

Exhibit 2

EXPERT OPINIONS OF PROFESSOR JULIAN KU

I have been asked by Blank Rome LLP, attorneys for Defendants James Mitchell and John Jessen, to provide expert opinions in response to the opinions of professors Kevin Jon Heller and Christopher Einolf filed by Plaintiffs Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud, and Obaid Ullah (as personal representatives of Gul Rahman) in their lawsuit against the Defendants.

BACKGROUND AND QUALIFICATIONS

The opinions I offer herein reflect the expertise I have developed as a legal scholar focused on the relationship between international law and U.S. constitutional law. In particular, I have devoted much of my research to studying complex legal issues raised by the lawsuits brought under 28 U.S.C. §1350 (the Alien Tort Statute or ATS). The conclusions expressed herein reflect my considered opinion as to the proper interpretation of customary international law under the Alien Tort Statute given within a reasonable degree of professional certainty.

I am currently the Maurice A. Deane Distinguished Professor of Constitutional Law and Faculty Director of International Programs at the Maurice A. Deane School of Law at Hofstra University in New York. I am a nationally recognized expert on the relationship between international law and the American legal system. In 2012, I co-authored *Taming Globalization: International Law, the U.S. Constitution, and the New World Order* (Oxford University Press) (with John Yoo) which analyzes the treatment of international law in U.S. law, including international laws used in claims similar to the ones that are the focus of this Report. I am also the author of over forty articles, essays, and book chapters, several of which are also focused on legal issues related to lawsuits brought against individuals and corporations under the Alien Tort Statute. My work on the Alien Tort Statute has appeared in leading peer-reviewed academic journals including the *American Journal of International Law*, *Supreme Court Review*, and *Constitutional Commentary*. I have presented academic papers on the Alien Tort Statute at leading academic conferences including the Annual Meeting of the American Society of International Law. I am also a member of the American Law Institute, which is a select group of lawyers and scholars charged with developing authoritative principles and “restatements” of different areas of American law. In this capacity, I have been participating in the preparation of a “Fourth Restatement of U.S. Foreign Relations Law,” some of which is related to the subject of this opinions expressed herein. A detailed list of my publications and presentations is set forth in my curriculum vitae, which I understand is being provided along with this report.

I am a graduate of the Yale University School of Law where I hold a Juris Doctor degree and Yale College, where I hold a Bachelor of the Arts degree in Ethics, Politics & Economics.

During the course of my academic career, I have given expert opinions or filed amicus briefs on numerous cases involving the Alien Tort Statute including in the U.S. Court of Appeals for the Second Circuit (*Balintulo v. Daimler*) and in the U.S. Supreme Court (*Sosa v. Alvarez-Machain*). I have never been deposed or testified at a trial as an expert in a case.

I am being compensated for my time at an hourly rate of \$650.00. This hourly rate is what I have charged in the past for legal consulting and expert witness work. Payment of my fees is in no way contingent on the opinions that I expressed herein or the outcome of this case.

Defendants' counsel has made available to me the following documents which I have reviewed in formulating my opinions set forth herein.

1. Complaint
2. Answer
3. Motion to Dismiss (ECF-27)
4. Motion to Dismiss Order
5. Report of Christopher Einolf
6. Report of Kevin J. Heller
7. Report of Charles A. Morgan
8. Motion to Dismiss (ECF-105)

I also been afforded an opportunity to speak with Dr. James Mitchell and Dr. Bruce Jessen, the defendants in this case. I have not requested any documents or information from them that has not been provided to me.

Additionally, in formulating my opinion contained herein, I have reviewed numerous publicly available documents including the Army Field Manual No. 2-22.3 for Human Intelligence Collection Operations, the Convention Against Torture, the Geneva Conventions, the International Covenant for Civil and Political Rights, the Senate Select Committee on Intelligence Committee Study of the CIA's Detention and Interrogation Program, the Memorandum to Alberto Gonzales from Assistant Attorney General Jay Bybee (August 1, 2002), and the "Justices," "Medical," and "Ministries" Cases in the Trials of War Criminals before the Nuremberg Military Tribunals.

SUMMARY OF OPINIONS

Within this Report I review, discuss, and critique the Heller and Einolf opinions. I disagree with the Heller and Einolf opinions in three fundamental respects.

First, the Heller Opinion exaggerates the level of international consensus supporting a prohibition on human experimentation in the type of customary international law applicable to the Defendants' alleged conduct. There is both insufficient universal acceptance and specificity of such a norm in non-international armed conflicts (which is the only type of international law applicable to the Defendants' alleged conduct) to recognize a cause of action under the Alien Tort Statute.

Second, the Heller Opinion mistakenly defines the term "human experimentation" to include "anything done to an individual to learn how it will affect him."¹ This definition of "human experimentation" is far broader than can be supported by norms of customary international law,

¹ Heller Opinion at 19-20.

especially the narrow set of universally accepted norms needed to secure jurisdiction under the Alien Tort Statute.

