

**ALI V. RUMSFELD: CHALLENGING THE PRESIDENT'S AUTHORITY TO
INTERPRET CUSTOMARY INTERNATIONAL LAW**

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INTRODUCTION

Can a federal court override the Executive Branch's interpretation of customary international law ("CIL")? *Ali v. Rumsfeld*,¹ the landmark lawsuit brought by the ACLU and Human Rights First against Donald Rumsfeld, squarely presents this important question, which has never been resolved by any court. By alleging that Secretary Rumsfeld violated CIL prohibitions against torture and cruelty in the development and implementation of interrogation policies for detainees in Iraq and Afghanistan, the *Ali* plaintiffs raise a direct challenge to the Secretary's, and the President's, interpretation of CIL.

Of course, the *Ali* suit also alleges violations of constitutional and treaty law, in particular the Fifth and Eighth Amendments and the Geneva Conventions. Each of these causes of action raises important and complex questions in their own right. My limited goal in this symposium essay, however, is to focus on the problems created by the lawsuit's challenge to the government's interpretation and application of CIL.

What are these problems? A judicial determination of Rumsfeld's liability may require a federal court to override the Executive Branch's interpretation of CIL. Because the Executive Branch holds the primary responsibility for the interpretation of CIL on behalf of the United States, a judicial determination of Rumsfeld's liability could undermine the Constitution's allocation of foreign affairs powers to the President. The President's control over the interpretation of CIL is not only reflected in the Constitution's text and structure but also in judicial precedent and historical practice. Moreover, as a purely functional matter, the Executive Branch holds a substantial comparative advantage over the courts in the interpretation of CIL, especially as that CIL is implemented in policies otherwise within the authority of the Executive Branch.

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¹ *Ali v. Rumsfeld*, No. 05-CV-01201, 2005 WL 922428 (N.D.Ill. Apr. 8, 2005).

Indeed, the limited factual record that is publicly available suggests that the Defense Department made a good faith effort to apply CIL in the development of policies for the interrogation of detainees. Defense Department officials were required to make difficult and complex determinations about the nature of particular interrogation techniques based on a variety of complex factors related to military objectives and foreign policy. It is hard to see how federal courts are well-positioned to second-guess these complex policy determinations.

To be sure, the Executive Branch's administration of interrogation policies in Iraq, Afghanistan, and Guantanamo Bay has been deeply flawed. As a legal matter, officials like Secretary Rumsfeld may well have violated the Constitution and relevant international treaties by authorizing, permitting or failing to prevent such abuses. But these failures and mistakes should not blind us to the broader structural point: federal courts do not, and should not, have the legal authority to override the Executive Branch's interpretation of CIL.

Part I of the essay will briefly summarize the legal and factual basis of the *Ali* lawsuit. It explains how much of the *Ali* plaintiffs' case depends upon the idea that a federal court can override the Executive Branch's own interpretation of CIL. Part II then sets forth my doctrinal claim: the Executive Branch's interpretation of CIL is binding on courts on matters within its constitutional authority absent congressional action to the contrary. Part III then applies this approach to the *Ali* lawsuit. It argues that, at least based on the limited factual record available, the Defense Department's interpretation of CIL as part of its development of *policies* governing the interrogation of detainees, cannot be rejected by a federal court hearing the *Ali* plaintiffs' claims.

I. ALLEGING A TORT IN VIOLATION OF THE "LAW OF NATIONS"

The ACLU and Human Rights First rightly hailed their lawsuit against Secretary of Defense Donald Rumsfeld and other defense department officials as a landmark lawsuit. In contrast to most of the other lawsuits filed in the wake of the September 11, 2001 attacks and the U.S. response to those attacks, this suit directly challenges the legality of a high-level Executive Branch official's implementation of policies deemed crucial to the prosecution of the war on terrorism.²

² See *Ali*, 2005 WL 922428. See also *Arar v. Ashcroft*, No. 1:04-CV-00249, 2004 WL 2410405 (E.D.N.Y. Jan. 22, 2004); Tim Harper, *Arar Deportation 'Within Law': Ashcroft*, TORONTO SUN, NOV. 21, 2003, at A13. For a discussion of this and other cases against the executive, see Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105, 110-14 (2005).

