

**BRIEF IN SUPPORT OF ABOU ELKASSIM BRITEL'S REQUEST FOR REPARATIONS AND AN
OFFICIAL APOLOGY FOR EXTRAORDINARY RENDITION AND TORTURE**

SUBMITTED TO:

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INTRODUCTION

“The wounds that were inflicted upon us cannot be undone. In my opinion, it is never too late to work to restore trust and faith.”

--Herman Shaw, survivor of Tuskegee Syphilis Study and recipient of a formal apology from the United States government, August 24, 1997

“[A]n apology for centuries of brutal dehumanization and injustices cannot erase the past, but confession of the wrongs committed can speed racial healing and reconciliation and help Americans confront the ghosts of their past.”

--H.Res. 194 (110th): Apologizing for the enslavement and racial segregation of African-Americans, 110th Congress, 2007–2009. July 29, 2008

“You wonder why we didn't do it 100 years ago. It is important to have a collective response to collective injustice.”

--Sen. Tom Harkin (D-Iowa), lead sponsor of Senate resolution apologizing for slavery, June 18, 2009.

“I tip my hat to North Carolina, finally they came to their senses and decided to do what's right.”

--Elaine Riddick, victim of forced sterilization, upon apology and reparations offered by the North Carolina government, July 26, 2013.

“This means the world to me.”

--Maher Arar, victim of extraordinary rendition and torture upon receiving official apology from Canadian government, January 26, 2007.

“The wrong has been done, sadly. What I can ask now is for some form of reparation so that I can have a fresh start and try to forget, even if it won't be easy I want an apology. It is only fair to say that someone who has done something wrong must apologize.”

--Abou Elkassim Britel, Victim of extraordinary rendition and torture, waiting to receive an official apology from the United States, Pakistan, Morocco, and Italy, September 15, 2013.

Following the September 11, 2001 attacks, the United States implemented a widespread and systematic program of extraordinary rendition, secret detention, and torture. The release of executive memoranda concerning this program, independent investigations by foreign governments and other international organizations, as well as the Senate Intelligence Committee's report on the use of torture – which as of the writing of this policy brief remains

confidential – all evidence the significant human rights violations that have taken place due to harmful and unlawful national security policies and practices of the United States. Despite the considerable documentation of U.S. involvement in human rights violations through its extraordinary rendition program, the United States has declined to accept any responsibility for its wrongdoings, has refused to acknowledge the harm and suffering caused by hundreds of individuals and their families, and has failed to issue any formal apology to the survivors of the program.

One such individual, Abou Elkassim Britel, an Italian citizen of Moroccan descent, was tortured and subjected to cruel, inhuman, and degrading treatment for nine years. In the period from March 2002 until April 2011, he was kidnapped, beaten, at times held in complete isolation, threatened, humiliated, degraded, and imprisoned in notorious torture prisons. Although he has been released from prison and has returned to his wife, Khadija Anna Lucia Pighizzini, in Bergamo, Italy, he continues to suffer greatly from the physical and psychological damage resulting from his ordeal.

Four governments are implicated in his torture: Pakistan, where he was first seized, accused of being a terrorist, and tortured; the United States, whose officials and agents tortured him and extraordinarily rendered him to Témara prison in Morocco; Morocco, where he was detained, tortured, and incarcerated; and Italy, whose officials were complicit with Pakistan and the United States and otherwise failed to assist and protect him. These governments violated international human rights treaties and norms, particularly the Convention Against Torture.

The years of torture have left no part of Britel's life untouched. In addition to the many medical problems that Britel experiences, the false and wrongful accusations lodged against him associating him with terrorism have left him and his family stigmatized and isolated from their community. As a consequence, Britel and his wife live their day-to-day

lives with little or no social support or social integration. Britel struggles on a daily basis to piece back together that which he used to call “life.”

This policy brief focuses on the wrongdoing and obligations of the United States, while recognizing that all four nations complicit in Britel’s extraordinary rendition and torture (the United States, Pakistan, Morocco, and Italy) have an obligation, both legal and moral, to acknowledge the torture and cruel, inhuman and degrading treatment of Britel. The need for such an acknowledgement is critical. The human rights violations Britel suffered in gross violation of the Convention Against Torture, as well as other international rights norms, have been compounded by the refusal of the governments complicit in his torture to recognize the harm he has suffered or redress the damage they have caused. For these violations, Britel is seeking an official apology as a means of reparation and redress.

This policy brief illustrates both the need for, and right to, an official apology for Abou Elkassim Britel. Section One sets forth the factual scenario and events concerning Britel’s extraordinary rendition and imprisonment. It describes the enumerable ways in which his human rights were violated during his arrest in Pakistan, his extraordinary rendition to Morocco, his prolonged imprisonment there without cause or due process, and the repeated acts of torture that took place throughout his ordeal. Section One also describes the countless difficulties and suffering that Britel has experienced following the events of his extraordinary rendition.

Section Two provides the legal history and background that precedes Britel’s request for an apology. Notwithstanding protracted legal efforts extending to the U.S. Supreme Court, Britel’s attempts to obtain a judgment of accountability for his torture were summarily dismissed. U.S. court opinions in matters pertaining to extraordinary rendition have created barriers to redress for survivors and deny the most foundational rights to accountability and redress for torture otherwise guaranteed under international law.

Section Three defines torture including descriptions of common methods of torture, summarizes the physical and psychological effects of torture and the obstacles to treatment and repair, and situates Britel's circumstances within realm of these explanations. It demonstrates the potential restorative effects that an official apology can provide by offering a measure of truth, thus helping to restore the dignity of the victim.

Section Four demonstrates the political feasibility of an official apology offered by the United States and its political subdivisions. It reviews the nature of a political apology sought by Britel and sets forth the necessary components to ensure that it is offered in a manner that is meaningful and possessed of moral and political significance. It demonstrates the political benefits of an apology, explains how apologies, when offered meaningfully, can assist the victim of human rights violations, and thus sets in relief the importance of doing so in Britel's case.

Section Five provides additional legal context for Britel's request for an official apology by demonstrating the use of acknowledgments of wrongdoing as a means to resolve legal disputes in domestic civil matters. It also historicizes the use of public apologies through previous examples of government statements of wrongdoings and explores lessons to be learned from such examples.

Section Six sets out the current legal framework that obliges governments to officially apologize in cases such as that of Abou Elkassim Britel. His kidnapping, torture, rendition, and imprisonment violated customary international human rights law, central provisions of the International Covenant on Civil and Political Rights, and the Convention Against Torture. The Draft Articles on the Responsibility of States for Internationally Wrongful Acts thus requires the four governments to undertake reparations including an apology. Under international law, the four governments implicated in these violations have an obligation to acknowledge their actions, to render an apology to Britel as remedy for the extensive physical

and psychological injuries they have caused, and to relieve the stigma that continues to thwart his efforts to regain his life.

Finally, Section Seven, with a particular focus on the United States, establishes that in order to maintain the values embedded in international human rights, and to assure that the principle of reciprocity upon which much of international law rests endures, U.S. officials must apologize to Britel as a means of taking responsibility for the human rights violations it has committed.

It is ultimately the goal of this policy brief to highlight the obligation of all citizens to hold state governments accountable for violations of human rights against individuals like Abou Elkassim Britel. While there will never be an adequate remedy for what Britel has suffered, it is essential that the four governments acknowledge their role in the violation of Britel's human rights and offer him the apology he seeks and deserves.

The authors of this policy brief acknowledge that there are hundreds of other individuals like Britel who suffered egregious violations as a result of the U.S. extraordinary rendition program. While the request for an acknowledgement and apology focuses on Britel's particular plight, the efforts to repair his harm must be understood in the context of a larger campaign for justice to achieve redress and social reconstruction for all those who have suffered torture and extraordinary rendition. Civil society concerned with human dignity and rights must advocate in a steadfast manner to seek broad and varied forms of relief, of which an acknowledgement and apology are but one measure. Without these efforts, accountability for torture may remain a political impossibility. Existing official reports on mistreatment of detainees, essential as they are, serve as an accompaniment to, and not a substitute for, the task of recognizing the violations committed against particular individuals and the necessity to try to make them whole again.

SECTION ONE
INTRODUCTION TO ABOU ELKASSIM BRITEL: VICTIM OF EXTRAORDINARY RENDITION AND TORTURE

I. Personal Background

Abou Elkassim Britel (Britel) was born in Casablanca, Morocco in 1967.¹ When he was twenty-two years old, he moved to Italy where he began to build a life for himself, finding work in a poultry shop.² Seven years later, in 1995, Britel married Anna Lucia Pighizzini, an Italian citizen.³ Soon after, he qualified as an electrician.⁴ In 1999, Britel became an Italian citizen.⁵

In 2000, Britel and his wife created a website called “Islamiqra.”⁶ They planned to translate important Islamic texts from Arabic into Italian.⁷ They hoped to obtain funding for this work from the embassies of Islamic countries in Italy.⁸ A professional translator advised them that they would be more likely to obtain necessary financial support for their business if they traveled to Islamic countries and communicated directly with potential sponsors; thus, they pursued funding following this advice.⁹

II. Capture and Detention in Pakistan

In June of 2001, Britel traveled from Italy to Iran, hoping to find funding and support for his translation business.¹⁰ He then continued on to Pakistan for the same reasons.¹¹ On March 10, 2002, Britel was traveling by taxi when he was stopped at a police roadblock in

¹ Declaration of Abou Elkassim Britel in support of the legal complaint filed on 30 May 2007 in *Binyam Mohamed et al v. Jeppesen Dataplan, Inc.*, No. C07-02798 JW (N.D. Cal. Civ. R.1-1 filed 30 May 2007) (hereinafter Decl. of Abou Elkassim Britel) at 1. (Attached)

² Decl. of Abou Elkassim Britel, ¶ 2.

