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'The Gloves Came Off': Torture and the United States after September 11, 2001

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Abstract
This article examines the use of 'enhanced interrogation techniques' in the context of international legal obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) and the domestic implementation of the international prohibition of torture into United States (US) law under 18 United States Code Sections 2340-2340A. The legal basis for the interrogation programme was a series of contentious legal memoranda written by Department of Justice Office of Legal Counsel lawyers.[1] This article examines whether the memo drafters ought to be investigated for incurring criminal liability for the consequences of their memoranda, namely under CAT and Sections 2340-2340A and what has unfolded under President Obama's administration.

Keywords
torture; Convention against Torture; 18 United States Code Sections 2340-2340A; *jus cogens*; torture memos

1. Introduction

'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[,]'[2] it is of the utmost imperative to restate that the prohibition on the use of torture is absolute, yet states continuously violate this *jus cogens* prohibition for their own purposes.[3] Torture is explicitly

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1) H Steiner, P Alston, and R Goodman, *International Human Rights in Context Law Politics Morals Third Edition* (Oxford University Press, 2007) at 252-255.

2) Universal Declaration of Human Rights (UDHR), GA res. 217A (III), UN Doc A/810 at 71 Preamble.

3) Steiner *et al.*, supra n. 1, at 225; M Shaw, *International Law* 6th ed (Cambridge University Press, 2008) at 326-327.

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prohibited in Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT).[4]

United States (US) state practice under the administration of former President George W. Bush brought the age-old problem of states engaging in torture to the forefront of the international community's attention, in addition to national and international media coverage of this issue.[5] A chilling description of this period comes from Mark Danner, in which he states that 'the gloves came off'.[6] This heightened attention arose partially because of the so-called 'War on Terror' beginning in late 2001,[7] in which the Bush administration and the Central Intelligence Agency (CIA) began a system of interrogation using draconian interrogation methods.[8] Before and after the 2003 Iraq war, news came out regarding the use of torture in obtaining intelligence from detainees in various parts of the world, ranging from Iraq to Guantanamo Bay, Cuba to Poland.[9] Further, the treatment of detainees at Abu Ghraib raised questions of how US troops behaved abroad, what kinds of interrogation techniques were used, who allowed and directed these techniques to be used, where they were used, and how detainees were being treated, among many others questions including overarching questions of legality.[10] Perhaps one of the reasons for the increase in this practice was the attempt of the Bush administration to find a connection between al-Qaida and Iraq.[11]

Were these instances and reports of torture examples of the US armed forces and intelligence officers behaving badly, or were these symptomatic of deeper structural, policy, and/or legal problems? Perhaps all of these factored into the problem, as the Bush administration systematically stretched its understanding of the US' international and national legal obligations not to torture and attempted to justify this practice in a series of highly contentious legal memoranda written by Jay Bybee and John Yoo, among others.[12]

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4) DJ Harris, *Cases and Materials on International Law Sixth Edition* (Sweet & Maxwell, 2009), at 758-765.

5) J Mayerfield, 'Playing by Our Own Rules: How US Marginalization of International Human Rights Law Led to Torture'(2007) 28 *Harvard Human Rights Journal* 20 89-140, at 90.

6) M Danner, 'US Torture: Voices from the Black Sites', *The New York Review of Books*, 9 April 2009, reporting that Cofer Black, formerly head of the CIA Counterterrorism Center, testified before Senate Intelligence Committee: 'All I want to say is that there was "before" 9/11 and "after" 9/11. After 9/11 the gloves came off[,]', available at: <http://www.nybooks.com/articles/archives/2009/apr/09/us-torture-voices-from-the-black-sites/?pagination=false.

7) Mayerfield, supra n. 5, 90; M Nowak, 'What practices constitute torture, US and UN Standards' (2006 28 (4)) *Human Rights Quarterly* 809-841, at 814; Steiner *et al.*, supra n. 1, at 252-262.

8) Danner, supra n. 6.

9) Ibid.

10) Mayerfield, supra n. 5 at 134-136.

11) A Lowrey, 'The Torture Timeline', *Foreign Policy*, 23 April, 2009, available at <http://www.foreignpolicy.com/articles/2009/04/22/the_torture_timeline>, 1.

12) Steiner *et al.*, supra n. 1, at 252-255; Mayerfield, supra n. 5, at 102. While President Bush seemed to believe that he was capable of ordering torture, as Mayerfield argues, President

With the election of President Barack Obama in 2008 and President Bush's departure, there was the possibility that US policy would change. In the instance of torture, however, has the US really changed its procedures and practices in interrogating and retrieving information from detainees? Has it changed the legal rhetoric surrounding 'unlawful combatants' previously used by John Yoo regarding the status of detainees at Guantanamo Bay and other such prisons?[13]

Under the Obama administration, some overtures have been made regarding the rhetoric on torture and the transparency of the government. When the Obama administration released the torture memoranda, many expressed outrage.[14] However, reports of torture in Afghanistan with possible US involvement[15] in the absence of Department of Justice (DOJ) inquiry into the possible criminal violations of the prohibition of torture in US law have raised concerns of Obama's record on torture.[16]

This article examines the background of interrogation techniques in the US under the Bush administration, whether there has been adequate implementation of the CAT into domestic law, whether there is a case for prosecution, and if so, why this has not occurred.[17] Jamie Mayerfield suggests that there has been a lack of prosecution because there has been an under-integration and respect for international human rights law in the American legal system, despite treaty and international legal obligations to implement international legal instruments such as CAT into domestic law.[18] However, the relevant provisions of CAT have been implemented into domestic law in 18 United States

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Bush's statement seems more like a statement of the legality of the interrogation methods used, underlying which was a belief that they did not constitute torture. See also 'Bush: "We do not torture" terror suspects', MSNBC, 7 November, 2005, available at: <http://www.msnbc.msn.com/id/9956644/ns/us_news-security/t/bush-we-do-not-torture-terror-suspects/#.T9SrOtXB-a8>.

13) J Yoo, 'The Status of Soldiers and Terrorists under the Geneva Conventions', (2004) 3 *Chinese Journal of International Law* at 137; J Yoo and J Ho, 'The Status of Terrorists', (2003) 44 *Virginia Journal of International Law* 207. B Canfield, 'The Torture Memos: the Conflict between a Shift in US Policy towards a Condemnation of Human Rights and International Prohibitions against the Use of Torture', (2005 (33)) *Hofstra Law Review* 1049-1090, at 1076.

14) T Hegghammer, 'Irreparable damage', *Foreign Policy*, 4 May 3009, available at: <http://experts.foreignpolicy.com/posts/2009/05/04/irreparable_damage>.

15) See, for example, A Rubin, 'UN finds systematic torture in Afghanistan', *New York Times*, 10 October 2011, available at <http://www.nytimes.com/2011/10/11/world/asia/un-report-finds-routine-abuse-of-afghan-detainees.html?ref=global-home>.

16) See E Lichtblau and E Schmitt, 'US Widens Inquiries into 2 Jail deaths', *New York Times*, 30 June 2011, available at: <http://www.nytimes.com/2011/07/01/us/politics/01DETAIN.html?pagewanted=1>.

17) Nowak, supra n. 7, at 810. Canfield, supra n. 13, at 1075.

18) Mayerfield, supra n. 5, at 94.

Code Sections 2340-2340A.[19] This article begins with a short history of torture in the US and an examination of international law on torture and US obligations under the current international legal regime. It then proceeds to a discussion in the domestic integration of international law/US international legal obligations on torture into US domestic law in Sections 2340-2340A. To further explore the impact of domestic implementation of the international legal obligations on torture on political decisions, this article discusses the legal analysis on torture in the torture memos in order to understand the logic behind the conclusions drawn by the Department of Justice Office of Legal Counsel that led to the interrogation techniques at detention centers abroad.[20] This article also notes rhetorical differences between the Bush and Obama administration views on torture and its use at detention centers in interrogation techniques. Finally, this article argues that while there has been sufficient legislative integration of CAT into the US' federal law, there has been insufficient political will to prosecute those employed by or connected to the United States government for the crime of torture as set out in CAT and in Sections 2340-2340A.[21]

2. Torture in the US and US International Legal Obligations

John T. Parry argues that the US 'ha[s] used torture as a tool of foreign policy since 1900 [... since] the United States has been an acknowledged imperial power.'[22] The US also has a history of practicing torture abroad as a 'counter-insurgency tactic';[23] during the Cold War, 'torture by proxy' emerged, in which the US essentially outsourced torture and financially supported military regimes to extract torture; torture specialists, or security officials, were instructed by the CIA and supervised by US employees.[24] This also resulted in the CIA KUBARK (code name for CIA) Counterintelligence Interrogation handbook, which is now a declassified manual on how to interrogate suspects

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19) MJ Garcia, 'U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques', 25 January 2008, CRS Report for Congress, available at: <http://fpc.state.gov/documents/organization/101750.pdf >, 8. 18 United States Code Sections 2340-2340A ('US Code Sections 2340-2340A'), available at: <http://www.gpo.gov/fdsys/pkg/USCODE-1994-title18/pdf/USCODE-1994-title18.pdf >, at 429-430.

20) Steiner *et al.*, supra n. 1 at 252-255.

21) See K Greenberg, 'What the Torture Memos Tell Us', (2011) 51 *Survival: Global Politics and Strategy* 5-12, at 9.

22) J Parry, 'Torture Nation, Torture Law', (2008-2009) 97 *The Georgetown Law Journal* 1001-1056, at 1004.

23) Mayerfield, supra n. 5, at 97.

24) Ibid.

against their free will.[25] Torture is contrary to the following US international legal obligations under customary international law and US international treaty obligations.

2.1. Customary International Law

As the prohibition on torture is absolute and recognized as a *jus cogens* norm, the US is proscribed from engaging in torture.[26] Despite the prohibition on torture by the international community, does contrary state practice negate this? The International Court of Justice ('ICJ') in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* ('*Nicaragua Case*') stated that state practice does not need to be absolute for there to be a customary rule; it needs to be general and any contrary practice would be a violation.[27] The fact that there is a recognized and acted upon prohibition on torture is enough to satisfy the requirement of state practice.[28]

Further, in the *Prosecutor* v *Brđanin*, the Defence argued that US state behavior, as indicated in one of the torture memoranda from the United States Department of Justice, indicated a change in customary international law (CIL) 'on the amount of harm that must have been caused by the act'.[29] However, the Appeals Chamber restated that CAT sets out the crime of torture, and that it 'may be considered to reflect [CIL,]'[30] though '[n]o matter how powerful or influential a country is, its practice does not automatically become customary international law.'[31]

2.2. US International Treaty Obligations

As the US has ratified many international human rights treaties, it is legally obligated to uphold the norms and procedures set out regarding torture. In addition to CAT, the US is bound by the United Nations Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).[32] Regarding the use of torture in armed conflict, the US is bound by the 1949 Geneva Conventions (GC), Additional Protocol II of 1977 and III of

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25) Ibid. at 97-98. Parry, supra n. 22, at 1009-1011.
26) Harris, supra n. 4, at 758.
27) International Committee of the Red Cross, Customary IHL, Rules, Introduction, Assessment of Customary International Law, available at: <http://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin#refFn35>, citing the ICJ, *Nicaragua Case*, para. 186 in footnote 35.
28) Shaw, supra n. 3, at 326-327.
29) *Prosecutor v. Brđanin*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-99-36-A, 3 April 2007, para. 244.
30) Ibid. para. 246.
31) Ibid. para. 248.
32) Steiner *et al.*, supra n. 1, at 226-227.

