

5-1-2001

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### Recommended Citation

Kepner, Timothy J. (2001) "Torture 101: The Case against the United States for Atrocities Committed by School of the Americas Alumni," *Penn State International Law Review*: Vol. 19: No. 3, Article 7.  
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# Torture 101: The Case Against the United States for Atrocities Committed by School of the Americas Alumni\*

## I. Introduction

The mountains of El Salvador used to harbor and protect the small village of El Mozote. At one time El Mozote used to be a place where men, women, and children lived together peacefully while working hard to sustain their reasonable quality of life. However, on December 11, 1980, during the El Salvador civil war, the peace and tranquility of this small village was shattered. After engaging in a conflict with guerrillas in the vicinity, the Atlacatl Battalion, a battalion of the El Salvador Army, entered the village.<sup>1</sup> After spending the night in the village, the soldiers of the Atlacatl Battalion forced the villagers out of their homes, and proceeded to torture, interrogate, and execute the men.<sup>2</sup> After eliminating the adult males of the village, the soldiers then separated the women from the children.<sup>3</sup> The soldiers then systematically executed the women before slaughtering the children.<sup>4</sup> Rufina Amaya, a woman who survived the El Mozote siege, has described the events:

There were soldiers on both sides. Then they moved away to see the women kneeling down on the ground to pray. They killed all of them. Not a single one of them survived. Just me, by the grace of God. I hid under a tree. When I heard the

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\* This comment, written by Timothy J. Kepner, received the 2001 Richard Reeve Baxter Award. This award is given in recognition of excellence in scholarship and legal writing in the field of international law.

1. See SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS (Richter Productions 1994); U.N. Truth Commission Report on El Mozote, at [http://www.parascope.com/articles/0197/el\\_moz05.htm](http://www.parascope.com/articles/0197/el_moz05.htm) (last visited Jan. 9, 2001).

2. See U.N. Truth Commission Report on El Mozote, at [http://www.parascope.com/articles/0197/el\\_moz05.htm](http://www.parascope.com/articles/0197/el_moz05.htm) (last visited Jan. 9, 2001).

3. See *id.*

4. See *id.*

screams of the children, and I knew which ones were mine, they were crying 'Mommy, they are killing us.'<sup>5</sup>

In the end, the soldiers of the Atlacatl Battalion burned the village to the ground and massacred more than 900 men, women, and children.<sup>6</sup> Out of 143 bodies later identified in a lab following the massacre, 131 were children under the age of twelve, including three infants under the age of three months.<sup>7</sup>

When horrific and terrible human rights abuses have occurred, such as the El Mozote massacre, the question of responsibility weighs on every person's mind. In regards to the deaths of the innocent men, women, and children at El Mozote, the most obvious parties responsible are the Atlacatl Battalion and the El Salvador Army. However, if the world were to hold only these two parties responsible for the El Mozote massacre, responsibility would not be truly assessed because in the shadows of El Mozote there lurks another responsible party with blood on its hands—the United States of America.

After an investigation into the El Mozote massacre, twelve soldiers were cited for the massacre.<sup>8</sup> Of these twelve soldiers, ten were graduates of the School of the Americas.<sup>9</sup> The School of the Americas ("SOA") is a training facility financed and operated by the United States with the mission of training Latin American soldiers.<sup>10</sup> However, the SOA has also received infamous recognition for the great number of SOA graduates who have committed human right abuses.<sup>11</sup> Besides the El Mozote massacre, SOA graduates have played key roles in nearly every coup and major human rights violation in Latin America in the past fifty years.<sup>12</sup> In fact, Latin American nations with the worst human rights records have consistently sent the most soldiers to the SOA.<sup>13</sup> Martin Meehand, a Congressman from Massachusetts, has noted "[i]f the SOA held an alumni association meeting, it would bring

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5. SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

6. *See id.*; U.N. Truth Commission Report on El Mozote, at [http://www.parascope.com/articles/0197/el\\_moz05.htm](http://www.parascope.com/articles/0197/el_moz05.htm) (last visited Jan. 9, 2001).

7. *See* SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

8. *See id.*

9. *See id.*

10. *See* GENERAL ACCOUNTING OFFICE, *School of the Americas: U.S. Military Training for Latin American Countries*, GAO/NSIAD-96-178, 20, August 1996.

11. *See* JACK NELSON-PALLMEYER, *SCHOOL OF ASSASSINS: THE CASE FOR CLOSING THE SCHOOL OF THE AMERICAS AND FOR FUNDAMENTALLY CHANGING U.S. FOREIGN POLICY* 9 (1997).

12. *See id.*

13. *See* Brian Brown, *School for Scandal*, COMMONWEAL, Dec. 18, 1998, at 10.

together some of the most unsavory thugs in the hemisphere.”<sup>14</sup> There have been so many despots trained at the SOA that it has earned numerous nicknames including “School of Coups,” “School of Assassins,” and “School of Dictators.”<sup>15</sup>

The United States government and other defenders of the SOA have argued that the SOA cannot be blamed for a “few bad apples” who commit human rights abuses.<sup>16</sup> The problem with this argument is the fact that the SOA curriculum has not only been weak in teaching a respect for human rights, but has, in fact, encouraged Latin American soldiers to torture and use other techniques that are considered violations of international law. The United States can no longer deny its responsibility and liability for the tortures, assassinations, massacres, and murders committed by the soldiers that it has trained.

The purpose of this Comment is to discuss the United States’ liability in domestic courts for the human rights abuses committed by soldiers who received training from the SOA using the perspective of a hypothetical alien plaintiff. First, Part II of this Comment will discuss the background of the SOA, the legacy of some of its graduates, and the evidence that torture and disrespect for human rights are part of the SOA curriculum. Part III will then explore the legal complications the hypothetical plaintiff would face trying to establish and maintain jurisdiction in a Federal District Court when suing the United States under the Alien Tort Act and the Federal Tort Claims Act. Part IV will analyze the United States’ liability for teaching torture and improper human rights training using reasoning and analysis from civil rights jurisprudence. Finally, this Comment will conclude with a brief discussion about Congress “shutting down” the SOA.

## II. The School of the Americas

After World War II, the fear of communism became the driving force behind United States foreign policy.<sup>17</sup> According to George Kennan, the former head of the State Department’s planning staff, the goal of United States foreign policy after World War II was not democracy, freedom, development, or human rights.<sup>18</sup> Instead, regional stability became the goal of United States

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14. *Id.*

15. NELSON-PALLMEYER, *supra* note 11, at 41.

16. *Id.* at 18-19.

17. *See* NELSON-PALLMEYER, *supra* note 11, at 56-57.

18. *See id.* at 39.

foreign policy, especially in Third World areas where the United States had "vital interests"<sup>19</sup> and where social conditions such as hunger, poverty, and inequality were feeding impulses for social change.<sup>20</sup> In order to protect its vital interests and maintain regional stability, the United States supported repressive militaries and governments through its considerable ideological and financial weight.<sup>21</sup> However, in Latin America, the United States' support was not limited solely to financing governments and militaries, but also included the training of Latin American soldiers and officers by United States personnel.<sup>22</sup> These trained soldiers were to become the instruments of foreign policy in Latin America.<sup>23</sup>

#### A. *History and Background of the School of the Americas*

In 1946, the United States established a training institution in the Panama Canal Zone.<sup>24</sup> The original purpose of this institution was to provide training to United States Army personnel in garrison technical skills such as food preparation, maintenance, and other support functions.<sup>25</sup> But soon the institution's goal became the promotion of stability throughout the Latin American region.<sup>26</sup> In 1963, the institution officially became the School of the Americas and Spanish was declared the School's official language.<sup>27</sup> In 1984, the SOA moved to its current location at Fort Benning, Georgia, in order to comply with the terms of the 1977 Panama Canal Treaty and because of a conflict between the United States and Panamanian officials regarding the operation and command of the SOA.<sup>28</sup> Then in 1987, under 10 U.S.C. §4415, Congress formally authorized the Secretary of the Army to operate the SOA with the objective of providing military education and training to military personnel of Latin American and Caribbean countries.<sup>29</sup>

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19. "Vital interests" is a euphemism for United States corporate investments. *See id.* at 39.

20. *See* NELSON-PALLMEYER, *supra* note 11, at 39, 40.

21. *See id.* at 40.

22. *See id.*

23. *See id.*

24. *See* SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

25. *See* GENERAL ACCOUNTING OFFICE, *supra* note 10, at 20.

26. *See* NELSON-PALLMEYER, *supra* note 11, at 40.

27. *See* GENERAL ACCOUNTING OFFICE, *supra* note 10, at 20.

28. *See id.*; NELSON-PALLMEYER, *supra* note 11, at 2.

29. *See* GENERAL ACCOUNTING OFFICE, *supra* note 10, at 20. Title 10, Section 4415 of the United States Code, entitled "United States Army School of the Americas," provides:

(a) The Secretary of the Army operate the military education and training facility known as the United States Army School of the Americas.

Since the SOA opened, 55,000 military officials and 4,000 policemen and civilians from over twenty-three different countries have trained at the school.<sup>30</sup> Half the students who attend the SOA come from five primary countries—Colombia, El Salvador, Nicaragua, Peru, and Panama.<sup>31</sup> Even though the United States Army offers training of foreign soldiers at other locations, the SOA trains most of the Latin American military students who come to the United States because the courses are primarily taught in Spanish.<sup>32</sup> Candidates for the school are selected by foreign military officials and then approved by the United States embassies in Latin America.<sup>33</sup> Both United States and Latin American military personnel teach courses at the SOA, with civilians teaching some of classes.<sup>34</sup> According to the Pentagon, “the mission of the school is to train the armed forces of Latin America, promote military professionalism, foster cooperation among multi-national military forces, and to expand trainees’ knowledge of United States customs and traditions.”<sup>35</sup> The United States considers training and educating Latin American militaries as a critical and long-term investment in its national security strategy of promoting democracy in Latin America.<sup>36</sup>

The United States’ taxpayers primarily fund the SOA.<sup>37</sup> In 1995, the SOA received \$2.6 million from the Army’s operation and maintenance account and a total of \$18.4 million were spent on the School’s operation costs.<sup>38</sup> In the early 1990’s, a total of \$30 million

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- (b) The School of the Americas shall be operated for the purpose of providing military education and training to military personnel of Central and South American countries and Caribbean countries.
  - (c) The fixed costs of operating and maintaining the School of the Americas may be paid from funds available for operation and maintenance of the Army.
  - (d) Tuition fees charged for personnel receiving military education and training from the school may not include the fixed costs of operating and maintaining the school.

30. See SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1; NELSON-PALLMEYER, *supra* note 11, at 2.

31. Brian Brown, *School for Scandal*, COMMONWEAL, Dec. 18, 1998, at 10.

32. See GENERAL ACCOUNTING OFFICE, *supra* note 10, at 2. Other institutions where the United States offers training to Latin American soldiers are the Naval Small Craft and Technical Training School in Panama and the Inter-American Air Force Academy located at the Lackland Air Force Base in Texas. See *id.* at 6, n.5.

33. See *id.* at 7.

34. See *id.* at 3.

35. SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

36. See GENERAL ACCOUNTING OFFICE, *supra* note 10, at 1, 6.

37. See *id.* at 2.

38. See *id.* at 2, 35.

was used to renovate the buildings and dorms of the school.<sup>39</sup> Besides direct funding from taxpayers, the SOA also receives indirect funding from taxpayers through foreign militaries using United States security assistance grants.<sup>40</sup>

The core curriculum at the school centers on commando and combat courses.<sup>41</sup> Specifically, SOA courses include: commando operations, sniper training, counterintelligence training, defense resource management, weapons training, infantry tactics, tactical intelligence, patrolling, battle planning, civil-military relations, and psychological warfare.<sup>42</sup> Since 1990, the curriculum at the school has expanded to include addressing post-Cold War needs of the Latin America region.<sup>43</sup> The school's curriculum is based on United States military doctrine and practices, and the materials used are identical to the materials presented to United States military personnel.<sup>44</sup>

The Army and the United States have claimed "[i]t is a requirement of the School that every course, regardless of subject or length, include formal instruction emphasizing the sanctity of human rights and proper role of the military in a democratic society."<sup>45</sup> However, benevolent statements like this can only be accurately evaluated by discussing a handful of SOA graduates.

### *B. Graduates of the School and Their Legacy*

In 1995, the State Department reported that, even though progress has been made, abuses of human rights continue to be widespread in some Latin American countries.<sup>46</sup> The horrible reality surrounding the widespread existence of human rights abuses is the fact that graduates from the SOA have played key

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39. See SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

40. See GENERAL ACCOUNTING OFFICE, *supra* note 10, at 2. The United States provides money to foreign countries to allow these foreign countries to purchase military training from the United States through three foreign assistance programs—Foreign Military Financing, International Narcotics and Law Enforcement, and International Military Education and Training. See *id.* at 6, n.4.

41. See School of the Americas Watch, *Congress Closes U.S. Army School of the Americas, Gives Okay to Open Clone*, at <http://www.soaw.org/leg.html> (last visited Sept. 26, 2000).

42. See GENERAL ACCOUNTING OFFICE, *supra* note 10, at 2; SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

43. See GENERAL ACCOUNTING OFFICE, *supra* note 10, at 2.

44. See *id.* at 12.

45. NELSON-PALLMEYER, *supra* note 11, at 21.

46. See GENERAL ACCOUNTING OFFICE, *supra* note 10, at 4.

roles in some of the worst human rights abuses in El Salvador, Colombia, Guatemala, and other countries.

