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## Repatriate . . . Then Compensate: Why the United States Owes Reparation Payments to Former Guantánamo Detainees

Cameron Bell

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# REPATRIATE . . . THEN COMPENSATE: WHY THE UNITED STATES OWES REPARATION PAYMENTS TO FORMER GUANTÁNAMO DETAINEES

*Cameron Bell\**

*In late 2001, U.S. government officials chose Guantánamo Bay, Cuba, as the site to house the “war on terror” detainees. Since then, 779 individuals have been detained at Guantánamo. Many of the detainees have endured years of detention, cruel and degrading treatment, and for some, torture—conduct that violates well-established prohibitions against torture and inhumane treatment under both general international law and the law of war. Under these bodies of law, the United States is required to make reparation—through restitution, compensation, and satisfaction—for acts that violate its international obligations. But the United States has not offered financial compensation to any Guantánamo “war on terror” detainee, past or present. Although U.S. laws ostensibly provide a mechanism for victims of torture and maltreatment to pursue civil actions against the government, strategic procedural barriers have prevented any detainee from successfully bringing a claim for damages. With access to domestic courts unlikely, this Article argues that unless the United States unilaterally opts to compensate detainees, the only avenue for relief is through international principles of state responsibility, a process that still poses great challenges for Guantánamo detainees seeking financial compensation.*

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\* J.D. Candidate, May 2015, Loyola Law School, Los Angeles; B.A. Women’s Studies, The George Washington University, May 2011. Thank you to Professor Dave Glazier, whose expertise and guidance made this Article possible, and Jessica Medina, for her wonderful leadership and vision. Incredible and immense thanks to Scott Klausner, for everything. Additional thanks to Leah Johannesson and Christian Conkle for expert editing and research assistance. Finally, thank you to the editors and staff of the *Loyola of Los Angeles Law Review*, who worked tirelessly to get this piece to print.

## TABLE OF CONTENTS

I. INTRODUCTION .....	870
II. BACKGROUND .....	872
A. The Road to Guantánamo .....	873
B. The Rise of Enhanced Interrogation Techniques.....	877
C. Guantánamo’s Lasting Effects.....	882
D. Emerging from the “Legal Black Hole” .....	883
III. JUDGING THE CONDUCT UNDER INTERNATIONAL LAW .....	886
A. The Law of War and International Law Principles of State Responsibility .....	886
B. Universal Prohibitions and International Obligations.....	889
C. The Convention Against Torture .....	892
1. Prohibitions Against Torture and CID Under the CAT .....	893
2. Understanding the United States’ Obligations Under the CAT .....	895
D. Questions Unanswered: Why U.S. Conduct at Guantánamo May Fall Outside the CAT’s Purview .....	897
1. Where Is Guantánamo Bay? .....	898
2. What Does the CID Reservation Mean?.....	899
3. When, If Ever, Can a Country Derogate from the Prohibition of CID? .....	900
IV. A DETAINEE’S INABILITY TO INDIVIDUALLY SEEK REDRESS IN ARTICLE III COURTS .....	902
A. The Right to Reparation in the Twentieth Century .....	902
B. Why the Law of War Does Not Confer a Right of Action.....	904
C. Adding Insult to Injury: Why Detainees Are Unable to Bring a Claim Under U.S. Law.....	907
1. Claims Under the Alien Tort Statute and Federal Tort Claims Act .....	908
2. Claims Under the Torture Victim Protection Act.....	911
D. A Proposed Framework for Reform in U.S. Courts .....	913
1. Violations of a <i>Jus Cogens</i> Norm Should Waive Sovereign Immunity .....	914

Spring 2015]	<i>REPATRIATE . . . THEN COMPENSATE</i>	869
2.	For Guantánamo Detainees, the United States’ Waiver of Sovereign Immunity Would Still Not Suffice To Provide Meaningful Access to U.S. Courts.....	916
V.	THE SOLE EXISTING OPTION: STATES INVOKE RESPONSIBILITY ON BEHALF OF THEIR NATIONALS .....	918
A.	Invoking State Responsibility for Conduct That Does Not Rise to the Level of <i>Jus Cogens</i> .....	919
1.	Wrongful-Detention Claims.....	919
2.	CID Claims .....	920
B.	Invoking State Responsibility for Violations of <i>Jus Cogens</i> Norms.....	922
VI.	CONCLUSION. ....	923

## I. INTRODUCTION

Immediately after September 11th, 2001, the United States embarked on the “Global War on Terror.”<sup>1</sup> The United States military deployed troops in Afghanistan to bring the individuals responsible for September 11th to justice. Since then, thousands of individuals have been detained overseas, accused of being “enemy combatants.”<sup>2</sup> And 779<sup>3</sup> of these so-called combatants were sent to the U.S. detention center at Guantánamo Bay, Cuba,<sup>4</sup> a site that the U.S. government unofficially claimed to house the “worst of the worst.”<sup>5</sup> As of January 14, 2015, 122 detainees remain in custody.<sup>6</sup> Many of the detainees have endured years of detention, cruel and degrading treatment, and for some, torture.<sup>7</sup> Such conduct violates well-established prohibitions against torture and inhumane treatment under both general international law and the law of war. Although general principles of state responsibility and specific law-of-war rules<sup>8</sup> provide that states have an obligation to make reparation for

1. President George W. Bush first used the phrase “War on Terror” in his address to America on September 20, 2001. Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001) [hereinafter September 20 Address]. The term stuck; it was subsequently used throughout the Bush administration’s tenure. President Barack Obama, however, curbed the use of the phrase. See Scott Wilson & Al Kamen, “Global War on Terror” Is Given New Name, WASH. POST, Mar. 25, 2009, [http://www.washingtonpost.com/wpdyn/content/article/2009/03/24/AR2009032402818.html?wprss=rss\\_politics/administration](http://www.washingtonpost.com/wpdyn/content/article/2009/03/24/AR2009032402818.html?wprss=rss_politics/administration).

2. THE CONSTITUTION PROJECT, DETAINEE TREATMENT 57 (2013); see also *id.* at 311.

3. N.Y. Times & NPR, GUANTÁNAMO DOCKET, <http://projects.nytimes.com/guantanamo> (last visited Sept. 9, 2014) [hereinafter GUANTÁNAMO DOCKET].

4. Cullen Murphy et al., *Guantánamo: An Oral History*, VANITY FAIR (Jan. 11, 2012), <http://www.vanityfair.com/politics/2012/01/guantanamo-bay-oral-history-201201>.

5. *Id.* The phrase became a colloquial term used by senior Bush Administration officials, including President Bush, to describe those who had already been moved to Guantánamo. See, e.g., Scott Horton, *Did Bush Know Guantánamo Prisoners Were Innocent?*, HARPER’S MAG. (Apr. 9, 2010), <http://harpers.org/blog/2010/04/did-bush-know-guantanamo-prisoners-were-innocent/>; see also Cheney: *Gitmo Holds ‘Worst of the Worst’*, NBC NEWS (Jun. 1, 2009), [http://www.nbcnews.com/id/31052241/ns/world\\_news-terrorism/t/cheney-gitmo-holds-worst-worst/#.UwuYg80YzOg](http://www.nbcnews.com/id/31052241/ns/world_news-terrorism/t/cheney-gitmo-holds-worst-worst/#.UwuYg80YzOg) (verifying that Vice President Cheney used the term); Ken Pallen & Peter Bergen, *The Worst of the Worst?*, FOREIGN POL’Y (Oct. 20, 2008), [http://www.foreignpolicy.com/articles/2008/10/19/the\\_worst\\_of\\_the\\_worst](http://www.foreignpolicy.com/articles/2008/10/19/the_worst_of_the_worst) (confirming that Secretary of Defense Donald Rumsfeld used the term).

6. GUANTÁNAMO DOCKET, *supra* note 3.

7. See *infra* Part II.B–C.

8. See, e.g., Hague Convention IV—Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague (IV) Convention]; Annex to the Hague (IV) Convention: Regulations Respecting the Laws and Customs of War on Land [hereinafter Hague (IV) Regulations].

violations, thus far, the U.S. government has not been held legally accountable for its treatment of Guantánamo detainees.

Despite the term “Global War on Terror,”<sup>9</sup> there has been much debate about whether a conflict that purports to combat an amorphous, abstraction like “terror” is governed by the law of war. Although al-Qaeda and the Taliban emerged as the clear enemies early in the conflict<sup>10</sup>—thus prompting the more accurate phrase, “War Against al-Qaeda and the Taliban” (WAQT)—an early 2002 memorandum from the White House asserted that the “war against terrorism” would “require[] new thinking in the law of war.”<sup>11</sup>

Indeed, this “new thinking” has led high-ranking White House officials to selectively apply the law of war: they have looked to it to authorize detention of “enemy combatants,” and at the same time, they have violated other provisions of it, stripping the alleged combatants of rights that would otherwise be afforded to them.<sup>12</sup> Put differently, the law of war provides nuanced rules that supersede conflicting general international human-rights law, while also granting unique privileges to combatants.<sup>13</sup> But under the War on Terror’s framework, it seems the law of war continues to supersede international human-rights law, *without* providing any of these law-of-war privileges.

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9. September 20 Address, *supra* note 1. While perhaps a clever sound bite, the law of armed conflict does not recognize “terror” as an opponent in war. As such, this Article’s future references to the armed conflict will be to the War Against al-Qaeda and the Taliban (WAQT).

10. See Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter November 13 Military Order] (naming members of al-Qaeda as the subjects of the military order); see also Memorandum from President George W. Bush to the Vice President, Sec’y of State & Def., Attorney Gen., & Other Officials 2 (Feb. 7, 2002) [hereinafter Bush Memorandum], available at <http://www2.gwu.edu/~nsarchiv/torturingdemocracy/documents/20020207-2.pdf> (referring to the United States’ “conflict with the Taliban”).

11. Bush Memorandum, *supra* note 10.

12. See *id.*; Remarks as Delivered by Secretary of Defense Donald H. Rumsfeld, U.S. DEP’T OF DEF. (Feb. 13, 2004), <http://www.defense.gov/speeches/speech.aspx?speechid=99>; *The Law of War in the War on Terrorism: A Council on Foreign Relations Debate*, COUNCIL ON FOREIGN RELATIONS (Apr. 14, 2005), [www.cfr.org/world/law-war-war-terrorism-council-foreign-relations-debate/p8030](http://www.cfr.org/world/law-war-war-terrorism-council-foreign-relations-debate/p8030).

13. David Glazier, *Playing by the Rules: Combating al-Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 963–64 (2009) (“The law of war takes precedence over conflicting general rules as a *lex specialis* during armed conflict, but international human rights law remains applicable, governing when there are lacunae in law of war coverage.”).

Since the WAQT began, the United States has not offered financial compensation to any Guantánamo detainee. Although U.S. statutes ostensibly provide a mechanism for victims of torture and maltreatment to pursue civil actions against the government, strategic procedural barriers have prevented detainees from successfully bringing a claim for damages. Courts dismiss detainees' claims or never hear them at all because of jurisdictional limitations. Moreover, detainees' attempts to seek the protections of international agreements have proved unsuccessful in American courts because the relevant treaties do not confer a private right of action for individuals.

This Article argues that even under the more permissive standard that the law of war provides, the United States breached its obligations to the detainees and to the international community at large, and thus should be held accountable and required to make reparation. Part II of this Article traces the history of the U.S. Naval Base at Guantánamo Bay as it relates to the WAQT. Drawing upon existing scholarship, Part III explains the international law and assesses the legality of the conduct at Guantánamo under the law of war, as well as other customary international law and treaty obligations. Part IV summarizes the current options for a detainee acting on his own behalf in U.S. courts to seek redress under both domestic and international law, and exposes the futility of such claims. Part V describes the existing pathway to redress for detainees when an international state acts on their behalf and highlights the problems with the existing structure.

In light of the U.S. government's influence in the international community and past history of enforcing or condemning other countries' human-rights violations, and the courts' inability to provide relief, U.S. government officials should reconsider implementing policies that provide financial compensation for those individuals who were mistreated or tortured at Guantánamo. The law requires it.

## II. BACKGROUND

In late 2001, the U.S. government decided that many of the individuals being captured overseas in the WAQT would be detained at Guantánamo Bay. Despite early promises that detainees would be treated humanely, the perceived need for increased

intelligence-gathering led to harsher “interrogation techniques” that may have been wholly ineffective in collecting legitimate information. Instead, the techniques caused physical pain and psychological trauma for many of the detainees, with some Bush officials referring to the treatment as “torture.” Although U.S. courts have grown more sympathetic to the detainees since 2002, no detainee, either released or still in custody, has received financial compensation for his imprisonment at Guantánamo.

#### *A. The Road to Guantánamo*

On September 11, 2001, the United States experienced an attack unlike any it had experienced before. Within hours, President Bush declared that the United States was in a “war against terrorism”—a war it would win.<sup>14</sup> Seven days later, President Bush signed the Authorization for the Use of Military Force (AUMF) into law, which provided:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>15</sup>

On October 7, 2001, the United States mobilized its armed forces and launched “Operation Enduring Freedom.”<sup>16</sup> In the months that followed, hundreds of suspected “unlawful enemy combatants” were in U.S. custody.<sup>17</sup> Some of these individuals were captured by U.S. forces. Some, like Mohammed al-Qahtani, were closely linked to terrorist attacks against the United States.<sup>18</sup> But others, like Abdul

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14. Address to the Nation on the Terrorist Attacks, 2 PUB. PAPERS 1099, 1100 (Sept. 11, 2001), available at <http://www.gpo.gov:80/fdsys/pkg/PPP-2001-book2/pdf/PPP-2001-book2-doc-pg1099.pdf>.

15. Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224, § 2(a) (2001) (codified at 50 U.S.C. § 1541 (2006)).

16. ANDY WORTHINGTON, *THE GUANTÁNAMO FILES* 5 (2007).

17. THE CONSTITUTION PROJECT, *supra* note 2, at 62.

18. Memorandum from D.M. Thomas, Rear Admiral, U.S. Navy, Recommendation for Continued Detention Under DoD Control (CD) for [Mohammed al-Qahtani] (Oct. 30, 2008), available at <http://projects.nytimes.com/guantanamo/detainees/63-mohammed-al-qahtani>



Rahim Abdul Razal al Janko, were prisoners of the Taliban who expected to be liberated by American forces but found themselves in U.S. detention instead.<sup>19</sup> Most, however, were sold by Northern Alliance soldiers or other individuals to American forces for a \$5,000 reward.<sup>20</sup> No matter how they came into U.S. custody, in the early years of the conflict, many of those who would later be detained at Guantánamo were swept up in the hostilities, deemed unlawful enemy combatants, and held in preventive detention.

On November 13, 2001, President Bush signed a military order that would lead to years of litigation, torture scandals, and a perceived decline in support from the international community.<sup>21</sup> In the order, President Bush indicated that the country was in a “state of armed conflict,” a position that the U.S. government continued to maintain even after President Bush left office.<sup>22</sup> The November 13 order authorized the U.S. government to detain non-U.S. citizens at an appropriate location<sup>23</sup> and prescribed the guidelines for their subsequent detention.<sup>24</sup> Any non-U.S. citizen who was believed to be a member of al-Qaeda, to have supported al-Qaeda in a variety of enumerated ways, or to “ha[ve] knowingly harbored one or more individuals” who were either a member of al-Qaeda or had assisted al-Qaeda, was subject to the order.<sup>25</sup> This classification, under the President’s military order, enabled the United States to detain these individuals “at an appropriate location . . . outside or within the

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/documents/11 (“Detainee was an intended ‘20th Hijacker’ for the 11 September 2001 attacks, but failed to gain entry into the US to complete his mission.”).

19. *Al Janko v. Gates*, 831 F. Supp. 2d 272 (D.D.C. 2011), *aff’d*, 741 F.3d 136 (D.C. Cir. 2014).

20. *See* DAVID HICKS, *GUANTÁNAMO: MY JOURNEY* 179 (2010); *see also* THE CONSTITUTION PROJECT, *supra* note 2, at 34–35 (2013) (“[Ninety-three percent] of those who ended up at Guantánamo were not captured by U.S. or coalition forces; most were handed over to the United States by Pakistani or authorities listed as ‘not stated’ when the United States was offering a reward for terrorist suspects.”).