2005 (AP), and has recognised much of Additional Protocol I as customary international law.[33]

A. *Universal Declaration of Human Rights*

'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'[34] This statement in Article 1 of the UDHR sets out the basic principle of human rights that ought to be respected by all states. Further, in Article 3, it states that '[e]veryone has the right to life, liberty and security of person.'[35] This applies to torture, as it affirms that every individual has the right to be free from harm and implicitly states that governments do not have the right to attack or transgress on this right. Crucially, Article 5 articulates in no uncertain terms that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'[36]

B. *Convention Against Torture*

The most significant international treaty regarding the US' international legal obligations on torture, CAT sets out the definition of torture in Article 1(1):

> For the purposes of this Convention, torture means 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, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[37]

Antonio Cassese stated that much of Article 1(1) is now customary international law.[38] According to CAT, state parties are required to enact domestic law that criminalizes the use of torture under Articles 2(1) and 4 of CAT.[39] The US ratified CAT in October 1994, stating that torture is 'categorically denounced as a matter of policy and as a tool of state authority[,] and that it] constitutes a

33) G Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010); Steiner *et al.*, supra n. 1, at 396.
34) UDHR, Article 1.
35) Ibid.
36) Ibid.
37) Nowak, supra n. 7, at 817; CAT, Article 1(1).
38) A Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2008), at 152.
39) Shaw, supra n. 3, at 327; CAT Article 2(1). L Oette, 'Implementing the prohibition of torture: the contribution and limits of national legislation and jurisprudence', (2012) 16 (5) *The International Journal of Human Rights* 717-736, at 718.

criminal offence under the law of the [US],'[40] further stating that '[n]o official of the Government [...] is authorized to commit or to instruct anyone else to commit torture.'[41]

Though the US is bound by CAT, its reservations indicate that it considers itself bound by the obligation under Article 16 to prevent ['']cruel, inhuman or degrading treatment or punishment['] only insofar as [it is] prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.'[42] However, the US understands and accepts the definition of torture and that its victims would be under 'the offender's direct custody or physical control' and 'that the term 'acquiescence' requires that the public official [...] have awareness of such activity', though the US does not consider itself bound by Article 30(1).[43] Further, this does not mean that the US has relieved itself of its obligation to enact domestic legislation to criminalize torture.[44]

2.3. Torture and the Bush Administration

Possible violations of this prohibition on the use of torture arose again at the forefront of international attention due to practices and policies of the Bush administration in the wake of 9/11/01 and with the rise of the war on terror.[45] The legal foundations of Bush's counter-terrorism policies aroused much debate about the question of state use of torture, and whether the US' actions violated its international obligations and national legislation.[46] This became particularly evident in issues regarding treatment of detainees at Abu Ghraib and Guantanamo Bay and reports of secret prisons around the world.[47]

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40) 'Consideration of Reports Submitted by State Parties under Article 19 of the Convention Initial reports of States parties due in 1995 Addendum United States of America', 15 October 1999, Committee against Torture, 9 February 2000, available at: <http://www.state.gov/documents/organization/100296.pdf>, para 6.

41) Ibid.

42) 'US reservations, declarations, and understandings, CAT', Congressional Record S17486-01 (daily edition, 27 October, 1990), available at University of Minnesota Human Rights Library at: <http://www1.umn.edu/humanrts/usdocs/tortres.html>. See Markovic, supra n. 95, 354.

43) Ibid.

44) CAT Articles 2(1) and (4); Oette, supra n. 39 at 718.

45) Steiner *et al.*, supra n. 1 252-262.

46) See Nowak, supra n. 7.

47) E Bumiller, DE Sanger and RW Stevenson, 'The Conflict in Iraq: The President; Bush Says Iraqis Will Want G.I's To Stay To Help', *New York Times*, 28 January 2005, available at:<http://query.nytimes.com/gst/fullpage.html?res=9F04EFDE143BF93BA15752C0A9639C8B63&pagewanted=all>, 2. See also R Seamon, 'US Torture as Tort', (2006) 37 (3) *Rutgers Law Journal* 715-806 at 720, footnote 11.

A. *Rhetoric*

Despite the fact that the use of 'enhanced or coercive interrogations began in 2002',[48] in a 2005 interview with the *New York Times*, former President Bush stated that '[t]orture is never acceptable […] nor do we hand over people to countries that do torture.'[49] However, in September 2006, Bush admitted that overseas prisons existed.[50]

Years after leaving office, former Vice President Dick Cheney echoed President Bush's assertion that the US does not engage in torture:[51] '[t]he notion that somehow the [US] was torturing anybody is not true [.] […] Three people were waterboarded and the one who was subjected most often to that was Khalid Sheikh Mohammed and it produced phenomenal results for us.' This blunt admission reveals that Cheney clearly did not believe that waterboarding constituted torture for years. He also stated that '[…] the techniques […] were all previously used on Americans[.][…] All of them were used in training for a lot of our own specialists in the military. So there wasn't any technique that we used on any al Qaeda individual that hadn't been used on our own troops first, just to give you some idea whether or not we were 'torturing' the people we captured.'[52]

B. *State Practice: Overseas Detention/Interrogation Facilities*

The CIA detained and interrogated two prominent former al-Qaeda operatives at detention facilities abroad: Abu Zubayda and Khalid Shaikh Mohammad in Thailand and Poland, respectively.[53] Regarding these facilities and overseas interrogation techniques, a battle started between the CIA and the FBI in 2002.[54] Because the FBI objected to the types of interrogation techniques being used, they refused to participate in the treatment of Mr. Zubayda, which resulted in a meeting between Condoleezza Rice, Donald Rumsfeld, and John Ashcroft.[55] White House lawyers apparently authorised the CIA's use of 'more

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48) 'CIA Interrogations' (NYT CIA), *New York Times*, 1 July, 2011, available at: <http://topics.nytimes.com/top/reference/timestopics/organizations/c/central_intelligence_agency/cia_interrogations/index.html?scp=5&sq=torture%20iraq&st=cse>.

49) Bumiller, Sanger, and Stevenson, supra. n. 47, and Seamon, supra. n. 47, 720.

50) BBC News, 'Bush admits to CIA Secret Prisons', 7 September 2006, available at: <http://news.bbc.co.uk/1/hi/world/americas/5321606.stm>; NYT CIA, supra n. 48; S Ito, 'Critical Torture Memos Released', *Blog of Rights*, American Civil Liberties Union, 24 July 24 2008, available at: <http://www.aclu.org/2008/07/24/critical-torture-memos-released>.

51) J Rogin, 'Cheney: We Waterboard US Soldiers, so it's not torture', *Foreign Policy*, 9 September 2011, available at:<http:/thecableforeignpolicycom/posts/2011/09/09/cheney_we_waterboarded_us_soldiers_so_it_s_not_torture>.

52) Ibid.

53) NYT CIA, supra n. 48.

54) Ibid. See also D Johnston, 'At a Secret Interrogation, Dispute Flared Over Tactics' *New York Times*, 10 September 2006, available at: <http://www.nytimes.com/2006/09/10/washington/10detain.html>.

55) Ibid.

aggressive techniques' regarding Abu Zubaydah in July 2002.[56] The administration then decided to go ahead with these techniques after the DOJ approved them in a series of memos[57] later to be known as the 'torture memos'.[58]

Despite the fact that these detention centers, or 'black sites', existed far from the purview of the United States citizenry, the highest officials in the Bush Administration exercised authority over the techniques employed by the CIA.[59] George Tenet, Director of the CIA, kept them up to date of occurrences within the network such as 'specific procedures to be used on specific detainees–["]whether they would be slapped, pushed, deprived of sleep, or subject to simulated drowning["]–in order to seek reassurance that it was legal.'[60]

Indeed, these detention centers abroad led the International Committee of the Red Cross (ICRC) to write a report motivated by 'its grave concern over the humanitarian consequences and legal implications of the practice by the United States (US) authorities of holding persons in undisclosed detention in the context of the fight against terrorism.'[61] After President Bush declared that on September 6th, 2006 fourteen '"high value" detainees had been transferred from the High Value Detainee Program run by the [CIA] to the custody of the Department of Defense in Guantanamo Bay Internment Facility', the ICRC received a grant of access and met with each of them from the 6th to the 11th of October, 2006.[62]

The ICRC Report identified a clear procedure that began to emerge as to the treatment detainees received.[63] This involved 'physical and psychological ill-treatment with the aim of obtaining compliance and extracting information[,]' including 'transfers [...] to multiple locations, continuous solitary confinement and incommunicado detention [...] and the infliction of further ill-treatment through the use of various methods either individually or in combination, in addition to the deprivation of other basic material requirements.'[64] The main elements of the CIA programme included: 'arrest and transfer';[65]

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56) Danner, supra n. 6.
57) NYT CIA, supra n. 48.
58) See 'The Bush Admin's Secret OLC Memos', American Civil Liberties Union, 24 August 2009, available at: <http://www.aclu.org/accountability/olc.html>. These in tandem with the torture memoranda became the basis for the treatment of detainees during the war on terror. Danner, supra n. 6.
59) Danner, supra n. 6.
60) Ibid. at 3.
61) International Committee of the Red Cross ('ICRC') Regional Delegation for United States and Canada, "ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody", Washington, 14 February 2007, available at: <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>, at 3.
62) Ibid. at 3.
63) Danner, supra n. 6.
64) ICRC, at 4.
65) Ibid. at 5.

'continuous solitary confinement and incommunicado detention';[66] and other methods of 'ill-treatment'.[67]

The ICRC also expressed concern over detainees' lack 'of access to the open air[;] deprivation of exercise[;] deprivation of appropriate hygiene facilities and basic items[;] and restricted access to the Koran[;] linked with interrogation'.[68] The conditions of the detainees significantly improved when the need to interrogate them waned.[69] For example, detainees eventually received 'clean clothes on a weekly basis [and gradually received] solid food three times per day[.]'[70] This strongly suggests that the pursuance of these interrogation techniques and harsh treatment mechanisms were in congruence with the value placed on each detainee regarding the urgency of the information that could be obtained and was necessary to obtain from each.

