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CIVIL LIABILITY OF BUSH, CHENEY, ET AL. FOR TORTURE, CRUEL, INHUMAN, AND DEGRADING TREATMENT AND FORCED DISAPPEARANCE

Jordan J. Paust*

As documented in this article, treaty-based and customary international law regarding forced disappearance, human rights, and the laws of war provides rights to compensation and forms of reparation. In particular, the 1949 Geneva Conventions expressly recognize private rights and contemplate compensation in courts of law. Within the U.S., several statutes execute relevant international law for civil sanction purposes and several federal and state court cases have recognized personal liability. The article also demonstrates why there should be no immunity for conduct in violation of international law, why substitution of the U.S. for individual defendants should not occur, and why relevant international law has primacy over the Military Commissions Act.

I. INTRODUCTION

It is well beyond reasonable doubt that during an admitted “program” of serial criminality designed to use secret detention and coercive interrogation of human beings from the waning months of 2001 until 2009, former President Bush, former Vice President Cheney, Alberto Gonzales, and several other members of the Bush Administration authorized, ordered, and/or abetted the forced disappearance of persons (a crime against humanity and war crime), other war crimes (including torture, cruel, inhuman, and degrading treatment of human beings and the transfer of non-prisoners of war out of occupied territory), and other serious international crimes implicating universal jurisdiction and a universal responsibility aut dedere aut judicare (i.e., to hand over or to initiate prosecution of those reasonably accused).1

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Types of relevant criminal responsibility include: (1) direct perpetration of an international crime by authorizing or ordering its commission;
(2) complicity with respect to international crime where an individual was aware that his or her conduct can or will facilitate conduct of a direct perpetrator; and (3) dereliction of duty with respect to those who exercised de facto or de jure authority as a leader and refused or failed to take reasonable corrective action.²

Prosecution of several lawyers within the Bush Administration for complicity would be on firm ground, especially with respect to those who wrote memoranda that facilitated the common, unifying plan devised by an inner circle to use torture and other forms of coercive interrogation. As noted above, criminal complicity can occur when a person is aware that his or her conduct (e.g., writing a memo stating that waterboarding is not torture) can or will assist or facilitate conduct of a direct perpetrator. The person who aids and abets need not know that the conduct of the direct perpetrator is criminal or, for example, whether the conduct constitutes “torture” or cruel or inhuman treatment. It suffices that an accused was aware of the relevant factual circumstances, and even a direct perpetrator need not have known that his or her act amounted to an inhuman act either in the legal or moral sense. Furthermore, all acts of assistance, either by words or acts and omissions, that lend encouragement or support will suffice if the accused knows or is aware that such conduct can or will facilitate the use of an illegal tactic or form of treatment.

Are such former officials who are reasonably accused also subject to civil liability for violations of treaty-based and customary international law? The short answer is yes.

II. THE DUTY TO PROVIDE AND THE RIGHT TO FAIR COMPENSATION

A vast array of international laws assures the right to fair compensation for secret detention and coercive interrogation. For the victims of torture, a mandatory duty to provide fair compensation, including means for rehabilitation, is set forth in Article 14 of the Convention Against Torture:

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 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.\(^3\)

Other treaty-based and customary duties of states exist regarding rights of individuals to an effective remedy, access to courts, and nonimmunity with respect to torture, cruel, inhuman, and degrading treatment. Prominent among these are the right to a remedy, access to courts, and nonimmunity that are based in Articles 2(3)(a) and 14(1) of the International Covenant on Civil and Political Rights (ICCPR),\(^4\) as emphasized in the General Com-

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\(^3\) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14(1), opened for signature Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 [hereinafter CAT]. 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. See, e.g., JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 72, 90 n.98, 129–30 n.14 (2003) [hereinafter PAUST, INTERNATIONAL LAW]. If there is even a need for statutory incorporation in view of such clear, immediate, and mandatory language, federal statutes also execute the treaty-based right to a remedy. See infra notes 9, 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 Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture to the United States, ¶ 14, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006), available at http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc8ee00290ce0/$FILE/G0643225.pdf (stating that the U.S. “should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction . . . “). See also id. ¶ 15 (“provisions 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.”); id. ¶ 19 (there exists an “absolute prohibition of torture . . . without any possible derogation.”); id. ¶ 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.”); id. ¶ 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.”).

\(^4\) International Covenant on Civil and Political Rights art. 2(3)(a), Dec. 9, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR] (stating that each State Party has a duty to “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.”); id. art. 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. An attempted declaration of partial non-self-execution with respect to Articles 1–27 of the ICCPR is incompatible with the object and purpose of the treaty and void ab initio as a matter of law. See, e.g., PAUST, INTERNATIONAL LAW, supra note 3, at 362–66; infra note 5. 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 U.S. See, e.g., infra note 6. Moreover, federal statutes execute the Covenant for civil sanction
ments of the Human Rights Committee that operates under the auspices of the ICCPR.\(^5\) Article 50 of the ICCPR further mandates that all of "[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."\(^6\) This provision assures that rights and duties under the treaty apply with respect to decisions and conduct in Washington, D.C. as well as in judicial proceedings within the U.S. in which claims to fair compensation proceed.

The rights to an effective remedy and access to courts are also reflected in Article 8 of the Universal Declaration of Human Rights,\(^7\) which purposes. See infra notes 69–71. Article 2(3)(a) of the ICCPR expressly applies to acts of public officials and, therefore, necessarily recognizes nonimmunity of public officials. See infra note 48.

\(^5\) See, e.g., JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 83–84, 412–13 (2009); Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 82 (Tex. 2000) (citing U.N. Human Rights Comm., General Comment No. 13, U.N. GAOR, 39th Sess., Supp. No. 40, at 143, U.N. Doc. A/39/40 (1984) ("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."); U.N. Human Rights Comm., General Comment No. 7, ¶ 1, U.N. GAOR, 16th Sess., U.N. Doc. E/CN.4/Sub.2/Add.1/963 (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."); U.N. Human Rights Comm., General Comment No. 20, ¶ 15, U.N. Doc. HRI/GEN/1/Rev.1 (1994) ("States may not deprive individuals of the right to an effective remedy, including compensation . . . ."); U.N. Human Rights Comm., General Comment No. 24, ¶ 11, U.N. GAOR, U.N. Doc. CCPR/C/Rev.1/Add.6 (Nov. 2, 1994) ("[A] State could not make a reservation to Article 2, 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."); id at ¶ 12, 17 (stating that "when 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"] and that 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 Covenant.").

\(^6\) ICCPR, supra note 4, art. 50. Article 50 is set forth with mandatory "shall" language that provides an immediate duty and is typically self-executing. Moreover, it expressly requires that all provisions of the Covenant shall apply in all parts of a federated state without exception. The United States had no reservation with respect to Article 50 and it clearly operates directly within the United States. See PAUST, INTERNATIONAL LAW, supra note 3, at 362. Moreover, if there is even a need for statutory incorporation of such clear, immediate and mandatory language, federal statutes also execute treaty-based rights to a remedy. See infra notes 69–71.

\(^7\) Universal Declaration of Human Rights art.8, G.A. Res. 217A, at 73, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"). On the nature of the Universal Declaration (1) as customary international law, and (2) as an authoritative aid for interpretation of human rights protected by and through the U.N. Charter, see, e.g., MYRES S. MCDougAL, HAROLD D. LASSWELL, LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 272–74, 302, 325–
mirrors patterns of generally shared expectations concerning customary roots of the right to an effective remedy in domestic courts for violations of human rights and various other rights under international law. 8 As part of human rights law, rights to an effective remedy and access to courts are also necessarily part of U.N. Charter-based obligations of all members of the U.N. to assure “universal respect for, and observance of, human rights . . . .”9

Undoubtedly for this and related reasons, the U.N. General Assembly emphasized in 2007 and 2008 that “national legal systems must ensure that victims of torture and other cruel, inhuman or degrading treatment or punishment obtain redress, are awarded fair and adequate compensation and

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8 See, e.g., PAUST, INTERNATIONAL LAW, supra note 3, at 224–29.