A. *The Allegations*

The *Ali* lawsuit alleges that Rumsfeld and his subordinates in the Defense Department “authorized, ratified, or failed to stop” the use of coercive techniques in the interrogation of detainees in Iraq and Afghanistan.³ In particular, Rumsfeld “was directly and personally” involved in setting interrogation rules, and exercised his power to allow “illegal practices, namely, the torture or other cruel, inhuman or degrading treatment of detainees in U.S. custody.”⁴

The lawsuit has three main sets of allegations. The first set of allegations focuses on Rumsfeld’s “policies, patterns, or practices governing the detention and interrogation of detainees in Afghanistan or Iraq” and alleges that these “policies, patterns, or practices” caused the torture and inhumane treatment of the plaintiffs.⁵ The second set of allegations center around Rumsfeld’s “knowledge of torture and abuse of detainees.”⁶ The third set of allegations charge that Rumsfeld failed to act upon his knowledge of the abuses to stop the torture and mistreatment of the plaintiffs.⁷

The specific allegations of torture, abuse, or inhumane treatment include “severe and repeated beatings, cutting with knives, sexual humiliation and assault, confinement in a wooden box, forcible sleep and sensory deprivation, mock executions, death threats, and restraint in contorted and excruciating positions.”⁸

B. *The Causes of Action*

The *Ali* plaintiffs’ claims of torture, abuse, and inhumane treatment allege violations of three types of law cognizable in federal courts: U.S. constitutional law, treaties, and CIL.

First, the plaintiffs argue that their mistreatment violates the Due Process Clause of the Fifth Amendment of the United State Constitution and the prohibitions against Cruel and Unusual Punishment contained in the Fifth and Eighth Amendments.⁹ The complaint alleges that the Due Process

³ Complaint at para. 203, *Ali v. Rumsfeld*, No. 05-CV-01201, 2005 WL 922428 (N.D.Ill. Mar. 1, 2005), available at http://humanrightsfirst.com/us_law/etn/lawsuit/PDF/rums-complaint-022805.pdf [hereinafter *Ali* Complaint].

⁴ Consolidated Amended Complaint, *Ali v. Rumsfeld*, No. 05-CV-1378, 2005 WL 37263f00 (D.D.C. Jan. 5 2005), available at <http://www.humanrightsfirst.info/pdf/06105-etn-rums-complaint.pdf> [hereinafter *Ali* Amended Complaint].

⁵ *Ali* Complaint, *supra* note 3, paras. 43, 45-71.

⁶ *Id.* paras. 72-116.

⁷ *Id.* paras. 117-138.

⁸ *Id.* para. 1.

⁹ *See id.* paras. 194-205; U.S. CONST. amend. V; U.S. CONST. amend. VIII.

Clause of the Fifth Amendment “prohibits any person acting under the color of U.S. law from engaging in or allowing torture, abuse or other treatment that ‘shocks the conscience’”¹⁰ and the Cruel and Unusual Punishment Clause of the Fifth and Eighth Amendments prohibits “any person under the color of U.S. law from engaging in or allowing torture, or other cruel, inhuman or degrading treatment that constitutes deprivation of basic human needs such as food and reasonable safety, and the unnecessary and wanton infliction of pain”¹¹ The complaint also alleges that Rumsfeld’s “actions, orders, authorizations, approvals and omissions caused the torture and abuse of plaintiffs . . . and [gave] rise to a cause of action for damages . . . pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.”¹²

Second, the plaintiffs argue that their mistreatment violates provisions in the Third and Fourth Geneva Conventions, especially Common Article 3.¹³ This provision, which is contained in several treaties signed and ratified by the U.S. government, requires that U.S. military personnel to avoid any “violence to life and person . . . [including] cruel treatment and torture.”¹⁴

Third, and most importantly for the purposes of this essay, the plaintiffs argue that their abuse constitutes a violation of CIL, in particular the CIL of human rights.¹⁵ The plaintiffs seek damages pursuant to the Alien Tort Statute (“ATS”),¹⁶ which is permitted pursuant to the Supreme Court’s recent decision in *Sosa v. Alvarez-Machain*.¹⁷ In *Sosa*, the Supreme Court kept the door of federal courts ajar for violations of well-settled norms of CIL.¹⁸

Although the violations of CIL constitute only one of the *Ali* plaintiffs’ four causes of action, they may well prove to be the least difficult path to the plaintiffs’ success in their lawsuit. At least one court has held that the Geneva Conventions are not self-executing as a matter of domestic U.S.

¹⁰ Ali Complaint, *supra* note 3, para. 195.

¹¹ *Id.* para. 202.