Third, the Einolf Opinion mistakenly relies upon non-legal historical references to “torture” to reach conclusions concerning the technical legal definition of torture. Specifically, it ignores the crucial difference between historical examples of torture as that term is used outside of the legal context, and the specific intent that is a legal prerequisite under both U.S. and international law. Further, a close examination of this legal definition reveals that there is no consensus on the novel question of whether an individual who relies on legal advice that his actions do not constitute torture can possess the specific intent necessary to sustain liability under the Alien Tort Statute.

This Report will begin in Part I by briefly describing the strict legal requirements for imposing liability for violations of customary international law under the Alien Tort Statute. In Part II, I explain my disagreements with the Heller Opinion. I first explain that there is insufficient consensus under the standards required by the ATS for the Heller Opinion’s claim that the Defendants’ alleged conduct violates the applicable laws of armed conflict. Moreover, even if the Heller Opinion was correct that such a consensus existed, I then explain that the Defendants’ alleged conduct does not constitute “human experimentation” that violates the narrow set of customary international law norms that could potentially trigger application of the Alien Tort Statute. In Part III, I explain why the Einolf Opinion’s review of historical understandings of torture are not relevant to determining whether the Defendants, acting pursuant to legal advice, possess the specific intent necessary for potential legal liability under the Alien Tort Statute.

I. STANDARDS OF LIABILITY UNDER THE ALIEN TORT STATUTE

The Heller Opinion notes that, following the U.S. Supreme Court’s opinion in *Sosa v. Alvarez-Machain*, plaintiffs must show that the Defendants violated a norm of customary international law “so well defined as to support the creation of the federal remedy.”² But this description does not fully capture the strict limitations that the ATS imposes on plaintiffs seeking to impose liability under the ATS.

Sosa’s core approach is contained in the observation that courts “have no congressional mandate to seek out and define new and debatable violations of the law of nations.”³ Rather, the Court cautioned, “federal courts should not recognize private claims under federal common law for violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.”⁴ This means norms must be more than simply “well-defined” (as the Heller Opinion suggests). Rather, when a court recognizes a cause of action under the ATS, it cannot choose among competing versions of what international law requires or should require. Only when international law norms are “specific, universal, and obligatory”⁵ can such norms be used to create a cause of action under the ATS.

² Heller Opinion at 3-4 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004)).

³ *Id.* at 728. (emphasis supplied).

⁴ *Id.* at 732.

⁵ *Id.* at 732 (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

The Heller Opinion also underplays *Sosa*'s requirement of specificity. Under *Sosa*, even where international law rules obtain undisputed acceptance as a general matter, they must be defined to a level of specificity to plainly encompass the particular defendant's alleged conduct.⁶ Thus, it is not sufficient to show uncontroversial agreement upon an abstract rule such as a norm against "non-consensual human experimentation;" there must also be uncontroversial agreement that the defendant's specific alleged conduct violated that rule.

In *Sosa* itself, the Supreme Court refused to recognize the existence of a cause of action under the ATS even though it acknowledged that a rule against arbitrary detention commanded universal agreement. But this universal acceptance of a norm against arbitrary detention in the abstract, the *Sosa* court found, does not mean there was sufficient widespread agreement that the specific conduct in *Sosa* (illegal detention for a short period of time) violated that abstract rule.⁷ The Court noted that while "it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line" needed to support ATS jurisdiction.⁸ The Court stated that recognizing a cause of action here "would go beyond any residual common law discretion we think it appropriate to recognize" and dismissed the suit for lack of jurisdiction.

As with the first factor, this insistence on specificity comports with the Court's reading of the ATS as making actionable only undisputed, binding rules of international law. Rules may be widely agreed to in the abstract while many specific applications remain hotly disputed. Requiring that general acceptance extend to the specific applications at issue in the case again assures that the court is not making new international law by extending abstract principles, nor picking sides in international law debates.

In sum, *Sosa* establishes substantial limits on recognizing federal causes of action for international law violations that are not acknowledged by the Heller Opinion. It is not sufficient, under *Sosa*, for a court to believe that customary international law prohibits non-consensual human experimentation, or that customary international law contains a universally-recognized general principle arguably extending to Defendants' alleged conduct. Rather, the pertinent inquiry is whether customary international law (1) contains an undisputed rule, and (2) defines that rule specifically and uncontroversially to include the Defendants' alleged conduct.

⁶ See *id.* at 732-33 & n.21 (describing "requirement of clear definition.").

⁷ *Id.* at 737.