The guarantees include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III) (A) (Dec. 10, 1948) which states in the plainest of terms, ‘no one shall be subjected to torture.’ The General Assembly has declared that the Charter precepts embodied in this Universal Declaration ‘constitute basic principles of international law.’ G.A. Res. 2625 (XXV) (Oct. 24, 1970) [the 1970 Declaration on Principles of International Law].

See also Torture Victim Protection Act, Pub. L. 102-256; 106 Stat. 73 (1992), at pmbl. (the express purpose of the statute is “[t]o carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights.”) [hereinafter TVPA]. See also Memorandum for the United States as Amicus Curiae, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), reprinted in 19 I.L.M. 585, 592 (1980) (“the Universal Declaration . . . goes beyond the UN Charter in specifying and defining fundamental rights to which all individuals are entitled.”); id. at 602 (“[I]t has long been established that in certain situations, individuals may sue to enforce their rights under international law . . . . [The] international law of human rights . . . endows individuals with the right to invoke international law . . . . As a result, in nations such as 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.”).
receive appropriate social and medical rehabilitation."[10] Earlier, in the Basic Principles and Guidelines on the Right to a Remedy and Reparation,[11] the General Assembly provided detailed information concerning the right to "equal and effective access to justice"[12] and to an effective judicial remedy for victims of violations of human rights law,[13] as well as the type of "[a]dequate, effective and prompt reparation" and "compensation, rehabilitation, [and] satisfaction" required by international law.[14]

With respect to the laws of war in particular, Article 3 of the 1907 Hague Convention (No. IV)[15] expressly recognizes that a belligerent that violates the Convention "shall . . . be liable to pay compensation."[16] The 1949 Geneva Conventions expressly require that no state "shall be allowed to absolve itself or any other . . . of any liability incurred by itself or by another . . . in respect of" grave breaches of the Convention.[17] The fact that no state can absolve itself or another of liability is consistent with patterns of expectation that liability for war crimes must continue despite an attempt by a state to deny civil sanctions. The obligation to pay compensation also serves to ensure that no state recognizes immunity with respect to such lia-

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[12] Basic Principles, supra note 11, at Annex, part II, ¶ 3(c); id. part VII, ¶ 11(c).

[13] Id. at pmbl., part VIII, ¶ 12.

[14] Id. part IX, ¶¶ 15–22.


[16] HC IV, supra note 15, art. 3. Regarding Supreme Court recognitions of nonimmunity for violations of the laws of war and neutrality in the years 1950, 1917, 1822, and 1808, see infra note 48.

bility. More generally, the Geneva Conventions expressly recognize and provide various private rights and contemplate compensation in courts of law. In fact, private judicial remedies predate the Conventions and have existed more generally with respect to violations of treaty-based and customary laws of war since the beginning of the U.S. Article 91 of Protocol I to the Geneva Conventions reaffirms widespread expectations with respect to state responsibility for war crimes and the propriety of compensation as a sanction response. Article 91 stresses that a party to an international armed conflict that “violates the provisions of the [Geneva] Conventions or of this Protocol shall . . . be liable to pay compensation.” In 1990, the U.N. Security Council reaffirmed such forms of responsibility with respect to Iraqi violations of the Geneva Conventions. Iraq, the Council declared, is “liable for any loss, damage or injury arising in regard to . . . [certain states] and

18 See, e.g., Jordan J. Paust, Judicial Power to Determine the Status and Rights of Persons Detained Without Trial, 44 HARV. INT’L L.J. 503, 516 nn.43–45 (2004), and cases cited [hereinafter Paust, Judicial Power]; 1 COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 83–84 (1952) (stating that rights exist and claims are “to be evoked before an appropriate national court by the protected person who has suffered the violation.” (emphasis added)); 3 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 630 (1960) (stating that a violator state is “liable to pay ... material compensation for breaches of the Convention . . . .”); 4 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 209–11 (1958) (providing the responsibilities of states and individuals); infra note 24. Certain rights in the Geneva Conventions are not only self-executing (see, e.g., PAUST, BEYOND THE LAW, supra note 1, at 71–72, 134–35 n.10, 219–20 n.43; Paust, Judicial Power, supra at 515–16), but they are also executed for civil sanction purposes by a number of federal statutes. See, e.g., infra notes 69–72. Concerning the fact that the U.S. military was involved in an international armed conflict in Afghanistan, see, e.g., PAUST, BEYOND THE LAW supra note 1, at 1–3, 7, 10, 47.

19 See, e.g., Ex Parte Quirin, 317 U.S. 1, 27–28 (1942) (quoted infra note 96); The Paquete Habana, 175 U.S. 677, 698 (1900); id. at 714; Freeland v. Williams, 131 U.S. 405, 416 (1889) (“no civil liability attached” when no war crime occurred); Ford v. Surget, 97 U.S. 594, 605–06 (1878) (stating that individuals are relieved from civil liability where no war crime occurred); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1851) (suit could be brought in “any district in which the defendant might be found”); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43–45 (1800) (Chase, J., concurring); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 279 (1796) (Iredell, J., concurring) (“rights . . . derived from the laws of war . . . and in that case the individual might have been entitled to compensation . . . .”); Royal Holland Lloyd v. United States, 73 Ct. Cl. 722, 748 (1931) (stating in dictum that prisoners of war have personal rights and can pursue “[c]laims for losses based on personal injuries, death, [or] maltreatment to prisoners of war . . . .”); PAUST, INTERNATIONAL LAW, supra note 3, at 63–64 n.130, 226–27, 291–92 nn.488–95 (addressing several other state court cases). Concerning Supreme Court recognition of nonimmunity in 1822 and 1917, see generally infra note 48.


21 Id. art. 91.
their nationals" and is "liable under the Convention . . . [for] grave breaches committed by it, as are individuals . . . ." More recently, the practice of providing private judicial remedies for violations of the laws of war has been further effectuated in a growing number of modern cases that have recognized personal liability as well as the liability of private juridical persons. It is important in this regard that there has been unswerving recognition in every relevant judicial opinion since the beginning of the U.S. that the President and all persons within the Executive branch are bound by the laws of war. Since the President has no authority to violate international law, authorizations to do so are ultra vires and the conduct of compliant subordinates remains unlawful.

25 See, e.g., PAUST, BEYOND THE LAW, supra note 1, at 20–23, 72–75, 86, 88–89, 92, 169–72. See also Paust, Judicial Power, supra note 18, at 519–24 (demonstrating the President's duty is constitutionally-based, since under Article II, § 3 of the Constitution the President has an unavoidable duty to faithfully execute the laws, including international law). See also PAUST, INTERNATIONAL LAW, supra note 3, at 169–73 (asserting that the President of the U.S. is bound to obey customary international law).
26 See, e.g., Little v. Barreme, 6 U.S. (2 Cranch) 170, 178–79 (1804) (stating that "orders given by the executive" or executive "instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass" and "[i]f his instructions afford him no protection, the law must take its course . . . ."); Ex parte Orozco, 201 F. 106, 111–12, 118 (W.D. Tex. 1912) (stating that conduct resting "merely upon an order directed by the President" was illegal and cannot "be sustained in a court of justice."); United States v. Smith, 27 F. Cas. 1192, 1220–21, 1228–31 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J., on circuit) (stating that the President is bound by the law and cannot "dispense with its execution, and still less can he authorize a person to do what the law forbids" and if the President approved a violation, "it would not justify the defendant in a court of law, nor discharge him from the binding force" of the law); 11 Op. Att'y Gen. 297,
With respect to the customary and *jus cogens* crime against humanity and violation of the laws of war known as forced disappearance or secret detention, which was also engaged in as part of an admitted Bush program, it is significant that the International Convention for the Protection of All Persons From Enforced Disappearance affirms expectations of the international community that each state party “shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation” and that reparation “covers material and moral damages and, where appropriate, other forms of reparation such as: (a) [r]estitution; (b) [r]ehabilitation; (c) [s]atisfaction, including restoration of dignity and reputation; [and] (d) [g]uarantees of non-repetition."

