

Lawfare and Torture at Guantanamo Bay: A Comparison of the Bush and Obama  
Administrations

By  
Nechelle Nicholas

A Thesis Submitted to  
Department of Political Science  
Saint Mary's University, Halifax NS  
In Partial Fulfilment of the Requirements for  
the Degree of Bachelor of Arts (Hons.), Political Science

April 2018, Halifax Nova Scotia

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Approved: Dr. Marc Doucet  
Associate Professor and Chair  
Department of Political Science  
Saint Mary's University

Date: April 17, 2018

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## **ABSTRACT**

Guantanamo Bay is commonly referred to as a ‘legal black hole’ where the United States violated the international prohibitions of torture in the years following the 9/11 attacks. The Bush administration justified these violations through its creation of the ‘unlawful enemy combatant’ category and other legal tactics. This justification through legal means and an evasion of international law has been defined in academia as a form of ‘lawfare’, which refers to the use of law, international and domestic, as a tool that seeks to permit prohibited acts. While many analyses examine statements made by Bush administration officials, the infamous ‘torture memos’ and US legislation, this essay examines the US’ dialogue with the United Nations Committee Against Torture through an analysis of reports submitted by, and to, the Bush and Obama administrations. This essay allows for an additional perspective on how the US, which has committed to torture prevention through ratifying anti-torture conventions, engaged in lawfare, to varying degrees, under the Bush and Obama administrations.

Date: April 17, 2018

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## **Introduction**

Human rights are central to the function of key international organizations such as the United Nations (UN), as evidenced through the various conventions and treaty bodies which are in existence today. Conventions serve to bind states to respect international human rights standards through principles and articles which are approved and ratified (Mingst, Karns, & Lyon, 2017, p. 246). The 1987 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is one such way in which UN member states seek to bind contracting parties to respect principles prohibiting the use of torture and acts of ill-treatment. However, the United States, which has ratified the CAT has been criticized by human rights lawyers, non-governmental organizations (NGOs), and even the Committee Against Torture (CAT Committee) for its actions surrounding the Guantanamo Bay detention facility in Cuba. Upon declaring a ‘global War on Terror’ following the September 11, 2001 attacks on US soil, the US administration under President George W. Bush transferred and detained suspected terrorists at Guantanamo Bay. In the years following, the Bush Administration faced criticisms on the grounds that detainees faced indefinite detention, lacked access to justice, and in certain cases were tortured. The Bush administration sought to justify its actions through the creation of the legal category of ‘unlawful enemy combatant’, which applied to detainees held in Guantanamo. According to Bush administration officials, these unlawful combatants had no rights under the 1949 Geneva Conventions (which protect prisoners of war (POW)), and the CAT did not apply to them. The CAT Committee has identified these determinations by the Bush administration as contravening human rights standards, specifically articles in the CAT prohibiting the use of torture. Following his election in 2008, Barack Obama was quick to condemn the actions of the Bush administration and showed this with his immediate executive orders to close Guantanamo

Bay. However, President Obama was not immune from criticism by the CAT Committee, as he continued some of Bush's policies and failed to close the detention facility despite his executive orders.

This essay will examine the concept of 'lawfare' in order to apply it to both administrations' actions surrounding Guantanamo Bay. Many scholars refer to lawfare as the use of legal tools to gain a military advantage or to extend the tools of war through the use of the law. This essay will argue that the Bush administration, through its manipulation of the CAT and Geneva Conventions, engaged in lawfare to justify its contravention of these same international legal instruments at Guantanamo Bay. This concept allows for an additional examination of how the infamous torture practices were justified by the Bush administration and also how the US, a global hegemon, sought to do this through using international and domestic law as a tool of navigation around its obligations. Although the Obama administration was not as blatant in justifying its actions and by extension rejecting international law, this essay will also examine how the Obama era was marked by 'inactions', such as the failure to prosecute high level officials involved in torture practices, which too contravened its international obligations under the CAT. Through the Bush administration's use of lawfare, these obligations were not only put into question, but its justifications of practices that the CAT Committee criticized, put it in a 'state of exception'.<sup>1</sup> Informed by the concept of lawfare, an analysis of the dialogue which emerged between the CAT Committee and the US in the form of reports submitted by and to both administrations allows for a further examination of the US's torture record at Guantanamo Bay.

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<sup>1</sup> Lellio and Castano (2015) describe the US' actions as "at the limit between politics and the law" or as a "state of exception". It is through this claim of 'exception' that the US government attempts to make a case for the necessity and legality of torture programmes (p. 1283).

This essay will begin by examining the commitment that the US has to international law regarding the prohibition of torture and how this was affected by both administrations' approaches to detention practices at Guantanamo Bay. This will be followed by a review of literature which will examine the two dimensions of lawfare that this essay focuses on, i.e. 'anti-war' lawfare and 'pro-war' lawfare. A third section will comprise of an analysis of the dialogue between the CAT Committee and the US over the course of the Bush and Obama presidencies. A fourth section will discuss the points of comparison that appear throughout the thesis which will conclude with the argument that the Bush administration engaged in pro-war lawfare, while the Obama administration did not.

## **Methodology**

A contextual analysis of the governing international law relevant to this thesis will be done. This will comprise of the main obligations set out in the CAT and Geneva Conventions, followed by an analysis of the US' commitment to these obligations. Major events which occurred during the Bush and Obama administrations will then be analyzed in the context of Guantanamo Bay and the human rights violations surrounding torture. The review of literature will take the form of an examination of the concept of lawfare, in particular, its various uses by and against both administrations. It is worthy to note that much of the analysis focuses on the Bush administration's use of lawfare. This is so, because President Bush was in office at the time of the September 11, 2001 attacks, after which what his administration called the "global War on Terror" began (Oakes et al., 2016, p. 938). Had President Obama been in office at the time, the analysis would likely focus more on his tenure. The particular focus brought to the Bush administration, especially in the analysis of lawfare, is not to discount the Obama

administration's actions in office, but is simply due to the time in which these events occurred and how the Bush administration dealt with them. Upon developing the theoretical framework for the concept of lawfare, a total of six documents will be analyzed. This consists of the 'dialogue' between the US and CAT Committee which occurred during the reporting processes of the Bush and Obama administrations. These documents are: the *2005 2<sup>nd</sup> Periodic report of the US to the CAT Committee*, the *2006 Concluding Observations of the CAT Committee*, the *2007 follow-up report by the US to the CAT Committee's recommendations* (all completed during the Bush administration); the *2013 3<sup>rd</sup> to 5<sup>th</sup> reports of the US to the CAT Committee*, the *2014 Concluding observations of the CAT Committee* and the *2015 follow-up report by the US to the CAT Committee's recommendations on the combined reports* (all completed during the Obama administration). As will be seen in the review of literature, many analyses of the Bush and Obama eras with regards to lawfare and Guantanamo Bay use statements made by government officials, domestic legislation, government documents etc. as primary sources of data. However, along with the use of these sources, the following analysis uses state reports and responses by the Committee Against Torture. In this case, the CAT represents international obligations to prohibit torture under international law and by extension, the CAT Committee represents the 'voice' of this international law. Therefore, this analysis is useful both theoretically, through the incorporation of the concept of lawfare and empirically, through an examination of the responses from the treaty body which upholds international law on torture. This examination of the 'dialogue' between the US and the CAT Committee through its theoretical and empirical contributions, adds to the existing analyses of the Bush and Obama eras as they pertain to human rights violations in the form of torture. The following section shall examine the torture prevention obligations present in international law and how the US has

committed to these obligations, a brief background on Guantanamo Bay and how both administrations conducted the affairs surrounding this detention centre.

## **I. Background**

### **A. Obligations to prohibit and combat torture under international law**

The CAT Committee, a treaty body under the UN Human Rights Council, monitors the implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>2</sup> Adopted in 1984, the CAT is an international legal instrument which contains 33 articles and serves as an inter-state agreement on international standards for the prohibition of torture.<sup>3</sup> The CAT Committee monitors the implementation of the CAT by State parties through examining submitted state reports, and establishing mechanisms which involve considering individual complaints, undertaking inquiries and considering inter-state complaints.<sup>4</sup> The CAT Committee itself was established pursuant to Article 17 and began to function in 1988 with 10 experts who are elected by State Parties for four year terms (UNHCR, Fact Sheet #17)<sup>5</sup>. The CAT came into force in 1987 and as of today, 163 State Parties have

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<sup>2</sup> United Nations Human Rights Office of the High Commissioner (UNHCR). Committee Against Torture. Retrieved from <http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIntro.aspx> (accessed on March 20, 2018).

<sup>3</sup> Ibid, (accessed on March 20, 2018).

<sup>4</sup> Ibid.

<sup>5</sup> UNHCR. Fact Sheet No. 17, The Committee Against Torture. Retrieved from <http://www.ohchr.org/Documents/Publications/FactSheet17en.pdf> (accessed March 20, 2018).

ratified the Convention.<sup>6</sup> Clark (2013) contends that “procedurally, ratification opens a state to further scrutiny by the official CAT Committee established to monitor each treaty” (p. 127). This contention is embodied in requirements for state parties under the CAT to submit an initial report, regular periodic reports and to have a representative of the country respond to questions and concerns before the treaty body (Clark, 2013, p. 127). Added to the requirements under the CAT are the CAT Committee’s issuance of “concluding observations” in response to each government’s report which follows a follow-up report by these governments in response to the CAT Committee’s observations (Clark, 2013, 127). The regular periodic reports by the US and ‘concluding observations’ by the CAT Committee will be documents examined in this essay. It is worthy to note that the structure of the CAT Committee’s concluding observations is done according to the Articles in the CAT. In other words, each of the CAT Committee’s recommendations are made according to the obligations set out in its governing document i.e. the CAT; and states’ human rights records (specifically with regards to torture) are ‘evaluated’ according to this. Looking beyond formalities, the entire reporting process is meant to demonstrate how important states’ commitments to the CAT are and how it should be upheld through the CAT Committee’s thorough examination of its human rights records.

For the purpose of this analysis, specific articles in the CAT, the 1949 Third Geneva Convention and Common Article 3 will be used. These documents also contain international legal prohibitions on torture and are referred to in the reports that will be examined. The specific articles that will be taken into consideration for this analysis are those that comprise Part I of the CAT, which are Articles 1 through 16. The analysis is not limited to just this section of the

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<sup>6</sup> UNHCR Website, Status of Ratification Dashboard. Retrieved from <http://indicators.ohchr.org> (accessed on March 20, 2018).

Convention, but the articles contained therein will figure prominently in the analysis of the US' international obligations to the CAT. The relevant articles of the CAT can be summarized as follows. Article 1 provides a definition of torture and explicitly defines it 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... a confession, punishing him for an act he...has committed". Article 2 makes it clear that countries must take all measures to prevent torture within the various arms of government and that a state of war, threat of war or order from a superior does not constitute a justification for torture. Articles 3 and 4 respectively state that a state should not extradite anyone to a place where they are likely to be tortured; and that all acts of torture should be enshrined in a state's criminal law. Article 5 states that Article 4 and by extension, the domestic laws (and accompanying penalties for the attempt to and practice of torture) should apply to the state's nationals as well as extend to any territory under the State's jurisdiction. Articles 10 and 11 speak to personnel involved in detention practices; they state that education and training on the prohibition of torture should be done, which should be included in the instructions concerning the duties and functions of the personnel. Articles 12 through 16 speak to proper and impartial investigations by competent authorities and individuals' right to complain to and have their case impartially examined by authorities under protection from intimidation. More importantly, Article 15 states that any statement established as a result of torture cannot be invoked as evidence in proceedings, with the exception that such a statement can only be used against the accused as evidence that the statement was made.

With 143 articles, the Third Geneva Convention, which replaced the 1929 Prisoner of War Convention, establishes the principle that prisoners of war shall be released and repatriated

without delay when active hostilities end.<sup>7</sup> Along with the First and Second Geneva Conventions, the Third Convention prohibits the use of torture of individuals detained in both international conflict and conflict of a non-international nature (Sikkink, 2013, p. 147). Conflict that takes the form of the latter is covered in Common Article 3, which is essentially a condensed format of the Geneva Conventions. Specifically, it requires humane treatment for all persons in enemy hands and prohibits torture, humiliating and degrading treatment and unfair trial.<sup>8</sup>

## **B. US Commitment to international law and Guantanamo Bay**

Although the United States has ratified fewer human rights treaties than other comparable treaties, it ratified the 1949 Geneva Conventions in 1955<sup>9</sup> and the CAT in 1994 (Sikkink, 2013, p. 147). More importantly, these conventions impose international legal obligations to never use torture and inhumane and degrading treatment under any circumstances (Sikkink, 2013, p. 147). Sikkink (2013) argues that the US was deeply involved in the drafting of these treaties and worked to make the prohibition of torture and cruel and degrading treatment more precise and enforceable (p. 147). This was done specifically in the CAT as the US delegation made sure the treaty's precision supported provisions on universal jurisdiction with regards to torture (Sikkink,

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<sup>7</sup> International Committee of the Red Cross (ICRC). (2010). The Geneva Conventions of 1949 and their Additional Protocols. Retrieved from <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> (accessed February 22, 2018).