1. *El Salvador*—In 1980, a civil war in El Salvador became a focal point for human rights advocates.<sup>47</sup> This war found the citizens of El Salvador threatened by unrestrained death squads that killed up to fifty people a night.<sup>48</sup> On March 23, 1980, Archbishop Oscar Romero made a plea to the leaders of El Salvador:

I would like to make an appeal in a special way to the men of the Army in the name of God and the name of the suffering people whose laments rise to the heavens each day more tumultuous. I beg you, I ask you, I order you in the name of God. Stop the repression.<sup>49</sup>

The next day, Archbishop Romero was assassinated.<sup>50</sup> A number of years after the assassination, the National Security Archives in Washington, D.C. obtained a copy of a declassified cable from the American Embassy in El Salvador.<sup>51</sup> The cable discussed a meeting during which Roberto D'Aubuisson planned the murder of Archbishop Romero, and held a lottery to select the actual killer.<sup>52</sup> D'Aubuisson and two of the three officers directly responsible for Archbishop Romero's death were all graduates of the SOA.<sup>53</sup>

On November 16, 1989, six Jesuit priests, their housekeeper, and her fifteen-year-old daughter were murdered in San Salvador.<sup>54</sup> The Jesuits were murdered because they were considered "intellectual leaders" of Communist aggression.<sup>55</sup> A United States Congressional investigation, headed by Representative Joseph Moakley, began to look into these murders.<sup>56</sup> The investigation found that the Atlacatl Battalion committed the murders after some of the members of the Battalion returned from the United States where they received training in a number of areas, including human rights.<sup>57</sup> The investigation concluded that nineteen of the

47. See SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

48. See *id.*

49. *Id.*

50. See *id.*

51. See *id.*

52. See SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

53. See *id.*

54. See *id.*

55. *School of the Americas: Closing Time*, AMERICA, Nov. 28, 1998, at 3.

56. See SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

57. See *id.* As discussed previously, the members of the Atlacatl Battalion were also responsible for the El Mozote Massacre. See *supra* notes 1-7 and accompanying text.



twenty-six officers implicated in the murders, including the lieutenant in charge of the squad, were graduates of the SOA.<sup>58</sup> Additionally, General Juan Rafael Bustillo, former air force chief of El Salvador and graduate of the SOA, helped to plan and cover up the Jesuit massacres.<sup>59</sup>

The United Nations created a Truth Commission to specifically investigate the human rights atrocities committed during the El Salvador civil war.<sup>60</sup> The United Nations Truth Commission report held that the El Salvador military and other United States backed governments were responsible for the vast majority of human rights violations, massacres, and civilian deaths.<sup>61</sup> The Truth Commission further listed the names of specific officers responsible for atrocities during the El Salvador war, and this list was cross-referenced with a list of graduates from the SOA.<sup>62</sup> More than two-thirds of the sixty officers cited in the Truth Commission Report were alumni of the SOA.<sup>63</sup> Apart from the soldiers and officers already discussed, the report also noted a number of other SOA graduates involved in human rights abuses. These graduates include: three officers cited for the rape and murder of four nuns buried in an unmarked grave; three officers cited for the murder of two union leaders; two officers cited for the El Junquillo Massacre; three officers cited for the Las Hojas Massacre; and six officers cited for the Sebastian Massacre.<sup>64</sup>

2. *Colombia*—More than 100 of the 246 Colombian officers cited for war crimes by an international tribunal in 1993 were graduates from the SOA, including Colombia's Lieutenant Colonel Victor Bernal Castano.<sup>65</sup> In 1992, Lieutenant Colonel Bernal Castano was allowed to attend the SOA in order to escape a criminal investigation of his role in the massacre of a peasant family.<sup>66</sup> Furthermore, Human Rights Watch, an international human rights watchdog group, compiled a report discussing the link between the Colombian government and Colombian military and

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58. *See id.* One of the Atlacatl lieutenants during the killings was Jose Ricardo Espinoza Guerra. Guerra had been a Jesuit alumnus who had once been a student of one of his victims. *See School of the Americas: Closing Time*, AMERICA, Nov. 28, 1998, at 3.

59. *See* NELSON-PALLMEYER, *supra* note 11, at 33.

60. *See* SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

61. *See* NELSON-PALLMEYER, *supra* note 11, at 6.

62. *See* SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

63. *See* Cesar Chelala, *School of the Americas Accused of Training Human-Rights Abusers*, LANCET, Nov. 22, 1997, at 1530.

64. *See* NELSON-PALLMEYER, *supra* note 11, at 7; SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

65. *See* NELSON-PALLMEYER, *supra* note 11, at 9.

66. *See id.*

paramilitary groups, groups who were deemed responsible for numerous human rights violations.<sup>67</sup> At least seven officers cited in the Human Rights Watch Report are graduates of the SOA.<sup>68</sup>

In 1999, Brigadier General Jaime Ernesto Canal Alban, a graduate of the SOA, commanded the Third Brigade when it set up a “paramilitary” group under the name of the “Calima Front.”<sup>69</sup> Both the Calima Front and the Third Brigade were linked to drug trafficking and the massacres of numerous civilians.<sup>70</sup> Moreover, the Fourth Brigade headed by General Carlos Ospina Ovalle, another SOA graduate, has been linked to the El Aro massacre committed in October 1997.<sup>71</sup> Two other Fourth Brigade soldiers who were in charge of commanding an ambush to steal ransom money being delivered for the release of a civilian kidnapped by guerrillas were both graduates from the SOA.<sup>72</sup> One of these Fourth Brigade soldiers, Major David Hernandez Rojas, has also been linked to the creation of a death squad called “La Muerte” (Death).<sup>73</sup> Also, Major Jesus Maria Clavijo, who was a graduate of the SOA, took part in the killings carried out near El Carmen de Atrato in February 1999, and ordered the soldiers under his command to dismember corpses with chainsaws in order to foil identification.<sup>74</sup> Clavijo was also implicated by individuals as a party to a series of murders in Medellin and has been linked to the disappearance of two noted leaders of “displaced people.”<sup>75</sup> Finally, Colonel Jorge Plazas Acevedo, another graduate of the SOA, planned and carried out a series of kidnappings for ransom and murders as head of the Thirteenth Brigade’s intelligence unit.<sup>76</sup>

3. *Guatemala*—General Romeo Lucas Garcia was the Guatemalan dictator from 1978 to 1982, and was also a graduate of the SOA.<sup>77</sup> During Garcia’s reign, there were 5,000 political murders and up to 25,000 civilian deaths at the hands of the Guatemala military.<sup>78</sup> Garcia’s bloody reign and legacy was aided

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67. See Human Rights Watch, *The Ties That Bind: Colombia and Military-Paramilitary Links*, at <http://www.hrw.org/reports/2000/colombia> (last visited Sept. 26, 2000).

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. See Human Rights Watch, *supra* note 66.

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.*

77. See NELSON-PALLMEYER, *supra* note 11, at 33.

78. *See id.*

by another SOA graduate, General Manuel Antonio Callejas y Callejas, who oversaw the disappearance and assassination of thousands of political opponents.<sup>79</sup>

Another Guatemalan general and SOA graduate, General Hector Gramajo, organized military atrocities that resulted in the death of over 200,000 men, women, and children.<sup>80</sup> In 1991, Gramajo was found liable in a United States civil suit for the rape and torture of Diana Ortiz, a United States Ursuline nun.<sup>81</sup> Ortiz had been abducted, tortured, raped, scarred by more than 100 cigarette burns over her body, lowered into a pit filled with the mutilated and decomposing bodies of men, women, and children, and forced to participate in the abuse of fellow prisoners for the "crime" of teaching Mayan children how to read.<sup>82</sup> A United States District Court ordered Gramajo to pay \$47.5 million in damages, but he ignored the court's order and blamed the cigarette burns on Ortiz's body as the result of a failed lesbian love affair.<sup>83</sup> Even though Gramajo was linked to more than 200,000 military atrocities and had participated in the torture of Diana Ortiz, Gramajo was invited to be the honorable commencement speaker at the SOA two years after his involvement in Diana Ortiz's torture.<sup>84</sup>

Finally, Colonel Julio Roberto Alpirez, another SOA graduate, was linked to the killing of Michael DeVine, an American innkeeper in Guatemala, and the torture and death of Efrain Bamaca Velasquez, a Guatemalan rebel leader who was married to Jennifer Harbury, an American lawyer.<sup>85</sup> Furthermore, Colonel Lima Estrada, another SOA alumnus, was arrested for the 1998

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79. *See id.* at 10. The SOA has a "Hall of Fame," where the photos of some of the graduates that the School honors hang. Callejas has his photo hanging in this "Hall of Fame." *See id.*

80. *See* SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

81. *See* NELSON-PALLMEYER, *supra* note 11, at 10.

82. *See* NELSON-PALLMEYER, *supra* note 11, at 12; Sharon Erickson Nepstad, *School of the Americas Watch*, PEACE REVIEW, March 2000, at 67.

83. *See* NELSON-PALLMEYER, *supra* note 11, at 15.

84. Sharon Erickson Nepstad, *School of the Americas Watch*, PEACE REVIEW, March 2000, at 67.

85. *See* NELSON-PALLMEYER, *supra* note 11, at 16. Evidence also shows that Alpirez was on the CIA's payroll when he attended the SOA in 1989 and continued to work for the Agency after he returned to Guatemala in 1990. The CIA had a part in covering up relevant information about the murders committed by Alpirez in order to protect "sources and methods." *Our Man in Guatemala*, WASH. POST, March 26, 1995 at C06. Also, Jennifer Harbury has brought suit against the CIA officials who participated in the torture of her husband, and against the State Department and National Security Council for concealing information about her husband's fate. *See Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000).

assassination of Guatemalan human rights champion, Bishop Juan Gerardi.<sup>86</sup> Gerardi had been beaten to death with a brick days after he released a human rights report critical of the Guatemalan Army.<sup>87</sup>

4. *Other Countries*—Notorious graduates from the SOA are not limited solely to El Salvador, Colombia, or Guatemala. In Honduras, four of the five ranking officers who organized death squads in the 1980's and nineteen of the ranking officers linked to death squad Battalion 316, including battalion founder, General Luis Alonso Discua, are all graduates of the SOA.<sup>88</sup> In addition, General Policarpo Paz Garcia, the corrupt dictator of Honduras from 1980 to 1982, was also a graduate of the SOA.<sup>89</sup>

In Peru, the three highest ranking Peruvian officers convicted in 1994 for murdering nine university students and a professor, and the Peruvian commander who brought out tanks to obstruct the investigation of the murders were all graduates.<sup>90</sup> During the reign of the Somoza dictatorship in Nicaragua, over 4,000 National Guard troops graduated from the SOA, and many of these troops later became the Contras responsible for the deaths of thousands of civilians in the 1980's.<sup>91</sup> Also, Lopoldo Glatieri, the general in charge of Argentina's "dirty war," an incident where an estimated 30,000 people disappeared, were tortured, and murdered, was also a graduate.<sup>92</sup> Finally, the former dictator of Bolivia, Hugo Banzer, and General Manuel Noriega, a long-time CIA operative currently serving forty years in a United States prison for drug trafficking, are also both graduates from the SOA.<sup>93</sup>

The large number of human rights violations committed by soldiers and officers who happened to be former students at the SOA could be a simple coincidence. Just because the SOA is a common link between atrocities committed in numerous Latin American countries does not mean that the SOA has played any

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86. See School of the Americas Watch, *Congress Closes U.S. Army School of the Americas, Gives Okay to Open Clone*, at <http://www.soaw.org/leg.html> (last visited Sept. 26, 2000).

87. See *id.*

88. See SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1; NELSON-PALLMEYER, *supra* note 11, at 9.

89. See NELSON-PALLMEYER, *supra* note 11, at 33.

90. See SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

91. See *id.*

92. See NELSON-PALLMEYER, *supra* note 11, at 9.

93. See SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1; NELSON-PALLMEYER, *supra* note 11, at 9. Hugo Banzer's photo also hangs in the SOA's "Hall of Fame." See SCHOOL OF THE AMERICAS: SCHOOL OF ASSASSINS, *supra* note 1.

type of a role in these atrocities. However, the truth is that the SOA curriculum has not only been weak in teaching a respect for human rights, but has, in fact, encouraged Latin American soldiers to torture and use other techniques that are considered violations of international law.

*C. Evidence Exists Showing that the SOA Curriculum Includes Torture and Other Techniques that are Violations of International Law*

In 1996, the Pentagon publicly admitted that the training manuals used at the SOA instructed officers in the art of execution and torture.<sup>94</sup> The Pentagon revealed this horrible fact in 1991 after the Presidential Intelligence Oversight Board was asked by President Clinton to investigate allegations about CIA operations in Guatemala. This investigation followed the torture and rape of Diana Ortiz and the killings of Michael Devine and Efrain Bamaca.<sup>95</sup> The report developed by the Board noted in a single paragraph that the SOA had used improper instruction materials in training Latin American officers from 1982 to 1991.<sup>96</sup> These training materials, which never received proper Department of Defense review, “appeared to condone (or could have been interpreted to condone) practices such as executions of guerillas, extortion, physical abuse, coercion, and false imprisonment.”<sup>97</sup> The report noted that the Department of Defense “modified the materials” and directed officials in certain Latin American countries to retrieve all copies of the originals.<sup>98</sup>

Even though the SOA denies the manuals ever existed, the Pentagon declassified the Spanish-language manuals allowing Americans to read “some of the noxious lessons the United States Army taught to thousands of Latin American military and police officers at the School of the Americas.”<sup>99</sup> The manuals identified “religious workers, labor organizers, student groups and others in

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94. See NELSON-PALLMEYER, *supra* note 11, at 32.

95. See James Hodge, *Training Manuals Said to Condone Torture*, NATIONAL CATHOLIC REPORTER, July 26, 1996, at 10.

96. See *id.*

97. NELSON-PALLMEYER, *supra* note 11, at 51.

98. Hodge, *supra* note 95, at 10.

99. NELSON-PALLMEYER, *supra* note 11, at 84-85. According to the Department of Defense, the original English versions of the manuals, which were translated to create the Spanish versions of the manuals used by the SOA, no longer exist. See School of the Americas Watch, *School of the Americas Manuals*, at <http://www.soaw.org/soam.html> (last visited Jan. 9, 2001).

sympathy with the cause of the poor” as targets and insurgents.<sup>100</sup> The manuals, which are written in a “chilling bureaucratized with which spooks routinely try to sanitize the unmentionable,” advocate executions, torture, false arrest, blackmail, censorship, payment of bounty for murderers, and other forms of physical abuse against insurgents.<sup>101</sup> For example, the manual entitled “Terrorism and the Urban Guerilla” states that one of the duties of a counterintelligence agent is recommending targets for “neutralizing,” which is a euphemism for elimination or assassination.<sup>102</sup> As part of the “Interrogation” manual, military officers were taught to gag, bind, and blindfold suspects and, “coincidentally,” thousands of Latin Americans who were tortured and murdered during interrogation were gagged, bound, and blindfolded.<sup>103</sup> Finally, the “Handling of Sources” manual discussed how a counterintelligence agent “could cause the arrest or detention of the employee’s [informant’s] parents, imprison the employee or give him a beating as part of the placement plan.”<sup>104</sup> A former instructor at the SOA has revealed that

Literally thousands of those manuals were passed out. The officers who ran the intelligence courses used lesson plans that included the worse [sic] material contained in the seven manuals. Now they say that there were only eighteen to twenty passages in those manuals in clear violation of U.S. law. In fact, those same passages were at the heart of the intelligence instruction.<sup>105</sup>

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100. Gail Lumet Buckley, *Left, Right, and Center*, AMERICA, May 9, 1998, at 5.