Abu Zubaydah reported being subjected to isolation in a white room, sitting in a bed and on chairs for what he thought were for weeks at a time, and developing sores and blisters as a result, in addition to receiving no food except for Ensure, and complained of exposure to very cold rooms, constant loud music/noises, having cold water poured over him,[71] and of forced nudity, among other techniques.[72] In addition, Walid Bin Attash reported to the ICRC incidents of forced standing with his arms overhead, which hurt the stump left after he lost a leg in Afghanistan; after a time the guards would remove the prosthetic leg and cause more pain.[73] He was also subjected to slaps, beatings, and other maltreatment that was designed not to produce bruises.[74] Further, while at Guantanamo Bay,[75] Khalid Shaikh Mohammed 'was water-boarded 183 times',[76] and he reported being beaten in the chest and stomach, and that a "'CIA agent…punched him several times in the stomach, chest, and face [and]…threw him on the floor and trod on his face.'"[77] Also, Mohammad, Abu Zubayday, and Abdelrahim Hussein Abdul Nashiri, were all subjected to water-boarding, the point of which Mohammad believed was to 'take [him] to [the] breaking point.'[78]

66) Ibid. at 9.
67) Ibid. at 4, 5, 8-10.
68) Ibid. at 9, 19.
69) Ibid. at 21.
70) Ibid.
71) Danner, supra n. 6.
72) Ibid.
73) Ibid. at 4.
74) Ibid.
75) NYT CIA, supra. n. 48.
76) Ibid.
77) Danner, supra n. 6.
78) Ibid. at 5.

According to international law, the detention regime of undisclosed locations is of, at best, a tenuous nature. The ICRC Report identified that 'it is a basic tenet of international law that any person deprived of liberty must be registered and held in an officially recognized place of detention.'[79] The ICRC also identified principles of international humanitarian law (IHL), the Geneva Conventions, and the ICRC's supervisory role in outlining the legal regime for detention.[80] The ICRC also noted that the enforced disappearances of the fourteen detainees with whom it visited violated customary international law, such as 'the prohibition of arbitrary deprivation of liberty and the prohibition of torture and/or other cruel, inhuman or degrading treatment (CIDT)' and also raised concerns regarding lack of access to due process.[81] The ICRC also reminded the US of its obligations under CAT and the prohibition on the use of torture and CIDT and obligations under Common Article 3.[82]

In its report, the ICRC concluded that '[t]the allegations of ill-treatment of the detainees indicate that, in many cases, the ill-treatment to which they were subjected [...] constituted torture [...and CIDT].'[83] Signaling the participation in the health personnel, the ICRC called this a 'gross breach of medical ethics and, in some cases, amounted to participation in torture and/or [CIDT].'[84] The ICRC also recommended an investigation into 'all allegations of ill-treatment' and punishment for those responsible.[85]

2.4. National Law on Torture

National law enacting CAT criminalizes the use of torture. The implementation of US' legal obligations under CAT are in Chapter 113C-Torture, under Section 2340 of the United States Code,[86] and Section 2340A is of particular importance.[87] According to Section 2340 Definitions:

> torture means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control; [...]
>
> (2) severe mental pain or suffering means the prolonged mental harm caused by or resulting from – (A) the intentional infliction of severe physical pain or suffering; (B) the

79) ICRC, at 23.
80) Ibid. at 23.
81) Ibid. at 24.
82) Ibid. at 24-25.
83) Ibid. at 26.
84) Ibid. at 26-27.
85) Ibid. at 27.
86) 18 US Code Sections 2340-2340A. Canfield, supra n. 13, at 1058-1060.
87) Ibid.

> administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.][88]

This definition of torture is slightly different from CAT's definition in Article 1(1). First, Section 2340 adds the phrase 'under the color of law', whereas Article 1(1) links the perpetrator to the state by stating 'when such pain or suffering is inflicted by or at the instigation of or with the consent of a public official or other person acting in an official capacity. It does not include pain or suffering arising from only, inherent in or incidental to lawful sanctions.'[89] There is some ambiguity as to what 'under the color of law' means; this could extend or limit the potential liability for those who broke the law. In a sense, if it is a restrictive test, meaning if torture is only committed by those employed by or contracted to the US, or commanded to be performed by such an individual, those who might commit acts that would otherwise be torture might not be liable under this section. However, if 'under the color' of law is applied loosely, this could be expanded to include government contractors and the likes. However, this might be a loophole for the government in cases of rendition.[90] If the government sends terrorist suspects or individuals who might have information that could be used for intelligence to other countries, it is arguable whether people cooperating with the United States and using torture methods would be liable under Section 2340. Nowak argues that Section 2340's definition satisfies the US' obligation under CAT Articles 1 and 4 to implement the provisions of CAT into national law by virtue of the words 'severe physical or mental pain or suffering' and 'lawful sanctions[.]'[91]

Further, Section 2340 does not include the phrase or similar wording to include 'for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, for any reason based on discrimination of any kind[.]'[92] This severs the act of torture from using coercive methods of intelligence gathering. In a sense this broadens the definition to include acts that might not be for the purpose of gathering information, though this is perhaps not in line with the intent behind Article 1(1).

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88) Ibid. Canfield, supra n. 13, at 1058.
89) CAT Article 1(1).
90) Mayerfield, supra n. 5 at 105.
91) Nowak, supra n. 7, at 817.
92) CAT Article 1(1).

Section 2340A sets out the crime of torture:

(a) OFFENSE.—Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term or years or for life."
(b) JURISDICTION.—There is jurisdiction over the activity prohibited in subsection (a) if—
    (1) The alleged offender is a national of the United States; or
    (2) The alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.
(c) CONSPIRACY.—A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.[93]

This section contains the core of anti-torture legislation in the United States, which criminalizes the act and fulfills the US' international legal obligations under CAT Article 2(1) to implement legislation creating this offense.[94] The above offense applies to cases outside of the territorial United States, which means that this law applies to United States operatives in Guantanamo Bay, those who were in Abu Ghraib, and other prisons around the world. The personal jurisdiction principles outlined in Section 2340A(b) include individuals who are US citizens and those who are not citizens but are on US soil. However, this does not extend to non-Americans abroad who commit acts of torture, which may have created a loophole for the government in extracting information for intelligence from detainees abroad. Significantly, Section 2340A(c) extends liability to those 'who conspire to commit' torture, which might provide some accountability for those who are not involved in torture but are instrumental in its planning and execution.

2.5. Torture Memoranda

Interestingly, Milan Markovic suggests that the Bush administration asked for information on 'how much pressure CIA interrogators could exert on uncooperative Al Qaeda detainees [among others]',[95] but this was necessary because

93) 18 US Code Section 2340A. See also Canfield, supra n. 13 at 1059.
94) Oette, supra n. 39 at 718.
95) M Markovic, 'Can Lawyers Be War Criminals', (2007) 20 *Georgetown Journal of Legal Ethics* 347-369, at 348.

'the United States lacked human intelligence—spies inside the terrorist organization.'[96] This utilitarian reasoning[97] perhaps served as a justification behind considering expansion of interrogation methods, which led to the White House's request for information on the legal issues related to interrogation techniques.[98] The argumentation behind US state practice in detention centers began in a series of legal memoranda written by top-level Bush administration officials in the Department of Justice.[99] The torture memo analysis also ties into the question of the ticking bomb scenario, in which the necessity of torture to protect national security is considered.[100]

A. *Bybee Memo to Alberto Gonzales* (*Bybee Memo*)

The first of these memoranda, by Jay Bybee, restricted the definition of torture to include severe physical or mental pain or suffering, contravening the international obligations proscribing the use of torture and using a narrower definition than that in Article 1(1) CAT.[101] In his memo, Bybee's legal analysis attempted to create the appearance of complying with Sections 2340- 2340A.[102]

In the introduction to the Bybee Memo, the following is stated:

> Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture [...] it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. We conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threat of imminent death[...].'[103]

This is of great significance, as it means that the authors acknowledged that the threat of imminent death could satisfy the predicate part of the crime of torture as defined by the Statute. For acts such as waterboarding, which are committed to create the sensation of drowning, this could satisfy the section that deals with torture. Karen Greenberg noted that this 'redefined torture so

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96) Ibid. at 347-348.
97) J Bentham in Steiner *et al.*, supra n. 1, at 228-230.
98) Ibid. at 347.
99) Nowak, supra n. 7, at 812.
100) Ibid. at 810, footnote 3, citing M Strauss, "Torture", (2004) 48 *New York Law School Law Review*, 201-274, and AM Dershowitz, "The Torture Warrant: A Response to Professor Strauss" (2004) 48 *New York Law School Law Review* 275-294.
101) Nowak, supra n. 7, at 812, see footnote 10. Steiner *et al.*, supra n. 1, at 252-262. Canfield, supra n. 13, at 1079.
102) J Bybee, US Department of Justice, Office of Legal Counsel, Memorandum for AR Gonzales, Counsel to the President, 'Re Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A' ('Bybee Memo'), August 1, 2002, available at: <http://www.slate.com/features/whatistorture/pdfs/020801.PDF>, at 1. Nowak, supra n. 7, at 813; Nowak also points out that this practice contravenes the US' obligations under the ICCPR.
103) Bybee Memo, supra n. 102 at 1.

that only physical pain' as described above could constitute torture.[104] In addition, Manfred Nowak noted that the Bybee Memo looked to other statutes to define 'severe pain', concluding that this would mean that a patient would have an 'emergency medical condition entitling a patient to health benefits.'[105] Nowak notes that Bybee's interpretation of torture 'encompasses only extreme acts' allows necessity or self-defense to act as defenses to get rid of individual criminal responsibility.[106] Further, Bybee asserted that 'the treaty's text prohibits only the most extreme acts by reserving criminal penalties solely for torture and declining to require such penalties for [CIDT]. This confirms our view that the criminal statute penalizes only the most egregious conduct.'[107] Nowak notes that in interpreting Section 2340 as bringing CAT into national law, Bybee chose to use the US' position at the time of drafting, which was to insert the word 'extremely', which was not ultimately included, though most states thought that 'severe pain and suffering' adequately fulfilled the requirement of torture.[108] Significantly, Greenberg also points out that this analysis replaced 'torture' with phrases [such as] 'enhanced interrogations', 'counter-resist techniques' and 'coercive interrogations'.[109]

Regarding the specific intent or *mens rea* requirement of the crime, Bybee noted that Section 2340A 'requires that severe pain and suffering be inflicted with specific intent.'[110] He then stated that the specific intent in the case of torture under the statute would be 'the specific intent to inflict severe pain, [and that] the infliction of such pain must be the defendant's precise objective.'[111] He then said that if this result were 'likely', this would be general intent.[112] Further, if there were a 'good faith belief']' that such an outcome would not happen, there is no specific intent.[113] The problem with the above legal argument is that there is very little room for argument that when an individual is in a detention center and is subjected to harsh interrogation techniques such as waterboarding, an interrogator or individual involved would in good faith believe that anything but severe pain and suffering would result. Markovic also notes that this specific intent definition is 'very [narrow].'[114]

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104) Greenberg, supra n. 21 at 5-6.
105) See Nowak, supra n. 7, at 812.
106) Ibid.
107) Bybee Memo, supra n. 102 at 1-2.
108) Nowak, supra. n. 7, at 813. Nowak argues that Bybee sidestepped the legal opinion of the majority of states at the Convention drafting and the case law of the Committee in order to incorrectly conclude that 'CAT's text, ratifying history and negotiating history all confirm that Section 2340A reaches only the most heinous acts. See Nowak, supra n. 7, footnote 19.
109) Greenberg, supra n. 21 at 6.
110) Bybee Memo, supra n. 102 at 3.
111) Ibid.
112) Ibid. at 3-4.
113) Ibid. at 3. Canfield, supra n. 13, at 1075.
114) Markovic, supra n. 95 at 351.

