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THE INTERNATIONAL PROSCRIPTION AGAINST TORTURE AND THE UNITED STATES' CATEGORICAL AND QUALIFIED RESPONSES

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Abstract: Although the prohibition against torture is a *jus cogens* and proscribed by multiple international treaties and United States law, such bans did not prevent the torture of detainees in United States' custody. For a state truly to protect people from torture, it must rely less on definitions and prohibitions and turn to leadership and policy; proscriptions by themselves cannot stop torture—only leadership and policy can. In the case of detainees held by the United States during the war on terror, presidential leadership created an environment that allowed torture, and it was not curtailed until presidential leadership stopped it.

INTRODUCTION

Torture, although once a widely used interrogation and punishment tool, has now largely been banned by a combination of customary and treaty law.¹ The most comprehensive of these treaties is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), subscribed to by 147 member states, including the United States.² The most significant aspects of the CAT are its definition and its complete proscription of torture. The ban on torture is so absolute that it is considered *jus cogens*: an international norm so accepted by the community of states, that no derogation of the prohibition is ever permitted.³ Yet despite this proscription, people from every continent are still subjected to systematic

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¹ See generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

² CAT, *supra* note 1; see also Omer Ze'ev Bekerman, *Torture—The Absolute Prohibition of a Relative Term: Does Everyone Know What Is in Room 101?*, 53 AMER. J. COM. L. 743, 750 (2005).

³ See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 153–57 (Dec. 10, 1998). See generally CAT, *supra* note 1.

physical and mental victimization at the hands of governments, including some of the most progressive Western governments.⁴

The explanation for this discrepancy is painfully simple: definitions and proscriptions, by themselves, cannot stop torture—only leadership and policy can. I experienced this reality firsthand as a Marine lawyer deployed to Iraq. There, although the definition and the ban created a framework, it was leadership and practical policies that effectively combated torture.

Few dispute that it is torture for a prisoner to be, “bound to an inclined board, with his feet raised so his head is slightly lowered, have cellophane wrapped over his face, and then have water poured over him to create an unavoidable gag reflex and terrifying fear of drowning.”⁵ Yet according to the Bush administration, this interrogation technique, known as waterboarding, did not constitute torture and was, therefore, not in contravention of international law.⁶ These divergent views identify a flashpoint in the torture debate: what constitutes torture?

Although definitions play a significant role in answering that question, leadership, policies and, ultimately, a nation’s commitment to humane treatment are more important. A state’s accession to anti-torture conventions is not dispositive of whether that state actually practices torture; a number of CAT signatories have, after all, been accused of it. But by investigating a state’s torture definition, one can determine if that state actually condones internationally prohibited practices. Such an investigation, however, is only a starting point. To that end, after this article examines the definitions of torture, the international proscription, and the U.S. response, it will show that for a state truly to protect people from torture, it must move beyond definitions and prohibitions and rely instead on leadership and policy.

⁴ See generally CAT, *supra* note 1.

⁵ See Brian Ross & Richard Esposito, *CIA’s Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1322866&page=1>.

⁶ John Sifton, from Human Rights Watch, explains, “the person believes they are being killed, and as such, it really amounts to a mock execution, which is illegal under international law.” *Id.*

I. DEVELOPMENT OF THE DEFINITION OF TORTURE

The definitions of torture contained in international instruments vary.⁷ Nevertheless, the wide acceptance of the CAT definition of torture reflects a consensus “representative of customary international law.”⁸ The CAT defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁹

The CAT definition is the most comprehensive and widely used and is, therefore, considered the international standard. It establishes a cross national norm banning *any* use of torture. The norm is expressed and developed in numerous international documents.

For example, it has steadily expanded since the signing of the United Nations Charter (the Charter) in 1945. One of the stated purposes of the United Nations is to, “solve international problems of a humanitarian character . . . [by] promoting and encouraging respect for human rights.”¹⁰ Article 55(c) of the Charter goes on to state, “the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all.”¹¹ In Article 56, “members pledge themselves to take joint and separate action

⁷ See Johan D. van der Vyver, *Torture as a Crime under International Law*, 67 ALB. L. REV. 427, 432-53 (2003).

⁸ Prosecutor v. Delalic, No. IT-96-21-T, ¶ 459 (ICTY 1998).