<sup>8</sup> ICRC (2010). The Geneva Conventions of 1949 and their Additional Protocols. Retrieved from <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> (accessed February 22, 2018).

<sup>9</sup> ICRC. Treaties and Documents by State. Retrieved from [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=US](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=US) (accessed March 4, 2018).

2013, p. 147). Moreover, the Geneva Conventions were implemented in US domestic legislation in 1966 when the War Crimes Act was passed by overwhelming majorities in Congress (Sikkink, 2013, p. 147). This Act made it a criminal offence to commit grave breaches of the Geneva Conventions, including torture and cruel and degrading treatment (Sikkink, 2013, p. 147). Sikkink (2013), however argues that the motive behind implementing the Geneva Conventions in domestic law was to allow the US to prosecute war criminals, especially those from North Vietnam, who had tortured US soldiers during the Vietnam War (p. 147). Added to the fora of US implementation of international standards to domestic law, was the enactment of a new federal anti-torture statute after the CAT was ratified (Sikkink, 2013, p. 147). In this law, torture was made a felony and provided for criminal prosecution of alleged torturers in federal courts in specified circumstances, as well as incarceration or even the death penalty if the torture resulted in the victim's death (Sikkink, 2013, p. 147).

Guantanamo Bay is located in Eastern Cuba and has been used by the US as a naval base since 1898 following the Spanish-American War (Oakes et al., 2016, p. 942). The Cuban American Treaty of 1903 gave the US perpetual control over the base (Oakes et al., 2016, p. 942). In exchange for approximately \$4000 a year, the land could be kept under US control until an agreement was made to end it (Oakes et al., 2016, p. 942). Despite Cuban objections during Fidel Castro's rule, the base remained but became less valuable after the end of the Cold War (Oakes et al., 2016, p. 942). In 1991, approximately 34, 000 Haitian refugees were sent to Guantanamo Bay after they fled a military coup which ousted Jean-Bertrand Aristide, Haiti's first democratically elected president.<sup>10</sup> Cubans fleeing Castro's rule, who were rescued by the

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<sup>10</sup> CNN Library (2018, February 1), Guantanamo Bay Naval Station Fast Facts. *CNN*. Retrieved from <https://www.cnn.com/2013/09/09/world/guantanamo-bay-naval-station-fast-facts/index.html> (accessed March 21, 2018).

US Coast Guard<sup>11</sup> joined the Haitians in 1994. By 1995, the Haitian refugees returned home and Cubans were processed and allowed to emigrate to the US under the Clinton administration.<sup>12</sup> However, following the September 11, 2001 attacks by Al Qaeda terrorists under the leadership of Osama bin Laden, the centre was used to house “enemy combatants” captured by US troops in Afghanistan. Afghanistan’s Islamic fundamentalist movement, the Taliban, which ruled until ousted by a US-led, and UN sanctioned, military intervention in 2001, was suspected of harbouring persons involved in the 9/11 attacks (Guild, 2009, p. 37). When the Taliban refused to turn over bin Laden, this led to airstrikes launched against Al Qaeda and Taliban targets in Afghanistan. The US military campaign in Afghanistan was just the mere beginning of what the Bush administration termed, “the global War on Terror” (Oakes et al., 2016, p. 938). Suspected Al Qaeda/ Taliban members and supporters<sup>13</sup> were captured and sent to Guantanamo Bay in 2002 in an effort to hold them for an indeterminate period, without charge or trial (Guild, 2009, p. 37). The Bush administration needed to hold captured Taliban fighters and other “enemy combatants” in the words of then Secretary of Defense, Donald Rumsfeld, in ““the least worst place”” (Oakes et al. 2016, p. 942). However, during the Iraq war which began in 2003, the

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<sup>11</sup> Santiago, F. (2014, August 18), 20 years ago, 35,000 *balseros* fled Castro's Cuba on anything that would float. *Tampa Bay Times*. Retrieved from <http://www.tampabay.com/news/humaninterest/20-years-ago-35000-balseros-fled-castro-cuba-on-anything-that-would-float/2193473> (accessed March 21, 2018).

<sup>12</sup> Ibid; Approximately 35 000 persons were interdicted at sea and ferried to Guantanamo Bay following a large search and rescue operation undertaken by the US Coast Guard. These persons were nicknamed *balseros* because of the homemade rafts and boats that they used. On May 2, 1995, the Clinton administration announced that most of the detainees would be processed and allowed to emigrate. To curtail high-seas departures, a deal was made with the Cuban government which entailed the issuing of 20, 000 visas a year to Cuba.

<sup>13</sup> Guild notes that there exist some discrepancies in how individuals ended up at Guantanamo Bay. These discrepancies entail contradictions in US accounts and accounts of those who have been released from the facility. This includes accounts that foreigners in Afghanistan and Pakistan were picked off the streets by criminal gangs and ‘sold’ to the US authorities for substantial sums of money on the basis that the individuals were ‘Taliban’ (Guild, 2009, p. 37).

international community was shocked at the revelation of images and leaked ‘torture memorandums’ (torture memos) which detailed prisoner abuse by the US army and Central Intelligence Agency (CIA) at detention facilities in Guantanamo Bay, Cuba and the Abu Ghraib prison in Iraq.

Throughout the operations of the Guantanamo Bay detention facility, the United States committed human rights violations against suspected terrorists. “Enhanced interrogation techniques” which included waterboarding and slamming prisoners against walls have been identified by NGOs and other critics, but more importantly, by the CAT Committee. This human rights treaty body has called for the closing of the detention facility in its reports and has expressed its concerns over the violations which have occurred there.

### **C. The Bush administration**

Oakes et al. (2016) argue that Bush’s presidency was ultimately defined by the 9/11 crisis and shaped America in the first decade of the twenty-first century (p. 937). Not only was the international community shocked at images of abuse at detention facilities, but there was also widespread outrage at the actions of the Bush administration regarding the torture of detainees in the immediate post 9/11 era. Some academics argue that the Bush administration attempted to legitimize the practice of torture during the interrogation of detainees as well as justify the practice of detention without trial (Lellio and Castano, 2015, p. 1279). These attempts by the Bush administration are captured in the creation of the legal category of unlawful enemy combatant. This category was applicable to members of Al Qaeda and the Taliban detained by the US. The category had the intent of making detainees appear to be outside of the law (Lellio and Castano, 2015, p. 1279). At a Department of Defense media briefing on 11 January 2002, the

same month that the first prisoners arrived at Guantanamo Bay, Rumsfeld stated that persons held there would not be viewed in legal terms as prisoners of war, but as “unlawful combatants” and as such they, “do not have any rights under the Geneva Convention[s]” (Guild, 2009, p. 37). Along with the classification of unlawful enemy combatants, ‘enhanced interrogation techniques’ were used on prisoners. Such techniques were adopted by the Central Intelligence Agency (CIA), which included, but were not limited to slamming a detainee’s head against the wall, sleep deprivation and water boarding. For a time, the base provided the Bush administration with the freedom to apply these techniques, performed by CIA agents, FBI and military interrogators. Some authors maintain that these techniques copied Chinese Communist methods from the 1950s (Oakes et al., 2016, p. 942). However, because individuals were categorized as unlawful enemy combatants, the Bush administration deemed these enhanced interrogation techniques (by which some prisoners were tortured) as permissible (Lellio and Castano, 2015, p. 1280). This clear violation of the CAT and US domestic law was done through the administration’s use of legislative loopholes, which some scholars argue can be defined as a form of “lawfare”. This concept, according to Finkelstein (2017), captures how certain states have made “use of law to accomplish military aims” (p. 383). Following on this, Richter-Montpetit (2014) highlights how the concept gained popularity after it was used in a widely cited article by Major General Charles Dunlap Jr., a former US Deputy Judge Advocate General. Dunlap defined lawfare as “strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective” (p. 48). As will be examined in greater detail in subsequent sections of this essay, lawfare essentially has a double usage in academic scholarship. The first way in which lawfare is used falls within what is identified in this essay as an ‘anti-war’ stance. This first usage reflects the manner in which lawyers and NGOs have

sought to use international and domestic law to constrain US military power. Through this anti-war stance and in opposition to US human rights violations, lawyers, NGOs and even scholars may use the law and courts to achieve the objective of bringing the US to justice. The second usage identified in this thesis is referred to as ‘pro-war’ lawfare. This second usage reflects how the US engaged in the manipulation of international legal instruments (such as the Third Geneva and the CAT) to justify the use of torture on a legal basis. This second usage of lawfare is the focus of this research with regards to the Bush administration and its application to the Obama administration. It can be argued that the Bush administration engaged in lawfare against international human rights standards enshrined in the CAT and Geneva Conventions through torture memos and the Military Commissions Act of 2006. Several legal torture memos were requested by the CIA to protect the administration from potential war crimes prosecution. The torture memos rejected the application of the Geneva Conventions to detainees and justified aggressive interrogation techniques used by the CIA. The Bush administration further engaged in lawfare by using the Military Commissions Act of 2006. Luban (2008) uses the “Lawfare hypothesis” and the “Torture Cover-up hypothesis” to explain how the US has evaded the rule of law and challenged the lawyers representing detainees at Guantanamo Bay through the use of military commissions enshrined in the Act. Luban (2008) argues that although the Act forbade the admission of evidence obtained under torture, it “finesses this difficulty in various ways” (p. 2022). For Luban (2008), according to the Act, coerced evidence could be admitted if it was reliable and there was a dispute about the level of coercion. In other words, if during the trial the defendant claims the evidence was obtained through torture and the government disputes that the techniques were torture, then the evidence could be admitted regardless of the defendant’s claims (p. 2022). The Act also gave prosecutors the ability to prevent defense inquiries into sources and

methods by which evidence was obtained (Luban, 2008, pp. 2022-2023). Furthermore, the rules of the Act permitted hearsay which allowed an interrogator to testify about what a witness said without describing the conditions or threats that occurred. However, Luban (2008) argues that “the issue at Guantanamo may not be lawfare alone; it may also be covering up torture.” (p. 2023). Therefore, through creating difficulties for defense lawyers, lawfare made plea bargains the only viable option for detainees (Luban, 2008, p. 196).

“Habeas corpus” is another term that appears frequently in the literature and the reports. It refers to a writ which allows federal courts to determine the validity of an individual’s detention held by the US. Specifically, it allows for judicial access to US domestic courts to contest an individual’s holding in Guantanamo Bay. During Bush’s presidency, under the Military Commissions Act of 2006 and the Detainee Treatment Act of 2005, it was held that prisoners at Guantanamo Bay could not access the federal courts using habeas corpus, but had to go through the military commissions and then appeal in the D.C. Circuit Court. However, in *Rasul vs. Bush* (2004), the Supreme Court held that detainees, who were classified as ‘enemy combatants’ had the constitutional right to habeas corpus. In other words, detainees were given access to US civil courts for their cases to be tried, something that prisoners were not able to do before. The following subsection shall examine the Obama administration’s actions regarding Guantanamo Bay.

#### **D. The Obama administration**

The Obama administration moved away from Bush’s harsh 9/11 policies, but Yin (2011) argues that Obama made further mistakes, due to an overreaction to his predecessor’s policies (p.

