

# Bush Administration Noncompliance with the Prohibition on Torture and Cruel and Degrading Treatment

Bringing Human Rights Home by  
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Barbara CA

Kathryn Sikkink

## INTRODUCTION

In recent years, U.S. executive branch actions have led to the perception that it is particularly hostile to international law, especially in the area of human rights and humanitarian law. A series of high-profile U.S. decisions to try to withdraw its signature from the ICC Statute and make side agreements to undermine its application and to declare that the Geneva Conventions don't apply to the case of the conflict in Afghanistan, and thus to detainees in Guantánamo, have given the impression of a country not committed to the application of international law.<sup>1</sup>

On some other human rights issues, U.S. policy continues to adhere to international legal standards and the United States has provided leadership on global human rights. Bush administration policy makers have been at the forefront of pressures for world attention and action to the crisis in Darfur, Sudan. Some scholars have argued that the United States was careful to adhere to the norms of noncombatant immunity in the major combat phase of the 2003 war in the Iraq, and that the number of civilian casualties was as a result relatively low, given the ambitious nature of the war which required coalition forces to take Iraqi cities.<sup>2</sup> At the same time, the Supreme Court has brought U.S. practice more in line with international law on the death penalty by prohibiting the death penalty for juveniles and for mentally retarded individuals. Finally, on a whole series of issues, including women's rights and children's rights, the United States is generally in compliance with international law, even in cases where the Senate has failed to ratify the relevant treaties. So, for example, the United States has not ratified the Convention on the Elimination of All Forms of Discrimination against Women, even though it is substantially in compliance with most of its provisions.<sup>3</sup>

These are the mixed signals that the United States is sending to the world on human rights. But of the signals we send to the world, none are as important as our own human rights practices. And of the recent signals we have sent, none is as grave as U.S. practice of torture and cruel and degrading treatment in Abu Ghraib, Guantánamo, and Afghanistan. The United States was substantially in compliance with the prohibition of torture until late summer 2002, when the first known cases of ill treatment of detainees at Guantánamo occurred.<sup>4</sup> Starting in 2002 the United States has been in violation of the prohibition on torture and cruel and degrading treatment. In a 2004 memo, however, the Justice Department signaled a retreat from the most egregious forms of noncompliance. The McCain Amendment to the Detainee Treatment Act of 2005 prohibited cruel, inhuman, and degrading treatment of any individual in custody of the U.S. government. Finally, after the Supreme Court's decision in the *Hamdan v. Rumsfeld* case, in July 2006 the Department of Defense mandated that their policies and practice comply with Common Article 3 of the Geneva Convention, which calls for humane treatment of all detainees. The executive, however, still claims the right to engage in "extraordinary rendition" that is, the practice of turning U.S. detainees over to other states known to use torture, a practice in violation of international legal obligations. This chapter will explore why the United States first violated international law on torture and then eventually brought policy back in greater compliance with international and law.

Scholars of international relations and global civil society have long said that the real test of international law and the power of transnational human rights advocates will be their ability to limit the action of the most powerful states. In the short term, this case illustrates a central point of realist theory of international politics: Powerful states are able to disregard international rules at will. In the longer term, however, this case shows that even the United States is not above the reach of international human rights law that it itself helped build.

The individuals who instigated the policy of noncompliance with the prohibition on torture made some grave errors in perception and judgment. They have misread the political realities of the current world and in doing so have put themselves, the victims of their policies, and the legitimacy of the U.S. government at risk. Most tragically, their misjudgment had dire human consequences, not only for the victims of torture, but also for the young soldiers who were its direct perpetrators.

One of the basic tenets of the neoconservatives in the Bush administration is a disdain and skepticism for international institutions and international law.<sup>5</sup> But their ideological bias against the United Nations and international law led them to misunderstand the very nature of modern human rights law and particularly the law prohibiting torture. They believed it was voluntary and malleable. Second, they also discounted the possibility of significant international and domestic opposition to their policy, resistance that eventually made the policy so politically costly that it had to be altered.

International law prohibits torture absolutely. Under no circumstances may states engage in torture. In 1980, a U.S. federal court judge summed up the customary international law prohibition against torture, declaring

that the "the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."<sup>6</sup> The Torture Convention also grants universal jurisdiction in the case of torture. That is, under the treaty any state has jurisdiction over a case of torture if the alleged torturer is present on its territory. Universal jurisdiction provides for a system of decentralized enforcement in any national judicial system against individuals who commit or instigate torture.<sup>7</sup> In other words, any country that has ratified the Torture Convention could in principle indict and try U.S. individuals reputed to be responsible for torture in Iraq or Guantánamo Bay. The British House of Lords recognized the universal jurisdiction in the case of torture when it allowed extradition proceedings against General Augusto Pinochet to go forward for torture that occurred in Chile during the Pinochet regime (1973–1990).<sup>8</sup> Universal jurisdiction for torture and the high-profile use of the universal jurisdiction in a handful of cases (such as the Pinochet case) have made it clear that some enforcement of the prohibition on torture is possible. U.S. policy makers have disregarded this possibility of decentralized international enforcement for the violation on the prohibition on torture.

By misunderstanding these political realities, the Bush administration gave the wrong advice and signals to operatives in the field. They led them to believe that they were operating under the cover of law when they were not. They led them to believe that the power of the U.S. government could protect them from retribution. The U.S. government can and will certainly try to protect individuals involved in torture from retribution, and it will succeed in many cases. But it is unlikely to succeed in all cases. In other words, the realists engaged in wishful thinking. They described a world as they thought it ought to be, not as it actually is, and in doing so, they put themselves, their victims, and the very legitimacy of the U.S. government in harm's way.

