter and relevant human rights

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Covenant shall extend to all parts of federal States without any limitations or exceptions." ICCPR, *supra* note 17, art. 50; *see* JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 86-89, 589-90 (3d ed. 2009); PAUST, *supra*, at 361-62.

24. It was reported that the Obama Administration made this erroneous claim before the U.N. Human Rights Council. *See, e.g.*, Amelia Mathias, *UN Rights Investigator Warns US Drone Attacks May Violate International Law*, JURIST, Oct. 28, 2009, http://jurist.law.pitt.edu/paperchase/2009/10/un-rights-investigator-warns-us-drone.php. It is widely known that human rights law applies in time of armed conflict. *See, e.g.*, Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶¶ 216-220, 345(3) (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 104-106 (July 9); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); THOMAS BUERGENTHAL, DINAH SHELTON & DAVID P. STEWART, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 331-32 (3d ed. 2002); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 299-306 (2005); RICHARD B. LILLICH ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 211-16 (4th ed. 2006); PAUST, *supra* note 1, at 4, 140 n.35; JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 640, 653, 676, 811-13 (3d ed. 2007) (quoting Johann Bluntschli's recognition in 1866); Philip Alston et al., *The Competence of the UN Human Rights Council and Its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the 'War on Terror,'* 19 EUR. J. INT'L L. 183, 192-97 (2008) (offering an extensive survey of international institutional recognitions); *see also* Coard v. United States, Case No. 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 3 rev. ¶ 39 (1999) ("[C]ore guarantees apply in all circumstances, including situations of conflict."); G.A. Res. 63/166, pmbl., U.N. Doc. A/RES/63/166 (Feb. 19, 2009) ("[F]reedom from torture and other cruel, inhuman or degrading treatment or punishment is a non-derogable right that must be protected under all circumstances, including in times of international or internal armed conflict or disturbance."); G.A. Res. 62/148, pmbl., U.N. Doc. A/RES/62/148 (Mar. 4, 2008) (same); G.A. Res. 60/148, pmbl., U.N. Doc. A/RES/60/148 (Feb. 21, 2006) (same); Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 59/182, pmbl., ¶¶ 1-2, U.N. Doc. A/RES/59/182 (Mar. 8, 2005); S.C. Res. 1738, ¶ 9, U.N. Doc. S/RES/1738 (Dec. 23, 2006) ("[V]iolations of international humanitarian and human rights law in situations of armed conflict."); S.C. Res. 1265, ¶ 4, U.N. Doc. S/RES/1265 (Sept. 17, 1999); Human Rights Comm., International Covenant on Civil and Political Rights, Gen. Comment No. 31, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); Human Rights Comm., International Covenant on Civil and Political Rights, Gen. Comment No. 29, ¶¶ 3, 9, 11 & n.6, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); Eur. Parl. Ass., *Lawfulness of Detentions by the United States in Guantánamo Bay*, Res. No. 1433, ¶ 4 (2005), *available at* http://assembly.coe.int/Documents/AdoptedText/ta05/ERES1433.htm; Paust, *Torture*, *supra* note 1, at 1535-37 (noting that human rights law applies in all social contexts, including contexts in which humanitarian law applies); Alfred de Zayas, *The Status of Guantánamo Bay and the Status of the Detainees*, 37 U.B.C. L. REV. 277, 281-82, 309-10 (2004). More generally, the duty of states under the United Nations Charter to respect and observe human rights applies universally and without a war-context limitation. *See* U.N. Charter arts. 55(c), 56. This Charter-based duty also pertains when U.S. military personnel participate in U.N. missions under a U.N. flag. *See, e.g.*, Jordan J. Paust, *The U.N. Is Bound By Human Rights: Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity*, 51 HARV. INT'L L.J. Online 1 (Apr. 12, 2010), http://www.harvardilj.org/wp-content/uploads/2010/09/HILJ-Online_51_Paust.pdf.

law, especially human rights law that requires humane treatment of all persons of any status who are captured or otherwise detained under any circumstances. It would also be useful for the President to acknowledge that under an express provision of the CAT "a state of war or a threat of war" cannot obviate the treaty-based prohibition of torture.[25] The CAT clearly applies in time of war and the nefarious ploy of the Bush Administration that it does not apply in time of armed conflict[26] should be formally renounced.

It is important to note in this regard that the customary and treaty-based human rights prohibitions of torture and cruel, inhuman, or degrading treatment of any detained person are matched by customary and treaty-based laws of war that apply to any detainee of any status during any armed conflict. Both sets of prohibitions and rights are absolute and, therefore, they apply without any terrorist, terrorism, or alleged necessity exception.[27] For these reasons, application of such forms of human rights law during war will not inhibit lawful military conduct during war concerning the treatment of detainees. In fact, I know of no relevant human right that would needlessly inhibit lawful conduct on the battlefield.[28]

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25. *See* CAT, *supra* note 4, art. 2(2).

26. *See, e.g.*, John B. Bellinger, Legal Adviser, U.S. Dep't of State, Opening Remarks at the U.S. Meeting with U.N. Committee Against Torture (May 5, 2006), http://www.state.gov/g/drl/rls/68557.htm ("[D]etention operations are governed by the law of armed conflict, which is the *lex specialis* applicable to those operations."). The CAT Committee rejected this ploy and urged the United States to abandon such a claim. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture, United States of America, 36th Sess., May 1-19, 2006, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006) [hereinafter CAT Comm. U.S. Report].