455). In his second full day in office, President Obama issued three Executive orders concerning lawful interrogations, Guantanamo Bay and detention policy options (State Dpt., 2013, p. 10). With these orders, he instructed the CIA to close down any detention facilities that it operated. At the time of writing, Guantanamo Bay still remains open<sup>14</sup> and this inability to close the detention facilities remains one of the main criticisms of the Obama administration. However, there are various points of comparison regarding both administrations' actions and inactions. Yin (2011) states that both Bush and Obama learned from Bush's 'first-term-mistake' of not having a formal process to capture fighters and transfer them to Guantanamo Bay or leave them in Afghanistan. The Bush administration introduced Combatant Status Review Tribunals (CSRTs) and Administrative Review Hearings (ARHs) (explained further in this essay) to fix the "mistake" he made of not having a formal process to determine combatant status of Guantanamo Bay detainees. Both Obama and Bush learned from this mistake as seen in the reduction of the Guantanamo Bay detainees throughout their presidencies and Obama specifically learned by employing a Special Task force to evaluate detainees' status (Yin, 2011, p. 462-463). Lellio and Castano (2015) critique the Obama administration for failing to prosecute officials who approved or practiced torture in 2008 (p. 1283). Forsythe (2011) argues that although the Obama administration declared that Bush's legal memos were 'null and void', called for the closing of Guantanamo Bay through his executive orders, and forbade most of the enhanced interrogation

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<sup>14</sup> In fact, and also in striking contrast to Obama's executive order to close Guantanamo Bay, President Trump signed an executive order to keep Guantanamo Bay open. The order instructs the defense secretary, James Mattis, to deliver a new policy on battlefield detentions, "including policies governing transfer of individuals to US Naval Station Guantanamo Bay". In his State of the Union address on January 30, 2018, Trump said that the move to close Guantanamo Bay reflected softness in the fight against terrorism. In reviving the Bush administration's infamous legal category, Trump stated that, "terrorists are not merely criminals. They are unlawful enemy combatants. And when captured overseas, they should be treated like the terrorists they are." Borger, J. (2018, January 31), Donald Trump signs executive order to keep Guantánamo Bay open. *The Guardian* Retrieved from <https://www.theguardian.com/us-news/2018/jan/30/guantanamo-bay-trump-signs-executive-order-to-keep-prison-open> (accessed March 22, 2017).

methods, he shared some continuity with Bush's policies (p. 781). This included echoing the Bush administration's argument that the US was at war with Al Qaeda and using "executive justifications for detention" (Forsythe, 2011, p. 781). Forsythe (2011) asserts that although he gave "new life" to military commissions<sup>15</sup>, Obama used them to try some prisoners and continued to use "administrative detention without legal charge or trial for others" (p. 781-782). Forsythe (2011), however notes that Obama faced intense criticism for many of his counterterrorism policies, especially those related to the treatment of terror suspects, specifically from former Vice President Cheney and his supporters (p. 782). This criticism was voiced when Congress blocked Obama's efforts in 2009 to close Guantanamo Bay and upgrade a detention facility in Illinois to accept the transfer of some detainees (Forsythe, 2011, p. 782). The Obama administration faced further difficulties in 2010 when proposals arose to try Khalid Sheik Mohammed (KSM), the supposed mastermind of 9/11 in a federal court. This included restrictive legislation and the alteration of the prosecutions plans for KSM, who had been tortured (Forsythe, 2011, p. 782). Bush also faced similar criticism on the issue of trying KSM and other high level Al Qaeda suspects in federal courts, but Yin (2011) argues that on this issue, Obama made a new mistake- the inability to initiate the criminal prosecution of KSM, because of the criticisms that Bush faced (p. 472-473). Yin (2011) states that Obama did not completely renounce the use of military commissions, but "agreed that some cases are appropriately prosecuted in the military system" (p. 471). Another main criticism of Obama is his administration's failure to prosecute persons who approved or practiced enhanced interrogation methods on abusers (Lellio and Castano, 2015, p. 1283). Lellio and Castano (2015) argue that

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<sup>15</sup> As will be discussed in the section on the analysis of reports, President Obama replaced the 2006 Military Commissions Act with 2009 Military Commissions Act, giving prisoners better access to the courts.

this contravenes the US' obligations to the CAT and "the UN High Commissioner for Human Rights, as well as the Special Rapporteur on counterterrorism and human rights, have demanded accountability for such egregious violations" (p. 1283).

Given the context of the obligations under the CAT and the Geneva Conventions and an overview of what occurred during both administrations, the following section will examine the literature surrounding the concept of lawfare in order to provide a theoretical framework to evaluate the actions of both administrations.

## **II. Literature review: Lawfare as 'pro-war' and 'anti-war'**

This section serves as an examination of how lawfare has been used by various scholars. Upon revision of the literature, two dimensions of lawfare have been identified, which will be used in this analysis. These two dimensions are: 'pro-war' and 'anti-war'. The term 'pro-war' will be used to describe the use of international law as a tool of manipulation by governments (in this case, the US government). Lawfare, in this sense, is meant to capture how law, international and domestic, can be used as a tool of war where prohibited acts are rendered permissible. On the other hand, defining lawfare through the lens of 'anti-war' will be used to describe how international and domestic law can serve as a mechanism to constrain state behavior in the conduct of warfare. This second dimension of lawfare is engaged in by actors such as NGOs and human rights lawyers and reflects how the tradition of international humanitarian law, of which the Geneva Conventions is a component, has sought to limit what is permissible during war.

Much of the literature surrounding the US' human rights record with regards to Guantanamo Bay speaks to the pro-war aspect of lawfare, i.e. the Bush administration's

engagement in lawfare as a means to legitimize and justify certain policies or actions. This essay seeks to focus on this pro-war dimension, where the Bush administration engaged in lawfare to justify the human rights violations that occurred at Guantanamo Bay. However, the anti-war aspect will also be examined to complete the theoretical basis of this essay. This review of literature will reveal the multifaceted and nuanced nature of the pro-war dimension of lawfare because of the way in which the Bush administration engaged in it. This is so, as while lawfare is described as the use of law to gain an advantage, added to this, the Bush administration sought to negate international law by rendering the CAT and Geneva Conventions inapplicable to Guantanamo detainees. The analysis of documents, which follows this section will provide linkages to the literature review and further confirm this nuanced nature of the concept of lawfare by examining how the CAT Committee responded to the Bush administration's pro-war stance.

Megret (2006) provides a striking analysis of the literature surrounding the US and its commitment to international anti-torture standards. He acknowledges that dominant discourse may condemn the Bush administration's actions with regard to captured detainees. However, he contradicts the dominant discourse by arguing that 'exclusion' of the 'the other' may be built into the very constitution of the laws of war and international humanitarian law (Megret, 2006, p. 2). In other words, the legal "justifications" that many scholars argue have been given by Bush administration officials may have been embedded into the laws of war such as the Geneva Conventions. Megret (2006) contends that even before the creation of international humanitarian law, history has shown that from the late 1800s and early 1900s, the exclusion of non-European peoples was embedded in the design of the very beginnings of the laws of war in Europe. He traces this exclusion back the historical roots of the laws of war themselves and emphasizes that

international humanitarian law has a racist and colonial past that is present in its contemporary usage, specifically in fighting the War on Terrorism (Megret, 2006, p. 4). Megret (2006) notes that the same year (1876) that the International Committee for the Relief of Military Wounded took the name by which it is known now, i.e., as the International Committee of the Red Cross, was the same year when the European colonial expansion in Africa began (Megret, 2006, p. 4). This was the period when “King Leopold II of Belgium, the soon to be tormentor of Congo, convened a conference in Brussels which began the ‘Scramble for Africa’ (Megret, 2006, p. 4). Megret (2006) also cites the time of the adoption of The Hague Conventions which happened to occur towards the end of a twenty-year period which saw Africa pass from being largely self-governed to being mostly dominated by European powers (Megret, 2006, p. 4). Megret (2006) states that “the exclusion of non-European peoples from the laws of war was a direct function of the adoption by the nascent ‘international community’ ...with its emphasis on the state as the sole source of law” (p. 14). As a result of the state being regarded as what Megret refers to as the “methodological and substantive framework of international law”, the laws of war were considered to apply only between states and to the extent that states were party to them (Megret, 2006, p. 14). Thus, Megret (2006) states that “there would be little scope for applying the laws of war (or any international law)” to those that European parties were fighting, who were not parties to the relevant instruments. (p. 14). This is where the theme of ‘civilized’ and ‘non-civilized’ arise where specifically, civilization is associated with the laws of war and not to ‘non-civilized’ peoples (Megret, 2006, p. 16). Upon decolonization, Third World states ratified the Geneva Conventions and could therefore obtain protection during conflicts (Megret, 2006, p. 22).

Megret (2006) uses the arguments of Bush administration officials on the applicability (or rather inapplicability) of the laws of war to Al Qaeda and Taliban members to examine how the

exclusion of the “uncivilized” or “savages” has resurfaced (p. 24). Megret (2006) examines the 2002 Bybee memorandum, remarks by the then Deputy Assistant Attorney General, John Yoo<sup>16</sup> and others to make this argument (p. 24). Megret (2006) argues that both Bybee and Yoo, in their claims that the Geneva Conventions did not apply to Al Qaeda, because it is not a nation state and has not signed on to the Conventions, resembled the conventional argument that savage tribes or the uncivilized were not party to relevant treaties (Megret, 2006, p. 24). Adding to this claim, John Yoo stated that ““even if Al Qaeda were a nation-state and a party to the Geneva Conventions, its members would still qualify as illegal belligerents due to their very conduct”” (Megret, 2006, p. 25). This “conduct”, according to Yoo suggests that illegal combatants had no intention of respecting the laws of war because they violate the core tenets of these laws (Megret, 2006, p. 25). Furthermore, Yoo’s reasoning, which bares similarity to the case of non-civilized peoples follows that unlawful combatants cannot benefit from the laws of war because they cannot possibly be expected to reciprocate (Megret, 2006, p. 25).

In Yoo’s words:

The primary enforcer of the laws of war has been reciprocal treatment: We obey the Geneva Conventions because our opponent does the same with American POWs. That is impossible with Al Qaeda. It has never demonstrated any desire to provide humane treatment to captured Americans. .... [a] treaty like the Geneva Convention makes perfect sense when it binds genuine nations that can reciprocate humane treatment of prisoners.

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<sup>16</sup> This memorandum, dated January 22, 2002 and entitled ‘Application of Treaties and Laws to al Qaeda and Taliban Detainees’ was one of the ‘torture memos’ signed by then Assistant Attorney General, Jay Bybee and submitted to Alberto R. Gonzales Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense (Megret, 2006, p. 24). The main argument in this memo was that the Geneva Conventions did not apply to suspected Al Qaeda terrorists.

... but the Geneva Convention makes little sense when applied to a terrorist group or a pseudo-state (Megret, 2006, p. 25).

Megret (2006) states that the Bush administration's "resuscitation" of the historical exclusion of the 'other' leads to the dominant response of condemnation of his policies, which is evidenced by many scholars, especially in this thesis (p. 26). He admits that there are some elements in the US' policies which are highly questionable, such as Yoo's emphasis on the role of reciprocity<sup>17</sup> (Megret, 2006, p. 26). However, Megret (2006) argues that "humanitarian lawyers<sup>18</sup> often fail to acknowledge as readily as they should that there is a strong legal case that the Geneva Conventions would simply not grant POW status to many of those caught in Afghanistan" (p. 27). He further argues that, "many humanitarian lawyers know, but loathe to concede that the Bush administration is often merely mimicking the law [in its claims]" (Megret, 2006, p. 27). Megret (2006) thus critiques these lawyers for knowing this information, but choosing to conceal it; and states that this withholding of knowledge is part of the "'hidden college' of international humanitarian lawyers" (p. 27). He continues that, "the US authorities' case is not often a case to simply violate or do away with the law, [but rather] a characteristically strict, *almost legalistic* interpretation of the law" (Megret, 2006, 27). In other words, Megret (2006) contends that although actions of the Bush administration were heavily seen as violations by many, including lawyers, it could be argued that officials were operating within the confines of international law. To further support this argument, Megret (2006) states that a strong case can be made that Al

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<sup>17</sup> Megret (2006) argues "that Yoo confuses a common factual explanation for *why* the laws of war are ever actually respected with a legal-dogmatic justification for not respecting them" (p. 26).

<sup>18</sup> Humanitarian lawyers who use the law to fight US policies through anti-war lawfare.

Qaeda members do not fulfil the criteria of the Geneva Conventions<sup>19</sup> to be considered as “belligerents as a militia, volunteer corps or resistance movement” (p. 27). These requirements include: one having to be commanded by a person responsible for his subordinates, to carry arms openly, to have a fixed recognizable emblem and to conduct their operations in accordance with the laws and customs of war (Megret, 2006, p. 27). Because a strong case can be made premised on simply what the law says and nothing else, Megret (2006) argues that the case that Al Qaeda members should not be entitled to prisoner of war status<sup>20</sup> is hard to defeat (p. 27). Megret makes a striking legal argument here by simply stating that the international law governing the protection of individuals, such as those detained at Guantanamo Bay can support the claims of the Bush administration officials. However, it leaves open the question of if the torture committed by interrogation personnel was justified. Megret (2006) answers this question by stating that although a reading of the law can be argued to make several cases in favour of the Bush administration and against international humanitarian lawyers, what should be done with Al Qaeda members is a totally different issue (p. 27).

Megret (2013) argues that since the enactment of the Geneva Conventions and after the establishment of other contemporary laws of war, we can now distinguish between different types of combatants (p. 28). However, a blind spot remains, which presumes that we know what a (legal) combatant is (Megret, 2012, p. 28). He contends that the laws of war, thus determine the legitimate participants in warfare (as can be seen in the US’ justification of its practices through the creation of the classification, ‘unlawful enemy combatants’) (Megret, 2013, p. 28). He states

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<sup>19</sup> Megret (2013) also uses the criteria of The Hague Regulations along with the Third Geneva Convention for one to be classified as belligerents, a militia, volunteer corps or resistance movement (p. 27).