21. November 13 Military Order, *supra* note 10.

22. *Id.* Additionally, President Bush defended his response to September 11 and Guantánamo in his memoir. *See* GEORGE W. BUSH, *DECISION POINTS* 126–82 (2010); *see also* George W. Bush, Remarks at the National Defense University (May 23, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (“And so our nation went to war. We have now been at war for well over a decade.”).

23. November 13 Military Order, *supra* note 10. In the coming weeks, one such location would be established: Guantánamo. *See infra* notes 36–42 and accompanying text.

24. November 13 Military Order, *supra* note 10.

25. *Id.*

United States.”<sup>26</sup> Moreover, the President ensured that they would be “treated humanely[,] . . . afforded adequate food, drinking water, shelter, clothing, and medical treatment; allowed the free exercise of religion consistent with the requirements of such detention; and detained in accordance with such other conditions as the Secretary of Defense may prescribe.”<sup>27</sup> Most importantly, the military order denied all those who would become detainees the ability “to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.”<sup>28</sup>

While the November 13 order never expressly characterized detainees as prisoners of war, its language resembled provisions in both Common Article 3 of the Geneva Conventions and the Geneva Convention Relative to the Treatment of Prisoners of War (“Geneva III”).<sup>29</sup> Indeed, Common Article 3, which applies to a non-international armed conflict,<sup>30</sup> mirrors the language of the November 13 order almost verbatim: “Persons . . . placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances *be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*”<sup>31</sup> Additionally, a provision of Geneva III states, “[t]he Detaining Power shall supply prisoners of war during transfer with sufficient food and drinking water to keep them in good health, likewise with the necessary clothing, shelter and medical attention.”<sup>32</sup> Although the November 13 guidelines certainly fell short of the treatment required for prisoners of war—provisions mandating that the prisoners are “quartered under conditions as

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26. *Id.*

27. *Id.*

28. *Id.* at 57, 835–36.

29. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III].

30. There has been much debate as to whether Common Article 3 was ever intended to apply to a conflict like that between the United States and al-Qaeda in the WAQT. Historically, the provision was intended for civil wars or internal armed conflicts. However, in 2006, the U.S. Supreme Court held that as a matter of law, Common Article 3 *did* apply. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

31. Geneva III, *supra* note 29, art. 3 (emphasis added).

32. *Id.* art. 46.

favorable as those for the forces of the Detaining Power,<sup>33</sup> advanced a salary,<sup>34</sup> and able to retain possession of their belongings<sup>35</sup>—at the very least, they indicated that the United States was willing to adopt at least some law-of-war principles.

But when the first twenty detainees arrived in Guantánamo Bay, Cuba, on January 11, 2002,<sup>36</sup> there was little consensus within the Bush Administration about which laws would govern the detention. Indeed, Guantánamo was chosen in part because of its status as a “legal black hole,”<sup>37</sup> and the unlikelihood that a U.S. federal court would find that it could exercise jurisdiction over the territory in habeas proceedings.<sup>38</sup> Whether traditional protections under the law of war would apply provided an additional source of discord among high-ranking government officials. Senior officials in the White House, Office of the Vice President, Department of Justice (DOJ), and Department of Defense (DOD) asserted that there were loopholes in the Geneva Conventions that rendered them inapplicable to this “novel” conflict.<sup>39</sup> Other military officials and senior staff at the Department of State expected that previous detention practices would apply at Guantánamo: soldiers would follow the Geneva Conventions, and the International Committee of the Red Cross would have an on-site presence.<sup>40</sup> In fact, responding

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33. *Id.* art. 25.

34. *Id.* art. 60.

35. *Id.* art. 18.

36. WORTHINGTON, *supra* note 16, at 125.

37. See Murphy et al., *supra* note 4 (“I asked all our assistant secretaries and regional bureaus to canvass literally the world to begin to look at what options we had as to where a detention facility could be established. We began to eliminate places for different reasons. One day, in one of our meetings, we sat there puzzled as places continued to be eliminated. An individual from the Department of Justice effectively blurted out, What about Guantánamo? The individual then began to make clear that Guantánamo now is an empty facility, that there’s a basic structure there, that it’s a place that had been used to hold Haitian and Cuban migrants, and that U.S. courts in the past have given the executive branch great deference in what it did in Guantánamo.” (statement of Pierre-Richard Prosper, the U.S. ambassador at large for war crimes from 2001–05)); see also Memorandum from Patrick F. Philbin & John Yoo, Deputy Assistant Attorneys Gen., to William J. Haynes II, Gen. Counsel, Dep’t of Def. (Dec. 28, 2001) [hereinafter Philbin-Yoo Memorandum], available at <http://www2.gwu.edu/~nsarchiv/torturingdemocracy/documents/20011228.pdf> (discussing possible habeas jurisdiction over aliens at Guantánamo).

38. Philbin-Yoo Memorandum, *supra* note 37.

39. Memorandum from John Yoo, Deputy Assistant Attorney Gen. & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Def. (Jan. 9, 2002), available at <http://www2.gwu.edu/~nsarchiv/torturingdemocracy/documents/20020109.pdf> (discussing the application of treaties to al-Qaeda and Taliban detainees).

40. Murphy et al., *supra* note 4 (quoting an interview with William H. Taft IV, Chief Legal Advisor to the U.S. Dep’t of State); see also Memorandum from William H. Taft IV, Chief Legal

to the argument that the Geneva Conventions did not apply to either the conflict with al-Qaeda or the Taliban, the Department of State maintained that the protections *did* apply, emphasizing that to declare them inapplicable could further endanger U.S. troops during hostilities.<sup>41</sup> If the United States disregarded the Geneva Conventions, the State Department warned, then it was possible the United States would be unable to assert the Conventions' protections if American troops were captured abroad.<sup>42</sup>

Ultimately though, President Bush's official stance in February 2002 affirmed that the Geneva Conventions applied to the conflict with the Taliban but not with al-Qaeda, because "al Qaeda is not a High Contracting Party to Geneva."<sup>43</sup> Furthermore, President Bush concluded that members of the Taliban were "unlawful combatants" and therefore not prisoners of war, and that neither al-Qaeda nor the Taliban detainees would be entitled to the protections of Common Article 3, as "the relevant conflicts [were] international in scope."<sup>44</sup> Nevertheless, the United States insisted that it would "continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."<sup>45</sup>

### *B. The Rise of Enhanced Interrogation Techniques*

In the months that followed, however, government officials were increasingly attracted to "enhanced interrogation techniques"<sup>46</sup> and

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Advisor to the U.S. Dep't of State, to Alberto Gonzales, White House Counsel (Feb. 2, 2002) [hereinafter Taft Memorandum], available at [http://www.nytimes.com/packages/html/politics/20040608\\_DOC.pdf](http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf) (arguing that the Geneva Convention should apply to the conflict in Afghanistan).

41. Taft Memorandum, *supra* note 40. William H. Taft IV was one of the few senior officials who objected to determining the Geneva Conventions did not apply. He wrote, "A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the Convention . . . and weakens the protections afforded by the Conventions to our troops in future conflicts." *Id.*

42. *Id.*

43. Bush Memorandum, *supra* note 10.

44. *Id.*

45. *Id.*

46. THE CONSTITUTION PROJECT, *supra* note 2, at 37–39; see also Memorandum from Jay Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Bybee Standards Memorandum], available at <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf> (discussing the legal boundaries of the "Standards of Conduct for

investigated the legal boundaries of using new strategies to extract information from detainees.<sup>47</sup> These proposed interrogation practices were modeled after the military's Search, Evasion, Resistance and Escape (SERE) program, which was designed to prepare military personnel for ill treatment they might suffer if captured by countries that did not follow the Geneva Conventions.<sup>48</sup> The SERE program included techniques like "prolonged hooding, stress positions . . . sleep deprivation and waterboarding" in closely monitored conditions.<sup>49</sup> It was intended to train U.S. military in resistance methods that would prevent them from revealing information or "develop[ing] a sense of 'learned helplessness,'" while under the control of enemy captors.<sup>50</sup>

However, during the WAQT, the SERE techniques were used against alleged terrorists with the opposite intent: to break down the detainees and "ensure that [they] would comply with [their] captor's demands."<sup>51</sup> At the same time, some FBI interrogators expressed legitimate concerns that these techniques would not result in effective intelligence-gathering, since the detainees might confess to anything to end the treatment.<sup>52</sup>

Throughout the creation of the new interrogation program at Guantánamo, senior government officials assessed the legality of the proposed tactics. A 2002 memorandum from DOJ to the White House considered whether the interrogation methods could give rise to criminal liability under the domestic statute, 18 U.S.C. § 2340,<sup>53</sup>

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Interrogation Under 18 U.S.C. §§ 2340–2340A," including "acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical").

47. Memorandum from Diane Beaver, Staff Judge Advocate, to Commander, Joint Task Force 170 (Oct. 11, 2002) [hereinafter Beaver Strategies Memorandum], available at <http://www2.gwu.edu/~nsarchiv/torturingdemocracy/documents/20021011.pdf> (addressing the legality of counter-resistance strategies at Guantánamo); Bybee Standards Memorandum, *supra* note 46.

48. THE CONSTITUTION PROJECT, *supra* note 2, at 205.

49. *Id.*

50. *Id.* Learned helplessness refers to a behavioral "phenomenon" in which an individual who has been conditioned through repeated, controlled behavior to believe that he is powerless will "give up," even in instances where the same controlling behavior is not used. For instance, "psychologist Dr. Martin Seligman . . . found that when dogs were given electric shocks while confined in harnesses that they could not escape, most later failed to escape shocks when the harnesses were removed." *Id.*

51. Scott Shane, 2 *U.S. Architects of Harsh Tactics in 9/11's Wake*, N.Y. TIMES, Aug. 12, 2009, [http://www.nytimes.com/2009/08/12/us/12psychs.html?\\_r=1&p](http://www.nytimes.com/2009/08/12/us/12psychs.html?_r=1&p).

52. *Id.*

53. 18 U.S.C. § 2340 (2012).

which was implemented to fulfill the United States' obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>54</sup> Although government lawyers consulted the CAT, they did so only to “confirm[] [their] view that the criminal statute penalizes only the most egregious conduct,” and to conclude that the proposed conduct at Guantánamo would not reach a level high enough to impose liability concerns.<sup>55</sup>

The same was true for DOJ's analysis of the Torture Victims Protection Act (TVPA), the domestic statute that provides a tort remedy to torture victims.<sup>56</sup> Put differently, DOJ consulted the TVPA only to “predict the standards that courts might follow in determining what actions reach the threshold of torture in the criminal context” and to bolster the conclusion that “cruel and extreme physical pain” was almost always a prerequisite to a successful TVPA action.<sup>57</sup> For its part, DOJ focused on the terms of § 2340, which defined torture as “an act . . . specifically intended to inflict severe physical or mental pain or suffering.”<sup>58</sup> It ultimately concluded that “severe physical pain,” was indicated by “physical damage . . . [that] must rise to the level of death, organ failure, or the permanent impairment of a significant bodily function.”<sup>59</sup> The memorandum was leaked on June 13, 2004,<sup>60</sup> and replaced six months later with a new memorandum providing amended interpretations of “severe physical pain or suffering” that lowered the threshold from the 2002 requirement and guidance for the definition of “prolonged mental harm” as interpreted under the TVPA.<sup>61</sup> To

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54. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter *Convention Against Torture*].

55. *Id.*; Bybee Standards Memorandum, *supra* note 46, at 2.

56. *See* Bybee Standards Memorandum, *supra* note 46, at 22–27; Torture Victim Protection Act, 28 U.S.C. § 1350 (2012).

57. Bybee Standards Memorandum, *supra* note 46, at 2.

58. *Id.* at 2–3.

59. *Id.* at 6. In determining what constituted “severe pain,” the Office of Legal Counsel looked to “Congress’s use of the phrase ‘severe pain’ elsewhere in the United States Code”—sections relating to emergency medical care for undocumented individuals and conditions relating to when the federal government would reimburse hospitals for providing emergency medical care to undocumented individuals, 8 U.S.C. § 1369 (2012), and emergency medical treatment for Medicare beneficiaries, 42 U.S.C. § 1395(w)(22) (2006).

60. THE CONSTITUTION PROJECT, *supra* note 2, at 350.

61. Memorandum Opinion for the Deputy Attorney Gen., from Daniel Levin, Acting Assistant Attorney Gen., Office of Legal Counsel (Dec. 30, 2004) [hereinafter *Revised Standards*].

constitute adequate mental pain, according to the revised memorandum, “the prolonged mental harm must be caused by acts falling within one of the four statutory categories.”<sup>62</sup> One such category included “the administration or application . . . of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality,”<sup>63</sup> conduct that was often used and documented at Guantánamo.<sup>64</sup> The 2004 memorandum reiterated the United States’ condemnation of torture as an “abhorrent” practice.<sup>65</sup>

Contrary to the Bush administration’s early promises, however, declassified documents and accounts from various released detainees indicate that treatment of the Guantánamo detainees was far from humane. Multiple accounts from released detainees, as well as from a report from the Office of the Inspector General of the FBI, revealed recurring treatment, used either to punish uncooperative detainees or to compel them to “break.”<sup>66</sup> Authorized techniques included isolating a detainee for up to thirty days, deprivation of light and auditory stimuli, and twenty-hour interrogations.<sup>67</sup> Additionally, interrogators employed two forms of sleep deprivation: traditional sleep deprivation and a practice known as “sleep adjustment.” Under traditional sleep deprivation, a detainee was prevented from sleeping at all. This practice was authorized for use up to 180 continuous hours.<sup>68</sup> During the “sleep adjustment” or “frequent flyer” program, an interrogator would awaken a detainee periodically, anywhere

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Memorandum], available at <http://www.justice.gov/olc/18usc23402340a2.htm> (replacing Bybee Standards Memorandum, *supra* note 46).

62. *Id.*

63. *Id.*

64. See *infra* Part IV.C.2.

65. Revised Standards Memorandum, *supra* note 61.

66. See THE CONSTITUTION PROJECT, *supra* note 2, at 205; U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FBI’S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTÁNAMO BAY, AFGHANISTAN, AND IRAQ 171–211 (May 2008) [hereinafter THE FBI’S INVOLVEMENT], available at <http://www.justice.gov/oig/special/s0805/final.pdf>.

67. Beaver Strategies Memorandum, *supra* note 47.

68. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., to John A. Rizzo, Gen. Counsel, Cent. Intelligence Agency 12–13 (May 30, 2005) [hereinafter Bradbury Memorandum], available at [http://www2.gwu.edu/~nsarchiv/torture\\_archive/docs/Bradbury%20memo.pdf](http://www2.gwu.edu/~nsarchiv/torture_archive/docs/Bradbury%20memo.pdf) (analyzing whether some interrogation techniques violated the United States’ obligations under Article 16 of the CAT). In the same memorandum, Bradbury explained that, while sleep deprivation was authorized for up to 180 hours, interrogators had only used this method in excess of 96 hours with three detainees.

from every hour to every few hours, and move him to a different cell.<sup>69</sup> Though this second method provided detainees with some rest, individuals who were subjected to the program were rarely afforded more than four hours of sleep each night;<sup>70</sup> one detainee was reportedly kept awake and interrogated for twenty hours per day for a two-month period.<sup>71</sup>

Additional interrogation techniques included exposure to extreme temperatures; sexual humiliation, including contact with female interrogators that exploited detainees' religious and cultural beliefs; beatings; and short-shackling—a method by which “the detainee’s hands and feet were chained close to a bolt on the floor so that the detainee could not sit or stand comfortably.”<sup>72</sup> Short-shackling was frequently combined with other techniques, such as flashing lights, loud music, and cold and hot temperatures, to further “break” an uncooperative detainee.<sup>73</sup> Moreover, Guantánamo guards often responded to disobedience with force that “looked like

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69. THE FBI'S INVOLVEMENT, *supra* note 66, at 182–84.