101. James Kitfield, *School for Scandal*, NATIONAL JOURNAL, Oct. 5, 1996, at 2144; see also NELSON-PALLMEYER, *supra* note 11, at 51.

102. See NELSON-PALLMEYER, *supra* note 11, at 51.

103. See *id.*

104. *Id.* at 52.

105. Barbara Jentsch, *School of the Americas Critic*, PROGRESSIVE, July 1997, at 14. A similar manual, entitled “Operaciones Sicologicas en Guerra de guerrillas” (Psychological Operations in Guerilla Warfare), was one of the issues the International Court of Justice (I.C.J.) had to analyze in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). The manual had described the proper instances when violence and terror was to be used against certain targets, including court judges, mesta judges, and police officials. *Id.* at 66. The I.C.J. held that the manual encouraged the commission of acts that were illegal under international law, but did “not find a basis for concluding that any such acts which may have been committed as imputable to the United States of America as acts of the United States of America.” *Id.* at 148. As discussed in Part IV, this Comment does not claim that the acts committed by the SOA graduates are imputable to the United States, but claims that the United States is directly liable for the atrocities and torture committed by SOA graduates because of improper training.

The Pentagon has stated that the inclusion of “objectionable” material in the training manuals was the result of “mistakes,” and that there was “no deliberate and orchestrated attempt . . . to violate Defense Department or U.S. Army policies.”<sup>106</sup> However, the Pentagon has not stated how the “mistakes” happened or who was responsible for them.<sup>107</sup> In fact, the Pentagon has decided that there is no need for further investigation to assess individual responsibility.<sup>108</sup> On the other hand, the Department of Defense has stated that the manuals were the work of “misguided junior officers working from outdated intelligence materials.”<sup>109</sup> The explanation given by the Department of Defense includes the fact that the intelligence officers who created the manuals “simply assumed that U.S. laws against assassination, beatings, and blackmail applied only to U.S. citizens and thus were not applicable to the training of foreign military officers.”<sup>110</sup>

Students at the SOA are not only taught how to torture and assassinate properly, but they also receive human rights training. The SOA and its supporters have made it seem as if the present human rights training has always been part of the school’s curriculum.<sup>111</sup> However, as admitted by Georgia Congressman Sanford Bishop, it was only “as the cold war began to end, [that] the School of the Americas began to adopt a new curriculum.”<sup>112</sup>

The SOA does not offer a course specifically geared towards the respect for human rights and international law.<sup>113</sup> Instead, all of the SOA’s courses, except the computer literacy course, include a mandatory four-hour block of human rights instruction.<sup>114</sup> The average duration of a course at the SOA is seven weeks.<sup>115</sup> This means that trainees at the SOA are receiving only four hours of human rights training in a seven-week period. However, the instruction is expanded in some courses.<sup>116</sup> For example, the command and general staff officer courses have three days devoted

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106. School of the Americas Watch, *Pentagon Investigation Concludes that Techniques in SOA Manuals were “Mistakes,”* at <http://www.soaw.org/Manuals/ig-report.html> (last visited Sept. 26, 2000).

107. *See id.*

108. *See id.*

109. *Id.*

110. *Id.*

111. *See* NELSON-PALLMEYER, *supra* note 11, at 25.

112. *Id.* quoting 140 CONG. REC. 3771 (1994).

113. *See* GENERAL ACCOUNTING OFFICE, *supra* note 10, at 10-11.

114. *See id.* at 13.

115. *See id.* at 10-11.

116. *See id.* at 13.

to human rights that include a discussion of incidents in which Latin American militaries have been involved.<sup>117</sup> Yet, the command and general staff officer course lasts forty-seven weeks.<sup>118</sup> Four hours of human rights training in a seven week course, or even three days of human rights training in a forty-seven week course, does not seem adequate considering the number of human rights abuses that SOA graduates have been linked to.

The increased inadequacy of human rights training is evidenced by the facts that the instruction offered is merely cosmetic and that the students at the school have little respect for the human rights classes. Charles T. Call, an associate for the United States hemispheric security policy at the Washington Office on Latin America, was the first human rights advocate to be invited to give a guest lecture at the SOA.<sup>119</sup> Call stated that the changes made were

not much more than a facelift. . . Several instructors, I found, are from countries with appalling human rights records. . . . Indeed, much of the training at the school is done by officers from Latin American militaries which have strongly resisted increased civilian control and accountability. Yet the Defense Department invites officers from these militaries to serve as teachers and role models. . . . Even more distressing, I found that the United States continues to invite soldiers accused of gross human rights violations to the school.<sup>120</sup>

Retired United States Army Major Joseph Blair, a former instructor at the SOA and a former high-level officer in the CIA who led the Operation Phoenix program in Vietnam, which resulted in the deaths of more than 40,000 Vietnamese, agrees with Call's observation regarding the human rights training at the SOA. Blair states that the four hour blocks of instruction on human rights are considered "a bunch of bullshit" and that the human rights training is treated as a joke by most of the Latin American trainees.<sup>121</sup>

When I was there, a general who was an officer in the dictatorship of General Pinochet of Chile taught about four hours of human rights. It was a joke for fifty or sixty Latin American officers to sit in a class and have someone from Chile

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117. See GENERAL ACCOUNTING OFFICE, *supra* note 10, at 13.

118. See *id.* at 10-11.

119. See NELSON-PALLMEYER, *supra* note 11, at 25.

120. *Id.* at 26.

121. *Id.* at 27.



preach to them about how they should be concerned about human rights in their own country.<sup>122</sup>

Another example of how human rights training has been treated as a joke is evidenced by one training exercise where soldiers were supposed to be taught to use restraint when dealing with a priest and catechists while retaking control of a mock town controlled by a group of rebels.<sup>123</sup> However, during the exercise the priest and catechists were either killed or abused seventy-five percent of the time, and the priest's frequent death was treated as a school-wide joke.<sup>124</sup>

Some former instructors and students have publicly denounced the school and its teachings. In 1989, Major Joseph Blair retired from the Army and has now become a vocal opponent of the SOA and United States foreign military policy.<sup>125</sup> Blair became a critic of the SOA after reading newspaper stories in which the United States Army and school officials denied knowing that graduates of the SOA were committing murders and atrocities in Latin America.<sup>126</sup> Blair has confirmed that torture was taught at the school while he was an instructor.<sup>127</sup>

I sat next to Major Victor Thies who created and taught the entire course which included seven torture manuals and 382 hours of instruction . . . . He taught primarily using manuals which we used during the Vietnam War in our intelligence-gathering techniques. These techniques included murder, assassination, torture, extortion, and false imprisonment.<sup>128</sup>

Blair confirms that even though the Carter Administration decided to stop using the techniques applied during the Vietnam War, the SOA kept supplying Latin Americans with recommendations to use techniques and procedures that were clear violations of human rights and international law.<sup>129</sup> Blair observes that "[o]nce you learn it in the school, you retain it for life."<sup>130</sup>

Former graduates of the school have also spoken out to reveal the horrors that are taught at the SOA. Jose Valle, a member of

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122. Jentzsch, *supra* note 105, at 14.

123. See NELSON-PALLMEYER, *supra* note 11, at 27.

124. See *id.*

125. See Jentzsch, *supra* note 105, at 14.

126. See Linda Cooper, *Former Instructor Says SOA Should Close*, NATIONAL CATHOLIC REPORTER, May 8, 1998, at 7.

127. See Jentzsch, *supra* note 105, at 14.

128. Nepstad, *supra* note 84, at 67.

129. See Jentzsch, *supra* note 105, at 14.

130. *Id.*

Battalion 316 and an admitted torturer, stated that while a student at the SOA he took an intelligence course in which he viewed "a lot of videos which showed the type of interrogation and torture [American intelligence officers] used in Vietnam."<sup>131</sup> Another former SOA graduate revealed that

The school was always a front for other special operations, covert operations. They would bring people from the streets [of Panama City] into the base and the experts would train us on how to obtain information through torture. We were trained to torture human beings. They had a medical physician, a U.S. medical physician which I remember very well, who was dressed in green fatigues, who would teach the students . . . [about] the nerve endings of the body. He would show them where to torture, where and where not, where you wouldn't kill the individual.<sup>132</sup>

The recent addition of human rights training to the SOA curriculum cannot disguise the past abuses that SOA alumni have been involved in. Also, it cannot change the fact that the United States Army and the SOA have played key roles in human rights abuses and violations of international law by teaching torture, assassination, and a disrespect for human rights. The United States has denied liability for the actions of its graduates,<sup>133</sup> but the tenets of domestic and international law do not agree that the United States is not liable for the violations of international law committed by the alumni of the SOA.

### III. Establishing and Maintaining Jurisdiction Against the United States

Presently, no blueprint exists describing how a victim of an SOA graduate's atrocity can bring suit against the United States because no precedent exists internationally or domestically that has decided one country's liability for training another country's military to torture and disrespect human rights.<sup>134</sup> However, for

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131. NELSON-PALLMEYER, *supra* note 11, at 32.

132. NELSON-PALLMEYER, *supra* note 11, at 31 *quoting* INSIDE THE SCHOOL OF ASSASSINS (Richter Productions 1996).

133. See School of the Americas Watch, *Pentagon Investigation Concludes that Techniques in SOA Manuals were "Mistakes,"* at <http://www.soaw.org/Manuals/ig-report.html> (last visited Sept. 26, 2000).

134. In 1986, Nicaragua brought suit against the United States in the International Court of Justice (I.C.J.) for events that occurred prior to the fall of President Anastasio Somoza Debayle in 1979 and after the time when a Junta of National Reconstruction and an eighteen member government was installed by the

reasons to be discussed, the most favorable way for a plaintiff to establish the United States' liability for torture in Latin America because of improper training at the SOA is to bring suit in a United States District Court. Assuming that no Americans have been abused by any SOA graduates, and would therefore not have standing to bring suit, an alien plaintiff must establish jurisdiction through a two-prong procedure. First, the alien plaintiff must establish jurisdiction through the use of the Alien Tort Act and the Federal Tort Claims Act.

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Frente Sandinista de Liberacion Nacional, the group that led an armed coup against President Somoza. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 20 (June 27). Even though the United States first supported the new government, the United States' opinion of the new Nicaraguan government changed. The United States began to provide support to the Contras, a force fighting against the new government that was responsible for "considerable material damage and widespread loss of life, and [had] also committed such acts as killing of prisoners, indiscriminate killing of civilians, torture, rape, and kidnapping." *Id.* at 21. Support for the Contras came specifically from budgetary legislation that Congress enacted and the President approved in 1983 with a "specific provision for funds to be used by United States intelligence agencies for supporting 'directly or indirectly, military or paramilitary operations in Nicaragua.'" *Id.* The I.C.J. reasoned that by approving and encouraging the recruiting, training, arming, equipping, and supplying of the Contras, the United States "committed a *prima facie* violation of [the customary international law principle of the non-use of force] by its assistance to the Contras in Nicaragua, by 'organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another state,' and 'participating in acts of civil strife in another State.'" *Id.* at 118. However, the I.C.J. noted that even though the funding provided to the Contras by the United States constituted intervention into the internal affairs of Nicaragua, the funding alone did not amount to the use of force. *Id.* at 119. Finally, the I.C.J. held, among other things, that the United States could not justify its actions by claiming collective self defense of El Salvador, Honduras, or Costa Rica because no armed attack had occurred against any of these countries nor did they request the United States' help. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 119 (June 27).

The *Nicaragua* case is not determinative of the issue presented in this case for a number of reasons. First, neither Congress nor the President approved the teaching of torture to SOA graduates by any written law. In the *Nicaragua* case, Congress specifically passed legislation that provided funds for the Contras' operations and the President subsequently approved this legislation. Second, the I.C.J. determined the issue in light of the United States justifying its actions on using the doctrine of collective self-defense. The facts surrounding the atrocities committed by the SOA graduates do not give the United States any support to make this argument. Finally, I.C.J. judgments have "no binding force except between the parties and in respect of that particular case." Statute of the I.C. J., art. 59. In other words, I.C.J. judgments are not mandatory precedent and are not determinative of any case.

### A. *The Alien Tort Act*

In recent years, more alien plaintiffs have been bringing suit in United States District Courts for violations of international law, specifically human rights violations, that have been committed by individuals, nation states, and international corporations.<sup>135</sup> This trend has been aided in large part by the Alien Tort Act.<sup>136</sup> Even though the controversial Alien Tort Act has a murky past,<sup>137</sup> the first Congress passed the Act to permit alien citizens to bring suit in Federal District Court for violations of international law or a United States treaty.<sup>138</sup> According to the Act, subject matter jurisdiction can be maintained if three conditions are satisfied: (1) the plaintiff is an alien; (2) the claim is for a tort; and (3) the tort is committed in violation of the law of nations or a treaty of the United States.

In this case, the first condition is easily satisfied. The plaintiffs who have standing to bring suit against the United States are the victims of the inhumane acts and atrocities committed by SOA graduates. Because these atrocities have been committed in Latin America, one can safely assume that the majority of victims are not citizens of the United States. In other words, the majority of plaintiffs who have standing, which are represented by the hypothetical plaintiff, would be considered aliens.

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135. See Elizabeth Amon, *Coming to America*, NAT'L L.J., Oct. 23, 2000, at A1.

136. 28 U.S.C. § 1350 (2000).

137. Some case law suggests that the Alien Tort Act may have been passed strictly to target only private, nongovernmental acts that are contrary to a treaty of the United States or the law of nations, such as piracy and assaults against ambassadors. See Amon, *supra* note 135, at A1. See also Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (D.C. Cir. 1985) ("This obscure section of the Judiciary Act of 1789 [the Alien Tort Act] . . . may conceivably have been meant to cover only private, nongovernmental acts that are contrary to treaty or the law of nations—the most prominent examples being piracy and assaults upon ambassadors."). However, this reasoning is not supported by other and more recent case law that supports the proposition that aliens can sue governmental officials for violations of international law. See *Kadic v. Karadzic*, 70 F.3d 232 (2d. Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, *Estate of Marcos v. Hilao*, 513 U.S. 1126 (1995); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

138. Title 28, Section 1350 of the United States Code, entitled "Alien's Action for Tort," provides:

The district courts shall have 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.

