UiO : Faculty of Law
University of Oslo

The Use of Torture in the 'War on Terror'

What was the role of international and domestic law in legitimising the United States' use of torture?

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Table of contents

1 Introduction

Following the September 11 attacks United States President George W. Bush declared a 'war on terror' – a war that begins with al Qaeda but "will not end until every terrorist group of global reach has been found, stopped and defeated."[1] The right to be free from torture and other cruel, inhuman or degrading treatment or punishment cannot be derogated from, meaning there is absolutely no defence that can be put forward to justify the commission of this crime. The United States government has admitted to using torture as a post-9/11 'war on terror' counterterrorism measure in Central Intelligence Agency ('CIA') black sites and military prisons including Abu Ghraib in Iraq and Guantanamo Bay in Cuba.

Countless reports have come out from detainees in custody at these CIA black sites and military prisons, revealing the torture and ill-treatment they have suffered under the approval of the United States government. The reported abuses demonstrate a program of systematic torture: hooded and naked detainees were positioned in human pyramids and photographed with smiling military personnel in the back, intimidated by attack dogs during interrogations, sexually assaulted and humiliated, beaten with brooms, punched, slapped, kicked, had phosphoric liquid poured on them, force-fed, waterboarded, forced to undergo sleep deprivation, and solitary and cramped confinement, among numerous other abuses.

This thesis seeks to analyse how the United States used domestic and international law to legitimise their use of torture in the 'war on terror'. It aims to achieve this by firstly providing an overview of the prohibition of torture in international and domestic law. It will then explore how the 'torture memos' utilised the law in the formulation of their 'enhanced interrogation techniques', and the legality of said techniques. This will be followed by an analysis of the legal, political, and social justifications provided by the United States for torture. This thesis will then conclude with a discussion on why other States have not investigated and brought forward proceedings against the United States for their use of torture in the 'war on terror'.

This thesis seeks to answer this question through the analysis of instruments of international and domestic law, case law, reports written by the United States government and its agencies as well as by non-governmental organisations, journal articles, and news articles. It must be

[1] President Bush, 'Address to a Joint Session of Congress and the American People' (Speech, White House, 20 September 2001) <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

understood that there are (understandably) limited available resources which discuss the United States and their use of torture. The US government has not made much information regarding their activities in CIA black sites and military prisons publicly available. Most of the information that has been released by the United States government is what the government has deemed worthy of being made a matter of public knowledge, and as such, limits this thesis' ability to analyse their actions completely. The declassification of the 'torture memos' written by attorneys in the United States Department of Justice's Office of Legal Counsel as well as reports including the Senate Select Committee's Report on torture in 2014 and the CIA Inspector General's 2004 Special Review of Counterterrorism, Detention and Interrogation Activities still include substantial amounts of redacted information.

2 The prohibition of torture

2.1 International law

Respect for human dignity is important to understand as it is inextricably linked with the integrity of the person, and by extension the right to be free from torture and ill-treatment.[2] Respect for human dignity forms the foundation by which the right to be from torture and ill-treatment is derived and its presence in such a large amount of human rights treaties emphasises the importance of the right as a whole. Respect for human dignity is paramount and derivations from this right through means such as torture is an infringement of the main tenet of human rights orthodoxy. Respect for human dignity is entrenched in various sources of international law including:

a. *Universal Declaration of Human Rights* (Preamble, article 1, article 22, and article 23(3));
b. *International Covenant on Civil and Political Rights* (Preamble, and article 10);
c. *International Covenant on Economic, Social and Cultural Rights* (Preamble, and article 13);
d. *Charter of Fundamental Rights of the European Union* (Preamble, and articles 1, 25, and 31); and
e. *African Charter on Human and People's Rights* (Preamble, and article 5).

[2] Carla Ferstman, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 4th ed, 2022) 169, 169-70.

International humanitarian law recognises the importance of human dignity in Common Article 3(1)(c) of the *Geneva Conventions*, and article 75(2)(b) of the Additional Protocol I. It is recognised in international criminal law through articles 8(2)(b)(xxi) and 8(2)(c)(ii) of the *Rome Statute of the International Criminal Court*. The prohibition of torture is also relevant to the right to life, privacy, liberty and security, humane treatment in detention, and fair treatment in criminal proceedings. The interconnectedness of all these rights highlights the importance of ensuring human rights are continuously upheld.

The most notable international human rights convention prohibiting torture and ill-treatment is the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('Convention against Torture')[3]. The prohibition of torture can also be found in other international human rights conventions:

a. Article 7 of the *International Covenant on Civil and Political Rights*;
b. Article 3 of the *European Convention on Human Rights*;
c. Article 5 of the *American Convention on Human Rights*;
d. Article 5 of the *African Charter on Human and Peoples' Rights*; and
e. Article 8 of the *Arab Charter on Human Rights*.

International humanitarian law prohibits torture, as noted in the Geneva Conventions and its Additional Protocols I and II.[4] Common Article 3 of the Geneva Conventions prohibits "violence to life and person," "cruel treatment and torture," and "outrages upon personal dignity, in particular humiliating and degrading treatment." The commission of torture may also be determined to be war crimes as per the Geneva Conventions and its Additional Protocol I.[5] Torture is a unique crime – it highlights how international human rights law, international humanitarian law, and international criminal law overlap and have practical effects on each other. It is accepted that the use of torture is both a human rights violation and an international crime.

[3] Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*Convention against Torture*').
[4] Common Article 3; Geneva Convention I art 12(2); Geneva Convention II art 12(2); Geneva Convention II arts 13, 17(4), 87(3), 89; Geneva Convention IV arts 27, 32; Additional Protocol I art 75(2), Additional Protocol II art 4(2).
[5] Geneva Convention I art 50; Geneva Convention II art 51; Geneva Convention III art 130; Geneva Convention IV art 147; Additional Protocol I art 11.

The prohibition of torture also finds its sources in international custom and general principles of law. The prohibition of torture is so strongly accepted by the international community that it is a fundamental principle of customary international law.[6] The idea of a right being absolute is at the core of human rights – the right to be free from torture is considered one of human rights' few absolute rights and is considered 'intrinsically wrong' no matter the circumstances.[7] It is a negative duty, in that refraining from committing the act of torture is the only way to respect the right to be free from torture. Infringement of this right occurs when the act of torture is committed.[8] Peremptory norms of general international law (*jus cogens*) means that all States are to observe the prohibition of torture and refrain from committing the act of torture, regardless of whether they have ratified the treaty containing the rule or not. *Jus cogens* prohibits a definite type of conduct, in that the rule is to refrain from committing the act of torture.[9] The prohibition of torture has achieved *jus cogens* status, deeming it an 'intransgressible principle of international customary law.'[10] The right to be free from ill-treatment, that is, cruel, inhuman or degrading treatment or punishment, also enjoys *jus cogens* status.[11] *Jus cogens* plays perhaps the most significant role for the purposes of this thesis, alongside the Convention against Torture.

The Convention against Torture must be examined more closely for the purposes of answering the question this thesis poses. The Convention against Torture entered into force on 26 June 1987 and there are 173 Parties to the Convention. The Convention against Torture established the Committee against Torture through Article 17, which is a committee consisting of 10 experts with 'recognized competence in the field of human rights.' The main function of the Committee against Torture is 'to ensure that the Convention is observed and implemented by all State Parties.'[12] State Parties to the Convention against Torture agree:

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[6] Nigel S. Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2018) 165, 167.
[7] Marie-Bénédicte Dembour, 'Critiques' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 3rd ed, 2018) 41, 46-7.
[8] Ibid.
[9] *Prosecutor v Furundžija (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber III, Case No IT-95-17-1, 10 December 1998) [153-154], cited in Association for the Prevention of Torture and the Center for Justice and International Law, *Torture in International Law: A Guide to Jurisprudence* (2008) 169 <https://www.corteidh.or.cr/tablas/26562.pdf>.
[10] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports, 1996 [79].
[11] Committee against Torture, *General Comment No 2: Implementation of Article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008) [3]; Juan E. Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading punishment or treatment*, UN Doc A/HRC/25/60 (10 April 2014) [40].
[12] Committee against Torture, 'Background to the Convention', *United Nations Human Rights Office of the High Commissioner* (Web Page) <https://www.ohchr.org/en/treaty-bodies/cat/background-convention>.

> *"to prevent acts of torture in connection with activities that include … **arrest, detention and imprisonment; interrogation** (emphasis added); and the training of police (civil or military), medical staff, public officials and anyone else who may be involved in the arrest, detention and questioning of a person."*[13]

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment entered into force on 22 June 2006 with the objective of establishing a Subcommittee on Prevention of the Committee against Torture as per Article 2. Article 4 of the Optional Protocol allows the Subcommittee on Prevention to visit to places of detention in States who are parties to the Protocol, with the view of ensuring that human rights standards are being observed.

The Convention against Torture defines torture in article 1 as:

> *'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'*

Article 2 of the Convention against Torture provides that:

> *'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever … may be invoked as a justification of torture.'*

Article 2 is in line with the idea that the right to be free from torture or cruel, inhuman or degrading treatment or punishment is absolute. Combined with article 4(2) of the ICCPR which characterises the prohibition of torture as non-derogable even in times of public emergency, torture will always be specifically excluded as it is *jus cogens* and respect for human dignity is above all.

[13] Ibid.

Article 3 draws the principle of non-refoulement to attention, stating that 'no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

Article 15 sets forward that 'any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.' This provision is especially important as it takes away the main motivation to use torture in the first place. If the commission of the crime of torture is for the purposes of obtaining evidence, the evidence received as a result of the act of torture is automatically deemed inadmissible.

Finally, article 16 states that each State Party is also under an obligation to prevent acts of cruel, inhuman or degrading treatment or punishment which do not amount to the level of torture defined by article 1 of the Convention against Torture.

2.2 Domestic law of the United States

The United States signed the Convention against Torture on 18 April 1988 and ratified it on 21 October 1994. The United States has not taken any action on the Optional Protocol to the Convention against Torture. Sections 2340 and 2340A of the United States Code were the sections that implemented the United States' obligations under the Convention against Torture into their domestic law.

Section 2340(1) of the United States Code defines torture as:

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

Section 2340(2) defines 'severe mental pain or suffering' as:

> *"the prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering; […] the threat of imminent death; or […] the threat that another person will imminently be subjected to death, severe physical pain or suffering."*

According to section 2340A the offence of torture only occurs if the act was committed outside the United States and by a national of the United States, or if the offender is present in the United States. Torture is punishable by fine, by imprisonment up to 10 years, or both. Torture is punishable by life imprisonment or by death if the commission of torture results in the death of the victim.

3 The United States and their relationship with torture

3.1 The 'torture memos'

The previous section outlined the international and domestic law that the United States must abide by during their formulation of their 'enhanced interrogation techniques'. This section provides an overview of the so-called 'torture memos', a series of legal memorandum, and how the attorneys from the Office of Legal Counsel used the law in their evaluation of their interrogation and detention policies and techniques.

The 'torture memos' gained prominence followed the revelation of prisoner abuse at Abu Ghraib, where memos written by Assistant Attorney General Jay Bybee and Deputy Assistant Attorney General John Yoo were also leaked. The Obama administration declassified the remaining torture memos in 2009.

3.1.1 The Yoo memo

The Yoo memo provided to William J. Haynes II, General Counsel, on 9 January 2002 concerned the application of treaties and laws to al Qaeda and Taliban detainees.[14] The memo concluded that "customary international law, whatever its source or content, does not bind the President, or restrict the actions of the United States military, because [it] does not constitute federal law recognized under the Constitution."[15] He also concluded that the laws of armed conflict "do not protect members of al Qaeda and the Taliban militia [as they are] a non-state actor [and] cannot be a Party to the international agreements governing war."[16] This memo effectively absolved officials from the United States military from being charged with war

[14] Memorandum for William J. Haynes II, General Counsel, Department of Defence, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, on Applications of Treaties and Laws to al Qaeda and Taliban Detainees (9 January 2002).
[15] Ibid 2.
[16] Ibid 1.

crimes by asserting that the Geneva Conventions provided people held in US custody no protection.