Within the Americas, the Inter-American Court of Human Rights awarded compensation to the family of a victim of forced disappearance in the now famous *Velasquez Rodriguez* case. Article 63(1) of the American Convention on Human Rights allows the Inter-American Court to decide “that fair compensation be paid to the injured party.” As recognized by the Inter-American Court in a later case, Article 63(1) “codifies a rule of customary international law which is one of the fundamental principles of

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27 See *Paust, Beyond the Law*, supra note 1, at 34–41 (describing why secret detentions, renditions and forced disappearances violate customary international law); *Restatement (Third) of the Foreign Relations Law of The United States § 702(c) cmt. a, c, n, RNs 1, 11 (1987) (discussing the scope of *jus cogens*).

28 See *Paust, Beyond the Law*, supra note 1, at 12, 28, 30, 32.


30 *Id.* art. 24 (4)–(5); *see also id.* pmbl. (“[T]he right of victims to justice and to reparation.”). The right to “an effective remedy” and “adequate compensation” for victims of enforced disappearance was recognized earlier by the General Assembly in its 1992 Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, arts. 9, 19, U.N. Doc. A/RES/47/133 (Feb. 12, 1993). *See also id.* art. 5 (stating such conduct renders “perpetrators and the State or State authorities which organize, acquiesce in or tolerate such disappearances liable under civil law . . . .”).


33 *Id.* art. 63(1).
modern international law, that being the responsibility of States . . . to make reparation." More recently, the Court declared:

It is a principle of International Law that any breach of an international obligation resulting in harm gives rise to the duty to adequately redress such harm . . . . The obligation to compensate is governed by International Law and it may be neither modified nor disregarded by the State in reliance upon its domestic law.

The reparation of the damage flowing from a breach of an international obligation calls for, if practicable, full restitution (restitutio in integrum), which consists in restoring a previously-existing situation. If not feasible, the international court will then be required to define a set of measures such that, in addition to ensuring the enjoyment of the rights that were violated, the consequences of those breaches may be remedied and compensation provided for the damage thereby caused. In addition, there is also the State's obligation to adopt affirmative measures to guarantee that no injurious occurrences such as those analyzed in the case at hand will take place in the future.

Although the U.S. has not yet ratified the American Convention, within the U.S., at Guantánamo, and elsewhere in the Americas, the U.S. is bound to take no action inconsistent with the object and purpose of the Convention. Such actions would necessarily include orders, authorizations, complicity, and other acts in violation of the human rights to freedom from torture and cruel, inhuman, and degrading treatment and the right to "fair compensation" that are protected in the Convention. This obligation arises because the U.S. signed the treaty in 1977 while awaiting ratification. Additionally, the U.S. is bound by the American Declaration of the Rights and

34 Garrido and Baigorria Case (Reparations), Inter-Am. C.H.R., OEA/ser. C./No. 39, ¶ 40 (Aug. 27, 1998); see also id. ¶¶ 41, 47–65, 73 ("The case law of this Court has consistently been that the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment, and to ensure the victim adequate compensation."); id. ¶ 74 (there is a "legal obligation to investigate . . . and to bring to trial and punish the authors, accomplices, accessories after the fact, and all those who may have played some role in the events that transpired.").

35 Case of La Cantuta v. Peru, Inter-Am. C.H.R., OEA/ser. C./No.162, ¶¶ 199–201 (Nov. 29, 2006). The Court added: "Reparations are measures aimed at removing the effects of the violations. Their nature and amount are dependent upon the specifics of the violation and the damage inflicted at both the pecuniary and non pecuniary levels. These measures may neither enrich nor impoverish the victim or the victim's beneficiaries, and they must bear proportion to the breaches declared as such in the Judgment." Id. ¶ 202 (footnote omitted).

36 See Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 ("A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty . . . subject to ratification").
Duties of Man. The American Declaration affirms that “[e]very human being has the right to life, liberty and the security of his person”, “[e]very individual who has been deprived of his liberty... has the right to humane treatment”; and “[e]very person may resort to the courts to ensure respect for his legal rights.”

Reparations—including restitution, compensation and rehabilitation for victims of enforced disappearance, other crimes against humanity, genocide, and war crimes—can also be ordered “directly against a convicted person” by the International Criminal Court (ICC). Although the U.S. has yet to ratify the Rome Statute of the ICC, it is possible that a U.S. national will be prosecuted before the ICC under certain circumstances. For example, when a crime is authorized, ordered, or abetted and is perpetrated in territory of a party to the treaty (e.g., in Afghanistan), then the ICC could provide civil sanctions against a convicted U.S. national.

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38 American Declaration of the Rights and Duties of Man, supra note 37, art. I.

39 Id. art. XXV.

40 Id. art. XVIII.


42 See id. art. 75(1)–(2). It is also declared within Article 75 that “[n]othing in this article shall be interpreted as prejudicing the rights of victims under national or international law.” Id. art. 75(6).

43 See, e.g., id. arts. 12(2)(a), 13, 14(1), 15(1); Paust, Torture, supra note 1, at 1571–72, 1571 n.111.
With respect to civil sanctions, Justice Breyer recognized more generally in 2004 that universal jurisdiction that pertains with respect to "torture, genocide, crimes against humanity, and war crimes . . . necessarily contemplates a significant degree of civil tort recovery." In fact, over the last thirty years, a remarkable number of U.S. cases have recognized the right to civil remedies against individuals, juridic persons, and states—not merely for violations of the laws of war, but also for torture, cruel, inhuman, and degrading treatment in violation of other treaty-based and other customary international law, and forced disappearance of persons. Several cases have also recognized the unavoidable fact that violations of international criminal law and human rights law cannot be lawful "official" or "public" acts of state and are not entitled to any form of immunity. In fact,  


