Is the United States Bound by the Customary International Law of Torture? A Proposal for ATS Litigation in the War on Terror

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"Regardless of its substance, however, customary international law cannot bind the executive branch under the Constitution because it is not federal law."

The terrorist attacks of September 11, 2001 were a seminal moment for the United States. This horrific act of murder and destruction inspired the United States to declare "war on terror," a war unlike any other in American history. For the first time, the United States is at war with international non-state actors—terrorist groups—not supported by specific nation-states; all previous wars have been against international sovereigns. Moreover, the War on Terror is not limited to a discrete set of enemies but extends to the concept of "terror"—the use of force and fear against civilians to achieve political ends.

Though this war is unique, some consequences of its prosecution are similar to previous wars. Like the atrocities of Vietnam, US actors have allegedly committed acts of abuse. Numerous organizations have accused US agents of abusing and torturing unlawful combatants detained at the US Naval Station at

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1 Memorandum from John Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, US Department of Justice, to William J. Haynes II, General Counsel, US Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees 34 (Jan 9, 2002) (hereinafter Yoo and Delahunty Memorandum) (on file with author).

Guantanamo Bay, Cuba ("Guantanamo" or "GTMO") and military bases in Iraq and Afghanistan.

Unlike in other wars, the President has determined that the entire set of the Geneva Conventions’ and customary international law’s humanitarian guarantees does not apply to all enemy combatants. Specifically, the unlawful combatants of al Qaeda and the Taliban are denied the entire suite of international humanitarian law’s protections.3

Can the Administration legally do this? The legal arguments for excluding the Geneva Conventions’ protections are sound; for example, "al Qaeda is not a High Contracting Party to Geneva."4 The United States can conceivably avoid such treaty obligations, but most of customary international law’s humanitarian protections are *jus cogens*, that is, states cannot lawfully derogate from them.

The United States allegedly tortured War on Terror detainees. Does this violate the customary international law of torture or did President Bush’s determination exempt the United States from its obligations? Is there enough evidence to reasonably suggest that the United States engaged in torture? As a policy matter, should the international norm against torture bind the United States?

A few words are needed at the outset. Many scholars have discussed the binding authority of customary international law, but there has yet to be a thorough exegesis of the anti-torture norm in the specific context of War on Terror detainees. The Administration has asserted that the United States is not domestically bound by customary international law.5 This Comment tests that proposition against the customary international law of torture.

Because I attempt to address the Administration’s claim on its own terms—that al Qaeda and the Taliban are excluded from some customary humanitarian rights—I will only address the alleged torture of al Qaeda and Taliban detainees. Though the atrocities at Abu Ghraib are perhaps the most infamous example of US abuse,6 those Iraqi detainees were arguably covered by the Geneva Conventions. At the very least, President Bush did not determine

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4 Id at ¶ 2.a.

5 Yoo and Delahunty Memorandum at 34 (cited in note 1).

that the Iraqi detainees, like al Qaeda and the Taliban, were excluded from international humanitarian law.\(^7\)

This inquiry proceeds in three parts. First, I determine whether the United States tortured War on Terror detainees. I then consider whether a binding international norm against torture exists and if the United States violated it. Finally, I examine this issue from a policy standpoint, asking whether it is good policy to have the customary international law of torture bind the United States.

I. ACTS OF TORTURE

The first issue to consider is whether the United States actually tortured detainees. There is considerable evidence to suggest that US agents engaged in morally questionable, abusive behavior. This evidence comes from three sources: the detainees themselves, the International Committee of the Red Cross ("ICRC" or "Red Cross"), and "pro-US" sources such as US agents.\(^8\) I will address each in turn.

A. DETAINEE REPORTS

This Section examines the detainees’ allegations by looking to lawsuits they filed and their interviews with third parties. In considering their claims, one must retain a healthy dose of skepticism because the detainees are interested parties whose reports may be tainted by self-serving bias.

1. Lawsuits

The American Civil Liberties Union ("ACLU") has filed a lawsuit against US Secretary of Defense Donald H. Rumsfeld on behalf of detainees who were allegedly held and abused in Afghanistan and Iraq.\(^9\) The four Afghanistan detainees—Mehboob Ahmad, Said Nabi Siddiqi, Mohammed Karim Shirullah, and Haji Abdul Rahman—assert claims of torture that are brutal in their honesty and shocking in their detail.

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7 See John C. Yoo, *The Status of Soldiers and Terrorists under the Geneva Conventions*, 3 Chinese J Intl L 135, 135 (2004) (noting that "it has been U.S. policy to extend the rights and privileges of prisoners of war under the Geneva Convention to Iraqi detainees").

8 By "US agents," I mean individuals acting under color of US law or authority. I do not define this term to just encompass persons whose job title includes "agent," such as Special Agents of the Federal Bureau of Investigation.

9 Complaint for Declaratory Relief and Damages, *Ali v Rumsfeld*, No 1:05-cv-01201 (ND Ill filed Mar 1, 2005) 2005 WL 922428. Three other lawsuits were filed, but those defendants would be liable only for abuse in Iraq. See *Ali v Karpinski*, No 9:05-cv-00654 (DSC filed Mar 1, 2005); *Ali v Pappas*, No 3:05-cv-00371 (D Conn filed Mar 1, 2005); *Mohammed v Sanchez*, No 7:05-cv-00065 (SD Tex filed Mar 1, 2005).
All four plaintiffs assert sexual humiliation and battery: they were all forcibly stripped naked and photographed and they all suffered repeated anal probing. Mr. Ahmad was told that “soldiers would rape his wife” and US interrogators battered Mr. Shirullah until his right eardrum ruptured, thereby causing permanent right ear deafness. Mr. Siddiqi endured long hours of sleep deprivation by the continual “throwing [of] stones at him and other detainees all night.” Such constant abuse has caused near paralysis and impairments of vision, hearing, and memory.

Mustafa Ait Idr, among other plaintiffs, is suing the US Department of Defense under the Freedom of Information Act (“FOIA”) to discover physical evidence of his torture at Guantanamo. He claims that “U.S. military guards jumped on his head until he had a stroke that paralyzed his face, nearly drowned him in a toilet and later broke several of his fingers.”

2. Third-party Accounts

Detainees’ reports have not been confined to formal legal filings. A host of news reports have relied on detainees’ statements to frame the picture of US detention and abuse. Murat Kurnaz asserts that at Guantanamo “[h]e had his head forced under water, . . . was tortured with electric shocks and . . . was sexually humiliated by female interrogators.” Moazzam Begg wrote to a court that “he has been repeatedly beaten and has heard ‘the terrifying screams of fellow detainees facing similar methods.’ He said he witnessed two detainees die after US military personnel had beaten them.” Mamdouh Habib arrived at Guantanamo “in ‘catastrophic shape’ . . . [m]ost of his fingernails were missing, and while sleeping at the prison he regularly bled from his nose, mouth and ears.” Despite such maladies, “US officials there denied him treatment,” saying

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10 Rumsfeld, No 1:05-cv-01201 at ¶ 155.b, 158.b, 161.c, 164.b.
11 Id at ¶ 155.b.
12 Id at ¶ 161.a, 162.
13 Id at ¶ 158.e.
14 Id at ¶ 156, 165.
15 Id at ¶ 162, 165.
16 The act is codified at 5 USC § 552 (2000).
17 Oleskey v United States Department of Defense, No 1:05-cv-10735 (D Mass filed Apr 13, 2005).
18 Carol Leonnig, Guantanamo Detainee Suing U.S. to Get Video of Alleged Torture, Wash Post A2 (Apr 14, 2005).
19 Detainee Alleges Torture at Guantanamo, St Petersburg Times 2A (Mar 10, 2005).
20 Carol D. Leonnig, Further Detainee Abuse Alleged; Guantanamo Prison Cited in FBI Memos, Wash Post A1 (Dec 26, 2004).
21 Id.
instead “if you cooperate with your interrogators, then we can do something.”