¹² *Id.* para. 197 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

¹³ *Id.* paras. 215-18. *See also* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

¹⁴ Geneva III, *supra* note 13, art. 3(a).

¹⁵ Ali Complaint, *supra* note 3, paras. 206-14, 219-22.

¹⁶ Alien Tort Claims Act, 28 U.S.C. § 1350 (2000).

¹⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

¹⁸ *See id.*

law.¹⁹ Proving a constitutional violation of the Fifth or Eighth Amendments also faces serious evidentiary and legal obstacles. For instance, the plaintiffs' most difficult factual claim will be proving that Secretary Rumsfeld knew or should have known of the levels of abuse occurring in Iraq and Afghanistan. The plaintiffs are unlikely to succeed in their constitutional claims if they cannot prove that difficult factual claim.

In contrast, the plaintiffs can argue that Rumsfeld's mere authorization of certain aggressive procedures, such as the use of "stress positions", constitutes a violation of CIL.²⁰ CIL arguably requires Rumsfeld to refrain from authorizing any actions deemed to be cruel, inhuman, or degrading. For this reason, the *Ali* plaintiffs will likely rely heavily on their CIL cause of action as their lawsuit moves forward.

II. CONSTITUTIONAL ALLOCATION OVER THE INTERPRETATION OF CIL

Although the Supreme Court has recently indicated that CIL should be considered a type of federal law,²¹ it did not decide which branch of the federal government holds the authority to issue binding interpretations of CIL. In this part, I argue that the Executive Branch, and not the federal courts, controls the interpretation and application of CIL on behalf of the United States.²²

A. *CIL and the Constitution*

The status of CIL in domestic U.S. law has been the subject of substantial debate and uncertainty.²³ One of the reasons for this uncertainty is

¹⁹ *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert granted*, 126 S. Ct. 622 (2005).

²⁰ See Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 286 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Working Group Report].

²¹ See, e.g., *Sosa*, 542 U.S. 692.

²² This section advances an argument John Yoo and I have developed at greater length elsewhere. See Julian G. Ku & John C. Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153 (2004).

²³ The literature on this question is voluminous and can be divided into three camps. One group holds that CIL is part of the Laws of the United States under both Article III and Article VI. See, e.g., Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after Erie*, 66 FORDHAM L. REV. 393 (1997). Another group holds that CIL is not federal law under either Article III or Article VI. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 38-44 (1995). Finally, one group splits the difference holding the CIL is federal law for purposes of Article III but not for

that the text of the Constitution mentions CIL only once. Article I, Section Eight authorizes Congress to “define and punish . . . Offences against the Laws of Nations.”²⁴ This under-used and understudied provision might give Congress the exclusive power to interpret or recognize CIL.²⁵ But, neither historical materials nor judicial interpretation of this provision has supported this reading.²⁶

Rather, the majority view of courts and commentators is that even if Congress has not codified CIL as federal statutory law, CIL is still cognizable by federal courts as part of the common law. This view holds that CIL should be understood as incorporated into the phrase “Laws of the United States” in Articles III and VI of the Constitution.²⁷ As such, claims of CIL violations would properly fall within the federal courts’ subject matter jurisdiction under Article III²⁸ and would also preempt inconsistent state law under Article VI.²⁹

As noted in a series of articles, however, the incorporation of CIL as federal law is unsupported by any judicial precedent prior to the 1980s, nor is it required by any convincing evidence of the original intent of the drafters of the Constitution.³⁰ Indeed, early historical documents and subsequent judicial precedent actually support the view that CIL forms part of the general common law that was not exclusive to either federal or state courts.³¹

Article VI. See, e.g., Michael D. Ramsey, *International Law as Non-Preemptive Federal Law*, 42 VA. J. INT'L L. 555, 560 (2002).

²⁴ U.S. CONST. art. I, § 8, cl. 10.

²⁵ The lone recent study of the clause can be found in Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations,”* 42 WM. & MARY L. REV 447 (2000).

²⁶ See *id.* at 477-83 (noting examples of instances where the Supreme Court has “applied an evolving notion of the law of nations”).

²⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1987). The Restatement is published by the American Law Institute and is generally accepted to reflect the views of leading scholars and practitioners on important areas of law.

²⁸ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

²⁹ Although no court has preempted state law using CIL, there is some academic support for this view. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 reporters’ note 3 (1987).

³⁰ See, e.g., Bradley & Goldsmith, *supra* note 23, at 819; Weisburd, *supra* note 23, at 38-44.