<sup>20</sup> The case made by then Bush officials, mainly Bybee, Yoo and Rumsfeld.

that, with the gradual codification of the laws of war, we witness a recycling of the issue of what the applicable rules are (for instance, whether obligations are owed on the basis of reciprocity<sup>21</sup>), into the definition of who is entitled to their benefit (for example, capacity to reciprocate as a condition for combatant status) (Megret, 2013, p. 28). Megret (2013) argues that “the laws of war can be seen as continuously excluding that which does not conform to the image they project of legitimate warfare” (p. 31) This, of course has roots in the historical establishment and evolution of the laws of war. Finally, Megret (2013) states that:

The crumbling of the founding dichotomy between ‘civilization’ and savagery, moreover, can only send the laws of war stumbling down into a spiral of decomposition .... it may also explain why, paradoxically, the laws of war need their ‘savages’, whether they be war criminals, terrorists or unlawful combatants, and go through periodic ‘crises of otherness’ that lead them to reassert... their foundational counter-image (p. 37).

As introduced earlier, Dunlap popularized the concept of lawfare and his work is widely cited by many scholars. In his 2001 article,<sup>22</sup> Dunlap defines lawfare as “a method of warfare where law is used as a means of realizing a military objective” (Dunlap, 2001, p. 4). Dunlap (2001) contends that with the rise of international law, which encompassed the creation of the

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<sup>21</sup> This issue of reciprocity is based on remarks made by Yoo where he stated that “[a] treaty like the Geneva Convention makes perfect sense when it binds genuine nations that can reciprocate humane treatment of prisoners... but the Geneva Convention makes little sense when applied to a terrorist group or a pseudo-state” (Megret, 2013, p. 25). In other words, Yoo supported the inapplicability of the Geneva Conventions (the main argument of the Bush administration) based on this issue of reciprocity. If Al Qaeda (which is not a nation-state) showed no desire to treat American prisoners humanely, then Yoo contends that the Geneva Conventions “make little sense” to be applied (Megret, 2014, p. 25).

<sup>22</sup> The term was popularized through a paper that Dunlap prepared for the 2001 Humanitarian Challenges in Military Intervention Conference. Dunlap did not coin the term, but due to the time that this was published (November 29, 2001), i.e. subsequently after the 9/11 attacks, many scholars refer to Dunlap’s use of the term in this paper.

1949 Geneva Conventions, a principle focus was to spare non-combatants the adverse effects of war (p. 2). Here, the anti-war dimension arises, where Dunlap (2001) argues that through the use of lawfare by NGOs, there exists an element of ‘anti-Americanism’ where international law is used to “check American power” (p. 3). Through an anti-war stance, NGOs who see international law as a way to constrain states (and to protect non-combatants through the Geneva Conventions, for instance), engage in lawfare against the US. He further states that this may be the reason that criticism of US positions mark much of the debate in the international community. Dunlap’s arguments on this anti-war dimension of lawfare are important in analyzing the criticism and debate surrounding the US’ actions around Guantanamo Bay and dialogue with the CAT Committee. Dunlap (2001) further states that this dimension of lawfare is frequently used by US opponents to cynically manipulate the rule of law and humanitarian values it represents (p. 4). In a 2008 article, Dunlap returns with a more refined definition of lawfare (used earlier in this essay)<sup>23</sup> where he continues his argument that the rise in international law is tied to globalization (Dunlap, 2008, p. 146). He also states that lawfare is like a tool or weapon that can be used in accordance with the virtues of the rule of law (Dunlap, 2008, p. 148). Dunlap (2008) argues that concern from the public, NGOs, legislatures and courts over the behavior of militaries is not a public relations problem<sup>24</sup>, but rather of adherence to the

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<sup>23</sup> In his 2001 paper, Major General Charles Dunlap, Jr, defines lawfare as the ‘strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective’ (Richter-Montpetit, 2014, p. 48).

<sup>24</sup> NGOs, courts and others with an anti-war position may have sparked public attention through their concern over the US government’s policies surrounding Guantanamo Bay. However, Dunlap asserts that these expressions of concern were more than a public relations problem (for the Bush administration), but rather “a legitimate and serious activity that is totally consistent with adherence to the rule of law, democratic values, and – for that matter – lawfare” (Dunlap, 2008, p. 148). In other words, Dunlap identifies the engagement in anti-war lawfare by NGOs, etc. as important and it can be argued that this signifies the further importance of international law. This engagement in anti-war lawfare is critical to ensuring that states like the US adhere to not only their commitments to international law, but to the rule of law.

rule of law and lawfare itself (Dunlap, p. 148). Dunlap (2008) asserts that there are both negative and positive forms of lawfare, and it is now a part of modern warfare (p. 149). He further goes on to critique Yoo's arguments<sup>25</sup> that military lawyers (JAGs) "are responsible ... for a 'breakdown' in civil-military relations" and that, "JAG legal opinions amounted to 'policy preferences'"<sup>26</sup> (Dunlap, 2008, p. 150). Dunlap (2008) attempts to dispel this notion by stating that the work of JAGs, which included opposition to harsh physical interrogation techniques and an evidentiary scheme<sup>27</sup> for military commissions were not a 'policy preference', but rather insistence upon due process (Dunlap, 2008, p.150-151). Dunlap (2008) supports the work of JAGs throughout his article and stands by their role of upholding constitutional values as well as advising military officers and reiterates that their role is what ought to be done in the lawfare era (pp. 151-152).

In continuing on the concept of lawfare, Jones (2016) examines how the anti-war dimension gained currency after the 9/11 attacks, which prompted the 'pro-war' use of law reaction by the Bush administration (p. 227). Jones (2016) also continues Dunlap's (2001) argument that an element of anti-Americanism in the use of lawfare exists to 'check' the US' actions (p. 227). He states that "as soon as international law and ... human rights law began being deployed to check certain practices in the War on Terror", the US adopted an oppositional stance (Jones, 2016, p.

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<sup>25</sup> John Yoo and Glenn Sulmasy, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 *UCLA Law Review* 1815 (2007). Subsequent to his tenure as a Bush administration official, John Yoo became a Professor at the University of California, Berkeley. The arguments that Dunlap critiques are contained in this article in the August issue of the *UCLA Law Review*.

<sup>26</sup> Yoo's contentions are a representation of Bush administrations view of how JAGs, NGOs and others used lawfare i.e. against the US government through the courts. This use of lawfare can be contrasted to how Bush officials used the law to dismiss international instruments through their memos, military commissions and statements.

<sup>27</sup> This 'evidentiary scheme' that Dunlap refers to a tenet of military commissions where an accused would have been convicted and sentenced to death based on evidence he never saw. JAGs used lawfare to oppose this (Dunlap, 2008, p. 150).

227). Jones (2016) argues that Abu Ghraib and Guantanamo Bay “signified the ultimate abuse of the law, and the Torture Memos were artefacts of lawfare *par excellence*” (p. 227, emphasis in original).<sup>28</sup> However, he states that US neoconservatives opposed this view of lawfare and argued that “the real abuse of law in Guantanamo Bay came not from those who conducted and authorized torture, but from the unlawful enemy combatants and the NGOs and lawyers who represented them” (Jones, 2016, p.227). These neoconservatives believed that “the detainees constructed a ‘mistreatment narrative’ which they used ‘as ammunition for waging tactical lawfare’” (Jones, 2016, pp. 227-228). In other words, neoconservatives believed that detainees and their advocates in the post 9/11 context “launched a massive campaign through various court systems worldwide”. In evaluating this use of lawfare, Jones (2018) identifies the “interesting...extension of the lawfare label to US lawyers in particular to the human rights community in general” (p. 228). Jones (2016) continues that within this extension through the lawfare discourse, “human rights law itself becomes indistinguishable from the enemy Other and must therefore be militated against” (p. 228). Jones’ (2018) work is significant to the understanding of the dichotomy of lawfare that exists and more importantly that the concept thrives within the post/911, War on Terror environment. Neoconservative views on lawfare help to understand the Bush administration’s stance on issues surrounding Guantanamo and how it deployed tools of lawfare to engage in this globalized, new era of ‘war’ through legal means.

Luban (2008) uses what he terms the “lawfare hypothesis” and the “torture cover-up hypothesis” to “provide an explanation for government efforts to take out the adversary” in its pro-war engagement of lawfare (p. 2021). This “adversary” includes lawyers, NGOs who

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<sup>28</sup> Here, Jones ultimately identifies the Torture Memos as artefacts or rather, tools of lawfare. He also identifies ‘unlawful enemy combatants’ as a term of “lawfare art”.

challenged the actions of the US. Luban (2008), in referring to a book published by Yoo<sup>29</sup> states that Yoo regards his own efforts to legitimize tactics such as indefinite detention and harsh interrogation as a way of waging war through law<sup>30</sup> (p. 2020). He continues that Yoo defends these controversial tactics in his book by saying that they should not be seen as problematic, but as “exercises of traditional war powers in a new kind of war” (p. 2020). Here, Luban (2008) identifies Yoo’s statements as “keeping with the concept of ‘lawfare’ by which is meant the use of international law and litigation as a method of gaining military advantage”<sup>31</sup> (p. 2020). In line with Dunlap and Jones’ arguments that anti-Americanism sentiments exist within the fora of lawfare, Luban (2008) states that some commentators regard the use of lawfare as an insidious tool of America’s enemies. He continues that these enemies include internationalist NGOs with an agenda to promote (Luban, 2008, p. 2020). Therefore, Luban states that the concept of lawfare helped to provide an explanation for government efforts to take out the adversary through their pro-war stance. Luban and Jones both quote the 2005 National Defense Strategy of the US to not only support the lawfare argument, but to show the striking way in which US officials used it. The 2005 National Defense Strategy, produced by the Pentagon and signed by the Secretary of Defense states, “Our strength as a nation state will continue to be challenged by those who

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<sup>29</sup> Yoo published a memoir entitled *War by Other Means* which Luban also reviews in one of his earlier works – David Luban, *The Defense of Torture*, N.Y. REV. BOOKS, Mar 15, 2007, pp. 37-40.

<sup>30</sup> Before this statement, Luban quotes Prussian military strategist, Carl von Clausewitz’s, famous description of war as “the continuation of politics by other means”. He argues that, Yoo puts an “ingenious twist of Clausewitz” through his defense the legality of controversial tactics (while he worked under President Bush), (Luban, 2011, p. 2020).

<sup>31</sup> Similar to Dunlap’s analysis of Yoo’s contentions, Yoo’s statements can be seen as a legitimate representation of the US government’s use of lawfare.

employ a strategy of the weak using international fora, judicial processes, and terrorism”<sup>32</sup>  
(Luban, 2008, p. 2020). Jones and Luban admit that this “equation of judicial process with terrorism” is startling, but it confirms the Bush administration’s acceptance of their understanding of the lawfare theory (Luban, 2008, pp. 2020-2021). Also, it justifies the categorizing of lawyers who invoke international law, human rights or civil liberties as America’s enemies (Luban, 2008, pp. 2020-2021). Luban further states that the US government’s idea of lawfare is fundamentally a “paranoid overreaction to perfectly legitimate legal challenges to Guantanamo detentions” (p. 2021). In other words, the US government’s pro-war stance on lawfare was an overreaction to anti-war challenges by NGOs and human rights lawyers. He also points out that Dunlap (2008) goes to great lengths to distance his ideas from this “paranoid thinking” by stating that concern from those such as NGOs, lawyers etc. is a serious activity. However, even amidst Dunlap’s efforts to support the work of lawyers, NGOs etc., who are accused of being ‘anti-American’, Luban (2008) states that Dunlap is a JAG (Dunlap was a JAG at the time of his writing) (p. 2021). Therefore, devotees to the lawfare theory, such as neo conservatives may disregard Dunlap’s sentiments and use it as another example of why JAGs (who advise military lawyers and aid in representing detainees) “must be brought to heel” (Luban, 2008, p. 2021).<sup>33</sup>

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<sup>32</sup> Historical Office, Office of the Secretary of Defense. (2005), The National Defense Strategy of the USA. Retrieved from [http://history.defense.gov/Portals/70/Documents/nds/2005\\_NDS.pdf?ver=2014-06-25-124535-143](http://history.defense.gov/Portals/70/Documents/nds/2005_NDS.pdf?ver=2014-06-25-124535-143) (accessed March 13, 2018).

<sup>33</sup> Luban also argues that government policies (intentionally or not) made it difficult for lawyers to provide legal representation for Guantanamo Bay prisoners (p. 1983). Difficulties such as limited flights to the prison itself and slow mail were by-products of security procedures and the geographical isolation of Guantanamo Bay (Luban, 2008, p. 1990).

Although in this essay, it is argued that lawfare has a double usage i.e. use by the US government and use by NGOs, lawyers etc., Morrissey (2011) identifies two alternative ways in which the US government employed lawfare in the War on Terror (p. 280). More specifically, he breaks down the pro-war stance into two forms. The first form that Morrissey (2011) identifies involves the “indefinite detention and sometimes extraordinary rendition of enemy combatants, legally sanctioned and politically justified by the exceptional circumstances of late modern war and terrorist violence” (p. 280). The second form that Morrissey (2011) identifies involves a legal strategy which conditions and protects the US military in ‘offensive’ mode (p. 280). In this second form, in order to protect itself from ‘attacks’ by NGOs, lawyers and international bodies like the UN, the US engaged in lawfare through legal means. Throughout his analysis, Morrissey focuses on this second form which he argues, “operates at the national and transnational scale and involves the careful legal designation and protection of US military personnel” (Morrissey, 2011, p. 280). Morrissey defines this form of lawfare as, “forward juridical warfare”, where he argues that the US military mobilizes the law in the waging of war along the new frontiers of its War on Terror.<sup>34</sup> Like Luban (2008), Morrissey (2011) acknowledges Clausewitz’s observation that war is the “continuation of political commerce by other means” (Morrissey, 2011, p. 291). However, he adds to this definition by stating that, “today, the lawfare of the US military is a continuation of war by legal means” (Morrissey, 2011, p. 291).