70. Detainees in the “frequent flyer” program were allowed some sleep, but it was minimal. As one DOD memorandum concluded:

There is no legal requirement that detainees must receive four hours of sleep per night, but if a U.S. Court ever had to rule on this procedure, in order to pass Eighth Amendment scrutiny, and as a cautionary measure, they should receive some amount of sleep so that no severe physical or mental harm would result.

Beaver Strategies Memorandum, *supra* note 47, at 6. Donald Rumsfeld approved most of the proposed counter-resistance techniques on December 2, 2002. Memorandum from William J. Haynes II, Gen. Counsel, to Donald Rumsfeld, Sec’y of Def. (Nov. 27, 2002), *available at* <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf> (approved and signed by Rumsfeld on Dec. 2, 2002).

71. Declaration of Gitanjali S. Gutierrez, Esq., Lawyer for Mohammed al Qahtani 4, *available at* [http://ccrjustice.org/files/Publication\\_DeclarationonAlQahtani.pdf](http://ccrjustice.org/files/Publication_DeclarationonAlQahtani.pdf); *see also Interrogation Log Detainee 063*, *available at* [http://ccrjustice.org/files/Publication\\_AlQahtaniLog.pdf](http://ccrjustice.org/files/Publication_AlQahtaniLog.pdf).

72. THE FBI'S INVOLVEMENT, *supra* note 66, at 179; *see* HICKS, *supra* note 20; WORTHINGTON, *supra* note 16; RLUHEL AHMED, ASIF IQBAL, & SHAFIQ RASUL, COMPOSITE STATEMENT: DETENTION IN AFGHANISTAN AND GUANTÁNAMO BAY (2004), *available at* [http://humanrights.ucdavis.edu/resources/library/documents-and-reports/tipton\\_report.pdf](http://humanrights.ucdavis.edu/resources/library/documents-and-reports/tipton_report.pdf). *See generally* THE FBI'S INVOLVEMENT, *supra* note 66, at 171–211 (detailing the conduct observed by the FBI at Guantánamo).

73. THE FBI'S INVOLVEMENT, *supra* note 66, at 179. According to the report, published in 2008, short-shackling at Guantánamo was prohibited in May 2004. *Id.* at 180. *But see id.* at 181 n.132 (“In commenting on a draft of this report, the DOD stated that ‘short-shackling’ is also a technique used to control violent or belligerent detainees to ensure the safety of others . . .”).



some violent street fight”;<sup>74</sup> kicking detainees, taunting them, and using dogs for intimidation were not uncommon practices.<sup>75</sup>

### C. *Guantánamo’s Lasting Effects*

Omar Deghayes, a British resident and law graduate, spent nearly six years imprisoned at Guantánamo.<sup>76</sup> Deghayes was found in Pakistan and transported to Guantánamo Bay on August 5, 2002.<sup>77</sup> Upon his release in December 2007,<sup>78</sup> Deghayes returned to Great Britain, suffering from post-traumatic stress disorder and “[blind] in one eye after a guard allegedly tried to gouge out his eyeballs with his fingers.”<sup>79</sup> For Deghayes and the other British detainees, the stigma of their detention in Guantánamo remains: some of the men have been victims of racial attacks, and the children of one detainee have even been bullied at school.<sup>80</sup>

Indeed, the treatment of one detainee in particular, alleged “20th hijacker”<sup>81</sup> Mohammed al-Qahtani, prompted Judge Susan Crawford, a “Cheney loyalist,”<sup>82</sup> to conclude years afterward that al-Qahtani was tortured by the United States.<sup>83</sup> As a result, Judge Crawford did not allow him to be prosecuted by a military commission.<sup>84</sup> Mohammed al-Qahtani remains at Guantánamo indefinitely and has no recourse for the treatment he endured.

But other detainees—those like Omar Deghayes or Abdul Rahim Abdul Razal al Janko, whose seven-year detention was

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74. HICKS, *supra* note 20, at 220–21.

75. *Id.* at 215–16, 220–21; WORTHINGTON, *supra* note 16, at 133–34.

76. Tracy McVeigh, *Britain’s Guantánamo Survivors Are Suffering a Toxic Legacy*, GUARDIAN (Dec. 31, 2011), <http://www.theguardian.com/world/2012/jan/01/released-guantanamo-british-detainees>.

77. Memorandum from Mitchell R. LeClaire to SOUTHCOM (JTF-GTMO Assessment), (Apr. 10, 2004), available at <http://projects.nytimes.com/Guantánamo/detainees/727-omar-amer-deghayes>.

78. N.Y. Times & NPR, *Omar Amer Deghayes*, GUANTÁNAMO DOCKET, <http://projects.nytimes.com/guantanamo/detainees/727-omar-amer-deghayes> (last visited Sept. 9, 2014).

79. McVeigh, *supra* note 76.

80. *Id.*

81. WORTHINGTON, *supra* note 16, at 205.

82. *Cast of Characters: Key Players in the Cheney Series*, WASH. POST, [http://voices.washingtonpost.com/cheney/about/cast\\_of\\_characters/](http://voices.washingtonpost.com/cheney/about/cast_of_characters/) (last visited Oct. 20, 2013); see also David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 178–79 (2008).

83. *Bush Official Says Gitmo Detainee Was Tortured*, CNN (Jan. 15, 2009), <http://www.cnn.com/2009/US/01/15/guantanamo.torture/>.

84. *Id.*

deemed “unlawful” by a federal district court<sup>85</sup>—have been released or cleared for release. Many of them returned to their home countries (or were “repatriated” to new countries) to find that their wives had moved on, their children had grown up, and their livelihoods had been destroyed.<sup>86</sup>

Unlike any other country, the United Kingdom has provided financial compensation to its released detainees. Yet its motives may not be purely altruistic. Upon their release, the British detainees “sued Britain for alleged complicity in their torture.”<sup>87</sup> To avoid disclosing confidential security documents and participating in “lengthy and expensive court proceedings,”<sup>88</sup> the British government proposed a financial settlement, but maintained that the settlement “involve[d] no concession of liability.”<sup>89</sup> Nevertheless, the confidential settlement, rumored to be millions of dollars, was to be split among sixteen men:<sup>90</sup> the fifteen former detainees, as well as Great Britain resident Shaker Aamer, who, despite being cleared for release in January 2010, remains at Guantánamo after twelve years.<sup>91</sup>

Most of the detainees, however, do not return to countries as sympathetic as the United Kingdom upon leaving Guantánamo. For many of the men, the only remedy, if any, that they will see after years of wrongful detention and mistreatment is their release.

#### *D. Emerging from the “Legal Black Hole”*

Guantánamo opened for WAQT detainees in early 2002, and until 2004, detainees found little success in challenging their detention: “[w]ith none of the protections afforded to prisoners of international conflict applicable, detainees at Guantánamo were held under any conditions the U.S. government determined appropriate.”<sup>92</sup>

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85. *Al Janko v. Gates*, 831 F. Supp. 2d 272 (D.D.C 2011), *aff’d*, 741 F.3d 136 (D.C. Cir. 2014).

86. McVeigh, *supra* note 76.

87. Janet Stobart, *Ex-Guantanamo Detainees Settle Suit Against Britain*, L.A. TIMES, Nov. 17, 2010, <http://articles.latimes.com/2010/nov/17/world/la-fg-britain-prisoners-20101117>.

88. *Id.*

89. McVeigh, *supra* note 76.

90. *Id.*

91. N.Y. Times & NPR, *Shaker Aamer*, GUANTÁNAMO DOCKET, <http://projects.nytimes.com/guantanamo/detainees/239-shaker-aamer> (last visited Sept. 9, 2014).

92. *Guantánamo Litigation—History*, LAWFARE BLOG (Dec. 16, 2009, 9:33 AM), <http://www.lawfareblog.com/wiki/detention/non-criminal-detention-after-911/non-criminal>

However, in 2004, three “war on terror” cases reached the Supreme Court, including *Rasul v. Bush*.<sup>93</sup> In *Rasul*, the Supreme Court held that the Guantánamo detainees had a statutory right to habeas corpus, and that such a right was “not dependent on U.S. citizenship.”<sup>94</sup>

Over the next three years, a battle ensued between the Supreme Court and the executive and legislative branches. Just one week after the ruling in *Rasul* and “in the hope of curtailing . . . judicial challenges,”<sup>95</sup> DOD established the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC).<sup>96</sup> OARDEC oversaw the Combatant Status Review Tribunals (CSRTs), which implemented a process of review to determine whether individuals detained at Guantánamo were, in fact, “enemy combatants.”<sup>97</sup> Yet the CSRTs provided detainees with little meaningful review. In a sworn affidavit, Lieutenant Colonel Stephen Abraham, who participated in the CSRT process, implied that the CSRTs were inadequate and corrupt.<sup>98</sup> In one instance, Lieutenant Colonel Abraham was assigned to a CSRT and all panel members “found the information presented to lack substance.”<sup>99</sup> Lieutenant Colonel Abraham stated:

What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence. Statements allegedly made by percipient witnesses lacked detail. Reports presented generalized statements . . . without stating the source of the information or providing a basis for establishing the reliability or the credibility of the source.<sup>100</sup>

The panel determined that “there was no factual basis for concluding that the individual should be classified as an enemy combatant,” and

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-detention-under-the-authorization-for-the-use-of-military-force/guantanamo-litigation/history-of-guantanamo-litigation/.

93. 542 U.S. 466 (2004).

94. *Guantánamo Litigation—History*, *supra* note 92.

95. Glazier, *supra* note 82, at 169.

96. Nat Moger, *OARDEC Conducts ARBs and CSRTs*, JOINT TASK FORCE GUANTANAMO (June 6, 2008), <http://www.jtfgtmo.southcom.mil/storyarchive/2008/June/060908-oardec.html>.

97. Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy (July 7, 2004), *available at* <http://www.defense.gov/news/Jul2004/d20040707review.pdf>.

98. Reply to Opposition to Petition for Rehearing, *Boumediene v. Bush*, 553 U.S. 723 (2008) (No. 06-1196), *available at* <http://www.scotusblog.com/movabletype/archives/A1%20Odah%20reply%206-22-07.pdf> (Declaration of Stephen Abraham).

99. *Id.* para. 21.

100. *Id.* para. 22.

reported their findings to the Director of OARDEC.<sup>101</sup> Lieutenant Colonel Abraham's declaration continued:

[The OARDEC Director and Deputy Director] immediately questioned the validity of our findings. They directed us to write out the specific questions that we had raised concerning the evidence to allow [the government representative] to present further argument as to why the detainee should be classified as an enemy combatant. Ultimately, in the absence of any substantive response to the questions and no basis for concluding that additional information would be forthcoming, we did not change our determination that the detainee was not properly classified as an enemy combatant. OARDEC's response to the outcome was consistent with the few other instances in which a finding of "Not an Enemy Combatant" (NEC) had been reached by CSRT boards. In each of the meetings that I attended with OARDEC leadership following a finding of NEC, the focus of inquiry on the part of the leadership was "what went wrong."<sup>102</sup>

Lieutenant Colonel Abraham was never assigned to another CSRT panel.<sup>103</sup>

One year after *Rasul*, Congress passed the Detainee Treatment Act of 2005, which "purported to strip all U.S. courts of jurisdiction to hear any habeas corpus petitions filed by Guantánamo detainees."<sup>104</sup> The following year, the Supreme Court heard *Hamdan v. Rumsfeld*,<sup>105</sup> and ruled that Common Article 3 applied to the "war on terror."<sup>106</sup> Again, Congress responded and passed the Military Commissions Act of 2006.<sup>107</sup> This time, Congress "wholly eliminat[ed] the statutory grant of federal jurisdiction" for Guantánamo detainees and empowered the military commissions to

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101. *Id.* para. 23.

102. *Id.*

103. *Id.* para. 24.

104. *Guantánamo Litigation—History*, *supra* note 92.

105. 548 U.S. 557 (2006).

106. *Id.* at 631–32; Glazier, *supra* note 82, at 174; *Guantánamo Litigation—History*, *supra* note 92.

107. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended at 10 U.S.C. §§ 948–49); *see also* *Guantánamo Litigation—History*, *supra* note 92.

try so-called unlawful enemy combatants.<sup>108</sup> Finally, in 2008 the Court found that Guantánamo detainees had a *constitutional* right to habeas corpus in *Boumediene v. Bush*.<sup>109</sup> Still, despite constant litigation concerning Guantánamo, there has yet to be a single case where a detainee has successfully challenged his detention and received a monetary remedy.<sup>110</sup>

### III. JUDGING THE CONDUCT UNDER INTERNATIONAL LAW

Although the Bush administration's internal memoranda concluded that the detention and "enhanced interrogation tactics" complied with domestic law, there was little analysis of whether the conduct complied with international law. Indeed, the 2002 DOJ memoranda seemed to focus on whether U.S. officials could be held criminally liable for the conduct at Guantánamo and proposed defenses like necessity and self-defense that DOJ believed the White House could assert in the event of a prosecution under domestic law for the conduct.<sup>111</sup> Yet the mere fact that criminal prosecution was unlikely did not discharge the United States from its international obligations, under either the law of war or relevant human rights treaties—specifically, the Convention Against Torture.<sup>112</sup> The White House's determination that the Geneva Conventions of 1949 did not apply, and its failure to thoroughly consider other sources of the law of armed conflict, including treaties with non-derogable norms, led to new policies that, in fact, violated the law.

#### *A. The Law of War and International Law Principles of State Responsibility*

The law of war consists of both customary international law, developed over the last several centuries, and a series of international treaties providing specific rules for, *inter alia*, warfare, the treatment of prisoners of war, and the treatment of civilians. In particular, the

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108. *Guantánamo Litigation—History*, *supra* note 92.

109. 553 U.S. 723, 771 (2008); *Guantánamo Litigation—History*, *supra* note 92.

110. There have been some detainee successes in court. However, the only cases that Article III courts are willing (or able) to entertain involve petitions for habeas corpus. *See, e.g.*, *Rasul v. Bush*, 542 U.S. 466 (2004); *Al Janko v. Gates*, 831 F. Supp. 2d 272 (D.D.C. 2011), *aff'd*, 741 F.3d 136 (D.C. Cir. 2014). *But see* *Aamer v. Obama*, 742 F.3d 1023, 1026 (D.C. Cir. 2014) (finding that "petitioners' challenges to the conditions of their confinement properly sound in habeas corpus and thus are not barred by the [Military Commissions Act]").

111. Bybee Standards Memorandum, *supra* note 46, at 39–46.

112. *See infra* Part III.C.

Hague Convention (IV) [R]especting the Laws and Customs of War on Land,<sup>113</sup> its annexed Regulations [C]oncerning the Laws and Customs of War on Land,<sup>114</sup> and the Geneva Conventions of 1949 provide much of the rules and foundation governing armed conflict in the present day.<sup>115</sup> The Hague Convention (IV) of 1907 (giving rise to the term “Hague Law”) governs the general rules of warfare, listing guidelines for defining belligerents in a conflict and addressing permitted weapons and military tactics.<sup>116</sup> The Geneva Conventions (giving rise to the term “Geneva Law”), on the other hand, provide a set of rules outlining the treatment for the sick and wounded (Conventions I and II),<sup>117</sup> prisoners of war (Convention III),<sup>118</sup> and civilians (Convention IV).<sup>119</sup> Inevitably, there is some overlap between Hague Law and Geneva Law: the Hague Convention briefly addresses prisoners of war, a topic that was later expanded in Geneva III, and the Hague Convention (IV) fully defers to the Geneva Convention for the laws “on the treatment of the sick and wounded.”<sup>120</sup> Although states may not be parties to these treaties, they may nonetheless be legally bound by the rules the treaties mandate under customary international law.<sup>121</sup>

If a state violates the law of war or any other international obligation, the wrongful act triggers the state’s international responsibility.<sup>122</sup> A variety of factors, including the source of the

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113. Hague (IV) Convention, *supra* note 8.

114. Hague (IV) Regulations, *supra* note 8.

115. ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 236 (2nd ed. 2010). Since the initial ratification of the Geneva Conventions, three additional protocols have been introduced, but only one has been ratified by the United States. *See* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, T.I.A.S. 07-908, 1125 U.N.T.S. 17512.