⁹ CAT, *supra* note 1, art. 1(1). There are, of course, competing definitions. Webster’s dictionary defines torture as the “infliction of severe physical pain as punishment or coercion.” Webster’s II New Riverside University Dictionary (1984). W.R. Kidd, a California police lieutenant during the 1920s and 1930s, explained that, “torture may consist of beatings; of long grillings by relays of interrogators under blinding lights; or locking the prisoner up in a dungeon without food or water for long periods of time.” Yale Kamisar, *Torture During Investigations: A Police Manual’s Foresight*, NAT’L L. J., Mar. 10, 2008, at 22.

¹⁰ U.N. Charter art. 1, para. 3.

¹¹ *Id.* art. 55, para C.

in cooperation with the [United Nations] for the achievement of the purposes in Article 55.”¹² Although the Charter does not specifically prohibit torture, it sets an aspirational goal for all its members to promote respect for human rights—a goal that includes, by implication, a prohibition against the use of torture.

Thereafter, in 1948, the United Nations adopted the Universal Declaration of Human Rights (the Declaration),¹³ which states in part that, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹⁴ Because the Declaration was a General Assembly resolution, and not a treaty, some question whether the prohibition is binding or whether it simply creates an international norm.

That question was partially answered in 1976, when the United Nations International Covenant on Civil and Political Rights (the Covenant) declared: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹⁵ The Covenant derives these proscriptions from an inherent sense of human dignity.¹⁶ In other words, the prohibition of torture is an inalienable right, and not simply a right granted by states. Nearly twenty years later, the United States ratified the Covenant with numerous reservations.¹⁷ The most significant reservation states that Articles 1–27 of the Covenant, which include the prohibitions against torture, are not self-executing.¹⁸

Notwithstanding the limited scope of the Covenant, the CAT came into force in 1987.¹⁹ It was significant not only because it defines and proscribes torture, but also because it creates proactive and reactive tools that parties can use to limit the use of torture throughout the world. The CAT is comprised of thirty-three articles organized into three parts.²⁰ These articles create a comprehensive approach to the issue of torture. Among other things, the CAT provides: (1) the use of torture is proscribed regardless of the situation, (2) the pro-

¹² *Id.* art. 56.

¹³ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

¹⁴ *Id.* art. 5.

¹⁵ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 7.

¹⁶ *Id.* art. 6.

¹⁷ 138 Cong. Rec. S4781, 4781–84 (1992).

¹⁸ S. EXEC. REP. NO. 102–23 (1992).

¹⁹ *See id.*

²⁰ *Id.*

scription is applicable to all states regardless if they have become a party to the convention, (3) parties cannot extradite persons to states where there is a significant possibility that they may be tortured, (4) following the orders of a superior is not a legal defense for torture, (5) the treaty functions as an extradition treaty for a country that wishes to send a person accused of torture to stand trial in another country, (6) evidence obtained from torture cannot be used in proceedings that are adverse to the victim, and (7) parties must educate persons, who would be in a position to torture, about the prohibition to torture.²¹

II. THE UNITED STATES AND TORTURE

To understand the United States response to the CAT, one must first understand that the United States has historically supported human rights and proscriptions against torture through legislation and policy. Although several American colonies imported forms of torture from Europe, its use in the colonies was far less widespread than in the old world.²² The ratification of the United States Constitution and, later, the Bill of Rights, further prohibited actions that constituted torture. For instance, the Eighth Amendment to the Constitution bans cruel and unusual punishments, and the Fourth and Fifth Amendments ban unreasonable seizures and violations of due process during interrogations. Although these amendments do not explicitly ban torture, they do so by implication. For this reason, with a notable exception, torture has never been an authorized punishment in the United States.²³

A. *United States Actions Against Torture Prior to CAT*

The significant area in which government sanctioning of torture conflicts with constitutional aspirations, of course, arises in the treatment of African Americans in the southern parts of the United States.

²¹ See Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 ALB. L. REV. 427, 431–32 (2003).

²² These forms of torture included: drawing and quartering, burning at the stake, whipping, branding, dunking in water, and placement in stockades. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICA* 37–44 (1994).

²³ *Id.* But see THE READERS COMPANION TO AMERICAN HISTORY 684–86 (Eric Foner & John A. Garraty eds., 1991) (noting that African Americans were systematically subjected to torture by the southern state governments and the Ku Klux Klan as late as the mid-twentieth century).