27. *See, e.g.*, PAUST, *supra* note 1, at 2-5.

28. For example, the rights to freedom from arbitrary deprivation of life and freedom from arbitrary detention that apply to any person of any status in the actual power or effective control of a state in any social context are limited by the word "arbitrary." *See, e.g.*, ICCPR, *supra* note 17, arts. 6(1), 9(1) (stating also that detention must be based on "grounds" and "procedure" that "are established by law"). During war, lawful killings and detention of non-prisoners of war under the laws of war would not be arbitrary and they would actually be conditioned by higher law of war standards under principles of reasonable necessity and proportionality. Concerning the reasonable necessity standard for lawful detention of non-prisoners of war who pose a significant security threat during an international armed conflict, see, for example, GC, *supra* note 2, arts. 5, 42-43, 78. With respect to the ever applicable human right to freedom from "arbitrary" detention, it should be noted that when applying such a standard there must not be discrimination on the basis of impermissible grounds, such as national origin, race, or religion. *See, e.g.*, ICCPR, *supra* note 17, arts. 2(1), 26. Moreover, the right of access to courts for review of the propriety of detention must be the same for citizens and aliens. *See, e.g.*, *id.* arts. 2(3), 9(4), 14(1), 26; Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 507-10, 514 (2003) [hereinafter Paust, *Judicial Power*], *quoted in part in* Hamdi v. Rumsfeld, 542 U.S. 507, 520-21 (2004)

Some claim that the laws of war are a superior *lex specialis*,[29] but such Latinized nonsense is intellectually bankrupt and unacceptable. It is widely known that some human rights are peremptory norms *jus cogens*—that is, they are superior and trump any inconsistent international law in any circumstance, including inconsistent laws of war.[30] The rights to freedom from torture and cruel, inhuman, and degrading treatment are examples.[31] Furthermore, these and certain other human rights are nonderogable—that is, they cannot be derogated from even in time of war or because of an alleged necessity.[32] Moreover, the phrase *lex specialis* has been made up and favored by a few textwriters and jurists who do not seem to understand that norms *jus cogens* have primacy, not every type of law of war. Additionally, the phrase *lex specialis* appears in no known international agreement. It is nonsense to claim that every law of war will displace or prevail over every relevant human right in time of armed conflict. Additionally, human rights obligations are universal and apply in all social contexts under the United Nations Charter, and article 103 of the Charter guarantees their primacy over inconsistent law of war treaties.[33]

IV. THE OBAMA ADMINISTRATION'S CONSTITUTIONALLY BASED OBLIGATION TO END IMPUNITY

President Obama has an express and unavoidable constitutional duty to execute the laws faithfully,[34] including customary and treaty-

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(O'Connor, J., opinion). Secret detention is illegal under various international laws. *See, e.g.*, PAUST, *supra* note 1, at 35-41.

29. *See, e.g.*, discussion *supra* note 26.

30. *See generally* PAUST, VAN DYKE & MALONE, *supra* note 23, at 61-64; PAUST, *supra* note 1, at 4, 35, 37, 69.

31. *See* PAUST, *supra* note 1, at 3-5.

32. *See, e.g.*, ICCPR, *supra* note 17, art. 4(2); THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 163 (4th ed. 2007); PAUST, *supra* note 1, at 4, 141 n.38. The rights and prohibitions under article 7 regarding torture and cruel, inhuman, and degrading treatment are examples. *See* ICCPR, *supra* note 17, art. 4(2) (listing article 7 among expressly nonderogable human rights).

33. *See* U.N. Charter arts. 55(c), 56, 103.

34. U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed."). Such laws include treaties and customary international law and the President is bound thereby. *See, e.g.*, PAUST, *supra* note 23, at 169-73; PAUST, *supra* note 1, *passim*. Every relevant judicial opinion since the beginning of the United States has recognized that the President and all persons within the Executive branch are bound by the laws of war, a point famously recognized by President Lincoln's Attorney General in 1865 while addressing the need to prosecute war crimes and the lack of congressional power to limit the reach of the laws of war or to authorize their infraction. *See* 11 Op. Att'y Gen. 297 (July 1865); *see also* PAUST, *supra* note 1, at 234-36 n.4 (stating that Congress can set limits on the President's war powers). For the many Supreme Court and other judicial opinions affirming that the Executive is bound by the laws of war, see, for

based international law that requires without exception the initiation of prosecution or extradition of any person who authorized, ordered, abetted, or engaged in torture or other forms of illegal treatment of human beings.[35] At the time of this writing, the Obama Administration has failed to faithfully execute such laws and to either prosecute or extradite several members of the Bush Administration, including several lawyers, who beyond reasonable doubt are reasonably accused.[36] As noted in another writing:

> If for any reason the United States fails to prosecute or extradite those who are reasonably accused, the U.S. would remain in violation of critically important treaties and various damaging consequences will continue. Among several abnegative consequences would be a general deflation of respect for the rule of law (especially the laws of war) and doubt within the community whether the United States will fulfill its commitments under other treaties that are of great significance to the international community. . . .
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> . . . A great President must surely realize that we cannot restore the rule of law, we cannot adequately train soldiers to obey the laws of war, we cannot properly move forward without complying with international law and ending impunity through Executive prosecution or extradition of those who are reasonably accused. We must reaffirm the fundamental