³ Decl. of Abou Elkassim Britel, ¶ 1.

⁴ Decl. of Abou Elkassim Britel, ¶ 2.

⁵ Decl. of Abou Elkassim Britel, ¶ 1.

⁶ Decl. of Abou Elkassim Britel, ¶ 2.

⁷ Decl. of Abou Elkassim Britel, ¶ 2.

⁸ Decl. of Abou Elkassim Britel, ¶ 3.

⁹ Letter, Roberto Hamza Piccardo, <http://www.statewatch.org/cia/documents/de%20longhi/de%20longhi-nota-01.pdf>. (in Italian).

¹⁰ Decl. of Abou Elkassim Britel, ¶ 3.

¹¹ Decl. of Abou Elkassim Britel, ¶ 3.

Lahore.¹² The police accused Britel of traveling on a fake Italian passport and took him to the police station.¹³ Britel was arrested and detained on immigration charges.¹⁴ Britel's wife, Anna, had spoken to him on the phone earlier that day.¹⁵ However, she would not speak to him again until February 2003.¹⁶ The arrest would mark the beginning of a decade-long struggle of injustice involving physical and mental torture; extraordinary rendition; cruel, inhuman, and degrading treatment; a denial of due process; and lengthy imprisonment.

While detained in Pakistan, Britel faced a litany of horrors at the hands of the police and the Pakistani secret service. He was tortured physically; he was beaten with a cricket bat, suspended from the walls of his cell, and deprived of sleep for three days while tied to a gate.¹⁷ In addition to this brutal physical treatment, he suffered mental and emotional torture. His captors repeatedly threatened to rape the female members of his family. These threats caused him as much trauma as the beatings and threats to his own bodily integrity.¹⁸ He was humiliated and denied access to a toilet, and instead was given a bucket to use once every twenty-four hours.¹⁹ His captors accused him of being a terrorist.²⁰ These interrogations by the police and Pakistani secret service agents were so violent that, after one occasion, Britel required medical attention for a week.²¹ In addition to the horrific treatment, one police officer stole Britel's watch.²² When he complained, the other officers laughed.²³ This incident further exacerbated Britel's sense of powerlessness, loss of control, and injustice.

¹² Interview by Cageprisoners with Anna Lucia Pighizzini (Jan. 9, 2008) (hereinafter Cageprisoners), at <http://www.cageprisoners.com/our-work/interviews/item/158-interview-with-khadija-pighizzini>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Decl. of Abou Elkassim Britel, ¶ 5; Cageprisoners, *supra* note 12.

¹⁸ Decl. of Abou Elkassim Britel, ¶ 5.

¹⁹ Cageprisoners, *supra* note 12.

²⁰ Decl. of Abou Elkassim Britel, ¶ 4.

²¹ Decl. of Abou Elkassim Britel, ¶ 4.

²² Cageprisoners, *supra* note 12.

²³ *Id.*

In the hopes of obtaining consular and other assistance, and to let “the outside world” know of his capture, Britel frequently asserted his Italian citizenship. He specifically requested legal representation and help from the Italian Embassy. He wanted to prove the authenticity of his passport.²⁴ His captors, however, continually ignored or denied his requests.

In April 2002, after enduring brutality for weeks, Britel’s torturers wrested from him a false confession about matters of which he had no knowledge, one that he made hoping it would put an end to his detention, torture, and pain.²⁵ After his “confession,” he was brought before U.S. officials and interrogators, who fingerprinted and photographed him.²⁶ His U.S. interrogators told him that if he did not cooperate, the Pakistani interrogators would kill him.²⁷

On May 5, 2002, Britel was transferred from Lahore to the Pakistani intelligence headquarters in Islamabad.²⁸ He was then blindfolded, tied up, and transferred to a place where he was interrogated four times by U.S. intelligence agents.²⁹ The U.S. agents questioned him about Osama Bin Laden and offered him sums of money for information he did not have.³⁰ The head of the Pakistani secret service was also in attendance. Those present threatened to torture him.³¹ Despite his repeated requests, he was again denied the right to speak to someone from the Italian Embassy.³²

An individual, who identified himself as David Morgan and a U.S. official, presented himself to Britel and explained that he was charged with Britel’s interrogation. Britel again asked to speak to someone at the Italian Embassy, but he was refused access to consular

²⁴ *Id.*

²⁵ Decl. of Abou Elkassim Britel, ¶ 4.

²⁶ Decl. of Abou Elkassim Britel, ¶ 7.

²⁷ Decl. of Abou Elkassim Britel, ¶ 7.

²⁸ Decl. of Abou Elkassim Britel, ¶ 8.

²⁹ Cageprisoners, *supra* note 12.

³⁰ Decl. of Abou Elkassim Britel, ¶ 8.

³¹ Cageprisoners, *supra* note 12.

³² Decl. of Abou Elkassim Britel, ¶ 8.

services. U.S. officials told Britel that the Italian Ambassador did not want to meet with him because he was a “terrorist.”³³ Morgan then told him that someone from the Moroccan Embassy would visit with him, instead; however, this meeting also never occurred. Morgan also assured Britel that he would be released and returned to Italy, a promise that did not materialize until nine years later.

During Britel’s arrest and detention in Pakistan, neither his wife nor his family knew of his whereabouts or what had happened to him. On June 7, 2002, Britel’s brother received a phone call from someone who claimed to have known Britel in prison in Pakistan, and warning that Britel’s life was in danger.³⁴ However, by the time Britel’s family received this terrifying message, he had already been abducted by U.S. agents, extraordinarily rendered, and deposited at a notorious Moroccan prison to be tortured for information.

III. Extraordinarily Rendered and Tortured: Aero Flight to Morocco

Flight logs and other data show that on May 24, 2002, Britel was transported from Pakistan to Morocco on a plane operated by Aero Contractors, Inc. (Aero), which flew out of Johnston County, a relatively small county in North Carolina. Aero is based at the county airport in the small town of Smithfield. Aero has ties to the CIA; Aero’s planes have been directly linked to the abductions and torture perpetrated through the CIA’s extraordinary rendition program.³⁵ Because of the unconscionable and illegal purposes of the flights, local and global individual and groups concerned with torture have referred to the planes leaving the airport as “torture taxis.” Flight logs and other data show that Britel was transported from Pakistan to Morocco on one of these “torture taxis,” more specifically, a plane identified as N379P.³⁶

³³ Cageprisoners, *supra* note 12.

³⁴ *Id.*

³⁵ Joby Warrick, *Ten Years Later, CIA ‘Rendition’ Program Still Divides N.C. Town*, WASHINGTON POST: NATIONAL SECURITY, (Feb. 9, 2009) available at http://www.washingtonpost.com/world/national-security/ten-years-later-cia-rendition-program-still-divides-nc-town/2012/01/23/gIQAwrAU2Q_story.html.

³⁶ Decl. of Abou Elkassim Britel, ¶ 17.

Agents forcibly blindfolded, handcuffed, and drove Britel to the airport in Islamabad, where he was forced to board N379P and flown to Morocco.³⁷ He was severely traumatized by the act of the kidnapping, and further traumatized by the torture, cruel, inhuman, and degrading treatment he experienced during the flight. What followed when he arrived at the airport can be described as a textbook example of the inhumane treatment to which victims of extraordinary rendition were subjected.

Britel's kidnapers forced him into a bathroom, grabbing him around the neck so tightly he thought he would suffocate, and then sliced off his clothes.³⁸ They removed his blindfold, and it was then he saw four or five men around him.³⁹ All were dressed in black; only their eyes were left uncovered.⁴⁰ Britel later referred to these faceless men as his "American Captors."⁴¹ On the plane, he was forced to endure further degrading treatment: he was photographed and forced to wear a diaper. His captors blindfolded him again and placed him in shackles and a metallic slip to which his arms and feet were bound.⁴² During the nine-hour flight, Britel was not allowed to use the bathroom, and although he was in pain, he was not allowed to move or shift positions. His mouth was taped shut and he was beaten whenever he moved.⁴³

On May 25, 2002, at 7:03 a.m., N379P—now carrying Britel—landed in Rabat, Morocco.⁴⁴ It is from here that U.S. agents delivered Britel to Témara, a notorious Moroccan prison with a documented history of grave human rights abuses. Later that same day, N379P departed Rabat for Porto, Portugal, where it remained overnight, before being sighted in

³⁷ Decl. of Abou Elkassim Britel, ¶ 11.

³⁸ Decl. of Abou Elkassim Britel, ¶ 11.

³⁹ Decl. of Abou Elkassim Britel, ¶ 11.

⁴⁰ Decl. of Abou Elkassim Britel, ¶ 11.