³¹ I have discussed the “CIL as general common law” view extensively in Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265, 271-91 (2001). This question has been the subject of substantial commentary elsewhere as well, and despite some aggressive claims by scholars such as Professor Paust, as in Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301, 301-02 n.4 (1999). Most other scholars have conceded that that CIL was understood

As a historical matter, federal and state courts have applied CIL as part of their interpretation of the general common law. This body of law was applicable in both federal and state courts, but it constituted neither federal nor state law. The “CIL as common law” understanding is further strengthened by judicial precedent.³²

Still, the status of CIL as domestic law remained unsettled in the courts until the Supreme Court’s decision in *Sosa*.³³ Although the Court did not explicitly address the status of CIL, it assumed that CIL could be, in limited circumstances, cognizable in federal courts, even in cases where diversity of citizenship did not exist.³⁴ While endorsing CIL as a form of federal law, the Court did not elaborate on either the textual or precedential basis for this holding. It also did not endorse using CIL as the basis for federal question jurisdiction. This means that CIL might remain a unique form of federal law that can only be invoked pursuant to the ATS and in no other context.³⁵

B. *CIL and the Executive Branch*

Despite the scholarly attention paid to judicial determinations of CIL, neither federal nor state courts have been the primary expositors of CIL in the U.S. system. Rather, the Executive Branch is the institution most responsible for administering, interpreting, and applying CIL. As a textual matter, this power flows from the Constitution’s vesting of the “executive power” in the President in Article II of the Constitution along with the general responsibility to conduct foreign affairs including the power to make treaties, appoint diplomats, and to command the military.³⁶ Because CIL is traditionally determined by state practice and administering foreign policy

as a form of general common law. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1987); Stephens, *supra* note 23, at 400-01, 401 n.34.

³² *See, e.g.*, *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 266 U.S. 580 (1924); *Ker v. Illinois*, 119 U.S. 436, 444 (1886); *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286 (1876).

³³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720, 728-730 (2004) (adopting the historical inference that the Alien Tort Statute, enacted by the First Congress, must have contemplated “that some, but, few, torts in violation of the law of nations were understood to be within the common law.”).

³⁴ *See id.* at 731 n.19.

³⁵ *Id.* (“[W]e know of no reason to think that federal-question jurisdiction was extended [to other CIL] subject to any comparable congressional assumption.”).

³⁶ *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) (containing the most powerful statement of the view that the President controls all foreign affairs matters not specifically allocated to Congress due to the Constitution’s allocation of “executive power” to the President in Article II). *See* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (critiquing the historical foundations of this view).

requires the President's administration of state practice, the President has typically been responsible for the interpretation, application, and recognition of CIL on behalf of the United States.

One of the best examples of Presidential assertion of the CIL power occurred in 1948 when President Harry Truman unilaterally declared that the United States claimed rights over the undersea continental shelf pursuant to the customary law of the sea.³⁷ This order extended U.S. claims over thousands of square miles of undersea territory and arguably modified the existing CIL of the sea.³⁸ Yet, the President's power to issue such a declaration accepting CIL rules on behalf of the United States has never been seriously questioned by any court. President Ronald Reagan made a similar declaration in 1983 when he accepted, on behalf of the United States, most (but not all) of the 1982 Law of the Sea Treaty rules as CIL binding on the United States.³⁹

Domestic courts have treated the President's views on CIL as binding. For instance, courts have given absolute deference to the executive's views of the proper application of the law of foreign sovereign immunity⁴⁰ prior to Congress's codification of the law of foreign sovereign immunity in 1975.⁴¹ Deference has continued in those areas that Congress failed to codify.⁴²

Scholars have debated whether the Executive is "bound" by CIL under his duties to "take care" that the laws be faithfully executed.⁴³ The leading case on the subject, *The Paquete Habana*,⁴⁴ contemplates a power by the executive to issue "controlling executive acts" to override a court's application of CIL.⁴⁵ Although the executive might be bound as a matter of international law, on this understanding of the case, no domestic court has the authority to require the executive to comply with a CIL rule. Although

³⁷ See Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Presidential Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945).

³⁸ See *id.*

³⁹ See Exclusive Economic Zone of the United States of America, Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 14, 1983).

⁴⁰ See, e.g., *Mexico v. Hoffman*, 324 U.S. 30 (1945); *F.W. Stone Eng'g Co. v. Petroleous Mexicanos*, 42 A.2d 57, 59-60 (Pa. 1945).