Martin Mubanga, another Guantanamo detainee, has alleged sexual abuse, writing to his sister that “American military police were treating him like a... male prostitute.”

B. INTERNATIONAL COMMITTEE OF THE RED CROSS REPORTS

The Red Cross is the neutral guardian of the Geneva Conventions’ panoply of human rights. While President Bush determined that the Geneva Conventions did not apply to illegal combatants, and therefore the Red Cross had no specific rights to guarantee, it did visit US detention centers such as Guantanamo as a neutral observer, and reported its findings. Though these reports are normally confidential, the Red Cross’s summary of its June 2003 inspection of Guantanamo was leaked to American newspapers.

This report claimed “the American military has intentionally used psychological and sometimes physical coercion ‘tantamount to torture’ on prisoners at Guantanamo Bay, Cuba.” Specifically, an unknown number of prisoners were subject to “humiliating acts, solitary confinement, temperature extremes, use of forced positions,” and “some beatings.” The detainees were also victims of exposure to “severe temperatures, loud music and other sounds, ... and forced nudity.” The Red Cross also asserted that “some doctors used patient records to help military investigators gather information,” which if true, is considered by the ICRC as “a ‘flagrant violation of medical ethics.”

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22 Id.
23 Id.
25 Memorandum from President Bush at ¶ 2 (cited in note 3).
27 See id. See also Josh White and John Mintz, Red Cross Cites “Inhumane” Treatment at Guantanamo, Wash Post A10 (Dec 1, 2004); Guy Taylor, Red Cross Sees “Problems” with Prisoner Care, Wash Times A4 (Dec 1, 2004).
28 Lewis, Red Cross Finds Detainee Abuse, NY Times at A1 (cited in note 26). A literal interpretation of the ICRC’s use of “tantamount” suggests that the Red Cross viewed the alleged abuses as close to, but were not in fact, actual torture.
29 Id.
30 White and Mintz, Red Cross Cites “Inhumane” Treatment, Wash Post at A10 (cited in note 27).
31 Id. See also M. Gregg Bloche and Jonathan H. Marks, When Doctors Go to War, 352 New Eng J Med 3, 5 (2005) (noting “probable cause for suspecting” that the physicians engaged in torture
The ICRC summarized the detainees' treatment at Guantanamo as designed to "make them wholly dependent on their interrogators" and "cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture." In the eyes of the Red Cross, these acts "violate[d] international rules against torture adopted by the United States and other countries." 

C. US AGENT REPORTS

Though the impressions and reports of US agents, like Red Cross reports, are normally confidential, a successful ACLU FOIA action has made many US detention documents available to the public. These documents are striking in their descriptions of abuse. One special agent of the Federal Bureau of Investigation ("FBI") complained that Department of Defense interrogators were "impersonating Supervisory Special Agents of the FBI" and were engaging in "torture techniques" that "have produced no intelligence of a threat neutralization nature to date."

Another FBI agent detailed his observations of torture at Guantanamo:
On a couple of occasions [sic], I entered interview rooms to find a detainee chained hand and foot in a fetal position on the floor, with no chair, food, or water. Most times they had urinated or defecated [sic] on themselves, and had been left there for 18, 24 hours or more. On one occasion [sic], the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold... On another occasion [sic], the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his hair out throughout the night. On another occasion [sic] not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the floor.
Guantanamo is not the only base where US-led torture allegedly occurred. As Rumsfeld asserted, US bases in Afghanistan are also sites of alleged abuse. The Washington Post quoted an anonymous official at the Bagram air base “who has supervised the capture and transfer of accused terrorists” as stating that “[i]f you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.”

These violations, often led by the Central Intelligence Agency (“CIA”), were euphemistically titled “stress and duress” techniques” and included detainees being “softened up” by MPs [military police] and US Army Special Forces troops who beat them up and confine[d] them in tiny rooms” or “held [them] in awkward, painful positions and deprived [them] of sleep with a 24-hour bombardment of lights.”

Cofer Black, head of the CIA Counterterrorist Center in September 2002, alluded to abusive practices at a September 26, 2002 joint hearing of the House and Senate intelligence committees. Mr. Black, while reluctant to discuss the specifics of CIA interrogations, stated: “This is a highly classified area, but I have to say that all you need to know: There was a before 9/11, and there was an after 9/11 . . . . After 9/11 the gloves come off.”

Perhaps an example of the new gloveless technique is the treatment of Abu Zubaida, a high-ranking al Qaeda member detained in Afghanistan in December 2002. Mr. Zubaida “was shot in the groin during his apprehension in Pakistan in March [2002]. National security officials suggested that Zubaida’s painkillers were used selectively in the beginning of his captivity.” While Bush administration officials claim that the United States is “scrupulous in providing medical care to captives,” one official “add[ed] in a deadpan voice, that ‘pain control [in wounded patients] is a very subjective thing.’”

D. Denials of Torture

Denials of torture have come in two forms: that there was no predicate abuse of detainees, or that detainees were abused but such abuse is not torture

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38 Id.
39 Id.
40 Id.
41 Id.
because it was either not grave enough or because the abuse was justified. These categories blend into each other, but I will attempt to address each in turn.

1. There Was No Abuse

Heather Mac Donald, an ardent defender of US practices, stridently claims that US interrogations did not rise to the level of abuse, let alone torture. Describing the military as “restrained,” she lists:

what the interrogators assumed they could not do without clearance from the secretary of defense: yell at detainees (though never in their ears), use deception (such as posing as Saudi intelligence agents), and put detainees on MREs (meals ready to eat—vacuum-sealed food pouches eaten by millions of soldiers, as well as vacationing backpackers) instead of hot rations. . . .

The most controversial technique approved was “mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing,” to be reserved only for a “very small percentage of the most uncooperative detainees” believed to possess critical intelligence.

Mac Donald concedes that there was at least one abusive technique: waterboarding, “temporarily submerging a detainee in water to induce the sensation of drowning.” She notes that this “is the most extreme measure the CIA has applied, according to a former Justice Department attorney, and arguably it crosses the line into torture.”

The United States has also denied that it abused detainees. The Department of Defense first categorically denied allegations of detainee abuse, but the Pentagon altered its denials after continuous allegations and investigations of torture, stating that “the military has been careful not to abuse detainees and has complied with treaties on the handling of enemy prisoners ‘to the extent possible’ in the middle of a war.” This caveat changes the flat prohibition against torture into a balancing test: the US will not abuse detainees so long as abuse is not necessary to the war effort.

This balancing is grounded in official US policy. Secretary Rumsfeld ordered that “[t]he Combatant Commanders shall, in detaining Al Qaida and Taliban individuals under the control of the Department of Defense, treat them

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42 Heather Mac Donald, How to Interrogate Terrorists, 15 City J 24, 30 (2005). This article is an excellent survey and defense of US practices.