However, Canfield argues that 'juries are allowed to infer specific intent from the factual circumstances[, which means that] even if the defendant has committed an act that he did not intend to rise to the level of torture or cause the requisite pain and suffering, the jury is still permitted to reach the conclusion that the defendant did intend to torture[.]'[115] In the Bybee Memo, it is stated that 'when a defendant knows that his actions will produce the prohibited result, a jury will in all likelihood conclude that the defendant acted with specific intent'.[116] Canfield's argument seems to suggest that if a jury can infer specific intent from a defendant's conduct, this will overcome the legal obstacle of a lack of specific intent in fulfilling this requirement of the crime, while the Bybee Memo suggests that a defendant's knowledge will suffice in fulfilling the specific intent requirement. Canfield, however, notes that knowledge does not fulfill the specific intent requirement.[117]

The ultimate effect of this was Secretary of Defense Donald Rumsfeld's use of the Bybee Memo in conjunction with interrogation practices/techniques at Guantanamo Bay.[118] Rumsfeld established a working group, which, based on this memo, produced 'a list of aggressive interrogation procedures to be used at Guantanamo Bay that eventually migrated to Iraq.'[119]

B. *Bybee Memo to John Rizzo*

Bybee signed off on a memo to John Rizzo, Acting General Counsel of the CIA,[120] In his memo to Rizzo, Bybee responded to a CIA request for their 'Office's views on whether certain proposed conduct would violate the prohibition against torture found at Section 2340A of title 18 of the United States Code[, specifically regarding] the course of conducting interrogations of Abu Zubaydah.'[121] This indicates that there was some concern on the part of the CIA regarding the legality of their conduct regarding Section 2340A, which criminalised the act of torture as mandated by US' participation in CAT, specifically laid out in Article 4.[122]

The text of the memo provides some insight into the main motivation behind the fierce interrogation methods used was national security. Indeed, the letter

115) Ibid.
116) Bybee Memo, supra n. 102 at 4.
117) Canfield, supra n. 13, at 1063.
118) Nowak, supra. n. 7, at 813. Markovic, supra n. 95 at 348. P Sands, *Torture Team, Rumsfeld's Memo and the Betrayal of American Values* (Palgrave Macmillan, 2008), at 18-23.
119) Markovic, supra n. 95 at 348.
120) J Bybee, US Department of Justice, Office of Legal Counsel, Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, 'Interrogation of al Qaeda Operative' 'Bybee Memo to John Rizzo', at 1 August 2002, available at: <http://www.washingtonpost.com/wp-srv/nation/pdf/OfficeofLegalCounsel_Aug2Memo_041609.pdf>, at 1. See NYT CIA, supra n. 48.
121) Ibid.
122) CAT Article 4. Oette, supra n. 39 at 718.

states that '[a]s [they understood] it, Zubaydah is one of the highest ranking members of the al Qaeda terrorist organization, with which the United States is currently engaged in an international armed conflict following the attacks [...] on September 11, 2001.'[123] This sentence shows that given the fact that the CIA and DOJ believed Zubaydah to be a high level terrorist, and given the past attacks on American soil related to his organization, it was in the national interest to use harsh interrogation methods in order to extract information that might be used as intelligence. However, the sentence also reveals that the DOJ operated under international law at the time, not only CAT, but the Geneva Conventions, seeing that the memo states that 'the United States is currently engaged in an international armed conflict',[124] and that this kicks in the operation of the Geneva Conventions, in the view of Bush administration attorneys, which regulate the law of armed conflict between states/international humanitarian law. Significantly, such a statement is of legal importance because it contains a different legal regime/level of protection for detainees. While others have considered the War on Terror to be a non-international armed conflict,[125] the status of the detainees has been seen as 'unlawful combatants' by the Bush administration.[126] The main question is whether the detention and interrogation methods contravened Section 2340A, but other international legal obligations may prove of great significance in such matters.

The memo then went on to state that 'Zubaydah is currently being held by the United States[,]' and that '[t]he interrogation team is certain he has additional information that he refuses to divulge [...] regarding terrorist networks in the United States or Saudi Arabia and information regarding plans to conduct attacks within the United States or against our interests overseas.'[127] First of all, this memo made no question of whether the detainee was held legally by the United States in this sentence or elsewhere, or what legal recourse he had available to him at the time. The memo went on to indicate that he had 'become accustomed to a certain level of treatment and display[ed] no signs of willingness to disclose further information.'[128] Therefore, there was anticipation of 'chatter' as before the September 11 attacks, and as a result, he would enter the 'increased pressure phase.'[129] The CIA utilized the Survival, Evasion, Resistance, and Escape programme.[130]

123) Bybee Memo to John Rizzo, supra n. 120 at 1.
124) Ibid.
125) See *Hamdan* v *Rumsfeld* 548 U.S. 557 (2006).
126) See Yoo articles, supra n. 13 and Executive Order 13440.
127) Bybee Memo to John Rizzo, supra n. 120 at 1.
128) Ibid.
129) Ibid.
130) Ibid.

Significantly, the memo covered the ten types of techniques used without a need for significant empirical data regarding the mental and physical effects of these techniques. Indeed, the techniques consisted of '(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (1) the water-board.'[131] The memo also asserted that 'Zubaydah [had] been involved in every major terrorist operation carried out by al Qaeda',[132] without any type of due process or trial phase. Further, regarding waterboarding, the CIA informed the DOJ that the Navy uses waterboarding,[133] which was intended to 'produc[e] the perception of "suffocation and incipient panic," i.e., the perception of drowning.'[134]

The memo considered the legality of each technique without any regard for their lasting medical/psychological implications, eventually resulting in a sign-off on the use of them.[135] The issues were 'whether those using these procedures would have the requisite mental state and whether these procedures would inflict severe pain or suffering within the meaning of the statute.'[136] Regarding severe pain or suffering, referencing the Bybee Memo to Gonzalez,[137] the memo concluded 'that a single event of sufficiently intense pain may fall within this prohibition', and that 'courts tend to take a totality-of-the circumstances approach and consider an entire course of conduct to determine whether torture has occurred.'[138] They considered 'severe pain' to be 'pain that is difficult for the individual to endure and is of an intensity to akin to the pain accompanying serious physical injury[,]' and divided physical and mental pain into two issues.[139]

After going through the different techniques, Bybee determined that none contravened Section 2340 and signed off on it,[140] considering that the techniques discussed 'involve[d] discomfort that [fell] below the threshold of severe physical pain.'[141] This did not consider the mental pain element in CAT Article 1(1) and the Section 2340 Definition of torture, which includes 'severe physical or mental pain or suffering[.]'[142] In this analysis, 'the facial hold and the attention grasp involve no physical pain', which meant that 'they cannot be

131) Ibid. at 2.
132) Ibid. at 7.
133) Ibid.
134) Ibid. at 4.
135) Ibid. at 9-18.
136) Ibid. at 9.
137) Ibid. at 9.
138) Ibid.
139) Ibid. at 9-10.
140) Ibid. at 10-18.
141) Ibid. at 10.
142) CAT Article 1(1) and Section 2340.

said to inflict severe physical pain or suffering', which does not include consideration of emotional or psychological pain or suffering resulting from such treatment, nor did use of confinement boxes or insects used to ignite fear in Zubaydah.[143] Most shockingly, perhaps, the memo found that sleep deprivation and waterboarding did not constitute violations of Section 2340A as it relates to physical pain, having considered pain and suffering as one concept.[144] Regarding mental/psychological pain or suffering, the memo found that none[145] except possibly waterboarding, violated Section 2340A.[146] The authors were unsure whether waterboarding would result in sufficient 'prolonged mental harm'[147] to produce a violation under Section 2340(2)(c), 'the threat of imminent death'.[148] This would last for 'months or years' and 'would [not] result from the use of the water-board]',[149] thus leading to the conclusion that waterboarding did not constitute torture 'in the absence of prolonged mental harm.'[150] The problem with this argument is in the construction of the legal argument. The argument depends on their reading that for there to be a violation of Section 2340A there must be long-term or permanent psychological damage. There is absolutely no way that long-term, repeated simulated drowning, as exemplified by Zubaydah and Khalid Sheikh Mohammad,[151] will leave a person of the greatest mental and physical fortitude without some sort of psychological ill. Further, another massive problem with this argument is that it does not contain any reference to empirical data, and the resultant conclusion is highly unlikely. The severe and lasting effects of such treatment as apparently documented in the SERE programme were not recounted or referenced, and the memo relied solely on the SERE experience and 'consultation with others with expertise in the field of psychology and interrogation' to conclude long-term or permanent mental health issues were not expected without providing a thorough investigation or evidence of research into the matter.[152] Further, it is difficult to believe a perpetrator would not believe or at least reasonably foresee that there might be the possibility of prolonged psychological damage when waterboarding a detainee repeatedly, and this uncertainty is revealed in the speculative prediction of how Zubaydah would react to such a course of conduct.[153]

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143) Ibid. at 10.
144) Ibid. at 10-11.
145) Ibid. at 11-19.
146) Ibid. at 11-15.
147) Ibid. at 15.
148) See 18 US Code Section 2340(2)(c); Bybee Memo to John Rizzo, supra n. 120 at 12.
149) Bybee Memo to John Rizzo, supra n. 120 at 15.
150) Ibid. at 16.
151) Danner supra n. 6.
152) Bybee Memo to John Rizzo, supra n. 120 at 15, 17-18.
153) Ibid.