In regards to the second condition, torture has been a recognized tort since *Filartiga v. Pena Irala*.<sup>139</sup> The plaintiffs in *Filartiga* were citizens of Paraguay who brought suit in Federal court against a former police inspector of Paraguay who tortured to death a member of the plaintiffs' family.<sup>140</sup> The District Court dismissed the case because torture was not recognized as a violation of the law of nations in 1789, the year the Alien Tort Act had been passed.<sup>141</sup> However, the Appellate Court unanimously acknowledged that although official torture had not been recognized as a violation of the law of nations in 1789, the universal prohibition had become a rule of customary law that brought torture within the language of the Alien Tort Act.<sup>142</sup>

*Filartiga* was a celebrated holding, but one Federal judge, Judge Bork, questioned whether victims of official torture committed in foreign nations could bring suit under the Alien Tort Act absent a grant by Congress of a private right of action.<sup>143</sup> Congress dealt with Judge Bork's criticism by codifying *Filartiga*'s holding in the Torture Victim Protection Act.<sup>144</sup> In passing the Torture Victim Protection Act, Congress noted that this Act enhanced the already available remedy under the Alien Tort Act by extending the remedy to United States citizens who may be tortured in a foreign country, and that the Alien Tort Act "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."<sup>145</sup> With the passage of the Torture Victim Protection Act, Congress recognized that torture is a tort that falls within the Alien Tort Act that must be recognized in all jurisdictions. Therefore, the second condition required under the Alien Tort Act is also satisfied.

The third condition needed to satisfy subject matter jurisdiction under the Alien Tort Act requires that the tort be committed in violation of the law of nations or a treaty of the United States.<sup>146</sup> The Alien Tort Act does not define the term "law

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139. 630 F.2d 876 (2d. Cir. 1980).

140. *Id.* at 878.

141. *Id.* at 880.

142. *Id.* at 884-85.

143. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

144. See H.R. REP. NO. 102-367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87.

145. *Id.*

146. Even though the United States is a party to some treaties and conventions that prohibit torture, as will be discussed later, this Comment restricts itself to

of nations,” but the courts have interpreted the term to mean “customary international law.”<sup>147</sup> The principles and rules of customary international law are living and evolving concepts that exist when nation states follow a general and consistent practice out of a sense of legal obligation.<sup>148</sup> One of the most important things to remember is that the law of nations and customary international law is not merely a doctrine of law that is separate from domestic law, but is, in fact, an integral part of the Federal common law of the United States.<sup>149</sup> In order to determine if an act violates customary international law, evidence must show that the act is generally recognized as wrong by a large number of nations.<sup>150</sup> The best starting point in determining whether the prohibition against torture is a violation of customary international law is to look at international treaties and conventions that have been created and ratified by a large number of nations.

Presently, numerous international treaties and conventions exist promoting human rights and prohibiting torture. One of the first treaties to be created and ratified by a large number of nations was the United Nations Charter. Articles 55 and 56 of the Charter make it clear that all members of the United Nations should strive to “promote . . . universal respect for, and observance of, human rights and fundamental freedoms. . . .”<sup>151</sup> One of the shortcomings

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discussing how torture violates customary international law for Alien Tort Act purposes. The reason for this limitation is one of simplicity. Instead of changing the hypothetical plaintiff’s nationality numerous times to determine if the United States has violated any treaty with any of the countries in Latin America, an alien plaintiff can allege a violation of customary international law independent of his nationality and whether his country is a party to a treaty prohibiting torture along with the United States.

147. See *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999).

148. See *Ge v. Peng*, No. 98-1986, 2000 U.S. Dist. LEXIS 12711 at \*11 (D.D.C. Aug. 28, 2000); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

149. See *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (“[I]nternational law, which, as we have frequently reiterated ‘is part of our law.’”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“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.”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-88 (2d Cir. 1980) (discussing the integration of the law of nations into the federal common law and jurisdiction of Article III of the Constitution).

150. See *Beanal*, 197 F.3d at 167.

151. U.N. CHARTER, art. 55. Article 55 of the United Nations Charter provides in relevant part:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance

of the United Nations Charter is that even though it states that human rights should be respected and promoted, the Charter does not define what human rights should be protected.<sup>152</sup>

In order to clear up the ambiguity and shortcomings of Article 55 of the United Nations Charter, the General Assembly of the United Nations created and passed without dissent the Universal Declaration of Human Rights.<sup>153</sup> Article 5 of this Declaration unequivocally states that “[n]o one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment.”<sup>154</sup> Scholars and courts have determined that this Declaration has become part of the body of customary international law since its creation and passage in 1948.<sup>155</sup> Along with the Universal Declaration of Human Rights, the General Assembly of the United Nations also created and passed the Declaration on the Protection of All Persons Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.<sup>156</sup> This Declaration, which also passed without dissent, expressly prohibits any state from permitting acts of torture.<sup>157</sup> Even though the United States is not a party to either of these Declarations, the Federal courts view these Declarations as significant in defining customary international law because “they specify with great precision the obligations of member nations under the [United Nations] Charter

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of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.

Article 56 of the United Nations Charter provides:

All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Though the United States is a party to the United Nations, the United States regards Articles 55 and 56 of the United Nations Charter as merely an expression of certain aspirations and not a self-executing treaty. *See Sei Fujii v. California*, 242 P.2d 617 (Cal. 1952).

152. The *Filitargia* court noted in regards to Article 55 of the United Nations Charter that “[a]lthough there is no universal agreement as to the precise extent of the ‘human rights and fundamental freedoms’ guaranteed to all by the Charter, there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture.” *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980).

153. G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 1, at 71, U.N. Doc. A/810 (1948).

154. Article 5 of G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 1, at 71, U.N. Doc. A/810 (1948).

155. *See Filartiga*, 630 F.2d at 882.

156. G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/1034 (1975). *See also Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

157. *See id.*

and because of their adoption, ‘member nations can no longer contend that they do not know what human rights they promised in the Charter to promote.’”<sup>158</sup> The fact that the United States did not become a party to these Declarations does not change the United States’ obligations under customary international law to respect human rights and not to promote torture. However, there are other United Nations’ resolutions and agreements that the United States has adopted that prohibit torture.

In 1990, the United States Senate ratified the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment along with more than 100 other nations.<sup>159</sup> This Convention includes provisions aimed at preventing torture, prosecuting torturers, and compensating victims of torture.<sup>160</sup> In addition to this Convention, the United States Senate ratified the International Covenant on Civil and Political Rights, which also includes provisions that prohibit torture.<sup>161</sup> Besides torture being prohibited by numerous international agreements, which supports the proposition that torture is outlawed by customary international law, the United States judiciary and other sources have went even further to state that the prohibition against torture is not only prohibited by customary international law, but is actually a *jus cogens* norm.

A *jus cogens* norm is a peremptory norm of international law that can never be abrogated by any country.<sup>162</sup> The Federal courts have long recognized the right of a person to be free from torture.<sup>163</sup>

158. *Filartiga*, 630 F.2d at 883.

159. G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984) (Entered into force for the United States in November 1994).

160. *See id.*

161. *See* Article 7 of G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1966) (Entered into force for the United States in September 1990).

162. *See* *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1016 (9th Cir. 2000).

163. *See* *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (stating that torture is prohibited by international human rights and humanitarian norms); *Trajano v. Marcos*, 978 F.2d 493, 499 (9th Cir. 1992), *cert. denied*, *Estate of Marcos v. Hilao*, 513 U.S. 1126 (1995) (stating that death from torture is contrary to the law of nations); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (stating the right to be free from torture is a “fundamental right”). In addition to the courts recognizing the prohibition against torture, Congress passed certain legislation that prohibited the United States from assisting countries that engage in torture. *See* Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. § 1712 (prohibiting agreements to finance sale of agricultural commodities to nations that have a consistent pattern of human rights violations); International Financial Institutions Act of 1977, 22 U.S.C. §§ 262d and 262(1) (prohibiting financial assistance to nations that have a consistent pattern of human rights violations unless the program serves “the basic human needs” of the



However, some courts in the United States have determined that the prohibition against torture is a *jus cogens* norm.<sup>164</sup> In addition, The Restatement (Third) of the Foreign Relations Law of the United States proclaims that the prohibition against “torture or other cruel, inhuman, or degrading treatment or punishment” is a *jus cogens* norm that cannot be derogated from.<sup>165</sup>

Looking at all these sources as evidence, it is clear that torture is prohibited by the law of nations and customary international law even if torture is not defined as a *jus cogens* norm. In this case, however, the United States itself has not tortured any person. Instead, the United States trained another nation’s soldiers to torture and disrespect human rights. In a factually similar case, a group of plaintiffs brought suit against President Ronald Reagan, the Central Intelligence Agency, the National Security Agency, and other federal officials for training, directing, authorizing, and financing the Contras who were responsible for torture and other degrading treatment of Nicaragua’s civilian population.<sup>166</sup> The court concluded that the plaintiffs could not obtain judicial relief for the violations alleged.<sup>167</sup> Even though the facts of *Sanchez-Espinoza* and this case are similar, the court’s decision is not determinative as to whether the victims of SOA torture can bring suit against the United States for its training of military soldiers because of a few important distinctions.

First, in *Sanchez-Espinoza*, the court was faced with judging a law that had been approved by both the executive and legislative branches.<sup>168</sup> However, the teaching of torture at the SOA never received official approval from either the executive or legislative branches. Also, the *Sanchez-Espinoza* court incorrectly reasoned

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citizens of such a nation); Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151n(a) & 2304 (stating that no foreign assistance would be provided “to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of the right to life, liberty, and the security of person . . .”).

164. See *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1016 n.15 (9th Cir. 2000); *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 789, 795 (9th Cir. 1996); *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988).

165. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, comment n (1987).

166. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205 (D.C. Cir. 1985). See also *supra* note 133.

167. *Id.* at 209.

168. See *Comm. of the United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 20 (June 27).

that the Alien Tort Act had been passed solely to cover private, nongovernmental acts.<sup>169</sup> Based on this reasoning, the court determined that no treaty or principle of customary international law existed that made the activities alleged by the plaintiffs illegal if conducted by private, non-state actors.<sup>170</sup> However, as discussed previously, since the *Filartiga* holding and its codification by the Torture Victim Protection Act, the idea that the Alien Tort Act does not provide subject matter jurisdiction to victims of torture committed by government officials has been overruled. In addition, even if the Alien Tort Act applied only to unlawful conduct by private, non-state actors, courts have held that individuals can violate international law for torture and other egregious conduct that violates customary international law.<sup>171</sup>

Because this case can be distinguished from *Sanchez-Espinoza* and because the act of conducting torture is prohibited by customary international law, it is only logical that training military officials to participate and engage in this notorious conduct is also prohibited. For jurisdictional purposes, the United States violated international law by making torture part of the curriculum at the SOA, and by failing to investigate or take adequate preventive measure once it had been discovered that a large number of SOA graduates had been involved in human rights violations.

In sum, an alien plaintiff can establish subject matter jurisdiction against the United States under the Alien Tort Act because torture is an actionable tort that violates the law of nations. However, the United States has sovereign immunity from lawsuits that can only be waived by an act of Congress. In this case, the Alien Tort Act does not waive the United States' sovereign immunity so jurisdiction against the United States must be maintained through another statute—the Federal Tort Claims Act.<sup>172</sup>

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169. *Sanchez-Espinoza*, 770 F.2d at 206.

170. *Id.*

171. *See* *Ge v. Peng*, No. 98-1986, 2000 U.S. Dist. LEXIS 12711 at \*11-12 (D.D.C. Aug. 28, 2000); *Kadic v. Karadzic*, 70 F.3d 232, 239-40 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

172. *See* *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), *cert. denied*, 508 U.S. 960 (1993) (alien plaintiffs brought suit against the United States under the Alien Tort Act in conjunction with the Federal Tort Claims Act); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985) (stating that the Alien Tort Act does not waive the United States' sovereign immunity).

### B. *The Federal Tort Claims Act*

The Federal Tort Claims Act<sup>173</sup> provides a limited waiver of the United States' sovereign immunity in claims involving money damages for injuries "caused by the negligent wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances 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>174</sup> Even though the Federal Tort Claims Act mentions "negligence" within its statutory language, the Federal Tort Claims Act does not waive immunity solely to tort actions involving negligence, but "the Act extends to novel and unprecedented forms of liability as well."<sup>175</sup> By its language, the Act waives the United States' immunity in broad, sweeping terms, but the language of 28 U.S.C. § 1346(b) also contains limitations to this waiver that must be overcome to maintain jurisdiction over the United States.

Under the Federal Tort Claims Act, the United States is liable for the actions of its employees under the respondent superior doctrine.<sup>176</sup> In other words, the United States can only be held liable when a master-servant relationship exists between the United States and the wrongdoer.<sup>177</sup> At first glance, it seems that an alien plaintiff could not sue the United States for the torture committed by the SOA graduates because there is no master-servant relationship between the United States and the SOA graduates. However, as will be explained further in Part IV, an alien plaintiff would not allege that the United States is vicariously liable for the actual torture committed by the SOA graduates. Instead, an alien plaintiff would allege that the United States is directly liable for the teaching of torture and other improper lessons that violated international law because the soldiers and instructors at the SOA were "acting within the scope of [their] employment."<sup>178</sup> Even though the soldiers and instructors at the SOA were "acting within the scope of [their] employment," satisfying one portion of the Federal Tort Claims Act, another restriction must be overcome.

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173. 28 U.S.C. § 1346(b) (2000).

174. *Id.*

175. *Holmes Herefords, Inc. v. United States*, 753 F. Supp. 901, 910 (D. Wyo. 1990).

176. *See Dumansky v. United States*, 486 F. Supp. 1078, 1090 (D.N.J. 1980).

177. *See id.*

178. 28 U.S.C. § 1346(b) (2000).