116. Hague (IV) Convention, *supra* note 8.

117. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

118. Geneva III, *supra* note 29.

119. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

120. Hague (IV) Regulations, *supra* note 8, art. 21.

121. AUST, *supra* note 115, at 6. For a further discussion of when a rule rises to the level of customary international law, *see id.* at 6–8.

122. *See* International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles].

obligation and the circumstances surrounding the breach, determine the consequences for the offending state.<sup>123</sup> The *Draft Articles on Responsibility of States for Internationally Wrongful Acts* and accompanying commentary provide basic rules that outline when an internationally wrongful act has been committed, any circumstances precluding wrongfulness and, most relevant to this Article, the requirement that an offending state make reparation appropriately.<sup>124</sup>

Under principles of international law, there are three distinct components to reparation for an internationally wrongful act: restitution, compensation, and satisfaction.<sup>125</sup> Restitution provides that a state must “re-establish the situation which existed before the wrongful act was committed.”<sup>126</sup> Where restitution does not provide an adequate remedy, the state “is under an obligation to compensate for the damage caused thereby . . . [which] shall cover any financially assessable damage.”<sup>127</sup> Financially assessable damage refers to:

[N]ot only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual . . . . Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life.<sup>128</sup>

Finally, if a wrongful act “cannot be made good by restitution or compensation,” the responsible state must give satisfaction: “an acknowledgement of the breach, an expression of regret, a formal

123. *Id.*

124. *Id.*

125. *Id.* arts. 34–37.

126. *Id.* art. 35.

127. *Id.* art. 36.

128. *Id.* art. 36, commentary para. 16; *see also The Lusitania Cases* (Ger. v. U.S.), 7 R.I.A.A. 32 (1923). The tribunal explained:

That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages, but not as a penalty.

*Id.* at 40.

apology, or another appropriate modality.”<sup>129</sup> A wrongful act is typically ameliorated by restitution or compensation, however, and thus, the satisfaction component is less common.<sup>130</sup>

### B. *Universal Prohibitions and International Obligations*

In times of peace, various laws—both domestic and international—inform the legality of state practices. In times of armed conflict, however, the law of war provides a set of specialized international rules that are better tailored to war. For example, under U.S. domestic law, killing is generally unlawful. But in a time of war, combatants possess the privilege “to attack and to resist the enemy,”<sup>131</sup> which permits tactics that can result in death. Killing is not only permissible; it is inevitable. The same relationship exists between international human rights law and the law of armed conflict: international human rights law applies as a “default” rule. During an armed conflict, however, the law of armed conflict supersedes the general rule.<sup>132</sup> Where individuals could not otherwise kill soldiers, imprison individuals in preventive detention, or cause large-scale destruction of property, the law of war permits such conduct, as long as it conforms to certain principles.<sup>133</sup>

However, while the law of armed conflict permits certain conduct that is otherwise unlawful under general domestic or international human rights laws, some conduct is always unlawful.<sup>134</sup> A peremptory norm of international law (also sometimes referred to as *jus cogens* or a “*jus cogens* norm”) is “a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted” by any state.<sup>135</sup> No

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129. Draft Articles, *supra* note 122, art. 37.

130. *Id.* art. 37, commentary para. 1.

131. U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 37 (2005).

132. *See id.* at 37–45.

133. *See generally id.* at 21–26 (2005) (describing the four basic principles of the law of armed conflict: military necessity, humanity, distinction, and proportionality).

134. Erika de Wet, *Jus Cogens and Obligations Erga Omnes*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 541, 541–48 (Dinah Shelton ed., 2013).

135. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, page number [hereinafter Vienna Convention]; *see also* de Wet, *supra* note 134, at 543 (“The fact that complete consensus amongst states is not a requirement for the emergence of a peremptory



justification can excuse a violation of a peremptory norm: “a genocide cannot justify a counter genocide,” and “the plea of necessity . . . cannot excuse the breach of a peremptory norm.”<sup>136</sup> Put differently, once prohibited conduct has reached the level of *jus cogens*, it has the strongest force and can never be violated—not by two countries agreeing in a treaty to violate the norm<sup>137</sup> and not by a state asserting a defense to excuse the violation.<sup>138</sup>

Very few acts have merited this heightened status, and there is some disagreement as to which conduct amounts to a peremptory norm.<sup>139</sup> The widely accepted view includes “the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.”<sup>140</sup>

In addition, there are separate obligations—obligations *erga omnes*—that are owed to all states.<sup>141</sup> Many scholars agree that all *jus cogens* norms rise to the level of obligations *erga omnes*.<sup>142</sup> But the inverse is not true: there are obligations *erga omnes* that are not *jus cogens*.<sup>143</sup> A third category of obligations—obligations *erga omnes partes*—describes the relationship among some groups of states, especially in the context of certain multilateral treaties. That is, where a treaty involves only a few states and “protect[s] a collective interest of the group,” the treaty creates an obligation *erga omnes partes*—an obligation owed *only* to members of that group.<sup>144</sup>

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norm implies that the (very small number of) states not in agreement can nonetheless be bound against their will.” (footnote omitted).

136. Draft Articles, *supra* note 122, art. 26, commentary para. 4.

137. Vienna Convention, *supra* note 135, art. 53.

138. See Draft Articles, *supra* note 122, arts. 20–26.

139. See *id.* art. 26, commentary para. 5. *But see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (purporting to expand the list of peremptory norms of international law).

140. See Draft Articles, *supra* note 122, art. 26, commentary para. 5. The *Restatement (Third) of the Foreign Relations Law of the United States* furthers a more idealistic view, suggesting “genocide; slavery or slave trade; the murder or causing the disappearance of individuals; torture or other cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; and systematic racial discrimination” are peremptory norms of international law. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). While U.S. courts have acknowledged the *Restatement*’s position, for example, *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994), it is not the internationally accepted view.

141. AUST, *supra* note 115, at 10.

142. *Id.*; de Wet, *supra* note 134, at 553–55.

143. AUST, *supra* note 115, at 10; see also de Wet, *supra* note 134, at 553–55 (noting that only certain *erga omnes* human rights obligations, e.g., the prohibition of genocide and torture, are peremptory norms because they have been recognized as such by the majority of states).

144. Draft Articles, *supra* note 122, art. 48, commentary para. 5.

Obligations *erga omnes* or *erga omnes partes* that do not rise to the level of *jus cogens* may be violated under some circumstances, including war.<sup>145</sup>

But a mere consensus that particular conduct is *jus cogens*, and thus a non-derogable norm, accomplishes little in the way of enforcement. As one scholar noted, “Practice has illustrated that the recognition of the peremptory status of a particular norm is no guarantee for effective enforcement of the norm and the values it represents.”<sup>146</sup> Indeed, while states *can* monitor and enforce obligations through principles of state responsibility, states are not required to pursue another’s breach, even when peremptory norms are violated.

The breach of *any obligation* owed to a state, whether an ordinary obligation or an obligation *erga omnes*, enables the injured state to “invoke the responsibility” of the offending state.<sup>147</sup> However, while a breach empowers the injured state to invoke responsibility, the state is not obligated to do so. If an injured state does invoke responsibility for a breach, it can “specify . . . the conduct that the responsible State should take in order to cease the wrongful act”<sup>148</sup> and indicate “what form reparation should take.”<sup>149</sup>

Obligations *erga omnes* are unique. Because the breach of an obligation *erga omnes* affects the international community as a whole, such a breach enables both the injured and non-injured states to invoke responsibility of the violating state.<sup>150</sup> For a non-injured state to invoke responsibility, either “the obligation breached is owed to a group of states including [the invoking] state and is established for the protection of a collective interest of the group” (constituting an obligation *erga omnes partes*), or “the obligation breached is owed to the international community as a whole” (constituting an obligation *erga omnes*).<sup>151</sup> Once a non-injured state has met these

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145. *See id.* arts. 20–26.

146. de Wet, *supra* note 134, at 560.

147. Draft Articles, *supra* note 122, general commentary, para. 5 (“[The present articles] apply to the whole field of the international obligations of states, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole.”).

148. *Id.* art. 43.

149. *Id.*

150. *See id.* art. 48, commentary para. 5; *infra* Part V.A–B.

151. Draft Articles, *supra* note 122, art. 48, para. 1.

threshold requirements, it can invoke basic principles of state responsibility. Through state responsibility, the invoking state can require: “(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition . . . and (b) Performance of the obligation of reparation in accordance with [the Draft articles], in the interest of the injured state or of the beneficiaries of the obligation breached.”<sup>152</sup> If an invoking state alleges a breach of an obligation *erga omnes*, the violating state can raise any defense that could “preclude [the] wrongfulness” of the breach.<sup>153</sup> However, no defense could preclude the wrongfulness of a state’s breach of a *jus cogens* norm.

Domestic laws further complicate the force of international treaty law, especially in the United States.<sup>154</sup> In general, a state can only be responsible for those obligations to which it has bound itself.<sup>155</sup> Furthermore, in the United States, many treaties are designated *not* to be self-executing, meaning domestic legislation must implement the United States’ obligations under international law. The resulting patchwork of applicable laws, permissible violations, and mechanisms for enforcement become particularly important when it comes to treaties that include both *jus cogens* and simple obligations.

### C. *The Convention Against Torture*

Adopted by the United Nations General Assembly in 1984, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment generally prohibits torture, as well as cruel, inhuman, and degrading treatment (CID) in any territory under the jurisdiction of a state party to the treaty.<sup>156</sup> However, due to the language of the treaty and the nature of the conduct, the precise force of each prohibition varies. Moreover, the United States’ reservations

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152. *Id.* art. 48, para. 2.

153. *Id.* arts. 20–25.

154. *See* AUST, *supra* note 115, at 78–80.

155. *See id.* at 5–8. However, two exceptions exist under customary international law whereby a nation will be responsible for obligations even if it has not bound itself: (1) a nation fails to establish itself as a persistent objector and unwillingly becomes bound by a rule, or (2) a nation develops after a rule of customary international law has developed. Interview with David Glazier, Professor of Int’l Law, Loyola Law Sch., in L.A., Cal. (Jan. 7, 2014).

156. Convention Against Torture, *supra* note 54.

have further limited the CAT's applicability to the United States' conduct.

### 1. Prohibitions Against Torture and CID Under the CAT

The CAT addresses torture, a peremptory norm of international law, and CID—conduct that does not rise to the level of *jus cogens*.<sup>157</sup> As a result, the CAT provides one example in which the distinction between *jus cogens* and other treaty obligations affects the legality of conduct.<sup>158</sup> In addition to prohibiting both torture and CID, the CAT includes provisions regarding redress and enforcement.<sup>159</sup> For instance, Article 14 requires that each state party “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”<sup>160</sup> Articles 21 and 22 empower the Committee Against Torture (“the Committee”) to receive communication of alleged violations from states party to the treaty and from individuals claiming to be victims of torture, respectively.<sup>161</sup> Although the Committee has the authority to investigate a state's practices, this oversight function means little in the way of actual enforcement; the Committee can neither ensure compliance, nor award damages.<sup>162</sup>

The CAT defines torture as:

[A]ny 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 party 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

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157. See *infra* Part III.D.3.

158. Convention Against Torture, *supra* note 54.

159. *Id.* art. 14.

160. *Id.*

161. *Id.* arts. 21–22.

162. *Id.*

public official or other person acting in an official capacity.<sup>163</sup>

The CAT limits the definition of torture to exclude “pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>164</sup> The CAT does not define CID, beyond indicating that it is treatment that does not rise to the level of torture.<sup>165</sup>

Differentiating between torture and CID is critical, as the two types of conduct have very different legal consequences. Committing torture violates a peremptory norm of international law (and thus an obligation *erga omnes*), which triggers a variety of enforcement mechanisms to address the violation.<sup>166</sup> On the other hand, CID breaches the CAT, but CID is not a peremptory norm of international law.<sup>167</sup> As a result, only an “injured” state can hold the wrongful state accountable for CID. Yet, some international authorities, including the International Court of Justice (ICJ), have indicated that the CAT creates an obligation *erga omnes partes*.<sup>168</sup> In one case, the ICJ found that the commission of CID would “injure” every state party to the treaty.<sup>169</sup> At the same time, the CAT’s text does not provide a right for states party to the treaty to assert another’s breach. In either circumstance, because CID has not attained the status of a *jus cogens* norm, the alleged violating party could justify its actions using permitted legal defenses (for instance, necessity or self-defense), as well as factual defenses (primarily, that the treatment did not rise to the level of cruel, inhuman, and degrading).<sup>170</sup>

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163. *Id.* art.1, para. 1.

164. *Id.*

165. *Id.* art. 16, para. 1.

166. *See supra* note 122 and accompanying text.

167. *See infra* Part III.D.3.

168. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, 450 para. 69 (July 20). While only persuasive authority, the ICJ recently concluded that the CAT created an enforceable obligation on behalf of all states party to the treaty. In other words, the CAT creates obligations *erga omnes partes*, in addition to addressing torture, which, even without the treaty provisions, would be an obligation *erga omnes*. *See also* Draft Articles, *supra* note 122, art. 48, commentary para. 6 (explaining obligations *erga omnes partes*).

169. *See* Questions Relating to the Obligation to Prosecute or Extradite, *supra* note 168, at 449 para. 68.

170. *See* Draft Articles, *supra* note 122, at 71–86.

## 2. Understanding the United States' Obligations Under the CAT

Ten years after the U.N. General Assembly adopted the CAT, the United States ratified it and included reservations limiting the effect of various provisions regarding both torture and CID.<sup>171</sup>

In its reservations and interpretive understandings, the United States clarified the definition of torture and, in turn, its obligations under the treaty. For the United States,

in order to constitute torture, 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.<sup>172</sup>

One understanding, added at ratification, qualified “torture” to “apply only to acts directed against persons in the offender’s custody or physical control.”<sup>173</sup> Another provided, “[I]t is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages *only for acts of torture committed*

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171. Convention Against Torture, *supra* note 54, art. 1, para. 1. The U.S. Senate ratified the Convention, subject to several reservations, on October 27, 1990. 136 Cong. Rec. 36192, 36198–99 (Oct. 29, 1990) [hereinafter CAT Reservations]. The text of these reservations is also available at the online U.N. Treaty Collection, [https://treaties.un.org/Pages/ViewDetails.aspx?mtmsg\\_no=IV-9&chapter=4](https://treaties.un.org/Pages/ViewDetails.aspx?mtmsg_no=IV-9&chapter=4). The United States included these as “understandings,” but such provisions altered the extent of the United States’ obligations under the treaty, essentially creating additional reservations. See AUST, *supra* note 115, at 65 (“[I]t does not matter how a declaration is phrased or what name is given to it—one must look at the *substance* . . . The statement went beyond mere interpretation and amounted to a reservation.”).

172. CAT Reservations, *supra* note 171, Reservation II(1)(a).

173. *Id.* Reservation II(1)(b).

*in territory under the jurisdiction of that State Party.*<sup>174</sup> And, the U.S. reservation qualified the definition of CID to include only “cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.”<sup>175</sup>

In its accompanying declaration, the United States deemed Articles 1 through 16 of the CAT not to be self-executing, thereby requiring additional domestic legislation to implement the provisions.<sup>176</sup> While the United States has maintained that its “criminal justice system contains a number of specific procedural mechanisms which, taken together, offer strong additional protections against the occurrence of torture and remedial opportunities in the event that it nonetheless occurs,”<sup>177</sup> it has also implemented laws specifically to fulfill its obligations under the CAT, such as the statute criminalizing acts of torture (§ 2340A) and the TVPA.<sup>178</sup>

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174. *Id.* Reservation III(3) (emphasis added). This provision seems to provide hope for detainees who seek damages, alleging that they were tortured. However, because the United States has declared that Articles 1 through 16 are not self-executing, the United States can argue that it need comply only with the requirements under the domestic law, the Torture Victims Protection Act (TVPA). The TVPA, however, is limited to conduct carried out by a foreign nation. *See infra* Part IV.C; *see also infra* Part III.C.3 (discussing whether Guantánamo is considered “territory under [U.S.] jurisdiction”).

175. CAT Reservations, *supra* note 171, Reservation I(1).

176. *Id.* Reservation III(1).