⁴¹ Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11 (2000).

⁴² See, e.g., *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (rejecting sovereign immunity for Panamanian leader on grounds that Executive Branch "has manifested its clear sentiment that Noriega should be denied head-of-state immunity").

⁴³ See Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1239-40 (1988) (arguing that the President is not bound by CIL under his duty to take care that the law is faithfully executed).

⁴⁴ *The Paquete Habana*, 175 U.S. 677 (1900).

⁴⁵ *Id.* at 700.

recent scholarship has contested this understanding of the case,⁴⁶ the Executive Branch seems to have adopted this view.⁴⁷ Moreover, no court has directly addressed this issue since *The Paquete Habana* case. The most recent Supreme Court decision on CIL in *Sosa* merely noted in a footnote that the Executive Branch's views on the foreign policy effects of hearing an ATS case should be given substantial deference, but it did not squarely address the significance of the executive's interpretation of CIL.⁴⁸

C. Functional Advantages of Executive Control over CIL

Even putting aside these doctrinal arguments, the Executive Branch appears to have a number of functional advantages over courts in the interpretation and administration of CIL. Due to his role as central representative of the nation in its international relations, the President develops and announces foreign policy, communicates with other nations, and negotiates and signs international agreements. Presidents also have foreign affairs powers that allow them to reach a variety of informal agreements and commitments with other nations. Given the President's role as chief spokesman and treaty-maker for the United States, allowing him to control recognition, acceptance and interpretation of CIL rules seems a sensible complement to his powers.

Indeed, division of control over CIL between the courts and the Executive Branch might send conflicting signals to other nations about U.S. views of CIL. Suppose the United States sought to wage a war that arguably violates the prohibition on the use of force contained in the U.N. Charter and in CIL.⁴⁹ An alien harmed by American military action in the war could bring an ATS suit against the U.S. government or individual members of the government and armed forces alleging the war and its conduct violated CIL. Judicial decisions to adopt a different rule of CIL through the ATS would conflict with the interpretation of CIL adopted by the Executive Branch.

⁴⁶ See Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321 (1985).

⁴⁷ See, e.g., Authority of the Federal Bureau of Investigation to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities, 13 Op. Off. Legal Counsel 163, 170-71 (1989) (discussing whether Congress and the executive can override CIL).

⁴⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 n.20 (2004).

⁴⁹ For a discussion of the international legal rules governing the use of force, see John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004). See also *Military and Paramilitary Activities (Nicar. V. U.S.)*, 1986 I.C.J. 14 (June 27).

D. Summary

In sum, historical practice and judicial doctrine strongly suggest that regardless of the status of CIL as domestic law, the President is the chief administrator of CIL on behalf of the United States. Absent congressional intervention, the President holds the power to accept or reject CIL rules on behalf of the United States and to make his interpretations binding on federal and state courts. This approach also coincides with the President's functional advantages in the interpretation and administration of CIL.

III. THE DEFENSE DEPARTMENT'S DEVELOPMENT OF POLICIES ON DETAINEE INTERROGATION

What are the consequences of the President's control over the interpretation of CIL? It means that when the President or his authorized subordinates issue a definitive interpretation of CIL, courts must defer to that interpretation. Acceptance of this view does not necessarily require a court to dismiss the *Ali* plaintiffs' claims under CIL. If the evidence shows, however, that Secretary Rumsfeld's development and implementation of coercive interrogation policies did not violate an interpretation of CIL adopted by either the President or by Congress, then the court should dismiss that portion of the lawsuit.

In this part, I review the available evidence detailing Rumsfeld's approval of new and more coercive interrogation policies.⁵⁰ Based on the limited public record, it appears that Rumsfeld approved those policies with an understanding that the policies did not violate CIL, as interpreted by the President. If these documents provide an accurate factual record of Rumsfeld's decisionmaking process, I believe that his approvals of coercive interrogation techniques are not a violation of CIL.

A. Rumsfeld's Approval of Coercive Interrogation Policies

The *Ali* complaint focuses heavily on Rumsfeld's actions during the fall of 2002 through the spring of 2003 in the development of new and more coercive policies to interrogate detainees in Guantanamo Bay.⁵¹ During that period, senior military officers responsible for interrogations in Guantanamo Bay requested Rumsfeld's approval of certain highly coercive interrogation

⁵⁰ I put aside for now the complaint's allegations of Rumsfeld's complicity in violating these policies because the facts on which those allegations are based are likely to remain in serious dispute.