3.1.2 The Bybee memos

Perhaps the most prominent memos of the 'torture memos' are those written by Jay Bybee. His first memo to Alberto Gonzales, Counsel to the President, on 1 August 2002 concerned the standards of conduct for interrogation under 18 U.S.C. sections 2340-2340A (United States Code).[17] In this memo, Bybee concluded that in order for an act to constitute torture under the United States Code, the victim:

> *"must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will result. If that pain or suffering is psychological […] these acts must cause long-term mental harm."*[18]

He also concludes that:

> *"acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical]…] must be of an* ***extreme nature*** *(emphasis added) to rise to the level of torture within the meaning of Section 2340A and the Convention."*[19]

The definition of torture under the United States Code was thereby redefined by Bybee to include only the most extreme acts. Such an interpretation went further than what is deemed acceptable treatment by the Convention against Torture.

Bybee also identified that it would be unconstitutional to find a potential violation of section 2340A as the application of this section of the Code would interfere with President Bush's Commander in Chief power to order interrogations of enemy combatants.[20] Further, he stated that the prosecution of executive officials carrying out 'enhanced interrogation techniques' would "significantly burden and immeasurably impair the President's ability to fulfil his constitutional duties."[21]

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[17] Memorandum for Alberto Gonzales, Counsel to the President, Department of Defence, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, on Standards of Conduct for Interrogation under 18 U.S.C §§ 2340-2340A (1 August 2002).
[18] Ibid 13.
[19] Ibid 1.
[20] Ibid 31.
[21] Ibid 35.

A second memo written by Bybee for John Rizzo, Acting General Counsel to the CIA, on 1 August 2002 concerned the interrogation of al Qaeda detainees, specifically high value detainee Abu Zubaydah.[22] The memo provided advice to Rizzo on whether specific proposed conduct would violate the prohibition of torture in section 2340A. Abu Zubaydah was one of the highest-ranking members of the al Qaeda terrorist organisation and the first person placed into United States custody at their black sites and military prisons. The CIA provided Bybee with a list of interrogation techniques that they proposed for use during their interrogations of Abu Zubaydah, seeking approval for each of them as they wanted to move interrogations into an "increased pressure phase."[23] The ten techniques listed were:

> *"1. attention grasp;*
> *2. walling;*
> *3. facial hold;*
> *4. facial slap (insult slap);*
> *5. cramped confinement;*
> *6. wall standing;*
> *7. stress positions;*
> *8. sleep deprivation;*
> *9. insects placed in a confinement box; and*
> *10. the waterboard."*[24]

Bybee assessed each individual technique, providing definitions, and assessing whether they would fall foul of the legalities of their redefined offence in section 2340A. Bybee particularly focused on the last two elements, insects placed in a confinement box and the waterboard, and whether they would inflict severe pain or suffering. Insects placed in a confinement box was deemed to not be torture as the level of discomfort that comes with a confinement box "cannot be said to cause pain that is of the intensity associated with serious physical injury," and that the introduction of an insect does not alter that assessment as the insects are not harmful.[25] However, in order to avoid the determination that this method would inflict severe mental pain or suffering, it was imperative that the interrogator inform Abu Zubaydah that "the insects will

[22] Memorandum for John Rizzo, Acting General Counsel, Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, on Interrogation of al Qaeda Operative (1 August 2002).
[23] Ibid 1.
[24] Ibid 2.
[25] Ibid 10.

not have a sting that would produce death or severe pain." If interrogators preferred not to inform him that they were placing insects in this confinement box, they were to ensure that they did not lead Abu Zubaydah to believe that any insect present "has a sting that could produce severe pain or suffering or even cause his death."[26]

The waterboard involves the subject's body responding as if they were drowning, even if they are fully aware that they are not. Bybee stated that the waterboard could not be said to inflict severe suffering as it is "simply a controlled acute episode, lacking the connotation of a protracted period of time generally given to suffering."[27] Bybee found that despite the use of the waterboard constituting a threat of imminent death, "prolonged mental harm must nonetheless result to violate the statutory prohibition on infliction of severe mental pain or suffering" as prolonged mental harm "is of some lasting duration e.g., mental harm lasting months or years."[28] In the proposal of the waterboard as an interrogation technique, the CIA advised the Office of Legal Counsel that "the relief is almost immediate when the cloth is removed from the nose and mouth" and as such, Bybee stated "in the absence of prolonged mental harm, no severe mental pain or suffering would have been inflicted, and the use of these procedures would not constitute torture within the meaning of the statute."[29] Consequently, all proposed methods were considered to be legally available for use during interrogation.

3.1.3 The Levin memo

The Levin memo was prepared in 2004 by Daniel Levin, Acting Assistant Attorney General, for James B. Comey, Deputy Attorney General, as a replacement of the 2002 Bybee memo following its leak to the New York Times.[30] This memo most notably rejected Bybee's interpretation of what constitutes torture under section 2340A of the United States Code, reaffirming the definition of torture as provided for by the Convention against Torture.[31] Levin also stated that torture is a violation of international human rights law, as well as United States domestic law.[32] Levin, however, did not withdraw Bybee's comments in his memo to Gonzales

[26] Ibid 14.
[27] Ibid 11.
[28] Ibid 15.
[29] Ibid 15.
[30] Memorandum for James B. Comey, Deputy Attorney General, Department of Defence, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, on Legal Standards Applicable Under 18 U.S.C §§ 2340-2340A (30 December 2004).
[31] Ibid 2.
[32] Ibid 1.

about the President's powers as Commander in Chief, and did not restrict any specific technique that Bybee approved in his memo to Rizzo, including the waterboard. This is noted in footnote 8 of the Levin memo, in which he states,

> *"while we have identified various disagreements with the [Bybee memorandums], we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum."*[33]

3.1.4 The Bradbury memos

Steven Bradbury, Principal Deputy Assistant Attorney General, wrote three memos to John Rizzo, Senior Deputy General Counsel of the CIA, in May 2005 reopening the discussion of the legality of certain CIA interrogation methods.

The first memo dated 10 May 2005 concerned the legality of each individual technique that may be used in the interrogation of a high value al Qaeda detainee.[34] Bradbury informed Rizzo that they did not consider "the President's authority as Commander in Chief, any application of the principle of constitutional avoidance … or any arguments based on possible defences of 'necessity' or self-defence" when coming to their conclusions of the legality of these techniques.[35] The specific techniques they were seeking approval for were:

> *"1. dietary manipulation;*
> *2. nudity;*
> *3. attention grasp;*
> *4. walling;*
> *5. facial hold;*
> *6. facial slap or insult slap;*
> *7. abdominal slap;*
> *8. cramped confinement;*
> *9. wall standing;*
> *10. stress positions;*

[33] Ibid 2.
[34] Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, on Application of 18 U.S.C §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (10 May 2005).
[35] Ibid 3.

11. water dousing;

12. sleep deprivation (more than 48 hours);

13. the 'waterboard'."[36]

The new techniques of dietary manipulation, nudity, abdominal slap, water dousing, and sleep deprivation (more than 48 hours) were provided by the CIA in this memo. Bradbury's memo concluded that the authorised use of the abovementioned methods used individually "would not violate the prohibition that Congress has adopted in sections 2340-2340A. This conclusion is straightforward with respect to all but two of the techniques."[37] Despite finding the use of sleep deprivation (more than 48 hours) and the waterboard as 'enhanced interrogation techniques' legal, their legality is contingent upon their use being with great caution and adherence to restrictions, proper training, as well as close and continuing medical and psychological monitoring.[38] Sleep deprivation must also not exceed 180 hours and this must be followed by 8 straight hours of uninterrupted sleep, should the 180 hour limit be reached. Bradbury determined that prolonged mental harm could not result from this technique, and the physical discomfort and distress that a detainee may experience from this technique does not amount to severe physical suffering.[39]

Waterboarding was assessed as "by far the most traumatic of the enhanced interrogation techniques."[40] The use of waterboarding is "strictly limited to at most 40 seconds, and a total of at most 12 minutes in any 24-hour period, and use of the technique is limited to at most five days during the 30-day period for which it is approved."[41] Bradbury concluded that this technique again does not amount to severe physical or mental pain or suffering as the physical distress only occurs during application and not afterwards. The psychological sensation of drowning accompanied with the waterboard also does not result in prolonged mental harm.[42] Therefore, none of the techniques, considered individually, were found to violate the prohibition of torture as set out in sections 2340-2340A.

[36] Ibid 6-15.
[37] Ibid 28.
[38] Ibid 28-9.
[39] Ibid 39-40.
[40] Ibid 41.
[41] Ibid 43.
[42] Ibid 43.

The second memo written by Bradbury for Rizzo on 10 May 2005 specifically addressed whether the combined use of these 'enhanced interrogation techniques' would violate the federal prohibition on torture.[43] This memo ran through the three phases of the interrogation – firstly, initial conditions where no interrogation techniques are used. Secondly, transition to interrogation where initial interviews are conducted to gauge the value of the detainee's knowledge. Thirdly, the 'enhanced interrogation techniques' are introduced.[44] The memo 'simulated' how 'enhanced interrogation techniques' could possibly be used in combination during a prototypical interrogation (a process possibly lasting 30 days before further approval is sought). Bradbury was mainly concerned with the use of the waterboard in combination with other techniques, finding no issue with the other techniques being used together. Waterboarding was only to be used in direct combination with dietary manipulation (placing detainee on a fluid diet to reduce the risk of aspiration of food matter) and during a course of sleep deprivation.[45] Bradbury ultimately stated that the use of the waterboard in combination with other enhanced interrogation techniques would not impose "distress of such intensity and duration as to amount to 'severe physical suffering', and, depending on the circumstances and the individual detainee, we do not believe the combination of the techniques, even if close in time with other techniques, would change that conclusion."[46] This was the same for prolonged mental harm, with Bradbury concluding that none of the detainees had experienced prolonged mental harm (such as post-traumatic stress disorder), as a result of the various techniques used on them.[47] Ultimately, Bradbury opined that none of the techniques used in combination would be found to violate the prohibition of torture found in the domestic law of the United States.

The third memo written by Bradbury for Rizzo on 30 May 2005 concerned the legality of the 'enhanced interrogation techniques' under article 16 of the Convention against Torture.[48] As mentioned above, article 16 concerns the obligation to prevent acts of cruel, inhuman or degrading treatment or punishment which do not amount to the level of torture. Bradbury

[43] Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, on Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees (10 May 2005).
[44] Ibid 4-6.
[45] Ibid 9.
[46] Ibid 17.
[47] Ibid 19.
[48] Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, on Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees (30 May 2005).

immediately concluded that "the CIA interrogation program does not implicate United States obligations under Article 16 of the Convention against Torture" because article 16 refers only to territories under a State Party's jurisdiction.[49] He stressed that because the United States does not exercise at least de facto authority as the government in any of the places where these CIA interrogations took place, and that no techniques were against United States citizens, article 16 is rendered inapplicable.[50]

When the United States ratified the Convention against Torture, they communicated the reservation that they are bound by article 16 only insofar that the "term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."[51] Therefore, the techniques were also examined against the United States' definition of cruel, unusual or inhumane treatment under the Amendments, should their earlier conclusion regarding the inapplicability of article 16 due to the geographical loction of the CIA black sites and military prisons be deemed incorrect. Bradbury came to the view that these techniques do not 'shock the conscience' as is required by these Amendments,[52] owing to the fact that the CIA "takes great care to avoid inflicting severe pain or suffering or any lasting or unnecessary harm" in the employment of their enhanced interrogation techniques.[53] As such, the 'enhanced interrogation techniques' used individually or in combination with each other were determined to be legal and not in violation of article 16 of the Convention against Torture.

