

PROSECUTING THE PRESIDENT AND HIS ENTOURAGE

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During his so-called “war on terror,” President Bush has authorized and ordered manifest violations of customary and treaty-based international law concerning the detention, transfer, and interrogation of numerous individuals. For example, in a February 7, 2002 memorandum, President Bush expressly authorized the denial of absolute rights and protections contained in the 1949 Geneva Conventions that apply in all circumstances to any person who is detained during an armed conflict. The President’s memo denied rights and protections under Geneva law

[B]y ordering that humane treatment be provided merely “in a manner consistent with the principles of Geneva” and then only “to the extent appropriate and consistent with military necessity,” despite the fact that (1) far more than the “principles” of Geneva law apply, (2) it is not “appropriate” to deny treatment required by Geneva law, and [it is well-understood that] (3) alleged military necessity does not justify the denial of treatment required by Geneva law.¹

Necessarily, the President’s 2002 memorandum authorized and ordered the denial of treatment required by the Geneva Conventions and, therefore, necessarily authorized and ordered violations of the Geneva Conventions—which are war crimes.²

My new book at Cambridge University Press, *BEYOND THE LAW*,³ identifies a reported presidential finding (signed in 2002) by President Bush, Condoleezza Rice, and then-Attorney General John Ashcroft approving unlawful interrogation techniques—including water boarding, and an authorization for the Central Intelligence Agency (CIA) to secretly detain and interrogate persons in a September 17, 2001 directive known as a memorandum of notification and that harsh interrogation tactics were devised in late 2001 and

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1. See JORDAN J. PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR* 7–8 (2007) [hereinafter PAUST, *BEYOND THE LAW*].

2. Every violation of the law of war is a war crime. See, e.g., *id.* at 13. A uniform and overwhelming number of federal cases demonstrates that the President and all persons within the executive branch are bound by the customary and treaty-based laws of war. See, e.g., *id.* at 21–22, 169–72.

3. PAUST, *BEYOND THE LAW*, *supra* note 1.

early 2002.⁴ Subsequently, the CIA disclosed the existence of a directive signed by President Bush granting the CIA power to set up secret detention facilities in foreign territory and outlining interrogation tactics that were authorized, as well as another document that contains a Department of Justice legal analysis specifying interrogation methods that the CIA was authorized to use against top al-Qaeda members.⁵ In fact, during a speech on September 6, 2006, President Bush publicly admitted that a CIA program has been implemented “to move . . . [high-value] individuals to . . . where they can be held in secret” and interrogated using “tough” forms of treatment, and stated that the CIA program will continue.⁶ In July 2006 and in furtherance of his program, President Bush had signed a new executive order authorizing “enhanced” interrogation tactics to be used against persons held in secret “black sites” overseas and elsewhere.⁷

As documented in *BEYOND THE LAW*, the unlawful “tough” interrogation tactics that are an admitted part of the Bush program are war crimes.⁸ They are also violations of nonderogable customary and treaty-based human rights law⁹ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁰ The transfer of non-prisoners of war out of war-related occupied territory in Afghanistan and Iraq during the Bush program was also a patent and per se violation of the laws of war. Such transfers are absolutely prohibited by express language in Article 49 of the Geneva Civilian Convention¹¹ and clearly and unavoidably constitute “grave breaches” of the Convention.¹² Moreover, the refusal to disclose the names or whereabouts of persons subjected to secret transfer and secret detention is a manifest and serious crime against humanity known as forced disappearance—a crime that also involves patent violations of related human rights law, the Convention Against Torture, and the laws of war.¹³

4. *Id.* at 28.

5. *Id.* at 28–29.

6. *Id.* at 29.

7. *See, e.g.*, Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1 (also disclosing the existence of memos penned by Seven G. Bradbury in OLC, DOJ). *See also* Randall Mikkelsen, *CIA Detention Program Remains Active: U.S. Official*, REUTERS NEWS, Oct. 4, 2007.

8. *See, e.g.*, PAUST, *BEYOND THE LAW*, *supra* note 1, at 1–4, 12–18, 27–31; Appendix, *infra*.

9. *Id.* at 4–5, 12–18, 27–31.

10. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. *See also* PAUST, *BEYOND THE LAW*, *supra* note 1, at 5.

11. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 49, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention].

12. Geneva Convention, *supra* note 11, art. 147; PAUST, *BEYOND THE LAW*, *supra* note 1, at 18.

13. *See* PAUST, *BEYOND THE LAW*, *supra* note 1, at 32.

John Yoo, a former Deputy Assistant Attorney General at the Office of Legal Counsel of the United States Department of Justice, has disclosed that detention, denial of Geneva protections, and coercive interrogation “policies were part of a common, unifying approach to the war on terrorism.”¹⁴ During meetings chaired by White House Counsel Gonzales, the inner circle decided that following Geneva law would interfere with their “ability to . . . interrogate,”¹⁵ since everyone understood that “Geneva bars ‘any form of coercion.’”¹⁶ “For the inner circle, ‘[t]his became a central issue,’¹⁷ and . . . they calculated that ‘treating the detainees as unlawful combatants would increase flexibility in detention and interrogation’;¹⁸ and the question became merely ‘what interrogation methods fell short of the torture ban and could be used’¹⁹ as ‘coercive interrogation,’²⁰ which includes outlawed cruel, inhuman, and degrading treatment.”²¹

In view of the fact that a “common, unifying approach” was devised to use “coercive interrogation” tactics and President Bush has admitted that such tactics and secret detention have been used as part of his approved program in other countries, it is obvious that use of coercive interrogation migrated to Afghanistan and Iraq as part of the common plan. It is also clear that presidential and other authorizations, directives, and findings (including two authorizations from Secretary of Defense Rumsfeld²² and one from Lt. Gen. Sanchez²³) and memos (such as the Yoo-Delahunty,²⁴ Gonzales,²⁵ Aschcroft,²⁶ Bybee,²⁷ Goldsmith,²⁸ and the newer Bradbury memos²⁹), and the 2003 Department of Defense Working Group Report³⁰ substantially facilitated the effectuation of the common, unifying plan to use coercive interrogation and that

14. JOHN YOO, WAR BY OTHER MEANS ix (2006).

15. PAUST, BEYOND THE LAW, *supra* note 1, at 30. (citing YOO, *supra* note 15, at 39).

16. *Id.* at 30. (citing YOO, *supra* note 15, at 39).

17. *Id.* at 30. (citing YOO, *supra* note 15, at 39).

18. *Id.* at 30. (citing YOO, *supra* note 15, at 43).

19. *Id.* at 30. (citing YOO, *supra* note 15, at 171).

20. PAUST, BEYOND THE LAW, *supra* note 1, at 30. (citing YOO, *supra* note 15, at 191).

21. *See, e.g.*, YOO *supra* note 14, at 200; PAUST, BEYOND THE LAW, *supra* note 1, at 30.

22. *See, e.g.*, PAUST, BEYOND THE LAW, *supra* note 1, at 26.

23. *Id.* at 16.

24. *Id.* at 9.

25. *Id.* at 5.

26. *Id.* at 7.

27. PAUST, BEYOND THE LAW, *supra* note 1, at 11.

28. *Id.* at 18.

29. *See* Shane, *supra* note 7, at A1.

30. *See* PAUST, BEYOND THE LAW, *supra* note 1, at 14.

use of unlawful coercive interrogation tactics was either known or a substantially foreseeable consequence of the common plan. Clearly, several memo writers and those who authorized coercive interrogation tactics were aware that their memos and authorizations would assist perpetrators of coercive interrogation.

What types of criminal responsibility can exist under international law with respect to such conduct? First, it is obvious that direct perpetrators of violations of the laws of war, the Convention Against Torture, and crimes against humanity (such as forced disappearance of persons as part of the President's "program" of secret detention) have direct liability. Leaders who issue orders or authorizations to commit international crimes can also be prosecuted as direct perpetrators.³¹

Second, any person who aids and abets an international crime has liability as a complicitor or aider and abettor before the fact, during the fact, or after the fact.³² Liability exists whether or not the person knows that his or her conduct is criminal.³³ Under customary international law, a complicitor or aider and abettor need only be aware that his or her conduct would or does assist a direct perpetrator.³⁴ In any case, ignorance of the law is no excuse. Especially relevant in this respect are the criminal memoranda and behavior of various German lawyers in the German Ministry of Justice, high level executive positions outside the Ministry, and the courts in the 1930s and 1940s that were addressed in informing detail in *United States v. Altstoetter* (The Justice Case).³⁵ Clearly, several memo writers in the Bush Administration abetted the "common, unifying" plan.

