The Case for Closing the U.S. Prison at Guantanamo Bay

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Recommended Citation
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One of the secret CIA black sites that the U.S. government made use of was held at Guantánamo Bay detention facility in Cuba. It was used to torture suspected terrorists into providing intelligence following the terrorist attacks of September 11. Despite the end of the use of this black site, thirty detainees remain there today. Guantánamo detainees have often been captured from their homeland, then forcibly disappeared, and brought to the detention facility for indefinite detention and interrogation prior to having been charged with a crime. Despite their knowledge against its use, the U.S. government authorized the use of these “enhanced interrogation techniques” despite their being in violation of the Torture Statute and the DTA as well as several international frameworks. The goal of this article is to locate the contradictions between these legal frameworks and first-hand accounts to prove that human rights violations were committed at Guantánamo Bay detention facility and suggest that all the remaining prisoners should either be tried in a court of law for their alleged crimes or should be set free as soon as possible. This article will do so by comparing the violation of these rights to first-hand accounts from several Guantánamo memoirs.

Scholarly Conversation

I began my research by looking into how the U.S. government was able to legally justify the Guantánamo detentions. Scholarly discussion around the legality of Guantánamo focuses on the bay’s history and geographic location, denying it a state of exception (Johns 2005, Gregory 2006, Neuman 2004, Reid-Henry 2007). The argument of the exception emphasizes that Guantánamo is a single, phenomenal instance of the breakdown of laws rather than having been established through the interpretation of already existing legal frameworks. Johns, specifically, began his research hoping to answer the question of whether Guantánamo Bay is a zone which deviates from the norm; if it embodies an absence, suspension, or withdrawal of the law; and if international law maintains jurisdiction in Guantánamo before the law, against the law, or despite the law. He explains how the prior international legal conversation surrounding Guantánamo, which included the work of Giorgio Agamben, was that it was an exceptional phenomenon, a single instance of the breakdown of law. However, Johns does not agree with this sentiment: “By [his] reading, the plight of Guantánamo Bay detainees is less an outcome of law’s suspension or evisceration than of elaborate, regulatory efforts by a range of legal authorities”
(Johns 2005). Johns also argues against the characterization that Guantanamo’s jurisdictional order provides a permanent state of exception as has been put forward by Carl Schmitt who described this state of exception as one that “defies codification and subjects its occupants to the unfettered exercise of sovereign discretion” (Johns 2005). Rather, Johns believes that the jurisdiction of Guantanamo is a result of the desire to use the wide scope offered by declaring Guantanamo Bay an exception to maintain the political goals of the United States.

Reid-Henry further believes that the geographic and historic location of the detention facility provides the legal and political groundwork for the current violations taking place there as it has been cast as a gray area in which there is an absence of law due to the rules of exceptional sovereignty and which functions as a space of exception. He makes his argument by examining Guantanamo through an imperialistic lens, looking at the history of Guantanamo Bay prior to it being chosen as a location for suspected terrorists.

Gregory, on the other hand, proposes a description of Guantanamo as a space which is best understood as a political struggle. He discusses the history of the use of a state of national emergency to suspend national laws, the colonial and military history of the United States in Cuba, and the legal applications that have been made to consider Guantanamo Bay a space both inside and outside of the U.S. Gregory also makes mention of the specific actions the Bush administration took, in response to the War on Terror, in order to find ways around the legal barriers impeding the use of enhanced interrogation techniques on the suspected terrorists.

Neuman then focuses on the issues of U.S. constitutional law and federal jurisdiction as it pertains to the status of the Guantanamo Bay Naval Base. He discusses “the constitutional status of Guantanamo as a nonsovereign territory, subject to complete U.S. territorial jurisdiction, the
extraterritorial application of fundamental due process rights, and the availability of federal habeas corpus to foreign nationals detained at Guantanamo” (Neuman 2004).