3.2 'Enhanced interrogation techniques'

A number of the discussed 'torture memos' by Office of Legal Counsel attorneys reviewed the 'enhanced interrogation techniques' employed by the CIA in the interrogations of detainees. In totality, the 'torture memos' identified 14 'enhanced interrogation techniques' that were determined to be in agreement with articles 1 and 16 of the Convention against Torture.

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[49] Ibid 16.
[50] Ibid 16.
[51] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Declaration and Reservations', *United Nations Treaty Collection* (Web Page, 10 December 1984) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en#EndDec>.
[52] Memorandum for Rizzo from Bradbury (n 49) 36.
[53] Memorandum for Rizzo from Bradbury (n 49) 37.

Many have since been found to be violations of articles 1 and 16.[54] Abdominal slap, dietary manipulation, nudity, and the waterboard were decommissioned for use as 'enhanced interrogation techniques' in 2006 following an investigation by the CIA.[55] The Senate Select Committee on torture made the following conclusions about the CIA's program, further delegitimising the effectiveness and legality of the techniques:

a. It was not an effective means of acquiring intelligence or gaining cooperation;
b. The justifications for use rested on inaccurate claims of their effectiveness;
c. Interrogations were brutal and far worse than the CIA represented to policymakers;
d. The conditions of confinement were harsher than the CIA represented to policymakers;
e. The CIA repeatedly provided inaccurate information to the Department of Justice;
f. The CIA was unprepared when they began their detention and interrogation program, with its management and operation deeply flawed;
g. The CIA subjected detainees to unapproved coercive interrogation techniques;
h. The CIA did not keep accurate records of detainees;
i. The CIA rarely reprimanded or held personnel accountable for serious and significant violations, inappropriate activities, and systemic and individual management failures; and
j. The CIA actively ignored internal critiques and objections of their program.[56]

3.3 Accounts of torture and prisoner abuse at CIA black sites and military prisons

Numerous reports of prisoners in custody at various black sites and military prisons corroborate the findings of the Senate Select Committee on torture, with countless detainees at Abu Ghraib and Guantanamo reporting that they had experienced or witnessed 'enhanced interrogation techniques' that were not authorised by the 'torture memos.'

3.3.1 Abu Ghraib

Seymour Hersh, a political journalist for The New Yorker, revealed the detainee abuse at the CIA black site Abu Ghraib in Iraq on 30 April 2004. His article drew to attention the United

[54] For example, *José Vicente and Amado Villafañe Chaparro v Colombia* (14 June 1994) CCPR/C/60/D/612/1995 found that waterboarding indeed constitutes torture.
[55] Central Intelligence Agency, *Chronology of CIA High-Value Detainee Interrogation Technique*, 4 <https://www.thetorturedatabase.org/files/foia_subsite/8_0.pdf>.
[56] Senate Select Committee, *Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (Report, 113th Congress 2d Session, 2014) xi-xxiii.

States military prison in Iraq that mainly held civilians (including women and children), "many of whom had been picked up in random military sweeps and at highway checkpoints."[57] The abuse was internally called to attention after Sergeant Joseph M. Darby provided photographs (taken on colleague Charles Graner's camera) to the United States Army Criminal Investigation Command staff member at the Abu Ghraib prison.[58]

The Hersh article discussed a report written by Major General Antonio M. Taguba following his investigation about misconduct in Abu Ghraib. Taguba's report (released publicly in October 2004 following a freedom of information request from the American Civil Liberties Union) found that between October and December 2003:

> *"numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees. This systemic and illegal abuse of detainees was intentionally perpetrated by several members of the military police guard force. … The allegations of abuse were substantiated by detailed witness statements and the discovery of extremely graphic photographic evidence."*[59]

The intentional abuse by military personnel included the following acts:

> *"a. Punching, slapping, and kicking detainees; jumping on their naked feet;*
>
> *b. Videotaping and photographing naked male and female detainees;*
>
> *c. Forcibly arranging detainees in various sexually explicit positions for photographing;*
>
> *d. Forcing detainees to remove their clothing and keeping them naked for several days at a time;*
>
> *e. Forcing naked male detainees to wear women's underwear;*
>
> *f. Forcing groups of male detainees to masturbate themselves while being photographed and videotaped;*
>
> *g. Arranging naked male detainees in a pile and then jumping on them;*
>
> *h. Positioning a naked detainee on a MRE Box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture;*

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[57] Seymour M. Hersh, 'Torture at Abu Ghraib', *The New Yorker* (online, 30 April 2004) <https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>.
[58] Anjani Trivedi, '10 Notorious Leakers and How They Fared', *Time* (online, 10 June 2013) <https://world.time.com/2013/06/10/10-notorious-leakers-and-how-they-fared/slide/abu-ghraib-photo-leak/>.
[59] Major General Antonio M. Taguba, 'Article 15-6 Investigation of the 800th Military Police Brigade' (Oversight Report, 14 March 2004) < https://www.thetorturedatabase.org/document/ar-15-6-investigation-800th-military-police-investigating-officer-mg-antonio-taguba-taguba-> 27.

i. Placing a dog chain or strap around a naked detainee's neck and having a female Soldier pose for a picture;

j. A male MP guard having sex with a female detainee;

k. Using military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee;

l. Taking photographs of dead Iraqi detainees."[60]

m. Breaking chemical lights and pouring the phosphoric liquid on detainees;

n. Threatening detainees with a charged 9mm pistol;

o. Pouring cold water on naked detainees;

p. Beating detainees with a broom handle and a chair;

q. Threatening male detainees with rape;

r. Sodomizing a detainee with a chemical light and perhaps a broom stick.[61]

Graphic photographs of the abuse were broadcast on CBS news program 60 Minutes II. These photographs showed hooded and naked prisoners, forced to assume humiliating poses, assembled into human pyramids, as well as dead bodies, with military personnel grinning and giving the thumbs-up to the camera.[62]

The allegations of abuse and the acts that were reported by detainees at Abu Ghraib well surpassed the 14 'enhanced interrogation techniques' deemed legally permissible by the Office of Legal Counsel. The legality of the individual and combined use of 'enhanced interrogation techniques' was determined to be contingent upon its cautious usage, proper training for military staff, and mental, physical, and medical monitoring. The revelation of prisoner abuse at Abu Ghraib represents the failure of the CIA black site and military prison system at abiding by the rules of international and domestic law.

3.3.2 Guantanamo Bay

Guantanamo Bay, a United States-run detention camp held on a United States naval base in Cuba, was opened following the 9/11 attacks. A report by the International Committee of the Red Cross leaked to the New York Times in November 2004 found that military personnel at Guantanamo "intentionally used psychological and sometimes physical coercion 'tantamount

[60] Ibid 27-8.
[61] Ibid 28-9.
[62] Seymour Hersh (n 58).

to torture' on prisoners."[63] The Committee found "a system devised to break the will of the prisoners at Guantanamo … and make them wholly dependent on their interrogators through 'humiliating acts, solitary confinement, temperature extremes, use of forced positions … exposure to loud and persistent noise and music, [and] 'some beatings.'"[64] The construction of this system was deemed to be an intentional system of cruel, unusual and degrading treatment and a form of torture.

The report also found that there was a "far greater incidence of mental illness produced by stress … much of it caused by prolonged solitary confinement."[65] Perhaps one of the most startling discoveries of this report was that "doctors and medical personnel conveyed information about prisoners' mental health and vulnerabilities to interrogators."[66] This led to a decline in the confidence of prisoners in their medical care. However, it is unsure whether the contents of the report leaked to the New York Times was true as the International Committee of the Red Cross did not publicly confirm or deny its truth. This is because their policy of "direct and confidential representations to the detaining authorities best serves the objective of ensuring that the detainees' treatment meets the standards set by international humanitarian law."[67]

Despite the organisation not confirming or denying whether the quotations in the New York Times article was true, there have been countless other reports of torture and prisoner abuse from Guantanamo in the 21 years it has been operational. Guantanamo remains "one of the most enduring symbols of the injustice, abuse, and disregard for the rule of law that the US unleashed in response to the 9/11 attacks."[68] Prisoners were subjected to "to torture and other ill-treatment that included placing them in stress positions, holding them in extended solitary confinement, threatening them with torture and death, siccing attack dogs on them, depriving

[63] Neil A Lewis, 'Red Cross Finds Detainee Abuse in Guantanamo', *New York Times* (online, 30 November 2004) <https://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html>.
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] International Committee of the Red Cross, 'The ICRC's work at Guantanamo Bay' (News Release 04/70, 30 November 2004) <https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/678fk8.htm>.
[68] Letta Taylor and Elisa Epstein, 'Legacy of the "Dark Side": The Costs of Unlawful U.S. Detentions and Interrogations Post 9/11", *Costs of War: Watson Institute for International and Public Affairs* (Report, 9 January 2022) <https://watson.brown.edu/costsofwar/files/cow/imce/papers/2022/Costs%20of%20War%20-%20Legacy%20of%20the%20%27Dark%20Side%27%20-%20Tayler%20and%20Epstein%20-%20FINAL%20Jan%209%202022.pdf> 10.

them of sleep, and exposing them for prolonged periods to extreme heat, cold, and noise."[69] This finding corroborates the methods mentioned in the leaked International Committee for the Red Cross' report. These methods were also confirmed by the Senate Select Committee on torture.[70]

Zayn Al-Abidin Muhammad Husayn (known as Abu Zubaydah), mentioned above in the second Bybee memo, was the first suspected al Qaeda detainee placed into CIA custody at various CIA black sites in December 2002. Personal illustrations created by Abu Zubaydah were released in a report by the Seton Hall University School of Law, depicting the various methods of torture used against him and other high-value detainees (including al-Nashiri and Majid Khan).[71] He serves "as the premiere witness for the implementation of both the approved and unapproved torture techniques" and in this report the "depictions are so realistic that the faces of his abusers have been redacted to protect their identity."[72] In this report, Abu Zubaydah reveals how he was the first ever detainee to be waterboarded, just one day after the Bybee's August 2002 memo approving the techniques.[73] He was waterboarded 83 times during this month.[74] Khalid Sheikh Mohammed, the architect of the 9/11 attacks, was waterboarded 183 times in March 2003.[75] The use of the waterboard went far beyond what was sanctioned by the Bybee memo, namely the amount of times the waterboard was used in the approved 30-day period.