45 See supra note 24.


48 See, e.g., Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1210 (9th Cir. 2007) (stating that "acts of racial discrimination cannot constitute official sovereign acts") (quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718 (9th Cir. 1992) ("International law does not recognize an act that violates jus cogens as a sovereign act.").) Enahoro v. Abubakar, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting in part) ("[O]fficials receive no immunity for acts that violate international jus cogens human rights norms (which by definition are not legally authorized acts.").) Doe I v. Unocal Corp., 395 F.3d 932, 958–59 (9th Cir. 2002); Altmann v. Republic of Austria, 317 F.3d 954, 967 (9th Cir. 2002) (quoting West v. Multi-
banka Comermex, S.A., 807 F.2d 820, 826 (9th Cir. 1987) ("[V]iolations of international law are not 'sovereign' acts."); In re Estate of Ferdinand Marcos, 25 F.3d 1467, 1471–72 (9th Cir. 1994) (human rights violations, including torture, are not lawful public acts of state); Liu v. Republic of China, 892 F.2d 1419, 1432–34 (9th Cir. 1989) (act of state doctrine not applied to assassination, which is not in the "public interest" and a strong international consensus exists that it is illegal); Bowoto v. Chevron Corp., No. C 99-02506 SI, 2007 WL 2349345, at *9–10 (N.D. Cal. Aug. 14, 2007) (quoting Siderman, 965 F.2d at 718); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F.Supp.2d 289, 344–45 (S.D.N.Y. 2003) (stating that adjudication of genocide, war crimes, enslavement, and torture is not barred by the act of state doctrine); Cabiri v. Assasie-Gyimah, 921 F.Supp. 1189, 1198 (S.D.N.Y. 1996) (defendant could not argue that torture fell within the scope of his authority); Xuncax v. Gramajo, 886 F. Supp 162, 176 ((D. Mass. 1995) ("these actions exceed anything that might be considered to have been lawfully within the scope of Gramajo's official authority.") (quoting DeLetelier v. Republic of Chile, 488 F.Supp. 665, 673 (D.D.C. 1980) (assassination is "clearly contrary to precepts of humanity as recognized in both national and international law" and "there is no discretion to commit, or to have one's officers or agents commit, an illegal act;" therefore, assassination cannot be part of official's "discretionary" authority)); Paul v. Avril, 812 F.Supp. 207, 212 (S.D. Fla. 1993) (rejecting defendant's argument regarding the act of state and political question doctrines as "completely devoid of merit" because the acts of torture, cruel, inhuman and degrading treatment, and arbitrary detention in violation of customary international law "hardly qualify as official public acts" and holding that the claims present "clearly justiciable legal issues"); Forti v. Suarez-Mason, 672 F Supp. 1531, 1546 (N.D. Cal. 1987) (torture, arbitrary detention, and summary execution "are not public official acts"); Johnson v. Eisentrager, 339 U.S. 763, 765, 789 (1950) (no form of immunity exists for war crimes in violation of Geneva law); Berg v. British & African Steam Nav. Co., 243 U.S. 124, 147, 152–56 (1917) (jurisdiction recognized regarding German government's violation of the law of nations and relevant treaties and nonimmunity existed because "an illegal capture would be invested with the character of a tort" and jurisdiction is not obviated despite the intervention of the German ambassador and a claim that since proceedings had been instituted in Germany that the U.S. court should decline); The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 350–55 (1822) (property taken by a foreign ship of war in violation of the law of nations is not immune and "is liable to the jurisdiction of our Courts" and if "a foreign sovereign . . . comes personally within our limits . . . he may become liable to judicial process in the same way"); Hudson v. Guestier, 8 U.S. (4 Cranch.) 293, 294 (1808) (acts violative of the law of nations are not entitled to recognition); Rose v. Himely, 8 U.S. (4 Cranch.) 241, 276–77 (1808); Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) ("In Linder v. Portocarrero, 963 F.2d 332, 337 (11th Cir. 1992), we held that the political question doctrine did not bar a tort action instituted against Nicaraguan Contra leaders [for war crimes in violation of common Article 3 of the Geneva Conventions]. Consequently, we reject Negewo's contention in light of Linder."); Daventree, Ltd. v. Republic of Azerbaijan, 349 F. Supp.2d 736, 755 n.4 (S.S.D.C. 2004) ("the Act of State doctrine only applies to valid acts of state."); Daliberti v. Republic of Iraq, 97 F. Supp.2d 38, 52–54 (D.D.C. 2000) ("nations that operate in a manner inconsistent with international norms should not expect to be granted the privilege of immunity from suit"); quoted in Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97, 106 (D.D.C. 2000); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 24 (D.D.C. 1998) ("bus bombings and other acts of international terrorism are not valid acts of state . . . ."); Doe I v. Unocal Corp., 963 F. Supp. 880, 892–95 (C.D. Cal. 1997) ("Because nations do not, and cannot under international law, claim a right to torture . . . . a finding that a nation committed such acts . . . should have no detrimental effect on the policies underlying the act of state doctrine. Accordingly, the Court need not apply the act of state doctrine in this case."); United States v. La Jeune Eugenie, 26 F.Cas.
state authority or sovereignty is conditioned on obedience to international law. It is the law upon which sovereignty rests. As the International Military Tribunal at Nuremberg recognized, acts in violation of international criminal law—including violations of the laws of war—are *ultra vires* or beyond the lawful authority of any state:

The doctrine of sovereignty of the State . . . cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position . . . . He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.49

832, 846–51 (C.C.D. Mass. 1821) (No. 15,551) (the law of nations “may be enforced by a court of justice, whenever it arises in judgment” and, with respect to “an offence against the universal law of society,” “no nation can rightfully permit its subjects to carry in on, or exempt them . . . [and] no nation can privilege itself to commit a crime against the law of nations . . . .”); S. REP. NO. 102-249, at 3-8 (1991) (Since the act of state doctrine “applies only to ‘public’ acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability,” adding: “[a] state that practices torture and summary execution is not one that adheres to the rule of law. Consequently, the [TVPA] is designed to respond to this situation by providing a civil cause of action in US courts” and the Senate Judiciary “Committee does not intend the ‘act of state’ doctrine to provide a shield from lawsuit . . . .”); 9 Op. Att’y Gen. 356, 357 (1859) (“A sovereign State who tramples upon the public law of the world cannot excuse himself by pointing to a provision of his own municipal code.”); General Comment No. 20, supra note 5, ¶ 2, 13, 15 (victims have a “right to an effective remedy, including compensation” whether violators of Article 7 were “public officials or other persons acting on behalf of the State, or by private persons” “acting in their official capacity, outside their official capacity or in a private capacity”); supra note 26.  

49 Opinion and Judgment of the International Military Tribunal, supra note 15. Importantly, since no state has authority to participate in international crimes and state sovereignty is not relevant when international crimes have been committed, “foreign policy” should also be irrelevant, states are on notice that international criminal conduct is without authority, and no state can rightly be embarrassed by inquiry into its international criminal activity or *acta contra omnes*. See Prosecutor v. Milosevic, Case No. IT-99-37-PT, Decision on Preliminary Motions, ¶¶ 26–34 (Nov. 8, 2001) (lack of head of state immunity for alleged international crimes is “a rule of customary international law”); Prosecutor v. Furundžija, IT-95-17/1-T, Trial Chamber Judgment, ¶¶ 153–55 (Dec. 10, 1998) (the prohibition of torture is “a peremptory norm of *jus cogens*” and as such “it serves to internationally de-legitimise any legislative, administrative or judicial act authorizing torture” and “would not be accorded international legal recognition”); Barrios Altos v. Peru, Inter-Am. C.H.R., OEA/ser. C./No. 75, Merits Judgment, ¶ 41 (Mar. 14, 2001) (amnesty laws “and establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance . . . .”). See also Prefecture of Voïotia v. Federal Republic of Germany, Case No. 137/1997, Judgment (Ct. of First Instance of Leivadia 1997), *extract addressed in Peter Bekker, International Decisions, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, 92 AM. J. INT’L L. 751, 766 (1999)* (“The acts of a state that violate *jus cogens* norms do not have the character of
During the subsequent Nuremberg proceedings, the tribunal in *United States v. Von Leeb* noted that “[i]nternational law operates as a restriction and limitation on the sovereignty of nations”; that Hitlerian directives might have had the force of domestic law; to recognize such directives as a defense to international crime “would be to recognize an absurdity” that international law “must be superior to and, where it conflicts with, takes precedence over national law or directives issued by any governmental authority” and that a “directive to violate international criminal common law is therefore void and can afford no protection . . . .”

The Second Circuit expanded upon these recognitions in *Filartiga v. Pena-Irala* with respect to torture when recognizing that “the torturer has become—like the pirate and slave trader before him—hostis humani generis, an enemy of all mankind.”

sovereign acts. In such cases it is considered that the accused state did not act within the ambit of its capacity as a sovereign. Acts contrary to *jus cogens* norms are null and void, and cannot constitute a source of legal rights or privileges, such as the claim to immunity . . . .”, aff’d Case No. 11/2000 (May 4, 2000); see also Maria Gavouneli, *International Decision: Prefecture of Voioitia v. Federal Republic of Germany. Case No. 11/2000. Areios Pagos (Hellenic Supreme Court), May 4, 2000, 95 AM. J. INT’L L. 198 (2001)). See Regina v. Bartle (the Pinochet case), 381 I.L.M. 581 (House of Lords, Mar. 24, 1999), (Browne-Wilkinson, L.J., sep. op.); Prinz v. Federal Republic of Germany, 26 F.3d 1166, 1182, 1184 (D.C. Cir. 1994) (Wald, J., dissenting) (“a state is never entitled to immunity for any act that contravenes a *jus cogens* norm, regardless of where or against whom that act was perpetrated . . . the state cannot be performing a sovereign act entitled to immunity” and “Germany could not have helped but realize that it might one day be held accountable for its heinous actions by any other state, including the United States”); Filartiga v. Pena-Irala, 577 F.Supp. 860, 862–63 (E.D.N.Y. 1984) (“there is no . . . justifiable offense to” a foreign state when jurisdiction is exercised over torture and domestic “immunities for government personnel or other such exemptions or limitations” cannot be used to obviate suits for violations of international law under the Alien Tort Claims Act). See Inter-American Convention on the Forced Disappearance of Persons art. IX, June 9, 1994, 33 I.L.M. 1529, 1531 (1994) (“The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties [and p]rivileges, immunities, or special dispensations shall not be admitted”), EMERICH DE VATTEL, THE LAW OF NATIONS bk. I, ch. IV, § 54 (1797) (“The Prince . . . who would in his transports of fury take away the life of an innocent person, divests himself of his character, and is not longer to be considered in any other light than that of an unjust and outrageous enemy”). See also supra note 48.