For her part, Sikkink (2013) attempts to apply the “spiral model” to the Bush administration’s use of legislation to protect its personnel and justify its acts by rejecting international legal instruments, such as the Geneva Conventions and the CAT. Many human

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<sup>34</sup> These ‘new frontiers’ refer to statements made by Yoo and other Bush administration officials, where mention of a ‘new kind of war’ was used as a reason for the non-application of the Geneva Conventions in the infamous torture memos.

rights researchers have used empirical evidence and methods to apply the spiral model to states (Simmons, 2013, p. 44). This model attempts to explain how international human rights norms have come to influence domestic human rights practices, essentially, from ratification to compliance (Simmons, 2013, pp. 43-44). Although Sikkink (2013) admits that there are ways in which the spiral model does not apply to the US case, she attempts to do so through applying the various stages of the model to how the Bush administration handled accusations of human rights violations (p. 163). The way in which she attempts to apply the US case to the spiral model contains tenets of the concept of lawfare and is therefore of worth for this thesis. For Sikkink (2013), states go through different phases in the spiral model, namely: repression; denial; tactical concessions; prescriptive status; and rule-consistent behavior (pp. 148-161).

As she goes through the different “phases” of the spiral model, three ways in which Sikkink describes the Bush administration’s use of lawfare are identified. The first surrounds the blatant denial of international instruments. This concurrently falls along Phase 2 of the spiral model i.e. “denial”. Sikkink (2013) argues that through public statements, legal memos and reports prepared by the Justice Department and the Defense Department, the Bush administration entered this process of denial. One such instance of this included the Bush administration’s argument that the Geneva Conventions did not apply to the Afghanistan conflict and thus the consideration of detainees as not falling in the category of ‘prisoners of war’, which is enshrined in the Geneva Conventions. This is where the term “illegal enemy combatants” was coined. Sikkink (2013) argues that this decision by the Bush administration was problematic in terms of the existing laws of war and “opened the door to torture” (p. 150). As stated earlier in this essay, the Geneva Conventions protect any detainee from torture in non-international and international conflicts. However, Sikkink (2013) argues that the Bush administration’s determination that the

Geneva Conventions were inapplicable to the Al Qaeda conflict could be implied as the permission of torture (p. 150). Another part of the phase of denial included the Bush administration's efforts to reinterpret the definition of torture in the Geneva Conventions and CAT in order to use certain interrogation techniques (Sikkink, 2013, p. 150). Sikkink (2013) cites the 2002 memorandum by Bybee (one of the infamous 'torture memos'), as an example of the creation of a "narrow definition of torture" contrary to the CAT and US legislation which implements the CAT (p. 151). The memorandum suggests 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" (Sikkink, 2013, p. 151). The 2002 memorandum also states that "the infliction of such pain must be the defendant's precise objective" (Sikkink, 2013, p. 151). Sikkink (2013) argues that the memo creates an "absurd and unstable definition" of torture where only one who "engages in a practice resulting in pain equivalent to death is a torturer" (p. 151).

Another category which stands out in Sikkink's analysis of the Bush administration, with respect to the concept of lawfare, surrounds the use of legislation to protect personnel. Sikkink (2013) argues that Bush administration officials sought legal tools to protect the CIA and other state officials from prosecution for acts they understood had the risk of criminal liability (p. 151). Sikkink (2013) cites a few instances where this was done. One such instance occurred in March 2002, a few months after Coalition forces occupied Afghanistan where a CIA lawyer made an "advance declination" request to the Justice Department (Sikkink, 2013, p. 151). In other words, a request for an "anticipatory 'immunity' or 'pardon' for interrogation practices" was made, in which the Justice Department refused to sign based on policy grounds (Sikkink, 2013, p. 151). However, Sikkink (2013) argues that the fact that the CIA put in such a request shows that Bush

administration officials were aware that their acts, it could be argued, went against domestic law and by extension international law (p. 151). This request made in early 2002, also suggests that from the beginning, Bush administration officials sought legal tools to protect themselves from acts that could have potentially provoked criminal liability (Sikkink, 2013, p. 151). Another instance surrounding the use of legislation to protect personnel was included in one of the first confidential memos, dated January 25, 2002 (Sikkink, 2013, p.152). As stated earlier, the Bush administration argued that the Geneva Conventions did not apply to detainees because of the War on Terror. Sikkink (2013) contends that by doing so, the Bush administration intended to make domestic prosecutions for torture less likely (p. 151). It should also be mentioned that the 1996 US War Crimes Statute specifically criminalized grave breaches of the Geneva Conventions (Sikkink, 2013, p. 151). It was in the confidential memo dated January 25, 2002, that the threat of prosecution was cited as a reason to declare that detainees captured in Afghanistan were not protected under the Geneva Conventions (Sikkink, 2013, p. 152). Through the argument that the Geneva Conventions did not apply, the memo implied that torturing detainees would not be a breach of the Conventions, thus, the US War Crimes Statute (domestic legislation) would not apply and could not be used to prosecute individuals (Sikkink, 2013, p. 152). More specifically to Guantanamo Bay, Sikkink (2013) cites an instance where a commander there completed a “twelve-page request for permission for more aggressive forms of interrogation including waterboarding” (p. 152). His lawyer wrote that military officials who used those techniques could be committing crimes under the Uniform Code of Military Justice (domestic military law), but that it might be solved with high level permission or immunity (Sikkink, 2013, p. 152). This use of legislation (immunity requests and the torture memos, backed by the blatant denial of the Geneva Conventions and the CAT) by Bush administration officials for protection against

prosecution is illustrative of the pro-war dimension of lawfare. Sikkink (2013) also states that the creation of the Military Commissions Act of 2006, which was passed by the Bush administration, strengthened the protection against prosecution already included in the Detainee Treatment Act (Sikkink, 2013, p. 155). It must be noted that the Detainee Treatment Act was also used by the Bush administration for legal protections. This Act banned cruel, inhuman or degrading treatment of prisoners, but Sikkink (2013) argues that the White house fought bitterly against it (p. 154). President Bush at one point threatened to veto it when it arrived on his desk (Sikkink, 2013, p. 154). The Bill passed by a margin of 90-9 and its final version included language which provided legal protections for US personnel engaged in interrogations as the White House sought to exclude the CIA from complying with the Bill (Sikkink, 2013, pp. 154-155). Sikkink (2013) argues that this legislative language made prosecutions more difficult in US courts because statutory law stated that as long as US officials felt they were acting according to the law, they could not be convicted (Sikkink, 2013, p. 155).

The two categories that have been identified in Sikkink's analysis thus far fall within the pro-war aspect of lawfare i.e. the blatant denial or manipulation of international law and the use of legislation to protect personnel. However, the following category identified from an examination of her work falls within the anti-war use of lawfare employed by NGOs and lawyers. This use is illustrated through Sikkink's analysis of the US Supreme Court's rulings. Sikkink's examination of these rulings not only adds to the purpose of this essay, but to the literature surrounding the concept of lawfare itself, in particular, Dunlap's (2008) contention that recourse to the courts is a facet of lawfare to be encouraged, not discouraged (p. 149). Sikkink (2013) argues that, "the most serious opposition to Bush's policy came from the US Supreme Court" (p. 155). Although it did not directly address torture, the landmark 2006 case of *Hamadan v. Rumsfeld* addressed the

legal claims made by the Bush administration in two central ways (Sikkink, 2013, p. 155). Firstly, it determined that the Geneva Conventions applied in Guantanamo Bay, where the Court ruled that the military commission system used to try detainees went against the Geneva Conventions and US domestic laws. Secondly, it rejected the claim of exclusive executive authority by upholding the Geneva Conventions and CAT (specifically Article 2) and US domestic law which states that a time of war does not suspend these principles of anti-torture (Sikkink, 2013, p. 155)

In contrast to Sikkink, Richter-Montpetit (2014) examines lawfare through the lens of “the legalization of state-administered suffering in custody with a focus on the Bush administration’s ‘Torture Papers’”<sup>35</sup> (p. 45). Richter-Montpetit (2014) credits scholars like Dunlap who made initial use of the concept of lawfare, “to denounce the use of law, in particular human rights and the laws of war, as a weapon of war against the [US]” (p. 48). However, she examines the concept of lawfare through her analysis of the use of post 9/11 “carceral lawfare” by the US government, specifically under the Bush administration, to create the new legal classification mentioned earlier, namely unlawful enemy combatants (Richter-Montpetit, 2014, p. 48). This “carceral lawfare” includes what Richter-Montpetit (2014) refers to as how both the Bush and Obama administrations “have sought to legalize a wide range of lethal and non-lethal security practices, including capture, rendition, indefinite detention [and] ‘enhanced interrogation’” (p. 48). These “practices”, mainly the detention of prisoners in Guantanamo Bay “evoke a state of lawlessness or exception” where Richter-Montpetit (2014) argues that both administrations have gone through great lengths “to suspend the law” (p. 48).

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<sup>35</sup> Also referred to as the ‘torture memos’.

Two weeks after Rumsfeld's announcement in 2002 that Guantanamo bay detainees would be treated as unlawful combatants, not as prisoners of war, Richter-Montpetit (2014) notes that "White House Counsel, Alberto Gonzales, advised President Bush in a memorandum that the War against Terrorism was a new kind of war, one that rendered the Geneva Conventions inapplicable" (p. 48). Richter-Montpetit adds that in the words of Gonzales:

The nature of the new war places a high premium on ... factors such as the ability to quickly obtain information from captured terrorists...to avoid further atrocities against American civilians.... [T]his new paradigm renders obsolete Geneva's strict limitations on questioning enemy prisoners (Richter-Montpetit, 2014, p. 48).

Richter-Montpetit (2014) argues that it was on the basis of Gonzales' memo that President Bush subsequently issued a directive to the US National Security Council on February 7, 2002, declaring that captured Al Qaeda and Taliban fighters were not prisoners of war and therefore, the Geneva Conventions did not apply to them (p. 49).

Richter-Montpetit (2014) contends that the legal classification, "unlawful enemy combatant" for War on Terror detainees effectively sought to place them outside the reach of the laws of war and more generally, the rule of law (p. 49). Furthermore, the memos attempted to establish that these unlawful enemy combatants in off shore facilities, including Guantanamo Bay, had no right to access US courts and that the judiciary had no oversight role for the government's overseas detention policies (Richter-Montpetit, 2014, p. 49). Also in the February 7 directive, President Bush claimed that "via executive fiat, the president had the unilateral authority 'to arrest virtually anyone... if he deemed them an enemy combatant'" (Richter-Montpetit, 2014, p. 49). As mentioned earlier, this claim of exclusive executive authority was rejected by the Supreme Court in *Hamadan v Rumsfeld* where the Geneva Conventions and CAT were upheld (Sikkink, 2013, p.

155). This claim by President Bush, which sought to make his executive discretion justified is applicable to the examination of his administration's use of lawfare. This is so, as it can be argued that this claim of executive authority falls within the pro-war use of lawfare and was used in an effort to circumvent international legal instruments like the Geneva Conventions and the CAT.

Like Sikknik (2013), Richter-Montpetit argues that there were concerns among CIA staff about the potential of prosecution for their interrogation practices. These concerns led to the creation of the torture memos by government lawyers in the Office of Legal Counsel (Richter-Montpetit, 2014, p. 49). Richter-Montpetit offers a similar analysis to that proposed by Sikknik (2013) in that she highlights how the 2002 Bybee memorandum created a narrow definition of torture, which was contrary to existing international law. In this memo, quoted above in the analysis of Sikknik's work, Bybee essentially argues that in order to define an act as torture, it must be highly severe and must be equivalent in intensity similar to pain which accompanies very far reaching occurrences such as "organ failure" and "death". Adding to this narrow definition, the memorandum stressed that for an action to be considered torture, it requires 'specific intent' (Richter-Montpetit, 2014, p. 50). This 'specific intent' meant that "the infliction of such [severe] pain must be the defendant's *precise objective*" (Richter Montpetit, 2014, p. 50). Bybee continues that even if the defendant is aware that severe pain will result from his actions, if causing harm is not his objective, then it is not done with *specific intent* and therefore cannot be classified as torture in the criminal context (Richter-Montpetit, 2014, p. 50).

Furthermore, Bybee states that:

As commander in chief, President Bush has the constitutional authority to order interrogations of enemy combatants to gain intelligence information ... Congress may no

more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movement on the battlefield (Richter-Montpetit, 2014, p. 50).