The boxes that were approved for cramped confinement were also being used as coffins for mock burials and as a common tool for water torture. The boxes were filled to the point where Abu Zubaydah would be submerged before the water would slowly leak out – he spent a total of "266 hours in a coffin-sized confinement box, each moment of this confinement was combined with the fear and threat of impending water and drowning."[76] Stress positions through the use of short shackles, standing suspension, forced bending over (including in rooms

[69] Ibid 11-2.
[70] Senate Select Committee (n 57).
[71] Mark Denbeaux, Dr Jess Ghannam and Abu Zubaydah, 'American Torturers: FBI and CIA Abuses at Dark Sites and Guantanamo' (Report, 9 May 2023) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4443310>.
[72] Ibid 6.
[73] Ibid 15.
[74] CIA Inspector General, 'Special Review of Counterterrorism, Detention and Interrogation Activities (September 2001-October 2003), Doc No 2003-7123-IG (7 May 2004) 90.
[75] Ibid 85.
[76] Senate Select Committee (n 57) 18.

with live insects such as cockroaches or scorpions) were also commonplace.[77] Procedures during rendition also involved the use of stress positions, but also involved being blindfolded with duct tape and earplugs with ear headphones also duct taped onto their head playing either no sound or loud music.[78] Rendition also meant that prisoners were forcibly subject to anal cavity searches (described as rape).[79] He was subject to beatings, hung from the roof with a chain "and for very long hours, long days or weeks", threatened with rape, and almost always forced to be naked.[80]

Majid Khan, a former prisoner held in various CIA black sites after his capture in March 2003 and transfer to Guantanamo in 2006 as a high value detainee, publicly spoke out about the details of his experience in these sites. He stated that he suffered from:

> *"dungeonlike conditions, humiliating stretches of nudity with only a hood on his head, sometimes while his arms were chained in ways that made sleep impossible, and being intentionally nearly drowned in icy cold water in tubs at two sites, once while a C.I.A. interrogator counted down from 10 before water was poured into his nose and mouth."*[81]

He further stated that military personnel pumped water and a purée of food through his rectum in a method called 'rectal feeding' by the CIA (to which Majid Khan described as rape), as well as received beatings while nude, spent long stretches in the dark and in chains, and blindfolded with duct tape which ripped off his eyebrows and eyelashes.[82] Interrogators also "poured ice water on his genitals, twice videotaped him naked and repeatedly touched his 'private parts.'"[83]

The interrogation accounts of Majid Khan, Khalid Sheikh Mohammed, and Abu Zubaydah showcase the disregard the military personnel had for the rules and restrictions in place for the interrogation of detainees, particularly in regards to the use of the waterboard. Not only did the

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[77] Mark Denbeaux, Dr Jess Ghannam and Abu Zubaydah (n 72) 23-28.
[78] Mark Denbeaux, Dr Jess Ghannam and Abu Zubaydah (n 72) 29.
[79] Mark Denbeaux, Dr Jess Ghannam and Abu Zubaydah (n 72) 30-1.
[80] Mark Denbeaux, Dr Jess Ghannam and Abu Zubaydah (n 72) 39, 44-5.
[81] Carol Rosenberg, 'For the First Time in Public, a Detainee Describes Torture at C.I.A. Black Sites', *The New York Times* (online, 30 October 2021) <https://www.nytimes.com/2021/10/28/us/politics/guantanamo-detainee-torture.html>.
[82] Ibid.
[83] Reuters in New York, 'CIA sex abuse and torture went beyond Senate report disclosures, detainee says', *The Guardian* (online, 3 June 2015) <https://www.theguardian.com/us-news/2015/jun/02/cia-sexual-abuse-torture-majid-khan-guantanamo-bay>.

military personnel ignore the rules and restrictions opined in the 'torture memos', but their actions in CIA black sites and military prisons also blatantly displayed an ignorance for the respect for human dignity and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

3.4 Legality of CIA black sites and military prisons and 'enhanced interrogation techniques'

This section of the thesis discusses the legality of the CIA black sites and military prisons and the system of 'enhanced interrogation techniques.' This section examines what conclusions made by the Office of Legal Counsel have since been determined incorrect (through case law and by treaty bodies) about the way the United States used international and domestic law to create 'lawful' detention and interrogation regimes.

3.4.1 CIA black sites and military prisons

Amnesty International stated that there were confirmed CIA black sites in 20 countries around the world, including countries such as Poland, Lithuania, Kosovo, Thailand, and Romania.[84] The black site at Abu Ghraib received public recognition following the reveal of prisoner abuse. Abu Ghraib saw over 100,000 prisoners pass through it, and at one stage in 2004 the prison held over 8,000 prisoners simultaneously.[85] Guantanamo Bay is "wholly within the authority and control of the United States government" despite being physically located outside the United States, meaning the United States is responsible for the human rights abuses which take place in the detention centre.[86] Guantanamo has seen over 780 detainees held in its gates since 2002. There are currently 30 prisoners still remaining – '11 of the remaining 30 have been charged with war crimes in the military commissions system (10 awaiting trial and 1 convicted), 3 are being held in indefinite law-of-war detention and are neither facing tribunal charges nor being recommended for release, and 16 are held in law-of-war detention but have been recommended for transfer with security arrangements to another country.'[87]

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[84] Amnesty International, 'Mapping CIA Black Sites' <https://www.amnestyusa.org/updates/mapping-cia-black-sites/>.
[85] Costs of War, 'Detention', *Watson Institute of International and Public Affairs* (Web Page, January 2022) <https://watson.brown.edu/costsofwar/costs/social/rights/detention>.
[86] Thomas M Antkowiak, 'The Americas' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 4th ed, 2022) 445, 448.
[87] The New York Times, 'The Guantanamo Docket' (News Page, 22 September 2023) <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html>.

Article 2(1) of the ICCPR requires that State Parties undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR]." This includes the "detention facilities in Guantanamo Bay, Afghanistan, Iraq and other overseas locations" according to the Human Rights Committee.[88] The United States' international legal obligations under international human rights law, international humanitarian law and international criminal law all applied to CIA black sites and military prisons. The United States' domestic law also applied to these black sites and military prisons, including the United States Code, War Crimes Act of 1996, and later the Detainee Treatment Act of 2005. All of these legal instruments were in place to ensure that the United States fulfils their legal obligations and treat their detainees in line with the law. Regardless of whether or not the Convention against Torture itself applies during armed conflicts such as the ones during the 'war on terror', "certain legislation enacted by the United States to implement the Convention against Torture requirements does."[89]

Bush (wrongly) proclaimed in 2002 that al Qaeda and Taliban detainees held in United States custody were not protected by the Geneva Conventions and declared martial law on the detainees at Guantanamo. His reasoning was that al Qaeda was not a Party to the Geneva Conventions and that the detainees cannot be classified as prisoners of war under the Conventions since the conflict was not of an international character; rather, the detainees were unlawful combatants.[90] However, the United States Supreme Court in *Hamdan v Rumsfeld* (2006) recognised that Common Article 3 applies as a matter of law to "all suspected al Qaeda or Taliban members held in United States custody."[91] Bush then signed Executive Order 13440 in 2007, declaring that the CIA's detention and interrogation program complied with all of their obligations under Common Article 3 of the Geneva Conventions.[92]

Therefore, the geographical limitation that was noted in Bradbury's third memo to Rizzo under article 16 of the Convention against Torture as well as Bush's proclamation regarding the status

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[88] Human Rights Committee, *Consideration of reports submitted by State Parties under article 40 of the Covenant*, 87th sess, UN Doc CCPR/C/USA/CO/3 (15 September 2006) [14].
[89] Congressional Research Service, 'U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques' (Report, 26 January 2009) <https://sgp.fas.org/crs/intel/RL32438.pdf> 17.
[90] Memorandum to the Vice President, Secretary of State, Secretary of Defence et al, from President Bush, on Humane Treatment of al Qaeda and Taliban Detainees (7 February 2002) 1-2.
[91] Center for Constitutional Rights, 'Faces of Guantánamo: Torture' (Report, July 2006) <https://ccrjustice.org/files/FOG_torture.pdf>.
[92] International Committee for the Red Cross, 'President Bush's Executive Order 13440' (20 July 2007) <https://casebook.icrc.org/case-study/united-states-treatment-and-interrogation-detention>.

of detainees under the Geneva Conventions were legally incorrect. One of Bradbury's arguments under article 16 of the Convention against Torture was that CIA black sites and military prisons do not exist in territories under their jurisdiction. The ICCPR and the Human Rights Committee have both since established that this is incorrect; the CIA interrogation program does indeed implicate the United States' obligations under article 16. Bradbury also drew to attention the reservation made by the United States upon ratification of the Convention against Torture. The Amendments in the domestic law of the United States had a much broader definition of cruel, inhuman or degrading treatment or punishment. It allowed for harsher techniques than what is generally accepted by the Convention against Torture, rendering the reservation incompatible with the object and purpose of the Convention.[93] The detainees were also afforded protection by the Geneva Conventions despite being initially classed as outside the scope.

3.4.2 Legality of 'enhanced interrogation techniques'

This thesis has thus far discussed the prohibition of torture as set out by international law and the domestic law of the United States. This was the law and the obligations that the United States was bound by when the Office of Legal Counsel considered the legality of certain 'enhanced interrogation techniques' proposed by the CIA in the leaked 'torture memos'. The 'torture memos' manipulated the law in such a way that determined all proposed 'enhanced interrogation techniques' to be within the confines of the law. However, multiple cases in international courts have held that many techniques implemented by the United States amounts to torture or cruel, inhuman or degrading treatment or punishment.

Various courts, George Bush and various members of his administration, Barack Obama, the United Nations High Commissioner for Human Rights, the Committee against Torture, the United Nations Special Rapporteur on torture, and the United Nations Special Rapporteur on protecting human rights while countering terrorism have all explicitly come forward and

[93] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 19(c).

determined that waterboarding will always constitute torture.[94] Rape will also always amount to torture.[95]

In *Aydin v Turkey* (1998), the European Court of Human Rights found that "the accumulation of acts of physical and mental violence inflicted […] amounted to torture."[96] The African Commission on Human and Peoples' Rights in *Abdel Hadi, Ali Radi & Others v Republic of Sudan* (2013) also agreed with this judgement, finding that a combination of physical violence and psychological suffering as well as other forms of ill-treatment amounted to torture. In that case, the methods involved included "severe beating with whips and sticks, […] rabbit jump, heavy beating with water hoses […], death threats, forcing them to kneel […] in order to be beaten on their feet and […] jump up immediately after, as well as other forms of ill-treatment."[97] The forms of ill-treatment referred to included "incommunicado detention, death threats, [and] denial of access to medical care and adequate toilet facilities."[98]

Prolonged incommunicado detention, as well as solitary confinement, were also found to be a form of ill-treatment in the cases of *El-Megreisi* (1994)[99], *Aber v Algeria* (2007)[100] and *Suárez-Rosero v Ecuador* (1997).[101] The European Court of Human Rights in *Ireland v United Kingdom* (1978) found that the use of wall standing and stress positions, sleep deprivation, dietary manipulation, subjection to white noise, and being covered with a hood amounted to inhuman and degrading treatment under article 3 of the European Convention of Human Rights.[102] The extrajudicial transfer of a detainee to a country where there is a real risk of torture or cruel, inhuman or degrading treatment or punishment is also a violation of the Convention against Torture.[103]

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[94] Human Rights Watch, 'Getting Away with Torture: The Bush Administration and Mistreatment of Detainees' (Report, 12 July 2011) <https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees>; *José Vicente and Amado Villafañe Chaparro v Colombia* (14 June 1994) CCPR/C/60/D/612/1995.
[95] *Aydin v Turkey* (1998) 25 EHRR 251 [83]-[86]; *Prosecutor v Kunarac et al*, Appeals Judgement, IT-96-23 and IT-23/1-T (20 June 2002) [150]-[151]; *Malawi African Association and Others v Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164-96/97, 210/98 (2000) [117]-[118]; *Rosendo Cantú et al v Mexico*, Merits, Reparations, Costs, Inter-American Court of Human Rights Series C No 2016 (31 August 2010) [118].
[96] (1998) 25 EHRR 251 [86].
[97] *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, Comm. No. 368/09 (2013) [71]-[73].
[98] Ibid [74].
[99] CCPR/C/46/D/440/1990 (23 March 1994) [5.4].
[100] CCPR/C/90/D/1439/2005 (16 August 2007) [7.3].
[101] Merits, IACtHR Series C No 35 (12 November 2007) [90]-[91].
[102] *Ireland v United Kingdom* (1978) 2 Eur Court HR 25 [167].
[103] *El-Masri v FYR Macedonia* (2013) 57 Eur Court HR 25; *Al Nashiri v Poland* (2015) 60 Eur Court HR 16; *Husayn (Abu Zubaydah) v Poland* (2015) 60 Eur Court HR 16.