However, other scholars have focused more specifically on the courts, analyzing past Supreme Court decisions pertaining to the Guantanamo detainees. Such cases include Rasul v. Bush (which concerns the right of Guantanamo detainees to file a writ of habeas corpus that would declare their detention unconstitutional) and Hamdi v. Rumsfeld (which concerns the violation of detainees' Fifth Amendment right to Due Process) in addition to the rights listed in the Constitution and whether these rights, or a subset of them, apply to the detainees (Roosevelt 2005). Roosevelt’s law review primarily discusses the case of Rasul v. Bush whose decision rejected the Executive's claim to complete freedom from judicial scrutiny. However, it is left unclear exactly which rights the detainees have that might be redeemed by a habeas petition which is a question that Roosevelt hoped to shed some light on through the perspective of conflict of laws. His goal in using a conflict perspective was to allow for a clearer understanding of the extraterritorial application of American law.

**Legal Context**

Several national and international frameworks specifically prohibit the use of torture as it is a crime against humanity and therefore never justifiable. However, the U.S. government authorized the use of torture under the guise of “enhanced interrogation techniques” at Guantanamo Bay detention facility from 2002 to 2009. These “enhanced interrogation techniques” included stress positions, sleep deprivation, and waterboarding. The authorization of the use of these techniques is especially problematic as the U.S. government was aware that such techniques were in direct violation of the United States Army Field Manual on Intelligence
Interrogation. The “enhanced interrogation techniques” had been reverse engineered from the Survival, Evasion, Resistance, and Escape (SERE) program which was used to train U.S. military personnel if they were captured and tortured by a foreign government. 

These techniques were practiced by the “special teams” despite their being in clear violation of the Torture Statute and the Detainee Treatment Act as well as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Geneva Conventions, and the Convention Against Torture.

The UDHR, the ICCPR, and the CAT all expressly prohibit torture. Article 5 of the UDHR states that “no one should be subjected to torture or to cruel, inhuman or degrading punishment.” This statement is then repeated almost word for word in the ICCPR while the Convention against Torture is more detailed. The CAT specifically defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person.” This portion of the definition alone evokes the question of what constitutes “severe” pain or suffering, especially since pain is subjective and how one can determine whether an act was committed “intentionally.” The CAT’s definition states that the pain or suffering had to have been inflicted “for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed…” This implies that if pain or suffering were not used for the purpose of obtaining such information it would not constitute torture. Hypothetically, if an incident were ever to be investigated after the fact Guantanamo staff could then simply use the excuse that the interrogation techniques, they employed were for the purpose of obtaining information from the detainee and not for the purpose of torture.
The four Geneva Conventions of 1949 are like the aforementioned documents, most specifically Common Article 3 which states that the prohibition of torture is one of the certain basic rules that no matter what the nature of a war or conflict cannot be revoked. Common Article 3 is most similar to the CAT whose second article nearly identically states that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency, may be invoked as a justification for torture.” However, the CAT then goes on to add that “an order from a superior officer or a public authority may [also] not be invoked as a justification of torture.” Both conventions further add on to the idea that the excuse that the United States was in a “state of war” does not justify the use of torture. This is relevant to the Guantanamo detentions as both statements have been used to justify torture and abuse. For example, to justify the use of the CIA interrogation program President Bush formally stated that the implementation of the program “saved innocent lives.” By making this statement to the public, Bush implied that Guantanamo detainees posed some type of threat to the U.S. and that the program needed to continue to get “lifesaving information” which would prevent a future attack (Pitter et al. 2021).

The Federal Torture Statue and the DTA also both specifically prohibit the use of torture. The Federal Torture Statute “prohibit[s] torture committed by public officials under color of law against persons within the public official's custody or control…[and] applies only to acts of torture committed outside the United States.” This definition thereby explicitly concerns the violations occurring at Guantanamo and differs from the definition of torture given by the CAT. The government purposely chose Guantanamo as the location for detainees because the U.S. Naval Base located there was not technically a part of U.S. sovereign soil which would thereby minimize judicial scrutiny. The DTA states that “no person in the custody or under the effective
control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.” This is applicable to the detentions at Guantanamo Bay as the “enhanced interrogation techniques” used at the detention facility were beyond the scope of those authorized by the United States Army Field Manual on Intelligence Interrogation.