⁸ *Id.*

II. THE HELLER OPINION INCORRECTLY STATES THAT THERE IS UNIVERSAL CONSENSUS FOR A PROHIBITION ON HUMAN EXPERIMENTATION IN NON-INTERNATIONAL ARMED CONFLICTS AND FOR A BROAD DEFINITION OF HUMAN EXPERIMENTATION

Application of these principles from *Sosa* is crucial to understanding the flaws in the Heller Opinion. Finding that customary international law prohibits non-consensual human experimentation is not sufficient for a court to recognize a cause of action to support jurisdiction under the Alien Tort Statute. Rather, the court must also find that the definition of non-consensual human experimentation specifically and uncontroversially includes the defendants' alleged conduct of using information from the interrogations to improve and refine their methods of interrogation. But as a close examination of the Heller Opinion itself reveals, there is no evidence of a universal prohibition of all human experimentation in the customary international law applicable to the Defendants' conduct: the law governing non-international armed conflicts. Moreover, even if such a consensus existed, there is no definition of "human experimentation" sufficiently specific and universally accepted under customary international law that would apply to the Defendants' alleged conduct.

A. The Heller Opinion Incorrectly States that There is Universal Consensus Supporting a Ban on Human Experimentation in Non-International Armed Conflicts

The Heller Opinion devotes the bulk of its discussion to attempting to establish that customary international law contains a norm prohibiting "non-therapeutic" or "non-consensual" experimentation on humans. This prohibition exists, the Heller Opinion states, in both international and non-international armed conflicts as well as in peacetime pursuant to international human rights law. Thus, the Heller Opinion details how provisions in the four Geneva Conventions explicitly prohibit "biological experiments" or "medical or scientific experiments of any kind" or which are not necessitated by medical treatment.

But as the Heller Opinion concedes, none of the explicit prohibitions on experimentation in the four Geneva Conventions apply to non-international armed conflicts. Yet these are the only relevant provisions because, as the U.S. Supreme Court has held,⁹ the U.S. is engaged in a "non-international armed conflict" with Al-Qaeda, and it is that conflict in which the Defendants' alleged conduct occurred. The Heller Opinion attempts to fill in the non-existent textual prohibition with commentary from the International Committee of the Red Cross stating that the drafters of Common Article 3, the provision governing non-international armed conflicts, intended to (but did not explicitly) prohibit "biological experiments." The Heller Opinion then tries to buttress this less than conclusive evidence by citing Article 5(2) to the Second Additional Protocol to the Geneva Conventions. But Article 5(2) merely prohibits "medical procedure[s] which [are] not indicated by the state of health of the persons concerned." This language is notably less explicit than the prohibitions on "biological experiments" in the other Geneva Conventions' provisions on international armed conflicts. Moreover, unlike the universally

⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (holding that Common Article 3 applies to U.S. conflict with Al Qaeda).

ratified Geneva Conventions, the United States and numerous other countries have refused to ratify the Second Additional Protocol, as the Heller Opinion also concedes.¹⁰

The Heller Opinion nonetheless argues that the Second Additional Protocol's prohibition on unnecessary medical procedures in Article 5(2) reflects customary international law and that the U.S. government has recognized this development. But it is far from clear that the U.S. has accepted Article 5(2) as customary international law. In fact, the U.S. government statement cited by the Heller Opinion merely states that the U.S. government believed some provisions of the Second Additional Protocol such as prohibiting violence against non-combatants and hostages reflected customary international law.¹¹ But instead of embracing the whole Protocol as embodying customary international law or specifying that human experimentation is prohibited under customary international law, the U.S. government simply noted that the other parts of the Second Additional Protocol are "obviously new...although they ...*hopefully will* in due course become part of customary law."¹² This is not, despite the Heller Opinion's claims otherwise, a recognition that human experimentation is prohibited in non-international armed conflicts.

A more natural reading of the Geneva Conventions is that there is an explicit prohibition on "biological experiments" in international armed conflicts under customary international law, but there is far less consensus supporting a similar customary international law prohibition in non-international armed conflicts like the one applicable to the Defendants' alleged conduct. Moreover, contra the Heller Opinion, the U.S. government has not accepted that such a customary international law prohibition applies to non-international armed conflicts.

The Heller Opinion also reviews human rights treaties, several which specifically prohibit non-consensual "medical or scientific experimentation" or "research on a person" where consent has been obtained. Other sources of state practice reviewed by the Heller Opinion use similar formulations. But while the Heller Opinion rightly classifies these sources as prohibiting "peacetime experimentation," it fails to point out that any customary international law prohibition imposed by international human rights treaties is irrelevant to actions taken during an armed conflict. Under the rule of "lex specialis," the laws specifically applicable to a particular situation govern instead of more general ones. There is no doubt that the Defendants' alleged conduct is governed by the "law applicable in armed conflict which is designed to regulate the conduct of hostilities," and not the general peacetime rules reflected in human rights treaties.¹³

Ultimately, the Heller Opinion's conclusion that there is a customary international law prohibition on human experimentation during both armed conflict and peacetime is irrelevant to determining whether there is a cause of action under the ATS for the Defendants' alleged conduct. Any universally accepted and specific norm prohibiting human experimentation applicable to this case must be drawn from the law governing non-international armed conflicts. But as a close reading of the Heller Opinion reveals, there is no evidence of clear, universal, and specific customary international law norm against human experimentation in this body of law.