C. *Yoo Memorandum* (*'Yoo Memo'*)

John Yoo's memorandum for William J. Haynes of 14 March 2003[154] furthered Jay Bybee's analysis.[155] He subsequently published articles describing the incorrect classification of Taliban fighters captured and held at Guantanamo Bay as 'unlawful combatants' and therefore lacking legal protection under the Geneva Conventions and its Additional Protocols.[156]

In his memo, Yoo discussed 'constitutional foundations of the President's power [...] to conduct military operations during the current armed conflict [, explaining] that detaining and interrogating enemy combatants is an important element of the President's authority to successfully prosecute war.'[157] Interestingly, Yoo concluded that the provisions of the United States Constitution do not apply to the interrogation techniques and detention regime, in effect circumventing Constitutional obligations to provide detainees with due process rights under the Fifth and Fourteenth Amendments and to abstain from inflicting "'cruel and unusual punishments'" under the Eighth Amendment.[158] However, if read with Section 2340A's jurisdictional provision, the jurisdiction of United States courts extends to US nationals and their conduct overseas.[159]

Yoo noted that "[Section]2340 applies to individuals who are acting "under color of law.["]"[160] Yoo disagreed with the argument that 'Congress enacted [the Statute] with the intention of restricting the ability of the Armed Forces to interrogate enemy combatants during an armed conflict.'[161] Apparently applying this to the President 'would raise grave separation of powers concerns[,]' and is 'unnecessary to give effect to the criminal prohibition.'[162] Yoo argued that while this would apply during peacetime, it would not apply during wartime to the military.[163] Upon examining Sections 2340-2340A, there is no temporal limitation on the operation of the statute, and it applies to United States citizens and those of other nationalities that set foot on US soil under Section 2340A (b).[164] Further, it would be a violation of the US obligations

154) J Yoo, US Department of Justice, Office of Legal Counsel, Memorandum for William J. Haynes II, General Counsel for the Department of Defense, 'Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States' ('Yoo Memo'), 14 March 2003, available at: <http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf>, at 1.
155) Nowak, supra n.7, at 812, 814.
156) supra n. 13; Yoo, 'The Status of Soldiers and Terrorists under the Geneva Conventions', at 137; see also Yoo and Ho, 'The Status of Terrorists', supra n. 13 at 207-228.
157) Yoo Memo, supra n. 154 at 2.
158) Ibid.
159) 18 US Code Section 2340A.
160) Yoo Memo, supra n. 154 at 18.
161) Ibid.
162) Ibid.
163) Ibid.
164) 18 US Code Sections 2340-2340A.

under CAT and customary international law to allow this to stop operating during wartime, as derogations are not permitted from this *jus cogens* customary international law, and CAT does not allow for states to violate their obligations on the grounds of 'state of war or threat of war, internal political instability or any other public emergency[.]'[165]

Further, Yoo incorrectly asserted that Sections 2340-2340A regarding the prohibition of torture do not apply to Guantanamo and other detention centers.[166] However, Section 2340A (a) explicitly states that 'Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.'[167] This makes the crime extraterritorial in scope, and Section 2340A (b) sets out the jurisdiction over the crime of the US courts.[168] Upon reading the statute carefully, the flaw in Yoo's argument is clear. He argued that 'to the extent that interrogations take place within the special maritime and territorial jurisdiction, such as at a US military base in a foreign state, the interrogations are not subject to Sections 2340-2340A[, but] if the interrogations take place outside the special maritime and territorial jurisdiction and are otherwise outside the United States, the torture statute applies.'[169] He argued that interrogations at Guantanamo would not fall under the statute, whereas those at a 'non-US base in Afghanistan' would fall under the statute.[170] However, the statute clearly states that it applies to operations outside of the United States. Further, Section 2340 (3) defines 'United States' as 'mean[ing] the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.'[171]

Yoo noted that 'there are no reported cases of prosecutions under section 2340A.'[172] This does not mean that there have not been instances in which individuals' conduct could have amounted to torture under Section 2340A; rather, it means that no actions had made it to court at that time, and in restricting the definition of torture and the mechanisms available to detainees and prosecutors alike, the Bush administration and Yoo sought to minimize if not eliminate the power of prosecutors to push for bringing a criminal investigation and/or prosecution into torture under this statute.[173] Moreover, this

165) CAT Article 2(2).
166) Yoo Memo, supra n. 154 at 32-33.
167) 18 US Code Section 2340A (a).
168) 18 US Code Section 2340A (b).
169) Yoo Memo, supra n. 154 at 34-35.
170) Ibid. at 35.
171) 18 US Code Sections 2340-2340A.
172) Ibid. at 45.
173) Canfield, supra n. 13, at 1075.

represents a potential violation of the US' international legal obligation under CAT, which mandates that states are under the obligation to prosecute the crime of torture.[174]

In his analysis, Yoo latched on a critical weakness in CAT: the fact that it is 'non-self executing and therefore places no legal obligations under domestic law on the Executive Branch, nor can it create any cause of action in federal court.'[175] This statement is not entirely correct, as CAT does have a treaty body that monitors compliance with CAT, the Committee against Torture,[176] and the criminalization of torture has also been integrated into federal criminal law.[177] Further, it is not entirely correct that international legal obligations cannot create domestic cases in federal court, such as treaty provisions or customary law.[178] However, the fact that CAT lacks an effective enforcement mechanism causes some concern, as it allowed Yoo to highlight this weakness in his justification for the US to go ahead with its interrogation programme. Further, he argued that CAT places 'no legal obligations under domestic law on the Executive Branch',[179] which is also questionable in light of Sections 2340-2340A.

Further, Yoo attempted to give the President's understanding of the US' treaty obligations enough weight to constitute a reservation to the treaty, thus illustrating a fundamental misunderstanding of the law of treaties.[180] Yoo argued that its legal obligations under Sections 2340-2340A and CAT are identical but that the US 'is bound only by the text of CAT as modified by the Bush administration's understanding.'[181] According to the Vienna Convention on the Law of Treaties Article 2(1)(*d*), a '[r]eservation [is] a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State[,]'[182] and a reservation 'must indicate the provision or provisions to which they relate[.]'[183] Therefore, the will of the President alone or the

174) CAT Article 4. Oette, supra n. 39 at 718.
175) Ibid. at 47.
176) See Committee against Torture, available at: http://www2.ohchr.org/english/bodies/cat/index.htm>.
177) NYT CIA, supra n. 48.
178) See Alien Tort Claims Act 1789.
179) Yoo Memo, supra n. 154 at 47.
180) Ibid. at 55-56. The Office of Professional Responsibility Report also noted that Yoo thought that an 'understanding' was a 'reservation' to CAT, at 238-239.
181) Yoo Memo, supra n. 154 at 56.
182) Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331.
183) K Zemanek, 'Vienna Convention on the Law of Treaties', United Nations Audiovisual Library of International Law, 2009, available at: <http://untreaty.un.org/cod/avl/pdf/ha/vclt/vclt-e.pdf>, at 2. See also 'Reservations to the Convention on Genocide', Advisory Opinion: International Court of Justice Reports 1951, available at: <http://www.icj-cij.org/docket/files/12/4283.pdf?PHPSESSID=6453601ca5ba31e61c39796578ificfc>, at 15; 'Reservations to

President's understanding of a treaty does not constitute a reservation to a treaty.

Yoo glaringly disregarded the absolute prohibition on torture in customary international law when he stated that 'the President may decide to override customary international law at his discretion.'[184] He argued that were it not for this, custom would not change, and that '[it could be argued that] such conduct was needed to shape a new norm to address international terrorism.'[185]

D. *Effect of the Yoo and Bybee Memoranda*

The Yoo and Bybee memoranda set a tenuous foundation on which the CIA and the DOD created a detention and interrogation scheme.[186] In a 2 March 2004 letter to Jack Goldsmith, Assistant Attorney General, Scott W. Muller of the CIA's Office of General Counsel requested affirmation of the analysis that had set the foundation for interrogation techniques used by the CIA.[187] Muller detailed interrogation techniques such as 'the abdominal slap', 'the sitting and kneeling stress positions', and 'two standing stress positions involving the detainee leaning against a wall.'[188] He also described 'Uses of water [… such as] pouring, flicking, or tossing […] a relatively small amount of water on detainees[.]'[189] Muller noted that these interrogation techniques were used as a part of SERE training,[190] indicating a belief that these techniques 'clearly [fell] within the legal parameters established by applicable law and are consistent with [OLC's] 2002 and 2003 guidance set forth[.]'[191]

In this letter, the CIA reflected a fundamental misunderstanding of CAT,[192] which states in Article 2(2) that '[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'[193] Relying on OLC legal analysis, the letter states that 'the Convention permits the use of such treatment or punishment in exigent circumstances, such as a national

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Treaties', International Law Commission, available at: < http://untreaty.un.org/ilc/guide/1_8.htm>.

184) Yoo Memo, supra n. 154 at 73-74.

185) Ibid. at 74.

186) Greenberg, supra n. 21 at 7. Sands, supra n. 118, 18-23.

187) SW Muller, Letter to Jack Goldsmith ('Muller Letter'), Central Intelligence Agency, Office of General Counsel, 2 March 2004, available at: <http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc22.pdf>, at 2.

188) Ibid. at 3.

189) Ibid.

190) Ibid.

191) Ibid. at 3-4.

192) Ibid. at 6.