43 Id at 32.

44 Id.

45 White and Mintz, Red Cross Cites “Inhumane” Treatment, Wash Post at A10 (cited in note 27).


47 Some US officials have further grounded the implicit cost-benefit balancing test by “defending[ing] some cases of harsh treatment by saying it was simply the cost of the so-called global war on terror.” Kate Zernike, Newly Released Reports Show Early Concern on Prison Abuse, NY Times A1 (Jan 6, 2005).
Is the United States Bound by the Customary International Law of Torture?

Decker

humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949. President Bush reaffirmed this order on February 7, 2002.

2. There Was Abuse, But It Was Not Torture

Even if US agents abused detainees, it does not follow that this abuse was torture. The abuse could have remained below the level of torture or the abuse could have been justified.

a) The abuse did not rise to the level of torture. This specific defense is difficult to mount given the volume of conflicting evidence. Heather Mac Donald tried to argue that the severity of coercion was not at the level of torture. It is also possible to argue that severe, nearly tortuous abuse is not torture because it was infrequently inflicted or because it was against US policy.

Mac Donald asserts both of these defenses. “Without question, some war on terror detainees have been abused, some have even died in custody. But that abuse was in violation of official policy, not pursuant to it.” Perhaps there can be a distinction between torture and acts of torture—just as international law recognizes a difference between genocide and acts of genocide—but the “violation of official policy” defense is a non-starter.

First, as noted above, official US policy implicitly allowed torture if it was militarily necessary. This general permission is grounded in concrete guidance. On December 2, 2002, Secretary Rumsfeld countenanced “counter-resistance techniques” such as the “[d]eprivation of light and auditory stimuli,” the “[r]emoval of clothing,” and “[t]he use of stress-positions such as the proposed standing for a maximum of four hours” in Guantanamo interrogations.
Secretary Rumsfeld rescinded his December 2 authorization on January 15, 2003. But, for one and one-half months, the US military was authorized to use sensory deprivation, forced nudity, and long-term stress-positions in detainee interrogations.

The violation of official policy defense takes for granted that the official policy of the United States was the implicit and explicit authorization of abusive techniques. And, even if torture were not authorized, the United States had a duty to ensure that its servicemen obeyed the chain of command and that they did not torture. Perhaps the United States should not be held responsible for an isolated individual act of torture, but the evidence demonstrates that the torture was widespread. The United States breached its duty of care when the torture became systemic, even if that torture was in “violation of official policy.”

b) The abuse was justified and therefore was not torture. If one accepts that detainees were abused, one can attempt to mitigate the abuse by arguing that it was justified—or at least required—by the war effort. The Administration’s initial schema for detainee treatment implicitly permitted abuse if it served “military necessity.” Could the abuse be excused away by legitimate military needs? Are there other justifications?

Defenders of US conduct have advanced three exculpatory rationales: (1) the aforementioned military necessity; (2) domestic organizations engage in similar behavior; and (3) the benefits gained by US abstention from torture—namely, the expectation that an enemy will treat its prisoners reciprocally, and thus humanely—no longer apply in the War on Terror.

The military necessity logic is essentially that detainees have material information that can only be collected, or can only be timely collected, if the questioners resort to abusive interrogation. War on Terror detainees, the logic goes, were immune to regular interrogation techniques because they believed that they would not be punished if they did not cooperate with interrogators and because motivators that worked on traditional detainees, such as love of family or love of life, “had little purchase among the terrorists ... The jihadists

53 Memorandum from Donald H. Rumsfeld, Secretary of Defense, to Commander USSOUTHCOM [United States Southern Command, the command responsible for Guantanamo], Counter-Resistance Techniques (U) (Jan 15, 2003) (on file with author).

54 See note 50 for a rejection of the logic that justification prevents an act from being characterized as torture.

55 Al Qaeda manuals revealed that uncooperative behavior “carried no penalties and certainly no risk of torture—a sign, gloated the manuals, of American weakness.” Mac Donald, 15 City J at 26 (cited in note 42).
would tell you, "I’ve divorced this life, I don’t care about my family,"’ recalls an interrogator at Guantanamo. ‘You couldn’t shame them.’”

Interrogators also claim that the laconic detainees possessed information vital to prosecuting the war and defending US interests. Chris Mackey, a former US interrogator in Afghanistan, lamented that reliance on “ineffective schoolhouse methods” meant “that his team ‘failed to break prisoners who I have no doubt knew of terrorist plots or at least terrorist cells that may one day do us harm. Perhaps they would have talked if faced with harsher methods.'”

Expanding on his argument, Mackey noted that the use of harsher techniques meant that they received better information sooner.

While some interrogators may claim that coercive techniques produced useful intelligence, others claim the exact opposite. At least one FBI agent complained that Guantanamo torture “tactics have produced no intelligence of a threat neutralization nature to date” and that the “techniques have destroyed any chance of prosecuting this detainee.” The dispute between the effectiveness of torture and military necessity will be discussed again in Section III.B, but it is important to recognize here that it has been offered as a reason why abuse did not become torture.

Another reason why abuse might have not equaled torture is because domestic organs used similar techniques. Mac Donald speculates that “if a bootcamp drill sergeant can make a recruit kneel with arms stretched out in front without violating the Convention Against Torture, an interrogator can use that tool against a recalcitrant terror suspect.”

Or, during the interrogation of Mohamedou Ould Slahi, an al Qaeda agent who recruited two of the September 11 pilots, “an army interrogator suggested, ‘Why don’t you mention to him that conspiracy is a capital offense?’ The FBI agent conducting the interrogation rejected this tactic because he believed that “any covert threat [which] inflicts ‘severe mental pain’ violates the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”).

Mac Donald dismisses this concern by noting “district attorneys and

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56 Id.
57 Id at 35.
58 Id at 28.
59 Bald e-mail (cited in note 35).
60 Mac Donald, 15 City J at 28 (cited in note 42).
61 Id at 30.
62 Id.
63 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 1465 UN Treaty Ser 85 (1987).
police detectives routinely invoke the possibility of harsh criminal penalties to get criminals to confess.  

This justification is inapt. Marginally tortuous behavior—as opposed to abuse that is clearly torture—may be permissible in the domestic context. This is especially true when one considers Mac Donald’s examples. A military recruit directly elected to participate in boot camp whereas an unlawful combatant\(^{65}\) at most indirectly elected to run the risk of capture, and the even smaller risk of abuse,\(^{66}\) by fighting. One could also argue that law enforcement’s implicit threats are more ancillary to prosecuting crime than torture is to detainee interrogations.\(^{67}\) Regardless, domestic use of a policy does not automatically justify its use in foreign affairs. This excuse is flawed because it fails to recognize the inherent difference between internal and external relations and because it assumes, without a priori justification, that the domestic practice is itself not torturous.\(^{68}\)

The final rationale for not equating abuse with torture is that the United States is fighting a new type of enemy in a new type of war.\(^{69}\) This enemy attacks office buildings instead of front line positions and “flout[s] every civilized norm animating the [Geneva] conventions.”\(^{70}\) An instrumental reason to respect international humanitarian law vis-à-vis the enemy is that the enemy will then respect such norms vis-à-vis one’s own troops. Yet, American compliance with humanitarian law has not caused terrorists to treat US servicemen humanely.\(^{71}\) Because the United States has not incurred reciprocal benefits by complying with customary international law, and because noncompliance seems not to

\(^{64}\) Mac Donald, 15 City J at 30 (cited in note 42).
\(^{65}\) Assuming that he was actually a combatant and was not mistakenly caught in the overbroad US dragnet.
\(^{66}\) See discussion in note 55 that al Qaeda manuals stated that US troops would not torture detainees, which would make an al Qaeda agent more likely to discount the risk of torture.
\(^{67}\) Though this may be a distinction without a difference.
\(^{68}\) To be clear, I am not implying that either of Mac Donald’s examples of domestic tactics violates the customary international law against torture. On first glance I do not believe that they do, and even if I did, such an argument would be well outside the scope of this Comment.
\(^{70}\) Mac Donald, 15 City J at 27 (cited in note 42).
\(^{71}\) “[O]ur adversaries in several recent conflicts have not been deterred by GPW [Geneva Convention III on the Treatment of Prisoners of War] in their . . . mistreatment of captured US personnel, and terrorists will not follow GPW rules in any event.” Gonzales Draft Memorandum at 3 (cited in note 69).
carry additional risks, what is the instrumental reason for not abusing or torturing detainees?