50 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 462, 489, 508 (1950). See also French case of Abetz, in William W. Bishop, Jr., *Judicial Decisions, 46 AM. J. INT’L L. 161, 162 (1952) (recognizing the nonimmunity of a diplomat and stating that the court cannot “subordinate the prosecution [of war crimes] to the authorization of the country where the guilty person belongs.”); Henfield’s Case, 11 F.Cas. 1099, 1104 (C.C.D. Pa. 1793) (No. 6360) (Jay, C.J., on circuit) (one should not obey an order of a “sovereign having no right to command what is contrary to the law of nature.”).

III. THE U.S. SHOULD NOT BE SUBSTITUTED IN U.S. CIVIL SUITS

The fact that international crimes are beyond the lawful authority of any state, are *ultra vires* and, therefore, cannot be lawful “official” acts is critically important with respect to proper interpretation of federal statutes, since under the venerable Supreme Court doctrine known as *The Charming Betsy* rule a court must interpret relevant federal legislation consistently with international law. More particularly, federal statutes that might otherwise allow substitution of the U.S. as a defendant in lawsuits brought in U.S. federal courts against former Bush Administration officials for ordinary violations of domestic law should be interpreted consistently with international law to avoid substitution of the U.S. with respect to acts that are criminal under international law and beyond the lawful authority of any government. Under *The Charming Betsy* rule, the 1988 Federal Employees Liability Reform and Tort Compensation Act (1988 Act), which in subsection (b)(1) generally provides that the U.S. be substituted as a defendant and that claims are to proceed under the Federal Tort Claims Act [FTCA] if claims arise out of the wrongful act of a federal employee “acting within the scope of his official duties” must be interpreted consistently with rele-

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52 See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804) (“[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. There were other early recognitions of this fundamental rule of construction. See, e.g., Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801); 1 Op. Att’y Gen. 26, 27 (1792) (stating that the municipal law is strengthened by the law of nations). See also id. at 53; Ross v. Rittenhouse, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792) (stating that the municipal laws of the U.S. enforce the law of nations); Miller v. The Ship Resolution, 2 U.S. (2 Dall.) 1, 4 (1781); 1 Op. Att’y Gen. 297, 299–300 (1865) (discussing how the laws of nations “constitute a part of the laws of the land”) 9 Op. Att’y Gen. 356, 362–63 (1859) (stating that laws operating on the interests and rights of other States must be executed according to the law of nations); The Ship Rose, 36 Ct. Cl. 290, 301 (1901) (declaring that international law prevails over any conflict between the municipal law of the United States and international law); The Schooner Nancy, 27 Ct. Cl. 99, 109 (1892); Rutgers v. Waddington, Mayor’s Court of the City of New York (1784), *in Select Cases of the Mayor’s Court of New York City* 1674–1784, 302 (1935) (constructing 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 ed., 1964); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 457–58 (1969); PAUST ET AL., supra note 5, at 153–54. The rule has modern recognition. See, e.g., id. at 154; infra note 84.


54 Id. § 1346.

55 Id. § 2679(b)(1). In addition to an outside the “scope of official duties” exception regarding substitution, there is a “violation of a federal statute” exception. See id. § 2679(b)(2). Since war crimes violate two sets of federal legislation (see, e.g., PAUST, BEYOND THE LAW,
vant international law. Since violations of international criminal law are *ultra vires* and beyond the lawful authority of any government, and no government can lawfully delegate authority to commit international crimes, the 1988 Act should be interpreted to recognize that a federal employee who commits an international crime is not “acting within the scope of his official duties.”

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supra note 1, at 5, 32, 145 n.47, 189 n.51), it would seem that a war crime is a “violation of a federal statute” within the meaning of § 2679(b)(2). The same point would pertain with respect to torture in violation of 18 U.S.C. §§ 2340–2340A.

Supra notes 49–50 and accompanying text. See also supra note 48.


Some cases have also recognized an exception more generally with respect to egregious misconduct. See, e.g., Monfore v. United States, 47 F.3d 1175, 1995 WL 66786, 1995 U.S. App. LEXIS 3365 (9th Cir. 1995) (unpublished table decision) (affirming denial of substitution because defendant’s defamatory statements were a substantial deviation from his professional duties and, therefore, not within the scope of his employment). See Wood v. United
An additional reason why treaty law must be used has been noted in another writing:

[Since] the 1988 Act and the FTCA are prior in time to ratification of the two treaties mentioned above [i.e., the ICCPR and the CAT] that [require personal liability and] deny any form of immunity [under the last in time rule the treaties must prevail; and they would prevail even if the legislation was enacted subsequent to ratification of the treaties under the "rights under a treaty" exception to the last in time rule.]

Therefore, even if substitution might be possible under an improper interpretation of the 1988 Act (i.e., one that did not follow the Supreme Court's mandate in The Charming Betsy and that did not use relevant international law for proper interpretation of the phrase "acting within the scope of . . . official duties"), under the last in time rule, treaty law of the U.S. affirming the need for personal liability must necessarily trump the inconsistent prior legislation, and substitution of the U.S. for individual defendants under the prior legislation should not occur.

An added concern can arise if government lawyers are used to defend those reasonably accused of international crime since "it would be professionally unethical for lawyers who are responsible for prosecution of war crimes on behalf of the United States . . . to defend former members of the government who are so reasonably accused . . . The clash of interests at stake could not be more sharply delineated."
The same concern can arise when a U.S. attorney must represent a foreign state requesting extradition during an extradition hearing in a federal court.

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58 Paust, Executive Plans and Authorizations, supra note 57, at 852–53 (citing PAUST, INTERNATIONAL LAW, supra note 3, at 101–02, 104–05, 120 (with respect to the last in time rule and its exceptions)).

With respect to sanction policies for crimes under international law, substitution of the U.S. for the criminally accused would not promote deterrence of criminal conduct, ensure the need for personal accountability and

Concerning judicial attention to the need to deter others from similar conduct in the future, see, e.g., Exxon Shipping Co. v. Baker, 128 S.Ct. 2605, 2620–21, n.9 (2008) (punitive damages are “aimed . . . principally at retribution and deterring harmful conduct.”); Gates v. Syrian Arab Republic, 580 F. Supp. 2d 53, 74 (D.D.C. 2008) (addressing the “two-fold” purpose of punitive damages: “to punish those who engage in outrageous conduct and to deter others from similar conduct in the future.”); Campuzano et al. v. Islamic Republic of Iran, 281 F. Supp. 2d 258, 279 (D.D.C. 2003) (“only a large amount of punitive damages can serve as an effective deterrent against future terrorist acts”); Acree v. Republic of Iraq, 271 F. Supp. 2d 179, 223–24 (D.D.C. 2003) (Iraqi subjection of U.S. POWs “to intense interrogation and torture” “repugnant to civilized society . . . [and] carried out by defendants as part of a systematic effort to obtain information” justified punitive damages, “deterring torture of POWs should be of the highest priority,” “[p]unitive damages are particularly appropriate in seeking to deter terrorist states from engaging in heinous acts . . ., including torture,” and “[o]nly a very sizable award would be likely to deter the torture of American POWs . . . in the future”); Cronin v. The Islamic Republic of Iran, 238 F. Supp. 2d 222, 235 (D.D.C. 2002) (“Punitive damages are awarded to punish a defendant for particularly egregious conduct, and to serve as a deterrent to future conduct of the same type.”); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1360 (“[p]unitive damages are designed both to punish and to teach a defendant, and to deter others from committing the same abuses”); Eisenfeld v. Islamic Republic of Iran, 172 F. Supp. 2d 1, 9 (D.D.C. 2000); Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1250–51 (S.D. Fla. 1997) (dual purpose of punitive damages is “to punish truly reprehensible conduct” and to “deter others from committing similar conduct”).