## REALISTS, NEOCONSERVATIVES, AND INTERNATIONAL LAW

The foreign policy agenda of the Bush administration was guided by neo-conservative intellectuals, often in reaction to what they perceived to be the failings of the realists such as Henry Kissinger. Neoconservatives critiqued realists for being inattentive to the internal politics of states, and in particular, for failing to be concerned with democracy and human rights. Also, contrary to the realists, neoconservatives believed that U.S. power could and should be used for moral purposes.<sup>9</sup> Realists on the other hand, believe that a "prudent" understanding of self-interest rather than morality should drive foreign policy.<sup>10</sup>

What these differences between the realists and the neoconservatives has tended to obscure, however, is that both realists and neoconservatives shared a common view about international law and international institutions. Both believe that international law is not an effective legal system and cannot be enforced against the wishes of a hegemon. Realists argue that because there is no central authority in the international system to enforce international law, enforcement will depend on political considerations and the actual

distribution of power in the international system. Thus, they conclude, international law exists and is complied with only when it is in the interests of the most powerful states to do so. Neoconservatives basically share these beliefs, and add to them an even stronger ideological bias against the United Nations, international law, and international institutions such as the International Criminal Court (ICC). Realists and neoconservatives believe that a great power can violate international legal obligations without significant cost. Realism leads its adherents to believe that while international law may be useful in dealing with other weaker countries, it does not bind hegemony, especially when their security is at stake. Thus, after 9/11, the United States believed that it did not need to heed international law and limit its discretion in interrogations. This position was recognized by an official involved in formulating Bush administration policy on detainees. "The essence of the argument was, the official said, 'it applies to them, but it doesn't apply to us.'"<sup>11</sup> A former CIA lawyer said, "There are hardly any rules for illegal enemy combatants. It's the law of the jungle. And right now, we happen to be the strongest animal."<sup>12</sup>

Neoconservatives in particular also believe in American exceptionalism, "the idea that America could use its power in instances where others could not because it was more virtuous than other countries."<sup>13</sup> Because neoconservatives see the United States as exceptional and benevolent, they did not believe that international law and international institutions could or should be used to constrain the United States. These ideas held by neoconservatives are an important part of the explanation for why the Bush administration felt able to violate international law on this issue.

In contrast to this realist and neoconservative view of international law, constructivist theories explore the role of ideas and norms in effecting political change. Constructivists believe that in today's world international norms and law, international institutions, and global civil society are part of the political realities of the modern world. Modern constructivists know that not all law is equal—some law is stronger than others. The prohibition against torture, however, is a clear example of strong law. Even for this strong law to be effective—it has to be backed up by some form of sanctions and implementation. Sanctions sometimes come from international bodies, but there are also more decentralized forms of sanctions, through domestic courts, for example. Global civil society has been very active in searching out tactics that will impose some form of sanctions on violators of international human rights standards. Constructivists pay attention to key developments in the political realities of the world that the realists and neoconservatives miss because they believe that power only resides with wealthy and militarily strong states.

Constructivism also reminds us that the key concept in the realist analysis—"national interest" isn't as obvious as the realists would have us believe. Our very understandings of national interest are about highly contested beliefs about who we are as a nation, and what constitutes our interests. Many of the arguments in the debate over torture in the United States revolve around contested notions of what constitutes the national interest. The realists acted as though the national interest was clear, but they encountered significant resistance,

not just from civil society but from within the security apparatus of the U.S. government itself.

## U.S. COMPLIANCE WITH THE PROHIBITION ON TORTURE AND CRUEL, INHUMAN, AND DEGRADING TREATMENT

A definition of compliance needs to include both what states do (behavior) but also what they say (are they aware of the norm and use it as justification for behavior).<sup>14</sup> Thus the examination of U.S. compliance with the prohibition on torture needs to look both at U.S. behavior, and U.S. explanations for and justifications of its behavior. What has made U.S. practice so unsettling is the *explicit* quality to its noncompliance. Not only was U.S. behavior not in conformity with the rules, but the justification of state officials made it clear that they didn't believe they were bound by international law. This explicit policy noncompliance takes the form either of direct repudiation of the law, or the form of justifying actions with such weak legal arguments that they must be considered "cheap talk," a rhetorical fig leaf of a sort to justify noncompliance with the law. In the case of the U.S. decision not to apply the Geneva Conventions to the conflict in Afghanistan, for example, even the legal advisor in the Bush State Department immediately signaled that the position was "untenable," "incorrect," and "confused."<sup>15</sup>

There are many reasons why we might expect a powerful state like the United States not to be in compliance with international law. As the only hegemon in the international system, it is difficult for other states to sanction the United States for flouting the law. The United States also has particularly difficult treaty ratification rules, and an ideological tradition of isolationism and skepticism about international institutions. As a federal system and a common law system, the United States may face additional difficulties with ratifying and implementing international law.<sup>16</sup>

But there are also reasons to believe that the United States might willingly comply with international human rights law. The United States also has a long liberal tradition of concern with human rights, a democratic regime that allows for checks and balances by the judicial and legislative branch on excesses of executive power, and a strong civil society, including many nongovernmental organizations working on human rights and civil rights. Oona Hathaway has argued democracies with these characteristics are more likely to face internal pressure to abide by their international treaty commitments, including lobbying, media exposure, and litigation. If these countries fail to comply, they are more likely to face sanctions from their domestic constituencies rather than from the international community. Thus these internal processes should lead democracies to have higher levels of compliance with their commitments.<sup>17</sup>

First, it is important to note that human rights change never comes easily or quickly in any country. Previous studies of human rights change in a wide range of countries around the world found that virtually all countries initially resist and reject international and domestic criticism and pressure for change

in their human rights violations.<sup>18</sup> For those who believe in “American exceptionalism,” part of the story here is that the United States was not exceptional in its early reactions to international and domestic criticism and pressures. Similar to other cases in the world, the Bush administration first denied that any human rights violations were occurring, and tried to discredit those individuals and groups that brought attention the issue of torture.

Both international and internal pressures were brought to bear on the Bush administration and eventually did play a role in leading to some changes in policy. Internal pressures were particularly important, especially pressures from the judicial branch, and belatedly, from the U.S. Congress. Opposition also came from within the U.S. military itself, especially the legal professionals within the military. This kind of opposition from within the military is unprecedented and unique. No studies of human rights change in countries around the world have previously identified that military itself as a force for compliance with human rights law.