This argument, like all the other defenses, falls prey to the unsupported assumption that abuse, if justified, is per se not torture. Torture speaks to conduct, not to the conduct's reasons. To define torture not based on its acts but on its motives is to conflate two very different inquiries. One should not venture down this confusing intellectual path and one should not let the reasons for abuse—even if they are good ones—obfuscate the inquiry into the facts of abuse.

E. THE EVIDENCE OVERALL: WAS THERE TORTURE?

Torture is defined at length in Section II.A.4, but as a preliminary matter, an act of torture must be specifically intended to cause severe physical pain, such as that of serious physical injury, or mental pain or suffering lasting for significant duration. With this in mind, I conclude that the United States tortured detainees at Guantanamo and in Afghanistan.

Some of the allegations may be false, but one cannot reasonably dismiss all of the claims wholesale. There is probable cause to believe that some acts of torture occurred, and that these acts were not limited to a sole locale or to a discrete set of offenders, but pervaded the system of US detention.

This torture is not confined to past behavior. Recent evidence suggests that Guantanamo officials have continued to torture detainees and that the CIA has detained and tortured al Qaeda members at secret facilities in Eastern Europe. Further, the White House has refused to disclose information about the CIA’s “detention of high-level terror suspects” to the full House and Senate intelligence oversight committees, and is restricting that information—“how and where the prisoners are being held and interrogated”—to the committees’ chairmen and ranking minority members. Torture may be continuing and Congress—the people’s representative—is being denied robust oversight.

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73 See Abuse at Guantanamo Hasn’t Stopped, Say Kuwaiti Prisoners, Kuwait Times (Jan 22, 2005).


US Senator John McCain has asserted Congress’s legislative prerogative by introducing an amendment—approved by the Senate on October 5, 2005—that would prohibit the “cruel, inhuman, or degrading treatment or punishment” of any “individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location.”

Though this amendment reiterates existing law, President Bush has threatened to veto it. Indeed, rather than entertaining a change in tactics, the President has insisted that “We will not relent” and that “We will keep our nerve.”

II. TORTURE IN CUSTOMARY INTERNATIONAL LAW

Because there is a reasonable likelihood that US agents tortured detainees, this Comment now moves from the existence of torture to whether that torture violated customary international law. Customary international law, unlike treaties, is often hard to discern. While treaties are grounded in text, customary international law is the product of two nebulous prerequisites: custom that is “a general and consistent practice of states,” and opinio juris, the requirement that states conform to this custom out of a “sense of legal obligation.” This Section inquires whether there is a customary international norm against torture, and finding that there is, it asks whether US torture violated it. Because of space limitations, I do not attempt to prove from first principles that the customary international law against torture exists; for the sake of brevity, I only show that there is such a law.

77 Specifically, the McCain Amendment requires that the Defense Department’s interrogations must conform to the United States Field Army Manual on Intelligence Interrogation and also that persons under US control must be accorded their Constitutional right to be free from “cruel, inhuman, or degrading treatment or punishment.” Id.
78 Eric Schmitt, Senate Moves to Protect Military Prisoners Despite Veto Threat, NY Times A22 (Oct 6, 2005).
80 Id at 1507.
82 Id.
A. IS THERE A CUSTOMARY INTERNATIONAL LAW OF TORTURE?

1. Custom

Finding custom is a tricky proposition, especially when the custom is the absence of something, for instance, the absence of torture. Perhaps due to the difficulty of pure empiricism, the custom prong of international law can be satisfied by "consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."83

The prohibition against torture grows out of all three sources of custom. Empirically, most states refrain from torture. This restraint is not shared by all states, though the degree of deviation is not clear. Before examining the extent of violations, one must recognize that torture only violates international custom if it is committed as official state action; customary international law is not offended by private, non-state acts of torture.84 Because the custom against torture only looks to state acts, violations can defeat this custom only if they are official state policy.

Professors Jack L. Goldsmith and Eric A. Posner note that courts and scholars characterize the number of torturing states as "many."85 Human Rights Watch also describes this set as "many," but their worldwide torture summary lists just sixteen offending countries.86 A cursory search of the US State Department’s Country Reports on Human Rights Practices suggests that more than twenty-five countries have some form of official torture.87 While "many" may be

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83 Filartiga v Pena-Irala, 630 F2d 876, 880 (2d Cir 1980), quoting United States v Smith, 18 US (5 Wheat) 153, 160–61 (1820). See also The Paquete Habana, 175 US 677, 700 (1900) (noting that "the works of jurists and commentators" can be used as evidence of the "customs and usages of civilized nations").


86 See Human Rights Watch, Torture Worldwide, available online at <http://hrw.org/english/docs/2005/04/27/china10549.htm> (visited Oct 25, 2005). The sixteen countries are: China, Egypt, Indonesia, Iran, Iraq, Israel, Malaysia, Morocco, Nepal, North Korea, Pakistan, Russia, Syria, Turkey, Uganda, and Uzbekistan.

87 A listing of the various countries covered by the report is available online at <http://www.state.gov/g/drl/hs/hrpt/2004/> (visited Oct 25, 2005). The countries' torture is often technically illegal but is still perpetrated by government agents.
hard to quantify, the clear majority of states do not torture. And, of the states that do torture, they still recognize, albeit emptily, that an anti-torture norm exists. "[E]veryone involved in the commission of torture acts on the assumption that it is illegal; no one acts on the assumption that it is legal under a new rule which would allow for torture."89

If international custom could only be derived from actual state behavior, the practice of torture might undercut the norm. For the purposes of customary international law, however, the sources of international custom are not so limited; norms can be gleaned from learned legal writings90 and official state pronouncements.91 These two sources strongly support the existence of an anti-torture norm.

One can divine official state pronouncements from a multitude of sources, including: diplomatic statements and protests, official legal opinions, policy statements, press releases, domestic legislation and judicial decisions, and treaties.92 A brief survey of the international legal and domestic US landscapes demonstrates the vitality of official state policy against torture.