The Federal Tort Claims Act, by its language, also limits the United States' waiver of immunity to only those torts that an individual can be liable for under state law.<sup>179</sup> Normally, international law applies solely to nation states and international organizations, but, as noted earlier, individuals can be found liable for international law violations that are considered notorious and egregious, such as torture.<sup>180</sup> Furthermore, it has been noted that a long recognized principle exists in the United States that customary international law is part of the Federal common law.<sup>181</sup> Because of the Supremacy Clause of the Constitution,<sup>182</sup> the Federal common law, including the integration of international law, is the Supreme Law of the land and is part of state law. In other words, because international law is integrated into state law through the Supremacy Clause and individuals can be liable for notorious and egregious violations of international law, an individual can be held liable under Georgia state law for committing and teaching torture. With the help of the Supremacy Clause and Federal common law, the United States' immunity is still waived under the Federal Tort Claims Act.

Even though the limitations contained in the text of 28 U.S.C. § 1346(b) does not preclude jurisdiction over the United States, a plaintiff must still overcome the exceptions to the waiver of immunity codified by Congress in 28 U.S.C. § 2680.<sup>183</sup> If any of the

179. See *Reynolds v. Southern Management, Inc.*, 856 F. Supp. 618, 620-21 (W.D. Okla. 1994); *Holmes Herefords, Inc. v. United States*, 735 F. Supp. 901, 913 (D. Wyo. 1990); *White v. Franklin*, 637 F. Supp. 601, 613 (N.D. Miss. 1986); *Dumansky v. United States*, 486 F. Supp. 1078, 1087 (D.N.J. 1980).

180. See *supra* note 171 and accompanying text.

181. See *supra* note 149 and accompanying text.

182. U.S. CONST. art. VI, cl.2. The Supremacy Clause provides:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

183. Title 28, Section 2680 of the United States Code, entitled "Exceptions," provides:

The provisions of this chapter [28 U.S.C.S. §§ 2671 et seq.] and section 1346(b) of this title shall not apply to-

- (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

exceptions contained in this section can be applied, then jurisdiction over the United States cannot be maintained. In this case, the only exceptions that may apply are the discretionary function excep-

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- (b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.
  - (c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter [28 U.S.C.S. §§ 2671 et seq.] and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if –
    - (1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
    - (2) the interest of the claimant was not forfeited;
    - (3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
    - (4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.
  - (d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.
  - (e) Any claim arising out of any act or omission of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.
  - (f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.
  - (g) [Repealed]
  - (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 U.S.C.S. §§ 2671 et seq.] and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purposes of this subsection, “investigative or law enforcement officer” means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.
  - (i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.
  - (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
  - (k) Any claim arising in a foreign country.
  - (l) Any claim arising from the activities of the Tennessee Valley Authority.
  - (m) Any claim arising from the activities of the Panama Canal Company.
  - (n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

tion,<sup>184</sup> the combatant activity exception,<sup>185</sup> and the foreign country exception.<sup>186</sup>

1. *The Discretionary Function Exception*—Congress implemented the discretionary function exception to the waiver of immunity in order to maintain the separation of powers between the political branches of government—the legislative and executive branches—and the judicial branch.<sup>187</sup> Congress wanted to prevent the judiciary from second guessing the acts or omissions performed by the members of the legislative or executive branch that involve an element of judgment or choice.<sup>188</sup>

The exercise of judgment which the exemption protects must be one which would otherwise involve courts in making a decision entrusted to other branches of the government. Decisions which require a government official to weigh competing policy alternatives are entitled to immunity for such decisions and are the ordinary responsibility of the legislative and executive branches.<sup>189</sup>

In other words, the exception does not permit the judicial branch to inquire into the action or decisions of the legislative or executive branches if these actions or decisions involved the weighing of alternative public policy considerations.<sup>190</sup> However, the exception does not apply in situations where the act or omission

184. See 28 U.S.C. § 2680(a) (2000).

185. See 28 U.S.C. § 2680(j) (2000).

186. See 28 U.S.C. § 2680(k) (2000). Although torture may be considered a claim that arises out of an assault and battery, the Assault and Battery Exception, 28 U.S.C. § 2680(h), would not be applicable in this case. This exception applies when a government employee directly commits an assault or battery. See *United States v. Shearer*, 473 U.S. 52 (1985) (stating that § 2680(h) covers claims that stem from a battery committed by a government employee); *Lamberston v. United States*, 528 F.2d 441 (N.Y. 1976), *cert denied* 426 U.S. 921 (stating that federal courts are without jurisdiction to entertain a suit against the United States based on assault or battery by government employee); *Wood v. United States*, 760 F. Supp. 952 (D. Mass. 1991), *aff'd*, 956 F.2d 7 (1st Cir. 1992), *cert. denied*, *Kimbro v. Velten*, 515 U.S. 1145 (1995) (stating that the Federal Tort Claims Act precludes claim against United States for assault and battery allegedly committed by its employee). A plaintiff alleging the United States is liable for the torture committed by SOA graduates because of the SOA curriculum would not be claiming that the SOA graduates are government employees or that the soldiers of the United States Army actually committed the torture making § 2680(h) inapplicable in this case.

187. See *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1086 (D.C. Cir. 1980).

188. See *Clark v. United States*, 805 F. Supp. 84, 87 (D.N.H. 1992).

189. *Canadian Transport Co.*, 663 F.2d at 1087.

190. See *Clark*, 805 F. Supp. at 87.

in question did not involve the exercise of choice or judgment.<sup>191</sup> The clearest example of actions that do not involve choice or judgment between alternative public policy considerations is when statutes, regulations, or policies exist prescribing a course of action to be followed by a governmental employee.<sup>192</sup>

When the Supreme Court first analyzed the discretionary function exception, the Court created a planning/operational dichotomy to determine whether an act or decision was “discretionary.”<sup>193</sup> The Court reasoned that decisions occurring at the “planning” level, such as the creation of laws, were discretionary while decisions occurring at the “operational” level, such as the enforcement of laws, were not discretionary.<sup>194</sup> Four decades later, however, the Court determined that this dichotomy was not appropriate because there were decisions that arguably occurred at the “operational” level that could be considered discretionary.<sup>195</sup> In place of the planning/operational dichotomy, the Court stated that a court should inquire into “the nature of the actions taken and whether they are susceptible to policy analysis.”<sup>196</sup> The most recent application of this new analysis is found in *Vickers v. United States*.<sup>197</sup>

In *Vickers*, the plaintiff’s ex-husband, a detention enforcement officer for the Immigration and Naturalization Service (INS), had shot her.<sup>198</sup> The plaintiff alleged that the United States government was liable for her injuries for two reasons. First, the plaintiff alleged that the INS was negligent in supervising and retaining her ex-husband as an officer entitled to carry a firearm.<sup>199</sup> The plaintiff also alleged that the INS failed to investigate a previous shooting incident involving her ex-husband and his former girlfriend.<sup>200</sup> The Ninth Circuit Court of Appeals first noted that the discretionary function exception had been enacted to prevent the judiciary from reanalyzing “legislative and administrative decisions grounded in social, economic, and political policy through the medium of an

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191. *Id.*

192. *Id.*

193. *See Dalehite v. United States*, 346 U.S. 15, 42 (1953).

194. *See id.* at 42.

195. *See United States v. Gaubert*, 499 U.S. 315, 324 (1991).

196. *Id.* at 325.

197. 228 F.3d 944 (9th Cir. 2000).

198. *Id.* at 947.

199. *Id.*

200. *Id.* at 947, 948.

action in tort.”<sup>201</sup> The court then explained the two-step analysis that the Supreme Court created in *Gaubert*.

The first inquiry is whether the challenged action involved an element of choice or judgment, for it is clear that the exception ‘will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.’ . . . If choice or judgment is exercised, the second inquiry is whether that choice or judgment is of the type Congress intended to exclude from liability—that is, whether the choice or judgment was one involving social, economic, or political policy.<sup>202</sup>

Furthermore, the court clarified that a decision by a government officer or agency does not have to actually be based on policy considerations to fall within the discretionary function exception, but the decision need only be “susceptible to policy analysis.”<sup>203</sup> In regards to the plaintiff’s first claim, the court stated that decisions concerning the hiring, training, and supervision of employees fall within the discretionary function exception.<sup>204</sup> Based on this reasoning and the fact that no evidence existed to show that the INS violated any mandatory policy or regulations, the court held that the decision to allow the ex-husband to carry a firearm based on earlier proficiency testing and the decision not to discharge the ex-husband were both “susceptible to policy analysis” and were within the boundaries of the discretionary function exception to the United States’ waiver of immunity.<sup>205</sup>

However, in regards to the plaintiff’s second claim, the court held that the INS had a duty to investigate the alleged shooting of the former girlfriend based on the existence of agency policy that required both reporting and investigation of such incidents.<sup>206</sup> The court reasoned that

[A]lthough INS investigators undoubtedly enjoy discretion in the conduct of an investigation, this discretion does not extend to the question of whether to report to superiors or to investigate at all an allegation of misuse of Service-issued firearms. The failure to report or to investigate therefore constituted a failure to follow the mandatory requirements

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201. *Id.* at 949 quoting *United States v. Gaubert*, 499 U.S. 315, 323 (1991).

202. *Vickers*, 228 F.3d at 949.

203. *Id.* at 950-51.

204. *Id.* at 950.

205. *Id.* at 951.

206. *Id.* at 951-52.



proscribed by agency regulations as implemented by policy guidelines. Since those regulations and guidelines required investigation and reporting action in the instant case, the [Federal Tort Claims Act's] discretionary function exception does not apply.<sup>207</sup>

For this reason, the court determined that the discretionary function exception did not bar the plaintiff's suit against the INS or the United States.<sup>208</sup>

Applying the two-prong standard to the case against the United States for the SOA curriculum, one finds that the discretionary function exception does not bar suit against the United States. The first prong requires one to determine whether a federal statute, regulation or policy exists prescribing a course of action that would then preclude a person from using judgment or choice. As early as 1866, the Supreme Court recognized that "[T]here is no law for the government of the citizens, the armies or the navy of the United States . . . which is not contained in or derived from the Constitution."<sup>209</sup> In other words, the Constitution is the source of military law. This being the case, the Supremacy Clause makes the Constitution the supreme law of the land along with the Federal common law. Once again, customary international law, which prohibits torture, is part of the Federal common law and supreme law of the land. Because the military is controlled by the Constitution, military regulations and training procedures must not violate the supreme law of the land or customary international law.

Further support for this claim can be found in *Orkilow v. United States*.<sup>210</sup> In *Orkilow*, the Central Intelligence Agency had conducted an expansive covert research project to investigate chemical and biological warfare, and to counter Soviet and Chinese advances in brainwashing and interrogation techniques.<sup>211</sup> Many of the experiments conducted were performed on unwilling human subjects.<sup>212</sup> The District Court held that "[w]hen a decision is made to conduct intelligence operations by methods which are unconstitutional or egregious, it is lacking in statutory or regulatory authority."<sup>213</sup> The court further stated that to determine that the decision to conduct illegal experiments on unwilling subjects

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207. *Vickers*, 228 F.3d at 953.

208. *Id.*

209. *Ex Parte Milligan*, 71 U.S. 2, 141 (1866).

210. 682 F. Supp. 77 (D.D.C. 1988).

211. *Id.* at 79.

212. *Id.* at 80.

213. *Id.* at 81.

involved a policy judgment “would extend the protection of the exception beyond what Congress intended to protect from judicial second guessing.”<sup>214</sup> In the case of the SOA, providing training in torture methods is egregious and unconstitutional because of the Supremacy Clause and, therefore, lacks any statutory or regulatory authority. Furthermore, the Pentagon specifically admitted that the manuals used as instructional purposes violated Department of Defense and Army policies.<sup>215</sup> Because the Constitution and policy regulations existed proscribing a course of action, judgment or choice could not be exercised in regards to the decision to teach torture at the SOA making the discretionary function exception inapplicable.

However, even if one were to assume that a choice or judgment could be exercised satisfying the first prong, one is hard pressed to imagine that the teaching of torture is the type of conduct Congress wanted to exclude from liability. As noted earlier, the Senate has ratified international agreements that prohibit torture, and the entire Congress specifically passed legislation that prohibits the United States from conducting foreign relations with governments that have a history of torture. It is not logical for Congress to want to punish foreign governments for engaging in torture, but allow the United States to teach foreign militaries how to engage in torture. “To hold that these discretionary decisions involve a measure of policy judgment would extend the protection of the exception beyond what Congress intended to protect from judicial second guessing.”<sup>216</sup> In sum, the discretionary function exception does not preclude an alien plaintiff from suing the United States.

2. *The Combatant Activity Exception*—Because the discretionary function exception does not apply in this case, the government may argue that the training occurring at the SOA falls within the combatant activity exception to the waiver of sovereign immunity supplied by the Federal Tort Claims Act. The Ninth Circuit Court of Appeals discussed the combatant activity exception in *Koohi v. United States*.<sup>217</sup> The court had to determine if the shooting down of an Iranian civilian aircraft by a Navy warship during a conflict with Iranian gunboats was within the combatant activity exception.<sup>218</sup> The court discussed at length the three

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214. *Id.* at 82.

215. *See supra* p.18.

216. *Orkilow*, 682 F. Supp. at 82.

217. 976 F.2d 1328 (9th Cir. 1992).

218. *Id.* at 1330.

primary reasons Congress had for creating the combatant activity exception.

First, tort law is based in part on the theory that the prospect of liability makes the actor more careful. . . . Here, Congress certainly did not want our military personnel to exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces; nor did it want our soldiers, sailors, or airmen to be concerned about the possibility of tort liability when making life or death decisions in the midst of combat. Second, tort law is based in part on a desire to secure justice—to provide a remedy for the innocent victim of wrongful conduct. . . . War produces innumerable innocent victims of harmful conduct—on all sides. It would make little sense to single out for special compensation a few of these persons—usually enemy citizens—on the basis that they have suffered from the negligence of our military forces rather than from the overwhelming and pervasive violence which each side intentionally inflicts on the other. Third, there is a punitive aspect to tort law. . . . Society believes tortfeasors should suffer for their sins. It is unlikely that there are many Americans who would favor punishing our servicemen for injuring members of the enemy military or civilian population as a result of actions taken in order to preserve their own lives and limbs.<sup>219</sup>

The Court then turned to the language of the statute, and determined that § 2680(j) is to be interpreted by its plain meaning and not technical legalese.<sup>220</sup> Using this reasoning, the court first noted that the phrase “combatant activities” includes “not only physical violence, but activities both necessary to and in direct connection with actual hostilities.”<sup>221</sup> The court then interpreted the phrase “time of war.”<sup>222</sup> The court reasoned that in the modern era, the United States has participated in armed conflicts and hostilities without a formal declaration of war.<sup>223</sup> For this reason, the court concluded that in order for actions to fall within the meaning of “time of war,” as used in the combatant activity exception, the only thing that is necessary is the existence of a significant armed conflict and not a formal declaration of war.<sup>224</sup> For the preceding reasons

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219. *Id.* at 1334-35.