⁴¹ Decl. of Abou Elkassim Britel, ¶ 18.

⁴² Decl. of Abou Elkassim Britel, ¶ 11.

⁴³ Decl. of Abou Elkassim Britel, ¶ 14.

⁴⁴ Decl. of Abou Elkassim Britel, ¶ 17.

Washington, D.C. on May 26, 2002, and then finally back to home base in Johnston County in the late afternoon.⁴⁵

IV. Detention and Torture in Morocco

Témara Prison is a notorious and once-secret prison in Morocco now known for torture and abuse.⁴⁶ Operated by the Direction de la Surveillance du Territoire (DST), the domestic Moroccan intelligence agency, the very fact of its secret operation is a violation of both international and Moroccan law.⁴⁷ Families are often unaware of their family member's location while detained in Témara. So it was with Britel's family. His wife and other family members were still unaware of his location during his initial detention, despite panicked and desperate efforts to locate him.

The brutal conditions and torturous practices associated with Témara were well known, and had to be known to United States officials. Human rights groups, including Amnesty International and the Moroccan Human Rights Organization, have documented the pattern and practice of violations that have occurred regularly at the prison.⁴⁸ A number of reports demonstrated that detainees at Témara who were held on suspicion of terrorism were mistreated and tortured during their detention there.⁴⁹ At the time, the U.S. government was also aware of reports of torture and harsh prison conditions.⁵⁰

⁴⁵ Rendition Circuit: 22-26 May 2002, Rendition of Abou Elkassim Britel, Pakistan to Morocco, THE RENDITION PROJECT, (May 24 2002).

⁴⁶ Kathryn Hawkins, *The Return of the Renditioned*, FOREIGN POLICY (Sept. 7, 2011), available at http://www.foreignpolicy.com/articles/2011/09/07/return_of_the_renditioned.

⁴⁷ *Id.*

⁴⁸ Statewatch Document 11, Torture in the "anti-terrorism" campaign- The Case of Témara Detention Centre," at 1, at <http://www.statewatch.org/cia/documents/de%20longhi/de%20longhi-11.pdf>.

⁴⁹ Morocco/Western Sahara Briefing to the Committee Against Torture, AI Index: MDE 29/011/2003, AMNESTY INTERNATIONAL, at 5 (Nov. 11 2003), <http://www.amnesty.org/en/library/asset/MDE29/011/2003/en/ce89b29c-d66e-11dd-ab95-a13b602c0642/mde290112003en.pdf>. MOROCCO: Human Rights at a Crossroads, HUMAN RIGHTS WATCH, Vol 16, No. 6(E) at 41 (Oct. 2004), <http://www.hrw.org/reports/2004/10/20/morocco-human-rights-crossroads>.

⁵⁰ Bureau of Democracy, Human Rights and Labor, *Morocco*, 2001 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES (2002).

Britel was held in Témara for eight and a half months in complete isolation, a practice that constituted a cruel form of punishment designed to cause trauma and suffering to the victim.⁵¹ As before, despite his requests, he was denied access to the Italian consulate.⁵² He was cut off from all those who loved him. His captors blindfolded, handcuffed, and severely beat him all over his body while interrogating him.⁵³ He was deprived of sleep and adequate food. Throughout his savage ordeal, his captors continuously threatened him with greater pain, including castration, sodomy with a bottle, and even death.⁵⁴ He was continuously threatened and pressured to act as an informant for Moroccan intelligence.⁵⁵ The Moroccan interrogators were very familiar with Britel's life in Italy, indicating the complicity of the Italian government in his continued torment.⁵⁶ These events would not have happened were it not for the fact that he was extraordinarily rendered for torture during interrogation by the United States and Aero Contractors.

In January 2003, almost a year after his disappearance, Britel's family learned that he might be in Morocco and began to mobilize on his behalf. On February 11, 2003, Britel was released from Témara and driven to his family's home in Kenitra, Morocco.⁵⁷ The Moroccan secret service had finally thought they had broken him enough to work as their collaborator.⁵⁸ Upon his release, his wife, Anna, flew to Morocco to be with him and help him to recover.⁵⁹ This was the first time that Britel had seen his wife in twenty months. Although he was out of prison, Britel's pain and suffering did not abate. He was physically ill and experienced

⁵¹ Decl. of Abou Elkassim Britel, ¶ 18.

⁵² Decl. of Abou Elkassim Britel, ¶ 18.

⁵³ Decl. of Abou Elkassim Britel, ¶ 19.

⁵⁴ Cageprisoners, *supra* note 12.

⁵⁵ Decl. of Abou Elkassim Britel, ¶19.

⁵⁶ Cageprisoners, *supra* note 12.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

dizziness and chronic diarrhea.⁶⁰ His left eye and ear were permanently damaged.⁶¹ Large patches of his skin had turned black and blue and were now without hair.⁶² Anna had originally planned on taking Britel back with her to Italy, but once she arrived in Morocco, she realized he was in no condition to travel.⁶³ He could not tell her exactly what he had gone through, but he could only walk a few feet, was always cold, and suffered myriad health problems.⁶⁴ Anna traveled to Morocco twice to see Britel during this time, taking unpaid leave from her employment.⁶⁵

Although he was finally out of prison and with his family and wife, Britel was not truly free to leave Morocco, nor was he free from official threats and harassment. Moroccan intelligence agents regularly contacted Britel at his family's home. At least once a week, an officer would come by to hound and pressure him to work as an informant upon his return to Italy.⁶⁶ Britel could not escape this ongoing intrusion into his life by Moroccan authorities. At that time, he was unable to return to Italy because, as noted above, his passport had been confiscated in Pakistan and was never returned.⁶⁷ Eventually, in May 2003, Britel received the necessary travel documents.

V. Britel's Re-arrest, Detention, and Continued Torture

On May 16, 2003, Britel started to make his way home to Italy by bus at 1:30 p.m. However, he was again arrested and detained, this time in Bab Melilla, where he was held for six hours without explanation.⁶⁸ Britel and his wife Anna had both petitioned the Italian Embassy for an escort to accompany them to the airport, to make sure they were able to

⁶⁰ Decl. of Abou Elkassim Britel, ¶ 19, Bureau of Democracy, Human Rights and Labor, *Morocco*, 2001 COUNTRY REPORT ON HUMAN RIGHTS at 21.

⁶¹ Decl. of Abou Elkassim Britel, ¶ 19, Bureau of Democracy, Human Rights and Labor, *Morocco*, 2001 COUNTRY REPORT ON HUMAN RIGHTS, at 1.

⁶² Decl. of Abou Elkassim Britel, ¶ 19.

⁶³ Cageprisoners, *supra* note 12.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Decl. of Abou Elkassim Britel, ¶ 22.

⁶⁷ Decl. of Abou Elkassim Britel, ¶ 23.

⁶⁸ Decl. of Abou Elkassim Britel, ¶ 25.

depart.⁶⁹ However, the embassy denied their requests.⁷⁰ Britel was eventually taken by car back to Témara, the same hellish prison he had been released from only months earlier.⁷¹ Britel's wife and family were once again kept unaware of his location, although given his past capture, detention, and torture, Anna suspected the DST was secretly holding him at Témara again.⁷²

Britel was accused of engaging in subversive activities. He was again threatened and tortured for the purposes of exacting a confession, a practice known to be commonplace in Témara. Britel could not withstand the torture and signed a "confession" that he was never permitted to read. He spent four more terrible months in Témara, once again in atrocious conditions.⁷³ His second secret detention at Témara was especially horrific, as his own family was often interrogated in rooms near his own.⁷⁴ He was always handcuffed, even during meals and in the toilet. He was denied the comfort of a copy of the Quran and not permitted to change his clothes.⁷⁵ On September 16, 2003, Britel was transferred from Témara to Salé prison (Zaki) in Morocco. In total, Britel was held for nearly five months from his second detention until his trial on October 3, 2003.⁷⁶

Britel was tried for "the establishment of an armed gang to prepare and commit terrorist acts in the framework of a joint project with the purpose of subverting the system and holding meetings without authorization and pursuit of activities in an unauthorized association." He was convicted based on the confession that he made while under extreme duress during the second period of unacknowledged detention at Témara.⁷⁷ He was denied

⁶⁹ Cageprisoners, *supra* note 12.

⁷⁰ *Id.*

⁷¹ Decl. of Abou Elkassim Britel, ¶ 26.

⁷² Cageprisoners, *supra* note 12.

⁷³ Decl. of Abou Elkassim Britel, ¶ 26.

⁷⁴ Cageprisoners, *supra* note 12.

⁷⁵ *Id.*

⁷⁶ Decl. of Abou Elkassim Britel, ¶ 26.