Any evaluation of compliance with the Torture Convention must look at state policies with regard to torture, the actual occurrence of torture, and state responses to reported incidents of torture. Policy change with regard to torture and cruel and degrading treatment did not occur voluntarily within the Bush administration, or as a result of confidential internal critiques. Rather it changed its policy as a result of relatively high-profile domestic opposition, particularly from the U.S. Supreme Court.

While there is evidence that the United States condoned torture in U.S. training programs in the past, there are important differences between the past and present practices and justifications.<sup>19</sup> Prior to 2002, high-level policy makers did not explicitly justify practices that can be considered torture and cruel, inhuman, and degrading treatment. In the 1970s, when members of Congress learned of accusations that U.S. personnel were complicit with torture in Brazil and Uruguay through an AID program called the Public Safety Program the executive agreed to close down the program.<sup>20</sup> In the 1990s, when critics found training manuals used at the Army School of the Americas that advocated the use of the torture, the Pentagon decided to discontinue use of the manuals.<sup>21</sup> But the Army did not discipline any of the individuals responsible for writing or teaching the lesson plans, nor were any students retrained.

Although the main pressure on the United States began after the publication of the photos of Abu Ghraib prison in April 2004, the use of torture and cruel and degrading treatment began in the detention center in Guantánamo Bay in 2002. Many official reports and secondary literature document the widespread practices of torture and cruel and degrading treatment directly by U.S. troops and personnel.<sup>22</sup> Perhaps never before in the history of debates over torture and cruel and degrading treatment has so much information been available about the different techniques used by specific individuals and units. Much of this information comes from sources within the U.S. government, but there are also numerous reports from international nongovernmental organizations.

When the photos were first released from Abu Ghraib prison, officials characterized it as isolated aberrant acts by a few low-level soldiers during a

short time period. However, since that time, reports from the Red Cross and a barrage of leaked reports from within the U.S. government reveal that the U.S. practice of torture and inhuman and degrading treatment is far more widespread and long-standing, occurring not only in Abu Ghraib, but also in other detention centers in Iraq, in Afghanistan, and in Guantánamo. A widespread practice in multiple locations implies an institutional policy, not human error.<sup>23</sup> The International Committee of the Red Cross (ICRC) visited Guantánamo in June 2004, and reported in a confidential report later made public that the military there had used coercion techniques that were "tantamount to torture." Specifically, the ICRC said its investigators found a system of "humiliating acts, solitary confinement, temperature extremes, use of forced positions." "The construction of such a system, whose stated purpose is the production of intelligence, cannot be considered other than an intentional system of cruel, unusual and degrading treatment and a form of torture."<sup>24</sup> Continuing revelations of reports by FBI agents reveal ongoing use of practices that the FBI deems unacceptable, such as keeping detainees chained in uncomfortable positions for up to twenty-four hours.<sup>25</sup> There are still debates about exactly which techniques constitute torture and which constitute inhuman and degrading treatment, or about what the Geneva Conventions mean when they refer to humane treatment. But there is no doubt that the United States was not in compliance with its international legal obligations with regard to humane treatment at least from 2002 to 2006.

Bush administration officials began offering explicit justifications and authorization for torture to military and intelligence agencies, in a series of now-public legal memos and reports prepared by the Department of Justice and the Defense Department between August 2002 and September 2003. These memos offered general signals about the need for and acceptability of harsher interrogation techniques sent from high levels of the administration. These general signals were then "translated" on the ground into a wide range of techniques, some explicitly approved from above and many not explicitly approved from above. By circulating the memos and reports but not issuing executive orders, the top level of the administration was able to set policy while still retaining legal deniability about accountability for the effects of that policy.

In these memos and documents, the Bush administration made three main arguments that helped justify and authorize torture and cruel and degrading treatment. The first was the argument that the Geneva Conventions did not apply to the conflict in Afghanistan, and thus the detainees from that conflict would not be considered prisoners of war, but rather illegal combatants. This decision is problematic with regard to the laws of war, but it carried with it implications that opened the door to torture. The Geneva Conventions absolutely protect any detainee from torture. Thus, a decision that the Geneva Conventions don't apply to a conflict could be understood as saying that torture is therefore permitted. That some U.S. soldiers read these as signals is clear from some of their comments and testimony. "One member of the 377th Company said that the fact that prisoners in Afghanistan had been labeled 'enemy combatants' not subject to the Geneva Conventions had contributed to an unhealthy attitude in the detention center." "We were pretty

much told that they were nobodies, that they were just enemy combatants," he said. "I think that giving them the distinction of soldier would have changed our attitude toward them."<sup>26</sup> Military intelligence officials and interrogators at Guantánamo said that "when new interrogators arrived they were told they had great flexibility in extracting information from detainees because the Geneva Conventions did not apply at the base."<sup>27</sup>

The second argument Bush administration officials made was about the definition of torture. Rather than actually say that they supported the use of torture, they made strenuous efforts to reinterpret the definitions of torture and to redefine our obligations under the Geneva Conventions and the Torture Convention so that the United States could use the interrogation techniques it wanted. The Bybee memorandum of August 1, 2002, written at the request of Alberto Gonzales, attempts to use a definition of torture that is outside any standard definition. First, it suggested that "physical pain amounting to torture must be the equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of body function, or even death." Nowhere in the history of the drafting of the Torture Convention nor in U.S. legislation implementing the Convention does the idea appear that to be counted as torture, the pain must be equivalent to death or organ failure. Second, the Bybee memorandum said that in order to qualify for the definition of torture, "the infliction of such pain must be the defendant's precise objective."<sup>28</sup> The Bybee memorandum attempts to create such a narrow definition of torture that only the sadist (i.e., for whom pain is the "precise objective") that engages in a practice resulting in pain equivalent to death or organ failure is a torturer. In other words, the memo creates an absurd and unsustainable definition, a definition contrary to the language of the law and common sense.

The third argument was about the president's ability to order torture in certain circumstances. The memos relied on a controversial constitutional position about the president's role as commander in chief of the armed forces to argue that the president had the authority to supercede international and domestic law and to authorize torture. Again, this runs contrary to the plain language of the Torture Convention, which says that "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture," and "[a]n order from a superior officer or public authority may not be invoked as a justification for torture."