¹⁰ Heller Opinion at 10.

¹¹ Remarks of Michael J. Matheson, 2 AM. UNIV. J. INT'L L. & POL. 419, 431 (1987).

¹² *Id.* (emphasis added).

¹³ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, ¶ 25, International Court of Justice (ICJ), 8 July 1996.

B. The Heller Opinion Fails to Establish That Its Definition of Human Experimentation is Universally Accepted in Customary International Law to the Extent Necessary to Trigger ATS Jurisdiction

But even if one accepts *arguendo* the Heller Opinion's view that there is a customary norm against human experimentation, the Opinion runs into serious difficulties attempting to show that this customary rule is "well defined" for the purposes of ATS. As the Heller Opinion admits, "[n]either the Geneva Conventions nor [Additional Protocol I] defines the term "experimentation."¹⁴ Instead, in an attempt to bridge this omission, the Heller Opinion relies on a definition offered in a 1981 academic article by M. Cherif Bassiouni, a scholar of international law.¹⁵ In that article, Professor Bassiouni defines experimentation subject to prohibition under international law as "anything done to an individual to learn how it will affect him."¹⁶ But Professor Bassiouni's only authority for his extremely broad definition is yet another academic article (this time from 1973). The author of this article, Professor Bowker, also fails to cite any authority, legal or non-legal, for his own narrower definition of human experimentation as "something done to the person with the principal purpose of finding what will happen to the person."¹⁷

In other words, the Heller Opinion's definition of human experimentation rests solely on two obscure decades-old academic articles that themselves do not rely upon sources of legal authority such as international treaties, state practice, or *opinio juris*. Indeed, it is highly unlikely that Professor Bassiouni intended for his general and extremely broad definition of "experimentation" to serve as a legal definition. Later in the same article, Professor Bassiouni called for a specialized international convention regulating human experimentation because the existing legal framework "is at present inadequate to meet the task of clearly defining the rights of subjects and the duties of investigators and states."¹⁸ In particular, Professor Bassiouni argued that a convention could provide what did not exist under customary law: "a *clear and acceptable definition of experimentation* which is sufficiently broad in scope to protect all human rights."¹⁹

This discussion establishes two important points about the definition of experimentation in the Bassiouni article. First, the definition offered by Bassiouni, and relied upon by the Heller Opinion, cannot possibly serve as a basis for defining "human experimentation" for the purposes of the ATS. The Bassiouni definition does not reflect state practice or *opinio juris*, and it does not even purport to advance an authoritative legal definition.

Second, the Bassiouni article confirms that there was no "clear and acceptable definition of experimentation" in customary law as of 1981. Even more importantly, a review of the Heller

¹⁴ Heller Opinion at 19.

¹⁵ M. Cherif Bassiouni, Thomas G. Baffles, and John T. Evrard, *An Appraisal of Human Experimentation in International Law and Practice: The Need for International Regulation of Human Experimentation*, 72 J. CRIM. L. & CRIMINOLOGY 1597, 1597 (1981).

¹⁶ *Id.* at 1597 n. 1.

¹⁷ W.F. Bowker, *Experimentation on Humans and Gifts of Tissue: Article 20-23 of the Civil Code*, 19 MCGILL L.J. 161, 164 (1973).

¹⁸ Bassiouni, *supra* note 15, at 1662.

¹⁹ *Id.* at 1663 (emphasis added).

Opinion confirms that no such definition has been developed in the subsequent three decades. Almost all of the major legal sources relied upon in the Heller Opinion in an effort to define and establish a norm against human experimentation, such as the Geneva Conventions and the ICCPR, had been concluded long before 1981. Yet the Heller Opinion does not cite any legal authority subsequent to the 1981 Bassiouni article that provides any definition of “human experimentation” whatsoever.

The Heller Opinion tries to flesh out the vague and overbroad definition advanced by Bassiouni by noting that the seminal *Medical* case at Nuremberg treated all of the Nazis’ horrific actions as experiments. But this does not solve the problem. While it is true that the Tribunal in the *Medical* case convicted Nazi defendants of war crimes based on their experiments, the Tribunal did not actually define the term “experiment” for the purposes of the indictment. This is not surprising because the Tribunal in the *Medical* case convicted the defendants of war crimes and crimes against humanity, and not of a separate independent crime of non-consensual human experimentation. The indictments therefore alleged a conspiracy to conduct medical experiments without the subjects’ consent “in the course of which experiments the defendants committed murders, brutalities, cruelties, tortures, atrocities and other inhuman acts.”²⁰ The Court’s emphasis on the horrors conferred by the experiments rather than the fact of the experimentation itself confirms that the Tribunal did not intend or need to offer a definition of experimentation in their judgment.