In response to this, Congress enacted the Civil Rights Act of 1871. The most important provision of this Act is now codified in § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress²⁴

Even today, this statute creates a private right of action against federal and state authorities who engage in abusive conduct.

Domestically, plaintiffs can use § 1983, in conjunction with the Fourth, Fifth and Eight Amendments, to hold authorities accountable for state actions that amount to torture. By holding police departments and individual police officers liable, § 1983 discourages abusive state action. The Alien Tort Claims Act²⁵ also creates a private right of action for violations of customary international law or treaties to which the United States is a party.²⁶ In 1979, two foreign citizens used this act to obtain punitive damages against foreign government officials for the torture and death of relatives.²⁷ In its opinion, the Second Circuit Court of Appeals wrote: “[F]or purposes of civil liability, the torturer has become like the pirate and slave trader before him, *hostis humani generis*, an enemy of all mankind.”²⁸

On the international front, the United States ratified the four Geneva Conventions in 1955.²⁹ The Geneva Conventions prohibit the use of torture in international armed conflict. Common Article 3 states:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed “hors de combat” by sickness, wounds, detention, or any other cause, shall in all circumstances be treated hu-

²⁴ Civil Rights Act, 42 U.S.C. § 1983 (1871).

²⁵ Alien Tort Claims Act of 1789, 28 U.S.C. § 1350 (2006).

²⁶ Eric Engle, Commentary, *The Torture Victims Protection Act, The Alien Tort Claims Act, and Foucault's Archaeology of Knowledge*, 67 ALB. L. REV. 501, 502 (2003).

²⁷ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 879 (2d Cir. 1980).

²⁸ *Id.* at 890.

²⁹ See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

manely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.³⁰

The Uniform Code of Military Justice (UCMJ), which regulates the conduct of U.S. service members, criminalizes violations of the Geneva Conventions.³¹ Furthermore, numerous articles within the UCMJ, such as the proscriptions against maiming, assaults, and the maltreatment of prisoners, specifically criminalize acts that constitute torture. As evidence of the United States' commitment to ending torture, after the Vietnam War, the armed forces systematically taught its members the principles of the Geneva Conventions including, significantly, the proscriptions against torture.

In sum it was among this constellation of laws that the CAT arrived. Domestically, the United States already proscribed torture via a combination of statutes and constitutional amendments. Internationally, the UCMJ and the Geneva Conventions prohibited U.S. service members from using torture in armed conflict.

B. United States Acceptance of CAT with Reservations and Reaffirmation

Although the U.N. General Assembly unanimously adopted the CAT in December of 1984, the United States did not sign it until April 1988.³² In October 1990, the Senate forwarded the CAT to the President with numerous reservations. Although some of the reservations may have been superficial, one was significant in that it changed the definition of torture to the following:

[I]n 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

³⁰ *Id.*

³¹ See generally The Uniform Code of Military Justice, 10 U.S.C. §§ 801–950.

³² United Nations, Office of the High Commissioner for Human Rights, Status of Ratifications for the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, <http://www.unhchr.ch/html/menu2/6/cat/treaties/conratification.htm> (last visited Apr. 14, 2009).

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.³³

This definition makes torture harder to prove because it requires specific, as opposed to general, intent. Furthermore, by narrowing the definition to include only the acts that cause severe physical pain and suffering or actual prolonged mental harm, the Senate left open a range of conduct, including physical assaults, which would not be actionable under U.S. law.

The Senate ratified the CAT with these reservations in 1994.³⁴ Congress then implemented the CAT's terms by legislating proscriptions against torture that same year.³⁵ In doing so, it defined torture as the following:

(1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) 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;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality."³⁶

³³ Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990).

³⁴ Convention Against Torture, reservation made by the United States (Oct 21, 1994), ¶ II.1(a).

³⁵ See Bekerman, *supra* note 2, at 767-68.

³⁶ 18 U.S.C. § 2340 (1)-(2).