In terms of the right to access medical care, this is addressed in the Constitution of the WHO, the Supreme Court’s Decision in *Estelle v. Gamble*, the UDHR, and the ICESCR. According to the Constitution of the WHO, “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition,” thereby including detention status under economic or social condition. The right of the government to provide medical care for prisoners was formally determined under the Eighth (pertaining to cruel and unusual punishment) and Fourteenth Amendments (pertaining to equal protection under the law) in the 8-1 Supreme Court Decision *Estelle v. Gamble*. Despite the presence of a medical facility at the detention center, Guantanamo detainees often did not receive proper medical attention when needed or at times access to healthcare was even used as leverage to try and force detainees to cooperate during interrogation.

Article 25 of the UDHR specifically states that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services…” By choosing to use the word “Everyone,” the UDHR declares those who have been detained to be protected from the loss of this right. The UDHR then goes on to define the right to medical care as including the right to
clothing which although the Guantanamo detainees were initially granted clothing interrogators often took away this “privilege” as punishment leaving them fully naked for days and sometimes even weeks at a time.

The ICESCR defines the right to access medical care almost word for word from the UDHR, but then takes its definition a bit further in Article 12: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for…The improvement of all aspects of environmental and industrial hygiene; The creation of conditions which would assure to all medical service and medical attention in the event of sickness.” It is important to consider mental health when discussing the right to healthcare, especially for Guantanamo detainees. Many of these individuals were not only forcibly disappeared from their homeland but many of them were also kept for days or weeks in solitary confinement which has been shown to have a profoundly negative impact on one’s mental wellbeing. The ICESCR touches on environmental hygiene as well which is relevant to the Guantanamo detentions, despite their access to a “shelter,” because detainees were often subjected to significantly low temperatures or extremes of light and darkness.

Several Guantanamo detainees have been forced to relocate to a country of the government's choosing and or have been restricted from obtaining a passport. In other words, these detainees have been prohibited from leaving their country of relocation following their release. Freedom of movement is primarily protected under Article 13 of the UDHR which states “Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country.” It is
hard to imagine finally being released from detention, often after a decade or more of wrongful imprisonment, to return to an unfamiliar land in which you are prohibited from leaving. One specific Yemeni Guantanamo detainee, whose memoir I will discuss later in my research, even went as far as to describe his relocation to Serbia as “Guantanamo 2.0.”

Research

As I have mentioned previously, I spent the spring semester reading eight Guantanamo memoirs to prove that national and international human rights laws were violated at the detention center by comparing them to firsthand accounts. When choosing which books I would read, I made sure to look for a wide variety of authors, from those who were previously detained at Guantanamo to one of the psychologists who reverse engineered the SERE program into the “enhanced interrogation techniques" and employees from a few different government agencies. I originally chose to focus on the sections of these memoirs which talked about torture, but as I continued to read, I realized that there were other common themes which arose across the books. Therefore, I later decided to include access to medical care and freedom of movement in my research in order to highlight that freedom from torture was not the only human right that was violated through the Guantanamo detentions, since it is the violation which is most discussed in relation to these detentions. For the remainder of my paper, I am going to give examples of how quotes from these memoirs clearly demonstrate that laws protecting individuals from torture, lack of access to medical care, and restriction of movement were violated.