177. United States, Initial Report to the Committee Against Torture, para. 120, CAT/C/28/Add.5 (Feb. 9, 2000); *see also* United States, Second Periodic Report to the Committee Against Torture, CAT/C/48/Add.3 [hereinafter Second Report] (May 6, 2005). “As described in the Initial Report, the legal system of the United States provides a variety of mechanisms through which persons subjected to torture or other abuse may seek redress, which are consistent with the obligations assumed by the United States upon ratification of the [CAT].” *Id.* para. 79.

178. For a greater discussion of the TVPA, *see infra* Part IV.C. For a greater discussion of 18 U.S.C. § 2340A, *see supra* Part I.B. There is a valid question as to whether the United States’ domestic laws comply with the nation’s international obligations under the CAT. For example, in the Bybee Standards Memorandum, *supra* note 46, DOJ wrote that, should the President or other officials face charges under 18 U.S.C. § 2340A, the domestic statute prohibiting and criminalizing torture, the accused could raise the defenses of necessity and self-defense. DOJ pointed out this discrepancy in a footnote, explaining that the CAT’s prohibition on torture, including for “such purpose as obtaining from him or a third person information or a confession” might “represent[] an attempt to to [sic] indicate that the good of obtaining information—no matter what the circumstances—could not justify an act of torture.” Bybee Standards Memorandum, *supra* note 46, at 41 n.23 (internal citations omitted) (citing Convention Against Torture, *supra* note 54, art. 1.1). The memorandum continued, “In enacting Section 2340, however, Congress removed the purpose element in the definition of torture . . . By leaving Section 2340 silent as to the harm done by torture in comparison to other harms, Congress allowed the necessity defense to apply when appropriate.” *Id.* Moreover, while the CAT provides

Articles 21 and 22 of the CAT permit states party to the treaty and individuals claiming to be victims of torture to file complaints with the Committee Against Torture, alleging that a state is not honoring its obligations under the Convention. The United States, however, recognizes the competence of the Committee to “receive and consider communications” only from a state party.<sup>179</sup> The United States narrowed its recognition of the Committee’s power even further, declaring that “such communications shall be accepted and processed only if they come from a state party which [also recognizes the Committee’s competence].”<sup>180</sup> In its justification for declining to “recognize the competence of the Committee to consider communications made by or on behalf of individuals claiming to be victims of a violation of the Convention by the United States,”<sup>181</sup> the United States has consistently referred to the existing “numerous opportunities for individuals to complain of abuse, and to seek remedies for such alleged violations” under the domestic legal system.<sup>182</sup> These “opportunities,” however, do not extend to the detainees at Guantánamo.

*D. Questions Unanswered: Why U.S. Conduct at Guantánamo May Fall Outside the CAT’s Purview*

The United States’ reservations, understandings, and declarations raise many questions as to whether a detainee could successfully claim that the United States has breached its international obligations. Specifically, whether the United States has violated the CAT depends on Guantánamo’s location, the ways in which the United States analyzes the prohibition on CID, and whether the prohibition of CID is non-derogable.

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that there may be no derogation whatsoever from the prohibition of torture, *see* Convention Against Torture, *supra* note 54, art. 2.2, DOJ concluded, “Aware of this provision of the treaty . . . Congress did not incorporate CAT article 2.2 into Section 2340. *Given that Congress omitted CAT’s effort to bar a necessity or wartime defense, we read Section 2340 as permitting the defense.*” Bybee Standards Memorandum, *supra* note 46, at 41 n.23 (emphasis added).

179. Convention Against Torture *supra* note 54, art. 21, para. 1.

180. CAT Reservations, *supra* note 171, at III.(2).

181. Second Report, *supra* note 177, para. 163.

182. *Id.*



### 1. Where Is Guantánamo Bay?

Guantánamo Bay's location outside of the United States could render the CAT entirely inapplicable to the conduct carried out there. By its terms, the CAT directs states party to the treaty to prohibit acts of torture and CID "in any territory under its jurisdiction."<sup>183</sup> While this jurisdictional element ultimately would not affect the general prohibition of torture—due to its status as a *jus cogens* norm—conduct that did amount to CID but occurred outside of the territory under a state's jurisdiction would be immune from scrutiny under the CAT.<sup>184</sup> Guantánamo Bay's legal status—whether it is "territory under the United States' jurisdiction"—remains unclear.<sup>185</sup> The U.S. Supreme Court touched on this issue in 2004; in *Rasul*, the Court, in concluding that the detainees had a right to habeas corpus, explained, "By the express terms of its agreements with Cuba, the United States exercises 'complete jurisdiction and control' over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses."<sup>186</sup>

In 2008, the Court revisited the discussion of the territorial jurisdiction of Guantánamo in another habeas case, *Boumediene*.<sup>187</sup> The majority wrote:

[F]or the purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantánamo Bay [but] take notice of the obvious and uncontested fact that the United States, by virtue of its *complete jurisdiction and control over the base* maintains *de facto* sovereignty over this territory.<sup>188</sup>

The majority opinion did not fully resolve territorial jurisdiction, but Justice Scalia's dissenting opinion may have provided some clarity. Justice Scalia charged the Court with "conced[ing] (necessarily) that Guantánamo Bay lies outside the sovereign territory of the United

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183. Convention Against Torture, *supra* note 54, art. 2, para. 1; *id.* art. 16.

184. This assertion necessarily presumes that CID is not a non-derogable norm. *See infra* Part III.D.3.

185. Philbin-Yoo Memorandum, *supra* note 37 (discussing possible habeas jurisdiction over aliens at Guantánamo).

186. *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

187. 553 U.S. 723 (2008).

188. *Id.* at 755 (emphasis added).

States,”<sup>189</sup> while also creating a “novel”<sup>190</sup> distinction between *de jure* and *de facto* sovereignty. He wrote, “The Court comes up with the notion that ‘*de jure* sovereignty’ is simply an additional factor that can be added to (presumably) ‘*de facto* sovereignty’ (i.e. practical control) to determine the availability of habeas for aliens, but that it is not a necessary factor, whereas *de facto* sovereignty is.”<sup>191</sup> If the United States does exercise *de facto* sovereignty over Guantánamo Bay, then it may be considered territory under the United States’ jurisdiction for the purposes of the CAT. But *Rasul* and *Boumediene* both considered whether Guantánamo detainees could “invoke the fundamental procedural protections of habeas corpus . . . a right of first importance.”<sup>192</sup> Because of the unique nature of a habeas corpus petition, the jurisdictional question that *Rasul* and *Boumediene* answer may differ from the one implicated by the CAT.

## 2. What Does the CID Reservation Mean?

Even if Guantánamo Bay *is* territory under the United States’ jurisdiction, a second obstacle to a detainee’s prospect of relief is whether the United States’ reservation, limiting CID to “cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States” exempts the United States’ conduct at Guantánamo from the purview of the CAT altogether. Due to careful drafting before the implementation of “enhanced interrogation techniques,” it may be difficult for a detainee to assert that the United States breached its obligations under the CAT as well as its reservation to the CAT by engaging in conduct that constituted “cruel, unusual and inhumane treatment” under the U.S. reservations.<sup>193</sup>

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189. *Id.* at 832 (Scalia, J., dissenting).

190. *Id.* at 835 n.3.

191. *Id.*

192. *Id.* at 798 (majority opinion).

193. The discussion of the United States’ reservation proceeds considering only the *conduct* that is permissible or unconstitutional under the Eighth Amendment. The uncertainty surrounding the precise meaning of the reservation raises many questions. For example, if the Constitution cannot be applied to aliens beyond the territory of the United States, does the language of the reservation serve to limit the United States’ obligation to prevent CID exclusively in U.S. territory? See Bradbury Memorandum, *supra* note 68 (relying on the same decisions that the U.S.

Moreover, courts apply the facts of each Eighth Amendment challenge to a general standard. For instance, in *Hope v. Pelzer*,<sup>194</sup> Hope was a prison inmate who was “handcuffed to a hitching post” for over two hours with his hands above shoulder height.<sup>195</sup> On another occasion, Hope was handcuffed to the post for seven hours.<sup>196</sup> The Court ultimately found that this treatment violated the Eighth Amendment, as it involved “the unnecessary and wanton infliction of pain . . . totally without penological justification.”<sup>197</sup>

The Court explained, “In making this determination in the context of prison conditions, we must ascertain whether the officials acted with ‘deliberate indifference’ to the inmates’ health or safety.”<sup>198</sup> In light of the general Eighth Amendment legal standard, a court may be largely deferential to the military’s claims that the treatment was necessary to obtain crucial national security information. It is therefore difficult to determine with certainty the precise conduct that is prohibited under Article 16 of the CAT.

### 3. When, If Ever, Can a Country Derogate from the Prohibition of CID?

However, even if the United States engaged in conduct prohibited by its reservation in a territory under its jurisdiction, the CAT’s silence as to whether CID is a non-derogable norm suggests that states can derogate from the prohibition against CID under certain circumstances. Basic principles of statutory interpretation suggest that the treaty’s drafters would have been unambiguous had

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Supreme Court discounted in *Boumediene*, 553 U.S. 723, including *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)). *But see* Beaver Strategies Memorandum, *supra* note 47, at 7 (“[T]he United States is only prohibited from committing *those acts* that would otherwise be prohibited under the United States Constitutional Amendment against cruel and unusual punishment.” (emphasis added)). If the Eighth Amendment only applies after the state has first “secured a formal adjudication of guilt,” *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979), and until adjudication the Due Process Clause is the applicable constitutional provision, to what extent are wartime detainees afforded a level of Constitutional process? Do the CSRTs comply? A full discussion of these issues, however, is outside the scope of this Article. For a further discussion of the CAT and the Eighth Amendment, see MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES 7–8 (2008), available at <http://fpc.state.gov/documents/organization/101750.pdf>.

194. 536 U.S. 730 (2002).

195. *Id.* at 734.

196. *Id.* at 735.

197. *Id.* at 737.

198. *Id.* at 737–38 (citing *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)).

they intended liability.<sup>199</sup> Article 2 of the CAT expressly states that torture is a non-derogable norm, and that “no exceptional circumstances whatsoever . . . may be invoked as a justification of torture.”<sup>200</sup> But no similar provision exists for CID.<sup>201</sup> Moreover, Article 16, the relevant provision that names CID, also references obligations contained in four other articles, stating that they “shall apply with the substitution for references to torture of references to other forms of cruel, inhuman, or degrading treatment or punishment.”<sup>202</sup> Article 2 is not included among those four.<sup>203</sup>

Furthermore, a separate United Nations Treaty, the International Covenant on Civil and Political Rights (ICCPR),<sup>204</sup> was adopted in 1966 and signed by the United States in 1977,<sup>205</sup> seven years before the CAT was adopted.<sup>206</sup> The ICCPR provides in relevant part, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>207</sup> However, unlike the CAT, the ICCPR has a specific derogation provision.<sup>208</sup>

Yet the subsequent paragraph bars states from derogating from certain articles, including Article 7, the prohibition against CID.<sup>209</sup> Thus, not only did the drafters of the CAT prohibit derogation

199. *See* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 176–77 (1994) (“If . . . Congress intended to impose aiding and abetting liability, we presume it would have used the words ‘aid’ and ‘abet’ in the statutory text. But it did not.”).

200. Convention Against Torture, *supra* note 54, art. 2, para. 2.

201. *See id.* art. 16.

202. *Id.* art. 16, para. 1.

203. *Id.*

204. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

205. The United States ratified the ICCPR in 1992, and included a reservation identical to its reservation to the CAT regarding the Fifth, Eighth, and Fourteenth Amendments. 138 CONG. REC. S4,781, S4,783–84 (daily ed. April 2, 1992) (resolution of ratification); *cf.* CAT Reservations, *supra* note 171.

206. *See* Convention Against Torture, *supra* note 54 (adopted in 1984, ratified by the United States in 1994).

207. ICCPR, *supra* note 204, art. 7.

208. *Id.* art. 4, para. 1. The specific derogation provision explains,

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law.

*Id.*

209. *Id.* art. 4, para. 2. Whether the United States has violated its international obligations under the ICCPR is outside the scope of this Article.

elsewhere in that very treaty, but a United Nations treaty that pre-dated the CAT included a non-derogation provision specifically concerning CID as well. Consequently, it seems as though CID under the CAT is not a non-derogable norm.

#### IV. A DETAINEE'S INABILITY TO INDIVIDUALLY SEEK REDRESS IN ARTICLE III COURTS

The principle of reparation has long existed in the United States. But for most detainees, the non-state nature of the WAQT creates new procedural challenges. While it would seem as though the Guantánamo detainees have multiple avenues to seek redress, in fact, they do not. Detainees have attempted to seek monetary damages individually in U.S. domestic courts, but such attempts have been futile—usually dismissed due to sovereign immunity or lack of jurisdiction. Ultimately, the only existing option is for states to come forward and invoke principles of state responsibility on behalf of the detainees.<sup>210</sup> Though limited, this is the sole option, short of defying existing precedent in federal courts.

##### *A. The Right to Reparation in the Twentieth Century*

As a general principle of law, when one party wrongs another, the offending party must pay damages. This principle also applies in international law—through international treaties, principles of state responsibility, and the law of armed conflict—requiring a state in violation of the law to pay compensation or make reparation accordingly.<sup>211</sup> Under customary international law and principles of state responsibility, a state responsible for an internationally wrongful act has an obligation to make reparation.<sup>212</sup> And this principle is reflected in the law of armed conflict: the Hague Convention (IV) of 1907 sets forth a series of rules governing land warfare, and states that if a belligerent party violates these rules, it “shall, if the case demands, be liable to pay compensation.”<sup>213</sup> Moreover, the Convention states that a belligerent party “shall be responsible for all acts committed by persons forming part of its

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210. See *infra* Part V.

211. See Convention Against Torture, *supra* note 54, art. 14; Hague (IV) Convention, *supra* note 8, art. 3; Draft Articles, *supra* note 122, arts. 35–39.

212. Draft Articles, *supra* note 122, art. 31.

213. Hague (IV) Convention, *supra* note 8, art. 3.

armed forces.”<sup>214</sup> These principles of reparation and compensation have been invoked throughout the twentieth century by the ICJ,<sup>215</sup> the United Nations,<sup>216</sup> and in post-war reparations agreements between countries.<sup>217</sup>

When its own citizens are affected, the United States has clearly recognized the need for reparation or compensation, as it has actively proposed or facilitated negotiations on behalf of its nationals. For instance, in a particularly noteworthy case, a U.S. citizen attempted—unsuccessfully—to sue Germany for imprisonment in concentration camps and forced labor during World War II. His action prompted U.S. President Bill Clinton to “personally raise[] [the] case with German Chancellor Helmut Kohl,” ultimately securing a \$2.1 million settlement for the citizen and eleven other concentration camp survivors.<sup>218</sup> The United States and Germany reached a second settlement for two hundred additional Americans in 1999.<sup>219</sup> And the United States has condemned Japan, repeatedly calling for reparations to Americans as a result of Japan’s treatment of prisoners of war and comfort women during World War II.<sup>220</sup>

More recently, two bills were introduced in Congress in spring 2013 proposing compensation to the survivors of the 1979–81 Iranian Hostage Crisis.<sup>221</sup> The Algiers Accord, which secured the hostages’ release in 1981, precluded any claims against Iran arising

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214. *Id.* In the context of Guantánamo, this language raises an interesting question of responsibility with respect to private agencies that do not constitute the “armed forces.” However, the obligations and liability of these individuals are outside the scope of this Article.

215. *See, e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 5 (Dec. 19), available at <http://www.icj-cij.org/docket/files/116/10455.pdf>; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

216. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 8, 1991); S.C. Res. 138, U.N. Doc. S/RES/138 (Jun. 23, 1960).

217. *See, e.g.*, Treaty of Versailles, arts. 231–47, June 28, 1919, 2 Bevens 43; Conference of Berlin, Protocol, §§ III, VII, Jul. 17–Aug. 2, 1945, 3 Bevens 1207; Paris Peace Treaties, arts. 74–77, Feb. 10, 1947, 49 U.N.T.S. 154.