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example, Hamdan v. Rumsfeld, 548 U.S. 557, 641-42 (2006) (Kennedy, J., concurring) (explaining that at least common article 3 of the Geneva Conventions applies and it "is part of a treaty the United States has ratified and thus accepted as binding law"); Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT'L L. & POL'Y 205, 240-42 n.135 (2008) [hereinafter Paust, *In Their Own Words*]; *see also* text *infra* note 69. International laws that President Obama must faithfully execute include the unavoidable obligation to initiate prosecution of or to extradite all persons of any status who are reasonably accused of war crimes (including violations of the Geneva Conventions), crimes against humanity, and crimes under the CAT. *See* sources cited *infra* note 35.

35. *See, e.g.*, Paust, *Torture*, *supra* note 1, at 1537-43; GC, *supra* note 2, art. 146 (mandating that all Parties, thus including the United States, must "search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches [of the Convention], and shall bring such persons, regardless of their nationality, before its own courts [for effective penal sanctions or] if it prefers, . . . hand such persons over for trial to another High Contracting Party"); CAT, *supra* note 4, art. 7(1) (expressly and unavoidably mandating that a Party to the treaty "under whose jurisdiction a person alleged to have committed any offence [for example, torture or complicity or participation in torture] is found shall . . . if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution").

36. *See* PAUST, *supra* note 1, at 21-23. This failure can also have personal implications for the President as Commander in Chief of the armed forces if crimes occur in the future because the failure to prosecute can become part of a failure of a leader to take reasonable corrective action after becoming aware of criminal activity. Such failure can involve dereliction of duty as a form of criminal responsibility. Concerning leader responsibility and the test for dereliction of duty, see, for example, PAUST ET AL., *supra* note 24, at 51-81.

> expectations of the Founders and Framers and countless others here and abroad that no one is above the law—that law exists not merely for those who are outside of government and without substantial wealth or power.[37]

It is partly encouraging that a new Human Rights Section within the Department of Justice (DOJ) has been created by federal legislation in 2009[38] and that the new section in the DOJ will prosecute serious human rights offenses such as genocide, torture, war crimes, and the use or recruitment of child soldiers that are committed by any person who is a national of the United States or who is found in the United States.[39] What remains most troubling, however, is the fact that the 2009 legislation refers to the old torture statute that is clearly inadequate to comply with U.S. obligations under the CAT to reach all proscribed acts of torture and to also enact legislation adequate for prosecution of cruel, inhuman, and degrading treatment.[40]

The 2009 legislation is also inadequate when referring merely to war crimes under the War Crimes Act[41] because certain revisions of the War Crimes Act that were pressed by the Bush Administration in 2006 created improper and severely limiting definitions of war crimes that are especially inconsistent with mandatory rights and duties under common article 3 of the Geneva Conventions and do not reach all violations of the laws of war.[42] However, other federal legislation incorporates all of the laws of war by reference as crimes against the laws of the United States and allows prosecution of any person for any war crime in the federal

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37. Paust, *Torture*, *supra* note 1, at 1574 n.119-20 (citing PAUST, *supra* note 1, at xi-xii, 20-23, 65-67, 71-76, 80-81, 86-91, 99). The writing added: "Presently, there is extensive evidence of manifest criminality engaged in by several individuals and many authoritative reports, published paper trails, and admissions already exist." *Id.* at 1574 n. 120; *see, e.g.*, *id.* at 1538 n.19, 1539 nn.21-22, 1557 n.73, 1559 nn.76-80, 1570 n.107; PAUST, *supra* note 1, at 5-19, 25-30, 32, 35-36, 45-46. They offer proof that what we saw in the Abu Ghraib photos, waterboarding, the cold cell, stripping persons naked and use of snarling dogs to instill intense fear are torture authorized and abetted at the highest levels. If they were not torture, they are cruel treatment. If they were not cruel, they constitute inhumane treatment. As such, they are manifest violations of the laws of war and any violation of the laws of war is a war crime. It is time to move beyond what for some has been convenient disbelief and for others has been racist indifference.

38. *See* Human Rights Enforcement Act of 2009, 28 U.S.C.A. § 509B (West 2009).

39. *See, e.g.*, *id.*; Andrew Ramonas, *New DOJ Human Rights Section Becomes Law*, MAIN JUSTICE, Dec. 23, 2009, http://www.mainjustice.com/2009/12/23/new-doj-human-rights-section-becomes-law.

40. Concerning such obligations under the Convention, see CAT, *supra* note 4, arts. 4(1), 16(1). Concerning the inadequacies of the present torture legislation, see, for example, PAUST, *supra* note 1, at 96, 256 n.89, and Paust, *Torture*, *supra* note 1, at 1569-70.