⁵¹ See *Ali Complaint*, *supra* note 3.

techniques that were not authorized by the Army's existing rules and regulations governing detainee interrogation.⁵²

On December 2, 2002, Rumsfeld approved some, but not all, of the new more coercive techniques.⁵³ He rescinded that approval six weeks later on January 15, 2003 and appointed a working group to study the policy and legality implications of such interrogation techniques.⁵⁴ This working group issued a recommendation supporting the legality and utility of most of the coercive techniques.⁵⁵ On April 16, 2003, Rumsfeld then gave approval of some, but again not all, of the recommended coercive techniques.⁵⁶ Although the policies approved were supposedly directed only at detainee interrogations at Guantanamo Bay, the lawsuit alleges that these policies were also implemented in Iraq and Afghanistan.⁵⁷

What types of coercive interrogation policies did Rumsfeld approve? In December 2002, Rumsfeld approved 17 techniques recommended by the Department of Defense's ("DOD") general counsel.⁵⁸ These techniques were divided into three categories.⁵⁹ The two Category I techniques consisted of verbal techniques, such as yelling at the detainee.⁶⁰ The 12 Category II techniques were far more coercive, including:

- The use of stress positions (like standing) for a maximum of four hours
- The use of an isolation facility for up to 30 days

⁵² Press Release, U.S. Dep't of Def., DoD Provides Details on Interrogation Process (June 22, 2004), <http://www.defenselink.mil/releases/2004/nr20040622-0930.html>.

⁵³ Memorandum from William J. Haynes, II, Gen. Counsel, U.S. Dep't of Def. to Donald Rumsfeld, Sec'y of Def., U.S. Dep't of Def., Counter-resistance Techniques (Nov. 27, 2002), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc5.pdf> [hereinafter Haynes November 27, 2002 Memo] (containing approval signature of Donald Rumsfeld on December 2, 2002).

⁵⁴ Memorandum from Donald Rumsfeld, Sec'y of Def., U.S. Dep't of Def. to William J. Haynes, II, Gen. Counsel, U.S. Dep't of Def., Detainee Interrogations (Jan. 15, 2003), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc6.pdf> [hereinafter Rumsfeld January 15, 2003 Memo].

⁵⁵ Working Group Report, *supra* note 20.

⁵⁶ Memorandum from Donald Rumsfeld, Sec'y of Def., U.S. Dep't of Def. to Commander, U.S. Southern Command, Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc9.pdf> [hereinafter Rumsfeld April 16, 2003 Memo].

⁵⁷ See Ali Complaint, *supra* note 3.

⁵⁸ Haynes November 27, 2002 Memo, *supra* note 52 (containing approval signature of Donald Rumsfeld on December 2, 2002).

⁵⁹ Memorandum from Jerald Phifer, Dir., J2 to Michael E. Dunlavey, Commander, Dep't of Def. Joint Task Force 170, Request for Approval of Counter-resistance Techniques (Oct. 11, 2002), available at http://www.npr.org/documents/2004/dod_prisoners/20040622doc3.pdf.

⁶⁰ See *id.*

- Deprivation of light auditory or light stimuli
- Placing a hood over detainee during transportation and questioning
- Removal of clothing
- Forced grooming
- Using detainee phobias (such as fear of dogs) to induce stress.⁶¹

The four Category III techniques were by far the most coercive. These techniques included:

- Use of scenarios designed to convince detainee that death or severely painful consequences are imminent for him and/or his family
- Exposures to cold weather or water
- Use of a wet towel or dripping water to induce the misperception of suffocation
- Use of mild, non-injurious contact such as grabbing, poking in the chest with the finger, and light pushing.⁶²

Based on the recommendations of his general counsel and other advisers, on December 2, 2002, Rumsfeld approved all of the recommended techniques in Categories I and II but only the last technique (“mild, non-injurious contact”) in Category III.⁶³ Use of any other Category III techniques required Rumsfeld’s personal approval.⁶⁴

On January 15, 2003, Rumsfeld rescinded his December 2, 2002 approvals and referred the question of interrogation techniques to a working group.⁶⁵ The working group recommended 35 techniques as legally permissible and beneficial as a matter of policy.⁶⁶ Rumsfeld approved 24 of these techniques, but required his personal approval for use of four of the techniques.⁶⁷ The four techniques requiring pre-approval were described as:

- Giving incentives to the detainee
- Insulting the pride or ego of the detainee
- Use of a “Mutt and Jeff” or “good cop, bad cop” interrogation approach

⁶¹ *See id.*

⁶² *Id.*

⁶³ Haynes November 27, 2002 Memo, *supra* note 52 (containing approval signature of Donald Rumsfeld on December 2, 2002).