The international community has repeatedly and forcefully repudiated torture,93 and this repudiation is shared by the United States. For example, it is a federal crime to commit or to attempt to commit torture outside of the United States,94 and federal district courts have original jurisdiction over suits by aliens who have allegedly been tortured.95 US courts have consistently recognized the existence of a customary international law against torture96 and President Bush's

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88 See Nurn v Gonzales, 404 F3d 1207, 1222–23 nn 11–12 (9th Cir 2005) (listing nations and agreements that outlaw torture).
89 Henckaerts, 21 Refugee Survey Q at 190 (cited in note 84).
90 See, for example, Filarfiga, 630 F2d at 880.
91 Henckaerts, 21 Refugee Survey Q at 190 (cited in note 84).
92 Id at 190–92.
93 See, for example, Geneva Convention Relative to the Treatment of Prisoners of War (1949), art 17, 6 UST 3316, 3330–32 (prohibiting torture of prisoners of war); International Covenant on Civil and Political Rights (1966), art 7, 6 ILM 368, 370 (1967); Rome Statute of the International Criminal Court (1998), arts 7–8, 37 ILM 999, 1004–1009.
96 Sosa v Alvarez-Machain, 542 US 692, 762 (2004) (Breyer concurring in part and concurring in the judgment); Nurn, 404 F3d at 1222; Kadic v Karadzij, 70 F3d 232, 243 (2d Cir 1995); Siderman de Blake v Republic of Argentina, 965 F2d 699, 717 (9th Cir 1992); Filarfiga, 630 F2d at 880. Even Judge Edwards's concurrence in Tel-Oren, which rejected an international norm against private acts of torture, conceded that official torture violates customary international law. Tel-Oren, 726 F2d at 795 (Edwards concurring).
administration has expressed official anti-torture views. All of these statements and laws support the existence of an anti-torture norm.

International legal scholars agree, perhaps unanimously, that there is an international custom against torture. Even scholars critical of the “new” customary international law, the part of customary international law in which the torture prohibition falls, concede that the torture norm exists; their objections are that (1) its foundation is illegitimate; (2) the norm does not accurately reflect state practice; and (3) its judicial and academic support is the product of fiat, not reasoned reflection and analysis.

All of this may be true, but the critics have aimed their fire at the wrong level of analysis. This Comment looks at what the law is, not whether the law is properly founded. The Supreme Court cautioned that academic work, for the purposes of the courts, should be relied upon “not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.” Further, whether or not the norm has a questionable pedigree, its independent life bootstraps its legitimacy. It might have been utterly foundationless at birth, but its existence has helped animate state (rhetorical) compliance, scholarly articles, and judicial decisions, all of which legitimize the norm.

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98 See Henckaerts, 21 Refugee Survey Q at 190 (cited in note 84).

99 See Curtis A. Bradley and Jack L. Goldsmith, III, The Current Illegitimacy of International Human Rights Litigation, 66 Fordham L Rev 319, 345 (1997) (noting “academic commentators have almost uniformly endorsed the modern position” of customary international law, of which the norm against torture is a part).

100 New customary international law is distinguished from its traditional cousin on at least three grounds: it is less concerned with actual state practice, it can develop at a quicker pace, and it speaks to the treatment of individuals rather than just to state-to-state relations. Curtis A. Bradley and Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv L Rev 815, 842 (1997).


102 Sosa, 542 US at 734, quoting The Paquete Habana, 175 US at 700 (emphasis added).

103 States’ acts may not always obey the norm against torture, but the violators do not claim to be in non-compliance. See Henckaerts, 21 Refugee Survey Q at 190 (cited in note 84).
Though state custom, by itself, may not fully establish an international norm against torture, the other sources of custom—scholarly writings and official state pronouncements—conclusively do. Further, torture falls under the “new” set of customary international law, meaning that conclusive evidence of rhetoric can outweigh weaker empirical evidence. Under this test, there is an international custom against torture.

2. Opinio Juris

The opinio juris requirement—states comply with the norm against torture out of a sense of legal obligation—is also often hard to find. One typically relies on the same evidence used to prove the existence of a custom—treaties and conventions, for example—but this dual use may lead to a problem of circularity.

Still, one can infer that the United States undertook a sense of legal obligation by entering into binding anti-torture agreements. Some of these agreements, for example, the Convention Against Torture, vested the United States with legal duties. Even if the United States did not observe the anti-torture norm for opinio juris reasons beforehand, the agreements’ legal responsibilities mean that subsequent compliance flows from, at least in part, a sense of legal obligation. Opinio juris does not require the exclusion of alternate state motivations. Even if the United States did not torture for reasons independent of legal duties, the opinio juris requirement is met because one of the US motives was legal obligation.

3. Jus Cogens

Most examples of customary international law condition binding force upon state consent. If a state does not consent to be bound by an international norm, if it persistently objects, the state cannot be held liable for violating the norm once it crystallizes into customary international law.

Jus cogens is an exception to the default requirement of state consent. Customary international law that is jus cogens requires universal compliance; a state cannot lawfully derogate from that norm or contract around it. The

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104 See discussion around note 100.
105 The United States’s consent to the Convention Against Torture was conditioned on reservations, understandings, and declarations (“RUDs”), but these RUDs did not undercut the principle that the United States was committing itself to some legal obligations.
106 Perhaps because torture is politically unpopular.
customary international law of torture is a vibrant example of a *jus cogens* norm that scholars and tribunals have consistently recognized.

The *jus cogens* facet further cements this law’s existence. Non-*jus cogens* laws can be changed and repealed by consistent state violation. *Jus cogens* norms cannot because violations are “not viewed as evidence against their CIL [customary international law] status, but rather [are] disregarded as mere lawbreaking.” Non-compliance, even if widespread, does not impeach the prerequisite state custom.

4. The Definition of Torture

Torture is defined in myriad instruments and there is no single, consistent definition. Fortunately, this Comment only needs to articulate torture’s outer contours. An exhaustive definition does not matter if the United States breached torture’s minimum requirements.

The Convention Against Torture defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The United States acceded to this convention, but its accession was subject to a set of reservations, understandings, and declarations (“RUDs”). These RUDs declared that the United States understood torture to require a specific intent to “inflict severe physical or mental pain or suffering” where “mental pain or suffering refers to prolonged mental harm” from, inter alia, “the intentional infliction or threatened infliction of severe physical pain or suffering” or “the threat of imminent death” of the victim or a third party.

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108 *Prosecutor v Furundzija*, Case No IT-95-17/1, Judgment, ¶¶ 155–56 (Dec 10, 1998); *Sosa*, 542 US at 762 (Breyer concurring in part and concurring in the judgment); *Nuru*, 404 F3d at 1222, citing *Siderman de Blake*, 965 F2d at 717; *Prinz v Federal Republic of Germany*, 26 F3d 1166, 1173 (DC Cir 1994), citing Third Restatement § 702; cmt n.


110 Convention Against Torture, art 1 (cited in note 63).

111 Convention Against Torture, reservation made by the United States (Oct 21, 1994), ¶ II.1(a) (hereinafter US RUDs); Implementation of Torture Convention in Extradition Cases, 22 CFR § 95.1(b) (2005). This altered definition is codified at 18 USC § 2340 (2000). The McCain Amendment's definition of “cruel, inhuman, or degrading treatment or punishment” is explicitly tied to these US RUDs.
The United States further narrowed this definition, holding that the torture label “only appl[ies] to acts directed against persons in the offender's custody or physical control”\textsuperscript{112} and that “the term ‘acquiescence’ requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.”\textsuperscript{113}

The Justice Department’s Office of Legal Counsel interpreted this definition to require “pain that is difficult to endure . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”\textsuperscript{114} Mental pain or suffering “must result from one of the predicate acts listed in the statute” and “must result in significant psychological harm of significant duration, e.g., lasting for months or even years.”\textsuperscript{115}

Ignoring this technical, narrow definition for a moment, President Bush has publicly claimed that he is opposed to torture, broadly defined: “the President has been very clear on the issue of torture, which is we are against it—and torture by anyone’s common-sense definition of it, not some fancy definition.”\textsuperscript{116} Independent of this rhetoric, the US definition of torture is very narrow.