It is important to note that torture, as proscribed by Congress, can only occur outside of the United States.³⁷ Furthermore, Congress has extended criminal jurisdiction over any act of torture, regardless of the offender's location or the nationality of the offender or victim.³⁸

C. *Leadership and Policy*

As stated earlier, definitions and proscriptions are necessary but insufficient instruments in the prevention of torture; leadership and policy implementation are the determinative factors. One example of these elements at work is evinced in President Clinton's 1999 promulgation of Executive Order 13107. This order directed all executive departments and agencies to, "maintain a current awareness of [the] United States' international human rights obligations that are relevant to their functions and perform such functions so as to respect and implement those obligations fully."³⁹ President Clinton's leadership regarding international human rights issues created an expectation within the executive branch that supported international human rights and the CAT.

In contrast, the Bush administration's derogation of the CAT and other international agreements signaled its tolerance of a more relaxed view on enforcing international human rights. For example, the administration's view on the United Nations and international law is exemplified by former Ambassador to the United Nations, John Bolton, who said: "There is no such thing as the United Nations. There is only the international community, which can only be led by the only remaining superpower, which is the United States."⁴⁰ Further evidence of the Bush administration's views on the CAT and interrogations is found in the actions of former Secretary of Defense Donald Rumsfeld, who directed military interrogators to "take the gloves off" when interrogating John Walker Lindh, the U.S. citizen captured while fighting for the Taliban.⁴¹

Perhaps the most illuminating insight into the Bush administration's views on torture are found in Assistant Attorney General John

³⁷ *Id.* § 2340A(b).

³⁸ *See id.*

³⁹ Exec. Order No. 13,107, 3 C.F.R. 234 (1999).

⁴⁰ Roland Watson, *Bush Deploys Hawk as New UN Envoy*, LONDON TIMES, Mar. 8, 2005, at 31.

⁴¹ Richard A. Serrano, *Prison Interrogators' Gloves Came off Before Abu Ghraib*, L.A. TIMES, June 9, 2004, at 1.

Yoo's "Torture Memo."⁴² This originally classified document, and a similar memo authored by Assistant Attorney General John Bybee, evidences the Bush administration's willingness to push the limits of domestic and international law during interrogations. Mr. Bybee's memo states:

[T]orture as defined in and proscribed by Sections 2340–2340A, only cover extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. . . . Because the acts inflicting torture are extreme, there is a significant range of acts that though they might constitute cruel, inhuman or degrading treatment or punishment, fail to rise to the level of torture.⁴³

Interrogators implemented the Bush administration's policy with regard to suspected Taliban and al Qaeda members, many of whom were classified as illegal enemy combatants, and detained in Guantanamo Bay, Cuba in order to render them beyond the reach of international and U.S. law.

The policies announced in the Yoo and Bybee memos created a climate in the executive branch that manifested a shift in values: the United States no longer categorically rejected torture; henceforth the rejection became qualified.⁴⁴

⁴² See Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., on Military Interrogation of Alien Unlawful Combatants Held Outside of the United States to William J. Haynes II, General Counsel of the Department of Defense (Mar. 14, 2003) *available at* http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf.

⁴³ See Memorandum from Jay S. Bybee, Assistant Att'y Gen., on Standards of Conduct for Interrogations under 18 U.S.C. §§ 2340–2340A to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), at 46, *available at* http://www.washingtonpost.com/wpshr/politics/documents/chenev/torture_memo_aug2002.pdf.

⁴⁴ One may argue that this analysis is unfair, because the Bush administration, unlike its predecessors, had to contend with the September 11 attacks. Even before the war on terrorism, however, the Bush administration was accused of unilateralism for its, "abrupt rejection of several international treaties, such as the Kyoto Protocol on global warming, the Anti-Ballistic Missile Treaty and certain elements of an emerging agreement to stem the spread of light weapons." All of these policies signaled a desire to not be bound by international legal norms. Alan Sipress & Steven Mufson, *Powell Takes the Middle Ground*, WASH. POST, Aug. 26, 2001, at A01.