Third, individuals can also be prosecuted for participation in a "joint criminal enterprise,"³⁶ which the International Criminal Tribunal for the Former Yugoslavia has recognized can exist in at least two relevant forms: (1) where all the accused "voluntarily participated in one of the aspects of the common plan" and "intended the criminal result, [whether or not they knew it was a

31. See, e.g., JORDAN J. PAUST, M. CHERIF BASSIOUNI, *ET AL.*, INTERNATIONAL CRIMINAL LAW 32, 35, 51-73 (3rd ed. 2007) [hereinafter PAUST, ICL].

32. *Id.* at 47 (citing Prosecutor v. Akayesu, Case No. IT-95-14/1-T, Trial Chamber, ¶ 545 (Sept. 2, 1998); PAUST, BEYOND THE LAW, *supra* note 1, at 18, 24, 30.

33. See Rome Statute of the International Criminal Court arts. 25(3)(c)-(d), 30, 32(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

34. See Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber, ¶¶ 236-38, 245, 249 (Dec. 10, 1998); *But see* Rome Statute, *supra* note 33, art. 25(3)(c) (adding a new "purpose" to facilitate the test that will leave ICC jurisdiction incomplete).

35. See *United States v. Altstoetter*, 4 Law Reports of Trials of War Criminals Case No. 35, 1 (U.N. War Crimes Comm'n, 1948).

36. PAUST, ICL, *supra* note 31, at 32, 37-38.

crime] even if not physically perpetrating the crime”³⁷; and (2) where “(i) the crime charged was a natural and foreseeable consequence of the execution of that enterprise, and (ii) the accused was aware that such a crime was a possible consequence of the execution of that enterprise, and, with that awareness participated in that enterprise.”³⁸

Fourth, civilian and military leaders can also be liable for dereliction of duty with respect to acts of subordinates when the leader:

- 1) Knew or should have known that subordinates were about to commit, were committing, or had committed international crimes;
- 2) The leader had an opportunity to act; and
- 3) The leader failed to take reasonable corrective action, such as ordering a halt to criminal activity or initiating a process for prosecution of all subordinates reasonably accused of criminal conduct.³⁹

What legislation allows prosecution of some of these crimes? In the United States, there are several forms of legislation that can be used. However, there is presently no federal statute permitting prosecution of “crimes against humanity” as such, although one could be enacted and operate retroactively without violating any *ex post facto* prohibitions as long as what is being prosecuted under the new statute was a crime against humanity under international law at the time of the alleged commission.⁴⁰

Prosecution in the federal district courts would most likely occur under two forms of federal legislation that allow prosecution of relevant war crimes. The first is the War Crimes Act.⁴¹ This statute allows prosecution, for example, of those U.S. nationals who commit a relevant war crime outside the United States. Listed war crimes include some violations of the 1907 Hague Convention No. IV⁴² and all “grave breaches” of the Geneva Conventions⁴³ (which include certain forms of mistreatment of detainees and the unlawful transfer of persons).⁴⁴ Also clearly relevant is the statutory listing of violations

37. Prosecutor v. Brdanin, Case No. IT-99-36-T, Trial Chamber, ¶ 264 (Sept. 1, 2004).

38. *Id.* ¶ 265; Prosecutor v. Blaskic, Case No. IT-95-14-T-A, Appeals Chamber, ¶ 50 (July 29, 2004)

39. See, PAUST, ICL, *supra* note 31, at 51-73; PAUST, BEYOND THE LAW, *supra* note 1, at 52, 70.

40. See, e.g., PAUST, ICL, *supra* note 31, at 234, 236.

41. 18 U.S.C. § 2441 (2003).

42. 18 U.S.C. § 2441(c)(2) (2003).

43. 18 U.S.C. § 2441(c)(1) (2003).