There can be many different purposes for which torture can be committed. The ICTY case of *Prosecutor v Furundzija* (1998) held that the humiliation of the victim is a purpose of torture, as humiliation is in direct conflict with the principle of human dignity to which international humanitarian law seeks to uphold.[104] Humiliation in and of itself can also be deemed to be a form of cruel, inhuman or degrading treatment or punishment.[105] The *Greek case* held that "treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience."[106] Self-incrimination can also be a specific purpose[107], as well as intimidation.[108]

3.4.2.1 Special Review of Counterterrorism, Detention and Interrogation Activities

The CIA Inspector General launched a special review into the counterterrorism, detention and interrogation activities between September 2001 and October 2003, releasing the findings on 7 May 2004. This review was declassified (while still heavily redacted) in August 2009 and offered the first glimpse into the realities of the United States' counterterrorism program during the 'war on terror'. The review was ordered for two reasons: following an allegation that unauthorised interrogation techniques were used in the interrogation of high value detainee Abd Al-Rahim Al-Nashiri, and also a tip that some of the military personnel on some CIA black sites and military prisons were violating human rights.[109]

The special review extensively considered the effectiveness of the 'enhanced interrogation techniques' that were being implemented by military personnel. 'Enhanced interrogation techniques' were rationalised to the Office of Legal Counsel as an effective tool for "securing intelligence from detainees that were unresponsive to [regular interrogation methods], thereby increasing the capacity of the United States to prevent future terrorist attacks."[110] As noted in

[104] (Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998) [162].
[105] *Womah v Cameroon*, CCPR/C/51/D/458/1991 (10 August 1994) [9.4]; *Hénaf v France* (2005) 40 EHRR 44 [55]-[60]; *Loayza v Peru*, IACtHR series C No 33 (17 September 1997) [46(d)], [58].
[106] *The Greek Case* (1969) Yearbook: European Convention on Human Rights No 12, 186.
[107] *Cantoral Benavides v Peru*, Merits, IACtGR Series C No 67 (18 August 2000) [104]; *Tibi v Ecuador*, Preliminary Objections, Merits, Reparations and Costs, IACtHR Series C No 114 (7 September 2004) [148].
[108] *Gomez-Paquiyauri Brothers v Peru*, Merits, Reparations and Costs, IACtHR Series C No 110 (8 July 2004) [116].
[109] CIA Inspector General (n 75) 1-2.
[110] Ruth Blakely, 'Dirty Hands, Clean Conscience? The CIA Inspector General's Investigation of 'Enhanced Interrogation Techniques' in the War on Terror and the Torture Debate' (2011) 10 *Journal of Human Rights* 544, 547.

Bybee's second memo to Rizzo, the CIA's standard interrogation techniques were 'enhanced' specifically for use on high value detainee Abu Zubaydah. The documentary material that the CIA Inspector General reviewed in his investigation did not actually produce any conclusive results about the effectiveness of the 'enhanced interrogation techniques'. No imminent plots were uncovered as a result of the techniques. He concluded that in the case of Abu Zubaydah, he could not definitively answer that his 83 applications of waterboarding in August 2002 was the reason for his "increased [cooperation], or if another factor, such as the length of detention, was the catalyst."[111] In the case of Al-Nashiri the CIA could not determine exactly why he became more cooperative "because of the litany of techniques used by different interrogators over a relatively short period of time."[112]

It is important to note that the CIA had been aware of the fact that the 'enhanced interrogation techniques' were a violation of international humanitarian law since the 1980s. The 'enhanced interrogation techniques' used in the 'war on terror' were closely modelled off the Human Resource Exploitation Training Manual 1983 that was used by CIA personnel during the Cold War. The techniques in this Manual were outlawed by the CIA in the Cold War, stating that the Manual condoned the use of torture and degrading and humiliating treatment. The Manual was no longer "authorized nor condoned" and was considered a poor means of obtaining evidence as it "yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear."[113]

Majid Khan, a high-value detainee, said that "the more [he] cooperated, the more [he] was tortured" and that he "lied just to make the abuse stop."[114] This directly corroborates the Manual's finding that the subject of the torture can just say what they think the interrogator wants to hear, greatly diminishing the value of the intelligence they provide. Despite the CIA being aware that these methods constituted torture, they went ahead with their 'enhanced interrogation techniques' program and began twisting the law to make the techniques legal regardless. By disregarding their own policies, the CIA illustrates a blatant and wilful disregard for the law.

[111] CIA Inspector General (n 75) 90.
[112] CIA Inspector General (n 75) 90-1.
[113] Ruth Blakeley (n 111) 548.
[114] Carol Rosenberg (n 82).

In the case of *Seloumi v France* (2000) the Grand Chamber of the European Court of Human Rights held that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to torture could be classified differently in the future."[115] This means that the standards on what is considered torture is changing. The 1983 Manual was determined to have condoned acts of torture and ill-treatment and was subsequently dropped by the CIA as a training manual. The CIA placed disclaimers at the start of the Manual, emphasising that it was no longer authorised for the reason that the methods were deemed by them to be torture. This conclusion was reached in the 1980s, twenty years prior to the judgement of *Seloumi v France*. If the CIA themselves determined that the 1983 Manual methods constituted torture or ill-treatment in the 1980s, one can reasonably make the determination that the methods would still constitute torture today. The CIA revived their very own disgraced Manual from the 1980s to create the 'enhanced interrogation techniques', ignoring all disclaimers. Therefore, one can easily understand that the CIA was well aware of the illegality of their own actions. There is no amount of moral or legal justification that the United States government can provide for their violation of the prohibition of torture.

The CIA Inspector General's special review acknowledged that the 'enhanced interrogation techniques' are "inconsistent with the public policy positions that the United States has taken regarding human rights."[116] The review also illustrates how the CIA and military personnel working at the CIA black sites and military prisons were aware that they went further than what they were authorised to do whenever they implemented the 'enhanced interrogation techniques' in interrogations. The 'torture memos' represent an effort by the CIA to retroactively seek approval from the Office of Legal Counsel for methods already being implemented during interrogation practices in order to avoid legal repercussions.[117] This begs the question of how, despite knowledge of the illegality of their actions, senior level officials are yet to be held responsible for their actions. The torture and inhumane treatment of their detainees, especially the ones they deemed 'high value', constitute a violation of the prohibition on torture, a conclusion that was agreed upon by the CIA themselves.

All these cases and the CIA Inspector General's review evidence that most, if not all, of the 'enhanced interrogation techniques' employed by the CIA constitute a form of torture or cruel,

[115] *Seloumi v France* (2000) 19 EHRR 403 [101].
[116] CIA Inspector General (n 75) 91.
[117] Blakeley (n 111) 550.

inhuman or degrading treatment or punishment individually or combined. *Husayn (Abu Zubaydah) v Poland* (2015) held that the United States' program of 'enhanced interrogation' was tantamount to torture.[118] This judgement was tied with the judgement of *Al Nashiri v Poland* (2015).[119] If the 'approved' 'enhanced interrogation techniques' have been classified as torture by the European Court of Human Rights, one can reasonably find that the unapproved and unauthorised interrogation techniques that were also being used would also constitute torture. As the prohibition of torture and other cruel, inhuman or degrading treatment or punishment both enjoy *jus cogens* status, the question of how the United States has not been held responsible for their violations of international law awkwardly remains.

4 Justifications provided by the United States for their use of torture

This section analyses how the United States legitimised their use of torture and other cruel, inhuman or degrading treatment or punishment following the revelations of prisoner abuse and the leaking of the 'torture memos', revealing their incorrect conclusions about the legality of the 'enhanced interrogation techniques'. The United States implemented a variety of justifications in order to legitimise their acts of torture and other cruel, inhuman or degrading treatment or punishment. These justifications can be broadly categorised into the legal, political, and social spheres.

4.1 Legal justifications

4.1.1 Legal reinterpretation and reclassification

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment's status in customary international law and as a *jus cogens* norm means that there is no possible legal justification that can be provided. However, the United States has developed a unique circumstance whereby state practice provided twisted justifications for their treatment of detainees. The only possible basis available to the United States to deny their legal obligations to not commit torture was to argue that the governing laws do not apply to their situation.

The 'torture memos' purposely misinterpreted the United States' obligations under the Convention against Torture such that they could make their 'enhanced interrogation techniques'

[118] *Case of Husayn (Abu Zubaydah) v Poland* [2014] Eur Court HR [511].
[119] *Al Nashiri v Poland* (2015) 60 Eur Court HR 16 [504].

comply with the law. Bybee's memos showcase a desperation to twist international law to legitimise the United States' counterterrorism purposes. Bybee weaponises legal reclassification and reinterpretation to serve the ulterior motives of the CIA, putting forward arguments about what Bybee (or the CIA) "wanted the law to be, rather than assessments of what the law actually is."[120] His departure from the Convention against Torture's article 1 definition evidences this, and is further supported in his second memo when he reaffirmed his redefinition of torture and examined each of the proposed techniques according to this definition. By reinterpreting the meaning of torture, the government could claim that they did not contravene their international law obligations.

The high threshold set by *Ireland v United Kingdom* also allowed Bybee to legitimise the CIA's standard and enhanced 'interrogation techniques.'[121] This case found the techniques implemented in their interrogation practices to be ill-treatment, placing the United States in contravention of treaty obligations by relying on it. The 'torture memos' also showcase a system by which the CIA and the Office of Legal Counsel essentially worked together to confirm the legality of each proposed technique.[122] This can be seen through Bybee's memo discussing waterboarding where he states that "although the waterboard constitutes a threat of imminent death, prolonged mental harm must result." This is legally incorrect but becomes 'correct' according to Bybee's redefinition of torture. This allows the United States government to legitimise the actions of CIA interrogators and provides them a 'legal defence' to the citizens of the United States should they get brought up on charges. This method of legal justification – the reclassification and reinterpretation of the law from illegal to legal – poses a dangerous precedent for the international prohibition of torture.

4.1.2 Necessity and self-defence

"Torture is considered as one of the most egregious and morally reprehensible human rights abuses and its prohibition is one of the most fundamental values of democratic societies. The prohibition is absolute and non-derogable and applies even in the most difficult of circumstances including public emergencies."[123] The legal and political justifications provided in the 'torture memos' heavily relied upon the concept of the 'war on terror' being a 'necessary'

[120] Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press, 2013) 21.
[121] Memorandum from Bybee to Rizzo (n 23) 28.
[122] Karen Greenberg, 'What the Torture Memos Tell Us' (2009) 51 *Survival* 5, 7.
[123] *Abdel Hadi, Ali Radi & Others v Republic of Sudan* (2013) Comm. No. 368/09 [69].

response to the 9/11 attacks. The legal and political justifications provided by the Bush administration following the revelation of prisoner abuse at Abu Ghraib were very effective at swaying public opinion, legitimising their use of 'enhanced interrogation techniques' as being absolutely necessary and in self-defence. The arguments of necessity and self-defence also link to the paradigm of good and evil through Bush's declaration of war in 2003 in which he stated that the "dangers to our country and the world will be overcome" as a result of their intervention in Iraq.[124] These justifications legitimise one another, working in tandem to achieve the goals of the government.

The defences of necessity and self-defence are available for violations of section 2340A under the domestic law of the United States as Bybee lengthily discusses in his first memo to Gonzales.[125] These defences heavily pervaded the justifications used by the Bush administration to legitimise their use of torture and cruel, inhuman or degrading treatment or punishment. The United States often utilised the hypothetical situation of the 'ticking time bomb scenario' to legitimise their violations of international law. By arguing that the detainees were withholding knowledge and information of imminent potential terror acts targeting the United States and the only way to retrieve this information from the detainees was through 'enhanced interrogation techniques' amounting to torture, self-defence and necessity could arguably be relied upon as a defence to said torture. The citizens of the United States and the international community are aware in retrospect of the fact that the 'enhanced interrogation techniques' aided only in the production of bad intelligence and would have been ineffective at stopping at an imminent threat to the livelihood of the United States. By framing their violations of international law as something necessary, something imperative for the security of their country, the severity of their violation of the prohibition on torture would be minimised and/or legitimised for use.