193) Ibid.

emergency or war.'[194] This statement conflicts with Article 2(2) of CAT, which does not make any exception for the use of torture at all.[195]

Further, the letter states that 'CIA interrogations of foreign nations are not within the 'special maritime and territorial jurisdiction' of the United States where the interrogation occurs on foreign territory in buildings that are not owned or leased by or under the legal jurisdiction of the US government."[196] Regarding Sections 2340-2340A, 'federal statute against torture is limited to acts committed ["]outside the United States.["]'[197] As the CIA relied on the legal analysis set out by Bybee and Yoo, and both treated these sections, Sections 2340-2340A in particular, as binding and applicable to overseas detentions, they implicitly accepted that these statutes would be applicable and possible roadblocks to successfully using enhanced interrogation techniques, what some would call a euphemism for torture, against detainees.[198] Additionally, the memoranda blurred the line between general and specific intent, as the CIA relied on the analysis that concluded that 'the interrogators do not have the specific intent to cause ["]severe physical or mental pain or suffering["]' due to 'good faith'; and 'a good faith belief need not be a reasonable belief; it need only be an honest belief.'[199]

Finally, Muller declared that '[the Fifth, Eight, and Fourteenth Amendments] do not apply. The Due Process Clauses of the Fifth and Fourteenth Amendments, which would be the only clauses in those amendments that could arguably apply to the conduct of interrogations, do not apply extraterritorially to aliens.'[200] Whether or not the territorial jurisdiction of the US Constitution applies in Guantanamo Bay, Section 2340A(b) extends jurisdiction of the United States courts to the act 'in (a) if (1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States,

194) Ibid. at 6.
195) CAT Article 2(2).
196) Ibid. at 6-7.
197) Canfield, supra n. 13, at 1081. See also CNIC//Naval Station Guantanamo Bay, available at: <http://www.cnic.navy.mil/guantanamo/index.htm>. See also 'Cuba demands US gives back Guantanamo Bay', *Herald Sun*, 14 February 2008, available at: <http://www.heraldsun.com.au/news/world/cuba-wants-guantanamo-back/story-e6frf7lf-111115549551>. Cuba's Foreign Minister as of 2008, Felipe Perez Roque, apparently fed up with US treatment of detainees in the war on terror, demanded closure of Guantanamo Bay, due to 'the violation of human rights, unjust incarceration of prisoners held there without charges, and their appearances in courts without guarantees and in which they are convicted in advance[.]' However, the status of the lease is questionable, as Fidel Castro's government has not accepted money for the least, USD5000 a year, since he assumed power in 1960. Ibid.
198) V Iacopino, 'A Memo on Torture to John Yoo', *The Guardian*, 21 June 2011, available at: <http://www.guardian.co.uk/commentisfree/cifamerica/2011/jun/02/john-yoo-torture-waterboarding>.
199) Muller Letter, supra n. 187.
200) Ibid. at 7-8.

irrespective of the nationality of the victim of the alleged offender.'[201] This clearly indicates that a US national would be under the jurisdiction of the United States if the individual were engaged in conduct that fulfilled the legal requirements of torture abroad, and this jurisdiction would extend to non-US nationals if they were on US territory.

E. *Subsequent Memoranda: The Levin Memorandum* (*'Levin Memo'*)

After Yoo and Bybee eventually departed from their positions at the DOJ, Bybee's replacement Jack L. Goldsmith told the CIA to disregard earlier memos approving harsh interrogation methods; however, 'harsh methods' were reintroduced in 2005 by Steven G. Bradbury.[202]

The US departed from the previous torture memoranda in the 20 December 2004 Memorandum for James B. Comey, Deputy Attorney General, declaring that '[t]his memorandum supersedes the August 2002 Memorandum in its entirety.'[203] The main focus of the discussion in the 2004 Memo reflected the controversy surrounding the severity requirement of pain in the previous discussion/statutory analysis of Sections 2340-2340A,[204] and it reaffirms the US' commitment to the prohibition of torture domestically and internationally.[205]

In a discussion of Sections 2340-Section 2340A and CAT obligations, Levin cited the Senate's understanding of torture that it entered into when ratifying CAT, which it attached to its understanding:

> an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.[206]

The above definition reflects the understanding of torture that the US Senate ratified and was deposited in the US instrument of ratification[207] and therefore is the true definition of torture that must be interpreted when analyzing Sections 2340-2340A.

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201) 18 US Code Section 2340A(b).
202) NYT CIA, supra. n. 48.
203) Second Periodic Report of the United States of America to the Committee Against Torture ('Second Periodic Report'), 6 May 2005, available at the University of Minnesota Human Rights Library at: <http://www1.umn.edu/humanrts/cat/us-statereport2005.html>, Annex 3.
204) Ibid.
205) Canfield, supra n. 13, at 1052.
206) Second Periodic Report, supra n. 203, Annex 3.
207) Ibid.

On a point relating to the *mens rea* requirement of Sections 2340-2340A, Levin concluded that 'good faith' would not satisfy the 'specific intent' requirement of the statute, essentially rendering this an exonerating defence.[208] Bruce Canfield notes that the Levin Memo reasons that a person with 'sufficient intent to commit torture … is subject to criminal prosecution, if he is aware that his actions will result in crossing the threshold of severe pain.'[209]

3. Legal Considerations and Developments

3.1. Waterboarding

A central issue regarding the use of interrogation techniques such as waterboarding is whether or not these techniques collectively or individually constitute torture. This debate is compounded by the ambiguous distinction between CIDT and torture, and where the line is drawn on both an international scale but also in domestic legal cases.[210] Under CAT's Article 1 definition of torture, it is very tempting to conclude that waterboarding, among other interrogation techniques approved in the memoranda discussed above, constitutes torture, as inflicting 'severe pain or suffering, whether physical or mental, [intentionally] on such a person for such purposes as obtaining from him or a third party[.]'[211] For the purposes of clearly distinguishing between torture and CIDT and determining what has actually happened in detention centers for the purposes of interrogation, a serious investigation and legal proceedings are necessary. This also mirrors the US definition of torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control[.]"[212] The question would potentially hinge on the question of severity, as noted by Geordina Druce, which constitutes a question of interpretation.[213]

Regarding Section 2340, Manfred Nowak regards the severity requirement as applying to the phrase "'severe physical or mental pain or suffering'" as evidence of the US' intent to adhere to its international legal obligations.[214] Though Bybee concluded that the severity threshold 'must rise to a similarly

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208) Ibid.
209) Canfield, supra n. 13, at 1052.
210) G Druce, 'Does Waterboarding Constitute Torture', (2008) 6 *Dartmouth Law Journal* 351-367, at 351-354.
211) CAT Article 1. See Druce, ibid. at 354-356.
212) 18 US Code Section 2340.
213) Druce, supra n. 210, at 356.
214) Nowak, supra n. 7, at 811.

high level – the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions—in order to constitute torture[,]'[215] this does not mean that an investigation and therefore analysis of the severity requirement would render the same conclusion or would accept that severity justified such extreme physical and/or mental harm.

3.2. Response under President Bush – Executive Orders ('EO')

Nearly five years after the first torture memo, in July 2007 President Bush issued Executive Order 13440 that approved CIA use of some interrogation methods that military interrogators were prohibited from using, which the DOJ approved as in accordance with the Geneva Conventions.[216]

This was a clear step forward for the treatment of detainees under the Bush Administration. The EO provided clarification of acts that were forbidden under the US law and indeed provided some clear lines between techniques allowed in the torture memos and the laws prohibiting such behavior. Significantly, EO 13440 extended Common Article 3 of the Third GC for Prisoners of War to all detainees and concluded that it applied to CIA activities in 'a program of detention of interrogation'.[217]

3.3. International Representations: Second Periodic Report to Committee against Torture

In its 2005 Report, the US reaffirmed its stance that it 'is unequivocally opposed to the use and practice of torture. No circumstances whatsoever [...] may be invoked as a justification for or defense to committing torture. This is a long-standing commitment of the [US], repeatedly reaffirmed at the highest levels of the US Government.'[218] Despite this affirmation, the reality of 2005 indicates that the highest levels of government had not uniformly adhered to these principles, as particularly evident in the Bybee and Yoo memoranda, though this may have been mollified by the Levin Memo.[219]

However, when addressing concerns that detainees had been tortured, the Report stated that 'The President of the [US] has clearly stated that torture is

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215) Ibid. at 812.
216) Executive Order 13440, 'Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency', (2007) 72 (141) Federal Register, 24 July 2007, available at: <http://edocket.access.gpo.gov/2007/pdf/07-3656.pdf>. See also NYT CIA, supra n. 48.
217) Executive Order 13440.
218) Second Periodic Report, supra n. 203, para 3.
219) Levin Memo, available at: <http://www.justice.gov/olc/18usc2340-2340a2.htm>.

prohibited [,] and that w]hen allegations of torture or other unlawful treatment arise, they are investigated and if substantiated, prosecuted.'[220] By 2005, though, no legal action had been taken under Sections 2340-2340A. The Report cited the 2004 Levin Memo as evidence that the US was complying with CAT, without mentioning the earlier memoranda or interpretation of CAT.[221] Though no domestic proceedings under Sections 2340-2340A had taken place, the Report stated that a 'separate system of military justice [existed] for members of the United States armed forces.'[222] Despite this system and the different examples of law enforcement prosecutions between 1 October 1999 and 1 January 2005, none fell under the Torture Act, and none examined the memoranda written by the OLC under the Bush administration.[223] Further, in response to concerns regarding the August 2002 memorandum and its authorised detention and interrogation techniques, the Report quoted Alberto Gonzales: 'the President has not authorized, ordered or directed [...] any activity that would transgress the standards of the torture conventions or the torture statute[.]'[224]

4. Developments Under Obama Administration

When Barack Obama became President in January of 2009, the United States faced a choice regarding its use of torture to gain intelligence: to continue on the trajectory set by President Bush and his administration, or to desist from following the Bush administration's mechanisms and to desist from using these interrogation methods as a means of gathering intelligence.

4.1. Guantanamo Bay

In one of his first moves as President, Obama promised to stop the practices that the Bush administration had executed in their use of interrogation tactics.[225] He promised this in an executive order and set up task forces to focus on 'rendition, detention, and interrogation, among others.'[226] Upon assuming office, President Obama stated that 'nobody's above the law, and if there are clear instances of wrongdoing...people should be prosecuted[,]' while Attorney General Eric Holder stated that 'waterboarding is torture.'[227]

220) Second Periodic Report, supra n. 203, para 7.
221) Ibid. at para 10.
222) Ibid. para 16.
223) Ibid. para 18, Annex 1.
224) Ibid. para 58.
225) Danner, supra n. 6.
226) Ibid.
227) Ibid.

In Executive Order 'Closure of Guantanamo Detention Facilities', on January 22, 2009, President Obama ordered the closure of Guantanamo Bay, where at that time around 800 individuals had been detained,[228] arguing that doing so was 'consistent with the national security and foreign policy interests of the United States and the interests of justice[.]'[229] Significantly, President Obama stated that '[n]o individual currently detained at Guant[a]namo shall be held[…] except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3[.]'[230] This statement signaled a willingness to comply with international law, specifically the Geneva Conventions, in an attempt to distance the new administration from the Bush administration by recognizing that the detainees had some protection under the law, instead of being solely at the mercy of President Bush. President Obama also recognised that '[t]he individuals currently detained at Guant[a]namo have the constitutional writ of habeas corpus[, and most] of those individuals have filed petitions […] in Federal court challenging the lawfulness of their detention.'[231] Significantly, however, the EO did not raise concerns under Sections 2340-2340A or CAT.[232]

4.2. Rhetorical Differences

A rhetorical shift of the Obama administration signified the President's public departure from the Bush administration. In a March 2009 release, the DOJ stated that it had filed a new standard with the District Court for the District of Columbia[233] in which it stated that it would no longer refer to detainees abroad as 'enemy combatant'.[234] It also changed the reasoning for detaining individuals abroad which 'does not rely on the President's authority as Commander-in Chief independent of Congress's specific authorization[, drawing] on the international laws of war to inform the statutory authority conferred by Congress[, providing] that individuals […] are detainable only if the support was substantial.'[235]

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228) 'Closure of Guantanamo Detention Facilities Executive Order – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities', The White House, 22 January 2009, available at: <http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities>.