41. War Crimes Act, 18 U.S.C. § 2441 (2006), *referred to in* Human Rights Enforcement Act, 28 U.S.C.A. § 509B(e).

42. *See, e.g.*, PAUST, *supra* note 1, at 93-97; David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. U. J. INT'L HUM. RTS. 30, 46-47 (2009); Paust, *Torture*, *supra* note 1, 1569-70.

district courts.[43] Nonetheless, President Obama should work with Congress to amend the War Crimes Act so that the war crimes covered by its provisions fully reflect relevant international law that is binding on the United States. With respect to genocide, present U.S. legislation concerning genocide as such is remarkably deficient and nearly guarantees that genocide will not be effectively prosecuted in a U.S. court. President Obama should seek amendments to the legislation in order to comply with the obligation of the United States under the Genocide Convention to prosecute all persons, for example, who are reasonably accused of having committed or abetted genocide.[44] If not, our obligation under the Genocide Convention will remain "an empty promise."

V. THE NEED TO ALLOW CIVIL SANCTIONS FOR VICTIMS OF UNLAWFUL TREATMENT

As documented in a recent article, a vast array of international laws assures the rights of access to courts and to fair compensation for victims of secret detention, torture, and cruel, inhuman, and degrading treatment.[45] For example, a mandatory duty to provide fair compensation, including means for rehabilitation, is set forth in article 14 of the CAT:

> Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as

43. *See* 10 U.S.C. § 818 (2006); PAUST, *supra* note 1, at 145 n.47, 189 n.51; PAUST ET AL., *supra* note 24, at 241-47 n.2 (noting that, as affirmed by the United States Supreme Court, the precursor to 10 U.S.C. § 818, article 15 of the 1916 Articles of War, had incorporated all of the customary laws of war as domestic criminal law or offenses against the laws of the United States). As the writings cited note, jurisdiction in federal district courts is appropriate under 18 U.S.C. § 3231, since the district courts exercise judicial power and have original and concurrent jurisdiction over all offenses against the laws of the United States. The Human Rights Enforcement Act does not preclude such jurisdiction and could not control the independent discretion of the Attorney General with respect to which set of legislation might be used to initiate prosecution of violations of the laws of war.

44. *See, e.g.*, Jordan J. Paust, *The Need for New U.S. Legislation for Prosecution of Genocide and Other Crimes Against Humanity*, 33 VT. L. REV. 717 (2009) (noting also why we need a statute covering crimes against humanity and that a new statute could incorporate customary crimes against humanity by reference). As noted, 18 U.S.C. § 1093(8) is particularly harmful and should be deleted. *See id.* at 724.

45. *See* Jordan J. Paust, *Civil Liability of Bush, Cheney, et al. for Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT'L L. 359, 361-71 (2009) [hereinafter Paust, *Civil Liability*].

> possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.[46]

The right to a remedy, access to courts, and nonimmunity are also based in articles 2(3)(a) and 14(1) of the ICCPR,[47] as emphasized in General Comments of the Human Rights Committee that operates under the auspices of the Covenant.[48]

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46. CAT, *supra* note 4, art. 14(1). Both sentences quoted contain a duty that is phrased in mandatory "shall" language that provides textual clarity regarding the immediate mandatory duty and that is typically self-executing. *Id.*; *see, e.g.*, PAUST, *supra* note 23, at 72, 90 n.98, 129-30 n.14. If there is even a need for statutory incorporation in view of such clear, immediate and mandatory language, a number of federal statutes also execute the treaty-based right to a remedy. *See, e.g.*, Paust, *Civil Liability*, *supra* note 45, at 364 n.9, 380-81 & nn.69-71. Article 14 of the CAT necessarily applies to acts of public officials covered under article 1 of the treaty and, therefore, articles 1 and 14 necessarily assure nonimmunity of public officials. *See* CAT, *supra* note 4; *see also* CAT Comm. U.S. Report, *supra* note 26, ¶¶ 14 ("[The United States] should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction. . . ."), 15 ("[P]rovisions of the Convention . . . apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world."), 19 ("[There exists an] absolute prohibition of torture . . . without any possible derogation."), 28 ("The State party should ensure, in accordance with the Convention, that mechanisms to obtain full redress, compensation and rehabilitation are accessible to all victims of acts of torture or abuse, including sexual violence, perpetrated by its officials."), 32 ("The State party should . . . ensure that all allegations of violence in detention centres are investigated promptly and independently, perpetrators are prosecuted and appropriately sentenced and victims can seek redress, including appropriate compensation.").

47. *See* ICCPR, *supra* note 17, arts. 2(3)(a) ("[The duty t]o ensure that any person whose rights . . . are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."), 14(1) ("All persons shall be equal before the courts and tribunals. In the determination of . . . his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."). Both provisions are set forth with mandatory "shall" language that provides an immediate duty and is typically self-executing. *Id.* An attempted declaration of partial non-self-execution with respect to articles 1-27 of the Covenant is incompatible with the object and purpose of the treaty and void *ab initio* as a matter of law. *See, e.g.*, PAUST, *supra* note 23, at 362-66. In any event, the declaration expressly does not reach article 50 of the treaty, which mandates application of all of the provisions of the treaty within the United States. *See* ICCPR, *supra* note 17, art. 50. Moreover, federal statutes execute the Covenant for civil sanction purposes. Article 2(3)(a) of the ICCPR expressly applies to acts of public officials and, therefore, necessarily recognizes nonimmunity of public officials. *See id.* art. 2(3)(a).