Because states cannot make treaties to contract around \textit{jus cogens} norms,\textsuperscript{117} US obligation under the norm against torture should be unaltered by its RUDs. One can put this issue aside, however, because the abuse of detainees consisted of torture even under the restrictive US definition.

Therefore, for this Comment, torture is defined as an act (1) specifically intended to inflict (2) severe physical pain that is difficult to endure and equivalent to serious physical injury or (3) mental pain or suffering lasting for a significant duration and arising from the intentional or threatened infliction of

\textsuperscript{112} US RUDs at ¶ II.1(b); 22 CFR § 95.1(b)(4).
\textsuperscript{113} US RUDs at ¶ II.1(d); 22 CFR § 95.1(b)(5).
\textsuperscript{114} Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, to Alberto R. Gonzales, Counsel to the President, \textit{Re: Standards of Conduct for Interrogation under 18 USC §§ 2340–2340A} 1 (Aug 1, 2002) (hereinafter Bybee Torture Memorandum) (on file with author).
\textsuperscript{115} Id. This memorandum was eventually rescinded by the Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice, to James B. Comey, Deputy Attorney General, \textit{Re: Legal Standards Applicable Under 18 USC §§ 2340–2340A} (Dec 30, 2004) (on file with author).
\textsuperscript{116} Dobriansky and Kozak press conference (cited in note 97).
\textsuperscript{117} See Vienna Convention on the Law of Treaties (1969), art 53, 8 ILM 679, 698–99. The United States is not a party to this convention, but the principle, as a matter of common sense, should apply just the same.
severe pain or suffering, the threat of imminent death, or the threat that another
person will be subject to the same. The victim must be within the actor's
custody or physical control, the abuse must be official and not private conduct,
and a public official can only be vicariously liable if he instigated the torture or
had actual prior knowledge of its existence and failed to stop it.

B. DID THE UNITED STATES VIOLATE THE CUSTOMARY
INTERNATIONAL LAW OF TORTURE?

1. Was the Abuse Torture?

The above definition sets out three necessary elements of torture: first, the
victim must be within the alleged torturer's custody or physical control; second,
the torturer must have specific intent; third, the torture must cause severe
physical or mental pain. These elements are combined with a final general
requirement: torture must be the product of official acts.\textsuperscript{118} US abuse satisfies all
four requirements, thus the abuse of detainees violates the customary
international law against torture.

\textit{a) Custody or physical control.} This element is the easiest to prove. All of
the detainees at Guantanamo and the Afghani bases were under the custody and
physical control of the abusing US agents, thereby meeting the first element's
requirement.

\textit{b) Specific intent.} The element of specific intent requires a more
involved proof. The cold record relied upon in Section I does not include
confessions by US agents that they abused detainees with the specific intent to
torture. But, as a matter of logic, specific intent can be inferred from conduct;\textsuperscript{119} I make such an attempt here.

Because torture requires the specific intent to inflict severe physical or
mental pain, abuse that is incidental to interrogations is per se not torturous.
Under this metric, yelling at detainees, feeding detainees military rations instead
of hot meals, and "mild, non-injurious physical contact"\textsuperscript{120} are not torture; one
can reasonably infer from these acts that the intent was to gain information, not
to torture, and any discomfort was ancillary to this primary goal.

But information gathering can cross into sadism. Jumping on a detainee's
head until he has a stroke that paralyzes his face,\textsuperscript{121} forcing a detainee's head

\textsuperscript{118} Third Restatement § 702 cmt b (cited in note 81).
\textsuperscript{120} See Mac Donald, 15 City J at 30 (cited in note 42).
\textsuperscript{121} Leonnig, Guantanamo Detainee Suing U.S., Wash Post at A2 (cited in note 18).
under water and inflicting electric shocks, raping detainees and photographing them naked, or threatening a detainee that "soldiers would rape his wife," are not techniques designed to elicit information but are cruel acts motivated by a specific desire to severely harm detainees. This sadistic motive is the specific intent to torture.

This inference is buttressed by the fact that many of the grossly abusive techniques did not produce intelligence. If the sadism yielded information, one could argue that the abuse, while severe, was still motivated by the search for intelligence. But one cannot reasonably claim that abuse that is ineffective at developing intelligence originated from a motive to gather intelligence. Why persist in using ineffective techniques if one is truly seeking knowledge? The only reasonable answer is that the abusers had the specific intent to torture.

c) Severe physical or mental pain. The touchstone in proving severe pain is the actual acts of abuse and, like specific intent, not all abuse rises to the level of torture. But shooting a detainee in the groin and withholding pain medication, beating and deafening a detainee by rupturing his right eardrum, or repeatedly raping a prisoner are all injuries that result in severe, hard-to-endure physical pain. Indeed, the rupturing of the right eardrum is per se organ failure. Having one's wife threatened with gang rape is a threat of immense third-party suffering that could cause intense long-term psychological distress. All of these examples demonstrate that some abuse caused severe harms, thereby proving the third element.

d) Official acts. Only official conduct can transform torture-like abuse into actual torture; abuse by private individuals, no matter how injurious, by definition cannot be torture. The abuse of detainees was the product of official acts because they were committed by US agents, who were supervised and controlled by the US government, and who acted pursuant to official US policy.

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122 Detainee Alleges Torture, St Petersburg Times at 2A (cited in note 19).
123 Rumsfeld, No 1:05-cv-01201 at ¶ 158.b.
124 Id at ¶ 155.b.
125 See Bald e-mail (noting that the “torture techniques” at Guantanamo “have produced no intelligence of a threat neutralization nature to date”) (cited in note 35).
127 Rumsfeld, No 1:05-cv-01201 at ¶ 161.a-162.
128 Id at ¶ 158.b.
129 See Bybee Torture Memorandum at 1 (cited in note 114).
130 Rumsfeld, No 1:05-cv-01201 at ¶ 155.b.
131 Third Restatement § 702 cmt b (cited in note 81).
The logical chain between acts committed by US officials and official acts is self-evident. But, some critics contend that though US agents committed the abuse, it was not official conduct because the offenders were acting contrary to official policy. The other two rationales—(1) the offenders were supervised by the US chain of command and (2) official US policy permitted abuse—must be developed to rebut this challenge.

Most of the abusers were US servicemen who were subject to the command and control of the military's chain of command. The definition of torture excuses the acts of subordinates if their superiors did not have prior knowledge of the torture; it is official conduct only when a superior has prior knowledge and fails to stop the abuse. Detainees were repeatedly abused in US custody. Commanders could have been ignorant of the initial incidences until the abuse became systemic—as it did at Guantanamo and in Afghanistan. After umpteenth acts of abuse, only a fool would believe that, if left unchecked, the abuse would not continue.

Further, abuse was reported in the press, lawsuits, and official government channels. This abuse, once systemic, must have given the superiors reason to suspect continued abuse; if not, the commanders were willfully and woefully ignorant. The marginal acts of systemic abuse were official conduct, transforming the sadism into torture.