This paucity of legal material offering a specific definition of experimentation, when combined with the admission of key scholars like Bassiouni that a treaty defining the term is needed, weighs heavily against a conclusion that the prohibition against human experimentation is a specific, universal, and obligatory norm sufficient to support a cause of action under the ATS. At the very least, a court applying the ATS should heed *Sosa*’s call for caution and refuse to apply the general abstract norm against human experimentation to the Defendants’ alleged conduct.

Despite the Heller Opinion’s insistence that the Defendants’ alleged conduct “clearly violates” the norm against human experimentation, there is surprisingly little evidence in the Complaint supporting this conclusion. According to the Complaint, allegations of which I assume to be true for purposes of my opinions contained herein, the Defendants “hypothesized” that they could overcome resistance to interrogation by inducing a condition of “learned helplessness.” They then allegedly devised a plan to execute this interrogation strategy. Finally, the Complaint alleges that the Defendants tried (but failed) to get an independent researcher to assess the effectiveness of their strategy.

These allegations are a far cry from the facts present in cases like the Nuremberg *Medical* case. In that case, the principal, if not exclusive, purpose of all of the experiments conducted was to gain biological information and data to confirm or assess a pre-existing theory or project. Thus, Nuremberg victims were subjected to freezing in order to investigate the most effective means to treat chilled or frozen victims. Others were infected with malaria in order to test immunization methods.

²⁰ “The Medical Case,” Indictment, Count One, I Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 10 (October 1946-April 1949).

In other words, the principal purpose of the biological experiments punished in the *Medical* case was to gain information to confirm or support the goals of the Nazis' medical and scientific research teams. There was no purpose for conducting the experiments other than gaining this medical or scientific information.

In the case of the Defendants, however, the Complaint's allegations make clear that the Defendants' actions were wholly in service of "enhancing the strategic interrogation" process.²¹ Although the Complaint alleges that the Defendants' documented their methods of interrogation, there is no allegation that the Defendants' main purpose for participating in the process was to learn information to develop their scientific theories or treatments. Rather, the Complaint, read as a whole, alleges that the so-called experiments were all simply efforts to improve and refine the ongoing interrogations. Moreover, the Complaint's allegations that the Defendants had done no prior academic research into coercive interrogations only supports the idea that the Defendants' sole purpose was to help improve the interrogations, and not to conduct experiments for their own scientific research.²²

The Complaint also alleges that the real motivation for the Defendants' conduct was not to gain knowledge from experiments for their scientific research. Rather, the Complaint charges that the Defendants spent time monitoring and assessing the interrogation methods in order to collect on a lucrative government contract.²³ This allegation reveals that even the Plaintiffs do not allege that the Defendants' purpose in participating in the interrogations was to conduct a real human experiment of any kind. Instead, the Plaintiffs allege that the Defendants designed a program and took pains to assess its effectiveness in order to convince the government to continue paying them. Whatever the ethics of this alleged financial motivation, it is hardly evidence of a plan to conduct medical experiments and hardly a violation of a universal international norm.

Moreover, the Plaintiffs' extraordinarily broad (and legally insupportable) definition of experiment would render all systematic efforts to develop interrogation methods by research and study "human experimentation." Yet the type of analysis the Defendants allegedly conducted is commonly used to design and improve interrogation methods. The Army Field Manual for Human Intelligence Collection (the "Army Field Manual") specifically instructs interrogators to "continually assess[]" the source of information to see if the "approaches – and later the questioning techniques—chosen in the planning and preparation phase will indeed work."²⁴ Interrogators are therefore expected to learn from the information gleaned in one approach, and switch to another approach if the first approach is found to be ineffective. But under the Heller Opinion's absurdly broad definition, interrogators who change approaches due to information "learned" from using a prior interrogation approach, as instructed to do by the Army Field Manual, are conducting illegal human experiments.

Similarly, the "Reid Technique," one of the most widely used methods guiding police interrogations in the United States was developed through study of interrogations in precisely the

²¹ Complaint at ¶38.

²² Complaint at ¶23.

²³ Complaint at ¶66-68.

²⁴ Army Field Manual fm 2-22.3, 8-12 (2006).

method that the Plaintiffs allege is illegal human experimentation. The Reid Technique was developed by Fred Inbau, a Northwestern University law professor during the 1950s to replace the aggressive “third degree” interrogation methods of earlier decades. Professor Inbau created and refined his interrogation strategy based on research, but also based on his observation and participation in the interrogation of real criminal suspects. As the *New York Times* noted, “A meticulous scholar, Mr. Inbau kept detailed notes on the various techniques he had used in the course of an interrogation. Then, to determine which had been most effective in obtaining the confession, he would interview the prisoner after his conviction, including one interview on death row three days before the execution.”²⁵ The results of Professor Inbau’s years of experience conducting and observing interrogations resulted in various books and academic articles, including “Criminal Interrogation and Confessions,” which the *New York Times* calls “the undisputed bible of police interrogation.”²⁶

Like the Defendants are alleged to have done, Professor Inbau had ideas for how to conduct an effective interrogation. He distilled these ideas into a series of techniques which were used to train others and which he used himself. He then carefully recorded the results of the application of interrogation strategies on non-consenting humans charged with real crimes, and refined and further developed his strategies based on what he learned from the real interrogations. Under the Heller Opinion’s definition of experimentation, all of this activity would constitute a violation of customary international law. Surely, this is not the case.