The Inter-American Court of Human Rights has declared: “The State is under a duty to use all means available to fight the situation of impunity surrounding the instant case, as impunity fosters the chronic repetition of human rights violations and the total defenselessness of the victims and their next of kin . . . .” Case of La Cantuta v. Peru, Inter-Am. C.H.R., OEA/ser. C./No.162 (Nov. 29, 2006), ¶ 222. The court also clarified what sort of measures are required in this regard:

Therefore, further to its duty to investigate and, if appropriate, punish the guilty parties, the State is required to remove all obstacles—both factual and legal—contributing to impunity, and use all available means to expedite the investigation and the relevant proceedings, thus preventing the recurrence of acts as serious as those under analysis in the case at hand. The State may not rely upon any domestic law or regulation to justify its failure to comply with the Court’s order to investigate and, if appropriate, criminally punish the parties responsible for the La Cantuta events. Particularly, as has been the case ever since the Court’s judgment in the case of Barrios Altos v. Peru, the State may never apply amnesty laws—which will produce no effects in the future . . ., raise the statute of limitations, non-ex post facto nature of criminal laws or res judicata defenses, or rely upon the principle of double jeopardy . . . or resort to any other similar measure designed to eliminate responsibility in order to escape its duty to investigate and punish those responsible. Accordingly, as the case may be, the relevant investigations need to be opened against all parties investigated, convicted, or acquitted or whose cases were dismissed, in a military criminal proceeding.

Id. ¶ 226.
atone,\textsuperscript{61} sensitize elites to more adequately condition their future behavior, or best serve the rule of law.\textsuperscript{62} Substitution usually results in dismissal because immunity of the U.S. pertains.\textsuperscript{63} Substitution is, therefore, a mendacious form of judicial process that can ultimately deny justice.\textsuperscript{64} Given this common result, when substitution and dismissal occur, the U.S. is not in compliance with treaty-based and customary international law that requires equal access to courts and the availability of judicial remedies for violations of international law. Substitution and dismissal would especially violate Article 2(3)(a) of the ICCPR, which expressly mandates that victims "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."\textsuperscript{65}

\begin{footnotesize}
\begin{enumerate}
\item See Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1359 (punitive damages are "an appropriate, if not essential, mechanism for upholding prohibitions of human rights abuses reviled by the international community."); \textit{id.} at 1360 (quoted \textit{supra} note 60); Paul v. Avril, 901 F. Supp. 330, 336 (S.D. Fla. 1994) ("punitive damages must reflect the egregiousness of the defendant's conduct, the central role he played in the abuses, and the international condemnation with which these abuses are viewed."), \textit{quoted in} Licea v. Curacao Drydock Co., Inc., 584 F. Supp. 2d 1355, 1365 (S.D. Fla. 2008); Filartiga v. Pena-Irala, 577 F. Supp. at 864 ("the objective of the international law making torture punishable as a crime can only be vindicated by imposing punitive damages"), \textit{id.} at 865 (remedy of punitive damages should pertain "in order to give effect to the manifest objectives of the international prohibition against torture"); \textit{supra} note 60.

\item See Elaine Scarry, \textit{Presidential Crimes: Moving on is Not an Option}, BOSTON REV. (Sept.–Oct. 2008), available at http://bostonreview.net/BR33.5/scarry.php ("The incalculable damage left by Bush and Cheney's day-in-and-day-out contempt for national and international law includes the power to . . . trivialize into a matter of personal preference any future president's adherence to the law. Will we become a country in which the rule of law is just another policy preference?").

\item See, e.g., Elizabeth A. Wilson, \textit{Is Torture all in a Day's Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation against U.S. Federal Officials}, 6 RUTGERS J.L. & PUB. POL'Y 175 (2008); \textit{supra} note 57.

\item Denial of justice is a violation of customary international law. See, e.g., \textit{Restatement (Third) of the Foreign Relations Law of the United States} § 711 & cmts. a, c, RN 2 (1987); PAUST, INTERNATIONAL LAW, \textit{supra} note 3, at 225, 287–88 n.481 ("One can scarcely conceive of the rule of law without there being a possibility of having access to the courts . . . . The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognized" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice.") (quoting \textit{Goldner v. United Kingdom}, 18 Eur. Ct. H.R. (ser. A), ¶¶ 34–35 (1975)).

\item ICCPR, \textit{supra} note 4, art. 2(3)(a). Of course, if the acts are \textit{ultra vires} they cannot be acting in an official capacity, but the requirement that there be an effective remedy nonetheless pertains.
\end{enumerate}
\end{footnotesize}
IV. IMMUNITY DOES NOT PERTAIN BECAUSE OF THE MILITARY COMMISSIONS ACT

It is of further interest that the 2006 Military Commissions Act (MCA)\(^6\) will not provide immunity from suits for violations of treaty law of the U.S. or customary international law. Section 5 of the MCA had attempted to deny use by any person of "the Geneva Conventions or any protocols thereto in any . . . civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories."\(^6\) With respect to future litigation, the language did not attempt to deny use of (1) customary international law reflected in Geneva law; (2) the 1907 Hague Convention No. IV and customary laws of war reflected therein; (3) any other customary laws of war; (4) related treaty-based or customary human rights law; (5) Article 14 of the Convention Against Torture; (6) any other federal statute as a "source of rights"; or (7) use of the Ninth Amendment to the Constitution for incorporation of human rights of U.S. nationals,\(^6\) which in any event must trump an inconsistent statute. Therefore, despite the attempt in Section 5 of the MCA to deny use of the Geneva Conventions as a source of rights, lawsuits are possible, for example, under the Alien Tort Claims Act (ATCA or ATS) with respect to other violations of international law;\(^6\) the Torture Victim Protection Act with respect to torture or extrajudicial killing as defined therein;\(^6\) and—in the case of alleged U.S. victims of terrorist

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\(^6\) Id. § 5(a).

\(^6\) Concerning human rights of U.S. nationals under the Ninth Amendment, see, e.g., PAUST, INTERNATIONAL LAW, supra note 3, at 323–26, 331–32, 336–40.

\(^6\) Alien Tort Statute, 28 U.S.C. § 1350 (2006) [hereinafter ATCA]. By express terms, this statute is only available for alien plaintiffs but expressly applies with respect to any treaty of the U.S. and the customary law of nations. The ATCA executes both forms of international law.