Although the memoirs of former Guantanamo detainees primarily touched on torture, the memoir of Staff Sergeant Joseph Hickman confirmed these accounts as well. Hickman writes,
“[Aamer] was beaten for two and a half hours straight. Seven naval military police participated in his beating. Mr. Aamer stated he had refused to provide a retina scan and fingerprints. He reported to me that he was strapped to a chair, fully restrained at the head, arms, and legs. The MPs inflicted so much pain, Mr. Aamer said he thought he was going to die” (Hickman 2015). Most would agree that a two and a half-hour beating would constitute “cruel punishment” which inflicted “severe pain” for the purpose of obtaining information, in this case a retina scan and fingerprints, thereby clearly violating the UDHR, ICCPR, and CAT. The actions described by Hickman also clearly violate the Geneva Conventions, Federal Torture Statute, and DTA because he states the abuse as having been committed by “seven naval military police,” who cannot justify their behavior under the umbrella of the War on Terror. Furthermore, the Federal Torture Statute protects those in “public official’s custody” outside the U.S., which Cuba most definitely is as it is not considered part of the U.S., and the DTA protects those “under the effective control of the Department of Defense or under detention in a Department of Defense facility” which Guantanamo Bay is.

As a former detainee, Mohamedou Slahi was able to discuss specific instances in which he was denied access to health care during his time at Guantanamo. For example, he writes in his memoir “In the secret place, the physical and psychological suffering must be at their highest extremes. I must not know the difference between day and night. I couldn’t tell a thing about days going or time passing; my time consisted of crazy darkness all the time. My diet times were deliberately messed up. I was starved for long periods and then given food but not given time to eat” (Slahi 2021). This example demonstrates a violation of the right to access medical care as it directly violates the WHO Constitution and Supreme Court decision in Estelle v. Gamble by failing to provide adequate medical care to Slahi. More specifically, the UDHR and ICESCR
touch on the rights to food, adequate mental health, and environmental and industrial hygiene as caveats of the right to medical care. The quote above from Slahi makes mention of violations of these rights as he mentioned the continual forced darkness which would be considered both an infringement of his right to industrial hygiene and adequate mental health which he experienced as well as the manipulation of his meals which would clearly fall under the right to food listed in the UDHR.

In terms of freedom of movement, the most prominent example of the violation of this right by the U.S. government was Mansoor Adayfi. When he was finally granted release from Guantanamo Bay detention facility he was told by a Serbian official, “... ‘If we do host you and you try to leave our country, we will arrest you and put you in prison.’... [He] was told by everyone at Guantanamo, even the Red Cross, that [he] had no choice but to leave to Serbia. They told [him] that if [he] refused, they would force [him] to go. There was nothing [he] could do to stop the relocation. If [he] didn’t accept their offer, [he] was told [he] wouldn’t get another one and that [he] could spend the rest of [his] life in Guantanamo” (Adayfi 2021). This is an obvious violation of the right to freedom of movement protected under the UDHR as it states that “Everyone has the right to leave any country, including his own, and to return to his country.”

Not only does this excerpt from Adayfi’s memoir show that he had no choice in his relocation to or confinement in Serbia, but when I had the opportunity to speak to Mansoor via Zoom he told us that he has often been harassed by the Serbian authorities. More specifically, he spoke to us about his violent interaction with Serbian officials following his discovery of hidden cameras in his apartment which was documented in his interview with Frontline. He even went as far as to describe Serbia as “Guantanamo 2.0.”
Conclusion

The abuses committed at Guantanamo Bay constitute torture as defined under national and international human rights law. However, Guantanamo was not the only black site where torture is believed to have taken place. Other black sites were created by the U.S. Government in other parts of the world, the locations of which are mostly still classified, in which these same types of violations took place. For example, the horrific torture and prisoner abuse committed at Abu Ghraib military prison in Iraq which included hooding and use of electric shocks. It is also important to note that at Guantanamo most of these abuses, particularly those pertaining to the right to access medical care, did not occur only at the black site maintained there but throughout the camp as a whole. Not only that, but despite the closure of the CIA black site located at Guantanamo thirty detainees remain there today and continue to be subjected to many of these abuses. No member of the U.S. government has yet to take accountability for those who have been tortured at the detention facility. Former President Barack Obama failed to close the detention facility as promised, and it is now up to current President Joe Biden to see this through and right the wrong. All the remaining prisoners should either be tried in a court of law for their alleged crimes or should be set free as soon as possible.
References


https://doi.org/https://doi.org/10.1111/j.1467-8330.2007.00544.x.