III. IMPACT OF THE BUSH ADMINISTRATION'S TORTURE POLICIES

In counter-attacking al Qaeda in Afghanistan and invading Iraq, U.S. forces have captured and detained thousands of people.⁴⁵ Some of these detentions lasted only moments; others have lasted for more than five years.⁴⁶ Their treatment has varied from humane to cruel. Testimony regarding the conditions within Abu Ghraib Prison in Iraq is enlightening, revealing that detainees were subjected to “sodomy, pouring phosphoric liquid on detainees, beatings, threats of rape and electrocution, stripping detainees naked, forcing them to masturbate, and simulate other sex acts in public and terrorizing naked detainees with dogs.”⁴⁷ There is also evidence of two Afghan prisoners dying from blunt force trauma while under the exclusive control of the United States.⁴⁸ Central Intelligence Agency (CIA) Director General Michael V. Hayden publicly admitted that the CIA had used waterboarding against al Qaeda suspects.⁴⁹ Other CIA sources described six sanctioned “Enhanced Interrogation Techniques” used against al Qaeda suspects incarcerated in isolation at secret locations around the world.⁵⁰

⁴⁵ See Carol D. Leonnig & Julie Tate, *Some at Guantanamo Mark 5 Years in Limbo; Big Questions About Low-Profile Inmates*, WASH. POST, Jan. 16, 2007, at A1; Steve Vogel, *U.S. Takes Hooded, Shackled Detainees to Cuba*, WASH. POST, Jan. 11, 2002, at A10.

⁴⁶ See Vogel, *supra* note 45, at A10.

⁴⁷ Bekerman, *supra* note 2, at 769.

⁴⁸ Engle, *supra* note 26, at 501.

⁴⁹ Scott Shane, *Waterboarding Focus of Inquiry by Justice Department*, N.Y. TIMES, Feb. 23, 2008, at A1.

⁵⁰ See Ross & Esposito, *supra* note 5. The six techniques were:

1. The Attention Grab: The interrogator forcefully grabs the shirt front of the prisoner and shakes him.
2. Attention Slap: An open-handed slap aimed at causing pain and triggering fear.
3. The Belly Slap: A hard open-handed slap to the stomach. The aim is to cause pain, but not internal injury. Doctors consulted advised against using a punch, which could cause lasting internal damage.
4. Long Time Standing: This technique is described as among the most effective. Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours. Exhaustion and sleep deprivation are effective in yielding confessions.
5. The Cold Cell: The prisoner is left to stand naked in a cell kept near 50 degrees. Throughout the time in the cell the prisoner is doused with cold water.
6. Water-Boarding: The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.

Looking at this evidence, it is arguable whether these actions and techniques were specifically intended to inflict “severe physical or mental pain or suffering upon another person within one’s custody or control.”⁵¹ What cannot be argued, however, is whether these acts are humane—they simply are not, and they certainly violate the spirit, if not the proscriptions, of the CAT.

A. Responses to the Pushing of Limits

Reports and photos of conditions in Abu Ghraib spread throughout the world, shocking the conscience of both those in the United States and the international community. Late in 2004, President Bush made an unequivocal directive, “United States personnel do not engage in torture.”⁵² That directive was followed up with a memo written by acting Assistant Attorney General Daniel Levin, declaring: “torture is abhorrent both to American law and values and to international norms.”⁵³ In 2005, Congress responded by passing the Detainee Treatment Act (DTA), which states that, “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”⁵⁴ The DTA went on to explain:

[T]he term “cruel, inhuman, or degrading treatment or punishment” means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.⁵⁵

The Presidential directive, the Assistant Attorney General’s declaration, and the DTA’s language signaled a shift in U.S. policy, which afforded greater protection to those detained by the United States and

⁵¹ 18 U.S.C. § 2340 (1)–(2).

⁵² Neil A. Lewis, *U.S. Spells Out New Definition Curbing Torture*, N.Y. TIMES, Jan. 1, 2005, at A1.

⁵³ *Id.*

⁵⁴ Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2739, 2740 [hereinafter DTA].

⁵⁵ *Id.*

brought the United States into greater alignment with the designs of the CAT.

The U.S. military has also extended and scrupulously enforced protective measures for detainees. From 2006 to 2007, I was deployed to Iraq as a legal advisor for a Marine unit. During that time, the unit in which I served captured in excess of one hundred detainees. My duties included ensuring the well being of those detained. Detainees were photographed and given medical exams before and after their detentions, and their treatment was heavily monitored to ensure no abuse took place. Reports of abuse, no matter how minor or trivial, were rigorously investigated. Similar provisions are currently in effect throughout the Department of Defense.