In sum, it is my opinion that there is no definition of “human experimentation” under customary international law that is sufficiently universal and well-accepted to establish an ATS cause of action based on Defendants’ alleged conduct. The Bassiouni definition offered by the Heller Opinion has no legal basis, as Professor Bassiouni openly acknowledged at the time. A more reasonable definition (which was the basis for the Bassiouni opinion) defines an experiment as an action whose “principal purpose” is to learn about the scientific effects of the action on humans. This definition would more closely fit the definition that seemed to guide the Tribunal in the *Medical* case, although that case also offered no specific definition. Keeping in mind the Supreme Court’s admonitions in *Sosa* to limit causes of actions to only those which are neither contested nor debatable, and which would uncontroversially apply to specific conduct, the Defendants’ alleged conduct cannot support an ATS cause of action. Not only is there no universal consensus of legal authorities, but the Heller Opinion cites no legal authorities that would specifically classify efforts to use psychological principles for the principal purpose of designing and improve an interrogation program as a human experiment in violation of customary international law.

²⁵ Robert McG. Thomas Jr., “Fred Inbau, 89, Criminologist Who Perfected Interrogation, *The New York Times* (May 28, 1998).

²⁶ *Id.*

III. THE EINOLF OPINION'S HISTORICAL EXAMPLES OF TORTURE ARE NOT RELEVANT TO DETERMINING WHETHER THE DEFENDANTS POSSESSED SUFFICIENT SPECIFIC INTENT TO VIOLATE THE PROHIBITION ON TORTURE IN CUSTOMARY INTERNATIONAL LAW

The Einolf Opinion reviews the history of the interrogation methods for which the Defendants are alleged to have been responsible for. It describes how many of the methods had been used at various times throughout history. It repeatedly refers to all of the methods as torture, although it does not rely upon any legal definition or determination to support its characterizations. Rather, throughout his Opinion, Professor Einolf describes extreme interrogation methods that he believes are similar to the ones allegedly designed by the Defendants, and then labels them torture without reference to any legal determination.

While the Einolf Opinion attempts to establish that all of the methods allegedly used in the CIA program were understood to be torture throughout history, it does not cite legal instances where courts or other legal decisionmakers classified the actions as “torture” under the specific definition required by customary international law. In particular, the Einolf Opinion ignores the requirement that any legal liability for torture first show that the alleged torturer had the necessary intent. This makes sense since the Einolf Opinion is a review of historical sources rather than legal elements. But any determination of legal liability for torture in a court under the ATS must satisfy the specific legal definition of torture rather than historical generalizations.

In the one case where the methods Einolf describes were adjudicated under the international law applicable to prohibiting torture, those methods were deemed to fall short of the legal definition of “torture.” Thus, as the Einolf Opinion itself acknowledges, methods such as “prolonged standing,” hooding, light deprivation, food and water deprivation, and sleep deprivation were found by the European Court of Human Rights to fall short of torture as that term is defined in the Convention against Torture.²⁷ Yet the Einolf Opinion uncritically continues to describe these methods as torture.²⁸ This further confirms that the Einolf Opinion is using the term “torture” in terms of common usage or as it is described in historical materials. But it does not use the term “torture” in a legal sense.

It is important to focus on the legal definition of torture because, as discussed in Part I, the Supreme Court in *Sosa* requires courts to not only determine whether there is a universally accepted norm of customary international law, but also to determine whether the application of this norm in a specific instance is also universally well-accepted. In my opinion, there continues to be uncertainty in the law about whether an alleged torturer possesses the intent necessary to incur liability under customary international law when that torturer relies on legal advice expressly stating his actions are not torture. This uncertainty is a good example of how an abstract norm that is universally accepted, such as the prohibition against torture, still fails to sustain a cause of action under the ATS due to disagreement and the lack of consensus about how the norm should be applied in a specific instance.

²⁷ Ireland v. United Kingdom, (1978) 2 EHRR 25, 167 (discussed in Einolf Opinion at 13 n. 103).

²⁸ Einolf Opinion at 14 (classifying the “British Five” techniques as torture).