218. Douglas Martin, *Hugo Princz, 78, U.S. Winner of Holocaust Settlement, Dies*, N.Y. TIMES, Jul. 31, 2001, <http://www.nytimes.com/2001/07/31/nyregion/hugo-princz-78-us-winner-of-holocaust-settlement-dies.html>.

219. *Id.*

220. H.R. Con. Res. 357, 106th Cong. (2000); H.R. Con. Res. 176, 104th Cong. (1996).

221. Justice for Former American Hostages in Iran Act of 2013, S. 559, 113th Cong. (2013); Justice for the American Diplomats Held Hostage in Tehran Act, H.R. 904, 113th Cong. (2013); JENNIFER K. ELSEA, CONG. RESEARCH SERV., R43210, THE IRAN HOSTAGES: EFFORTS TO OBTAIN COMPENSATION (2013), available at <http://fas.org/sgp/crs/misc/R43210.pdf>.

out of the incident.<sup>222</sup> Although the U.S. government already provided the survivors with “a cash payment of \$50 for each day held hostage,” the 2013 bills proposed the establishment of a U.S. fund to pay the hostage victims or their families, with one bill citing the “profound physical and mental abuse” that the hostages endured.<sup>223</sup> Indeed, many of the former hostages reported experiencing “depression . . . nightmares, flashbacks, divorces, and physical illnesses,” as a result of their captivity over thirty years ago.<sup>224</sup> The Hostage Crisis bills indicate that the United States recognizes the need to compensate individuals who were wrongfully imprisoned, mistreated, and as a result of their detention, suffered long-term psychological trauma.

*B. Why the Law of War Does Not Confer a Right of Action*

Multiple sources of international law support the notion of reparation or compensation when there is a violation of the law. However, most of these provisions are not understood as conferring a private right of action and thus are unavailing to Guantánamo detainees. Under the law of war, Article 3 of the Hague Convention provides, “A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”<sup>225</sup> A violation of the Hague Convention would seemingly require the United States to provide compensation to detainees. However, Hague Law governs permissible conduct during an armed conflict—the means of injuring a belligerent army, military occupation, and treatment of prisoners of war.<sup>226</sup> Detention at Guantánamo does not fall squarely within any of those categories. While it may be easy to find instances in which the United States has violated the CAT or perhaps even provisions of the

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222. ELSEA, *supra* note 221, at 1.

223. H.R. 904 § 2.

224. Jill Lawrence, “Argo” Is Great, but 52 Former American Hostages Are Still Looking for Justice, NAT’L J., Feb. 24, 2013, <http://www.nationaljournal.com/politics/argo-is-great-but-52-former-american-hostages-are-still-looking-for-justice-20130224>.

225. Hague (IV) Convention, *supra* note 8, art. 3. While Article 2 states that the Convention’s provisions only apply as between contracting powers to the convention, if the Convention’s provisions have become customary international law, then they apply universally (except to persistent objectors).

226. Hague (IV) Convention, *supra* note 8.

Geneva Conventions,<sup>227</sup> it is unlikely that Hague Law applies to the detention and even less likely that there has been a violation of Hague Law at Guantánamo.

But even if there *has* been a violation of Hague Law at Guantánamo, in practice, domestic courts in both the United States and other countries are reluctant to find that the Hague Convention provides a private right of action for reparations claims. For example, in *Goldstar (Panama) S.A. v. United States*,<sup>228</sup> a group of businesses sued the United States under Article 3 of the Hague Convention, seeking compensation and “claim[ing] that the United States Government [was] liable for damage to the property of [the] businesses that occurred as a result of looting and rioting in the wake of the United States’ invasion of Panama.”<sup>229</sup> The plaintiffs alleged that the United States had violated Article 43 of the Regulations when its armed forces failed to adequately “ensure . . . public order and safety” upon their invasion and occupation of Panama in 1989.<sup>230</sup> The district court dismissed the case for lack of subject matter jurisdiction.<sup>231</sup>

The circuit court affirmed the lower court’s ruling, rejecting the plaintiffs’ argument that “Article 3 must be interpreted as a

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227. In addition to the basic rules of conduct outlined in Common Article 3, Article 5 of Geneva III provides,

Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy belong to [the armed forces or another protected class eligible for treatment as a prisoner of war], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Geneva III, *supra* note 29, art. 5. Though detention facilities at Guantánamo opened in 2002, the first Combatant Status Review Tribunal (CSRT) to determine whether detainees were properly categorized as “enemy combatants” was not conducted until July 30, 2004. *Combatant Status Review Tribunal Summary*, U.S. DEP’T DEF. (Feb. 10, 2009), <http://www.defense.gov/news/csrsummary.pdf>.

228. 967 F.2d 965 (4th Cir. 1992).

229. *Id.* at 967.

230. *Id.* at 967–68. The relevant regulation states,

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Hague (IV) Regulations, *supra* note 8, art. 43.

231. *Goldstar*, 967 F.2d at 967.



self-executing waiver of sovereign immunity with regard to [claims for violations of the Hague Convention].”<sup>232</sup> Instead, the court stated:

International treaties are not presumed to create rights that are privately enforceable. Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action. The Hague Convention does not explicitly provide for a privately enforceable cause of action.<sup>233</sup>

To bolster its conclusion, the court relied on a Supreme Court case in which a party attempted to invoke a treaty’s compensation provision.<sup>234</sup> In that case, the Supreme Court ruled that the conventions “only set forth substantive rules of conduct” and “do not create private rights of action.”<sup>235</sup> In cases outside of the United States, nationals of other countries encounter similar barriers to asserting a private right of action for compensation under the Hague Convention; the courts occasionally find a private right to exist, based on both the international law and the state’s domestic laws.<sup>236</sup> Nevertheless, the predominant practice does not support a private right of action for individuals, as the source of the law is that between states.<sup>237</sup>

232. *Id.* at 968. For a greater discussion of sovereign immunity with respect to suits against the U.S. government, see *infra* Part IV.C.

233. *Goldstar*, 967 F.2d at 968 (citations omitted).

234. *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989).

235. *Id.* at 442.

236. The Federal Constitutional Court of Germany, in a 1996 case regarding reparations for forced labor during the Second World War, noted in dicta that international law did not prohibit a state from permitting individuals to claim compensation through national courts. 2 INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3561 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (citing Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court] May 13, 1996, 94 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 315 (Ger.)). Similarly, the Greek Supreme Court held in 2000 that because it had violated *jus cogens* norms Germany could not invoke sovereign immunity. *Id.* at 3561–62 (citing Prefecture of Voiotia v. Federal Republic of Germany, Areios Pagos [A.P.] [Supreme Court] 11/2000).

237. See *id.* at 3561, para. 193 (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Jun. 26, 2003, 155 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 279 (Ger.) (the *Distomo* case)) (“Germany’s Federal Supreme Court stated that, due to a concept of war as a ‘relationship from State to State’ as it existed during the Second World War, a State which was responsible for crimes committed at that time was only liable to pay compensation vis-à-vis another State but not vis-à-vis the individual victims.”); *id.* at 3562–63, para. 195 (citing Tōkyō Chilhō Saibansho [Tōkyō Dist. Ct.] Dec. 7, 1963, 355 HANREI JIHO [HANJII] 17 (Japan) (the *Shimoda* case)) (“[T]he Court concluded that ‘there is in general no way open to an individual who suffers injuries from an act of hostilities contrary to international law to claim damages on the level of international law’ except in limited circumstances.”); *id.* at 3563, para.

Yet some scholars, citing U.S. practices, suggest that there has been a shifting trend toward finding a private right of action for individual victims.<sup>238</sup> For instance, in 2000, the U.S. Congress passed a Concurrent Resolution calling upon the Japanese government to rectify its World War II violations of the Geneva and Hague Conventions. The resolution asserted that the Japanese government “should . . . immediately pay reparations to the victims of those [war] crimes, including United States military and civilian prisoners of war . . . and the women who were forced into sexual slavery and known by the Japanese military as ‘comfort women.’”<sup>239</sup> Unlike other reparations payments stemming from World War II, this resolution suggested that the victims had a direct right to receive compensation from the offending government. Perhaps the right to receive compensation will eventually become a right that can be asserted in court; until then, however, there are many obstacles for plaintiffs attempting to bring a claim for compensation in a domestic court.

*C. Adding Insult to Injury: Why Detainees Are Unable to Bring a Claim Under U.S. Law*

To date, litigation seeking compensation on behalf of Guantánamo detainees has relied on the Alien Tort Statute (ATS) and the Federal Tort Claims Act (FTCA), but such actions consistently fail.<sup>240</sup> Most often, the cases are dismissed for lack of subject matter jurisdiction in light of the jurisdiction-stripping provisions of the Military Commissions Act of 2006 (28 U.S.C. § 2241(e)).<sup>241</sup> In other instances, courts will dismiss the case due to

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197 (quoting Tōkyō Chilhō Saibansho [Tōkyō Dist. Ct.] July 27, 1995 (Japan) (the *Apology for the Kamishisuka Slaughter of Koreans* case)) (“[N]either the general practice nor the conviction (*opinio juris*) that the state has a duty to pay damages to each individual when that state infringes its obligations under . . . international humanitarian law can be said to exist.”).

238. 1 INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 541 (citing Draft Articles, *supra* note 122, art. 33 and commentary).

239. H.R. Con. Res. 357, 106th Cong. (2000).

240. *Hamad v. Gates*, 732 F.3d 990 (9th Cir. 2013); *Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012); *Ameur v. Gates*, 950 F. Supp. 2d 905 (E.D. Va. 2013), *aff’d*, 759 F.3d 317 (4th Cir. 2014); *Al Janko v. Gates*, 831 F. Supp. 2d 272 (D.D.C. 2011), *aff’d*, 741 F.3d 136 (D.C. Cir. 2014).

241. 28 U.S.C. § 2241(e)(2) (2006); *Hamad*, 732 F.3d 990; *Al-Zahrani*, 669 F.3d 315; *Ameur*, 950 F. Supp. 2d 905.

sovereign immunity.<sup>242</sup> One author explained that “where U.S. employees or officials are accused of being the alleged torturers, the United States launches procedural and substantive roadblocks to ensure that the claims do not succeed or even progress much beyond the filing stage.”<sup>243</sup>

### 1. Claims Under the Alien Tort Statute and Federal Tort Claims Act

In *Boumediene*, the Supreme Court held that the Guantánamo detainees had a “constitutional privilege of habeas corpus,”<sup>244</sup> striking down one segment of the jurisdiction-stripping provision of the Military Commissions Act.<sup>245</sup> The remaining provision reads:

Except [to review a CSRT determination, or to review the decision of a military commission], no court, justice, or judge shall have jurisdiction to hear . . . any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>246</sup>

At least one plaintiff seeking monetary damages has argued that he was *not* “properly detained as an enemy combatant,” pointing to his successful habeas petition as evidence, but the district court was not persuaded.<sup>247</sup> Without questioning the validity of the CSRTs, the district court found that “the determinations of two separate CSRTs—one in 2004, and another in 2008, both of which determined that plaintiff was an enemy combatant—more than

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242. *Ameur*, 950 F. Supp. 2d 905; see also *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011). *Ali* was a case concerning detention in Afghanistan and Iraq, but the court provided the same reasoning as Guantánamo detention cases with respect to the ATS and FTCA claims. 649 F.3d 762.

243. Peter Jan Honigsberg, *In Search of a Forum for the Families of the Guantánamo Disappeared*, 90 DENV. U. L. REV. 433, 455 (2012).

244. *Boumediene v. Bush*, 553 U.S. 723, 724 (2008).

245. *Id.* at 733.

246. 28 U.S.C. § 2241(e)(2). At Guantánamo, the determination of whether an individual was “properly detained as an enemy combatant” occurred through the CSRTs. See *supra* Section I.D.

247. *Al Janko v. Gates*, 831 F. Supp. 2d 272 (D.D.C. 2011), *aff’d*, 741 F.3d 136 (D.C. Cir. 2014). For the unclassified portion of the court’s analysis in the habeas petition, see *Al Ginco v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009).

satisf[ied] the statutory requirements of 28 U.S.C. § 2241(e)(2).”<sup>248</sup> Effectively, all detainees—those who are truly “the worst of the worst” and those who were merely swept up in the fog of war and are later released—will have the same fate: once a CSRT has “properly” categorized him as an enemy combatant, anyone who finds himself at Guantánamo will be barred from seeking any remedy other than a habeas petition for any aspect of his detention.

In light of *Boumediene*, plaintiffs assert that the remaining jurisdiction-stripping provision § 2241(e)(2) cannot be severed from the first, and that the statute must be struck down in its entirety.<sup>249</sup> Courts disagree.<sup>250</sup> Nevertheless, despite the courts’ conclusions that they do not have subject-matter jurisdiction to hear these claims, courts often continue their analysis and come to the same result under the ATS and FTCA, extinguishing another possibility of monetary relief.<sup>251</sup>

Although the purpose of the ATS and FTCA is to provide tort victims with an avenue for relief, this path is ultimately unavailing to detainees. The ATS grants “district courts . . . original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>252</sup> While the ATS confers jurisdiction, it does not create a cause of action itself.<sup>253</sup>

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248. *Al Janko*, 831 F. Supp. 2d at 279.

249. *Hamad v. Gates*, 732 F.3d 990 (9th Cir. 2013); *Al Janko*, 831 F. Supp. 2d 272.

250. *Hamad*, 732 F.3d at 1006; *Al Janko*, 831 F. Supp. 2d at 284.

251. *See, e.g., Ameer v. Gates*, 950 F. Supp. 2d 905, 913–14 (E.D. Va. 2013), *aff’d*, 759 F.3d 317 (4th Cir. 2014) (finding that there was no subject matter jurisdiction because of sovereign immunity); *Al Janko*, 831 F. Supp. 2d 272.

252. 28 U.S.C. § 1350 (2012). The Supreme Court drastically narrowed the scope of the ATS in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), addressing “whether a[n] ATS claim may reach conduct occurring in the territory of a foreign sovereign.” *Id.* at 1664. The majority held that the facts of the case could not overcome the presumption against extraterritorial application of the ATS because of the “serious foreign policy consequences,” including providing other nations the opportunity to “hale [U.S.] citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world.” *Id.* at 1669. Yet, *Kiobel* can be easily distinguished from Guantánamo litigation. While the conduct at issue is occurring in a sovereign nation (Cuba), aliens are attempting to bring claims against the United States in U.S. courts, thereby eliminating the same foreign policy concern. Even so, while the ATS may not bar the claim, the foreign country exception to the FTCA (discussed below) provides yet another obstacle.

253. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The Court explained, “In sum, although the [Alien Tort Statute] is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law.” *Id.* at 724. However, searching for the First Congress’s intent in passing

Consequently, a claim under the statute is often paired with—or as the courts put it, “restyled as”<sup>254</sup>—a claim under the FTCA in Guantánamo detainee litigation. The FTCA allows individuals who have been injured by the “negligent or wrongful act or omission” of any federal employee “acting within the scope of his office or employment” to bring a claim against the United States, in situations where “the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”<sup>255</sup> Though the federal government generally enjoys immunity from lawsuits, it can consent to be sued by expressly waiving its immunity.<sup>256</sup> The FTCA serves as such a waiver.<sup>257</sup>

In 1988, Congress passed the Westfall Act,<sup>258</sup> which amended the FTCA “to require that the United States be substituted as the defendant in any tort suit brought against a government employee acting within the scope of her employment.”<sup>259</sup> The D.C. Circuit has broadly interpreted “the scope of employment,” rejecting the notion that violations of *jus cogens* norms are outside of the scope of employment.<sup>260</sup> In fact, the D.C. Circuit held that “allegations of serious criminality do not alter [the] conclusion that the defendants’ conduct was incidental to authorized conduct.”<sup>261</sup> Under this standard then, all of the “enhanced interrogation tactics” might be

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the Alien Tort Statute in 1789, the Court did believe “the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations.” *Id.* The Court suggested that federal courts could recognize such claims, but highlighted the need for judicial discretion: “[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” *Id.* Yet, even with this invitation from the Supreme Court, lower courts are reluctant to find that the ATS confers a cause of action at all in detainee litigation. *See, e.g.,* *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (Edwards, J., dissenting).