\(^6\) TVPA, supra note 9. This statute provides a cause of action for alien and U.S. plaintiffs for torture and extrajudicial killing provided that the defendant acts "under actual or apparent authority, or color of law, of any foreign nation." Id. § 2(a). It is possible for a U.S. national to do so. Section 3(b)(2) of the TVPA has a far more limiting definition of torture involving mental pain or suffering than the CAT. See CAT, supra note 3. Since the CAT was ratified on October 21, 1994, after the TVPA had been created, the treaty is last in time and must prevail as domestic law of the United States. Concerning the last in time rule, see, e.g., PAUST, INTERNATIONAL LAW, supra note 3, at 100–01, 120. When the United States ratified the CAT, a unilateral understanding in the instrument of ratification considered that mental suffering must be "prolonged" and result from one of four listed causes, but the understanding was incorrect and is not legally relevant. See Paust, Torture, supra note 1, at 1570 n.107.
tactics and their estates, survivors, or heirs—the Antiterrorism Act (ATS).\textsuperscript{71} More generally, lawsuits for war crimes and crimes against humanity might also be possible under 28 U.S.C. § 1331.\textsuperscript{72} Additionally, lawsuits are possible under state law, especially since rights of access to courts and to remedies under treaty-based and customary international law are the supreme law of the land under the Supremacy Clause of the U.S. Constitution.\textsuperscript{73} In fact, a number of state court decisions have addressed war crime and human rights liability.\textsuperscript{74}

\textsuperscript{71} 18 U.S.C. § 2333 (2006). This statute provides a cause of action for U.S. plaintiffs and their estates, survivors, or heirs for “terrorism” (as broadly defined in § 2331) and allows treble damages, attorney fees, and costs. An exception exists with respect to a present (not former) “officer or employee of the United States or any agency thereof acting within his or her official capacity or under color of legal authority.” \textit{Id.} § 2337(1). The section, like any federal statute, must be interpreted consistently with international law (see supra note 52) by recognizing that when one is engaged in international criminal conduct, one is not “acting within . . . official” capacity or under “legal” authority. See \textit{supra} notes 48–51 and accompanying text.

\textsuperscript{72} See, e.g., Abebe–Jiri v. Negewo, 1993 WL 814304 (N.D. Ga. 1993), \textit{aff’d}, 72 F.3d 844 (11th Cir. 1996) (but focusing on the ATCA re: subject matter jurisdiction, \textit{id.} at 846–48); Xuncax v. Gramajo, 886 F. Supp. at 178 (regarding use of § 1331 in the alternative with the TVPA); Forti v. Suarez–Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987); see also Filartiga v. Pena-Frala, 630 F.2d at 887 n.22 (“We recognize that our reasoning might also sustain jurisdiction under the general federal question jurisdiction provision, 28 U.S.C. § 1331. We prefer, however, to rest our decision upon the Alien Tort Statute, in light of that provision’s close coincidence with the jurisdictional facts presented in this case.”). This point was addressed but not decided in Kadic v. Karadžič, 70 F.3d at 246 (the “causes of action [in this case] are statutorily authorized, and . . . we need not rule definitely on whether any causes of action not specifically authorized by statute may be implied by international law . . . as incorporated into United States law and grounded on section 1331 jurisdiction.”), the court agreeing nonetheless that a more specific statute, the ATCA, provides subject matter jurisdiction and that “jurisdiction” can rest on § 1331 or the ATCA.


\textsuperscript{74} See, e.g., PAUST, \textit{INTERNATIONAL LAW}, supra note 3, at 226–27, 291–92 nn.488–95. Of particular interest is Christian County Court v. Rankin & Tharp, 63 Ky. 502, 505–06 (1866)

There must be a remedy, and of that remedy the State judiciary has jurisdiction. There is nothing in the Federal Constitution which deprives a State court of power to decide a question of international law incidentally involved in a case over which it has jurisdiction; and for every wrong the common law . . . provides an adequate remedy. To sustain this action, therefore, it is not necessary to invoke any statutory
In any event, it is clear that Congress has no power to obviate the original jurisdiction of the Supreme Court or to violate the separation of powers by substantially interfering with judicial power and attempting to control rules for decision. The latter purpose and effect is exactly what Section 5 of the MCA attempted with respect to judicial use of the 1949 Geneva Conventions and, therefore, it should be recognized that the attempt is inoperative as a violation of the separation of powers. Even if Section 5 could be operative, the attempt in Section 5 to deny claims under the Geneva Conventions "as a source of rights" in cases before the courts would necessarily be trumped either by the venerable "rights under" treaties exception or by the law of war exception to the last in time rule, since rights aid . . . . Wherefore, on international and common law principles, we adjudge that the petition in this case sets forth a good cause of action . . . .

Id. 75 See Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810) (the "appellate powers of this court" are not created by statute but are "given by the constitution"), quoted in Hamdan v. Rumsfeld, 548 U.S. 557, 575 (2006).

76 Concerning the attempted reach of the 2006 MCA, see 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, 414–15 (2007) [hereinafter Paust, Above the Law]. In this article I wrote that:

Congress has no power to violate the separation of powers by such a blatant denial of a constitutionally mandated, traditional, and essential judicial power to implement treaty law of the United States that, as the Constitution expressly requires, "shall extend to all cases . . . arising under . . . treaties."

The violation of the separation of powers in this instance is especially evident where federal courts have continuing jurisdiction in all cases arising under treaties and Congress attempts to substantially inhibit judicial independence by controlling the results in certain cases. Congress is attempting precisely that by prescribing rules for decision in a particular way or, in this instance, rights and rules of law contained in the Geneva Conventions that cannot be used for decision. This congressional effort to deny use of particular law and to control judicial decision of cases in a particular way is all the more blatant where Congress has attempted to deny judicial use of common Article 3 as a rule for decision in detainee cases after the Supreme Court clearly decided that common Article 3 is a primary rule for decision [in Hamdan].

Id. at 414–15.

77 The "rights under" treaties exception is documented in Supreme Court and other cases. 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); Mitchell v. United States, 34 U.S. (9 Pet.) 711, 749, 755 (1835); PAUST, INTERNATIONAL LAW, supra note 3, at 104–05, 120, 137–39 nn.39–49, revised from 28 VA. J. INT'L L. 393, 410–14 (1988). 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) (an 1836 act of Congress could not "help the patent, it being of later date than
under the Geneva Conventions are both “rights under” treaties and part of the laws of war. Moreover, the Conventions expressly mandate that no state “shall be allowed to absolve itself . . . of any liability incurred.”

Section 7 of the MCA attempted a broader denial of rights of certain aliens to bring “any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement . . . .” As noted elsewhere, Section 7 was a flagrant “denial of justice” under customary international law and of peremptory

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 gds., 245 U.S. 89 (1917); Elkison v. Delisseline, 8 F. Cas. 493, 494–96 (C.C.D.S.C. 1823) (No. 4,366) (Johnson, J., on circuit) (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 U.S. Further, a restriction of a treaty right by legislation, “even by the general government,” cannot prevail).

The second exception to the last in time rule in these cases would be the law of war exception, which guarantees the primacy of the laws of war. See, e.g., Miller v. United States, 78 U.S. (11 Wall.) 268, 315–15 (1870) (Field, J., dissenting); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) (“If 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”—thus recognizing that congressional power is restricted by the laws of war); 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]”); PAUST, INTERNATIONAL LAW, supra note 3, at 106–07, 120, 141–42 nn.52–57; 8 ANNALS OF CONG. 1980 (1798) (remarks of Rep. 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 gds., Girouard v. United States, 328 U.S. 61, 69 (1946) (the 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); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 77 (counsel arguing that “[a]s far as Congress have thought proper to legislate us into a state of war, the law of nations in war is to apply”).

See Paust, Above the Law, supra note 76, at 379–80, nn.91–92, 412 n.196, 418 n.211. But see Noriega v. Pastrana, 564 F.3d 1290, 1296 (11th Cir. 2009) (ruling that Section 5 of the MCA “has superseded whatever domestic effect the Geneva Conventions may have in actions such as this” because the statute “which is subsequent in time is inconsistent with a treaty.”) (quoting Breda v. Greene, 523 U.S. 371, 376 (1998) (quoting Reid v. Covert, 354 U.S. 1, 18 (1957))), but not considering either the “rights under” treaties exception or the law of war exception to the last in time rule, much less the evident violation of the separation of powers noted above).

Supra note 17.

rights of access to courts, rights to a remedy, and equality of treatment under several multilateral and bilateral treaties of the U.S. and customary international law. Additionally, such a sweeping denial of treaty-based requirements is also a violation of the separation of powers, as it attempts to control judicial decision and to deny the judiciary its time-honored and essential role of applying fundamental and peremptory rights and requirements contained in treaty law of the United States.