44. See, Geneva Convention, *supra* note 11, art. 147.

of common Article 3 of the 1949 Geneva Conventions,⁴⁵ which expressly requires humane treatment of detained persons “in all circumstances” and also covers “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” as well as “outrages upon personal dignity, in particular humiliating and degrading treatment” of “persons taking no active part in the hostilities.”⁴⁶ Today, customary international law reflected in common Article 3 provides a set of minimum rights and duties in any armed conflict, although the article was originally designed to apply to cases of insurgency.⁴⁷ The Supreme Court’s opinion in *Hamdan*⁴⁸ and the concurring opinion of Justice Kennedy,⁴⁹ generally affirm this point about Geneva law—a point documented further in BEYOND THE LAW.⁵⁰

A second set of federal laws allows prosecution in federal district courts of any violation of the laws of war as offenses against the laws of the United States. As recognized by the Supreme Court in cases such as *Ex parte Quirin*⁵¹ and *In re Yamashita*,⁵² the precursor to 10 U.S.C. § 818 incorporated the laws of war by references as offenses against the laws of the United States. Under 18 U.S.C. § 3231, all offenses against the laws of the United States can be prosecuted in the federal district courts, whether or not there is concurrent jurisdiction in any military tribunal. These points have been well documented

45. See 18 U.S.C. § 2441(c)(3) (2003).

46. Geneva Convention, *supra* note 11, art. 3.

47. See, e.g., PAUST, BEYOND THE LAW, *supra* note 1, at 2–3.

48. See *Hamdan v. Rumsfeld*, 126 Sup.Ct. 2749, 2749 (2006) (the Court ruled that “there is at least one provision of the Geneva Conventions that applies here . . . Common Article 3”).

49. See *id.* at 2799–804 (Kennedy, J. concurring)

[T]he requirement of the Geneva Conventions . . . [is] a requirement that controls here . . . The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation’s armed conflict with al Qaeda in Afghanistan . . . That provision is Common Article 3 . . . The provision is part of a treaty the United States has ratified and thus accepted as binding law. . . . By Act of Congress, moreover, violations of Common Article 3 are considered ‘war crimes,’ punishable as federal offenses.

Id.

50. See, e.g., PAUST, BEYOND THE LAW, *supra* note 1, at 3.

51. 317 U.S. 1, 28, 30 (1942) (“Congress . . . exercised its authority to define and punish offenses against the law of nations . . . Congress has incorporated by reference . . . all offenses which are defined as such by the law of war”).

52. 327 U.S. 1, 7–8 (1946).

in another article.⁵³ Additionally, prosecution of some forms of torture could occur under the federal torture statute.⁵⁴

It would also be possible to prosecute civilians in a properly constituted military commission in a war related occupied territory using at least the minimum due process requirements under customary international law incorporated by reference in common Article 3 of the Geneva Conventions⁵⁵ and reflected in Article 14 of the International Covenant on Civil and Political Rights.⁵⁶ Prosecution of civilians might also be possible in a general court-martial in a theater of war in time of war if such a prosecution can survive a Fifth Amendment challenge such as that addressed in the Supreme Court's 1957 decision in *Reid v. Covert*⁵⁷ (which might be distinguished, since the case addressed the impropriety of military tribunal jurisdiction over U.S. civilians in time of peace). Prosecution of some persons is also possible under the Military Extraterritorial Jurisdiction Act,⁵⁸ which applies extraterritorially to "whoever engages in conduct outside the United States" that would be conduct criminally proscribed had the conduct been engaged "within the special maritime and territorial jurisdiction of the United States," but the conduct of a person who is not a member of the armed forces of the United States would have to have been engaged in while that person was (1) "employed by" US armed forces,⁵⁹ or (2) "accompanying" U.S. armed forces outside the United States.⁶⁰

A significant problem today, however, is the fact that the Bush Administration is unwilling to prosecute "their own" under any relevant statute and experts expect that the new Attorney General will not attempt to enforce relevant criminal law.⁶¹ As documented in BEYOND THE LAW, "for more than five years the Bush Administration has furthered a general policy of impunity

53. Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6, 10-23, 27 (1971), reprinted in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 447 (1976).