4.2 Political justifications

4.2.1 Identity and position in society

No State has brought forward action against the United States for their contravention of the *jus cogens* prohibition against torture, the Convention against Torture, or the Geneva Conventions. The language used by the attorneys at the Office of Legal Counsel in the 'torture memos' and

[124] President Bush, 'President Bush Addresses the Nation' (Speech, White House, 19 March 2003) <https://georgewbush-whitehouse.archives.gov/infocus/iraq/news/20030319-17.html>.
[125] Memorandum from Bybee to Gonzales (n 18) 2.

letters between attorneys convey how the United States often viewed themselves as above the law, unafraid of possible legal repercussion. For example, John Yoo wrote a letter to Alberto Gonzales on 1 August 2002 stating that:

> *"the Bush administration's understanding created a valid and effective reservation to the Torture Convention. Even if it were otherwise, there is no international court to review the conduct of the United States under the Convention."*[126]

This is further evidenced by Bradbury's final remarks in his third memo to Rizzo, stating that he "cannot predict with confidence whether a court would agree with this conclusion, though the question is unlikely to be subject to judicial inquiry."[127] The language used by these attorneys displays a shocking level of self-assuredness that their twisting of the law will remain unchallenged by the international community. The United States felt unconstrained by their international legal obligations, knowing that their legal manipulation would not get actioned in a court of law. The ideal of American exceptionalism thrives in the 'torture memos' and the general actions of the United States during their 'war on terror'. American exceptionalism has provided the United States with the "right to intervene in the affairs of nations throughout the world."[128] Placing themselves at the top of the international order allows the United States to act as it sees fit, without the risk of legal responsibility and accountability.

4.2.2 Impact of the destruction of CIA interrogation tapes

In 2005 it was revealed that CIA personnel approved and oversaw the destruction of videotapes of detainee interrogations, including Abu Zubaydah and Al-Nashiri. The simple question is why destroy tapes recording methods and processes that the CIA has deemed legal? If the CIA had nothing to hide, would the tapes not prove that their actions did not amount to torture or other cruel, inhuman or degrading treatment or punishment? The Director of the CIA stated that the tapes were destroyed to protect the agents involved with the interrogations from "retaliation from al Qaeda and its sympathizers."[129] Framing the destruction of tapes as a protection measure as opposed to what is clearly concealment of evidence and obstruction of

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[126] Letter for Alberto R. Gonzales, Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General (1 August 2002) 5.
[127] Memorandum for Rizzo from Bradbury (n 49) 40.
[128] Eric Forner, 'What Is American Exceptionalism', *Ethics & International Affairs* (online, 8 August 2013) <https://www.ethicsandinternationalaffairs.org/online-exclusives/what-is-american-exceptionalism>.
[129] Amnesty International, 'USA Destruction of CIA interrogation tapes may conceal government crimes' (Public Statement AMR 51/194/2007, 7 December 2007) <https://www.amnesty.org/en/wp-content/uploads/2021/07/amr511942007eng.pdf>.

justice allows the CIA to legitimise their actions once again as both political and internal social justifications. The destruction of the tapes also links to the necessity and self-defence arguments, in that their destruction was necessary for the security of their people and country. The interconnectedness of all these justifications highlights how all their provided justifications are complementary to each other, each serving their own unique purpose whilst also contributing to the larger picture that the United States is trying to put forward to the public.

While it will never be known what 'enhanced interrogation techniques' exactly were used on these high value detainees in these tapes, the fact of the destruction of the tapes by CIA personnel itself provides an irresistible inference that the CIA were in fact aware of the illegality of their actions. The simple fact that the contents of the tape leaves interrogators open to the possibility of retaliation from al Qaeda or its sympathisers if it were to be leaked must, as a matter of course, speak volumes about its contents. The possibility of retaliation would not occur if the interrogations complied with international law. The CIA were indeed culpable for the torture and other cruel, inhuman or degrading treatment or punishment of detainees; however, Assistant Attorney John Durham led an investigation into the destruction of the tapes and concluded that "he will not pursue criminal charges for the destruction of the interrogation tapes."[130] Durham provided no reasoning behind why he would not pursue criminal charges. Not pursuing criminal charges despite the obvious illegality of their actions showcases how the lack of justice for the victims of torture and ill-treatment once again prevails.

4.3 Social justifications

4.3.1 The paradigm of good and evil

The language of the enemy heavily permeates through the discourse of the United States government regarding the 'war on terror'. The 'war on terror' is in and of itself a counterterrorism measure launched in response to 9/11. The concept of *hostis humani generis*, meaning "enemy of the human race", is particularly relevant to the paradigm of good and evil that is present in the war on terror discourse.[131] During the 'war on terror' the United States continuously refers to the enemy (terrorist groups) and categorises them as 'evil'. By

[130] Office of Public Affairs, 'Department of Justice Statement on the Investigation into the Destruction of Videotapes by CIA Personnel' (Press Release No 10-1267, 9 November 2010) <https://www.justice.gov/opa/pr/department-justice-statement-investigation-destruction-videotapes-cia-personnel>.

[131] Dan Edelstein, 'Hostis Humani Generis: Devils, Natural Right, and Terror in the French Revolution' (2007) 141 *Telos* 57, 59.

categorising terrorist groups as an 'evil' that the United States must find, stop, and defeat, the government distinguishes themselves as a protector or a saviour in the eyes of the human race – they are the 'good' side. President Bush certainly played on the paradigm of good and evil in many of his public addresses concerning the 'war on terror'. Examples include statements such as "[the United States is] taking action against evil people […] Our war is a war against evil. This is clearly a case of good versus evil, and make no mistake about it – good will prevail", "these terrorists don't represent peace. They represent evil and war", and "it is a war against evil people who conduct crimes against innocent people."[132]

He also stated that "our enemy is a radical network of terrorists, and every government that supports them."[133] By defining the terrorist network as 'our' enemy, the members of the public and the international community were made to feel as though they were a part of this fight against evil. They become supportive of the measures that their government take to protect them from the evils of the terrorists, linking back to the legal justification of necessity and self-defence. They feel as though the decisions the government makes are with their best interests at heart. Rhetoric plays a great role in the shaping of the public's views on current situations, as was especially seen following the revelation of torture and prisoner abuse at Abu Ghraib. Violations of human rights were morally justified in the 'war on terror' when the public and the international community were told it was done in the name of saving them from evil. It even stands to reason to conclude that the 'war on terror' should then be considered to be an obligatory measure in the name of counterterrorism.[134] The United States sanctified themselves and their public standing rose in the international community through the demonisation of the 'evil' terrorists, that is, their opponents in their self-proclaimed 'war on terror.'[135]

The paradigm of good and evil has existed in natural law for the past millennium, tracing back to times of the laws of nature; "[since] the 'barbaric' practices of the 'savages' violated the laws of nature, European sovereigns had a natural right and duty to punish them."[136] It has always been the duty of the 'good' sovereign to punish the 'bad' enemy of the sovereign for their

[132] White House Archives, 'Backgrounder: The President's Quotes on Islam' *President George W. Bush* (Web Page) <https://georgewbush-whitehouse.archives.gov/infocus/ramadan/islam.html>.
[133] George Bush (n 1).
[134] Michael Freeman, 'Order, Rights and Threats: Terrorism and Global Justice' in Richard Ashby Wilson (ed), *Human Rights in the 'War on Terror'* (Cambridge University Press, 2005) 37, 52.
[135] Ibid.
[136] Dan Edelstein, *The Terror of Natural Right: Republicanism, the Cult of Nature, and the French Revolution* (The University of Chicago Press, 2009) 27.

crimes. The use of the words 'barbaric' and 'savages' declass the enemy, equating them with something no longer civilised. The 'barbaric' and 'savage' are morally bankrupt and must be punished. The international community in turn dehumanise and demonise the 'evil' enemy, allowing the United States government to punish the 'savage' terrorists in any way it sees fit. The Bush administration was successful in their distortion of the law and manipulation of public favour by playing into their citizens' fear of conflict.[137]

The lead prosecutor in Majid Khan's case, Colonel Walter Foster IV, told the jury that while Khan got "extremely rough treatment" while he was a prisoner in CIA custody, he is "still alive", "which is 'a luxury' the victims [of the Jakarta Marriott attack he couriered money to] do not have."[138] Former Vice President Dick Cheney said in an interview that "there isn't any other nation in the world that would treat people who were determined to kill Americans the way we're treating these people. They're living in the tropics. They're well fed. They've got everything they could possibly want."[139] Colonel Foster IV and Cheney's statements here display a complete disregard and lack of respect for the principle of human dignity afforded above all to everyone. A terrorist's right to human dignity is being impinged upon due to their commission of acts of terror. They are viewed as less worthy of human dignity by the international community and government officials alike. Comparing the detention of prisoners subjected to torture and cruel, inhuman or degrading treatment or punishment as 'the tropics' and 'luxury' implies that the hard or 'extremely rough treatment' that they are experiencing is a blessing and worth more than what they deserve. The 'savage' criminals are demoted to 'less than' or 'other' and therefore unworthy of the level of human dignity afforded to all citizens. Cheney's usage of the words 'determined to kill Americans' also further plays into the paradigm of good and evil by further emphasising how the detainees have only one mission – killing American citizens. The more this point is emphasised in public discourse, the more fearful the public becomes and, subsequently, the more supportive they are of measures that infringe upon the prohibition of torture.

In a post-9/11 society, fears of conflict were heightened exponentially. The opinions of the members of the public were moulded significantly by the United States government and their

[137] Filip Svítek, 'Identity, Securitization, and New Norm Creation: The Evolution of US Normative Behavior During the Global War on Terror' (2017) 35 *Politikon: The IAPSS Journal of Political Science* 5, 17.
[138] Carol Rosenberg (n 82).
[139] Wolf Blitzer, 'Cheney: Iraq will be 'enormous success story'', *CNN* (online, 24 June 2005) <https://edition.cnn.com/2005/POLITICS/06/23/cheney.interview/>.

rhetoric. The perception of the 'enemy of mankind' as 'evil' and morally corrupt leaves the members of the public impressionable to the propaganda that the 'good' government pedals. The paradigm of good and evil was therefore an incredibly useful tool in the United States' arsenal as they traversed the highly contentious legal and political topic that was the use of torture in the 'war on terror.'

4.3.2 The paradox of international human rights law

The United States' invasion of Iraq in 2003 was initially justified as a necessary measure to curb the efforts of Saddam Hussein in creating weapons of mass destruction.[140] However, this was soon determined to be a false claim, with no proof ever uncovered during the invasion.[141] The Bush administration thus decided to frame the invasion of Iraq as a fight for the protection and promotion of human rights for the citizens of Iraq, who the United States determined to be victims of a tyrannical and dictatorial regime controlled by Saddam Hussein.

The paradox of international human rights law is apparent here; in order to protect people from human rights abuses, the violation of human rights must first be committed. The paradox thrives where there is an instance of a fight for the promotion of human rights. The United States deemed the invasion of Iraq as obligatory in the 'war on terror' to protect the human rights of Iraqi citizens. The only way they could protect their human rights was to first commit breaches of human rights. This paradox allows government leaders to distort the norm of jus cogens. In the 'war on terror', the prohibition of torture is secondary to the actual act of torture. The law is twisted to ensure that ends justify the means. Donald Rumsfeld declared in 2002 that "the war on terrorism is a war for human rights."[142] The 'war on terrorism' is therefore branded in the eyes of the international community as a necessary means to protect and promote the human rights that all citizens are afforded.