Because these three arguments were so central to the government's case, one way to trace progress (or lack thereof) on U.S. compliance with the prohibition on torture is to trace the history of these three arguments or justifications: 1) non-applicability of the Geneva Conventions; 2) unconventional definitions of torture; and 3) the president's authority to authorize torture.

Bush administration policy makers decided to ignore the fact that the United States had clearly accepted a strong international legal obligation not to torture and had implemented that obligation in our domestic law. The United States had ratified two treaties that clearly state its international legal obligation not to engage in torture and inhuman and degrading treatment under any circumstances. Not only that, but the United States was deeply

involved in the process of drafting these treaties. U.S. delegates worked to make the treaty more precise and enforceable, and clearly supported treaty provisions on universal jurisdiction with regard to torture.<sup>29</sup> The administration of George H. Bush submitted the treaty to the Senate in 1990 and supported ratification. A bipartisan coalition in the Senate, including conservative Senator Jesse Helms, worked to ensure that the Senate gave its advice and consent for ratification. The Senate Foreign Relations Committee voted 10-0 to report the Convention favorably to the full Senate. When she spoke in support of ratification, Senator Nancy Kassenbaum, Republican from Kansas, said "I believe we have nothing to fear about our compliance with the terms of the treaty. Torture is simply not accepted in this country, and never will be."<sup>30</sup>

Despite this history, the memos written by Bush administration lawyers justifying the use of harsh interrogation techniques reveal no principled commitment to the prohibition on torture. The concern throughout is with how to protect U.S. officials from possible future prosecution, not about how to adhere to the principles of the law. The memos read like the defense attorney briefs for a client accused of torture, rather than expert advice on the generally accepted understandings about international law. It was not until twenty-nine months after the first memo, in a memo prepared explicitly for public consumption just before the confirmation hearing for Alberto Gonzales as attorney general, does the government state: "Torture is abhorrent both to American Law and values and to international norms."<sup>31</sup>

## OPPOSITION TO BUSH ADMINISTRATION NONCOMPLIANCE WITH INTERNATIONAL AND DOMESTIC LAW

### Opposition from Within the Executive Branch

The Bush administration could not persuade key legal advisors in its own State Department nor many legal experts within the branches of the U.S. military of its interpretations. Opposition to the decision that the Geneva Conventions didn't apply in Afghanistan and to the revision of interrogation techniques surfaced early. One day after the memorandum by Gonzales recommending that the administration not apply POW status under the Geneva Conventions to captured al Qaeda or Taliban fighters, Secretary of State Colin Powell wrote to Gonzales urging in the strongest terms that the policy be reconsidered. Powell argued that:

It will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the rule of law for our troops, both in this specific conflict and in general. It has a high cost in terms of negative international reaction, with immediate adverse consequences for our conduct of foreign policy. It will undermine public support among critical allies, making military cooperation more difficult to sustain.<sup>32</sup>

Despite Powell's misgivings, the Bush administration determined to move ahead with the policy on the Geneva Conventions in the face of the opposition

of the State Department. The State Department legal counsel made another effort to oppose it, in which he again echoes Powell's protest. In clear and firm language, he says that a decision to apply the Geneva Conventions to the conflict in Afghanistan would have been consistent with the "plain language of the Conventions and the unvaried practice of the United States in introducing its forces into conflict over fifty years . . . [and] the positions of every other party to the Conventions."<sup>33</sup>

Lawyers within the Bush administration did not only oppose the policy but warned of the possible legal consequences that administration officials could face if they insisted on these policies. In a memo dated January 11, 2002, State Department legal counsel William Taft IV wrote that "if the U.S. took the war on terrorism outside the Geneva Conventions, not only could U.S. soldiers be denied the protections of the Conventions—and therefore be prosecuted for crimes, including murder—but President Bush could be accused of a 'grave breach' by other countries, and prosecuted for war crimes." Taft also sent a copy of the memo to Gonzales, hoping it would reach Bush.<sup>34</sup> Alberto Mora, general counsel of the Navy, also warned his superiors of the possibilities of trials if they continued to disregard the prohibition on torture and cruel and degrading treatment, but his warnings were disregarded.<sup>35</sup> The Bush administration did not use these warnings as a reason to reconsider its policies. But this may explain why the following memos read more like a defense lawyer's briefs already defending their client against the charge of torture.

Other individuals associated with the military accused members of the Bush administration of "endangering troops," "undermining the war effort," "encouraging reprisals," or "lowering moral," not to mention "losing the high moral ground." Military sources criticized the administration for failing to ask the advice of the military's highest legal authorities, the Judge Advocates General (JAGs) of the various services.<sup>36</sup> Some retired military generals and admirals were so concerned about the positions taken by Gonzales that they wrote an open letter to the Judiciary Committee considering the nomination of Gonzales for attorney general. In it, they argued that military law has been ignored.

The August 1, 2002 Justice Department memo analyzing the law on interrogation references health care administration law more than five times, but never once cites the U.S. Army Field Manual on interrogation . . . The Army Field Manual was the product of decades of experience—experience that had shown, among other things that such interrogation methods produce unreliable results and often impede further intelligence collection. Discounting the Manual's wisdom on this central point shows a disturbing disregard for the decades of hard-won knowledge of the professional American military.<sup>37</sup>

According to Brig. General Cullen, the White House and Justice Department memos created the policy which in turn "spawned" torture and abuse. The Army Field Manual has sixteen approved methods of interrogation.