⁷⁷ See Kathryn Hawkins, *supra* note 46.

access to an attorney before his trial.⁷⁸ His trial was later decried as a farce; an observer from the Italian Embassy reported that it failed to comport with universally accepted fair trial standards and that the procedures followed were fundamentally flawed.⁷⁹ Britel was originally sentenced to fifteen years and then on appeal, the sentence was reduced to nine years.⁸⁰

VI. Britel's Imprisonment: Brutal Conditions

After Britel's conviction, he was sent back to Salé prison (Zaki). During the following nine years, he would be shuffled from prison to prison.⁸¹ In addition to Salé prison, he was also held in Ain Borja, Oukasha, and Kenitra Central prisons.⁸² Often times, after the authorities moved Britel to yet another prison, his family would be unaware that he had been transported somewhere new.⁸³ He was continually subject to indiscriminate violence and humiliation. On random but frequent occasions, guards entered his cell, tore up his bed, took his property, and taunted him by telling him that a member of his family had been mistreated. On occasion, he was stripped of his clothes and left naked.⁸⁴

Although these prisons were not secret detention centers like Témara, the conditions were still deplorable. And although Britel had already been convicted, he was still subject to torture and humiliation by the prison guards.⁸⁵ In his 2013 report on Moroccan Prisons, Juan E. Mendez, the Special Rapporteur on torture, and other cruel, inhuman or degrading

⁷⁸ Petition on behalf of Abou Elkassim Britel p. 6, ¶ 21, June 25, 2009, <https://www.aclu.org/files/pdfs/humanrights/nowakletter.pdf>.

⁷⁹ Decl. of Abou Elkassim Britel at 26.

⁸⁰ Decl. of Abou Elkassim Britel at 26.

⁸¹ Interview by the UNC School of Law Human Rights Policy Seminar with Abou Elkassim Britel and Anna Lucia Pighizzini, in Chapel Hill, NC (Apr. 16, 2014) (Hereinafter, Interview-Human Rights Policy Seminar).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Interview-Human Rights Policy Seminar, *supra* note 81.

⁸⁵ *Id.*

treatment or punishment, found that “that detainees [at Salé] convicted for terrorism-related offences continue to be subjected to torture and ill-treatment while serving their sentences.”⁸⁶

In October 2010, while being transferred to Kenitra from Oukacha prison, he was deprived of his possessions and brutally beaten.⁸⁷ His wife procured an attorney, Francesca Longhi, in Italy to help free her husband who came to Morocco on two occasions to see her client; however, Ms. Longhi was denied access to Britel.⁸⁸

Even though Britel’s spirit should have been completely broken after being wrongly accused, convicted, and tortured, he still demanded justice for himself and his fellow prisoners. In 2008, he, along with at least 300 prisoners in Moroccan prison, took part in hunger strikes to protest the atrocious prison conditions and the unjust trials.⁸⁹ Some inmates grew dangerously weak and had to be fed intravenously.⁹⁰ Many of them were men convicted of terrorist charges under dubious circumstances and based on forced confessions after torture. These hunger strikers demanded that they either be immediately released or offered new trials, arguing that their confessions were coerced and their trials unfair.⁹¹ “We had been parts of mass trials and got long sentences, even though there had been no evidence,” said one inmate, who spoke to a New York Times reporter by phone.⁹² Britel was also interviewed by the New York Times and confirmed his participation in the hunger strike to protest his conviction.⁹³

⁸⁶ Report of the Special Rapporteur on Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Mendez, Mission to Morocco: Advanced Unedited Version, A/HRC/22/53/Add.2, HUMAN RIGHTS COUNCIL at 7 par. 19 (Feb. 28, 2013) available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-53-Add-2_en.pdf.

⁸⁷ *Morocco: Italian "Extraordinary Rendition" Victim Tortured During Mass Prison Transfer*, Mar. 1, 2011 available at <http://en.alkarama.org/morocco/29-communication/621-morocco-italian-qextraordinary-renditionq-victim-tortured-during-mass-prison-transfer>.

⁸⁸ Interview- Human Rights Policy Seminar, *supra* note 81.

⁸⁹ Souad Mekhennet, *Hunger Strike by Hundreds of Islamists in Morocco Jails*, THE NYTIMES: AFRICA, (June 21, 2008) available at http://www.nytimes.com/2008/06/21/world/africa/21morocco.html?_r=0.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

Britel was not the only person who suffered through his imprisonment. Anna, his brave and faithful wife, endured much hardship and pain during this time. In addition to witnessing the consequences and marks of torture her husband bore, including his deteriorating condition, loss of weight, and deep marks on his wrists from handcuffs, she was without his company and love.⁹⁴ To support herself, she worked as a librarian, which allowed her to provide for him and to fund her travel to see him.⁹⁵ Arranging visits required special paperwork from the Moroccan authorities, a process she had to go through each time she wanted to visit her husband.⁹⁶ Guards degraded and harassed her when she would visit, subjecting her to body searches and destroying food and medicine she had brought for her husband.⁹⁷ Anna advocated for her husband as best she could, writing to the American Embassy of Morocco and to the Italian government, pleading for help, though none ever came. She also maintained a website, posting stories about Britel and urging people to take action on his behalf. She kept careful track of his hunger strike, fearing for his safety.⁹⁸ Anna's entire family was put under terrible strain during this time, as well. She experienced tense moments with her aging parents and siblings, especially when the papers reported that Britel was a terrorist.⁹⁹ Eventually, after witnessing her sacrifice and struggle, they began to see the truth and also wished for Britel's release.¹⁰⁰ Yet in this dark time, amazingly, Anna did not lose all hope. As she stated in an interview:

“These years have been so painful, but I know that the injustice that I’ve gone through will soon be over. I haven’t given way to hate; nor has Kassim. Instead, we’re waiting for his liberation. We want to live our lives, and to reclaim our rights to live in dignity as citizens and human beings. We look towards to the future; when truth will be heard, when our

⁹⁴ See Petition, *supra* note 78, p. 6, ¶ 22.

⁹⁵ Cageprisoners, *supra* note 12.

⁹⁶ Interview- Human Rights Policy Seminar, *supra* note 81.

⁹⁷ *Id.*

⁹⁸ Britel's wife had created a website where she posted reports and updates, seeking justice for her husband at www.giustiziaperkassim.net. Cageprisoners, *supra* note 12.

⁹⁹ Cageprisoners, *supra* note 12.

¹⁰⁰ *Id.*

*rights will be restored and when justice will finally be served.”*¹⁰¹

Britel was finally released from prison on April 14, 2011, after serving nearly a decade in prison for a crime he did not commit.¹⁰² An Italian investigation that focused on Britel was closed in September 2006, due to the complete lack of evidence of any wrongdoing on his part or any evidence of his association with terrorist activities or terrorists.¹⁰³ Although it is considered official government protocol for an official of the Italian government to interview an Italian citizen who suffered abroad, no Italian official or other representative of the government has ever inquired or sought information from Britel about his ordeal.¹⁰⁴

VII. International Response

Britel’s shockingly unjust experience did garner some international attention and efforts, though all fell woefully short of providing any sort of remedy or recompense for Britel. Reports expressed concern for Britel’s wrongful extraordinary rendition and torture and urged the Italian government to seek Britel’s release. These and other efforts are described below.

A. The EU Temporary Committee Report

On November 24, 2006, the EU Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners (The Committee) released its Draft Report. The report condemned the extraordinary rendition of Britel and criticized the Italian Ministry of Internal Affairs for having been in “constant cooperation” with foreign secret services concerning Britel’s case since his arrest in

¹⁰¹ Interview by the ACLU with Anna Lucia Pighizzini (Mar. 10, 2002) at 4.

¹⁰² Rendition Circuit *supra* note 45.

¹⁰³ Order of Dismissal, Dr. Francesca Morelli, Office of the Judge for Prelim. Investigations, Tribunal of Brescia, Sept. 29, 2006; *see also* Decl. of Abou Elkassim Britel, ¶ 27.

¹⁰⁴ Interview- Human Rights Policy Seminar, *supra* note 81.

Pakistan.¹⁰⁵ It also urged the Italian government to take steps to secure Britel's release.¹⁰⁶

Furthermore, the report expressed concern regarding Italy's involvement with extraordinary rendition, with the United State's foreign secret service operation, and the fact that rendition airplanes operated by the CIA made forty-six stopovers at Italian airports.¹⁰⁷

B. Efforts by the Italian Parliament

In January of 2007, 62 members of the Italian Parliament, 25 Italian senators and 12 members of the EU parliament petitioned the King of Morocco to have Britel "pardoned" and released from prison.¹⁰⁸ This effort, which was late in coming, was unsuccessful and Britel remained imprisoned for four more years. Although this initial advocacy was promising, the Italian government has not sought to provide Britel with any remedies or relief since.¹⁰⁹

C. The Second EU Temporary Committee Report

On February 7, 2007, the Committee released a second report featuring Britel. The report noted that Britel's lawyer, Francesca Longhi, had transmitted documents to the Committee "demonstrating that the Italian judicial authorities and the Italian Ministry for Home Affairs (the latter acting on behalf of the Direzione Centrale della Polizia di Prevenzione cited in connection with the investigation by the Divisione Investigazioni Generali ed Operazioni Speciali) cooperated constantly with foreign secret services and were well aware of all Britel's movements and whatever unlawful treatment he received, from the time of his initial arrest in Pakistan."¹¹⁰

D. Jeppesen Dataplan Lawsuit

¹⁰⁵ Rapporteur Giovanni Claudio Fava, Draft Report Nos. 52-54 (EU Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners) (Nov. 24, 2006).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at No. 56.

¹⁰⁸ Decl. of Abou Elkassim Britel, ¶ at 28.