220. *Id.* at 1333. *See also* Johnson v. United States, 170 F.2d 767, 769 (9th Cir. 1948).

221. *Id.* at 1333, n.5 *quoting* Johnson v. United States, 170 F.2d 767, 770 (9th Cir. 1948).

222. *See Koochi*, 976 F.2d at 1334.

223. *Id.* at 1334.

224. *Id.*

and because the executive branch made a deliberate decision to have the United States military involved in a series of hostile encounters during the Iraq-Iran war, the court held that the combatant activity exception banned the plaintiffs' suit against the United States.<sup>225</sup>

Applying the reasoning discussed in *Koohi* to the case of the SOA, one finds the combatant activity exception does not apply. First, applying the plain language of the statute, one may argue that the teaching of torture involves physical violence and would be a combatant activity. However, any physical violence that may be involved in the teaching of torture is "not necessary to or in direct connection with actual hostilities."<sup>226</sup> Similarly, because these activities are not related to any actual hostilities, either declared or undeclared, there is also no "time of war" within the meaning of the statute.

Furthermore, looking at the three reasons for the implementation of the exception none of these reasons exist allowing the United States to be shielded from liability. First, unlike the soldiers in combat, the SOA instructors have no need to use bold or imaginative measures to overcome enemy forces, and, therefore, should use greater caution when training soldiers. Also, it is undeniable that war creates innocent victims on both sides of the conflict that do not receive any special treatment. In the case of the SOA, however, there is no war and, furthermore, the training specifically instructs the SOA students to disrespect human rights and to target the poor, members of the church, and student activists as "insurgents." This notorious and negligent training focus produces innocent civilians that are harmed by SOA graduates trained by the United States, and these innocent victims deserve to secure justice. Finally, the American public may not favor punishing servicemen who harm members of an enemy military or civilian population as a result of protecting their own lives, but it is more likely that the American conscience would support punishing soldiers for training foreign soldiers how to conduct international human rights violations. For all of these reasons, it is clear that the combatant activity exception to the United States' waiver of immunity under the Federal Tort Claims Act would not bar a suit brought by the alien plaintiff.

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225. *Id.* at 1335.

226. *Id.* at 1333, n.5 quoting *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948).

3. *The Foreign Country Exception*—The final statutory exception to the waiver of sovereign immunity under 28 U.S.C. § 2680 that may arguably apply is the foreign country exception. As previously mentioned, liability under the Federal Tort Claims Act is determined “in accordance with the law of the place where the act or omission occurred,” and the foreign country exception is an extension of this concept.<sup>227</sup> In order to avoid the United States being held liable under the laws of a foreign country, Congress did not want the United States’ waiver of sovereign immunity to extend to claims arising in a foreign country.<sup>228</sup> When determining whether the foreign country exception applies, it is important to remember that the primary factor to consider is where the negligent act or omission occurred, not where the negligent act or omission had its operative effect.<sup>229</sup>

In *Sami v. United States*,<sup>230</sup> the plaintiff, an Afghanistan citizen, brought charges against the United States Government, the International Criminal Police Organization (Interpol), and individuals in the United States National Central Bureau of the Department of the Treasury (USNCB) for false arrest and imprisonment, libel, slander, and deprivation of his constitutional rights.<sup>231</sup> The plaintiff and his American ex-wife were engaged in a custody dispute over their two children, and both had secured custody over the children in different states; the plaintiff had custody in Maryland and his ex-wife had custody in Florida.<sup>232</sup> At a time when the children were physically in Florida, the plaintiff traveled to Florida and transported the children back to Maryland, even though he knew this action violated Florida law.<sup>233</sup> Immediately following this incident, the ex-wife successfully had three arrest warrants issued against the plaintiff; two in Florida and one in Maryland.<sup>234</sup> Next, the ex-wife feared that the plaintiff would leave the country so she contacted the USNCB, the United States’ liaison with Interpol.<sup>235</sup> The ex-wife’s fears were justified because the plaintiff did leave the country.<sup>236</sup> Numerous messages were sent

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227. 28 U.S.C. § 1346(b) (2000).

228. See *Meredith v. United States*, 330 F.2d 9, 10 (9th Cir. 1964), cert. denied, 379 U.S. 867 (1964).

229. See *In re Paris Air Crash*, 399 F. Supp. 732, 737 (C.D. Cal. 1975).

230. 617 F.2d 755 (D.C. Cir. 1979).

231. *Id.* at 758.

232. *Id.* at 757.

233. *Id.*

234. *Id.*

235. *Sami*, 617 F.2d at 757.

236. *Sami*, 617 F.2d at 758. The first message from the USNCB stated that a

to Interpol liaisons by USNCB along the plaintiff's expected route, and based on these requests German authorities arrested the plaintiff.<sup>237</sup> Soon after, however, the State Department determined that no extraditable offense was involved.<sup>238</sup> Even though the State Department relayed this determination to the German authorities with a request to release the plaintiff, the plaintiff was not released until four days after his original detention.<sup>239</sup>

In the process of determining whether the United States and its officials could be held liable for the improper and false detention of the plaintiff, the *Sami* court reiterated that the law of the place where the negligence or wrongful act occurred determines liability under the Federal Tort Claims Act.<sup>240</sup> In other words, under the Federal Tort Claims Act, the imposition of liability "focuses on the place of the government employee's act or omission."<sup>241</sup> Additionally, the court reasoned that the foreign country exception only applies when the "act or omission of any employee of the government" occurs in a foreign country, and it will not apply if only the claim arises in a foreign country.<sup>242</sup> The court then focused on the legislative history of the exception, and determined that the legislative history of the exception supported the conclusion that Congress did not intend for the exception to apply if the wrongful acts, negligence, or omissions occurred in the United States.<sup>243</sup> Finally, the court held that the foreign country exception did not exempt the plaintiff's suit against the United States or its agents.<sup>244</sup>

Turning now to the SOA, the act of teaching torture undeniably had its operative effect in Latin America. However, as discussed in *Sami*, the foreign country exception will only exempt a plaintiff's claim against the United States if the wrongful act,

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Florida warrant had been issued for the plaintiff, requested that the plaintiff be arrested, and stated that Florida would extradite the plaintiff. *Id.* The next message stated that the United States would extradite instead of Florida, and that a felony arrest warrant had been issued in Maryland. *Id.* The chief of the USNCB later stated that when he said that the United States would extradite he meant that Florida would request the United States to extradite and that he had no basis for stating that the Maryland warrant was for a felony. *Id.*

237. *Id.* at 758.

238. *Id.* at 758.

239. *Id.*

240. *Id.* at 761.

241. *Sami*, 617 F.2d at 762.

242. *Id.* at 762, n.7.

243. *Id.* at 762. *See also* Leaf v. United States, 588 F.2d 733 (9th Cir. 1978); Meredith v. United States, 330 F.2d 9 (9th Cir. 1964), *cert. denied*, 379 U.S. 867 (1964); Orlikow v. United States, 682 F. Supp. 77 (D.D.C. 1988); In re Paris Air Crash, 399 F. Supp. 732 (C.D. Cal. 1975).

244. *Id.* at 763.

negligence, or omission occurred in a foreign country, but not if the operative effect of the wrongful act, negligence, or omission occurred in a foreign country. In this case the wrongful act—the act of teaching torture—occurred in the United States. Because only the operative effect occurred in a foreign country and not the wrongful act of the United States’ agents, the foreign country exception does not preclude an alien plaintiff’s claim against the United States.

In sum, the Federal Tort Claims Act waives the United States sovereign immunity allowing an alien plaintiff to maintain jurisdiction over the United States. Neither the limitations in the language of the Federal Tort Claims Act nor the statutory exceptions to the waiver of immunity preclude the plaintiff from bringing suit against the United States for the act of teaching torture at the SOA. However, there is one final, judicially created barrier that must be overcome by an alien plaintiff to maintain subject matter jurisdiction.

### C. *Political Question Doctrine*

In *Baker v. Carr*,<sup>245</sup> the United States Supreme Court determined that, in order to maintain the separation of powers required by the Constitution, the judicial branch should refrain from challenging certain policy choices and value judgments that are reserved to the legislative or executive branches by the Constitution.<sup>246</sup> Even though the Supreme Court restricted the power of the judiciary to entertain certain political questions, the Court warned that courts should not apply the political question doctrine too broadly or discriminately by labeling any question involving the legislative or executive branch as “political” because this labeling could effectively exclude proper claims brought by a plaintiff.<sup>247</sup> The Court specifically noted that “the doctrine . . . is one of ‘political questions,’ not one of ‘political cases.’”<sup>248</sup> Although courts are to refrain from second-guessing the political branches of the government, the Supreme Court noted that the courts still have a role in cases involving a potential political question. The Court reasoned that the judiciary has a duty and the power to determine “whether a matter has in any measure been committed by the

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245. 369 U.S. 186 (1962).

246. *Id.* at 210.

247. *Id.* at 210-11. *See also* Comm. of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988).

248. *Id.* at 217.

Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed.”<sup>249</sup> In order to aid lower courts in ascertaining whether a political question exists in a particular case, the Court declared that the determination of a political question depends upon “a discriminating analysis of the question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.”<sup>250</sup>

Applying the reasoning from *Baker v. Carr* to the SOA case, one finds that both the legislative and executive branches exceeded the power vested in them by the Constitution. Under the Constitution, Congress has the power to establish and maintain an Army.<sup>251</sup> However, there is no constitutional basis for allowing the Legislature to condone or permit the teaching of torture at a United States military facility. Once again, the Supremacy Clause of the Constitution makes customary international law part of the Supreme Law of the land, and Congress cannot violate this Supreme Law in any manner. Similarly, the President is the Commander in Chief of the Army and has the power to engage in foreign relations.<sup>252</sup> However, as in the case of Congress, the President lacks the Constitutional authority to permit or condone the training of foreign soldiers in torture tactics. The fact that the teaching of torture is done by the military, an organization primarily controlled by both the Executive and Legislative branches, does not restrict a district court from hearing the case because both the Executive and Legislative branches exceeded their Constitutional powers.

Support for this conclusion can be found in *Committee of United States Citizens Living in Nicaragua v. Reagan*<sup>253</sup> and *Koohi v. United States*.<sup>254</sup> In *Committee of United States Citizens Living in Nicaragua*, a group of organizations and individuals sought enforcement of the International Court of Justice’s judgment in *Nicaragua v. United States*<sup>255</sup> by a United States District Court.<sup>256</sup> In

249. *Id.* at 211.

250. *Baker*, 369 U.S. at 211-12.

251. See U.S. CONST., art. I, sec. 8, cl. 12.

252. See U.S. CONST., art. II, § 2, cls. 1 & 2.

253. 859 F.2d 929 (D.C. Cir. 1988).

254. 976 F.2d 1328 (9th Cir. 1992). See *supra* notes 217-226 and accompanying text.

255. *Supra* note 134.

256. *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 932 (D.C. Cir. 1988).



the context of the political question doctrine, the Court of Appeals for the District of Columbia noted that the Executive branch does not have unlimited power to conduct foreign relations without supervision by the Judicial branch.<sup>257</sup> The court held, for political question purposes, that the plaintiff's case against the President could be maintained.<sup>258</sup>

Furthermore, in *Koohi v. United States*, the Ninth Circuit Court of Appeals decided that the political question doctrine did not preclude a court from hearing a case involving a United States warship during the Iran-Iraq war. The Ninth Circuit noted that the Supreme Court had often stated that "federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians."<sup>259</sup> The Ninth Circuit further proclaimed that military operations that intruded into the civilian sector would not be shielded from judicial review by merely claiming a military necessity.<sup>260</sup> Moreover, the court noted that the political question doctrine would not apply because the plaintiff sought money

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257. *Id.* at 935, quoting *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1515 (D.C. Cir. 1984).

258. *Id.* at 935. Importantly, the court later discussed whether international law violations have domestic legal consequences.

[D]o violations of international law have domestic legal consequences? The answer largely depends on what form the "violation" takes. Here, the alleged violation is the law that Congress enacted and that the President signed, appropriating funds for the Contras. When our government's two political branches, acting together, contravene an international legal norm, does this court have any authority to remedy the violation? The answer is "no" if the type of international obligation that Congress and the President violate is either a treaty or rule of customary international law. If, on the other hand, Congress and the President violate a peremptory norm (or *jus cogens*), the domestic legal consequences are unclear.

*Id.* at 935. The reasoning and discussion in this case does not effect the case against the SOA and actually leaves the courtroom door open for a case like the SOA for two reasons. Primarily, as discussed previously and noticed by the District Court of Appeals for the District of Columbia, the training and supporting of the Contras was done through a law enacted by Congress and signed by the President. In the case of the SOA, there has been no official law created by Congress or approved by the President. Also, as discussed above, the prohibition against torture may in fact be a *jus cogens* norm, and the court in *Comm. of United States Citizens Living in Nicaragua v. Reagan* actually accepts that the prohibition against torture is a *jus cogens* norm. *Comm. of United States Citizens Living in Nicaragua*, 859 F.2d at 941. The court never states that the prohibition against torture as a *jus cogens* norm does not have any domestic effect, and in fact leaves the door open for another court to determine this question.

259. *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992), *cert. denied*, 508 U.S. 960 (1993).

260. *Id.* at 1331-32.

damages, which are considered a remedy that does not intrude into the operations of the Executive or Legislative branches.<sup>261</sup>

In the case of the SOA, the military decisions of the Army, Legislature, and President are not beyond judicial review. As in *Koohi*, the SOA graduates have used their internationally illegal education to intrude into and harm the civilian population. Plus, the alien plaintiff in this case is only seeking money damages from the United States that have been determined as being non-intrusive into the affairs of either the Executive or Legislative branches.

In sum, both the Legislative and Executive branches have power to control the actions of the military, but this power is not absolute or beyond the power of the courts to question especially if the power is exercised unconstitutionally. Therefore, the political question doctrine is not controlling in the alien plaintiff's case against the United States for the SOA's deadly curriculum. Because jurisdiction can be maintained against the United States in a district court, the next step is to show liability.