Under Article I of the Convention Against Torture (CAT), torture is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession...”²⁹ Upon depositing its instrument of ratification, however, the U.S. government attached numerous reservations, declarations, and understandings. In particular, one U.S. understanding states that “in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering.”³⁰ This “specific intent” language is also reflected in the main U.S. statute implementing U.S. obligations under the CAT, which defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering.”³¹

This U.S. understanding of the CAT created a gap between the U.S. definition of torture and the CAT’s definition of torture. Under U.S. law, the plain language of 18 USC §2340 follows the “Understanding” and defines torture as an act “specifically intended to inflict pain and suffering.” In the CAT, the language of Article I suggests that torture can occur as long as the alleged torturer specifically intends to acquire information or force confession by way of inflicting severe pain and suffering. Mere knowledge that severe pain and suffering will occur may be enough to sustain liability as a torture under the CAT’s definition.

In other words, while it is universally accepted that torture is prohibited, it is far less than universally accepted whether torture liability can be satisfied by mere knowledge that severe pain and suffering will occur. Indeed, an en banc decision of the U.S. Court of Appeals for the Third Circuit split sharply on this very question, with a majority of judges concluding that the specific intent to inflict severe pain and suffering is the correct standard, while the dissenting judges argued in favor of a “mere knowledge” standard.³²

In any event, this difference in opinion about how to determine the specific intent requirement to impose liability for torture does not matter in this case. The Defendants almost certainly did not possess the specific intent to inflict severe pain and suffering, or even knowledge that such suffering was being inflicted. According to Complaint, the Defendants did not implement any of the “enhanced interrogation techniques” until the U.S. Department of Justice “authorized the use of every method proposed...”³³ Thus, by the very terms of the Complaint, the Defendants acted only after having the legality of each specific method assessed and approved by an appropriate authority.

The Defendants’ refusal to act until receiving legal approval casts serious doubt on the possibility that they could have the requisite specific intent to “inflict severe pain and suffering” or even their knowledge that such “severe pain and suffering” had occurred. Having been assured that their proposed methods did not meet the legal standard of “torture” and thus did not actually “inflict severe pain or suffering,” the Defendants do not possess the requisite specific

²⁹ Convention Against Torture, Art. 1(1), S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85.

³⁰ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. 101–30, at 9 (1990).

³¹ 18 USC §2340(1).

³² *Pierre v. Attorney Gen. of U.S.*, 528 F.3d 180 (3d Cir. 2008) (en banc).

³³ Complaint at ¶45.

intent under either standard. In other contexts, for instance, individuals relying on the advice of counsel that their actions are legal have avoided criminal liability because their reliance on counsel negates their requisite specific intent.³⁴ This was the case even if the legal advice was flawed or outright incorrect.³⁵ In any event, the Ninth Circuit has already held that the specific legal definition of torture relied upon by the Defendants was not unreasonable given the debate and uncertainty about the definition of torture during the 2001-2003 period.³⁶

To be sure, there are few precedents under international law relating to the intent of individuals acting in reliance on legal advice. In the seminal *Ministries* case at Nuremberg, the Tribunal convicted judges for their implementation of illegal orders. But judges in that case pleaded “judicial immunity” and “compulsion,” not reliance on legal advice.³⁷ I have been unable to identify any similar case applying the intent requirement for torture or other internationally proscribed acts in situations where that individual acted upon specific legal advice. While it is possible that the application of customary international law in some jurisdictions would not consider the reliance on legal advice to negate specific intent, it is also equally possible other jurisdictions would apply the same general legal rule in favor of the alleged torturer.

The point is that the novelty of this specific application of the customary international law prohibition against torture should preclude ATS jurisdiction in this case. Just as the *Sosa* Court itself refused to apply the norm prohibiting arbitrary detention to a specific case involving a detention, a court applying the *Sosa* standard should refrain from applying the prohibition on torture to Defendants who lack the necessary specific intent to incur liability due to their reliance on legal advice. This cautious approach to recognizing novel causes of actions under *Sosa* is uniquely appropriate in this situation.

There is another reason why the Court should be hesitant to recognize ATS jurisdiction in this case. Because the legality of the Defendants’ alleged conduct was specifically approved by authoritative decisionmakers in the Executive Branch, a court’s finding that a cause of action exists would contradict the contemporary executive branch’s interpretation of customary international law. Yet the Court in *Sosa* warned courts that the “potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”³⁸ It further noted that in certain cases at odds with the views of the Executive Branch, courts “should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”³⁹

³⁴ See, e.g., *United States v. Stevens*, 771 F. Supp. 2d 556, 567 (D. Md. 2011) (dismissing case for wrongful grand jury instruction because “good faith reliance on the advice of counsel negates a defendant’s wrongful intent.”).

³⁵ See Leonard B. Sand and John S. Siffert, 1 MODERN FEDERAL JURY INSTRUCTIONS ¶ 8.04 Inst. 8-4 (stating that good faith reliance on legal advice can negate intent “even if such advice were an inaccurate construction of the law.”) (cited in *United States v. Stevens*, 771 F. Supp. 2d. at 568.)

³⁶ See *Padilla v. Yoo*, 678 F.3d 748, 767 (9th Cir. 2012) (“[W]e cannot say that any reasonable official in 2001–03 would have known that the specific interrogation techniques allegedly employed against Padilla, however appalling, necessarily amounted to torture.”)