254. *Ali*, 649 F.3d at 774.

255. 28 U.S.C. § 1346(b)(1).

256. *United States v. Testan*, 424 U.S. 392 (1976).

257. *Ameur v. Gates*, 950 F. Supp. 2d 905 (E.D. Va. 2013), *aff’d*, 759 F.3d 317 (4th Cir. 2014).

258. 28 U.S.C. § 2679 (1948).

259. Case Comment, *Federal Statutes—Westfall Act—D.C. Circuit Holds That U.S. Officials Are Immune from Alien Tort Statute Claims: Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011), 125 HARV. L. REV. 1080, 1080 (2012). There are two exceptions to substitution: when the employer’s actions violate the Constitution, or when a statute specifically authorizes a lawsuit against the employee. *Ameur*, 950 F. Supp. 2d at 917–18.

260. *See, e.g.,* *Ali v. Rumsfeld*, 649 F.3d 762, 774–75 (D.C. Cir. 2011).

261. *Id.* at 775.

within the scope of employment, even though the conduct violates international law. Indeed, in the various detention cases—whether at Guantánamo or other overseas sites—courts maintain that substituting the United States as a defendant is proper.<sup>262</sup>

But new obstacles emerge. In the ordinary FTCA case, once the United States has been substituted as a defendant, the FTCA prevents it from raising a sovereign-immunity defense. For Guantánamo-detainee litigation, however, the FTCA’s “foreign country exception”<sup>263</sup> enables the United States’ sovereign immunity to remain intact. That exception “bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.”<sup>264</sup> To that end, courts have held the waiver of sovereign immunity does not apply to alleged violations of customary international law and the law of war, because claims that are “not cognizable under state tort law . . . [do] not fall within the sovereign’s waiver of immunity and must be dismissed.”<sup>265</sup>

## 2. Claims Under the Torture Victim Protection Act

FTCA claims are inaccessible to detainees, and so too are TVPA claims. Signed into law in 1992, the TVPA was intended to benefit victims of “acts of torture and extrajudicial killing committed overseas by foreign individuals.”<sup>266</sup> For Guantánamo detainees, the relevant clause of the TVPA provides, “An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual.”<sup>267</sup>

For the Guantánamo detainees, the TVPA is not a viable option for redress for two reasons. First, by its terms, the statute is limited to

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262. *See, e.g., id.; Aneur*, 950 F. Supp. 2d 905; *Al Janko v. Gates*, 831 F. Supp. 2d 272 (D.D.C. 2011), *aff’d*, 741 F.3d 136 (D.C. Cir. 2014); *Hamad v. Gates*, 732 F.3d 990 (9th Cir. 2013).

263. 28 U.S.C. § 2680(k) (2012).

264. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004). The foreign country exception plainly precludes “any claim arising in a foreign country” from the FTCA waiver. 28 U.S.C. § 2680(k).

265. *Al Janko*, 831 F. Supp. 2d at 283 n.20 (citing *Sobitan v. Glud*, 589 F.3d 379, 389 (7th Cir. 2009)).

266. Statement on Signing the Torture Victim Protection Act of 1991, 1 PUB. PAPERS 437 (Mar. 12, 1992) [hereinafter TVPA Signing Statement].

267. Torture Victim Protection Act, Pub. L. No. 102-256, § 2, 106 Stat. 73 (1992) [hereinafter TVPA] (codified at 28 U.S.C. § 1350).

conduct carried out by authority of a foreign nation. It is thus inapplicable to U.S. conduct at Guantánamo, or anywhere else in the world.<sup>268</sup> In fact, President George H. W. Bush reiterated this point when he signed the TVPA into law:

I am signing the bill based on my understanding that the Act does not permit suits for alleged human rights violations in the context of United States military operations abroad or law enforcement actions. Because the Act permits suits based only on actions “under actual or apparent authority, or color of law, of any foreign nation,” *I do not believe it is the Congress’ intent that H.R. 2092 should apply to the United States Armed Forces or law enforcement operations, which are always carried out under the authority of United States Law.*<sup>269</sup>

Second, the statute applies to *torture*, a label that the United States has repeatedly eschewed, even though the statute’s definition includes tactics comprising the “enhanced interrogation techniques” that have been recorded and released by DOD.<sup>270</sup> The TVPA defines torture to include mental pain that is intentionally inflicted for reasons such as “obtaining . . . information or a confession,” or “intimidating or coercing that individual.”<sup>271</sup> The statute expressly states that “mental pain or suffering refers to prolonged mental harm caused by or resulting from . . . the administration or application . . . [of] procedures calculated to disrupt profoundly senses or personality.”<sup>272</sup> Military judges have conceded that this conduct has occurred, yet they refuse to call the conduct “torture.” Indeed, when Colonel Stephen R. Henley, the military judge presiding over detainee Mohammed Jawad’s case, ruled on Jawad’s motion to dismiss due to torture, Henley wrote,

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268. *Id.* § 2(a).

269. TVPA Signing Statement, *supra* note 266 (emphasis added).

270. *See* Beaver Strategies Memorandum, *supra* note 47; Memorandum from William J. Haynes II, Gen. Counsel, Dep’t of Def., for Donald Rumsfeld, Sec’y of Def., *supra* note 70. In addition, the Bybee Standards Memorandum highlighted certain cases in which courts either identified the conduct at issue as torture, or found that the allegations of torture were at least sufficient to survive a motion to dismiss. Conduct similar to that cited as “torture” in the memorandum was later alleged to have occurred at Guantánamo. *See* Bybee Standards Memorandum, *supra* note 46, at 47–50.

271. TVPA, *supra* note 267, § 3(1).

272. *Id.* § 3(b)(2)(B).

[T]he accused was subjected to the frequent flyer program and moved from cell to cell 112 times from 7 May 2004 to 20 May 2004, on average of about once every three hours . . . The Accused was not interrogated and the scheme was calculated to profoundly disrupt . . . his mental senses.<sup>273</sup>

Colonel Henley then denied the motion to dismiss, without formally ruling on whether Jawad had, in fact, been tortured by U.S. officials.<sup>274</sup>

Thus, the U.S. judicial system is categorically unavailable to Guantánamo detainees who wish to obtain compensation for their confinement.<sup>275</sup> Congress has prevented U.S. courts from exercising jurisdiction over detainee claims; conduct at Guantánamo cannot compel a waiver of sovereign immunity under the FTCA. And because the conduct is not carried out under the laws of a foreign country, it does not trigger the TVPA, either. As a result, detainees have no successful pathway to compensatory relief in federal court.

#### *D. A Proposed Framework for Reform in U.S. Courts*

The resulting legal landscape for individuals who are tortured by the United States and wish to bring a claim in U.S. courts fails to comply with U.S. obligations under international law. Discussing an

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273. *United States v. Mohammed Jawad*, 1 M.C. 349 (Military Comm'n Guantánamo Bay, Cuba Sept. 24, 2008) (Ruling on Defense Motion to Dismiss—Torture of the Detainee (D-008)), available at <http://www.defense.gov/news/Ruling%20D-008.pdf>. Jawad was not the only detainee to have been subject to conduct that likely amounted to torture. Mohammed al-Qahtani, alleged to be the twentieth hijacker, was not recommended for prosecution by military commission after he was subjected to prolonged isolation and six recorded weeks of four hours of sleep per day and twenty-hour-a-day interrogations. WORTHINGTON, *supra* note 16, at 207. The treatment of detainees at Guantánamo prompted one FBI official to contact the Pentagon, voicing his concern about one detainee in particular, who is widely accepted to be al-Qahtani. *See id.* at 206; THE CONSTITUTION PROJECT, *supra* note 2, at 221. The letter explains that, as early as November 2002, one detainee (presumed to be al-Qahtani) was “evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reportedly hearing voices, crouching in a corner of the cell covered with a sheet for hours on end).” Letter from T.J. Harrington, Deputy Assistant Dir., Counterterrorism, FBI, to Major Gen. Donald J. Ryder, Army Criminal Investigation Command, *Suspected Mistreatment of Detainees* (July 14, 2004), available at [http://humanrights.ucdavis.edu/resources/fbi-documents/FBI87\\_001914%20to%200001916\\_DOJFBI001914.pdf](http://humanrights.ucdavis.edu/resources/fbi-documents/FBI87_001914%20to%200001916_DOJFBI001914.pdf).

274. *Jawad*, 1 M.C. 349.

275. *See Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014).



individual who had been detained in Afghanistan and Iraq, one judge highlighted the current double standard:

Under the majority's approach, despite the fact that torture has long been illegal under United States law, a *United States official* who tortures a foreign national in a foreign country is not subject to suit in an action brought under [the TVPA], whereas a *foreign official* who tortures a foreign national in a foreign country may be sued under [the TVPA].<sup>276</sup>

Thus, domestic legal reform is necessary.

### 1. Violations of a *Jus Cogens* Norm Should Waive Sovereign Immunity

In *Princz v. Federal Republic of Germany*,<sup>277</sup> the dissenting judge proposed an approach for compensation that could apply to Guantánamo litigation. In *Princz*, the D.C. Circuit held that Hugo Princz, an American Holocaust survivor, could not sue the German government to recover for the atrocities he had suffered during World War II; Princz had been imprisoned at Auschwitz, enslaved at Birkenau, and forced on the death march from Warsaw to Dachau.<sup>278</sup> Although the court acknowledged that the Third Reich violated *jus cogens* norms, the court held that the Foreign Sovereign Immunities Act (FSIA) protected Germany from suit, and that torturing and enslaving Princz did not constitute an implied waiver of immunity under the FSIA.<sup>279</sup> In reaching its conclusion, the court noted its aversion to granting jurisdiction for “a claim arising under international law,” stating that it could disrupt diplomatic relations between the United States and another sovereign state.<sup>280</sup> Moreover, to grant jurisdiction in *Princz* would “impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the

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276. *Ali v. Rumsfeld*, 649 F.3d 762, 789 (D.C. Cir. 2011) (Edwards, J., dissenting). After *Kiobel*, the Alien Tort Statute may no longer permit the suit. However, with respect to torture, the TVPA does confer jurisdiction, in accordance with U.S. obligations under the CAT. TVPA, *supra* note 267.

277. 26 F.3d 1166 (D.C. Cir. 1994).

278. *Id.*; *Princz v. Federal Republic of Germany*, 813 F. Supp. 22, 23 (D.D.C. 1992).

279. *Princz*, 26 F.3d at 1174.

280. *Id.* at 1174 n.1.

victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world.”<sup>281</sup>

In her dissent in *Princz*, however, Judge Wald suggested that *jus cogens* norms be held to a higher standard in domestic courts, due to the heightened status they hold in international law generally. Rebutting the court’s understanding of congressional intent, Judge Wald wrote, “Congress did not intend to thwart the opportunity of an American victim of the Holocaust to have his claims heard by the United States judicial system.”<sup>282</sup> She pointed out the paradox that the FSIA created, wherein states are bound by *jus cogens* norms regardless of their consent to be bound but, under principles of sovereign immunity, cannot be held liable in a domestic court for violating these norms unless the state has consented to suit.<sup>283</sup> After tracing the prosecution of *jus cogens* norms as war crimes arising out of both the Holocaust and the conflict in former Yugoslavia, Judge Wald concluded, “[U]nder international law, a state waives its right to sovereign immunity when it transgresses a *jus cogens* norm.”<sup>284</sup> When a state’s actions are so egregious that it is clear it “might one day be held accountable for its heinous actions,”<sup>285</sup> it cannot use sovereign immunity to shield itself from liability. “[B]y abdicating its responsibility to act in accordance with [peremptory norms of international law],” wrote Judge Wald, “Germany consciously waived its right to any and all sovereign immunity.”<sup>286</sup>

Although Judge Wald discussed *foreign* sovereign immunity, the logic in her dissent should apply in the domestic legal framework, justifying a waiver of *federal* sovereign immunity. Without a waiver, the United States can rely on sovereign immunity to escape liability for alleged acts of torture, a process that undermines the force of *jus cogens* norms. Additionally, the rationale for denying jurisdiction in *Princz*—to protect diplomatic relations with foreign states—is inapplicable in Guantánamo cases: the United States, not a foreign country, would be the defendant. Instead, a violation of *jus cogens*

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281. *Id.*

282. *Id.* at 1185 (Wald, J., dissenting).

283. *Id.* at 1181.

284. *Id.* at 1183.

285. *Id.* at 1184.

286. *Id.*

norms—in this case, torture—should at least reduce a victim’s barriers to accessing domestic courts.

2. For Guantánamo Detainees, the United States’  
Waiver of Sovereign Immunity Would Still Not Suffice  
to Provide Meaningful Access to U.S. Courts

If violating *jus cogens* norms waived sovereign immunity, Guantánamo detainees would still encounter two barriers to meaningful access in the courts: the jurisdictional bar of § 2241(e)(2) and the judiciary’s reluctance to effectively overrule the coordinate federal branches on matters of national security and foreign affairs. Although § 2241(e)(2)’s jurisdictional bar puts domestic law at odds with the United States’ international obligations under the CAT,<sup>287</sup> the U.S. Supreme Court and lower courts defer to the military, despite well-established precedents affirming the coexistence of domestic and international law. One early Supreme Court case explained, “[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>288</sup> Another Supreme Court decision stated, “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”<sup>289</sup> With respect to § 2241(e)(2), however, Congress has determined that the “court of appropriate jurisdiction” is not in the United States,<sup>290</sup> a decision that ignores the nation’s obligations under international law. As long as § 2241(e)(2) is enforced, Guantánamo detainee litigation will have the same result it does

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287. Although the United States declared that the CAT was not self-executing, such a declaration does not absolve the country of its *international* obligations. Section 2241(e)(2) violates Articles 13 and 14 of the CAT, which emphasize the importance of a torture victim’s access to the courts. Ironically, in a report to the United Nations one year before the jurisdiction-stripping provisions of 28 U.S.C. § 2241(e)(1) and (2) were passed, the United States justified its decision not to recognize the competence of the CAT Committee. The report explained, “The United States legal system affords numerous opportunities for individuals to complain of abuse, and to seek remedies for such alleged violations.” Second Report, *supra* note 177, para. 163.

288. *Alexander Murray, Esq. v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

289. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

290. 28 U.S.C. § 2241(e)(2) (“[N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial or conditions of confinement of an alien who is or was detained by the United States . . .”).

now, even if the United States waives sovereign immunity when *jus cogens* norms are violated.

On the other hand, the jurisdiction-stripping statute shields the Court from being put in a precarious position in which it must either apply international law in accordance with early canons of interpretation or invalidate the will of the two coordinate branches. The latter is a course of action the Court is reluctant to undertake, particularly with matters pertaining to war and national security.<sup>291</sup> Indeed, in his *Boumediene* dissent, Chief Justice John Roberts asserted that the majority opinion far overstepped the permissible limitations of the Court's judicial review by attempting to implement policy decisions.<sup>292</sup> But Justice Scalia went even further in resisting the majority's approach:

The Court today decrees that no good reason to accept the judgment of the other two branches is "apparent." . . . What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.<sup>293</sup>

Thus, while the outcome in *Boumediene* may provide hope for Guantánamo detainees, the Court has yet to indicate whether it will continue "blundering" down this path, ending its long tradition of deference in matters of war. Ultimately, a detainee's success requires that the United States waive its sovereign immunity and that the Court finds § 2241(e)(2) violates the nation's international obligations—ignoring prudential concerns and overruling the judgment of the executive and legislative branches. Only then will a

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291. See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Korematsu v. United States*, 323 U.S. 214 (1944). See generally Kim Lane Scheppelle, *The New Judicial Deference*, 92 B.U. L. REV. 89, 96–108 (2012) (tracing the "old judicial deference" of the Court in its pre-9/11 decisions about war and national security).

292. *Boumediene v. Bush*, 553 U.S. 723, 801 (2008) (Roberts, C.J., dissenting) ("One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.")

293. *Id.* at 831 (Scalia, J., dissenting).

detainee be afforded meaningful access to an American court. Because it is unlikely that these factors will converge, detainees must seek an alternative avenue for relief.