#### IV. Theory of Liability

The issue of liability against the United States for providing military training to Latin American soldiers that includes a lack of respect for human rights and torture methods is a delicate one because of the lack of precedent. At first it seems as if the United States cannot be liable at all under the Federal Tort Claims Act because liability under this Act attaches based on the doctrine of respondeat superior.<sup>262</sup> For this reason, one may argue that the United States cannot be liable for the actions of the SOA graduates because the graduates are not employees of the government. However, one must remember that the alien plaintiff is not alleging that the actions of the SOA graduates are the primary impetus for the lawsuit against the United States. Instead, the plaintiff is claiming that the action of the United States soldiers and other military personnel teaching and promoting torture is the cause of action. Furthermore, an alien plaintiff could not claim the United States is vicariously liable for the injuries and torture committed by SOA graduates because the United States cannot be held vicariously liable for the actions of a third party under the Federal Tort Claims Act.<sup>263</sup> Because the United States cannot be held

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261. *Id.* at 1332.

262. *See* 28 U.S.C. § 1346(b).

263. *See* *Barron v. United States*, 654 F.2d 644, 647 (9th Cir. 1981) ("Under the Federal Tort Claims Act the United States has not waived its sovereign immunity

vicariously liable for the torture committed by the SOA graduates and because employees of the United States did not actually commit torture, the United States must be liable under some other theory for the injuries inflicted upon the alien plaintiff by the SOA graduates. The only actions that can be a basis for liability against the United States is the actual improper training of foreign soldiers in torture tactics by the United States military.

Title 42 U.S.C. Section 1983<sup>264</sup> is the key piece of legislation that is used domestically by plaintiffs alleging a violation of their constitutional rights by a state or local official, agency or municipality. Even though a civil plaintiff can use Section 1983 to sue a municipality for constitutional violations, he finds himself in the same predicament the alien plaintiff suing the United States for the curriculum at the SOA finds himself in. A municipality, under Section 1983, cannot be held vicariously liable on the basis of the existence of an employer-employee relationship nor can it be held liable under a theory of respondeat superior.<sup>265</sup> Instead, a municipality can only be held liable under Section 1983 when the municipality *itself* causes the constitutional violation.<sup>266</sup> In other

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with respect to claims based on vicarious liability.”); *Gibson v. United States*, 567 F.2d 1237, 1243 (3rd Cir. 1977), *cert. denied*, 436 U.S. 925 (1978) (stating that United States cannot be held vicariously liable for injuries to independent contractors solely on basis that the United States retained control over the work); *Hall v. United States Gen. Servs. Admin.*, 825 F. Supp. 427, 432 (D.N.H. 1993) (stating that liability under the Federal Tort Claims Act cannot be premised on a theory of vicarious liability); *DiSalvatore v. United States*, 456 F. Supp. 1079, 1081 (E.D. Pa. 1978) (“In determining whether the [United States] can be liable for the negligence of an employee under the Federal Tort Claims Act, we must determine whether any claim would lie against it under the law of the state where the allegedly tortuous act or omission occurred . . . with the limitation that vicarious liability cannot attach for the acts of persons who are not United State employees.”).

264. 42 U.S.C. § 1983 provides:

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 State 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 any action at law, suit in equity, or other proper proceeding for redress. . . . For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

265. See *Brd. of the County Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997); *Collins v. City of Harker Heights*, 503 U.S. 115 (1992); *City of Canton v. Harris*, 489 U.S. 378 (1989); *Monell v. New York City Dept. of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978).

266. See *Monell v. Dept. of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978).

words, the municipality can only be liable when it directly causes the harm.

Many of the cases that have emerged finding a municipality directly liable under Section 1983 for a violation of a person's constitutional rights have concerned improper or deficient training of police officers or other city employees.<sup>267</sup> Although in the case concerning the SOA, a municipality is not the key player, the facts at issue in municipality liability cases under Section 1983 are extremely analogous to the SOA and the United States. For this reason, the jurisprudence interpreting Section 1983 provides adequate and compelling reasoning for holding the United States directly liable for the torture inflicted by the SOA graduates because of the improper, illegal, and deficient training program offered at the SOA.<sup>268</sup>

One of the first cases dealing with municipal liability on the basis of improper training of municipal employees was *Canton v. Harris*.<sup>269</sup> In *Canton*, police officials had ignored the plaintiff's obvious need for medical care while she was in their custody.<sup>270</sup> The plaintiff alleged that the omissions of the police officers violated her due process rights under the Fourteenth Amendment.<sup>271</sup> At the subsequent trial, the plaintiff presented evidence showing that the shift commanders had the sole discretion to determine whether a person in police custody needed to receive medical attention, but the evidence further demonstrated that the shift commanders received no special training to help them make these determinations.<sup>272</sup> The Supreme Court, relying on its earlier decision in *Monell v. New York City Dept. of Social Servs.*,<sup>273</sup>

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267. See *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) (concerning deficient training of sanitation department employees); *City of Canton v. Harris*, 489 U.S. 378 (1989) (concerning deficient training of police officers in determining the need for medical care of detainees) *Depew v. City of St. Marys*, 787 F.2d 1496 (11th Cir. 1986) (concerning improper training of police officers).

268. Many attorneys and scholars may be surprised to see jurisprudence and rationale concerning 42 U.S.C. § 1983, a domestic statute used to remedy civil rights violations, being used to establish legal liability against the United States for international violations. However, the use of § 1983 jurisprudence in international law by United States courts is not unprecedented. When Congress passed the Torture Victim Protection Act, Congress instructed courts to interpret the phrase "color of law," as used in the Torture Victim Protection Act, by employing § 1983 jurisprudence. See H.R. REP. NO. 102-367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87.

269. 489 U.S. 378 (1989).

270. *Id.* at 381.

271. *Id.*

272. *Id.* at 381-82.

273. 436 U.S. 658 (1978).

proclaimed that when a governmental policy or custom is executed and causes a constitutional violation and injury to an individual, the municipality itself can be held liable for the injury under Section 1983.<sup>274</sup> For a plaintiff to maintain a claim of liability against a municipality for the constitutional violation, the Court determined that the plaintiff needed to show the existence of a direct causal link between the municipal policy or custom and the constitutional violation.<sup>275</sup>

Turning to the plaintiff's case, the Court reasoned that, on its face, the city's medical treatment policy for persons in police custody was constitutional.<sup>276</sup> The Court further reasoned, however, that this policy can be regarded as unconstitutional if it is applied in an unconstitutional manner because of the city inadequately training its police officials.<sup>277</sup> In addition, the Court noted that not all deficient training programs could serve as a basis for Section 1983 liability against a municipality. Instead, the Court declared that the failure to train could only be a basis for liability "where the failure to train amounts to [a] deliberate indifference to the rights of persons with whom the police come into contact" and can be considered a municipal "policy or custom" actionable under Section 1983.<sup>278</sup> The Court further reasoned that "[m]unicipal liability under [Section] 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives' by city policymakers."<sup>279</sup> In other words, liability against a municipality can only attach where the failure to train reflects a "deliberate" or "conscious" choice by a municipality.<sup>280</sup> The Court clarified the seemingly absurd notion of a municipality creating a policy of improper training.

It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees, but it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been

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274. *Canton*, 489 U.S. at 385.

275. *Id.*

276. *Id.* at 388.

277. *Id.*

278. *Id.* at 389.

279. *Canton*, 489 U.S. at 389 quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84 (1986).

280. *Id.* at 389.

deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes the injury.<sup>281</sup>

Finally, the Court held that liability would only attach if the municipality's training program is closely related to the ultimate injury and the plaintiff could prove that the deficiency in the training program caused her injury.<sup>282</sup>

The Supreme Court reiterated their holding in *Canton* of municipal liability almost a decade later in *Board of the County Comm'rs of Bryan County v. Brown*.<sup>283</sup> The plaintiff in *Brown* had been severely injured when a police officer pulled her from her vehicle using an "arm bar" technique and threw her to the ground.<sup>284</sup> The plaintiff alleged that the county was liable for her injuries because the county sheriff had hired the officer that injured her without properly reviewing the officer's background to discover a variety of misdemeanor offenses.<sup>285</sup> Even though the Court ultimately held that the County could not be held liable for the plaintiff's injuries because of an isolated hiring decision, the Court did discuss the requirements of establishing municipal liability.<sup>286</sup> The Court once again reasoned that a plaintiff must demonstrate that the municipality was the "moving force" behind the constitutional injury alleged by establishing some direct casual link between a municipal policy and the constitutional injury.<sup>287</sup> The Court determined that this requirement ensured that the municipality would only be liable for constitutional violations that result from the decisions and actions of its "duly constituted legislative body or of those officials whose acts may be said to be those of the municipality."<sup>288</sup> Once again, the Court noted that a plaintiff who claimed that a facially constitutional and lawful municipal action led to the violation of a plaintiff's constitutional right had to show that the municipal action had been taken with

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281. *Id.* at 390.

282. *Id.* at 391.

283. 520 U.S. 397 (1997).

284. *Id.* at 400-01.

285. *Id.* at 401.

286. *Id.* at 416.

287. *Id.* at 404. *See also* *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992) ("[P]roper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation.")

288. *Brown*, 520 U.S. at 403-04.

“deliberate indifference” to its apparent or reasonably apparent consequences.<sup>289</sup> Finally, the Court also discussed the proving of fault and causation in inadequate training cases.

Existence of a [deficient training] program makes proof of fault and causation at least possible in an inadequate training case. If a program does not prevent constitutional violations, municipal decision makers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortuous conduct by employees may establish the conscious disregard for the consequences of their action—the “deliberate indifference” necessary to trigger municipal liability.<sup>290</sup>

Although in the case brought by the hypothetical alien plaintiff, Section 1983 cannot be directly applied, the facts at issue in municipal liability cases are extremely analogous to the SOA and the United States. In the hypothetical plaintiff’s case, instead of a municipality training police officers improperly that results in an individual’s constitutional rights being violated, the plaintiff has the United States government training foreign soldiers improperly that results in an individual’s human rights being violated. Applying the reasoning from *Canton* and *Brown*, one finds that the United States is directly liable for the torture inflicted by the SOA graduates.

The hypothetical alien plaintiff must first establish a direct causal link between the United States policy of training foreign soldiers improperly and the human rights violations inflicted upon the plaintiff. In addition, the alien plaintiff must show that the United States, through its policymakers and officials, deliberately or consciously chose to implement a course of action that amounted to a deliberate indifference to the rights of persons with whom the SOA graduates would reasonably come into contact with.<sup>291</sup>

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289. *Id.* at 407.

290. *Id.*

291. When arguing the existence of a direct causal link between a deficient training program and a constitutional violation in municipal liability cases under Section 1983, the question that must be answered is whether the injury would still have occurred if the training program lacked the deficient component. *See Canton v. Harris*, 489 U.S. 378, 391 (1989). While discussing this issue in *Canton*, the Supreme Court stated:

Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder, particularly since matters of judgment may be involved, and since officers who are well trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances. But judge and jury, doing their respective jobs, will be adequate to the task.

Turning first to the causal link, the evidence<sup>292</sup> demonstrates a direct link between the torture committed by the SOA graduates and the SOA instruction.<sup>293</sup> The best evidence of a link between the curriculum and the human rights violations are the manuals used as part of the SOA curriculum. The manuals specifically advocate the use of torture, executions, false arrest, and numerous other forms of physical and psychological abuse—a fact that has been admitted by the Department of Defense and the Pentagon. In fact, former instructors have also admitted that some of the courses at the SOA, especially the intelligence courses, focused primarily on the worst and most horrific material contained in the manuals. Besides condoning and instructing a student in the proper art of torture, execution, extortion, coercion, and physical abuse, the manuals specifically list targets that should be considered as insurgents and that should be eliminated. This list includes religious leaders, labor activists, student activists, and other individuals who sympathize with the poor. It is an extremely unlikely coincidence that foreign soldiers who had been instructed using these manuals subsequently commit torture upon individuals in Latin America. The coincidence seems even more unlikely when one considers that the victims of torture and murder at the hands of SOA graduates had been restrained, abused, and killed in the same manner as described in the manuals. Furthermore, the majority of these victims are exactly the type of people that the manuals described as insurgents, including Archbishop Oscar Romero, Jesuit priests, nuns, union leaders, and poverty stricken peasants. The obvious conclusion from these unlikely coincidences is that the

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*Id.* Because the Supreme Court trusted judges and juries to determine the existence of a causal link in § 1983 cases, the same trust of judges and juries should be afforded in this case. An alien plaintiff should be allowed to present all his evidence to the factfinder and allow it to determine whether the causal link between the SOA curriculum and the torture committed. The same factfinder should be allowed to determine whether the government evidenced a deliberate indifference towards the rights of people who SOA graduates may come in contact with.

292. The evidence used throughout this analysis has been thoroughly discussed in Part II.

293. In *Canton*, the Supreme Court noted that liability could not attach against a municipality because of a single officer's lack of training because the officer's shortcomings may be the result of other factors. *Canton*, 489 U.S. at 390-91. In this case, the hypothetical plaintiff would not be claiming that liability would attach against the United States for the shortcomings of one foreign soldier. As discussed above in Part II of this Comment, the evidence shows that numerous SOA graduates have been extensively involved in human rights abuses.



SOA graduates were enacting the instructions discussed in the manuals.

Further evidence of a direct causal link also exists by the lack of human rights training. Besides the fact that the amount of time a student at the SOA spends learning about human rights as compared to the amount of time that same student spends learning about combat and intelligence techniques is minimal, instructors at the SOA have exposed that the human rights training at the SOA is inadequate. Charles T. Call noted that the instruction at the school towards human rights is merely cosmetic and ineffective because the instructors teaching the human rights instruction are foreign soldiers who have already developed a horrific human rights record. Retired United States Army Major Joseph Blair has agreed with Call's assessment of the program, and further revealed that the soldiers treated the human rights training as a joke, which is evidenced from the school wide joke concerning the frequent death of the priest during a school training exercise. This inadequate training of soldiers to respect the rights of people that they come in contact with supports the notion that the training offered by the SOA caused the torture inflicted by the SOA graduates. By allowing foreign instructors who already have extensive and infamous human rights records to teach courses on respect and recognition of human rights creates an image that the training is not to be taken seriously.