Reinstating the claim of President Bush's exclusive executive authority, this quote shows how the 2002 Bybee memo also reasoned that "any legal limits on the way interrogations on enemy combatants are conducted 'would be an unconstitutional infringement of the President's authority to conduct war'" (p. 50). The memo also justified violations of US law regarding torture by "necessity or self-defense.... to elicit information to prevent a ...threat to the United States and its citizens" (Richter-Montpetit, 2014, p. 50). The second 2002 memo prepared by Deputy Assistant Attorney General John Yoo, for Gonzales replicated much of Bybee's memo in terms of legality of enhanced interrogation methods (Richter-Montpetit, 2014, p. 50). It spoke to the severe pain needed for acts to constitute as torture and the "specific intent" of the defendant. Yoo also states that, "in his capacity as commander-in-chief, President Bush has the capacity to overwrite any US laws banning the use of torture" (Richter-Montpetit, 2014, p. 50).

Finally, and very integral to this thesis, Richter-Montpetit (2014) argues that "the torture memos extend the official battlefield in the War on Terror away from the declared warzones in Afghanistan and Iraq" (p. 51). This "War on Terror battlefield" is extended into secret CIA run detention facilities across the globe (Richter, 2014, p. 51). Richter-Montpetit (2014) contends that the memos render lawful, acts which constitute torture in international and even US domestic law (p. 51).

The concept of lawfare applies more heavily to the Bush administration given the obvious reason that the 9/11 attacks occurred during his presidency. Thus, his response to the War on Terror at the time involved what Yin (2011) calls legal 'mistakes' made by the Bush

administration through an “‘ends justify means’ approach” with regards to Guantanamo Bay (p. 454). He also argues that the Obama administration made mistakes due to an overreaction to Bush policies through what he terms as an “‘anything but Bush’ approach” (Yin, 2011, p. 455). For Yin (2011), President Bush’s legal mistakes included detention without charges<sup>36</sup>, abusive and coercive interrogation tactics, lack of a formal process<sup>37</sup>, taking aggressive legal positions among others. However, Yin (2011) contends that both Bush and Obama’s ‘mistakes’ stem from a similar flaw: “the absence of a clear strategy for integrating military force and law enforcement in responding to the threat posed by Al Qaeda” (p. 455). This flaw could explain the Bush administration’s extensive use of lawfare through his ‘mistakes’. Although as will be seen in the following analysis of the reports that this essay will review, President Obama, upon taking office, released executive orders directing the Defense Department to close Guantanamo Bay. In comparing the administrations, Yin (2011) argues that Bush recognized the negative impact that Guantanamo Bay had on the US’ image and indicated his preference to close the base, but asserted the need to hold inmates there until the government sought suitable courts to prosecute them (Yin, 2011, p. 474). Yin (2011), states that, had Obama followed through on this promise, then the question of whether he learned from the mistakes of the Bush administration might have been answered differently (p. 474).

As will be seen in the analysis of the reports between the US and the CAT Committee Against Torture, the 2014 report on the CIA’s interrogation and detention program, authored by the US Senate Select CAT Committee on Intelligence, exposed the use of torture which has been

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<sup>36</sup> By February 2011, most remaining detainees remained uncharged and Supreme court cases such as *Hamdi v Rumsfeld* upheld the President’s authority to detain ‘enemy combatants’ without charges (Yin, 2011, p. 456).

<sup>37</sup> According to Yin (2011), the Bush administration’s legal mistake was the failure to establish a formal process for determining the combatant status of Guantanamo Bay detainees (p. 461).

condemned by the Obama administration (Lellio and Castano, 2015, p. 1281). Echoing Yin's argument that the Obama administration took an 'anything but Bush' stance, Lellio and Castano (2015) argue that this condemnation by the Obama administration has come due to the steps taken to reverse Bush's policy on torture and criticism that had been mounting. However, as the criticism against Obama for not prosecuting anyone who has approved or practiced torture increased, Lellio and Castano (2015) argue that the administration's inactions contravened the US' obligations under Article 7 of the CAT, which refers to fair prosecution of offenders of torture<sup>38</sup>. The UN High Commissioner for Human Rights and the Special Rapporteur on counterterrorism and human rights have also demanded accountability for these violations (Lellio and Castano, 2015, p. 1283).

This previous section examined the anti-war and pro-war dimensions of concept of lawfare in order to establish the theoretical framework for the essay's comparative analysis of the Bush and Obama administrations in their reporting to the CAT and the CAT's responses to these reports. The following section will provide an analysis of the dialogue between the CAT Committee and the US as well as linkages to how lawfare was used.

### **III. The dialogue between the US and UN CAT Committee**

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<sup>38</sup> Article 7 of the CAT states that a person under the jurisdiction of a State Party who has allegedly committed an offence, must be prosecuted, if they are not extradited. The relevant authorities should treat their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

UNHCR (1987). CAT. Retrieved from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> (accessed April 13, 2018).

This section will examine the points of comparison for both administrations identified in the analysis of the dialogue between the CAT Committee and the US through an examination of the reports listed below. These points of comparison concern four key areas: 1) the application of the Third Geneva Convention and the CAT to the detainees held at Guantanamo Bay; 2) the judicial process, specifically pertaining to the allegations of torture by US officials overseas; 3) military commissions; and 4) interrogation techniques. The following is an analysis of six documents which represent the dialogue between the Bush and Obama administrations and the CAT Committee on these four key areas of analysis. As stated earlier, these documents include the *2005 2<sup>nd</sup> Periodic Report of the US to the CAT Committee*, the *2006 Concluding Observations of the CAT Committee*, the *2007 Follow-up Report by the US to the CAT Committee's Recommendations* (all completed during the Bush administration); the *2013 3<sup>rd</sup> to 5<sup>th</sup> Reports of the US to the CAT Committee*, the *2014 Concluding Observations of the CAT Committee* and the *2015 Follow-up Report by the US to the CAT Committee's Recommendations on the Combined Reports* (all completed during the Obama administration).

#### **A. The application of international legal instruments**

The issue of the US' application of the Geneva Conventions and CAT at all times, including during armed conflict will first be analyzed. The 2<sup>nd</sup> Periodic Report of the US to the CAT Committee (2005) states President Bush announced that although the CAT applied to Taliban detainees, they were not entitled to 'prisoner of war' (POW) status (p. 52).<sup>39</sup> This further led to

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<sup>39</sup> According to the Bush administration: "The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the Al Qaeda. Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status

the conclusion by the Bush administration that these detainees were classified as “enemy combatants” to whom the Third Geneva Convention did not apply (State Dpt., 2005, pp. 52-53). Upon reviewing this particular issue of the application of the CAT, the CAT Committee expressed concern over the US’ opinion and recommended an application of the CAT at all times, including any territory under its jurisdiction. In contrast, the Obama administration agreed with the CAT Committee’s assessment in the 3<sup>rd</sup> to 5<sup>th</sup> reports of the US to the CAT Committee (2013), which affirmed the position that there was no excuse for the use of torture and that the CAT applied at all times (p. 7). In responding to the Obama administration (and in contrast to its response to the report submitted during the Bush administration), the CAT Committee listed this as a “positive aspect” and reiterated its position that neither does a time of war or armed conflict suspend the CAT and that it is applicable at all times (UN CAT Committee, 2014).

The Bush administration, in its follow-up report stated that the laws of war, and not the CAT is the applicable legal framework as it pertains to the issue of detentions (State Dpt., 2007, p. 7). Also, it was emphasized that the US was in an armed conflict with al-Qaeda, the Taliban, and their supporters at that time. Because of this, the report states that the laws of war entitle the US to detain and hold “enemy combatants” until hostilities end (State Dpt., 2007, p. 7). This position shares stark similarities to the Bush administration’s position in the 2<sup>nd</sup> Periodic Report to the CAT Committee. In reiterating this position and in defense of holding ‘enemy combatants’, the Bush administration stated that detainee interrogations are conducted under the CAT, the 2005 Detainee Treatment Act, Common Article 3 of the Geneva Convention and domestic law, which all prohibit torture and inhumane treatment of individuals (State Dpt., 2007, p.7). However, the

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under the treaty.” Statement by the U.S. Press Secretary, The James S. Brady Briefing Room, in Washington, D.C. (2002, February 7). Retrieved from <http://www.state.gov/s/l/38727.htm> (accessed March 22, 2018).

distinction made by the Bush administration that the laws of war and not the CAT applied to Guantanamo detentions is noteworthy. The Obama administration, in its follow-up report reiterated its position by stating that although the laws of armed conflict (the “laws of war” to which the Bush administration was referring to) fall under the controlling body of law with respect to the conduct of hostilities, a “time of war does not suspend the operation of the CAT, which continues to apply even when a State is engaged in armed conflict” (State Dpt., 2015, 6). Here, the Obama administration echoed its previous position that the CAT applies to the prisoners at detention facilities.

### **B. Allegations of torture (Judicial Process)**

One point of similarity between both administrations regarding detention facilities surrounds the inquiries into allegations of torture by US officials overseas. These investigations followed concerns raised over what detention and interrogation practices were authorized on the basis of a memorandum drafted by the Department of Justice’s Office of Legal Counsel in August 2002 (one of the legal memos) which interpreted the extraterritorial criminal torture statute<sup>40</sup> and the 2004 release of government documents related to interrogation techniques and U.S. laws regarding torture. During the Bush presidency, extensive investigative reports were carried out by the Department of Defense and “none of them found that government policy directed,

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<sup>40</sup> The definition of torture is codified in US law through the United States Code. The extraterritorial criminal torture statute is one such way this definition is codified. Specifically, at Chapter 113B of Title 18 of the United States Code, which provides federal criminal jurisdiction over an extraterritorial act or attempted act of torture if (1) the alleged offender is a national of the United States or (2) if the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender (State Department, 2005 2<sup>nd</sup> Periodic report, p. 5).

encouraged or condoned these abuses” (State Dpt., 2005, p. 63). Also, in the 2005 report submitted to the CAT by the Bush administration, a statement by White House counsel, Alberto Gonzales was included which said that the President did not condone any activity that constituted a transgression of the CAT (State Dpt., 2005, p. 21). The CAT Committee also expressed concern over lenient sentences in investigations of abuse, which sometimes involved death, by military and civilian personnel (UN CAT Committee, 2006, 26). Similarly, during the Obama administration, the Department of Justice carried out many investigations and reviews on interrogation practices, including the deaths of two inmates in CIA custody overseas (State Dpt., 2013, p. 49). These investigations were closed in 2012 after the Justice Department determined that the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt (State Dpt., 2013, p. 50). In responding to the Obama administration, the CAT Committee identified this as a failure to fully investigate these allegations and expressed concern about some CIA detainees who were never interviewed during these investigations. It further recommended a thorough investigation to be carried out, the prosecution of alleged perpetrators of abuses, compensation to victims and a full review of the CIA’s responsibilities (UN CAT Committee, 2014).

In response to the CAT Committee’s recommendation to close Guantanamo Bay and permit judicial access by enemy combatants, the Bush administration’s follow up report stated that those two issues “lacked arguable basis” in the Convention (State Dpt., 2007, p. 5) This was explained by the Bush administration’s contention that there were consequences to releasing dangerous terrorist combatants detained in Guantanamo and that there was concern over where individuals who could not be repatriated might be sent (State Dpt., 2007, p. 5). According to the Bush administration, this was a reason for its rejection to closing Guantanamo Bay. The CAT

Committee, in its concluding observations, also recommended that judicial access be permitted to detainees and expressed concern over the use of CSRTs and Annual Review Boards (ARBs) by the US (UN CAT Committee, 2006). In its follow-up report response, the Bush administration defended the use of the CSRTs and the ARBs as mechanisms whereby detainees could have access to the courts (State Dpt., 2007, p. 6). In explaining how these mechanisms work, the Bush administration stated that, along with the purpose of evaluating whether a detainee was properly classified as an enemy combatant, the decision could be appealed to a US domestic civilian court (State Dpt., 2007, p. 6). The Bush administration, in its follow-up report identified this opportunity for judicial review (being able to appeal domestically) as exceeding the “requirements of the law of war” and “unprecedented and expanded protection available to all detainees...more extensive than those applied by any other nation in....armed conflict to determine a combatant’s status” (State Dpt., 2007, p. 6). The follow-up report further provides statistics on the number of detainees who had departed Guantanamo Bay (120 detainees) since the CAT Committee’s recommendations to close the facility and provide judicial access the detainees in May 2006. Furthermore, it stated that 375 detainees were at Guantanamo Bay at the time, 405 released or transferred and 75 eligible for transfer or release because of the Department of Defense’s (DoD) review process. In response to the recommendation to close Guantanamo Bay, President Obama’s widely known intention to do so as per his executive orders was included in its follow-up report (State Dpt., 2015, 33). The CAT Committee was pleased with the Obama administration’s upholding of habeas corpus and periodic review process for detainees. However, it expressed concern over the large number of detainees who had their habeas corpus petitions rejected and the small number designated for potential prosecution (UN CAT Committee, 2014). In its follow up report, the Obama administration responded to this by stating

that detainees whose habeas petitions have been denied or dismissed, would continue to have access to counsel pursuant to the same terms applicable when their proceedings were pending (State Dpt., 2015, 37). Also, the Obama administration in its follow-up report, mentioned that those who had prevailed in habeas proceedings had been repatriated or resettled. Specifically, “more detainees were transferred out of the facility in 2014 than in any year since 2009 and the detainee population stands at its lowest since 2002” (State Dpt., 2015, 35). The CAT Committee noted as a positive development the Obama administration’s introduction of the periodic review process to review whether the detention of prisoners at Guantanamo Bay remained necessary (UN CAT Committee, 2014). In the 2015 follow-up report, the Obama administration mentioned that as of that same year, 22 full hearings and six-month file reviews were conducted, where it was determined that the detention of 15 detainees was no longer necessary to protect against a threat to the security of the US (State Dpt., 2015, 36). Three of these detainees were transferred to their countries of origin while the remaining 12 were eligible for transfer (State Dpt., 2015, 36). It is worth noting that this periodic review process is a move from the ARBs implemented during the Bush presidency. Instead of an annual review of detainees’ status as “enemy combatants”, a 6-month review was implemented by President Obama where detainees were able to participate with assistance from personal representatives and sometimes private counsel (State Dpt., 2015, 36).