48. *See, e.g.*, PAUST, VAN DYKE & MALONE, *supra* note 23, at 83-84, 412-13; Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 82 (Tex. 2000) ("Article 14(1) requires all signatory countries to confer the right of equality before the courts to citizens of all other signatories. . . . The Covenant not only guarantees foreign citizens equal treatment in the signatories' courts, but also guarantees them equal access to these courts."); Human Rights Comm., Gen. Comment No. 7, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.9 (1982) ("Complaints about ill-treatment must be investigated [and with respect to personal responsibility, t]hose found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation."); Human Rights Comm., Gen. Comment No. 20, ¶ 15, U.N. Doc. HRI/GEN/1/Rev.9 (vol. I) (1992) ("States may not deprive individuals of the right to an effective remedy, including compensation."); Human Rights Comm., Gen. Comment No. 24, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) ("[A] State could not make a reservation to article 2,

The recent article also documents why substitution of the United States for individual defendants who are former government officials should not occur with respect to crimes under international law and human rights violations.[49] President Obama and Attorney General Eric Holder can easily change such practices.[50] Also documented are the various reasons why international laws that require access to courts and to an effective remedy have primacy over inconsistent provisions in the Military Commissions Act (MCA),[51] something that the Obama Administration can formally recognize while seeking to fulfill the constitutionally-based duty to faithfully execute the laws. In particular, Attorney General Holder can direct attorneys in the Department of Justice to assure that such international legal requirements and relevant long-standing Supreme Court case law[52] that guarantees their primacy will actually be followed, especially in Executive briefs and statements of interest before U.S. courts.

It is already obvious that some federal judges have either been misled concerning the primacy of international law or have no understanding of relevant long-standing Supreme Court case law. Unfortunately, this may not be so unusual because most lawyers and judges in the United States have never taken a course in international law and most international law and constitutional law casebooks do not pay adequate attention to how international law has been incorporated into our domestic legal processes or address long-standing Supreme Court case law that has set forth clear rules to be followed in the event of a potential clash between a treaty and a federal statute. Counsel who are not professionally prepared in this regard simply cannot provide guidance for judges who might benefit from adequate briefing. Even if counsel on both sides provide appropriate briefing, an errant judge might simply run off a self-created cliff.

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paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy."), ¶ 12 ("[W]hen there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts . . . all the essential elements of the Covenant guarantees have been removed."). An attempted reservation to that effect is void *ab initio* as a matter of law because it would be "incompatible with the object and purpose of the treaty." *See id.* ¶ 6.

49. *See* Paust, *Civil Liability*, *supra* note 45, at 375-79.

50. *See* Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998) ("It shall be the policy and practice of the Government of the United States . . . fully to . . . implement its obligations under the international human rights treaties to which it is a party [and that a]ll executive departments and agencies . . . shall perform [their] functions so as to respect and implement those obligations fully.").

51. *See* Paust, *Civil Liability*, *supra* note 45, at 380-85.

52. *See id.* at 382-85 & nn.76-78 & 84.

Consider the surprising misinformation that appears in *dicta* in a recent circuit court opinion that is manifestly erroneous and contrary to venerable Supreme Court law. In *Al-Bihani v. Obama*,[53] Judge Janice Brown offered *dicta* that is loaded with a number of errors. As she opined,

> the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war . . . is mistaken. There is no indication in the AUMF, the Detainee Treatment Act of 2005, . . . or the MCA of 2006 or 2009, that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF. The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts. . . . Even assuming Congress had at some earlier point implemented the laws of war as domestic law through appropriate legislation, Congress had the power to authorize the President in the AUMF and other later statutes to exceed those bounds. . . . Therefore, while the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, *see Hamdi*, 542 U.S. at 520, . . . their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers.[54]

The first rule that Judge Brown missed is based in otherwise well-known Supreme Court case law that has been applied since the beginning of the United States, the *Charming Betsy* rule.[55] As the Supreme Court has long recognized, federal statutes must be interpreted consistently with international law (not the other way around) and international law is a

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53. Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010).

54. *Id.* at 871 (citations omitted). *But see id.* at 885 (Williams, J., concurring in part) (questioning the unnecessary *dicta* "divorced from application to any particular argument," especially in view of Justice O'Connor's and Justice Souter's recognitions in *Hamdi v. Rumsfeld* and the Executive's argument in *Al-Bihani* that "'[t]he authority conferred by the AUMF is informed by the laws of war'"). This Executive argument is correct in view of the fact that international law is a necessary background for the purpose of interpreting federal statutes. *See, e.g.*, discussion *infra* notes 56-57. This is what Justice O'Connor did in *Hamdi v. Rumsfeld* when using the law of war as an interpretive aid and quoting one of my articles to affirm the existence of presidential power to detain certain persons without trial. *See* 542 U.S. 507, 520-21 (2004). That is also what the Executive did in its brief with extensive analysis of relevant laws of war. *See* Brief for Appellees at 16, 18, 21, 23-25, 32-50, *Al-Bihani*, 590 F.3d 866 (No. 09-5051). In fact, the Executive argued, "The President has authority, consistent with the laws of war, to detain enemy forces." *Id.* at 21; *see also* sources cited *infra* note 57 (discussing related recognitions by the Executive in this case). There was no support for Judge Brown's dicta. *See Al-Bihani*, 590 F.3d at 871. Judge Brown's dicta offered no citation to a court opinion other than that in *Hamdi*. *Id.* The dicta has also misled a district court. *See* Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 115 n.8 (D.D.C. 2010).

55. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

necessary background for interpretive purposes.[56] Contrary to Judge Brown's claim, Congress used the word "appropriate" in the AUMF as a textual limitation that clearly conditioned what forms of conduct the President can authorize and under venerable Supreme Court law the word "appropriate" must be interpreted consistently with relevant international law such as the laws of war.[57]

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56. *See id.* at 117-18 (Marshall, C.J.) ("[A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate . . . rights . . . further than is warranted by the law of nations . . . ."). Importantly, Chief Justice Marshall's famous recognition added the point that statutes "can never be construed to violate" rights under international law, although international law might place limits on such rights. *Id.* There were other early recognitions of this fundamental rule of statutory construction. *See, e.g.*, Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801); Who Privileged from Arrest, 1 Op. Att'y Gen. 26, 27 (June 1792); *see also* United States v. Flores, 289 U.S. 137, 159 (1933) ("[I]t is the duty of the courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in light of recognized principles of international law."); Ross v. Rittenhouse, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792); Miller v. The Ship Resolution, 2 U.S. (2 Dall.) 1, 4 (1781); The Ship Rose v. United States, 36 Ct. Cl. 290, 301 (1901); Stewart v. United States, 27 Ct. Cl. 99, 109 (1892); Rutgers v. Waddington, Mayor's Court of the City of New York (1784), *reprinted in* 2 AMERICAN LEGAL RECORDS, SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784, at 302 (R. Morris ed., 1935) (construing the 1783 N.Y. Trespass Act consistently with the Treaty of Peace), *discussed in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 413-14 (Julius Goebel Jr. ed., 1964); 11 Op. Att'y Gen. 297, 299-300 (July 1865); Right of Expatriation, 9 Op. Att'y Gen. 356, 362-63 (July 1859); 1 Op. Att'y Gen. at 53 (stating that the municipal law is strengthened by the law of nations); PAUST, VAN DYKE & MALONE, *supra* note 23, at 153; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 457-58 (1969). *But see* Miss. Poultry Ass'n v. Madigan, 992 F.2d 1359, 1367 (5th Cir. 1993) ("We are loath . . . to extend this maxim to multi-lateral trade agreements."); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (discussing as unsupported dictum the duty of courts merely to enforce statutes, "not to conform" them "to norms of customary international law"). The rule has extensive modern recognition. *See, e.g.*, Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 142-42 (2005) (Ginsburg, J., concurring); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); PAUST, VAN DYKE & MALONE, *supra* note 23, at 154, 553-54, 662.

57. *See, e.g.*, PAUST, *supra* note 1, at 92; *see also* Brief for Appellees, *supra* note 54, at 21 ("The President has authority, consistent with the laws of war."), 23 ("[T]he AUMF is informed by the laws of war."), 49 ("[T]he *Hamdi* plurality made clear that the detention of individuals fighting . . . 'is so fundamental and accepted [as] an incident of war as to be an exercise' of the 'necessary and appropriate' force authorized by the AUMF [and that t]he AUMF 'includes the authority to detain [and] is based on longstanding law-of-war principles.'" (quoting *Hamdi*, 542 U.S. at 518, 521)), 50 ("[P]risoners of war can be detained during an armed conflict, but the detaining country must release and repatriate them without delay after the cessation of active hostilities." (internal quotation marks omitted)), 52-53 ("[T]he 'necessary and appropriate' force authorized by the AUMF—force . . . includes the power to detain belligerents for the duration of the conflict."); Koh, *supra* note 3, pt. III.B.1.b ("[W]e are resting our detention authority on a domestic statute—the 2001 [AUMF]—as informed by the principles of the laws of war [and] as a matter of *international law*, this Administration has expressly acknowledged that international law informs the scope of our detention authority. Both in our internal decisions about specific Guantanamo detainees, and before the courts in habeas cases, we have interpreted the scope of detention authority authorized by Congress in the AUMF *as informed by the laws of war*.").

A second otherwise well-known rule based in Supreme Court case law that Judge Brown missed is the *Cook* rule. Under the *Cook* rule, if, after attempting to construe a federal statute consistently with an earlier treaty, there still appears to be a clash, an unavoidable clash with a subsequent federal statute that might allow application of the last in time rule will not even arise unless there is a clear and unequivocal expression of congressional intent to override a particular treaty in the statute.[58] If not, the prior treaty has primacy in our domestic legal process. As noted in another writing, it is obvious that there was no clear and unequivocal expression of congressional intent to override any relevant treaty in either the AUMF or the 2005 Detainee Treatment Act.[59] Therefore, under venerable Supreme Court case law all relevant treaties have primacy over each of these forms of legislation.

It was also noted that in the 2006 MCA there was merely an intent to limit certain rights under the Geneva Conventions and there was no clear and unequivocal expression of congressional intent to override any other relevant treaty or customary international law.[60] As noted in this Article, provisions of the MCA that are inconsistent with the Geneva Conventions still will not prevail in any event.[61] One of the reasons why is the fact that even if a statute is unavoidably inconsistent with a prior in time treaty and Congress has expressed a clear and unequivocal intent to override the treaty in the statute and the last in time rule might apply, there are exceptions to the last in time rule documented in Supreme Court and other federal court decisions that can assure the primacy of at least portions of the prior treaty.[62] One of these exceptions assures the

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58. *See, e.g.*, *Weinberger*, 456 U.S. at 35 ("[A] congressional expression [to override is] necessary."); Cook v. United States, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified [domestically] by a later statute, unless such purpose on the part of Congress has been clearly expressed."); Cheung Sum Shee v. Nagle, 268 U.S. 336, 339-40 (1925) ("[The A]ct must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude . . . a congressional intent absolutely to exclude."); United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902) ("[The purpose to override] must appear clearly and distinctly from the words used [by Congress]."); PAUST, VAN DYKE & MALONE, *supra* note 23, at 153-54.