Mr. Gonzales embarked on a campaign to justify expanding those approved methods into areas that at least anyone would say are inhuman and degrading treatment. . . . when you are on that level and you speak you're carrying a lot

more weight, you are sending signals to the field that have enormous implications. It is development of policy by winks and nods, and that is the last thing you want to do at that level.<sup>38</sup>

In the minds of some military legal experts, the problem was exactly that “political lawyers” not military lawyers, were in charge of this policy, and they cut military lawyers with operational experience, but also a central understanding of what they call “complex security interests,” out of the policy formulation process. Retired Brig. General Cullen argued that the decision making process was “clearly stacked and the military lawyers were outvoted.”<sup>39</sup>

Members of the military also argued that torture is ineffective. General Hoar argued that torture may be effective in the short term, but in the long term it undermines the war effort. “Nowhere was this more graphic than the French counter-insurgency operations in Algeria, where torture was used in extracting timely intelligence from recently captured insurgents. This practice may have helped the French in winning the Battle of Algiers, but in the process, the French army lost its honor and ultimately lost the war . . . ”<sup>40</sup> People within the FBI also argued that torture was ineffective. Investigative journalist Jane Mayer said that “the fiercest internal resistance to this thinking has come from people who have been directly involved in interrogation, including veteran F.B.I. and C.I.A. agents. Their concerns are practical as well as ideological. Years of experience in interrogation have led them to doubt the effectiveness of physical coercion as a means of extracting reliable information.”<sup>41</sup> The FBI complaints about harsh interrogation practices began in December 2002, according to released internal documents. In late 2003, an agent complained that “these tactics have produced no intelligence of threat neutralization nature to date.”<sup>42</sup>

## Opposition from International and Domestic Human Rights Groups

International and domestic human rights organizations responded almost immediately to evidence of U.S. noncompliance with the prohibition of torture and cruel and degrading treatment, and their positions were well reflected in key print media outlets. Transnational advocacy networks in the area of human rights emerged and became especially significant in the 1970s and 1980s.<sup>43</sup> They have continued to grow since that time. Initially the transnational advocacy networks did not work extensively on human right practices within the United States. One exception was Amnesty International, that had long had adopted prisoners of conscience in the United States, and had been especially active working on the issue of the death penalty. Although many groups like Human Rights Watch or Human Rights First are based in the United States, in the past they focused their efforts on international human rights issues and left the domestic human rights scene to civil rights organizations such as the American Civil Liberties Union or the NAACP. By the 1990s, however, this had become an untenable political position, as other NGO allies within the networks frequently asked why U.S.-based groups did not work on the human rights practices of their own government. In the

1990s, Human Rights Watch significantly increased its work on U.S. human rights and humanitarian law violations and in 2001 created its U.S. program, and many other human rights organization followed suit.

Nevertheless, U.S. violations of human rights in the wake of the 9/11 attacks led to a dramatic increase in the activities of the transnational human rights networks with regard to the United States. The emerging revelations of torture and degrading treatment at Abu Ghraib and elsewhere created more consternation and effort. Never before have transnational human rights advocacy organizations and networks turned their spotlight on U.S. practices as they have today. As with advocacy network work in the past, these efforts have been supported by private foundations and individual funders.

Human rights advocacy groups for the most part have not organized major mobilization in the streets, nor have they been able to persuade large number of U.S. voters to care enough about their issues. They have been very active in producing reports, publicizing their reports, lobbying Congress, and in some cases, filing lawsuits against Bush administration officials and requesting documents through the FOIA to document their charges. As with all campaigns by networks, their potential for effectiveness comes in the long term, not the short term. It is also enhanced to the degree that they are able to build coalitions outside and inside of governments. In the United States, the traditional international human rights groups have formed coalitions with the civil liberties groups such as the ACLU, social justice groups, or the scores of immigration law activists to carry forward their work. As Wendy Patten points out in her chapter in this volume, these domestic groups working alongside U.S.-based international human rights groups became more open to using the "language, standards, and mechanisms" of international human rights in their work.<sup>44</sup> They have also worked with people in government and the media. So, for example, the many leaks and releases of documents related to torture have been the result of dissatisfaction of individuals within government and the concerted efforts of groups outside of government. Most documents have been made available as a result of FOIA requests that the ACLU has made in reference to their lawsuits against the government. When retired military lawyers became increasingly disenchanted with the Bush administration policy on interrogations and the laws of war, it is interesting that they reached out to colleagues in the human rights organization in the United States, and collaborated on some joint activities.

Organizations including the American Civil Liberties Union, Human Rights First, and the Center for Constitutional Rights have filed lawsuits against Bush administration officials for human rights violations in the war against terror. Although the lawsuits filed by national and international human rights organizations against Bush administration officials have not yet achieved any judicial victories, they have communicated the importance of holding state officials even in powerful countries accountable for past human rights violations. In the past twenty years, there has been a dramatic increase in the world of domestic, foreign, and international trials for human rights violations.<sup>45</sup> It seems likely that this is not a passing trend but a deep structural shift toward accountability for past human rights. Many of these trials, perhaps the majority of them, are not of the actual soldiers who pulled the trigger or applied the

electric shocks, but of one of their superior officers in the chain of command for bearing responsibility for the actions of his subordinates. As a result, while in the past, most perpetrators of gross human rights violations could expect never to face any consequences for their actions, today, it is more likely that some perpetrators may face some kind of judicial process.

Foreign lawsuits against Bush administration officials for torture could prosper eventually because universal jurisdiction is written into the language of the Torture Convention. The United States ratified the treaty, and despite numerous reservations, understandings, and declaration, it did not reserve against universal jurisdiction. The abuses happened well after U.S. ratification. Thus the criteria used by the Law Lords in the Pinochet case are satisfied. In principle, any ratifying country could exercise universal jurisdiction over U.S. citizens in the case of torture. Some judicial proceedings against Bush administration officials have already been initiated in Germany. While many of these judicial processes will eventually stall or lead to dismissals or acquittals for political or legal reasons, at a minimum, they can endanger the peace of mind, financial security, or reputation of suspected perpetrators. In the next few decades, former Secretary of Defense Donald Rumsfeld and others who advocated the policy of explicit noncompliance with the Geneva Conventions and the Torture Convention at a minimum may find themselves in a difficult position when they travel abroad. Before they initiate any international trip they may need to make inquiries about the state of trials in any country where they intend to travel.