In response to criticism by the international community and concern from the CAT Committee over proper investigations of abuse at detention facilities, the Obama administration in its 2015 follow-up report listed the various laws in place which provide the authority to conduct investigations of allegations of torture, whether it was committed outside or on US territory (State Dpt., 2015 11). These laws are based on the US Common Core (USC) document

where guidelines for strengthening legal safeguards are codified (State Dpt., 2015, 12). Consistent with the Detainee Treatment Act of 2005, which prohibits torture of anyone in US custody regardless of their nationality or location, these mechanisms/laws include the Torture Convention Implementation Act that gives the Department of Justice the authority to prosecute US nationals who commit or attempt to commit torture (State Dpt., 2015, 13). Also included is the Uniform code of Military Justice which was amended to include court-martial jurisdiction over persons serving with an armed force in the field, not only in time of declared war, but during contingency operations (State Dpt., 2015, 21). In terms of developments, the Foreign Claims Act allowed redress for inhabitants of foreign countries. This resulted in 36 claimants alleging detainee abuse and/or maltreatment in Iraq and compensation being awarded for five substantiated allegations of detainee abuse there (State Dpt., 2015, 20). Furthermore, according to the Obama administration's follow-up report, "thousands of investigations" have been carried out by the DoD and it has prosecuted or disciplined hundreds of service members for misconduct including the mistreatment of detainees (State Dpt., 2015, 31).

### **C. Military Commissions**

The issue of military commissions differentiated the Bush and Obama administrations in terms of their use of the commissions and the CAT Committee's response to their use. It must be noted that the military commissions were authorized under the Military Commissions Act which was revised over the years. In its report submitted to the CAT Committee under the Bush Administration, the US held the position that the Geneva Conventions recognized "military fora" as a legitimate channel to try individuals (State Dpt., 2005, p. 58). The noteworthy cases of *Rasul v. Bush* and *Hamdi v. Rumsfeld* were mentioned by the US as examples of such military

fora used to try detainees. In *Rasul v. Bush*, the Supreme Court decided on jurisdiction and held that persons outside of the US could file habeas corpus cases. Meanwhile, in *Hamdi v. Rumsfeld*, the Supreme Court held that the US could detain enemy combatants and that “detention was necessary and appropriate” to prevent them from committing any future acts of violence (State Dpt., 2005, p. 59). The CAT Committee in its concluding observations marked the Military Commissions Act as a positive development in light of the fact that, “military commissions shall not admit statements established to be made as a result of torture in evidence”, while also expressing concern over the use of these commissions (UN CAT Committee, 2006, 30). This concern was about the implementation of the commissions and limitations of detainee’s right to complain about abuses and unlawful detention. The CAT Committee also expressed concern over CSRTs and ARBs. CSRTs were designed by the Bush administration to ascertain combatant status of detainees, while ARBs were designed to determine if the government was justified in continuing to hold detainees at Guantanamo Bay (Yin, 2011, pp. 461-462). In another case- *Boumediene v. Bush*, the Supreme Court criticized CSRTs for various flaws, which were similar to those identified by the CAT Committee. These “flaws” included detainees not being entitled to counsel and provided with a military officer to assist only as a ‘personal representative’ (Yin, 2011, p. 461). CSRTs were also criticized as the detainee was only entitled to see the unclassified evidence supporting his classification as an enemy combatant (Yin, 2011, p. 461). Added to the criticisms were that the ‘personal representative’ only had access to classified evidence, but was not able to share it with the detainee (Yin, 2011, p. 461). Yin (2011) also states that one study of CSRTs revealed how “detainees were often unable to defend themselves, because critical allegations were redacted” (p. 462). However, through the state report submitted under the Obama administration, it is clear that a change was introduced to the formal process

for Guantanamo Bay trials. Under Obama, there was a change to the Military Commissions Act of 2006 in 2009 which addressed many of the “flaws” of CSRTs. It is also evident that this was the goal as the US State Department report (2013) explicitly states that these changes were made following the results of *Boumediene v. Bush* case (p. 21). The new Military Commissions Act of 2009 upheld the previous provision that prohibited the admission of statements obtained through torture (except in certain circumstances), it strengthened restrictions on hearsay, provided the accused on capital cases with counsel, enhanced the accused’s right to discover and offered a review of final judgments (State Dpt., 2013, p. 18). Also, as per President Obama’s executive orders, the Supreme Court decision (*Boumediene v. Bush*) regarding the jurisdiction of habeas corpus for detainees at Guantanamo Bay was upheld. Of noteworthy importance is that the report submitted to the CAT Committee during the Obama administration makes it clear that this process is separate from the executive branch (which includes the military). This clarification is of significant contrast to the increased role of the military in petitions filed by detainees under the Bush administration. Included in Obama’s executive orders was also the introduction of a process of periodic review for detainees at Guantanamo Bay who had not been convicted, charged, designated or transferred (State Dpt., 2013, pp. 21-22). According to the state report submitted under Obama, it was ensured that this process of periodic review was consistent with the CAT, Geneva Convention and Detainee Treatment Act (State Dpt., 2013, p. 22). The executive orders which included the periodic review process as well as the use of the decision in *Boumediene v. Bush* by the Obama administration were all commended as positive changes by the UN CAT Committee (UN CAT Committee, 2014, B, a, b, c). However, in identifying concerns and providing recommendations, the CAT Committee stated that although detainees have the “constitutional privilege of the writ of habeas corpus”, figures provided by the US

indicate that the federal courts have rejected a significant number habeas corpus petitions (UN CAT Committee, 2014). In response to the Obama administration's state report, the CAT Committee (2014) stated that, "out of the 148 men at Guantanamo Bay, only 33 have been designated for potential prosecution and the latter fail to meet international fair trial standards". The CAT Committee (2014) further noted that "36 others have been designated for continued law of war detention". It recommended to the Obama administration that indefinite detention should be ceased, "potential prosecution detainees to be charge and tried in federal courts and access to all evidence by detainees" (UN CAT Committee, 2014). Also, it expressed concern over the secrecy which surrounded the torture practices at Guantanamo Bay and recommended the declassification of the torture evidence, with minimal redactions (UN CAT Committee, 2014).

#### **D. Interrogation techniques**

Interrogation techniques used at Guantanamo Bay are also a significant point of analysis in the reports between the administrations. The Bush administration was criticized by many for the use of "authorized interrogation techniques" used at Guantanamo Bay, which included, but were not limited to stress positions, waterboarding and the use of dogs for fear (which resulted in death in some cases) (UN CAT Committee, 2006, C, 24). In the 2005 state report to the CAT Committee, (submitted during the Bush administration), it was noted that investigations were carried out into allegations of abuse and as previously mentioned, there was no link found between the authorized interrogation techniques and the abuse that occurred, not only at Guantanamo Bay, but in detention facilities in Iraq and Afghanistan. In a review done in 2004, the Naval Inspector General stated that it had found that the "Secretary of Defense's directions

with respect to human treatment of detainees and interrogation techniques were fully implemented” (State Dpt., 2005, p. 64). Consequently, a review of Department of Defense operations at the detention facilities found that out of the 24, 000 interrogations sessions that occurred since the beginning of operations, “only three cases of closed substantiated interrogation-related abuse exceeded the bounds of interrogation policy and consisted of minor assaults” (State Dpt., 2005, pp. 64-65). Furthermore, the Church Report<sup>41</sup>, released in 2005 found “no link between approved interrogation techniques and detainee abuse” (State Dpt., 2005, pp. 65). Meanwhile, the state report submitted under the Obama administration noted that, pursuant to his executive order on ensuring lawful interrogations, the Army Field Manual (AFM) was designated as appropriate guidance on interrogation for military interrogators and it prohibited any interrogation technique not authorized or listed in the AFM (State Dpt., 2013, p. 14, 41). Along with listing numerous interrogations techniques to be prohibited (including water boarding etc.), it provided a guide to be used while formulating interrogation plans for approval (State Dpt., 2013, p. 42). In responding to the 2013 state report, the CAT Committee commended President Obama’s 2014 public statement, “in which he qualified some of the so-called

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<sup>41</sup> According to the 2<sup>nd</sup> Periodic Report, concerns had been generated by the August 1, 2002, memorandum prepared by the Office of Legal Counsel at the Department of Justice, on the definition of torture and the possible defenses to torture under U.S. law. The August 1 memorandum was withdrawn on June 22, 2004 and replaced with a December 30, 2004, memorandum interpreting the legal standards applicable under the United States Code, also known as the Federal Torture Statute. On March 10, 2005 Vice Admiral Church (the former U.S. Naval Inspector General) released an executive summary of his report, which included an examination of this issue. His Report examined the precise question of ‘whether the Department of Defense (DoD) had promulgated interrogation policies or guidance that directed, sanctioned or encouraged the abuse of detainees.’ In a subsequent report, the Naval Inspector General engaged in a comprehensive review of DoD detention operations and detainee interrogation operations covering Guantanamo Bay, Iraq and Afghanistan. This report expanded upon his earlier findings with respect to interrogation operations at Guantanamo, noting that while “There have been over 24,000 interrogation sessions since the beginning of interrogation operations, there are only three cases of closed, substantiated interrogation-related abuse, all consisting of minor assaults in which MI interrogators, exceeded the bounds of approved interrogation policy.” He also highlighted that there was no link between approved interrogation techniques and prisoner abuse (State Dpt., 2005, p. 63). Accessed April 8, 2018.

‘enhanced interrogation-techniques’ as acts of torture” (UN CAT Committee, 2014). Although it acknowledged the US’ reservation that some of the authorized methods in the AFM were consistent with the CAT, it noted that some aspects of the AFM still left room for possibilities of abuse. In saying that, the CAT Committee recommended the abolishment of techniques regarding “physical separation technique”<sup>42</sup> which could amount to sleep-deprivation (categorized as “ill-treatment” according to the CAT) and sensory deprivation<sup>43</sup> which also raised concerns of the probability of torture and ill treatment of detainees (UN CAT Committee, 2014).

In response to the Bush administration’s state report, the CAT Committee provided the recommendation that the US, should “rescind any interrogation technique including... sexual humiliation, ‘waterboarding’, short shackling [etc.] that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention Against Torture” (UN CAT Committee, 2006, 24). The Bush administration responded by citing various US legislation which identified torture and the conspiracy to commit torture as crimes against which detainees should be protected (State Dpt., 2007, p. 7). These are the Detainee Treatment Act of 2006 and the extraterritorial torture statute. Along with these prohibitions, the report states that “all

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<sup>42</sup> Physical separation allows for the detainee to get four hours of continued sleep every 4 hours in a 24-hour period. The Committee determined that this provision in the AFM amounted to sleep deprivation — a form of ill-treatment —, and is unrelated to the aim of the ‘physical separation technique’, which is preventing communication among detainees. UN CAT Committee. (2014). Concluding Observations on the US’ 2<sup>nd</sup> 3<sup>rd</sup> and 5<sup>th</sup> report, (accessed March 22, 2018).