229) Ibid.

230) Ibid.

231) Ibid.

232) Ibid.

233) Department of Justice, Office of Public Affairs, 'Department of Justice Withdraws "Enemy Combatant" Definition for Guantanamo Detainees' ('DOJ Enemy Combatant'), 13 March 2009, available at: <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html>.

234) See Obama Administration Eliminates Term "Enemy Combatant", *ABC News*, 13 March 2009, available at: <http://abcnews.go.com/blogs/politics/2009/03/obama-administr-3/>.

235) Ibid.

Further, the release also revealed President Obama's determination to investigate the detention policy in place, which also indicated his plans to differentiate himself and distance himself from his predecessor.[236] Attorney General Eric Holder submitted a memorandum in addition to the filing in which he stated that an interagency investigation/review of the policy would take place and a review of each detainee's status would be conducted, which President Obama ordered.[237] However, in Attorney General Holder's memorandum, he stated that the policy would be 'refin[ed]', rather than fundamentally overturned.[238]

4.3. Further Action

Since then, Senators such as Democrat Dianne Feinstein and Republican Christopher Bond have also embarked on reviews of the procedures used by the CIA.[239] Senator Patrick Leahy, who was chairman of the Judiciary Committee in February 2008, called for a 'nonpartisan commission of inquiry' or a 'Truth and Reconciliation Committee' to investigate abuses under the Bush policy and their effect on the law.[240]

President Obama released the torture memoranda to the American Civil Liberties Union on 24th August 2009.[241] This gesture appeared to be an attempt to bring to light the different legal justifications used by President Bush and his administration in their actions, and/or perhaps it signaled an attempt to bring the past out into the open, or perhaps it was a wily political move on President Obama's part to differentiate himself from his predecessor as a President who would respect human rights, international legal obligations, and would commit himself to a presidency free from torture. However, the motive behind this release may not have been purely due to a respect for and desire to uphold human rights standards; this came about due to an American Civil Liberties Union (ACLU) suit to release the documents under the Freedom of Information Act on April 16, 2011.[242]

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236) DOJ Enemy Combatant, supra n. 233.

237) Ibid.

238) E Holder, 'Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay', in the United States District Court for the District of Columbia, 13 March 2009, available at: <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>.

239) Danner, supra n. 6 at 6.

240) Ibid.

241) 'Torture Documents Released 8/24/2009', American Civil Liberties Organization, August 24, 2009, available at: <http://www.aclu.org/human-rights_national-security/documents-delivered-responsive-torture-foia>. See also Greenberg, supra n. 21. at 5.

242) 'Secret Bush Administration Torture Memo Released Today in Response to ACLU Lawsuit', American Civil Liberties Organization, 1 April 2008, available at: <http://www.aclu.org/national-security/secret-bush-administration-torture-memo-released-today-response-aclu-lawsuit>; NYT CIA, supra n. 48.

4.4. Political Pressure

The response of the Obama administration to torture allegations has, however, been blocked due to political pressures imposed by Congress. While Khalid Sheikh Mohammed and four other men face charges in a military commission, with eight charges each ranging from attacking civilians, hijacking aircraft, terrorism, among others, they are not going to be tried in a federal court, as Obama had hoped.[243] Further, while President Obama hoped to hold trials in the US and to close Guantanamo Bay, Congress blocked this move by refusing to fund transferring detainees at Guantanamo Bay to be tried in a civilian court.[244] This represents the political nature of justice and the difficulties in creating a system of trying those accused of heinous acts and affording detainees due process.

4.5 DOJ Investigations

The DOJ began an investigation into those behind the torture memos.[245] Indeed, Yoo called the investigation 'shoddy', 'biased', and a 'witch-hunt against Bush administration lawyers' 'under the pretext of a cooked up ethics investigation.'[246] In the investigation, when asked if the President could 'order a village of civilians to be exterminated]', Yoo responded 'sure'.[247] However, the

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243) J Yager, 'DoD capital charges against Khalid Sheikh Mohammed', *The Hill*, 31 May 2011, available at: <http://thehill.com/blogs/blog-briefing-room/news/164041-dod-files-capital-charges-against-khalid-sheikh-mohammed>.

244) Ibid.

245) 'Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of 'Enhanced Interrogation Techniques' on Suspected Terrorists' ('Investigation into OLC'), Department of Justice Office of Professional Responsibility, 29 July 2009, available at: <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.

246) N Wing, 'John Yoo, Torture Memos Author, Calls DOJ Report "Shoddy" and "Biased"', *The Huffington Post*, 1 May 2010, available at: <http://www.huffingtonpost.com/2010/03/01/john-yoo-torture-memos-au_n_481317.html>.

247) S Stein, "Justice Department Report Accuses Torture Memo Writers of 'Poor Judgment'", *The Huffington Post*, 21 April 2010, available at: <http://www.huffingtonpost.com/2010/02/19/justice-department-report_n_469608.html> (last accessed 30 April 2013). Instead of being referred to state bar associations, David Margolis chose to describe their conduct as an exercise of 'poor judgment'. See M Isikoff, 'Report: Bush Lawyer Said President Could Order Civilians to be ["]Massacred["]', *Newsweek*, 19 February 2010, available at: <http://www.thedailybeast.com/newsweek/blogs/declassified/2010/02/19/report-bush-lawyer-said-president-could-order-civilians-to-be-massacred.html; 'Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists' (Investigation into OLC), Department of Justice Office of Professional Responsibility, 29 July 2009, available at: <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf.>.

DOJ report concluded that the torture memos had not committed any 'professional misconduct' but had exercised 'poor judgment'.[248] The report came from the DOJ Office of Professional Responsibility, and as a result *Newsweek* alleged that David Margolis decided to get rid of the DOJ's earlier finding of professional misconduct.[249]

Indeed, the report clarified several points of international law which had been obscured by the torture memo authors.[250] First, the report cleared up the misconception found in the first Yoo memorandum that a reservation was the same as an understanding to CAT.[251] The report noted that 'Reservations change US obligations without necessarily changing the text [of a treaty], and they require the acceptance of the other party[,]' and 'Understandings are interpretive statements that clarify or elaborate provisions but do not alter them.'[252] They noted that this 'could not have been lost' on the Bush Administration lawyers, and concluded that a court would 'likely [...] consider the international obligations separately from the enforcement of domestic law implementing the treaty[.]'[253]

Regarding international criminal law, the report examined the false conclusions drawn by the Bush administration lawyers regarding the International Criminal Court (ICC) and substantive provisions of international law.[254] Yoo argued that 'the US is not a signatory to the ICC Treaty, and that the treaty therefore cannot bind the US as a matter of international law[.]'[255] He went on to conclude that the interrogation techniques would not satisfy the elements of an international crime under the Rome Statute, as Article 7 applies to 'a widespread and systematic attack directed against any civilian population,' excluding individuals.[256] Further, Article 8 is confined to violations of the GCs, and the protections therein did not extend to Taliban and al Qaida members.[257] The DOJ Report noted that while article 8(2)(a) defined war crimes as grave breaches of the GCs, Article 8(2)(b) defined 'war crimes as ["][other]

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248) Stein, ibid n. 247.

249) Ibid. See also M Isikoff and D Klaidman, 'Justice Official Clears Bush Lawyers in Torture Memo Probe', *Newsweek*, 28 January 2010, available at: <http://www.thedailybeast.com/newsweek/blogs/declassified/2010/01/29/justice-official-clears-bush-lawyers-in-torture-memo-probe.html>.

250) See Investigation into OLC, supra n. 247.

251) Investigation into OLC, supra n. 247, at 238-239.

252) Ibid. at 239.

253) Ibid.

254) Rome Statute of the International Criminal Court (Rome Statute), 2187 UNTS 90.

255) Investigation into OLC, supra n. 247, at 239. See Mayerfield, supra n. 5, at 136-138. Mayerfield points out that the Bush administration stated that '[t]he existence of a functioning ICC will not cause the United States to retreat from its leadership role in the promotion of international justice and the rule of law.' Mayerfield, supra n. 5, at 138.

256) Rome Statute supra n. 254, Article 7.

257) Investigation into OLC, supra n. 247 at 240.

serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law.["]'[258] The DOJ Report also concluded that analysis leading to the conclusion that the detainees lacked protection under the GCs was 'unwarranted.'[259]

5. Addressing Torture in the US

5.1. Possible Criminal Investigations

Markovic notes that some have called for the criminal prosecution of the Torture Memo authors.[260] Criminal investigations would have and still would provide a useful mechanism for finding out whether the prohibition on the use of torture was violated in the US. While in 2008 the DOJ started investigation the 2005 destruction of CIA videotapes, which contained evidence of an interrogation of two detainees alleged to be members of al Qaeda, the DOJ announced 'that no charges would be brought in this matter.'[261] However, this was due to the fact that the five year statute of limitations for obstruction of justice charges passed, expiring on 9th November 2010.[262]

In November 2010, Amnesty International called for a criminal investigation into torture used by the Bush administration.[263] Amnesty reported that President Bush admitted that he authorised the interrogation techniques such as waterboarding in his memoirs, which he also admitted in an interview on 8 November 2010.[264] According to the *New York Times*, the Department of Justice decided in June 2011 to investigate two deaths abroad while it closed approximately one hundred other investigations.[265] Despite the volume of cases alleging torture regarding detainees, Attorney General Holder decided to close the cases regarding possible CIA torture, which would further the

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258) Ibid. Rome Statute, supra n. 254, Article 8(2)(b).

259) Investigation into OLC, supra n. 247 at 240.

260) Markovic, supra n. 95, at 349, 356. In his essay, Markovic considers whether the Torture Memo authors may be liable as war criminals. He cites Philippe Sands in footnote 19 as considering that the Torture Memo authors have inculpated themselves. Philippe Sands, 'Policymakers on torture take note – remember Pinochet', *San Francisco Gate*, November 13, 2005, available at: <http://www.sfgate.com/opinion/article/Policymakers-on-torture-take-note-remember-2595483.php#page-1>.