59. *See, e.g.*, PAUST, *supra* note 1, at 44-45, 91-98; Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 377-80, 400-06, 412-15 (2007).

60. *See* Paust, *Civil Liability*, *supra* note 45, at 380.

61. *See* sources cited *supra* note 51.

62. Concerning the five-step process for resolving a potential clash between a treaty and a subsequent federal statute, including the exceptions to the last in time rule documented in Supreme Court cases, see, for example, PAUST, *supra* note 23, at 99-108, 120-21; PAUST, VAN DYKE & MALONE, *supra* note 23, at 153-54, 532-48.

primacy of "rights under" treaties.[63] The other exception assures the primacy of the laws of war.[64] Contrary to Judge Brown's unsupportable *dicta*, even if one ignored the *Charming Betsy* rule and the *Cook* rule, under either of these exceptions to the last in time rule Congress could not rightly authorize the President to violate rights under treaties or the laws of war.

Moreover, as noted earlier in this Article, it is also otherwise well-known that treaty-based and customary laws of war are binding on the President and every other member of the Executive branch and, therefore, that they are of "controlling legal force" and set limits on the President's war powers.[65] The Founders, Framers, and early judicial opinions were also uniform in affirming that Congress is bound by the customary laws of war and cannot rightly authorize their infraction.[66] Moreover, it is

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63. *See, e.g.*, Jones v. Meehan, 175 U.S. 1, 32 (1899); Holden v. Joy, 84 U.S. (17 Wall.) 211, 247 (1872); Reichart v. Felps, 73 U.S. (6 Wall.) 160, 165-66 (1867); Wilson v. Wall, 73 U.S. (6 Wall.) 83, 89 (1867); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 631-32 (1857) (Curtis, J., dissenting); Mitchel v. United States, 34 U.S. (9 Pet.) 711, 749, 755-56 (1835); *see also* Smith v. Stevens, 77 U.S. (10 Wall.) 321, 327 (1870) (stating that a joint resolution of Congress could not relate back to give validity to a land conveyance that was void under a treaty); Marsh v. Brooks, 49 U.S. (8 How.) 223, 232-33 (1850) (stating that an 1836 act of Congress could not "help the patent, it being of later date than the treaty" of 1824 which had conferred part of the title to property in others); Chase v. United States, 222 F. 593, 596 (8th Cir. 1915) ("Congress has no power . . . to affect rights . . . granted by a treaty"), *rev'd on other grounds*, 245 U.S. 89 (1917); Elkison v. Deliesseline, 8 F. Cas. 493, 494-96 (C.C.D.S.C. 1823) (No. 4,366) (Johnson, J., on circuit) (noting that state law attempting to allow seizure of "free negroes and persons of color" on ships that come into its harbors directly conflicts with the "paramount and exclusive" federal commerce power, "the treaty-making power," and "laws and treaties of the United States" by "converting a right into a crime," and a plea of necessity to protect state security does not obviate the primacy of the laws and treaties of the United States), 494-96 (observing that a restriction of a treaty right by legislation, "even by the general government," cannot prevail); PAUST, *supra* note 23, at 104-05.

64. *See, e.g.*, Miller v. United States, 78 U.S. (11 Wall.) 268, 315-16 (1870) (Field, J., dissenting); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (recognizing that congressional power is restricted by the laws of war by stating that "[i]f a general war is declared [by Congress], its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations"); 11 Op. Att'y Gen. 297, 299-300 (1865) ("Congress . . . cannot abrogate [the "laws of war"] . . . laws of nations . . . are of binding force upon the departments and citizens of the Government. . . . Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government [to do so either]"); 8 ANNALS OF CONG. 1980 (1798) (statement of Rep. Albert Gallatin) ("By virtue of . . . [the war power], Congress could . . . [act], provided it be according to the laws of nations and to treaties."), *quoted in* United States *ex rel.* Schlueter v. Watkins, 67 F. Supp. 556, 564 (S.D.N.Y. 1946); *see also* United States v. Macintosh, 283 U.S. 605, 622 (1931), *overruled on other grounds*, Girouard v. United States, 328 U.S. 61, 69 (1945) ("[T]he war power . . . tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law."); Tyler v. Defrees, 78 U.S. (11 Wall.) 331, 354-55 (1871) (Field, J., dissenting); PAUST, *supra* note 23, at 106-07 (citing other cases); Paust, *In Their Own Words*, *supra* note 34, at 217-30.

65. *See* sources cited *supra* note 34; *see also* discussion *infra* notes 69-70.