## Other International Pressures

International pressure in opposition to Bush administration policy on torture and cruel and degrading treatment has presented an inconvenience, at a minimum, to the fulfillment of other Bush administration policy goals. A *Washington Post* article in November 2005 reported that the CIA was holding detainees in secret prisons in Eastern Europe led to an uproar in Europe and to an investigation by the EU of secret detention centers in Europe and cooperation of European governments with the U.S. policy of extraordinary rendition. Despite such criticisms, Condoleezza Rice, traveling in Europe in December 2005, maintained a tone of denial by chastising European leaders for their criticisms and claiming that interrogation of these suspects helped "save European lives."<sup>46</sup> Rice simultaneously argued that "at no time did the United States agree to inhumane acts or torture," and continued to state that "terrorists are not covered by the Geneva Conventions."<sup>47</sup>

In February 2006, a UN-appointed independent panel released a report calling on the United States to close the prison in Guantánamo, where it claimed that U.S. personnel engaged in torture, detained people arbitrarily, and denied fair trials. In May 2006, the UN Committee Against Torture was critical of U.S. policy, and urged the United States to close down the Guantánamo Bay prison and to end the use of secret overseas detention centers. The United States was not totally indifferent to this body, as witnessed by the size of its delegation to the meeting, and the size of its supplemental report. While this suggests that the Bush administration was prepared to engage with

its international critics, in the meeting, the U.S. government did not move away from its most controversial positions on torture and cruel and degrading treatment.

## Opposition from the U.S. Judicial Branch

The most effective opposition to Bush administration policies has come from within the U.S. Judicial Branch, and in particular from the U.S. Supreme Court. In a series of path-breaking decisions, the Supreme Court has upheld the rights of detainees to humane treatment and to the protections offered by the rule of law, both domestic and international. In June 2006, in the case *Hamdan v. Rumsfeld*, the Supreme Court gave a major rebuke to the Bush administration policy and legal interpretations. The Court ruled that the military commission system set up to try accused war criminals in Guantánamo Bay violated both U.S. laws and the Geneva Conventions. In what is now considered a landmark decision about the limits of executive power, the Court said that even during war, the president must comply not only with U.S. laws as established by Congress but also with international law.<sup>48</sup> In this sense, the Court directly contradicted the legal theories put forward by President Bush's legal advisors that the president has broad discretion to make decisions on war-related issues, which in turn they used to claim the president could authorize torture. In this sense, although *Hamdan* did not directly address torture, it addressed the legal claims of executive authority upon which the torture arguments had been based.

The development and evolution of the *Hamdan* case reveal the internal pressures that governments in democracies face to comply with international law. First, the Supreme Court acted as a true check on executive power. Second, both the military and civil society were actively involved in the case: Hamdan was successfully defended by his military-appointed defense lawyer, in cooperation with volunteer lawyers from both the academic world and private law firms, and some forty amicus curie briefs were filed in support of the Hamdan brief by human rights organizations, retired military officers, diplomats, and legal scholars.<sup>49</sup>

## BUSH ADMINISTRATION RESPONSES TO INTERNAL AND EXTERNAL PRESSURES

Initially the Bush administration did not respond to the internal or international opposition to its policies. The worldview of the neoconservative was initially confirmed. There were apparently few domestic or international political costs to this position. The large negative publicity in the release of the Abu Ghraib photos was not sufficient to end the practices. The American public did not demand more accountability for the use of torture. Despite the fact that the graphic revelations of torture came in an election year, torture did not become a campaign issue.

Not only was the administration not deterred by domestic and international criticism of its practices, but it promoted many of the individuals

most associated with noncompliance of the prohibition on torture. Mr. Bybee, who wrote the first controversial "torture" memo was named to the Ninth Circuit Court of Appeals; White House Legal Counsel Alberto Gonzales, who solicited and approved the Bybee memorandum, was nominated and confirmed for the attorney general; and Michael Chertoff, who as head of the Criminal Division of the Justice Department advised the CIA on the legality of coercive interrogation methods, was selected by Bush to be the new secretary of homeland security.<sup>50</sup> John C. Yoo, one of the authors of controversial Bush administration memos on the Geneva Conventions, said that President Bush's victory in the 2004 election, along with the lack of strong opposition to the Gonzales confirmation, was "proof that the debate is over." He claimed, "The issue is dying out. The public has had its referendum."<sup>51</sup>

But, contrary to Yoo's prediction, the issue did not die out. In anticipation of the confirmation hearings of Gonzales, the Justice Department issued a memo that began to retreat from the Bush administration's most egregious position on torture. Some members of Congress have criticized Gonzales for his position on torture, and the administration wished to defuse any issue that might interfere with his confirmation, and avoid a possible public embarrassment or reversal.

The Justice Department memo of December 30, 2004 "withdraws" and supercedes the August 2002 memorandum and modifies important aspects of its legal analysis. The new memo says "we disagree with statements in the August 2002 Memorandum limiting 'severe' pain under the statute to 'excruciating and agonizing' pain, 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.'" The new memo rejects the earlier assertion that torture only occurs if the interrogator had the specific intent to cause pain. "We do not believe it is useful to try to define the precise meaning of 'specific intent' . . . In light of the President's directive that the United States not engage in torture, it would not be appropriate to rely on parsing the specific intent element of the statute to approve as lawful conduct that might otherwise amount to torture." And finally, though the new memo does not reject the president's authority to order torture, it says it is "unnecessary" to consider that issue because it would be "inconsistent with the President's unequivocal directive that United States personnel not engage in torture."<sup>52</sup> This is still problematic because it continues to ignore the legal obligation of the United States not to engage in torture under any conditions. Nevertheless, this new memo on torture was recognition that the administration had not been able to unilaterally redefine torture. The definitional attempts had been costly, or were going to be costly to the confirmation of the attorney general, and thus some had to be put to rest. As retired Rear Admiral John Hutson recognized during the Gonzalez hearing, the Justice Department memo was not an exoneration of Judge Gonzales, but an indictment. "It's an acknowledgment of error." Thus, by late 2004, U.S. policy had been moderated on one of the three issues discussed above. The administration backed down from the most egregious efforts to redefine torture in ways utterly inconsistent with international law.