¹⁰⁹ Interview by ACLU *supra* note 101.

¹¹⁰ Rapporteur Giovanni Claudio Fava, Working Document No 9, 5 (EU Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners) (Feb. 7, 2007).

In May of 2007, Britel brought suit, along with others who had been subjected to extraordinary rendition by the United States and its agents and contractors, in a case filed against Jeppesen Dataplan alleging Jeppesen's complicity in their rendition and torture.¹¹¹ Britel, along with the other plaintiffs, submitted a declaration of facts concerning his victimization and torture.¹¹² As explained below, the case was never heard in court after the U.S. Government intervened and asserted the "state secrets privilege."¹¹³

E. Italy Holds the CIA Responsible

On September 19, 2012, Italy's highest criminal court upheld the convictions of twenty-three American citizens for kidnapping a Muslim cleric and transferring him from Italy to a country where torture was permitted.¹¹⁴ Prosecutors had identified twenty-two of the individuals who were tried as CIA agents.¹¹⁵ All twenty-three were tried in absentia and are unlikely to serve any prison time, as the Italian government has not sought extradition of these individuals.¹¹⁶ On March 12, 2014, the court upheld convictions for two CIA agents and former Italy CIA Chief Jeff Castelli, for the same kidnapping and rendition.¹¹⁷ A lower court had found that those three individuals were entitled to diplomatic immunity; however, that decision was reversed on appeal.¹¹⁸ These rulings are the only successful prosecutions of the CIA's rendition program during the Bush administration, albeit outside of the United States judicial system.¹¹⁹ Although Italy's justice system has symbolically

¹¹¹ See *supra* Section Two.

¹¹² Decl. of Abou Elkassim Britel.

¹¹³ See *infra* Section Two.

¹¹⁴ Andrea Vogt, Italy Upholds Rendition Convictions for 23 Americans, THE GUARDIAN, Sept. 19, 2012, available at <http://www.theguardian.com/world/2012/sep/20/italy-rendition-convictions-americans/print>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Judith Sunderland, Dispatches: Italy Stands Alone on Justice for CIA Abuses, HUMAN RIGHTS WATCH DISPATCHES, March 12, 2014, available at <http://www.hrw.org/news/2014/03/12/dispatches-italy-stands-alone-justice-cia-abuses>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

condemned the CIA's wrongdoing, the suffering of many victims of this wrongdoing—Britel included – were not included in this matter and remain without remedy.

VIII. Britel's Current Circumstances: Enduring the Consequences of Torture

A. The Effects of Physical and Emotional Trauma

Since his release, Britel has returned to Italy and currently resides there with his wife, Anna. They live in the small town of Bergamo, where Britel continues to suffer. In addition to the ignominy of his detention, Britel faces serious health consequences from his extensive time in prison and as a result of the torture he endured. When Britel arrived home in Italy he faced a series of physical and mental health problems, and he still endures many of these conditions today.¹²⁰

Britel has reported loss in visual acuity and has trouble concentrating.¹²¹ He was treated for suspected heavy metal poisoning, the exposure dating back to his time as a prisoner in Pakistan from March to May 2002.¹²² He cannot remember to take regular medications and has difficulty remembering daily appointments.¹²³ He also reports weakened limbs, which cause him to drop objects throughout the day.¹²⁴ He suffers with sleep trouble and a lack of appetite, and also complains of fatigue, depression, and anxiety.¹²⁵ Britel has lost weight since his return to Italy after his release from prison.¹²⁶ He has persistent discomfort and itching on his head.¹²⁷ A medical evaluation reports that Britel's psychopathological condition is consistent with Post-Traumatic Stress Disorder.¹²⁸ Britel attended a few sessions of psychotherapy and was prescribed psychotropic drugs, but he soon

¹²⁰ Dr. Luisella Maria Vigna, Medical Report, The Department of Preventive Medicine at the Clinica del Lavoro L. Devoto, Milan (Jan 31, 2012). This document refers to Britel's December 19, 2011 visit. (Attached)

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Dr. Sarah Viola, Clinical Notes Relating to Abou Elkassim Britel, Bergamo (Oct. 10, 2011). (Attached)

¹²⁶ *Id.* at 2.

¹²⁷ Interview- Human Rights Policy Seminar, *supra* note 81.

¹²⁸ *Id.*

stopped these sessions.¹²⁹ Unfortunately, these sessions were in Milan, and the travel was exhausting and anxiety-ridden; Britel was unable to endure the trip and had to discontinue his treatment.¹³⁰

B. Stigma

Britel remains isolated from his community because of the trauma and torture he experienced and which prevents him from reintegrating into his community. It is difficult for him to assume the routines of daily life. Additionally, both Britel and Anna have suffered – and continue to suffer—social ostracism as a result of Britel’s ordeal. He is isolated and marginalized because of the stigma of having been associated with terrorism. Both Britel and Anna have lost friends and have lost the support of the Muslim community. The Italian press has done them harm as well. After his trial in Morocco, some Italian publications reported that he had been convicted for leading the bomb-plot in Casablanca, or even that he was one of the suicide bombers—charges that were completely false and had never even been lodged against him by Moroccan authorities.¹³¹ Although Italian publications have since run accurate versions of Britel’s story, people are still reluctant to associate with him. He has explained his circumstances stating, “People used to talk to me normally. . . now some of them won’t talk to me because they fear they may be accused of being terrorists.”¹³²

IX. Moving Forward

Britel and Anna would like to move on with their lives. In their words, however, the ordeal “has affected [their] dignity.”¹³³ In addition to his feelings of isolation, health problems, and crippling anxiety, Britel also cannot find employment. Although Britel and

¹²⁹ Medical Report 2, 3 *supra* note 120.

¹³⁰ Human Rights Policy Seminar, *supra* note 81.

¹³¹ Cageprisoners, *supra* note 12.

¹³² Interview by N.C. Stop Torture Now with Abou Elkassim Britel and Anna Lucia Pighizzini, Raleigh/Bergamo 00:10:43:28—00:10:57:04 (Sept. 15, 2013).

¹³³ Interview- Human Rights Policy Seminar, *supra* note 81.

Anna are still translating texts, they still need funds for proofreading and publishing. Britel would like to work again.¹³⁴

Beyond the inherent difficulties of rebuilding their lives after such extensive suffering and stigma, Anna and Britel do take some comfort, however, in the knowledge that individuals and groups have advocated on their behalf. “Despite the burden that I carry because of the wrong that was done to me,” Britel said in an interview with North Carolina based advocacy group N.C. Stop Torture Now, “it felt good to know that somebody was thinking of me... sharing this injustice with me from a different angle, so to speak.”¹³⁵

However, this advocacy is not enough if it does not result in real justice for Britel and Anna. In order to clear his name and obtain relief, Britel is seeking a well-deserved political or official apology from the governments responsible for his ordeal. In his own words: “The wrong has been done, sadly. What I can ask now is some form of reparation, so that I can have a fresh start and try to forget, even if it won’t be easy . . . I want an apology; it is only fair to say that someone who has done something wrong must apologize.”¹³⁶

¹³⁴ *Id.* at 00:10:43:28—00:10:57:04.

¹³⁵ *Id.* at 00:04:1900 – 00:04:02:18; 00:03:49:20—00:04:02:18

¹³⁶ *Id.* at 00:06:50:27 -- 00:07:17:27

SECTION TWO
THE EXTRAORDINARY RENDITION PROGRAM AND THE LACK OF LEGAL ACCOUNTABILITY
FOR HUMAN RIGHTS VIOLATIONS

I. The Extraordinary Rendition Program.

The abuse Abou Elkassim Britel was forced to endure was not a unique incident, nor was it an uncommon practice. Documents and reports demonstrate that at least since 2002, the United States has employed CIA operatives to engage in a pervasive system for abducting and extraordinarily rendering individuals.¹³⁷ “Extraordinary rendition” is not defined with complete specificity. For the purpose of this policy brief, the term is used to refer to the abduction of foreign nationals, without process, by American officials and their contractors. Those abducted are transferred either to foreign or CIA custody overseas, typically to be subject to extended interrogation and torture.

However inapposite to human rights concerns and principles, the executive branch, in absence of contradictory domestic authority,¹³⁸ has asserted broad powers to abduct, transfer, and detain individuals abroad. In 1993, President H.W. Bush reportedly authorized a series of specific procedures for renditions into the United States; the document, National Security Directive 77, remains classified.¹³⁹ Such “renditions to justice” were expressly authorized by President Clinton in 1995 upon issuing Presidential Decision Directive 39, which asserted that the “[r]eturn of suspects by force may be effected without the cooperation of [a] host

¹³⁷ NYU Law Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions,”* 8, 2004 (available at www.chrgj.org/docs/TortureByProxy.pdf).

¹³⁸ The American government has drawn from over a century of legal jurisprudence to justify the program. As early as 1886, the Supreme Court held that the forcible abduction of a criminal from Peru, without due process or the benefit of a formal extradition order, did not pose a bar to criminal prosecution in the United States. *See Ker v. Illinois*, 119 U.S. 436 (1886). The Court would later affirm this principle over a century later in *United States v. Alvarez-Machain*, in which it held that unilateral overseas abduction did not pose an obstacle to prosecution in the United States even when the abduction took place without benefit of the extradition treaty the United States shared with the defendant’s host country. *United States v. Alvarez-Machain*, 504 U.S. 655, 665 (1992). While relatively settled as a matter of domestic law, these holdings are strongly contradictory with basic human rights norms. See *infra* note [10].