#### V. THE SOLE EXISTING OPTION: STATES INVOKE RESPONSIBILITY ON BEHALF OF THEIR NATIONALS

With detainees unable to independently assert a right to reparation in U.S. courts, the only possible remedy is for states to invoke principles of state responsibility and come forward on behalf of an injured detainee.<sup>294</sup> Irrespective of the specific conduct, in order for a state to invoke the responsibility of another state on an individual's behalf, the invoking state must have the right to "bring a claim" on an individual complainant's behalf. The doctrine of diplomatic protection provides a state with "the right to protect its nationals abroad" by "try[ing] to ensure that another state treats them in accordance with treaties binding on both states and the minimum standards for treatment of aliens laid down in customary international law."<sup>295</sup> Under the doctrine, any wrongful act provides a state with the *right*, but not the duty, to protect its nationals. Diplomatic protection is essential for the detainees at Guantánamo, who are unable to seek any non-habeas claim<sup>296</sup> in *any* forum.

While the concept of state responsibility is relatively straightforward, the spectrum of obligations, determined by the specific unlawful conduct alleged, makes invoking state responsibility on behalf of Guantánamo detainees more complicated.

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294. In light of the Military Order of November 13, 2001, it is possible that even the approach discussed in this section does not provide a remedy. The military order states, in relevant part:

With respect to any individual subject to this order . . . the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

November 13 Military Order, *supra* note 10, at 57, 835–36. Thus, in the military order, then-President Bush purported to eliminate the possibility of any detainee challenging his detention and bringing a claim against the United States. Yet, the validity of this order under international law is questionable, at best. Moreover, courts seem to have disregarded it in all of the Guantánamo litigation to date, relying instead on the jurisdictional bar and sovereign immunity.

295. AUST, *supra* note 115, at 167.

296. *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014). In *Aamer*, the D.C. Circuit found that a habeas petition permitted a detainee to challenge the conditions of his confinement. *Id.* While a major victory for the detainees still at Guantánamo, a habeas petition will not allow a detainee to seek financial compensation.

Regardless of whether the conduct constituted a *jus cogens* norm, a breach of an obligation *erga omnes* (or *erga omnes partes*), or neither, if an internationally wrongful act was committed, a state can invoke state responsibility. *Jus cogens* norms—such as genocide, slavery, and torture—can never be breached and create an obligation *erga omnes*, an obligation owed to all other states in the international community. For this type of obligation, any state in the international community can invoke responsibility for a breach, even on behalf of a non-national. If a state breaches an obligation protecting a specific group's collective interest—an obligation *erga omnes partes*—then any state *within that group* can invoke state responsibility. Like an obligation *erga omnes*, once an eligible state has established that there has been a breach of an obligation *erga omnes partes*, it can do so on behalf of a non-national. If, however, the conduct does not rise to either the level of an obligation *erga omnes* or *erga omnes partes*, a detainee must rely on his own state to assert a claim, using the doctrine of diplomatic protection.

*A. Invoking State Responsibility for Conduct That Does  
Not Rise to the Level of Jus Cogens*

Unlike torture claims, wrongful detention is not a *jus cogens* norm, and CID is not widely accepted as a *jus cogens* norm.<sup>297</sup> As a result, there is a small group of states that can assert a claim on the detainee's behalf; when an obligation *erga omnes* is not implicated, only the detainee's state of nationality can invoke state responsibility.<sup>298</sup> Furthermore, of those states that could assert a claim on behalf of one of their nationals, even fewer are likely willing to assert such a claim: States that have little clout in the international community are likely less inclined to confront the United States for its wrongful acts.

1. Wrongful-Detention Claims

Because the law of war permits countries to detain combatants<sup>299</sup> and civilians (subject to strict rules) until the end of

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297. See *supra* note 170 and accompanying text.

298. Draft Articles, *supra* note 122, art. 42.

299. Geneva III, *supra* note 29, art. 118. However, this provision is referring to prisoners of war, a designation not afforded to the individuals at Guantánamo.

hostilities,<sup>300</sup> it may be difficult for a state to argue that the United States has wrongfully detained individuals and should thus be liable to make reparation. This is particularly true in light of the CSRT determinations that most of the Guantánamo detainees were, indeed, enemy combatants, and the courts' subsequent treatment of the CSRTs, despite knowledge of their flaws.<sup>301</sup> Claims asserting violations of CID, on the other hand, appear to be more promising. Though not a peremptory norm, CID is prohibited in multiple treaties, including the CAT.<sup>302</sup> Further, Common Article 3 provides that "those placed *hors de combat* by . . . detention . . . shall in all cases be treated humanely," and that "cruel treatment and torture," as well as "outrages upon personal dignity, in particular, humiliating and degrading treatment" are prohibited.<sup>303</sup> While the prohibition against CID in the CAT could arguably be displaced by the law of armed conflict (*lex specialis*),<sup>304</sup> the inclusion of standards for treatment of detainees in the Geneva Conventions—namely Common Article 3—indicate that CID is not permitted under the law of war.<sup>305</sup> Still, the Geneva Conventions do not provide a private right of action. Therefore, if a detainee relies on Common Article 3 to demonstrate a violation of the law of war and seek reparation, a detainee can succeed only if his state of nationality invokes the responsibility of the United States.

## 2. CID Claims

While it is theoretically easier to assert violations of CID than claims for wrongful detention, two challenges remain for individuals who would like their states to invoke state responsibility. First, the

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300. Geneva IV, *supra* note 119, art. 133 (permitting internment but stating that "[i]nternment shall cease as soon as possible after the close of hostilities").

301. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008); *Al Janko v. Gates*, 831 F. Supp. 2d 272 (D.D.C. 2011), *aff'd*, 741 F.3d 136 (D.C. Cir. 2014).

302. While it seems as though CID is an obligation *erga omnes partes* to all states party to the CAT, and in fact, the ICJ recently concluded that it *was* an obligation *erga omnes partes*, the text of the treaty itself does not provide any state the right to invoke responsibility. On the contrary, the CAT provides states with the right to report to the *Committee*. This Article proceeds by examining the invocation of state responsibility for violations of CID in both instances—as an ordinary obligation *and* as an obligation *erga omnes partes*.

303. Geneva III, *supra* note 29, art. 3, art. 1(a), art. 1(c).

304. *See supra* note 13 and accompanying text.

305. Geneva III, *supra* note 29, art. 3. With respect to detention at Guantánamo, if the CAT falls short, Common Article 3, which prohibits CID, even during war, can provide the needed safeguard.

United States' reservations to the CAT (and other treaties involving the term "CID") limits the applicable definition to mean the treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments.<sup>306</sup> When the treatment of detainees violated this standard, U.S. officials have been reluctant to admit misconduct at Guantánamo and have historically done so only in response to leaked or declassified documents.<sup>307</sup> Moreover, it is difficult to speculate whether the United States would concede CID even under the definitions presented in its reservations, since such claims have yet to be successfully asserted and upheld because of jurisdiction-stripping statutes.

A second barrier to a detainee's victory on a CID claim under state responsibility is the dependence on the state of nationality. If the CAT does not create an obligation *erga omnes partes* to prohibit CID, then each detainee's state must exercise its right under the diplomatic-protection doctrine to invoke responsibility. This poses a clear problem for those detainees whose states are unwilling to assert a claim. Indeed, many released detainees have been repatriated to third countries, "either because their home country would not accept them or because the United States believed the home country might subject them to torture or other abuses."<sup>308</sup> Practical difficulties—jurisdiction-stripping statutes in the United States and the lack of a private right of action stemming from international treaties—prevent a detainee from asserting his own claim. As a result, if the CAT does not create an obligation *erga omnes partes*, a detainee whose state is unwilling to invoke state responsibility will be left without recourse for the treatment he endured. On the other hand, if the CAT *does* create an obligation *erga omnes partes*, then any state party to the CAT can invoke state responsibility on behalf of a detainee. Indeed, a recent ICJ opinion seems to suggest a shifting trend toward recognizing the CAT as creating an obligation *erga omnes partes*,<sup>309</sup>

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306. CAT Reservations, *supra* note 171, at I.(1); *see supra* Part III.D.2.

307. *Compare, e.g.*, Bybee Standards Memorandum, *supra* note 46, with Revised Standards Memorandum, *supra* note 61.

308. Max Fisher, *Kafka at Gitmo: Why 86 Prisoners Are Cleared for Release but Might Never Get It*, WASH. POST, Apr. 25, 2013, <http://www.washingtonpost.com/blogs/worldviews/wp/2013/04/25/kafka-at-gitmo-why-86-prisoners-are-cleared-for-release-but-might-never-get-it/>.

309. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 449, ¶ 68 (July 20, 2012).



an interpretation that would be immensely favorable to detainees seeking reparation. Nonetheless, unlike a breach of *jus cogens* norms, for which there are no defenses, the United States would be able to assert defenses for breaching an obligation *erga omnes partes*.

*B. Invoking State Responsibility for  
Violations of Jus Cogens Norms*

Many of the barriers to a successful invocation of state responsibility under a CID or wrongful-detention claim do not exist for allegations of torture because torture is a *jus cogens* norm, and thus an obligation *erga omnes*. If a state wishes to invoke state responsibility for the breach of a peremptory norm of international law, the breach must be a “serious breach,” meaning it “involves a gross or systematic failure by the responsible State to fulfil[l] the obligation.”<sup>310</sup> The International Law Commission commentary indicates that a “gross” failure “denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule.”<sup>311</sup> Additionally, to be considered “systematic,” “a violation would have to be carried out in an organized and deliberate way.”<sup>312</sup> Factors indicating that a violation is serious include “[t]he intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims.”<sup>313</sup> Once there is a serious breach of a peremptory norm, any state can invoke the wrongful state’s responsibility.<sup>314</sup> An eligible state can then require that the wrongful state pay reparation “in the interest of the injured State or of the beneficiaries of the obligation breached.”<sup>315</sup>

In light of all the evidence, a state could make a good argument against the United States for a “serious breach” of the prohibition against torture. After all, while the intent to torture was never specifically stated, the intent to engage in conduct that, in fact, amounts to torture (i.e., waterboarding, sleep deprivation, sensory

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310. Draft Articles, *supra* note 122, art. 40, commentary para. 2.

311. *Id.* art. 40, commentary para. 8.

312. *Id.*

313. *Id.*

314. *Id.* art. 48.

315. *Id.*

deprivation) is well documented.<sup>316</sup> As such, any state could invoke the United States' responsibility for torture on behalf of any detainee, even when that detainee is not a national of the invoking state. While this method is limited to individuals who can allege that they were tortured under the definition in the CAT, it is especially important for individuals whose countries either will not recognize them or refuse to invoke state responsibility.

Thus, under principles of state responsibility, a detainee who can demonstrate that he suffered torture has the greatest range of options available to seek compensation.<sup>317</sup> Because torture is a *jus cogens* norm, the obligation to refrain from torture is an obligation *erga omnes*. For detainees who were tortured at Guantánamo, either their state of nationality or any other state in the international community can invoke the responsibility of the United States for its internationally wrongful act, and successful invocation would require the United States to make reparation. For claims of CID that do not rise to the level of torture, a detainee's options are more limited. If the prohibition against CID is an obligation *erga omnes partes*, governed by the CAT, it can be invoked by any state party to the treaty. However, if it is a simple obligation, owed individually to a state under the CAT or under Common Article 3, then only the detainee's state of nationality can invoke the United States' responsibility. While no scenario presents an easy way to invoke state responsibility, the current state of the law precludes any other option for detainees to effectively seek a remedy.

## VI. CONCLUSION

In the wake of the September 11 terrorist attacks, the United States selected the U.S. Naval Base at Guantánamo Bay, Cuba, as the site to detain some of the men and boys captured overseas. Some detainees have been released and either repatriated or sent to a third

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316. See WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (2003), available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/03.04.04.pdf>; Memorandum from William J. Haynes II, Gen. Counsel, Dep't of Def., to Donald Rumsfeld, Sec'y of Def., *supra* note 70; Beaver Strategies Memorandum, *supra* note 47.

317. Of course, in the absence of a claim—or a forum to have such a claim heard—the “greatest range of options” refers purely to the number of states that could invoke the United States' responsibility.

country. Others remain at Guantánamo, cleared for release but waiting indefinitely. And U.S. laws—some enacted before September 11, others enacted when the terrorist attacks were a recent memory—provide little legal protection to those who have been at Guantánamo. After more than twelve years, the only detainee claim over which Article III courts can exercise original jurisdiction is a petition for habeas corpus. Federal courts are barred from hearing any other claim brought by a Guantánamo detainee.

But selecting Guantánamo as the location where the “worst of the worst” would be detained does not discharge the United States’ obligations under international law, even when the law of war permits some deviation. No matter the circumstances, the United States may never engage in torture. Even if the alleged conduct at Guantánamo—sleep deprivation, physical beatings, prolonged temperature manipulation, sensory deprivation, threats of sexual abuse—does not rise to the level of torture, such conduct may violate the law of war’s prohibition against cruel, humiliating, and degrading treatment found in the Geneva Conventions, as well as the prohibition on CID found in the CAT, to which the United States is a party.

Because detainees cannot assert a claim against the United States themselves, they must rely on other states—either their own or other states affected by the violation—to invoke state responsibility. And if a state succeeds, the United States must make reparation accordingly, through restitution, compensation, and satisfaction. Because of the long-lasting physical and psychological effects of years at Guantánamo, mere restitution cannot possibly suffice. Simply releasing detainees will neither return the years they spent at Guantánamo, nor make them whole.

Another possibility—albeit an idealistic one—would be for the United States to unilaterally opt to compensate detainees. For the detainees who may have been subjected to torture, the obligations are fairly clear. But detainees who suffered maltreatment that did not rise to the level of torture must not be forgotten. Through careful drafting of interrogation policies, U.S. officials evaded the scope of the nation’s international obligations prohibiting CID. Such conduct cannot be condoned, nor should the victims be left without remedy.

Compensation for the former Guantánamo detainees is required. But what amount of money will restore years of captivity and abuse?

Is it \$20,000, the amount paid to Japanese Americans who were interned during World War II?<sup>318</sup> Is it “at least \$40,000 each,” the amount suggested that Japan pay to the comfort women of World War II?<sup>319</sup> Or \$2.37 million each, the amount proposed by the U.S. Senate bill for each American hostage from the 1979–81 Iran Hostage Crisis?<sup>320</sup> Or perhaps the United States could follow the United Kingdom’s lead, paying every sixteen detainees a settlement totaling “millions of dollars”; would that be enough?<sup>321</sup>

In 1995, American Holocaust survivor Hugo Princz, whose lawsuits against Germany were dismissed due to sovereign immunity, finally received financial compensation. The settlement reached between the United States and Germany provided \$2.1 million, shared among Princz and eleven others.<sup>322</sup> Of Hugo Princz’s story and the final settlement, U.S. Senator Bill Bradley told the Senate:

Finally, yesterday, 50 years after the formal end of World War II and the formal liberation of the concentration camp prisoners, Hugo Princz made his own peace and accepted a settlement. It is not enough in dollar terms. Indeed, no amount of money could ever compensate Hugo Princz for his suffering—both during the war and during his quest for reparations. But by accepting German[y]’s settlement, Hugo Princz has vindicated his life of courage. He has won recognition of the justice of his cause.<sup>323</sup>

Certainly the fog of war can complicate “justice.” But the United States’ international obligations mandate adherence to the law. To ensure that it can secure justice for future Americans who are mistreated by other countries—as it did with Hugo Princz, the United States must honor its obligations. The United States must take the necessary and proper steps to remedy the harms it may have caused.

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318. Civil Liberties Act of 1988, Pub. L. 100-383, 102 Stat. 905.

319. H.R. Con. Res. 357, 106th Cong. (2000).

320. Justice for Former American Hostages in Iran Act of 2013, S. 559, 113th Cong. (2013); Justice for the American Diplomats Held Hostage in Tehran Act, H.R. 904, 113th Cong. (2013); ELSEA, *supra* note 221.

321. Stobart, *supra* note 87.

322. Martin, *supra* note 218.

323. 141 CONG. REC. 13,870 (1995).