⁶⁴ *See id.*

⁶⁵ Rumsfeld January 15, 2003 Memo, *supra* note 53.

⁶⁶ Working Group Report, *supra* note 20, at 341-43.

⁶⁷ Rumsfeld April 16, 2003 Memo, *supra* note 55.

- Isolation⁶⁸

The final April 2003 rules did not include most of the Category II techniques or any of the most serious Category III techniques.⁶⁹ Thus, authorization for the use of stress positions, the removal of clothing, forced grooming, or the use of phobias was rescinded. However, the rules did permit the following physically coercive techniques:

- Dietary and environmental manipulation
- Sleep adjustment (but not deprivation)
- “False flag”,⁷⁰

B. The President’s Interpretation of CIL Governing Detainee Interrogations

In giving approval to these policies, Rumsfeld and his subordinates consulted attorneys for advice on the legality of the more coercive techniques. The most comprehensive analysis of the advice released publicly is contained in the report of the Detainee Working Group appointed by Rumsfeld in January 2003 to review detainee policies. This advice concluded that almost all of the coercive interrogation policies being proposed would not violate CIL as interpreted by the U.S.

1. The Binding Effect of Customary International Law

Following advice from the Department of Justice, the Detainee Working Group concluded that “any Presidential decision in the current conflict concerning the detention and trial of al-Qaida or Taliban militia prisoners would constitute a ‘controlling’ Executive act that would immediately and completely override any customary international law.”⁷¹

This approach is mostly consistent with the theory of Presidential control over CIL delineated in Part II.⁷² If the President does control the interpretation and acceptance of CIL on behalf of the United States, than he may reject rules of CIL such as the CIL rules restraining the conduct of detainee interrogations.

⁶⁸ Cf. Working Group Report, *supra* note 20, at 341-43 with Rumsfeld April 16, 2003 Memo, *supra* note 55.

⁶⁹ Cf. Working Group Report, *supra* note 20, at 341-43 with Rumsfeld April 16, 2003 Memo, *supra* note 55.

⁷⁰ Cf. Working Group Report, *supra* note 20, at 341-43 with Rumsfeld April 16, 2003 Memo, *supra* note 55.

⁷¹ Working Group Report, *supra* note 20, at 243.

⁷² See *supra* Part.II.

On the other hand, the Department of Justice and Detainee Working Group report assumed that any “decision” made by the President and his subordinates with respect to detainee interrogations would automatically reflect a considered interpretation of CIL or a rejection of a CIL norm. The truth of this assumption is far from evident in the publicly released documents.

In fact, the only evidence of the Executive Branch’s careful consideration of CIL in the context of specific decisions about detainee interrogations is found in the Detainee Working Group Report. That report analyzed the applicability of CIL norms, even though it operated under the assumption that none of those norms provided “legally-enforceable restrictions” on the U.S.⁷³ Nonetheless, the Working Group Report did conduct a more specific inquiry on the applicability of CIL. As I will explain, they concluded that none of the interrogation policies proposed would violate CIL as accepted and interpreted by the U.S.

2. The Detainee Working Group Report’s Application of CIL to Detainee Interrogations.

The Report reviewed six major sources of CIL that might apply to the interrogation of detainees: The Universal Declaration of Human Rights, the American Convention on Human Rights, the Declaration on the Protection of all Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the First Additional Protocol to the Geneva Conventions, and the Geneva Convention Relative to the Protection of Civilians in Time of War.⁷⁴

All of these sources of CIL pose potential restrictions on detainee interrogations. The Universal Declaration on Human Rights, the American Convention on Human Rights, and the Declaration on Protection of all Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment all provide broad proscriptions of “torture and cruel, inhuman, or degrading treatment or punishment.”⁷⁵ The Geneva Conventions provide more specific protections for individuals detained by the military including a prohibition of “physical and mental torture, outrages

⁷³ Working Group Report, *supra* note 20, at 344.

⁷⁴ *Id.* at 338-39.