Finally, the revelations of the former instructors and students of the SOA also support a direct causal link. Major Blair has publicly admitted that torture had been taught at the school while he was an instructor there and that the instruction at the school had been based on techniques used by the United States military during the Vietnam War. Former students have also revealed that demonstrations on how to properly commit torture had been given by American soldiers who actually tortured people for these demonstrations. It is hard to argue that these non-simulated demonstrations had been presented to the students at the SOA to show what the students were *not* supposed to do. Instead, the only reason for giving live demonstrations of torture is to show students exactly how and what they were suppose to do to people who were "insurgents." Based on all the evidence concerning the manuals, the inadequate human rights training, and the actual instruction in torture, one can obviously see the direct casual link between the instruction and the human rights violations committed by the SOA graduates.

Besides demonstrating a direct causal link between the human rights violations and the SOA curriculum, the plaintiff needs to demonstrate that the United States government, through its officials and officers, consciously acted with deliberate indifference. Once again the manuals themselves are the best evidence of this requirement. The manuals specifically discuss how to violate a person's human rights through torture and murder. These horrible and noxious lessons are in violation of international law if committed against combatant enemies, but the notoriousness of the lessons is increased by the fact that the manuals identify members of the civilian population as insurgents and enemies that need to be "neutralized." The fact that the United States military deliberately chose to use these manuals at the SOA evidences that the United States acted with deliberate indifference to the human rights of both combatant and civilian persons that the SOA graduates would come in contact with.

Another example of deliberate indifference by the United States government is the fact that the Department of Defense and the Pentagon refused to change the curriculum after evidence had been gathered demonstrating that a large number of SOA graduates were involved in human rights violations. It is true that the Department of Defense claimed that it modified the material in 1996 and asked some Latin American officials not to use the materials. Yet, the Department of Defense had known since, at least, the early 1980's during the El Salvador civil war that SOA graduates had been involved in human rights abuses. However, the Department of Defense and the Pentagon refused to investigate and determine whether changes had to be made to the program. In fact, instead of investigating the allegations of SOA graduates being involved in human rights abuses, the Department of Defense and Pentagon honored some of these same graduates by inviting them back to the SOA to be instructors or speakers or by placing their pictures in the "Hall of Fame" at the SOA. Assuming that the Department of Defense did not know by the early 1980s of the violations, the extensive evidence demonstrates that long before 1996 the Department of Defense had reason to be put on notice that a new program was called for. Even if no deliberate attempt had been made to violate United States military policy, as claimed by the Pentagon and the Department of Defense, the deliberate choice to adhere to a program that failed to prevent human rights violations establishes the conscious disregard and deliberate indifference to the consequences of their actions.

Even though all the above mentioned evidence reflects a conscious choice of the United States government to be deliberately indifferent to the human rights of the citizens of Latin America and a causal link between the curriculum and human rights violations by the SOA graduates, one may argue that liability against the United States is lacking because the Congress, the Department of Defense, nor the President never officially approved the infamous curriculum at the SOA. However, turning once again to the jurisprudence under Section 1983, a plaintiff alleging that a municipality caused his constitutional rights to be violated does not have to show that the municipality officially sanctioned a certain practice through a properly created law or policy. Instead, a plaintiff can establish municipal liability by showing a persistent practice of misconduct that was allowed to continue without the municipality ceasing the practice. By the municipality allowing the practice to continue without interruption or correction, a custom that has the force of law can be created and result in a municipality being liable for any constitutional violations that may occur from that practice.

In *Adickes v. S.H. Kress & Co.*,<sup>294</sup> a white school teacher, Adickes, had been refused service in a Mississippi restaurant when she was accompanied by six of her black students.<sup>295</sup> The restaurant owner claimed that he was justified in not serving Adickes because he did not want a riot to ensue due to his serving a white woman accompanied by a group of blacks.<sup>296</sup> Subsequently to not being served, Adickes decided to leave the restaurant, and she was then immediately arrested by the police. Adickes alleged that her equal protection rights were violated under Section 1983 because the refusal to serve her was due to a state-enforced custom requiring segregation in local restaurants.<sup>297</sup> If Adickes could prove a state-enforced custom of segregation in restaurants, the Supreme Court had to determine if the custom had to have the force of law for Section 1983 purposes.<sup>298</sup> The Court first discussed that the phrase "under color of law" evidenced that Congress had created Section 1983 to punish only action that had been supported by the State.<sup>299</sup> Because Section 1983 was enacted only to punish actions and conduct approved by the State, the Court reasoned that a custom or

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294. 398 U.S. 144 (1970).

295. *Id.* at 146.

296. *Id.* at 154, n. 10.

297. *Id.* at 148.

298. *Id.* at 148-49.

299. *Adickes*, 398 U.S. at 163, 166.

usage had to have “the force of law by virtue of the persistent practices of state officials” for Section 1983 purposes.<sup>300</sup> The Court then discussed that Congress included customs in Section 1983 because Congress knew that discriminatory practices still existed in different states throughout the country.<sup>301</sup> The Court reasoned that the discriminatory practices by state officials could become so widespread and permanent that they could become a “‘custom or usage’ with the force of law” even though the practices had not been authorized by any written law.<sup>302</sup> The Court stated that “[i]t would be a narrow conception of jurisprudence to confine the notion of ‘laws’ to what is found written on the statute books and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law.”<sup>303</sup> Based on this reasoning, the Court remanded the case back to the district court for a new trial to determine if a custom of racial segregation in restaurants actually existed.<sup>304</sup>

In *Depew v. City of St. Marys*,<sup>305</sup> the plaintiffs, Depew and Fowler, were mechanics who had been test driving a jeep that had just been repaired when they were pulled over by Officer Kusek after Fowler had allowed the jeep to veer to the right two times to check the steering.<sup>306</sup> Even though Kusek did not detect any alcohol on Fowler’s breath, Kusek made Fowler take a sobriety test.<sup>307</sup> While Kusek went to get the equipment from his patrol car, Fowler sat down in the jeep to wait.<sup>308</sup> When Kusek returned to the jeep, Kusek attempted to force Fowler out of the jeep by grabbing Fowler around the neck, but, because he was afraid, Fowler held on to the steering wheel of the car.<sup>309</sup> Fowler was soon thrown to the ground and beaten before he was handcuffed while Depew was held at gunpoint and handcuffed by other officers that had arrived

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300. *Id.* at 167.

301. *Id.* at 167.

302. *Id.* at 167-68. *See also* Bd. of the County Comm’rs of Bryan County v. Brown, 520 U.S. 397, 404 (1997) (“Similarly, an act performed pursuant to a ‘custom’ that has not been formally approved by an appropriate decisionmaker may fairly be subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law.”).

303. *Id.* at 168 *quoting* Nashville, C. & St. L.R. Co. v. Browning, 310 U.S. 362, 369 (1940).

304. *Adickes*, 398 U.S. at 175.

305. 787 F.2d 1496 (11th Cir. 1986).

306. *Id.* at 1497.

307. *Id.*

308. *Id.*

309. *Id.*

on the scene.<sup>310</sup> Fowler and Depew filed suit against the mayor and the city council for the violation of their civil rights alleging that the use of excessive and unreasonable force used by Kusek and the other officers had been part of an established policy and custom of police misconduct.<sup>311</sup> Plaintiffs presented evidence at trial that showed there had been numerous complaints of police misconduct filed, and that there was a lack of training, supervision, and discipline.<sup>312</sup> The evidence further demonstrated that both the mayor and city council were aware of the widespread practice but neither the mayor nor city council admitted that a problem existed.<sup>313</sup>

The Eleventh Circuit Court of Appeals noted that municipal liability can only be maintained under Section 1983 if a plaintiff can establish that the city itself caused the plaintiff's deprivation of civil rights.<sup>314</sup> The court noted that to establish a custom or policy a plaintiff needs to show a persistent and widespread practice that violates constitutional rights, and that the municipality had actual or constructive knowledge of such practice.<sup>315</sup> The court then determined, based on the evidence presented at trial, that the city had actual knowledge of the improper police conduct, but failed to take any remedial action to rectify the constitutional violations by members of the police force.<sup>316</sup> The court held that "[t]he continued failure of the city to prevent known constitutional violations by its police force is precisely the type of informed policy or custom that is actionable under [Section] 1983."<sup>317</sup>

As with determining municipal liability, it would be a narrow conception of the law and policy to limit international liability to only practices established by a nation's laws. The fact that neither the Legislative nor Executive branches approved the SOA curriculum does not change the liability against the United States as discussed above. The evidence shows that the SOA engaged in an extensive and long-term practice of teaching torture to the students that attended the SOA, and that SOA graduates had been implementing these lessons on a widespread scale. The practice of teaching torture became such a permanent component of the SOA

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310. *Depew*, 787 F.2d at 1497.

311. *Id.*

312. *Id.* at 1498.

313. *Id.*

314. *Id.* at 1499.

315. *Depew*, 787 F.2d at 1499.

316. *Id.*

317. *Id.*

that it became a custom with the force of law. Furthermore, as discussed earlier, the Pentagon and the Department of Defense had knowledge that the training of torture had been taking place at the SOA and that numerous graduates of the SOA were involved in human rights abuses, but failed to take any remedial action. Furthermore, as will be discussed briefly below, Congress also knew about the curriculum at the SOA and the effects this curriculum was having in the Latin American region, but also failed to correct the problem by closing the SOA or by changing the curriculum. Because both the Legislative and Executive branches had been put on notice that the training program at the SOA was deficient through the improper conduct of the SOA graduates and both had failed to take any remedial measures to rectify the human rights violations committed by the students at the SOA, the United States government created exactly the type of custom that liability evolves from.

In sum, even though there is no precedent supporting or refuting international liability against the United States for the torture and other human rights violations committed by the SOA graduates, jurisprudence concerning civil rights under the Constitution supports the conclusion that the United States is liable for the torture committed. The evidence supports that the United States, through officials in both the Legislative and Executive branches, consciously chose to continue the practice of teaching students the “proper” art of torture, murder, assassination, coercion, and execution at the SOA instead of changing the curriculum to eliminate these noxious lessons after the government learned that the SOA graduates had been involved in human rights violations. Moreover, the continuation of these lessons and manuals at the school evidenced a deliberate indifference to human rights by the United States government, and the fact that the United States never officially approved this instruction does not preclude liability against the United States. Through the SOA, the United States government is unequivocally responsible and liable for the torture, murders, assassinations, and executions of the Latin American citizens who had the unfortunate luck of meeting members of the SOA alumni.

## V. Conclusion

For years, the closing down of the SOA has been debated in both houses of Congress. Numerous bills and proposals have been presented by a variety of legislators asking their fellow Congress-

men to shut down the “relic of the cold war.”<sup>318</sup> Unfortunately, none of these bills calling for the closure of the SOA ever passed the Legislature.

However, in October 2000, President Clinton signed the Defense Authorization Bill for 2001.<sup>319</sup> As part of this bill, the authority granted to the Secretary of the Army to operate the SOA under 10 U.S.C. § 4415<sup>320</sup> has been repealed.<sup>321</sup> This section of the Defense Authorization Bill in effect closes down the SOA. Considering the evidence gathered demonstrating the effects the SOA has had on the people of Latin America, the repealing of 10 U.S.C. § 4415 would seem like a victory for human rights advocates. However, the training institution known as the “School of the Americas” may have been “shut down” as of January 17, 2001, but the same law that has required the closing of the SOA has provided authorization to open a new military training facility for Latin American soldiers.

The new facility authorized by the Defense Authorization Bill will be known as the “Western Hemisphere Institute for Security Cooperation.”<sup>322</sup> This new facility will have the same mission as the SOA, and will be located at the same location as the SOA.<sup>323</sup> The similarities between the SOA and the Western Hemisphere Institute for Security Cooperation are not limited solely to the mission and location of the institutions. In fact, the School of the Americas Watch, a SOA watchdog, has compared the prior curriculum and structure of the SOA with the new institution.<sup>324</sup> Besides a slight change in the person authorized to run the school, there is no attempt to change the curriculum of the Western Hemisphere Institute for Security Cooperation by providing either quantitatively or qualitatively more human rights training than the SOA, and no attempt to critically assess the new institution through sources independent of the United States military, a problem that

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318. 145 CONG. REC. S4132 (1999) (statement of Sen. Durbin). *See also* S. 873, 106th Cong. (1999); H.R. 732, 106th Cong. (1999).

319. *See* Departments of Defense and Energy—Appropriations, Pub. L. No. 106-398, 114 Stat. 1654 (2000).

320. *See supra* note 29.

321. *See* Departments of Defense and Energy—Appropriations, Pub. L. No. 106-398, § 911(b), 114 Stat. 1654, 1654A-559 (2000).

322. *See id.*

323. *See* School of the Americas Watch, *Congress Closes U.S. Army School of the Americas, Gives Okay to Open Clone*, at <http://www.soaw.org/leg.html> (last visited Sept. 26, 2000).

324. *See id.*

also existed under the SOA.<sup>325</sup> In other words, instead of the United States government trying to seriously change the legacy and notorious curriculum of the SOA, the United States government decided to restrict its efforts to simply changing the name of the institution.

Even though the name has changed, an alien plaintiff from El Salvador, Guatemala, Colombia, or any other Latin American country who has been victimized at the hands of an SOA graduate can effectively bring a case against the United States in a Federal District Court under the Alien Tort Act and the Federal Tort Claims Act. As hard as the United States may argue, jurisdiction can and should be maintained over the United States because no exceptions to the United States' waiver of sovereign immunity apply. Once in court, an alien plaintiff can turn to jurisprudence concerning 42 U.S.C. § 1983 for help in proving liability against the United States for the torture and human rights violations it promoted through its deficient training program. Even if the closing down of the SOA is a valid attempt to seriously change the manner in which the United States trains foreign soldiers, this change does not affect the liability of the United States for the torture committed by the SOA graduates. A murderer cannot escape his responsibility and justice by simply changing his name and promising not to murder again. The United States has blood on its hands and should no longer be permitted to escape its liability and responsibility for the human rights abuses committed by SOA graduates, like the El Mozote massacre, by hiding in the shadows. Only when the light of truth and justice shines into the dark corners of death and suffering accompanying torture and other human rights violations to reveal the United States' role, will the terrified screams of the men, women, and children plagued by the legacy of the SOA finally be silenced.

*Timothy J. Kepner*

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325. *See id.*