¹³⁹ Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, 14, 2013 (available at <http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>).

government, consistent with” the principles outlined in National Security Directive 77.¹⁴⁰

Suspects were also rendered to foreign governments to stand prosecution around this time, reportedly with the express cooperation of Egypt.¹⁴¹ In total, as many as 80 renditions were undertaken prior to 9/11.¹⁴²

After 9/11, renditions were “vastly expanded in number and scope,” and were employed solely for the purpose of interrogation and torture rather than prosecution.¹⁴³ President George Bush reportedly authorized the CIA to conduct renditions without any prior approval from other branches of government, and to deliver suspects to the custody of foreign governments known to practice torture.¹⁴⁴ A *Washington Post* report from this time quoted a U.S. official purported to be directly involved in these renditions as stating, “We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.”¹⁴⁵

While no domestic legal authority expressly permits or justifies the use of extraordinary rendition and despite the fact that national and international scholars and institutions have declared it to be unlawful, the executive branch has asserted the authority to render individuals into U.S. custody without process.¹⁴⁶ In the Military Order of November

¹⁴⁰ Presidential Decision Directive 39 (PDD-39), U.S. Policy on Counterterrorism (June 21, 1995), available at <<http://www.fas.org/irp/offdocs/pdd39.htm>>.

¹⁴¹ Open Society Justice Initiative at 14.

¹⁴² “National Commission on Terrorist Attacks Upon the United States,” Statement by George Tenet, former Director of Central Intelligence, “Eighth Public Hearing,” March 24, 2004 (available at http://www.9-11commission.gov/archive/hearing8/9-11Commission_Hearing_2004-3-24.htm).

¹⁴³ Open Society Justice Initiative at 15.

¹⁴⁴ *Id.* at 15, citing Stephen Grey, *Ghost Plane* (2007) at 149, Douglas Jehl and David Johnston, “Rule Change Lets CIA Freely Send Suspects Abroad to Jails,” *The New York Times*, March 6, 2005.

¹⁴⁵ Open Society Justice Initiative at 15, citing Dana Priest and Barton Gellman, “U.S. Decries Abuse but Defends Interrogations; ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities,” *The Washington Post*, Dec. 26, 2002.

¹⁴⁶ Regardless of domestic authority, the extraordinary rendition program violates clear mandates of international law. *See, e.g.*, the Universal Declaration of Human Rights, Art. 5 (right to freedom from torture, and cruel, inhuman, or degrading torture or punishment); The International Covenant on Civil and Political Rights, Art. 7 (freedom from torture and inhuman, or degrading treatment or punishment); the Convention Against Torture, Art. 1 (defining “triggering act” as one “by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a subject,” including for the purpose of obtaining “information or confession”) and Art. 3 (obligation of non-refoulement to jurisdictions where the individual is likely to face torture). *See generally* University of North Carolina School of Law Immigration and Human Rights Policy

13, 2001, President Bush asserted the authority to “detain” at an “appropriate location” determined by the Secretary of Defense “any individual” whom the President determines is a member or has aided or abetted a member of al-Qaeda.¹⁴⁷

It is impossible to claim with certainty how many individuals have been extraordinarily rendered under the program. The Open Society Foundations has provided an overview of documented rendition activity, identifying 136 individuals subject to rendition, interrogation, and torture with the aid of 54 different countries.¹⁴⁸ Due to the clandestine nature of the program, the number is likely much higher, but no official records or numbers have been issued by the CIA.¹⁴⁹

In addition to direct government action through the CIA, private corporations and individuals in the United States have key connections to extraordinary rendition and torture. The Immigration and Human Rights Policy Clinic of the UNC School of Law has investigated the North Carolina connection to the extraordinary rendition program. Aero Contractors, Ltd., a North Carolina corporation operating in Johnston County, has served as an aviation contractor for the CIA and has participated in the rendition of at least five individuals.¹⁵⁰ Aero used planes, registered to dummy corporations that took off from either the Johnston County Airport in Smithfield, North Carolina, or the Global TransPark in

Clinic, *A Call to Uphold the Universal Principles of Responsibility and Protection of Human Rights*, available at <http://www.law.unc.edu/documents/clinicalprograms/ertorturencbriefweb.pdf>.

¹⁴⁷ Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

¹⁴⁸ Open Society Justice Initiative at 30-118.

¹⁴⁹ The Committee on International Human Rights of the Association of the Bar of the City of New York and The Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions,”* 2004, at 18, citing Dana Priest, *Torture: The Legal Road to Abu Ghraib and Beyond*, panel organized by the Center on Law and Security, NYU Law School (Sept. 23, 2004).

¹⁵⁰ Immigration and Human Rights Policy Clinic, UNC School of Law, *The North Carolina Connection to Extraordinary Rendition and Torture*, <http://www.law.unc.edu/documents/clinicalprograms/finalrenditionreportweb.pdf>, at 26.

Kinston, North Carolina.¹⁵¹ The hangar space used to house the Smithfield-based aircraft was and continues to be leased to Aero by Johnston County.¹⁵²

II. Opportunities and Obstacles to Redress.

At least seven survivors of the extraordinary rendition program have attempted resort to the United States judicial system to hold the United States and/or private entities and individuals accountable for their abuse. The courts, however, have largely thwarted any attempt to seek legal redress. Through a series of federal court opinions, substantial barriers have been erected which, for the time being, foreclose the possibility of successful litigation. These cases are reviewed here to establish that Britel has been denied traditional forms of legal recourse through the judicial system. Human rights obligations, to which the United States, as well as Pakistan, Morocco, and Italy are beholden, require some form of acknowledgement and repair. Absent judicial recourse, Britel is due an alternative form of redress, including, at minimum, an official public apology.

A. The Alien Tort Statute and *Bivens* Actions.

In *Arar v. Ashcroft*, Maher Arar, a Syrian-Canadian who was abducted from Kennedy Airport and rendered to Syria to face torture, sued U.S. government officials in order to seek redress for his injuries. Arar alleged that he was detained by U.S. officials and was then delivered, through the American immigration system, to Syrian custody.¹⁵³ Arar claimed that he was held at a Syrian military intelligence facility for a year, where he was kept in a cell six feet by three feet and seven feet high, beaten repeatedly with a two-inch thick electric cable, and forced to sign a confession that he received training as a terrorist in Afghanistan.¹⁵⁴

In his complaint, Arar alleged that officials of the U.S. government conspired with Syrian officials to effect his torture, a claim he brought under the Alien Tort Statute. To

¹⁵¹ *Id.* at 16, 20.

¹⁵² *Id.* at 17.

¹⁵³ *Arar v. Ashcroft*, 585 U.S. 559, 565 (2d. Cir. 2009).

¹⁵⁴ *Arar v. Ashcroft*, 585 U.S. at 566.

successfully bring a claim under that provision, a plaintiff must demonstrate that a defendant “acted under the color of foreign law, or under its authority.”¹⁵⁵

In evaluating this claim, the Second Circuit reasoned that the defendants, as officials of the U.S. federal government, were only liable if they possessed some power under *Syrian* law, and that they exercised such power in effecting his torture.¹⁵⁶ The court dismissed the claim because, in their view, Arar alleged that United States agents “encouraged and facilitated the exercise of power by Syrians in Syria, not that United States officials exercised power or authority under Syrian law.”¹⁵⁷ Alleging that defendants solicited torture to be conducted by others under the power of foreign law was found insufficient to state a claim under the Alien Tort Statute.

Arar’s second claim was a *Bivens* action alleging that individual agents of the federal government, through his detention, violated his Fifth Amendment rights. While the court noted that *Bivens* actions were designed to “deter individual federal officers from committing constitutional violations,” the Supreme Court has noted that the remedy is “an extraordinary thing that should rarely if ever be applied in ‘new contexts.’”¹⁵⁸ The court found that the “context” of this case was extraordinary rendition, a “distinct phenomenon in international law” in which no *Bivens* action had yet been applied.¹⁵⁹ Rendition, in the view of the court, involved too many delicate policy considerations to be an appropriate cause for *Bivens* actions. Allowing courts to adjudge *Bivens* actions in this context would “enmesh the courts ineluctably in an assessment of the validity and rationale of that policy.”¹⁶⁰

This case creates serious challenges to successfully seeking redress for the harm caused to extraordinary rendition survivors. By removing from liability under the Alien Tort

¹⁵⁵ *Arar v. Ashcroft* at 568, citing *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d. Cir. 1995).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Arar v. Ashcroft* at 571, citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 and 69 (2001).

¹⁵⁹ *Arar v. Ashcroft* at 572.

¹⁶⁰ *Arar v. Ashcroft* at 575.

Statute U.S. officials whose authority under foreign law cannot be established, a significant proportion of potential defendants have been immunized from suit. While plaintiffs may be free to sue their foreign torturers, it cannot be realistically expected that survivors of rendition have access to any information regarding those individuals. In many cases, if not most, foreign torturers will be shrouded in secrecy sufficient to immunize them from suit—especially considering the grave conditions under which rendition survivors are kept.