During his confirmation hearings, Gonzalez faced criticism from nongovernmental organizations and legal academics, including those associated with the military. Retired Rear Admiral John Hutson who testified against the confirmation of Gonzales for Attorney General, said:

Abrogating the Geneva Conventions imperils our troops and undermines the war effort. It encourages reprisals. It lowers moral. . . . Government lawyers, including Judge Gonzales, let down the U.S. troops in a significant way by their ill-conceived advice. They increased the dangers that they'd face. At the top of the chain of command, to coin a phrase that we've heard in the past, they set the conditions so that many of those troops would commit serious crimes.

Although Gonzales was confirmed without problems, the criticisms he faced signaled the beginnings of more assertive congressional actions on torture. William J. Haynes II, the Department of Defense chief legal officer who helped oversee Pentagon studies on the interrogation of detainees, faced opposition when he was twice nominated to the Fourth Circuit Court of Appeals, and President Bush eventually chose not to resubmit the nomination in the face of political opposition.<sup>53</sup>

In 2005, Senator John McCain introduced an amendment to the Department of Defense Appropriation Act that prohibited cruel and degrading treatment, and confined all interrogation techniques to those authorized by the U.S. Army Field Manual on Intelligence and Interrogation. Once again, the Bush administration continued to oppose these efforts to prohibit the use of abusive interrogation techniques. The Senate passed the amendment by a 90 to 9 margin, and the House by 308 to 122, and the amendment was incorporated into the Detainee Treatment Act of 2005.

Throughout the debate over the McCain amendment the White House sought to exclude the CIA from complying with the anti-torture legislation.<sup>54</sup> Even after President Bush was obliged to withdraw his veto threat and reached an agreement with McCain, the language of the signing statement still was couched in language that implied that president could override the ban if necessary. In other words, in early 2006, the administration continued to hold firmly to the third argument discussed above—that the president, facing a clear and present danger to national security, was not bound by the obligation to prohibit torture. It was not until the Supreme Court explicitly opposed this doctrine in the *Hamdan v. Rumsfeld* case in September 2006 that the Bush administration backed off its claim that the president could authorize the use of torture and cruel and degrading treatment.

Other provisions of this Detainee Treatment Act, however, undermine some of the protections offered by the McCain amendment, by stripping federal courts of jurisdiction over detainees in Guantánamo and implicitly permitting the Department of Defense to consider evidence obtained through torture. In addition, the Army Field Manual, previously publicly available, has now been rewritten to include ten classified pages on interrogation techniques.

In response to the Supreme Court's decision in *Hamdan v. Rumsfeld*, the Department of Defense finally issued a memo on July 7, 2006 that instructs recipients to ensure that all DOD policies comply with Common Article 3 of

the Geneva Conventions. In an important reversal of its earlier policy, the memo helped bring administration policy in line with the Supreme Court decision. But even as the administration appeared to accept Common Article 3, it asked Congress to pass legislation governing military commissions that would redefine Common Article 3, replacing its requirement that all detainees captured during armed conflict be treated humanely with a new "flexible" standard. The president sought to determine on a case-by-case basis whether treatment was cruel, inhuman, and degrading. Even after the failure of its repeated efforts to redefine the meaning of torture, the administration still persisted in its belief that it could redefine international law to suit its purposes. Fortunately, Congress rejected this proposal; the final Military Commission Act of 2006 (MCA) preserved the meaning of humane treatment under Common Article 3. But the MCA had other worrisome aspects as regards laws about torture and abuse. First, it makes it harder to prosecute those who commit war crimes, including torture, and it permits some evidence obtained under coercion to be used in military commissions. In summary, since 2005, the Congress has moved to limit executive noncompliance with the prohibition on torture and cruel and degrading treatment, but congressional action has fallen short of a full endorsement of international law on the subject.

Meanwhile, the Pentagon created a new Office of Detainee Affairs, "charged with correcting basic problems in the handling and treatment of detainees, and with helping to ensure that senior Defense Department Officials are alerted to concerns about detention operations raised by the Red Cross." A Human Rights First report concludes that "while the effect of this new structure is unclear, it has the potential to help bring U.S. detention policy more in line with U.S. and international legal obligations."<sup>55</sup> The Pentagon has also completed a series of investigations into abuses in detention centers and identified some of the possible causes of such abuses, including the failure to give meaningful guidance to soldiers in the field about rules that governed the treatment of detainees.

Since Abu Grahیب, the U.S. military has also moved to hold some soldiers accountable for abuse of detainees. First, the military has initiated a series of investigations and courts-martial. A comprehensive summary of a project on detainee abuse and accountability found that at least 600 U.S. personnel are implicated in approximately 330 cases of detainee abuse in Iraq, Afghanistan, and Guantánamo Bay. Authorities have opened investigations into about 65 percent of these cases. Of seventy-nine courts-martial, fifty-four resulted in convictions or a guilty plea. Another fifty-seven people faced nonjudicial proceedings involving punishments of no or minimal prison time.<sup>56</sup> Although many cases were not investigated and no senior officers have been held accountable, this is not an insignificant amount of accountability and punishment. This reaffirms the fact that the U.S. government officials who asserted that certain practices were legal or desirable misunderstood the law and misguided personnel in the field. There is reason to believe that investigations into torture and cruel and unusual punishment have not yet ended, and that higher-level officials may someday also face accountability, if not in the United States, then perhaps abroad.

The definition of torture in the Torture Convention focuses on pain or suffering "inflicted by or at the instigation of or with the consent or acquiescence of a public officials or a person acting in an official capacity." In the drafting of the treaty, the United States itself proposed the language "or with the consent or acquiescence of a public official," that appears in the Convention.<sup>57</sup> To date, U.S. sanctions have focused only on torture committed "by" public officials, and have disregarded the issues of instigation, consent, or acquiescence of other higher-level public officials. Almost all (95 percent) of the military personnel who have been investigated are enlisted soldiers, not officers. Three officers were convicted by court-martial for directly participating in detainee abuse, but no U.S. military officer has been held accountable for criminal acts committed by subordinates.<sup>58</sup>

## CONCLUSIONS

After 9/11 in the United States, there were deep disputes about the nature of the security threat and the proper response to them. What made torture possible was not the national security situation per se, but the neoconservative ideas held by a small group of individuals in power about the nature of the crisis and the appropriate response to it. If another group (for example, those associated with the position of Colin Powell) had prevailed in internal policy debates, it is plausible that the United States would currently be in compliance with the prohibition on torture.