Official US policy also sanctioned abuse prior to its commission. Secretary Rumsfeld approved “counter-resistance techniques.” These stress techniques have resulted in lasting, significant pain and injury, and according to military investigations, they resulted, at least in part, from Secretary Rumsfeld's authorization. In addition to explicit authorization, the Bush Administration implicitly authorized abuse if its commanders deemed it militarily necessary.

These four elements—US control, specific intent, severe physical or mental harm, and official policy—establish that some of the detainee abuse constituted torture and thereby violated customary international law.

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133 See the ACLU's FOIA documents (cited in note 34).
134 Rumsfeld Approval Memorandum (cited in note 52).
135 See Rumsfeld, No 1:05-cv-01201 at ¶¶ 156, 162, 165.
137 Memorandum from President Bush at ¶ 5 (cited in note 3); Memorandum from Secretary Rumsfeld to the Joint Chiefs of Staff (cited in note 48).
2. How Is the United States Bound by the Customary International Law of Torture?

Customary international law imposes obligations on nations, but it does not dictate how or if a state discharges these duties.\textsuperscript{138} The *jus cogens* norm against torture binds the United States, but its domestic law controls how this binding force is expressed.

The Supreme Court is typically reluctant to give domestic force to customary international law\textsuperscript{139} and it is generally understood that Congress has the power to violate it.\textsuperscript{140} Regarding the international norm against torture, however, neither the Supreme Court nor Congress has been shy about its domestic application.

The First Congress passed the Alien Tort Statute ("ATS") as part of the Judiciary Act of 1789.\textsuperscript{141} The ATS is a one sentence pronouncement that gives federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."\textsuperscript{142} The sentence's meaning had been vociferously debated by scholars and courts, but was conclusively decided by the Supreme Court in *Sosa v Alvarez-Machain*: ATS is purely jurisdictional and does not substantively convert international law into new domestic causes of action.\textsuperscript{143} The Court further held that ATS only permits suits based on a small subset of modern-day customary international law, specifically "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."\textsuperscript{144} The customary international norm against torture is implicitly included in this answer; aliens can sue in federal court for injuries caused by official acts of torture.

The international norm against torture, as shown in Section II.A.1, has been repeatedly recognized in domestic US law. In dicta, the *Sosa* Court stated that the anti-torture norm is sufficiently specific and established to allow aliens to sue under ATS.\textsuperscript{145} While other areas of customary international law may not

\textsuperscript{139} See *Sosa*, 542 US at 723–25.
\textsuperscript{140} See Third Restatement § 115(1)(a) (cited in note 81).
\textsuperscript{141} The act has been modified since its initial passage and is now codified at 28 USC § 1350 (2000). Courts and scholars have referred to this law both as the Alien Tort Statute and as the Alien Tort Claims Act.
\textsuperscript{142} Id.
\textsuperscript{143} 542 US at 714.
\textsuperscript{144} Id at 725.
\textsuperscript{145} Id at 728 (noting a clear, affirmative congressional mandate that "the Torture Victim Protection Act of 1991, 106 Stat 73 [Pub L No 102-256] provide[s] authority that establish[es] an
fall under ATS’s rubric, the norm against torture does and aliens may sue US officials to vindicate it.

Some might caution against this reading. Indeed, despite The Paquete Habana’s claim that “[i]nternational law is part of our law,” courts have been reluctant to allow domestic suits based on international customs that lack affirmative domestic integration. Further, if one can enforce the customary international right against torture under ATS, perhaps domestic courts would slide down the notorious “slippery slope” and allow other international causes of action.

A thorough examination of Sosa mutes both of these concerns. Although Congress has not incorporated customary international law wholesale, the Torture Victim Protection Act of 1991 established a “clear mandate” for “an unambiguous and modern basis for federal claims of torture and extrajudicial killing.” The international norm against torture has Congress’s imprimatur; ATS torture suits will not rest on empty judicial fiat.

Sosa also clearly limits the substantive domestic reach of customary international law. Torture’s “affirmative authority is confined to [that] specific subject matter” and courts have “no congressional mandate to seek out and define new and debatable violations of the law of nations” nor should they undertake “greater judicial creativity.” The customary international law of torture has been solidly established, clearly delineated, and affirmatively incorporated into domestic law. Torture litigation will be a “sticky staircase”—it will not create a slippery slope because courts have been explicitly instructed not to venture beyond this specific international norm.

While the customary international law of torture and ATS do not bind the United States in a strict sense—the United States still has the ability, as a factual matter, to torture—it does bind the United States by imposing costs and disinclining behavior. This binding force is the same for individuals under domestic law. Persons have the ability to murder and steal, but they are bound to pay the costs imposed by criminal law.

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unambiguous and modern basis for federal claims of torture and extrajudicial killing”) (internal quotations omitted).

146 The Paquete Habana, 175 US at 700.
147 See Tel-Oren, 726 F2d at 813 (Bork concurring).
148 See id at 812 (Bork concurring).
149 Sosa, 542 US at 728 (internal quotations omitted).
150 Id.
III. SHOULD THE CUSTOMARY INTERNATIONAL LAW OF TORTURE BIND THE UNITED STATES?

This Comment has shown that there is a compulsory customary international law against torture, that this norm binds the United States, and that the United States violated it by torturing War on Terror detainees. This Section steps back to a higher level of abstraction, asking whether the United States should be bound by the customary international law against torture. I conclude that the anti-torture norm’s binding power is good policy and that ATS litigation is a good method to apply this norm to the United States.

I will not consider moral arguments in this Section. Morality is usually debated at the level of first principles, where arguments aim to convince one to agree or disagree with a moral axiom; moral debates rarely reduce to nuanced, fine-grained analysis. Also, there are good reasons to suggest that states comply with international law for instrumental and not moral reasons; a moral analysis might not engage the true motives animating state behavior. This Section will focus on the instrumental reasons because they implicate policy and permit nuanced analysis and debate.

ATS litigation, the current method by which the customary international norm against torture binds the United States, yields tort damages to successful plaintiffs. These damages, paid by guilty official torturers, are crucial to establishing an “efficient” level of torture, an equilibrium that may rest at some or no incidences of abuse.

A. WHY THE UNITED STATES SHOULD NOT TORTURE

There are powerful reasons for the United States not to torture. Central among them are: torture is antithetical to the American ideal and rhetoric; torture seems to be, at best, only moderately effective at producing good intelligence; and US torture risks that Americans abroad will be tortured themselves.

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153 See Bald e-mail (noting that Guantanamo’s torture techniques “have produced no intelligence of a threat neutralization nature to date”) (cited in note 35).

154 Pamela Hess, Rumsfeld Sued in Detainee Torture Case, UPI (Mar 1, 2005) (noting the concern of Rear Admiral John Hutson, a former Navy Judge Advocate General, that “[i]n the future, our troops may not be the captors but the captives”).

828 Vol. 6 No. 2
Is the United States Bound by the Customary International Law of Torture?

There are less obvious reasons as well. US officials, in addition to American servicemen and travelers, also incur risks from US torture. In December 2004, a German federal prosecutor began investigating charges against high-ranking US officials, including Secretary Rumsfeld, Undersecretary of Defense for Intelligence Stephen A. Cambone, and former Director of Central Intelligence George Tenet.  Though the German prosecutor declined to pursue the case, this example highlights the collateral effects of torture. Justice Breyer noted that torture is one of the few international norms with such universal agreement that “every nation’s courts” has the power to “adjudicate foreign conduct involving foreign parties.” It is possible that Germany’s investigation of US conduct foreshadows the future. Even if US officials are never actually tried overseas, a lack of American legal process to check torture makes certain that the United States will bear the costs of opposing these trials and their concomitant risks.