The justifications provided for the invasion of Iraq tie into the thinking of Makau Mutua and Robert Meister.[143] When the government attempts to rescue victims from apparent 'evil' (in this case, the terrorist networks who have become dictators in their home state), they ignore

[140] Wiktor Osiatynski, 'Are Human Rights Universal in an Age of Terrorism?' in Richard Wilson, *Human Rights in the 'War on Terror'* (Cambridge University Press, 2005) 303.
[141] Ibid.
[142] Wendy Brown, 'Tolerance as/in Civilizational Discourse' (2008) 48 *Nomos* 406, 407.
[143] Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, 2002); Robert Meister, *After Evil: A Politics of Human Rights* (Columbia University Press, 2011).

the suffering of the perpetrator as a result of their rescue or intervention. Perpetrators of evil are therefore barred from accessing the protections that are afforded to them under international human rights law. This barring occurs as a result of the ideology or rhetoric of the 'good' United States government, enabling the United States to exclude themselves and their associates (for example, the United Kingdom or Australia as will be discussed in section 5.3 of this thesis) as perpetrators of human rights violations. The means that are used by the United States government to rescue the victims of evil are therefore considered exempt as violations of international human rights law.

The reveal of the prisoner abuse in Iraq's Abu Ghraib demonstrates how their social justification for the invasion was in fact untrue. The notion that the invasion was for the purposes of protecting the Iraqi people suffering human right violations was hypocritical when considering that the United States were the ones who were detaining (mostly innocent) citizens and violating their human rights such that it amounted to torture and cruel, inhuman or degrading treatment or punishment. This directly corroborates the paradox of international human rights law and the role it has played in the 'war on terror.'

In the 'war on terror', the emergency situation of 9/11 led to the United States' sovereign decision to use torture on the 'evil' terrorists who committed the attack or had ties to the attackers.[144] This concept, known as the state of exception, links perfectly with the paradox of international human rights law and also ties into the defences of necessity and self-defence that the Bush administration used as legal justification for their use of torture.[145] Abu Ghraib and Guantanamo Bay existed in this concept of the state of exception, "in the lawlessness declared by a sovereign decision."[146] The prohibition of torture and respect for human dignity enshrined in international law have been desecrated in this state of exception. The conclusion that the illicit activity committed by the State is necessary and a consequence of an emergency situation such as 9/11 fosters the state of exception in which Guantanamo Bay and Abu Ghraib thrived. The justifications provided for by the United States shield them from any fallout under the protection of the state of exception. It was therefore paramount for President Bush to invoke a

[144] Giorgio Agamben, *The State of Exception as a Paradigm of Government* (translated by Kevin Attell) (University of Chicago Press, 2005) 2-3.
[145] Ibid 24.
[146] Claudia Aradau, 'Law transformed: Guantanamo and the 'other' exception' (2007) 28 *Third World Quarterly* 489.

state of exception in the 'war on terror' to justify the actions his legal administration and the CIA would undertake to respond to the 9/11 attacks.

The paradox of international human rights law served as an important justification for the use of torture by the United States. The paradox essentially allows for violations of human rights to exist as the only means of protecting the human rights of the country for the future. The state of exception was a useful concept, allowing the United States to violate the prohibition of torture in a morally dubious way.

4.4 Future administrations and their relationship with torture

The United States government has a history of ignoring the well-documented practices of torture that has been committed by their own regime. The negligence to admit responsibility for torture began with the Bush administration and continued under the Obama, Trump, and Biden administrations.

Obama has acknowledged the use of torture, stating that "[the United States] did a whole lot of things that were right, but we tortured some folks."[147] His informal words and carelessness regarding the suffering of the victims is demonstrated by referring to the victims casually as "some folks." Obama banned the use of the 'enhanced interrogation techniques' immediately after he came into office in 2009, but never outwardly admonished the people who committed torture. He admitted that he was not going to prosecute anyone involved with the torture of detainees as "this is a time for reflection, not retribution."[148] He also refused to declassify 2,100 photographs depicting detention and interrogation operations despite a federal judge ordering him and his administration to in 2014.[149] He stated that "a lot of [the military personnel at these sites] were working hard under enormous pressure and are real patriots." By equating the violation of international law with a sense of pride of country, it highlighted the paradigm of good and evil the United States government used as social justification for torture. Denoting that the torturers are patriots and that the country is proud of them also illustrates the blasé attitude the government held towards seeking prosecutions for senior officials and further

[147] Roberta Rampton and Steve Holland, 'Obama says that after 9/11, 'we tortured some folks"', *Reuters* (online, 2 August 2014) <https://www.reuters.com/article/us-usa-cia-obama-idUSKBN0G14YY20140801/>.
[148] President Barack Obama, 'Statement of President Barack Obama on Release of OLC Memos' (Press Release, White House, 16 April 2009) <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/statement-president-barack-obama-release-olc-memos>.
[149] Jared del Rosso, *Talking About Torture* (Columbia University Press, 2015) 161.

implicates their acquiescence with the act of torture from the start of the 'war on terror'. He also announced his decision to close Guantanamo in 2009 but this did not occur; he slowly transferred prisoners out of Guantanamo, but 30 prisoners remain to date.[150] Obama's rhetoric was crucial in the social normalisation of the use of torture.

Trump expressed his support for torture countless times throughout his campaign, publicly stating that he believes waterboarding and torture "absolutely" works[151] and revealing an intention to keep Guantanamo open.[152] Despite being personally supportive of the use of torture for intelligence and counterterrorism purposes, his administration appear to have made no real attempts to reintroduce 'enhanced interrogation techniques', instead abiding by the Obama administration's anti-torture provisions.[153]

Biden reversed Trump's aim and has made efforts at closing Guantanamo, but remains staunch on the lack of convictions for people involved with torture.[154] He has also made statements on the International Day in Support of Victims of Torture condemning the use of torture. What is interesting about these statements is that he condemns Syria, Russia, North Korea, Burkina Faso, and Burma for their practices of torture whilst simultaneously continuing the pattern of ignorance we have seen with the United States government with respect to their own commission of torture, thereby exacerbating the ideal of American exceptionalism.[155]

4.5 Concluding remarks on justifications

Overall, the legal, political, and social justifications provided by the United States display an attempt to conceal the nature of their violations. It has been long established by investigations from within the United States government itself that their use of 'enhanced interrogation techniques' constituted torture or other cruel, inhuman or degrading treatment or punishment.

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[150] Kenneth Roth, 'Barack Obama's Shaky Legacy on Human Rights', *Human Rights Watch* (9 January 2017) <https://www.hrw.org/news/2017/01/09/barack-obamas-shaky-legacy-human-rights>.
[151] James Masters, 'Donald Trump says torture 'absolutely works' – but does it?', *CNN* (online, 26 January 2017) <https://edition.cnn.com/2017/01/26/politics/donald-trump-torture-waterboarding/index.html>.
[152] John J. Farmer and Edward M. Neafsey, 'Trump and the Law on Torture', *Lawfare* (online, 1 March 2018) <https://www.lawfaremedia.org/article/trump-and-law-torture>.
[153] Ibid.
[154] Noha Aboueldahab, 'It's Time for a Reckoning on Torture', *Foreign Policy* (online, 15 September 2021) <https://foreignpolicy.com/2021/09/15/guantanamo-bay-closure-torture-biden-administration/>.
[155] See Statement by President Biden (26 June 2023) <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/26/statement-from-president-biden-on-international-day-in-support-of-victims-of-torture/>; (26 June 2002) <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/26/statement-by-president-joseph-r-biden-jr-on-international-day-in-support-of-victims-of-torture-2/>.

The discourse surrounding torture has been heavily controlled by the government and public addresses. The media were also effective at purveying the view that the detainees in CIA black sites and military prisons were 'evil' and therefore deserved the torture and the infringement of their human rights. Rhetoric and ideology were consequently key tools in the justification of their violations in the eyes of the citizens of the United States and the international community. Nonetheless, the prohibition of torture remains *jus cogens* and the lack of accountability in relation to their violations in the international sphere must be investigated.

5 Consequences for the use of torture

5.1 Convictions for torture

The United States has a duty to investigate all acts of torture that occurs under its jurisdiction or are committed by its citizens under article 5 of the Convention against Torture. The United States indicted Chuckie Taylor under section 2340A for acts of torture committed in Liberia (as well as other war crimes) in 2006.[156] This conviction imparts upon the public that the United States is willing to prosecute its own citizens for acts of torture committed overseas only where it was not consented to or approved by their administration. They have not been willing to prosecute or even investigate senior officials in their government and the CIA for their liability in the torture of detainees. The double standards displayed by the United States is damning – they are quick to condemn human rights violations committed in other countries such as Liberia and Iraq but are slow to accept culpability for their own human rights violations, instead framing them as a necessity.

Article 2(3) of the Convention against Torture states that orders from a superior officer or a public authority cannot be invoked as a defence to torture. The revelation of prisoner abuse at Abu Ghraib led to the convictions of eleven military personnel – all convictions included the charge of dereliction of duty. Most of the personnel convicted only received minor sentences, the maximum sentence handed down being 10 years imprisonment for Charles Graner. Some convicted received discharges from the Army and some also received a reduction in their rank. All of those convicted were released on parole instead of serving their full sentences, including Charles Graner who only served 6 years of his 10-year sentence and Ivan Frederick II who only

[156] Human Rights Watch, 'Q & A: Charles 'Chuckie' Taylor Jr's Trial in the United States for Torture Committed in Liberia' (Web Page, 23 September 2008) <https://www.hrw.org/news/2008/09/23/q-charles-chuckie-taylor-jrs-trial-united-states-torture-committed-liberia>.

served 3 years of his 8-year sentence.[157] The commanding officer of all 12 Iraqi detention facilities at the time, Brigadier General Janis Karpinski, received a demotion to Colonel officially separate from the abuse at Abu Ghraib prison. She was not convicted for any charges against her, including dereliction of duty. Colonel Thomas Pappas was relieved of his command, fined $8,000 and disciplined for allowing muzzled dogs inside interrogation rooms, but faced no criminal prosecution. Lieutenant Colonel Steven L. Jordan was the only high-ranking officer to have been charged. He was found guilty only for "disobeying a general's command not to talk about allegations of abuse at the prison", however a few months later, he was cleared of all wrongdoing and his record was expunged.[158]

The convictions represent a feeble attempt to punish the personnel on these sites for their abuse and sexual humiliation of detainees. The prisoner abuse at Abu Ghraib was nothing short of torture and cruel, inhuman or degrading treatment or punishment, but the maximum prison term served was only 6 years. The fact that most of the people convicted were low-level personnel and the higher-level personnel faced no criminal convictions highlights how these convictions were purely superficial and were not intended to truly punish the people at the root of the abuse. The higher-ranking officials and the government repeatedly used the argument that the torture and ill-treatment were committed by "a few bad apples", taking no accountability for the torture and ill-treatment suffered by detainees.[159] However, these convictions and reprimands make clear that the abuse was a program of systemic torture, pervading every level of the CIA black sites and military prisons that held detainees. The lack of punishment for those that violated the law only further evidence that the systemic torture was encouraged as a method of counterterrorism.

5.2 Compensation and redress for victims of torture

Article 14 of the Convention against Torture provides for the compensation and redress for victims of torture. Despite admitting to torture, the United States has failed to comply with their international obligations under article 14. There have been multiple reports of victims of

[157] CNN Editorial Research, 'Iraq Prison Abuse Scandal Fast Facts', *CNN* (Web Page, 10 March 2023) <https://edition.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/index.html>.
[158] Ibid.
[159] Human Rights Watch, The Road to Abu Ghraib' (Report, 8 June 2004) <https://www.hrw.org/report/2004/06/09/road-abu-ghraib>.

torture claiming that they have not been provided with compensation or other redress.[160] The documentation of torture is extensive and yet there is no avenue or pathway for the victims of this abuse to file a claim or receive redress from the government of the United States. The only recognition these victims have received are a public apology from Bush for the "humiliation suffered by the Iraqi prisoners" and an unactioned plan by Rumsfeld for the legal compensation of Iraqi detainees.[161] Reparations are a general rule for violations of international law, yet the United States has made the process for obtaining reparations a challenge as claims have been dismissed by courts in the United States for reasons such as the state secrets doctrine.[162] While the government has found that the public has accepted their moral justifications for the use of torture, the lack of urgency to make reparations for victims of torture by the United States shows yet again complete disregard for their obligations under international law. The lack of compensation and redress for victims also further exemplifies how the United States view themselves as above the law, as a country with high international standing that does not fear the consequences of breaking international law.