Perhaps more damaging is the court's ruling on *Bivens* actions. Rather than making it more difficult to assert facts sufficient to bring a claim, the Second Circuit has categorically removed all cases involving extraordinary rendition from consideration in bringing *Bivens* actions. Given concerns of qualified immunity, *Bivens* actions might have been the most effective method for holding U.S. officials accountable for extraordinary rendition. However, since the Supreme Court declined to review the case, the issue appears to have been effectively settled.¹⁶¹

B. The State Secrets Doctrine.

In 2006, Khaled El-Masri, a Lebanese-German, brought suit against a number of public officials and private entities for his rendition. In his complaint, he described his abduction in Macedonia by officials of that government and delivery to CIA operatives, who rendered him to Kabul, Afghanistan.¹⁶² While in Afghanistan, El-Masri reported being kept in a “small, confined, unsanitary cell,” repeatedly interrogated, and denied communication with anyone outside of the facility.¹⁶³ After several months, El-Masri was released in a remote area of Albania.¹⁶⁴ It has been widely reported that El-Masri was targeted due only to

¹⁶¹ *Arar v. Ashcroft*, 560 U.S. 978 (2010) (denying certiorari).

¹⁶² *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

a clerical error; his name is common among Egyptians, and, when written in Arabic script, is identical to that of Khalid El-Masri, a known terrorist.¹⁶⁵

Like Arar, El-Masri brought a claim under the Alien Tort Statute as well as *Bivens* actions against the U.S. government defendants. Shortly after the claims were filed, the United States intervened in the suit, asserting the state secrets privilege.¹⁶⁶ Under that doctrine, the district court dismissed the claim.

In its review, the Fourth Circuit held that “the United States may prevent disclosure of information in a judicial proceeding if there is a reasonable danger that such disclosure will expose military matters which, in the interest of national security, should not be divulged.”¹⁶⁷ In determining whether the information asserted was privileged, the court applied its own interpretation of the test articulated in *United States v. Reynolds*. In the court’s understanding of that case, an explanation by the head of the agency asserting the privilege will often suffice to establish the sensitivity of information.¹⁶⁸ When information is found protected under the doctrine, the privilege is absolute, and for no reason may the information be disclosed.¹⁶⁹ Under the Fourth Circuit’s interpretation of the law, if the “circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters,” the entire claim must be dismissed out of hand.¹⁷⁰

Notwithstanding the high level of attention the extraordinary rendition program has garnered in recent public discourse and despite El-Masri’s willingness to base his claim upon

¹⁶⁵ Matthias Gebauer and John Goetz, *The CIA’s El-Masri Abduction: Cables Show Germany Caved to Pressure from Washington*, Der Spiegel (Dec. 9, 2010, 7:40 PM), <http://www.spiegel.de/international/germany/the-cia-s-el-masri-abduction-cables-show-germany-caved-to-pressure-from-washington-a-733860.html>.

¹⁶⁶ 28 U.S.C.A. § 517 permits the federal government to appear in any state or district court to “attest to the interests of the United States.”

¹⁶⁷ *El-Masri v. United States* at 302, citing *United States v. Reynolds*, 354 U.S. 1, 10 (1953) (internal quotations omitted).

¹⁶⁸ *El-Masri v. United States* at 305.

¹⁶⁹ *Id.*

¹⁷⁰ *El-Masri v. United States* at 306.

only publicly available information, the court still refused to hear the claim. In its view, even if El-Masri could assert a *prima facie* case without disclosing privileged information, the defendants would be required to disclose privileged information to raise an effective defense. As such, the Fourth Circuit affirmed the district court's dismissal of the claim.

C. Britel's Attempt to Seek Judicial Recourse.

The obstacles presented by *El Masri* are compounded by the Ninth Circuit's decision in *Mohamed v. Jeppesen Dataplan*. In that case, five survivors of rendition, including Britel, brought suit against a private defense contractor that provided flight plans and logistical assistance in their renditions.

As in *El-Masri v. United States*, the CIA director intervened, filing a classified motion to dismiss—even though the suit was against a private corporation and one to which no official of the United States had been party. In its *de novo* review of the applicability of the evidentiary privilege, the court noted that *Reynolds* imposes no timing requirement for the government to move to dismiss—the government need not show that specific evidence is about to be produced, but may make a motion prospectively, “even at the pleading stage.”¹⁷¹

In making its independent determination that the information was privileged under *Reynolds*, the court found itself “precluded from explaining precisely which matters [alleged] the privilege covers,” as the motion filed by the CIA remained classified.¹⁷² It was confident, however, that “the secrets fall within one or more of the categories identified by the government.”¹⁷³ Because the contractor's involvement in the extraordinary rendition program “could not be isolated from aspects that are secret and protected,” it affirmed the dismissal of the claim.¹⁷⁴ The risk of disclosing state secrets was “both apparent and inevitable.”¹⁷⁵ The

¹⁷¹ *Id.* at 1080.

¹⁷² *Mohamed v. Jeppesen Dataplan* at 1086.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1087.

¹⁷⁵ *Id.* at 1089.

court further held that although multiple public accounts of rendition were available, and the existence of the extraordinary rendition program *itself* was not a state secret, the defendant would be unable to raise a successful defense without divulging protected information even if the plaintiffs could assert a *prima facie* case based on public accounts.¹⁷⁶

III. The current state of litigation and apology as an alternative.

The combined effect of *Arar*, *El-Masri*, and *Jeppesen* is to foreclose any attempt to seek redress in American courts for harms suffered by victims of extraordinary rendition. International and domestic legal norms, as well as sharp policy criticism, demand that these opinions cannot simply end the discussion or advocacy on survivors' rights, nor can it mean that victims are not entitled to some form of reparations and restoration under international human rights treaties.

A. Legal Invalidity of the State Secrets Doctrine.

In terms of domestic law, the contemporary state secrets doctrine commits a basic legal error: in essence, it “equates the very subject matter [with the] central facts of a lawsuit.”¹⁷⁷ In *Jeppesen Dataplan*, Circuit Judge Michael Daly Hawkins penned a scathing dissent pointing out this legal error in the majority's *Reynolds* analysis. The dissent garnered four votes, comprising five of the eleven judges voting on the case. In the dissent, Judge Hawkins explains that using *Reynolds* to dismiss a claim at the pleading stage is far beyond the scope of the doctrine. At most, a defendant may use the privilege at the pleading stage to *refuse to answer* certain allegations, but, this “does not mean the privilege can be used to *remove altogether* certain subject matters from a lawsuit.”¹⁷⁸ To do otherwise would

¹⁷⁶ *Id.* at 1090.

¹⁷⁷ The University of North Carolina Immigration and Human Rights Policy Clinic, *Obligations and Obstacles: Holding North Carolina Accountable for Extraordinary Rendition and Torture* 130 (2012-2013), available at <http://www.law.unc.edu/documents/clinicalprograms/obligationsandobstaclesreport.pdf>, citing Steve C. Posner, Commentary, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007): *The State Secrets Doctrine and Extraordinary Rendition* (2008).

¹⁷⁸ *Jeppesen* at 1098, Hawkins, Circuit Judge, dissenting (emphasis added).

“ignor[e] well-established rules of civil procedure” that forbid the evaluation of “*hypothetical* claims of privilege that the government has yet to raise.”¹⁷⁹ The government’s claims of privilege are merely hypothetical because the government does not invoke the privilege in response to any specific discovery request. Absent such a request, the government may not merely present confidential evidence to the court and explain that there is a risk that the plaintiff *may* seek to disclose it. *Reynolds* was premised and decided upon the issue of “challenged evidence,” not potential evidence that is merely topically relevant.¹⁸⁰ Under this view, Britel should have been free to base his claim upon the ample public record of his rendition.

In addition to its questionable legal veracity, critics have taken aim at modern state secrets doctrine in terms of its policy and legal effect. Professor Steven Schwinn notes that *El-Masri* extends the doctrine to a “dangerous” extreme that “trumps any consideration of a plaintiff’s interest or need for evidence” and “crowds out any meaningful role for the courts.”¹⁸¹ Professor Laura Donahue writes of the “long shadow” cast by the doctrine, which opens up the possibility that “the privilege is not used to protect national security interests, but to hide officials’ bad behavior.”¹⁸² This sentiment is echoed by concerns that the doctrine poses a troubling challenge to the separation of powers principles upon which the Constitution is based.¹⁸³ Political commentator Walt Thiessen speaks more plainly, likening the doctrine to modern McCarthyism.¹⁸⁴

¹⁷⁹ *Id.* at 1099 (emphasis added.)

¹⁸⁰ *Id.* at 1100, citing *Reynolds* at 8-9.

¹⁸¹ Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 *Pace L. Rev.* 778, 810 (2010).

¹⁸² Laura K. Donahue, *The Shadow of State Secrets*, 159 *U. Pa. L. Rev.* 77, 214 (2010).