54. 18 U.S.C. § 2340-2340A (2000).

55. Geneva Convention, *supra* note 11, art. 3.

56. International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171; See also PAUST, BEYOND THE LAW, *supra* note 1, at 105.

57. 354 U.S. 1, 4-5 (1957).

58. 18 U.S.C. § 3261 (2000).

59. 18 U.S.C. § 3261(a)(1) (2000).

60. *Id.*

61. See, e.g. Anthony D'Amato, *Waterboarding: The Key Question for Mukasey*, THE JURIST, <http://jurist.law.pitt.edu/forumy/2007/10/waterboarding-key-question-for-mukasey.php> (last visited Feb. 15, 2008); Benjamin Davis, *Mukasey on Torture: Of Sins, Mistakes and Crimes*, THE JURIST, <http://jurist.law.pitt.edu/forumy/2007/10/mukasey-on-torture-of-sins-mistakes-and.php> (last visited Feb. 15, 2008).

by refusing to prosecute any person of any nationality under the War Crimes Act or alternative legislation, the torture statute, genocide legislation, and legislation permitting prosecution of certain civilians employed by or accompanying U.S. military forces abroad.”⁶² For example, the Administration refuses to prosecute memo-writers who have abetted what President Bush admitted in September 2006 is his “program” of (1) secret detention or forced disappearance and the per se war crime and “grave breach” of Geneva law involving the transfer of persons out of occupied territory, and (2) “tough” interrogation tactics (which are violative of several treaties of the United States and customary international laws, as documented most recently in *BEYOND THE LAW*),⁶³ and those who authorized such criminal activity during what has been described as a “common, unifying” plan devised by the “inner circle” to engage in what are patently unlawful forms of “coercive interrogation.” Only a few of the direct perpetrators of the common plan have been prosecuted in military fora and penalties have generally been surprisingly lenient.

Finally, in the long history of the United States, the Bush Administration is unique. President Bush and others have clearly authorized and abetted various types of serious and manifest international crime and the Administration refuses (1) to stop the violations, and (2) to initiate prosecution of all who are reasonably accused. We who are still free to speak out must continue our efforts to assure that no President, Vice President, or cabal of politically-appointed lawyers ever initiate, authorize, engage in, and abet such a common plan and program again. The very soul of America, the rule of law, and our common humanity are at stake.

62. PAUST, *BEYOND THE LAW*, *supra* note 1, at 31–32.

63. *See id.* at 2-5, 12-18, 24, 27-31.

APPENDIX

Sixteen “Tough,” “Coercive” Tactics Authorized for Interrogation
[and Categories of International Legal Proscription]⁶⁴

1. Water-boarding [terror, torture, cruel, inhuman, physical coercion];
2. Use of dogs to intimidate [terror, torture, cruel, inhuman, threats of violence, moral coercion];
3. Threatening to kill family members [terror, torture, cruel, inhuman, threats of violence moral coercion];
4. Cold cell [torture, cruel, inhuman, physical coercion, degrading, humiliating];
5. Stripping naked [inhuman, degrading, humiliating, moral coercion; (and in a given culture) cruel, physical coercion];
6. “Fear up harsh” [cruel, inhuman, physical coercion, moral coercion];
7. Striking to cause pain and fear [cruel, inhuman, physical coercion, moral coercion];
8. Severe stress matrix, including short shackling [cruel, inhuman, physical coercion];
9. Withholding of pain medication [cruel, inhuman, physical coercion];
10. Prolonged deprivation of sleep [cruel, inhuman, physical coercion];
11. Secret detention [forced disappearance, cruel, inhuman];
12. Threat of transfer to country for torture [cruel, inhuman, threats of violence, moral coercion; (and in a given case) terror, torture];
13. Transfer from occupied territory [unlawful transfer, grave breach];
14. Hooding to cause fear [inhuman, moral coercion -- exacerbated when used with stripping naked and/or hooding to include other categories of illegality];
15. Sexual humiliation [inhuman, degrading, humiliating, moral coercion], and;
16. Withholding of food [inhuman, physical coercion].

64. See generally PAUST, BEYOND THE LAW, *supra* note 1.