A second collateral effect of US torture is that it undercuts the power of customary international law. If followed by other states, the US policy of disregarding international norms could undermine the international system. Just as individuals interact within the shadow of domestic law, states order their relationships and treaties against the background of customary international law. This is especially true in international humanitarian law. Treaty-based humanitarian law, such as the Geneva Conventions, “does not... regulate a large proportion of today’s armed conflicts in sufficient detail.” This under-regulation is because “the bulk of current armed conflicts are non-international and such conflicts are subject to far fewer treaty rules than international ones.”


157 Sosa, 542 US at 762 (Breyer concurring in part and concurring in the judgment).


159 Henckaerts, 21 Refugee Survey Q at 187 (cited in note 84).

160 Id.
Customary international law "fills this gap in providing rules that are applicable to all armed conflicts, irrespective of their intensity." US torture, then, could unintentionally weaken or eliminate these background legal checks.

The War on Terror seeks more than the simple neutralization of its enemies; the United States is seeking to win the hearts and minds of its would-be adversaries. To do this, the United States must not just win battles, but "preserve[] U.S. credibility and moral authority by taking the high ground" to win international support and dissuade nascent terrorists from taking up arms against America. Even if torture yielded tactical advantages—and it is not clear that it does—these short-term gains are outweighed by the long-term damage to US strategy. Fyodor Dostoyevsky was rumored to have said that "[t]he degree of civilization in a society can be judged by entering its prisons." Nothing undercuts the image of American freedom and tolerance more than the brutal, graphic torture of then-defenseless detainees.

B. WHY THE UNITED STATES SHOULD CONSIDER TORTURE

The strongest reason why the United States should torture detainees is because torture provides useful intelligence that cannot be accessed via kinder interrogation methods. While the truth of this theory has been supported by some and rebutted by others, it is clear that military necessity does not conclusively warrant or justify torture.

The next best reason to torture is, ironically, to ensure that international humanitarian law is obeyed. John C. Yoo notes that "effective enforcement of international law, including the laws of war, requires the existence of incentives for compliance and disincentives for noncompliance." Al Qaeda and the Taliban do not observe the laws of war and the United States has not been able to successfully incentivize their compliance. Perhaps American torture might

161 Id.
162 Memorandum from Colin L. Powell, Secretary of State, to Alberto R. Gonzales, Counsel to the President and Assistant to the President for National Security Affairs, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan 3 (Jan 26, 2002) (on file with author).
164 See Mac Donald, 15 City J at 28 (cited in note 42). See also Section I.D.2.b.
165 See Bald e-mail (cited in note 35). See also Section I.D.2.b.
166 But, as noted in Section III.C, this reason could still be considered by policymakers.
167 Yoo, 3 Chinese J Int'l L. at 137 (cited in note 7).
168 See Gonzales Draft Memorandum at 3 (noting that US compliance with the laws of war has not prompted "our adversaries in several recent conflicts" to reciprocate) (cited in note 69).
be enough of a disincentive to force them back into harmony with the laws of war.

This argument echoes the rationale behind the 1968 US bombing of Bentre, Vietnam: “It became necessary to destroy the town to save it.” While it is possible that US torture—which is itself a violation of international law—could yield eventual compliance with humanitarian law, this policy does not evince respect for the spirit or substance of international law.

C. ATS Litigation Yields an Efficient Outcome

Multiple considerations should influence the decision to torture. Perhaps policymakers would agree with Professor Yoo’s incentive thesis or perhaps they would agree with Henckaerts’s belief about the importance of background humanitarian norms. Under the current calculus, however, it is unlikely that the wartime torturer considers any of these higher order concerns; the perceived short-term tactical gains of torture are likely considered to the exclusion of any collateral effects. ATS litigation based on the customary norm against torture is one way to ensure that this skewed reasoning does not happen.

All rational decisions, including the decision to torture, are products of cost-benefit analyses that force an entity to allocate its finite resources to maximize its goals. Law is based on this calculus: one obeys the law if the benefits of obedience outweigh the costs. Similarly, one breaks the law if the costs of noncompliance are less than the benefits of disobedience.

Humans, however, often use intellectual shortcuts instead of exhaustive cost-benefit analyses. The War on Terror’s torture decision is victim to this bounded rationality. If torturers were to face liability under ATS, they would have powerful incentives to rationally analyze the torture policy and thereby internalize torture’s externalities; the concern of possible litigation sharpens the mind and the threat of damage payments motivates one to consider—and perhaps alter—one’s behavior.


\[\text{For example, a company should breach a contract if it would derive$100 in benefit and only have to pay$50 in damages; the company realizes a net of$50. This reasoning need not be strictly financial: the law’s moral force is but one of its costs and benefits. The moral opprobrium—both internal and external—that the criminal incurs is a cost of disobedience and the moral satisfaction that the law-abider reaps is a benefit.}\]


\[\text{This is true even if the policymakers do not face personal liability. The directly liable torturers could be indemnified by the United States, thereby transmitting the incentives up the chain of command.}\]
Torture has consequences that are hard to conceive and difficult to quantify. What benefit does the United States derive from torturing a detainee? What is the cost of undercutting the background norms of international humanitarian law? How much is it worth to avoid exposing US officials to foreign liability? ATS suits will force policymakers to reach these conclusions without foreclosing policy options.

This plan only imposes procedural restrictions, not substantive ones. US policy can remain adaptive—a definite asset for the War on Terror’s prosecution. ATS litigation forces the internalization of torture’s externalities, both positive and negative because potential liability prompts rationality. If the United States persists in torturing, the torture will be the product of reasoned analysis and because its harms are presumably outweighed by its general benefits.\(^\text{173}\)

One objection to this approach is that liability will make policymakers overly reluctant to torture, even if its gains are greater than its harms. This may be true on the margins, but this objection is targeted not at this Comment’s thesis but at its implementation. Similarly, if this concern is valid, it can be remedied by altering the size and gradation of damage awards. Fine-tuning damage awards will minimize the odds that the officials would choose an incorrect policy.

Another possible concern is that torture litigation under ATS would weaken torture’s moral opprobrium and thereby lead to an increase of abuse. Steven D. Levitt and Stephen J. Dubner have shown that paying fines for forbidden acts—such as paying damages for torture—can legitimize and increase the underlying conduct.\(^\text{174}\) ATS’s incorporation of customary international law might make torture just another cost of waging war. Indeed, that is exactly what will happen if torture is subject to dispassionate cost-benefit scrutiny. This is a valid concern, but it must be balanced against the status quo. Torture is currently considered to be morally wrong, yet it was routinely and systematically inflicted by US agents. The moral opprobrium is not doing much to limit acts of torture. Lawsuits, however, would force torture’s benefits and costs into policymakers’ consciousness. Hoping for the elimination of torture may be a utopian dream; hoping for its efficient and sparing use is a realistic one.

\(^{173}\) This presumes that the damages are in direct proportion to the harm. Treble damages, such as those under antitrust law, would skew the analysis. However, a multiplier of damages would be appropriate if there is a significant risk that many acts of torture would not yield lawsuits. This multiplier would balance against the odds of not being sued.