Another reason why Section 7 cannot be operative against treaty-based rights is that a venerable Supreme Court rule of construction requires the primacy of any relevant treaty unless Congress has expressed within a subsequent federal statute a clear and unequivocal intent to override a particular treaty. There is no such clear and unequivocal expression of congressional intent in Section 7 with respect to any treaty, and the only relevant expression in the MCA is in Section 5 with respect to the Geneva Conventions. Additionally, if even operative, Section 7 would be trumped by both the “rights under” treaties and law of war exceptions to the last in time rule. Furthermore, as noted above, the Geneva Conventions expressly mandate that no state shall be able to absolve itself of liability.

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82 See PAUST, BEYOND THE LAW, supra note 1, at 98, 261–62 nn.116–117. Concerning the violation of customary international law known as a “denial of justice,” see, e.g., supra note 64.

83 PAUST, BEYOND THE LAW, supra note 1, at 98.

84 See, e.g., Weinberger v. Rossi, 456 U.S. 25, 35 (1982) (a “congressional expression [to override is] necessary”); Cook v. United States, 288 U.S. 102, 120 (1933) (the purpose to override or modify a treaty must be “clearly expressed” and “[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, 345–46 (1925) (the “Act 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 . . . must appear clearly and distinctly from the words used” by Congress); PAUST, INTERNATIONAL LAW, supra note 3, at 99, 107, 120, 124–125 nn.2–3, and other cases cited. See also Spector v. Norwegian Cruise Line, Ltd., 545 U.S. 119, 142 (2005) (Ginsburg, J., concurring); Bcharry v. Reno, 183 F. Supp.2d 584, 593–602 (E.D.N.Y. 2002) (regarding statutory construction consistent with the ICCPR and other international law); United States v. The Palestine Liberation Organization, 695 F. Supp. 1456, 1465, 1468 (S.D.N.Y. 1988) (“Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty . . . does the later enacted statute take precedence . . . and its progeny . . . require the clearest of expressions on the part of Congress.” (citing The Chinese Exclusion Case, 130 U.S. 581, 599–602 (1889) (finding clear intent to supersede); Edye v. Robertson (The Head Money Cases), 112 U.S. 580, 597–99 (1884) (same); Chew Heong v. United States, 112 U.S. 536 (1884)).

85 See supra notes 77–78.

86 Supra note 17.
reasons, the MCA should pose no barrier to litigation of claims under international law.

Moreover, if Sections 5 or 7 of the MCA had been operative, there would have been war crime responsibility for its creators under the laws of war. Article 23(h) of the 1907 Hague Convention affirms a relevant customary violation of the laws of war when stressing that “it is especially forbidden... [t]o declare abolished, suspended, or inadmissible in a court of law the rights... of nationals of the hostile party.” This type of crime led to prosecutions in United States v. Altstoetter (The Justice Case) during the Subsequent Nuremberg Proceedings under U.S. auspices when the indictment included war crimes involving “discriminatory measures against Jews, Poles, ‘gypsies,’ and other designated ‘asocials’ [that] resulted in... deprivations of rights to file private suits and rights of appeal.”

Rights of hostile foreign nationals under the 1949 Geneva Conventions and the 1907 Hague Convention operative during the wars in Afghanistan and Iraq are clearly among the relevant rights that cannot be declared abolished, suspended, or inadmissible in a court of law. Members of the Obama Administration and the judiciary should be careful that they do not declare that such rights are abolished, suspended, or inadmissible in a court of law under Sections 5 or 7 of the MCA, or in any other way. Additionally, the Obama Administration should not facilitate such a denial of rights if they wish to avoid possible accomplice liability.

87 HC IV, supra note 15, Annex, art. 23(h). The treaty reflects customary international law. See also supra note 15. See also Geneva Convention, supra note 17, art. 148 (quoted text at supra note 17).

88 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 3 (1951).

89 Id. ¶ 16.

More generally, the Founders, Framers, and early judiciary affirmed the fundamental expectation that Congress is bound by the law of nations. As Chief Justice Marshall recognized concerning the textual commitment to the judiciary of authority to decide cases arising under treaties and a test for self operative status and treaty-based remedies, "[t]he reason for inserting that clause [in Article III of the Constitution] was, that all persons who have real claims under a treaty should have their causes decided" by the judiciary and that "[w]henever a right grows out of, or is protected by, a treaty, ... whoever may have this right, it is to be protected" by the judiciary. One year later, Marshall confirmed a fundamental expectation of the Framers with respect to judicial power and human rights when he recognized that our judicial tribunals "are established ... to decide on human rights." Chief Justice Marshall also confirmed a fundamental expectation of the Founders and Framers that:


91 See, e.g., Paust, Founders & Framers, supra note 73, at 217–39.


93 Owings v. Norwood’s Lessee, 9 U.S. (5 Cranch) 344, 348–49 (1809). Clearly, a right that "grows out of" or is "protected by" a treaty can be an implied right, an express right, and a right that is evident even though the treaty contains no mention of various forms of remedy that might attach. This type of test was reiterated by Justice Miller in 1884. See Edye v. Robertson, 112 U.S. 580, 598–99 (1884) (Miller, J., opinion) ("whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.") (emphasis added). A number of Supreme Court cases have also recognized that treaties are to be construed in a broad manner to protect express and implied rights. See, e.g., Factor v. Laubheimer, 290 U.S. 276, 293–94 (1933); Nielsen v. Johnson, 279 U.S. 47, 51 (1929); Jordan v. Tashiro, 278 U.S. 123, 127 (1928); Asakura v. City of Seattle, 265 U.S. 332, 342 (1924) ("Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."); United States v. Payne, 264 U.S. 446, 448 (1924) ("Construing the treaty liberally in favor of the rights claimed under it, as we are bound to do . . ."); De Geoffroy v. Riggs, 133 U.S. 258, 271 (1890) ("where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."); Hauenstein v. Lynham, 100 U.S. 483, 487 (1879) ("Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred." (citing Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 249 (1830) ("If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?").)

94 Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810). Concerning the rich history of Founder, Framer, and judicial attention to human rights (which are generally at stake in these cases) and their use in thousands of federal and state cases, see, e.g., Paust, INTERNATIONAL LAW, supra note 3, at 193–223.
The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . [Blackstone] says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded."  

With respect to judicial power and the laws of war in particular, the Supreme Court has stressed, "[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 . . . individuals."  

V. CONCLUSION  

As noted in Part II above, the CAT, ICCPR, Universal Declaration of Human Rights through the U.N. Charter, American Convention on Human Rights, American Declaration of the Rights and Duties of Man, customary law regarding forced disappearance, customary human rights law, and customary laws of war provide rights to compensation and forms of reparation. The Geneva Conventions also expressly recognize private rights and contemplate compensation in courts of law. Federal statutes execute the Geneva Conventions and other international law for civil sanction purposes,
and several U.S. cases have recognized personal liability for violations of human rights law and the laws of war.

Additionally, as explained in Part III, there are various reasons why no federal statute should be interpreted contrary to international law to obviate civil liability of former President Bush, former Vice President Cheney, Alberto Gonzales, and others for perpetration of and complicity with respect to international crimes and the personal responsibility known as dereliction of duty with respect to de jure and de facto leaders. Moreover, under the last in time rule some seemingly limiting statutes regarding substitution of the U.S. for individual defendants are prior in time to relevant treaties and, however interpreted otherwise, must not prevail. Another federal statute, the MCA, is subsequent in time to U.S. ratification of relevant treaties, but there are several reasons why the MCA should not obviate jurisdiction in U.S. courts. Even if the MCA might otherwise be operative, the “rights under” treaties exception and the law of war exception to the last in time rule should ensure the primacy of rights to an effective remedy and access to courts under relevant international law.