261) NYT CIA, supra n. 48.

262) Ibid.

263) Amnesty International, 'US must Begin Criminal Investigation of Torture following Bush admission' ('AI Bush Admission'), 10 November 2010, available at: <http://www.amnesty.org/en/news-and-updates/us-must-begin-criminal-investigation-torture-following-bush-admission-2010-11-10>.

264) Ibid.

265) NYT CIA, supra n. 48.

impunity of those involved during the Bush administration.[266] However, Holder decided to conduct a criminal investigation regarding two deaths.[267] These include cases that Amnesty International argued involved torture, including those regarding waterboarding at Guantanamo Bay.[268]

However, there has been some progress, as in June 2011 the DOJ announced that two criminal investigations would begin investigating two deaths of detainees in US custody.[269] The two detainees, Manadel al-Jamadi and Gul Rahman, died in 2003 in Iraq at Abu Ghraib and 2002 in Afghanistan, respectively.[270] This is an insufficient effort on the part of the DOJ to determine whether or not abuses occurred at detention centers abroad, whether the US played a role in it, and whether individuals who could potentially face charges should and will be brought to justice. Halting investigations into what could be clear violations of domestic and international human rights obligations undermines the interests of justice, and this is precisely the danger of closing and severely limiting such investigations. Greenberg suggests that the Obama administration declined to pursue investigations due to possible perceptions that they were instigating a 'witch hunt'.[271]

Regarding the prosecution of torture and CIDT under international criminal law, Markovic suggests that the ICC would be a possible venue for prosecution, as under Article 12 'the ICC can exercise jurisdiction over crimes that occur on the territory of any one of the state-parties to the court.'[272] However, this is a highly unlikely possibility for political reasons, though Markovic notes that this might be a possibility for Afghanistan, which is a State Party to the Rome Statute.[273]

5.2. The Use of Sections 2340-2340A in Federal Courts

Thus far, the only use of Sections 2340-2340A (or 'the Torture Act') has been for the prosecution of Chuckie Taylor, or Charles Emmanuel, for torture committed in Liberia while his father, Charles Taylor, was President.[274] The United

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266) Amnesty International, 'US must reconsider closure of CIA torture cases', 1 July 2011, available at: <http://www.amnesty.org/en/news-and-updates/us-must-reconsider-closure-cia-torture-cases-2011-07-01>.
267) Ibid.
268) Ibid.
269) Lichtblau and Schmitt, supra n. 16 at 1.
270) Ibid.
271) Greenberg, supra n. 21 at 9.
272) Markovic, supra n. 95 at 361.
273) Ibid. at 361-362.
274) E Keppler, S Jean, and J. Paxton Marshall, 'First Prosecution in the United States for Torture Committed Abroad: The Trial of Charles "Chuckie" Taylor, Jr.', Human Rights Watch, available at: <http://www.hrw.org/sites/default/files/related_material/HRB_Chuckie_Taylor.pdf>, 1.

States Court of Appeals for the Eleventh Circuit eventually upheld a guilty verdict for overseas torture.[275] While the Torture Act has been used against a US citizen, Chuckie Taylor,[276] it has been used for a case of political convenience, as Chuckie Taylor's father faced trial at the Special Court for Sierra Leone during this period.[277] This statute could be used with greater emphasis on harder cases to bring those to justice who may have been responsible for or committed overseas torture.

6. US Involvement in the Ill-treatment of Detainees Abroad: Afghanistan

While the Obama Administration has taken steps to distance itself from the Bush Administration's stance on torture, these measures have proved insufficient to stop allegations of the practice of torture in military activities abroad. Reports of torture in Afghanistan surfaced in autumn 2011,[278] leading to the conclusion that domestic criminalization of torture and the steps taken by the Obama Administration and the DOJ have not provided sufficient deterrence to stop the use of torture. In a U.N. report entitled 'Treatment of Conflict-Related Detainees in Afghan Custody',[279] reports of severe treatment of detainees by the Afghan intelligence and the Afghan National Police surfaced, and the US and other Western 'backers' trained and gave money to Afghanistan, though it is unclear whether or not or to what extent 'American officials knew of the abuses'.[280] This again raises questions of the US' involvement in the ill-treatment of detainees abroad, and the possibility of investigation or prosecution for such potential involvement apparently does not serve as a great deterrent in the possibility of engaging in such conduct, should the US be shown to have involvement or awareness of this ill treatment. Moreover, past experiences of detainee treatment shows that the current regime of

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275) *United States* v *Roy M. Belfast, Jr.*, T.M.C. Asser Institute, Case No. 09-10461-AA, available at: <http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/US_v_Chuckie_Taylor_15-7-2010.pdf>.

276) Keppler, Jean, and Marshall, supra n. 274 at 2.

277) See Special Court for Sierra Leone, *Prosecutor* v *Charles Ghankay Taylor*, available at <http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx>.

278) D Rothkopf, 'Are we capable of conducting a moral foreign policy?' *Foreign Policy*, 11 October 2011, available at: <http://rothkopf.foreignpolicy.com/posts/2011/10/11/is_america_incapable_of_conducting_a_moral_foreign_policy>.

279) AJ Rubin, 'UN finds systematic torture in Afghanistan' *New York Times*, 11 October 2011, available at: <http://www.nytimes.com/2011/10/11/world/asia/un-report-finds-routine-abuse-of-afghan-detainees.html?ref=global-home.>, 1. UN Report 'Treatment of Conflict-Related Detainees in Afghan Custody', available at: <http://unama.unmissions.org/Portals/UNAMA/Documents/October10_%202011_UNAMA_Detention_Full-Report_ENG.pdf>, 1.

280) Rubin, ibid. at 1.

investigation and prosecution is insufficient to provide an effective deterrent to the ill treatment of detainees and to uphold the US' international obligations under CAT and customary international law, and domestic federal law under Sections 2340-2340A.

7. Conclusion

7.1. Failure of Sections 2340-2340A?

The above illustrations of Bush administration practices and the Obama administration's subsequent unwillingness to provide a full investigation and criminal prosecution into possible abuses indicates two things: first, it is possible for DOJ lawyers to bend the law to fulfill their own aims, whether they be in the realm of national security, so as to evade allegations that they authorised violations of US' international legal obligations and the criminalization of torture under US law. Further, the Obama administration's reluctance to investigate illustrates the fact that respect for the law prohibiting torture is limited and not completely upheld even at the highest echelons of government.

7.2. Elections

In order for there to be institutional and/or legal change that encourages the incorporation of international human rights law, standards, and norms into domestic political and legal institutions, there must be political will from the American people. Mayerfield notes that this must be done though the democratic process via the election of officials committed to international human rights law, specifically the prevention of torture.[281] While this is certainly correct, this is going to face significant political opposition, as there will be opponents of such change. Potential arguments that may sway the public include assertions of being soft on the war on terror, the utilitarian argument that torture is necessary to obtain intelligence to save American lives,[282] and the like.

7.3. International Criminalization of Torture?

Though CAT has many strengths, its greatest weakness is perhaps a contributing factor to what allows states such as the US to continuously violate international human rights norms. In order for international human rights law to

281) Mayerfield, supra n. 5, at 96.
282) J Bentham in Steiner *et al.*, supra n. 1, at 228-230.

effectively bind states, and therefore change state behavior, human rights treaties and bodies need greater built-in reinforcement or enforcement mechanisms.[283] CAT does not impose the obligation to recognize torture as an international crime on states parties, and perhaps this has had negative normative repercussions, as the *erga omnes* prohibition on torture is does not oblige states to recognize torture as a discrete crime.[284] In criminalizing the act of torture, CAT attempts to create a deterrent to future practice.[285]

A clear solution or, perhaps, deterrent to States/state officials from committing or authorising torture would be the recognition of torture as a discreet international crime, as advocated by Antonio Cassese.[286] Though CAT requires state parties to criminalize torture in their domestic legal systems, it does not create an explicit international crime of torture.[287] Further, though the international prohibition on torture has customary *jus cogens* status,[288] it is not an international crime in itself; it is currently prosecutable as a war crime and as the predicate crime of genocide and crimes against humanity (CAH) and under the International Criminal Court Rome Statute Article 7(1)(f).[289]

If the international community seriously pushed for the establishment of torture as a discrete international crime that could be prosecuted internationally, it may force states to reassess their activities abroad and substantially minimize if not eliminate their torture practices that they commit themselves or by proxy. If a total abolition is not possible, making torture a discrete international crime may deter present and future leaders from enabling this as state practice.

The next problem stems from the failure of international legal instruments, specifically CAT, to enforce itself. While enforcement of international law is always a perennial problem, in order for these treaties to clearly attain their goals, such as effectively criminalizing the use of torture, there needs to be an enforcement mechanism that holds national governments and governmental officials responsible, publicly and transparently, for their actions/roles in authorizing and using torture as a staple of foreign policy. Pertaining to the US, this means that the domestic criminalization of torture, as laid out in CAT, needs to extend to the highest level of officials.

Perhaps the best venue for this criminal or legal body would be the ICC, whose statute provides for jurisdiction over torture, but which can be expanded

283) Mayerfield, supra n. 5, at 95.
284) See Cassese, supra n. 38 at 148-152.
285) DP Stewart, 'The Torture Convention and the Reception of International Criminal Law within the United States', (1991) 15 *Nova Law Review* 449-474, at 449-450.
286) Ibid.
287) See CAT.
288) Steiner *et al.*, supra n. 1 at 225; Shaw, supra n. 3 at 326-327.
289) Cassese, supra n. 38 at 150-151. See the Rome Statute supra n. 254, See Markovic, supra n. 95 at 349, 352.

to consider torture as a discrete crime.[290] Transposed on the international legal stage, there ought to be real, tangible penalties for breaking international human rights norms, and perhaps this will be more easily achieved through an international criminal tribunal.

7.4. Future US Identity

A direct result of the interrogation techniques utilized by the US and the controversy surrounding this issue will be the legacy that is left behind and which course the US chooses to follow in the future. While there have been many who vehemently attacked said practices and continue to do so, there is the perpetually used utilitarian argument that torture is a necessary tool for state security. John T. Parry differentiates from David Luban's warning of a 'torture culture' that began as a result of the terrorist attacks of September 11, 2001, arguing that this culture started prior to these attacks.[291] He also argues 'that torture may be compatible with American values in practice and with the legal system'.[292] In the future, the US government, and the people who elect Congress members and the President, will have to decide which route it wishes to follow and which principles and values will define the United States.

290) See Cassese, supra n. 38 at 148-152. Markovic, supra n. 95 at 350.
291) Parry, supra. n. 22 at 1003, 1056.
292) Ibid.