³⁷ *United States of America v. Alstötter et al.* (“The Justice Case”) 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948) in III Trials of War Criminals Before the Nuremberg Military Tribunal at 1024.

³⁸ *Sosa* 542 U.S. at 727.

³⁹ *Id.* 542 U.S. at 733 n. 21.

Recognizing a cause of action in this case, in contradiction to the views of the Executive Branch at the time of Defendants' alleged conduct, would impinge on the Executive's discretion in managing foreign affairs and interpreting customary international law. The Executive Branch holds the dominant and authoritative role in the interpretation of customary international law on behalf of the United States. Undermining and contradicting the Executive Branch's authority in this way would complicate future Executive Branch efforts to state and apply U.S. views on customary international law because foreign nations would know that U.S. courts might choose to contradict such Executive Branch views.

The danger of such a discontinuity was anticipated by the Supreme Court in *The Paquete Habana*, which held that courts may look to customary international law "where there is no treaty, and no controlling executive or legislative act or judicial decision..."⁴⁰ This subordination of judicial interpretations of customary international law to "controlling executive" acts allows courts to avoid "impinging on the discretion of the ... Executive Branch in managing foreign affairs."⁴¹ In a manner very similar to the political question doctrine, *Sosa* warns courts that creating conflicts with presidential policy is a separate and independent reason to avoid asserting jurisdiction in an ATS case. That reason certainly applies here and counsels the court that it should refuse to recognize a cause of action for Defendants' alleged conduct.

In sum, the Einolf Opinion is irrelevant to determining the legal definition of torture for the purposes of the Alien Tort Statute since the Einolf Opinion does not rely upon sources offering legal definitions of torture. In looking at the legal definition of torture, there exists a lack of consensus over the nature and scope of specific intent for torture under customary international law. But even putting aside this lack of consensus on the proper understanding of specific intent, there is also a lack of consensus about the applicability of the specific intent standard in cases where the alleged torturer is relying upon legal advice. The novelty of this application weighs heavily against recognizing a cause of action in this case, where it is likely that the Defendants lacked the necessary specific intent to inflict severe pain and suffering due to their reliance on advice approving the legality of their actions. Moreover, *Sosa* instructs courts under the ATS to refrain from recognizing causes of action that would unduly impinge on the Executive Branch's discretion in managing foreign affairs. Recognizing a cause of action here would directly contradict contemporary Executive Branch views of customary international law.

IV. CONCLUSION

Even accepting all of the facts alleged in the Complaint as true, I do not agree with the conclusions of the Heller and Einolf Opinions finding that the Defendants violated customary international law under the narrow and limited requirements necessary for jurisdiction under the Alien Tort Statute.

With respect to the Heller Opinion, I do not agree that there is a clear and universal prohibition on human experiments sufficient to sustain jurisdiction under the ATS arising out of the only

⁴⁰ *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis added).

⁴¹ *Sosa*, 542 U.S. at 733 n. 21.

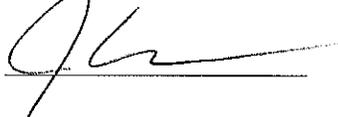
body of customary international law applicable to the Defendants' alleged conduct: the law governing non-international armed conflicts.

But even if there was such a universally accepted prohibition, I further disagree that the Heller Opinion's broad definition of human experimentation as "anything done to an individual to learn how it will affect him" has achieved sufficient universal acceptance and consensus to support a cause of action under the Alien Tort Statute. To the contrary, the definition of "human experimentation" offered by the Heller Opinion has very little legal foundation whatsoever, much less universal acceptance. This lack of international consensus on a specific definition of human experimentation counsels strongly against applying that term to the Defendants' alleged conduct. According to the Complaint, the Defendants' main purpose was to improve their methods of interrogation, perhaps for financial gain. But there is no allegation that the main, or even a significant, purpose of the Defendant's alleged actions was to gain medical or scientific knowledge. This is fatal to any ATS claim.

With respect to the Einolf Opinion, I disagree that its review of historical examples of interrogation methods that were called torture is relevant to determining the legal definition of torture for the purposes of the ATS. The key to determining the applicability of the anti-torture norm under the ATS is whether this *legal* norm has achieved universal consensus in its specific application. Indeed, the Einolf Opinion itself revealed how common historical references to torture, such as in the "British Five" case, might still fall short of a legal definition of torture applied by an international adjudicator.

Moreover, it is my opinion that the application of the "specific intent" requirement for torture under customary international law remains uncertain in the context of an alleged wrongdoer acting in reliance on specific legal advice. Given this uncertainty about the applicability of the norm, it would be inappropriate for the court to exercise its ATS jurisdiction in this case. This is doubly inappropriate given the conflict between a court's recognition of a cause of action in this case and the Executive Branch's contemporary views of the requirements of customary international law.

SIGNED:



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