66. *See, e.g.*, Paust, *In Their Own Words*, *supra* note 34, at 217-30.

clear that since 1916 Congress has incorporated all of the laws of war as offenses against the laws of the United States[67] and that, as the Supreme Court has famously affirmed, "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of enemy . . . individuals."[68] A long line of cases documenting judicial power to identify, clarify, and apply the laws of war in cases otherwise properly before the courts and to even second-guess Executive decisions made in time of war is also otherwise well-known.[69] More generally, customary international law has been used by the judiciary with or without an implementing statute[70] and numerous judicial opinions since the dawn of the United States have used human rights as part of their decision making.[71] As Chief Justice Marshall affirmed in 1810, our judicial tribunals "are established . . . to decide on human rights."[72]

Another potential problem with respect to U.S. assurance of the right to fair compensation involves access to and use of classified information during litigation. For example, Professor Jules Lobel has claimed that the Department of Justice continues "to assert the state

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67. *See* sources cited *supra* notes 41, 43. Prior to 1916, prosecution of violations of the laws of war and certain other international crimes had occurred without a federal implementing statute and this may still be possible today. *See, e.g.*, PAUST, VAN DYKE & MALONE, *supra* note 23, at 131-49; PAUST ET AL., *supra* note 24, at 301-04.

68. *Ex parte* Quirin, 317 U.S. 1, 27-28 (1942).

69. *See, e.g.*, Paust, *Judicial Power*, *supra* note 28, at 518-24, quoted in part in *Hamdi*, 542 U.S. 507, 520-21 (2004); discussion *infra* note 70; sources cited *supra* notes 34, 54, 63-64. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmts. c-e (1987).

70. *See, e.g.*, PAUST, *supra* note 23, at 7-12; Paust, *In Their Own Words*, *supra* note 34, at 231-39; Memorandum for the United States as Amicus Curiae at 21, Filartiga v. Pena-Irala, 630 F.2d 876 (2d. Cir. 1980) (No. 79-6090) ("[I]n . . . the United States where international law is part of the law of the land, an individual's fundamental human rights are in certain situations directly enforceable in domestic courts. As the Supreme Court said in *The Paquete Habana*, . . . 175 U.S. [677,] 700 [1900]: International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented."). In *Filartiga* in response to an argument that customary international law "forms a part of the laws of the United States only to the extent that Congress has acted to define it," the Second Circuit panel responded: "[t]his extravagant claim is amply refuted by the numerous decisions applying rules of international law uncodified in any act of Congress" and "[a] similar argument was offered to and rejected by the Supreme Court in *United States v. Smith*" in 1820 "and we reject it today. . . . Federal jurisdiction over cases involving international law is clear." *Filartiga*, 630 F.2d at 886-87. Interestingly, the Court in *Paquete Habana* ruled against Executive claims that the law of war had not been violated and found that Executive conduct violated the law of war in connection with the control of enemy aliens abroad in time of war. *See, e.g.*, Jordan J. Paust, Paquete *and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT'L L. 981 (1994).

71. *See, e.g.*, PAUST, *supra* note 23, at 208-24, 255-84 nn.187-467.

72. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810) (Marshall, C.J.).

secrets privilege to attempt to block lawsuits seeking accountability for extraordinary rendition and torture."[73] Although highly classified information should be protected when necessary, use of a state secrets doctrine merely to block lawsuits against former government officials would not be proper in our democracy or serve the rule of law. More generally, President Obama should attempt to control any Executive conduct designed to interfere with legal rights of access to courts and to fair compensation. Justice, accountability, and an end to impunity are also fundamental values at stake. Their enhancement can help to promote deterrence of criminal conduct, restore the rule of law, and allow our nation to move forward responsibly and with a demonstrated commitment to human dignity.

VI. CONCLUSION

President Obama, human rights are also our rights and human rights duties are also our responsibility. We need your leadership to achieve full recognition and implementation of treaty-based and customary international law that prohibits torture and cruel, inhumane, and degrading treatment of any human being and requires appropriate criminal and civil sanctions. Some of the measures needed can be done directly, such as withdrawal of void putative reservations to treaties; assurance of a meaningful recommitment within the Departments of Defense, Justice, and State to faithful execution of human rights law; and changes in U.S. policy and positions before international institutions such as the Human Rights Council and the committees that operate under the CAT and ICCPR.

Some measures will require new legislation to allow full execution of U.S. obligations under the Genocide Convention and the CAT. Amendments to the War Crimes Act to assure full adherence to the laws of war would also be useful but will require your leadership. Attorney General Holder can direct attorneys within the Department of Justice to assure that requirements for fair compensation under treaty-based and customary international law are observed and furthered instead of opposed by DOJ lawyers, and that Executive briefs and statements of interest before our courts inform judges of such requirements as well as

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73. Jules Lobel, *Preventive Detention and Preventive Warfare: U.S. National Security Policies Obama Should Abandon*, 3 J. NAT'L SECURITY L. & POL'Y 341, 341 (2009) (citing Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992 (9th Cir. 2009)); *see also* SCHARF & WILLIAMS, *supra* note 3, at 198 ("[I]nvocation of the 'state secrets' privilege [has been used] to terminate lawsuits.").

the existence of a number of venerable rules based in Supreme Court case law that are meant to assure their primacy.

It is time for a recommitment to human rights and human dignity. "[We] must always stand on the side of . . . human dignity."[74]

74. Barack Obama, President of the United States, Remarks by the President in a State of the Union Address (Jan. 27, 2010).