⁷⁵ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948); Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No.36, 1144 U.N.T.S. 123; Declaration on the Protection of all Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452(XXX), U.N. Doc. A/10034 (Dec. 9, 1975).

upon personal dignity” and a general requirement of humane treatment.⁷⁶

The Working Group then proceeded to analyze specific interrogation techniques within the context of these documents, prior U.S. statements, and other country’s views.⁷⁷ Although they labeled their consideration of foreign country views as “policy,” for the purpose of developing detainee policies,⁷⁸ assessing the requirements of CIL is a type of policy determination.

Thus, the Report pointed out a number of techniques as creating potential conflict with other nations views of the protections provided to detainees.⁷⁹ These techniques included non-physical techniques such as:

- Incentive or Removal – Providing a reward or removing a privilege
- Pride and Ego Down – Attacking or insulting the ego of a detainee, not beyond the limits of what would apply to a POW
- Mutt and Jeff – A team consisting of a friendly and harsh interrogator⁸⁰

Additionally, the Report noted that the following physical techniques could also be found to clash with other countries’ views and recognized CIL:

- Environmental Manipulation – Altering the environment to create moderate discomfort. Conditions would not be such that they would injure detainee
- Isolation – Isolating detainees from other detainees while still complying the basic standards of treatment
- Forced Grooming – Forcing detainee to shave hair or beard
- Sleep Deprivation – Keeping detainee awake for an extended period of time not to exceed 4 days in succession
- Face or Stomach Slap – A quick glancing slap to fleshy part of the cheek or stomach
- Removal of Clothing – Potential removal of all clothing
- Increasing Anxiety by Use of Aversions – Introducing factors that create anxiety but do not create terror or mental trauma (i.e. simple presence of a dog without directly threatening action)⁸¹

⁷⁶ Geneva III, *supra* note 13; Geneva IV, *supra* note 13.

⁷⁷ See Working Group Report, *supra* note 20.

⁷⁸ *Id.*

⁷⁹ *Id.* at 341-43.

⁸⁰ *Id.*

⁸¹ *Id.*

Although the Working Group Report did not find that any of these techniques violated CIL, their recommendation did note that other countries, and international institutions like the International Criminal Court, might very well hold that such techniques violate CIL.⁸²

Perhaps for this reason, the Working Group recommended that the less physically coercive techniques (including environmental manipulation) should be approved for use against detainees outside the U.S.⁸³ It then recommended that the most coercive techniques, most of which it also noted could be considered a violation of CIL by other nations, be subject to exceptional circumstances and require the approval of senior military officials.⁸⁴

In any event, Secretary Rumsfeld did not fully accept the Report's recommendations and simply rejected the most coercive techniques including sleep deprivation, removal of clothing, and use of aversions.⁸⁵ He also limited the use of the certain techniques that may be seen as violations of CIL, including isolation, to situations where his personal approval had been provided.⁸⁶

This limited public record does not reflect broad disregard for CIL. Rather, it demonstrates that the DOD, acting on behalf of the President, interpreted and rejected CIL rules governing the interrogation of detainees. In fact, it may have been concerns about CIL that convinced Secretary Rumsfeld to prohibit the use of the most coercive techniques.

CONCLUSION

The question is not whether there is a role for civilian courts in reviewing the legality of U.S. detainee interrogation policies. Courts have the duty and the authority to find members of the Executive Branch liable for violations of relevant constitutional, statutory, and treaty law.

CIL, however, presents a different issue. The President is authorized (subject to congressional oversight) to interpret and reject particular norms of CIL on behalf of the U.S. Courts cannot, and should not, wield power over CIL to override the President's interpretation or application of those principles to matters within his constitutional authority. That power is held by Congress.

The DOD's study and development of policies for the interrogation of detainees is one of those matters. The DOD's decision-makers did appear to consider the legality of these policies under the President's interpretation of CIL as well as under the views of CIL that might be adopted by foreign

⁸² *Id.* at 338-39.

⁸³ *Id.* at 346-347.

⁸⁴ *Id.*

⁸⁵ Rumsfeld April 16, 2003 Memo, *supra* note 55.

⁸⁶ *Id.*

states. They reasonably concluded that the use of certain coercive interrogation policies did not violate U.S. understandings of CIL, but that some of the policies might be considered violations of CIL by other countries.

For these reasons, I believe that no federal court will, or should, reverse the DOD's interpretation of CIL in this instance. The *Ali* plaintiffs may ultimately prevail in their suit, but they will not prevail by convincing a federal court to override the President's authority to interpret CIL.