5.3 The United States and their relationship with other States

The crimes committed by military personnel under the approval of government officials during the 'war on terror' are abhorrent and morally reprehensible, so it is interesting to examine the differing reactions of States towards the revelation of these crimes. It is curious that no State has ever stepped up to bring forward action against the United States for their breach of norm of *jus cogens* status, even after the government outright confirmed their use of waterboarding was torture, and demonstrated the countless methods in which they manipulated the law to justify it.

As noted throughout this thesis, norms that have achieved *jus cogens* status are absolute. They are unable to be legally justified no matter the circumstances, including war, necessity, and self-defence. Where a State Party has committed a breach of a norm of *jus cogens*, any State is free to institute proceedings against them in the International Court of Justice.[163] Articles 5, 6, and 7 of the Convention against Torture set out that acts of torture committed by citizens of the

[160] Human Rights Watch, 'Iraq: Torture Survivors Await US Redress, Accountability' (25 September 2023) <https://www.hrw.org/news/2023/09/25/iraq-torture-survivors-await-us-redress-accountability>.
[161] Ibid.
[162] Nathalie Weizmann, 'State Responsibility and Reparation for Torture as a Violation of IHL' (10 September 2014) <https://www.justsecurity.org/18232/state-responsibility-reparation-torture-violation-ihl/>.
[163] Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006) 518.

United States or under its jurisdiction must be investigated and prosecuted. The government complied with these articles in a very superficial manner. The investigations and convictions for the people involved in the Abu Ghraib photo scandal were punished inadequately. Higher level officials were not even prosecuted and no one from the Bush administration, CIA, or Office of Legal Counsel were investigated for their instigation of torture, or consent/acquiescence to committing torture. Article 20 of the Convention against Torture invites State Parties who have reliable information of the systematic practice of torture committed by another State Party to make an inquiry with the Committee against Torture for investigation. Article 21 of the Convention against Torture sets out the procedure by which a State Party who believes that another State is not fulfilling their obligations under the Convention may bring forward a complaint. The Bush administration have openly admitted to their use of torture and yet no State Parties themselves have sought action against the United States. It is ironic that other State Parties to the Convention have not put through inter-State complaints regarding the United States' use of torture. In fact, the inter-State complaints procedure under article 21 has never been used.[164]

There have previously been criminal complaints filed in Germany in 2004 and 2006 by Iraqi victims of torture and a Guantanamo detainee against Rumsfeld and other senior officials in the Office of Legal Counsel, CIA, and United States military, however these complaints were dismissed on the grounds that the United States "would investigate the matter in its own country."[165] Another criminal complaint was filed against Rumsfeld in France in 2007 by several United States, French, and European human rights organisations for his command responsibility for torture committed in CIA black sites and military prisons, however this was also dismissed as the French prosecutor determined that he had immunity as a former government official.[166] Furthermore, in Spain a complaint was filed in 2009 against several members of the Office of Legal Counsel including Jay Bybee, John Yoo, and Alberto Gonzales for their incorrect legal advice that resulted in the commission of torture by the government of the United States. This case was transferred to the United States Department of Justice to continue the investigation into torture, where the United States ultimately stated that "there

[164] International Justice Resource Center, 'Committee Against Torture' (Web Page) <https://ijrcenter.org/un-treaty-bodies/committee-against-torture/#Inter-State_Complaints>.
[165] Human Rights Watch, 'Getting Away with Torture' (Report, July 2011) <https://www.hrw.org/sites/default/files/reports/us0711webwcover_1.pdf> 93-5.
[166] Ibid 96.

exists no basis for the criminal prosecution of Yoo or Bybee."[167] Another complaint filed in Spain on behalf of Guantanamo detainees was eventually dismissed in 2015 following a six-year long investigation on the basis of a lack of jurisdiction.[168]

Australia and the United Kingdom are two States that have had citizens held in CIA black sites or military prisons. They are both allies of the United States and offered them military support during the invasions of Iraq and Afghanistan. They are both State Parties to the Convention against Torture. However, their responses to the revelation of prisoner abuse in these CIA black sites or military prisons differed despite their similar links to the United States.

Two Australian nationals that were detained in Guantanamo on suspected terrorism charges alleged that they were being subjected to torture while in detention. The Australian government endorsed the actions of the Bush administration and their system of military commissions under martial law for the trials.[169] The Prime Minister of Australia at the time even went as far as to delegitimise the claims of his own Australian citizens, stating that their claims "should be taken with a grain of salt" and that it was "strange that the allegations only emerged after the Abu Ghraib scandal erupted."[170] The Australian government also relied on the United States-led investigations into the allegations of torture instead of conducting their own. One of the Australian citizens had also been held in a CIA black site in Egypt and had made claims of torture as early as 2002, prior to the emergence of the Abu Ghraib scandal. The United States' article 3 non-refoulement obligation was violated when they subjected him to extraordinary rendition to Egypt where he faced torture.

In contrast to Australia, the United Kingdom (who were at first supportive of the detention of their citizens at Guantanamo) refused to allow their citizens to face trial by military commission as they believed that their citizens were not guaranteed a fair trial and expressed concerns about their treatment. They eventually repatriated all their citizens.[171]

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[167] Ibid 97-8.
[168] Center for Constitutional Rights, 'Accountability for U.S. Torture: Spain' (Web Page) <https://ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-spain>.
[169] Cynthia Banham, 'The Torture of Citizens after 9/11: liberal democracies, civil society and the domestic context' (2016) 20 *The International Journal of Human Rights* 914, 916-7.
[170] Ibid 916.
[171] Ibid 917.

The lack of article 21 complaints against the United States could likely be a result of their standing in the international order. The United States as a global superpower holds an incredible amount of power. Australia and the United Kingdom (both allies to the United States) reacted differently, but one could argue that Australia's support for the United States' detention and torture of two Australian citizens was largely due to their inability to 'stand up to' the power that was the United States. Australia, a country largely reliant on protection from the United States, would not dare to outwardly express its disapproval of their methods due to the risks it could have for the security of their country.[172] However, the United Kingdom, a well-established country in its own right with a significant global standing, would be in a better position to publicly disapprove of the United States as it would not affect their country's security.[173]

The differing reactions of Australia and the United Kingdom illustrate the politics of torture. Australia's support for the detention system, and the United Kingdom's remonstration of it, reveal two markedly different political approaches. The extent of United Kingdom's objection to the treatment of their detained citizens (and by extension, all detainees) went as far as repatriating their citizens. Notably, they did not publicly condemn the United States and their detention and interrogation program or use the United States' treatment of their citizens as a springboard to seek further international legal action.

6 Conclusion

This thesis has exhibited the ways in which the United States has managed to justify their manipulation of international law legally, politically, and socially/morally during the 'war on terror'. The 'torture memos' are a shocking picture of legal perversion; a means by which the United States incorrectly legalised torture despite full awareness of the illegality of their actions. Graphic photographs and written accounts of the torture suffered by detainees in CIA black sites and military prisons including Abu Ghraib in Iraq and Guantanamo Bay in Cuba uncovered the systematic abuse of law being committed by United States military personnel. This thesis has examined the way in which the United States has evaded culpability for their violations of international human rights law, international humanitarian law, international criminal law, and *jus cogens*. There were barely any legal ramifications for the senior officials

[172] Ibid 925.
[173] Ibid 926.

involved in the approval of torture following the revelation of prisoner abuse in these black sites and military prisons, and an unwillingness to pursue legal action against them still exists today.

Many members of the United States government and legal academics alike have all agreed that the actions that the government took did not serve their interests in the way that they would hope. Senator John McCain argued in 2005 that "prisoner abuse harmed (rather than helped) efforts in the war on terror, because it led to bad intelligence, and it also threatened the safety of troops captured by the enemy."[174] Sabrina Harman, one of the convicted Abu Ghraib soldiers for prisoner abuse, opined that the detainees in Abu Ghraib "will be our future terrorist" due to the abuse that they suffered by the hands of the US military.[175]

A case has recently been jointly brought forward to the International Court of Justice by Canada and the Netherlands against Syria due to the countless claims of torture committed by the Syrian government since 2011 during the civil war.[176] Many things can be considered about why States have chosen to prosecute a third world country as opposed to the large power that is the United States for the same crime. It may be that the United States is too powerful of a State to attempt to prosecute, however instances like this only serve to exonerate the United States from their international law obligations on torture.

An investigation by the International Criminal Court into crimes against humanity and war crimes in Afghanistan was reopened in October 2022, including "alleged crimes by the United States armed forces and the CIA both in Afghanistan and in clandestine CIA detention facilities in Poland, Romania, and Lithuania."[177] This investigation sets forth the possibility of accountability for the United States' use of torture and ill-treatment in Afghanistan and CIA black sites, despite not being a party to the Rome Statute.

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[174] Andrea Birdsall, 'But we don't call it 'torture'! Norm contestation during the US 'War on Terror'' (2016) 53 *International Politics* 176, 186.
[175] Philip Gourevitch and Errol Morris, 'Exposure', *The New Yorker* (online, 24 March 2008) <https://www.newyorker.com/magazine/2008/03/24/exposure-5>.
[176] International Court of Justice, 'The Court indicates provisional measures' (Press Release, No. 2023/67, 16 November 2023) <https://www.icj-cij.org/sites/default/files/case-related/188/188-20231116-pre-01-00-en.pdf> 1.
[177] Human Rights Watch, 'ICC: Afghanistan Inquiry Can Resume' (News Post, 31 October 2022) <https://www.hrw.org/news/2022/10/31/icc-afghanistan-inquiry-can-resume>.

We are also currently seeing a situation in Palestine, with the Center for Constitutional Rights suing President Biden in the United States District Court for the Northern District of California for his alleged failure to prevent genocide in Gaza. The complaint by the legal advocacy organisation indicated that the United States is complicit under customary international law in the commission of serious bodily or mental harm as an act of genocide including torture.[178] The prohibition of genocide including torture is also *jus cogens*. The United States' ability to previously escape liability for their violation of *jus cogens* does not bode well for the current situation unfolding in Gaza. The United States utilised the law to get away with their own use of torture, legally, politically, and socially justifying it as a necessary means of self-defence, and Israel is already finding the necessity and self-defence arguments useful in their self-proclaimed fight against Hamas. With the support of the United States behind them, we can only speculate just how little accountability Israel will have for their actions in Gaza.

The prohibition of torture or other cruel, inhuman or degrading treatment or punishment finds its sources in multiple instruments of international law. It is a peremptory norm of international law that has achieved *jus cogens* status. The 'war on terror' was launched as counterterrorism following the 9/11 attacks, whereby the 'enhanced interrogation techniques' employed as a euphemism for torture were utilised for the means of intelligence gathering in the 'war on terror.' Proving ineffective and constituting torture, with the government publicly corroborating this conclusion, the United States has created a situation whereby legal, political, and social justifications have legitimised their use of law. George Bush's statement declaring the start of the 'war on terror' simultaneously signified the start of a crusade by the United States in which human rights were purposely ignored and dismissed.

[178] Center for Constitutional Rights, Defence for Children International – Palestine' (Case No 3:23-cv-5829, November 2023) 67 <https://ccrjustice.org/sites/default/files/attach/2023/11/Complaint_DCI-Pal-v-Biden_w.pdf>.

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