<sup>43</sup> Sensory deprivation falls under the ‘field expedient separation technique’ which is aimed at prolonging the shock of capture, by using goggles or blindfolds and earmuffs on detainees in order to generate the perception of separation. The UN CAT Committee stated that, based on recent scientific findings, sensory deprivation for long durations has a high probability of creating a psychotic-like state in the detainee, which raises concerns of torture and ill-treatment. Ibid, (accessed March 22, 2018).

detainee interrogations were to be conducted in a manner consistent with Common Article 3 of the Geneva Convention and greater applicable law of war protections” (State Dpt., 2007, p. 7). Also, consistent with this section of the Geneva Convention were an updated Department of Defense detainee program directive and the revised AFM<sup>44</sup>. It was also reiterated that enemy prisoners of war were protected under the laws of war and “minimum standards prescribed by Common Article 3” (State Dpt., 2007, p. 8). The CAT Committee also expressed concern over torture practices and recommended the declassification of torture evidence. In its follow up report, the Obama administration stated that one development that was noted was the declassification of the contents of the White House’s report on the CIA’s former detention and interrogation program by the Select Senate Committee and under the determination of President Obama (State Dpt., 2015, 7). The Senate Select Committee subsequently produced this report in 2014 which contained a review of the program which included interrogation methods used on terrorism suspects in secret facilities outside of the US (State Dpt., 2015, 8). President Obama determined that the “executive summary, findings, and conclusions” of the report on the CIA’s former detention and interrogation program be released to the public with appropriate redactions (State Dpt., 2015, 7). The use of harsh interrogation techniques and the program was ended and prohibited in President Obama’s executive order after which he signed the National Defense Authorization Act for Fiscal Year 2016 (State Dpt., 2015, 8). It is in this piece of legislation that his executive order regarding provisions for the interrogation reforms was made into law (State Dpt., 2015, 8). These reforms codified in the 2016 Act include the prohibition of harsh interrogation techniques included in the abovementioned Select Senate CAT Committee report

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<sup>44</sup> Department of the Army. (2006). Army Field Manual 2-22.3, Human Intelligence Collector Operations. Retrieved from <https://www.state.gov/documents/organization/150085.pdf> (accessed February 4, 2018).

on the former CIA program (State Dpt., 2015, 8). Concerning the AFM, as stated in the previous analysis, the CAT Committee acknowledged that some interrogation methods listed in the AFM were consistent with the Convention, but some aspects still left room for abuse such as physical separation and sensory deprivation (UN CAT Committee, 2014). In response, the Obama administration, similar to the Bush administration stated that persons detained during armed conflict must be treated in accordance with domestic policy and treaty obligations. However, in response to the CAT Committee's recommendation with regards to the AFM, the Obama administration stated that it was binding on all relevant bodies and that the Department of the Army conducts yearly reviews of the AFM to ensure consistency with domestic law policy and practice and also to assess for needed updates due to lessons learned from operations (State Dpt., 2015, 41). Also, the Obama administration's state report asserts that provisions in the AFM, including those related to "physical separation" and "field expedient separation" (some of the interrogation techniques that the Bush administration was criticized for) must be applied with the manual's policy and guidelines which explicitly contain the provisions for detainees to be treated humanely and the prohibition of cruel, inhuman or degrading treatment regardless of their status (State Dpt., 2015, 42). In addition, the report states that the manual has procedural requirements so that certain techniques could not be "read or used in a such way as to be inconsistent with" the general guidelines of the AFM (State Dpt., 2015, 43). The CAT Committee also recommended the abolishment of separation techniques and sensory deprivation (UN CAT Committee, 2014). The State Department in its report under the Obama administration stated that the use of separation is applied consistently with the AFM guidelines and that nothing in the AFM authorizes or condones the use of sleep manipulation or sensory deprivation (State Dpt., 2015, 45).

This section, which has examined the dialogue between both administrations and the CAT Committee brings to light further linkages with the concept of lawfare, which was discussed in the review of literature. As both the analysis of reports and review of literature reveal many specific connections, a brief summary of the findings will be done in the following section.

#### **IV. Summary of Findings**

The concept of lawfare is important to this research in providing a conceptual framework for the empirical evidence analyzed i.e. the reports by and to the CAT Committee. In this essay, the concept of lawfare reveals how international law can be used as a tool by governments and most notably, the US government during the Bush administration. The main findings of this thesis are as follows: 1) The Bush administration's actions confirm the manipulation of international law through the pro-war dimension of lawfare; 2) The Obama administration did not manipulate international law, but reflected tenets of the anti-war dimension of lawfare; 3) The concept of lawfare is nuanced and multifaceted.

Many of the ways in which the Bush administration manipulated international law reflect the pro-war dimension of lawfare. One such way was through the blatant denial of international legal instruments. Through this determination in statements, the torture memos and state reports to the CAT Committee, the CAT and the Geneva Conventions were rendered inapplicable. Scholars such as Sikkink (2013) argue that through the determination that international law did not apply and the creation of the unlawful combatant category, it could be argued that the use of torture was made permissible (p. 150). The CAT Committee's concern over these determinations and enhanced interrogation techniques used during the Bush administration further reflect aspects of the pro-war dimension of lawfare. This dimension was also reflected in the Bush

administration's use of legislation to protect CIA officials from prosecution for crimes which would have resulted from their engagement in torture practices that violated international and domestic law. As mentioned earlier, tenets of the CAT and Geneva Conventions were included in domestic law, such as the US War Crimes Act. Therefore, if CIA officials were properly investigated and prosecuted, then they would have been criminally convicted under US law in addition to the US contravening articles in the CAT and Geneva Conventions. As examined in this essay, the Bush administration sought to navigate around its obligations through claims that international law did not apply, as well as through requests for immunity from interrogation practices which occurred at Guantanamo Bay. Also, the Bush administration fought heavily to include protection for CIA personnel through its praise of domestic legislation such as the 2005 Detainee Treatment Act in its state report, while still using this same Act to protect personnel from prosecution. Also, the reports reveal that this protection of personnel further extended through the Bush administration's use of military commissions where detainees were not able to see classified evidence which categorized them as combatants, had no counsel, among other flaws identified by the CAT Committee. Furthermore, this essay examined how the Bush administration's manipulation of the law through pro-war lawfare was a reaction to the 'anti-war' aspect of lawfare ever-present in the critique mounted against it by the international community.

Another finding identified through this analysis is that the Obama administration did not manipulate international law, but some of his actions reflected tenets of the anti-war dimension of lawfare. Most of the content of the reports submitted during the Obama administration denounced the actions of the Bush administration, echoing much of the concerns made by the CAT Committee. The Obama administration, in its 2013 state report agreed with the CAT

Committee that the Geneva Conventions and CAT applied at all times. Furthermore, through his executive orders, Obama declared the Bush administration's legal memos "null and void", thus making enhanced interrogation tactics and the unlawful enemy combatant category at Guantanamo Bay inapplicable (Forsythe, 2011, p. 781). Much like the CAT Committee, the Obama administration identified the Bush administration's legal tactics and rejected them. This can be seen through the examination of the issue of military commissions between both administrations. The Bush administration, through the Military Commissions Act of 2006 not only sought to protect CIA officials, but denied detainees fair access to the courts. The CAT Committee (and the Supreme Court in *Boumediene v. Bush*) expressed its concerns over this, and the Obama administration revised the 2006 Military Commissions Act in 2009 which remedied many flaws of the military commissions under Bush. Along with this change, the Obama administration made this judicial process separate from the executive branch (which includes the military) as opposed to the heavy role that the executive played in the Bush administration's military commissions. Therefore, while the Bush administration denied detainees judicial access and protected CIA officials through legal means (through domestic legislation such as the 2006 Military Commissions Act and War Crimes Act), the Obama administration, also through legal means addressed Bush's abuse of the law. This occurred through his revision of the Military Commissions Act in 2009 which gave detainees easier access to the courts by introducing a 6-month revision process (instead of the annual process under Bush), declassifying information regarding enhanced interrogation techniques, among other changes mentioned in the Obama administration's follow-up report. Obama's actions thus, to an extent reflect tenets of the anti-war dimension of lawfare, where the law is revered as a mechanism to constrain state behavior during warfare. In stark comparison to his predecessor, the Obama administration, in its reports

to the CAT Committee affirm some of the US' commitments to the CAT and Geneva Conventions. This was done through the Obama administration's denouncement of the inapplicability of international law to detainees in its periodic reports and its enactment of various legislation which improved detainee's judicial access (as mentioned previously) and provided improved guidelines for military personnel's treatment of detainees.

Finally, this essay reveals the nuanced, multifaceted and somewhat complicated nature of lawfare through the examination of the concept itself along with the analysis of the dialogue between the US and CAT Committee. This nuance is highly entrenched in the Bush administration's infamous claim that Geneva Conventions and CAT did not apply to detainees at Guantanamo Bay. International legal instruments such as the CAT and Geneva Conventions are used by international organizations such as the UN and serve to constrain state behavior (in this case, anti-torture practices) through agreed-upon principles and guidelines. However, with the Bush administration's claim of inapplicability, this function of international law was challenged. Added to this, although this thesis focuses on the double usage of lawfare i.e. anti-war and pro-war, from an examination of the concept, even these usages are multifaceted. For instance, through the determination that the Geneva Conventions did not apply, the Bush administration also sought protection for CIA officials. Sikkink (2013) argues that by doing this, officials would have been protected from domestic prosecution for interrogation practices. Here, we see that while the US had tenets of international law (Geneva Conventions and CAT) enshrined in their domestic legislation, they rendered these same international instruments inapplicable with the argument that detainees were illegal enemy combatants. Therefore, the Bush administration engaged in lawfare (through a denial of international law), not only because of what Luban (2008) and Jones (2016) argue was a reaction to criticism by lawyers and NGOs, but to protect

officials from prosecution (under the same international laws which they committed to and denied). Furthermore, while some of the literature used in this thesis does not explicitly mention lawfare, much of it discusses the very tenets of the concept. This somewhat speaks to how multifaceted lawfare as a concept is and how it can be used to examine various actions through an anti-war or pro-war lens.

The analysis of reports confirms scholars' arguments that the Bush administration did indeed engage in lawfare. They reveal the complicated nature of this concept evidenced by the different ways in which the Bush administration manipulated international law i.e. the CAT and Geneva Conventions. It can be said that through 'pro-war' lawfare, the Bush administration blatantly denied international instruments. Along with this blatant denial came the creation of the legal category, the 'unlawful enemy combatant' that the Bush administration used to justify the inapplicability of international instruments and thus the commission of torture. Furthermore, the reports reveal that the Obama administration did not engage in lawfare, but rather took an "anything but Bush stance" which sought to repair the 'pro-war' harms done by the Bush administration. However, the CAT Committee still raised concerns over some of the Obama administration's inactions regarding thorough investigations and interrogation practices which left room for torture.

## **V. Conclusion**

This thesis began by providing a contextual basis for the examination of the obligations which the US has to international law. As a ratified state of the CAT and through including elements of the Geneva Conventions in its domestic law, it has expressed its commitment to the prohibition of torture. The concept of lawfare was then examined to serve as a theoretical

framework for the discussion of the complex relationship that exists between law, domestic and international, and state practices that fall under the heading of warfare. As seen in the literature, lawfare can have a double usage i.e. anti-war and pro-war. Many scholars such as Jones (2016) and Luban (2008) contend that the Bush administration's engagement in 'pro-war' lawfare was as a result of the anti-war lawfare waged against it by lawyers and NGOs in response to practices at Guantanamo Bay. Through an analysis of six reports between the CAT Committee and the US, linkages to the concept of lawfare were seen, mainly through the Bush administration's determination that the Geneva Conventions did not apply to Guantanamo Bay detainees. Scholars such as Megret (2006) remind us that this 'pro-war' lawfare can be read through the very colonial nature of international instruments which have historically excluded the 'other' from the laws of war. Through the analysis of the dialogue between the CAT Committee and both administrations, the argument that the Bush administration engaged in lawfare was examined through the Committee's assertions and responses to the reports. This dialogue was broken down into the issues surrounding the application of the CAT and Geneva Conventions at all times, the judicial process, the use of military commissions and interrogation techniques. These issues also confirm many scholars' arguments as to how the Bush administration deployed lawfare.

Bush, through his post/911 policies generated numerous concerns voiced by the CAT Committee and other actors in the international community. Meanwhile, Obama's executive orders, which included the order to close Guantanamo Bay, did not distract the CAT Committee and scholars from his continuation of Bush's policies. To this date, it is clear that there is still a lack of thorough investigations into the abuse that occurred at Guantanamo Bay and blame must be put on both administrations in the failure to uphold their obligations to the CAT and Geneva

Conventions. Remnants of Bush's use of lawfare were carried over into the Obama era and the presence of Guantanamo Bay remains as a stark reminder of this. Along with this use of lawfare lies an interesting dynamic between the US and its obligations to the UN. On the one hand, the US has shown its commitment to human rights regarding the prohibition of torture by ratifying the CAT and consistently reporting during the Bush and Obama eras (as seen by availability of these reports to the researcher and the ability to use them in this essay). However, on the other hand, while attempting to uphold these obligations through regular reporting, one can see the US engaging in lawfare through a blatant disregard for the CAT when it comes to Guantanamo Bay. This interesting dynamic also reveals the nuance present in the way in which international legal instruments i.e. the CAT and Geneva Conventions were manipulated by the Bush administration. In a time where the battlefield has been transcended to offshore facilities, efforts to be in a 'state of exception' through this use of lawfare represent interesting power relations in the post/911 era.

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