Because this is an area of international law that is highly legalized and where the United States has ratified the relevant treaties and implemented them in corresponding national legislation, it is quite clear that the United States is in breach of existing legal obligations that it and the world community have long accepted. On this particular issue human rights advocacy groups and most legal scholars around the world are in agreement.

In the short term, this group of mainly political (not military) advisors closely associated with the president won the debate and prevailed with an argument that noncompliance with aspects of the Geneva Conventions and the Torture Convention was appropriate in the new circumstances. They justified their position with questionable international legal arguments that met opposition from the legal department of the State Department and the JAGs of the various military branches, not to mention human rights organizations, academics, and much of foreign legal opinion.

But although this group of neoconservative individuals won out in internal policy debates in the short term, their position was eroded in the longer term. In particular, the U.S. judicial system, both military and civilian, has provided some effective checks to the executive power. In addition, civil society organizations and some print media have denounced and worked against U.S. government abuse of detainees. Some international actors have also challenged U.S. practices of noncompliance. It would appear that domestic pressures have been more effective than international pressures in changing Bush administration practices. The Bush administration made changes in its policy on the treatment of detainees only as a result of concerted and public

opposition. The lesson we can take from this is common to most studies of compliance with human rights law around the world. Governments are usually unwilling to recognize that they have committed human rights violations and to make changes in policy necessary to bring their practices in accordance with international law. Only concerted, public, and costly pressures from a wide variety of both domestic and international actors lead to improvements in human rights practices. But despite the similarities between the U.S. case and other cases of human rights violations in the world, there are also some interesting differences. Human rights organizations responded very rapidly to the evidence of torture and abuse. Those charges were echoed by segments of the print media, including the *New York Times*, the *Washington Post*, the *New Yorker*, and the *New York Review of Books*, whose reporters also produced crucial investigative articles that gave impetus and evidence for the internal and international opposition. Perhaps most unique to the U.S. case was the fact that there was significant and sustained opposition within the military itself to the policy of noncompliance with the Geneva Conventions and the Torture Convention. Finally, the U.S. judicial branch, and particularly the Supreme Court, played a crucial role in restraining the worst excesses of executive power. As is common in the world of human rights, these responses and changes did not happen rapidly, and are still underway. As of mid 2007, it is not clear if the United States is now in compliance with domestic and international law on torture.

But the issue of U.S. noncompliance with the prohibition on torture has not gone away and has started to pose significant costs on the individuals associated with the policy as well as for the U.S. government. The policy has already been costly for U.S. soft power and claims to leadership in the area of democracy and human rights. In the future it is very likely that the policy of noncompliance will be costly in more concrete terms, such as lawyers' fees, compensation paid to victims, and in some cases, imprisonment.

The people whose positions carried the day within the administration misunderstood and misjudged the current nature of the international system on the issue of torture and mistreatment of detainees. They believe it to be a realist world where international law and institutions are quite malleable to exercises of hegemonic power. In the short term, their beliefs were confirmed. In the longer term, they will find that this misreading of the nature of the international system is personally and professionally costly to them, not to mention costly to the reputation and soft power of the U.S. government.

## NOTES

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2. See Colin H. Kahl, "In the Crossfire or the Crosshairs? Norms, Civilian Casualties, and U.S. Conduct in Iraq," *International Security* 32 (1) (Summer 2007).

3. The United States, for example, uniformly ranks high among countries for its level of "gender development" and "gender empowerment," as measured by the UN Development Program in its annual *Human Development Report*. Both are composite measures that reflect the enjoyment of many aspects of the rights enumerated in the CEDAW Convention.

4. The exception to this argument is that by sending detainees to Egypt in the "exceptional rendition" program, initiated in 1995, the United States has been in violation of Article 3 of the Torture Convention, which says state parties can not return detainees to states where there are substantial grounds to believe they will be subjected to torture. See Jane Mayer, "Outsourcing Torture," *The New Yorker*, February 14 and February 21, 2005.

5. See Francis Fukuyama, *America at the Crossroads: Democracy, Power, and the Neoconservative Legacy* (New Haven, CT: Yale University Press, 2006).

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

7. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1988).

8. *5 R v. Bartle and Commissioner of Police for the Metropolis and others, ex parte Pinochet*, House of Lords, 24 March 1999.

9. Fukuyama, *America at the Crossroads*, (n. 5).

10. George F. Kennan, "Morality and Foreign Policy," *Foreign Affairs* 64 (1985/1986).

11. As quoted in article by Michael Isikoff, "A Justice Department Memo proposes that the United States hold others accountable for international laws on detainees; but that Washington did not have to follow them itself," *Newsweek*, May 21, 2004.

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18. See, for example, Thomas Risse, Stephen Ropp, and Kathryn Sikkink (eds.), *The Power of Human Rights* (New York: Cambridge University Press, 1999) which included chapters on international and domestic pressures to bring about human rights changes in Chile, Guatemala, Kenya, Uganda, South Africa, Tunisia, Morocco, Indonesia, Philippines, Poland, and Czechoslovakia.

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21. United States, Department of Defense, "Memorandum for the Secretary of Defense," "Improper Material in Spanish Language Intelligence Training Manuals," (March 10, 1992).

22. See "Article 15-6 Investigation of the 800th Military Police Brigade," (The Taguba Report); "Final Report of the Independent Panel to 'Review DOD Detention Operations,'" (The Schlesinger Report) August 2004; "AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade," LTG Anthony R. Jones, "AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, MG George R. Fay," "Report of the International Committee

of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Convention in Iraq During Arrest, Internment and Interrogation," February 2004. All of these reports are available in the appendices to Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review Books, 2004).

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