This new reality highlights a pendulum swing after the end of 2004. Before the Bush administration, the United States categorically rejected torture. After September 11, the rejection was only a qualified one. Now, with the Presidential directive and the DTA, the United State once again categorically rejects torture.⁵⁶

B. *Why Torture Should Never Be an Option*

There are a number of reasons why the United States should avoid torture. Torture-derived information is unreliable. Victims of torture routinely provide specious information to limit or cease pain and suffering. Bob Baer, a former CIA officer, said, “you can get anyone to confess to anything if the torture’s bad enough.”⁵⁷ In at least one instance, CIA waterboarding resulted in questionable information that negatively impacted U.S. operations in Iraq.⁵⁸ Another reason to avoid torture is the human cost. When we think of torture, we rightly concern ourselves with the victim of the torture. The torturer, however, is also a victim and may suffer psychological harm associated with this antisocial conduct. Finally, when any country uses torture in

⁵⁶ This movement is similar to the process that the Israelis went through in the mid-1980s. See generally Bekerman, *supra* note 2. The General Security Service was publicly condemned for using force during interrogations of suspected terrorists and then lying to courts about their use of force during those interrogations. *Id.* After these revelations, an Israeli commission investigated the issues and opined: “where non-violent psychological pressure induced by intense and lengthy interrogations . . . d[id] not provide desired outcome[s], the application of ‘moderate physical pressure’ is acceptable.” *Id.* at 760. The Israeli High Court of Justice took up the issue in 1999 and held: “a reasonable investigation is necessarily one free of torture, free of cruel and inhuman treatment, and free of any degrading conduct whatsoever . . . these prohibitions are ‘absolute.’” *Id.* at 761.

⁵⁷ Ross & Esposito, *supra* note 5.

⁵⁸ See *id.*

defiance of international law, it does violence to its credibility. More importantly, such actions lower the bar for international human rights norms throughout the world and put more people at risk of being tortured.

C. *The Lawyer's Role in Preventing Torture*

Interpreting the law is paramount to a lawyer's job. Former Attorney General Mukasey's belief that, "a lawyer's principal duty is to advise his client as to the best reading of the law," reiterates this assumption; yet it neglects a critical aspect of the art of practicing law.⁵⁹ Although clients and society may only want to know what is legal, they also need to know what is prudent and what is right. Lawyers must be skillful enough to advise their clients on these points.

Lawyers' analytical skills prepares them to meet the challenges of legal interpretation. To be effective counselors, however, they must be skilled in moral decision-making as well. They should not use strict interpretations of the law to limit their advice to clients. Rather, they must allow morality to inform the advice they render, too. Law schools play a critical role in developing conscientious and effective counselors. Law students, after all, come to understand how the same legal framework that generated "all men are created equal" later came to sanctify "separate but equal."

I found myself applying these lessons less than two years after graduating from law school, while working on the front lines of detainee operations in Iraq. Both military personnel and lawyers believe that military lawyers serve as the conscience of the armed forces. As the conscience of the military, judge advocates must provide commanders and war-fighters not only with the sound legal advice they want, but also the counsel they need. As a lawyer in Iraq, I had to determine the level of care legally mandated for captured suspected insurgents, whether undergoing interrogation or awaiting transportation. Once I determined the required level of care, I viewed it as a floor, not a ceiling, for advising what level of care service members should be provided. My moral compass led me to believe that the Marines could provide better levels of care than the law required. I briefed my commander on both the legal requirements and my aspirational goals. He, in turn, ordered a level of care for detainees that far exceeded the legal requirements and the CAT.

⁵⁹ Michael B. Mukasey, *The Role of Lawyers in the Global War on Terrorism*, 32 B.C. INT'L & COMP. L. REV. 179, 180 (2009).

CONCLUSION

The prohibition against torture is not only a *jus cogens*, it is also proscribed by multiple international treaties and by U.S. law. These bans, however, do not, on their own, prevent the torture of detainees. Instead, presidential leadership and policies ended the inhumane treatment. It is the hand of a vigilant administration that curtails the torturer's fist. Laws and definitions are not inconsequential; they provide necessary theory and guidance. Yet they are subordinate to leadership and policy. Leaders must affirmatively choose to adhere to the spirit of the CAT and the foundational principles that underpin human rights norms. This choice includes a firm commitment to fuse the theoretical with grounded, practical procedures, thereby categorically rejecting torture.