¹⁸³ The University of North Carolina Immigration and Human Rights Policy Clinic, *Obligations and Obstacles: Holding North Carolina Accountable for Extraordinary Rendition and Torture* 151 (2012-2013), available at <http://www.law.unc.edu/documents/clinicalprograms/obligationsandobstaclesreport.pdf>, citing Dick Marty, Switz. Alliance of Democrats & Liberals for Europe, Council of Europe, *Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judiciary Scrutiny of Human Rights Violations* 7 (2011) (“The principles of separation of power and “checks and balances” must not only be quoted in nice speeches, they must above all be implemented!”)

¹⁸⁴ Walt Thiessen, *Origins of the State Secret Privilege*, *The Nolan Chart* (Oct. 12, 2007), <http://www.nolanchart.com/article299-origins-of-the-state-secrets-privilege.html>.

These criticisms have not gone unnoticed. In 2012 and again in 2013, Congressman Jerrold Nadler introduced to the House the State Secrets Protection Act, designed to implement “safe, fair, and responsible procedures for resolving claims of state secret privilege.”¹⁸⁵ Under the bill, evidence must be reviewed in camera,¹⁸⁶ courts may order the government to provide an adequate substitute for information found to be covered by the privilege,¹⁸⁷ and—perhaps most importantly—courts are forbidden to resolve an issue or claim based on the privilege until adverse parties have “a full opportunity to complete nonprivileged discovery” and to “litigate the issue or claim without regard to that privileged information.”¹⁸⁸ The bill is still pending.

Notwithstanding the wrongheaded interpretation of the doctrine courts have recently espoused, because the Supreme Court has denied certiorari in *El-Masri* and *Jeppesen Dataplan*, those cases continue to govern. These applications of the *Reynolds* state secrets doctrine raise a troubling obstacle to any future survivor of rendition in bringing a claim against his captors. Plaintiffs may only bring claims against those who were actually involved in their renditions, but any such individuals are necessarily tied to the CIA in ways that the government will assert are protected by the privilege. This is true of government agencies generally, government officials, and private contractors. Courts are apparently unwilling to divulge upon what evidence they make determinations that information is privileged or secret, and in no case could be permitted to cast judgment on the necessity or wisdom of keeping certain information classified. Thus claims involving the rendition program harm may be categorically precluded by the executive branch until that branch, in its discretion, deems the secret no longer worthy of defense.

B. International legal norms and non-judicial relief.

¹⁸⁵ H. R. 3332, 113th Cong. (2013).

¹⁸⁶ H. R. 3332, 113th Cong. § 3(b) (2013).

¹⁸⁷ H. R. 3332, 113th Cong. § 3(e) (2013).

¹⁸⁸ H. R. 3332, 113th Cong. § 7(c) (2013).

The combined effect of *Arar v. Ashcroft*, *El-Masri v. United States*, and *Mohamed v. Jeppesen Dataplan* has removed from consideration any possible claim a survivor of extraordinary rendition can make to seek restitution. The state secrets doctrine precludes survivors' claims from judicial review wholesale. Even if the evidentiary privilege can be avoided, *Arar's* effect on *Bivens* actions and claims under the Alien Tort Statute severely limit an alien survivor's range of options.

These opinions pose obstacles so severe they must be considered a total denial of judicial redress. The denial of so basic a right is in direct conflict with international legal norms to which the United States is beholden.¹⁸⁹ Until these misguided applications of the law are corrected, the United States must, in absence of judicial relief, offer to Britel some other form of legal remedy—including, at minimum, an apology.

In deciding *Mohamed v. Jeppesen Dataplan*, the Ninth Circuit specifically noted that its holding was “not intended to foreclose—or to pre-judge—possible *nonjudicial* relief, should it be warranted for any of the plaintiffs.”¹⁹⁰ While noting that there are multiple forms of possible legislative relief, including independent investigation into rendition activities, private bills, and amended causes of action, the court also noted that “the government, having access to the secret information, can determine whether [a plaintiff's] claims have merit” and “remedy such alleged harms while maintaining the secrecy national security demands.”¹⁹¹ On this point, the court cited favorably the recent example of the government making reparations to Japanese Latin American survivors of U.S. internment during World War II. This

¹⁸⁹ Articles 14 and 16 of the Convention Against Torture (CAT), signed and ratified by the United States, require that governments ensure that a survivor of torture or cruel, inhuman, or degrading treatment or punishment “obtains redress and has an enforceable right to fair and adequate compensation, including means for as full a rehabilitation as possible.” Convention Against Torture, Arts. 14, 16. See discussion in Section Six, *infra*.

¹⁹⁰ *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070, 1091 (9th Cir. 2010).

¹⁹¹ *Id.*

executive-level, discretionary relief must certainly also include the ability to offer an apology.

International law contemplates the use of apology as an adequate—and perhaps the most effective—remedy for survivors of torture.¹⁹² If Britel is denied redress through the courts, he must be made whole by a full, formal, and genuine admission of wrongdoing from the United States.

¹⁹² See Section Six, *infra*.

SECTION THREE
TORTURE, CONSEQUENCES, AND AN APOLOGY FOR ABOU ELKASSIM BRITEL

I. A General Understanding of Torture

Abou Elkassim Britel has suffered extreme physical and psychological torture. He seeks an apology as a means of obtaining healing and relief. For nine years, he was detained and incarcerated as a result of the actions by Pakistan, United States officials and Aero Contractors, Morocco, and Italy. In order to fully appreciate his desire for and right to an apology, it is important to consider the full import of torture, including definitions, methods, purposes and consequences. A general understanding of torture when applied to the facts of the case of Britel puts in sharp relief his suffering and the need to take any and all steps to ameliorate his harm and acknowledge the wrongdoings by government actors.

A. Definition of Torture

“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, punishing him for an act he or a third person has committed or is suspected of having committed.”¹⁹³ This definition, established by the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), is the most widely acknowledged definition of torture. The treaty definition makes evident that torture is the intentional infliction of severe mental or physical pain, authorized by higher state authorities for some specific purpose.¹⁹⁴ In addition to the prohibition on torture, CAT also defines and prohibits lesser actions that do not rise to the level of torture. Article 16 prohibits “other acts of cruel, inhuman or degrading treatment or punishment which do not arise to torture as defined in [A]rticle 1.”¹⁹⁵ Article 16 “is in the

¹⁹³ International Rehabilitation Council for Torture Victims, *Defining Torture*, What is Torture?, <http://www.irct.org/what-is-torture/defining-torture.aspx>.

¹⁹⁴ *Id.*

¹⁹⁵ Convention Against Torture, Part I, Article 16, <http://www.un.org/documents/ga/res/39/a39r046.htm>.

nature of a catch-all provision,” and serves to forbid any lesser, though still revolting treatment.¹⁹⁶

B. Purpose of Torture

Torture is often used to obtain information or confessions, obtain revenge against persons, create fear in the public sphere, or maintain social control.¹⁹⁷ On a deeper level, however, torture aims to terrorize the individual to the point of submission, thereby destroying self-worth.¹⁹⁸ It produces forced compliance with the torturer through fear, and seeks to cripple the mind, destroy the identity of the victim, and achieve the complete destruction of the victim’s self-will.¹⁹⁹ Torture works to attack an individual’s personality by inflicting terror and producing desperation, humiliation, and powerlessness. Torture destroys the victim’s ability to resist his or her torturer and leaves him or her with no remnants of free will.

C. Common Torture Methods

1. Physical torture

The most common form of physical torture is beating or blunt trauma.²⁰⁰ This includes slapping, kicking, whipping, or punching.²⁰¹ Oftentimes, torturers beat victims with

¹⁹⁶ M. Cherif Bassiouni, 37 Case W. Res. J. Int’l L. 389, 394.

¹⁹⁷ Physicians for Human Rights, *Purpose of Torture*, available at <http://phrtoolkits.org/toolkits/istanbul-protocol-model-medical-curriculum/module-1-international-legal-standards-overview/torture/purpose-of-torture/>.

¹⁹⁸ Shaun R. Whittaker, *Counseling Torture Victims*, *The Counseling Psychologist* (Apr. 01, 1988), available at <http://tcp.sagepub.com/content/16/2/272>.

¹⁹⁹ Dr. Federico Allodi, a psychiatrist at the Canadian Center for Investigation and Prevention of Torture (CIPT) contends that the aim of torture is to destroy self-worth of the victim, coercing them to submit to the torturers. *Id.* at 273.

²⁰⁰ Physicians for Human Rights, *Torture Methods and their Medical Consequences* [hereinafter *Torture Methods and their Medical Consequences*], available at <http://phrtoolkits.org/toolkits/istanbul-protocol-model-medical-curriculum/module-1-international-legal-standards-overview/torture/purpose-of-torture/>.

²⁰¹ Istanbul Protocol, *Manual on the Effective Investigation and Documentation of Torture*, Office of the United Nations High Commissioner for Human Rights Geneva, available at <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>.

wires or truncheons all over the body and head.²⁰² Torturers aim to produce maximum pain to prisoners often with minimal physical evidence resulting.²⁰³

Rule 33 of the UN Standard Minimal Rules for the Treatment of Prisoners explicitly proscribes the use of shackles or leg irons; however, these mechanisms are also frequently used to restrain victims, particularly for positional torture.²⁰⁴ Positional torture involves contorting the body into unnatural and forced positions for prolonged periods of time, often resulting in painful, and sometimes permanent, injuries to joints, tendons, ligaments, and nerves.²⁰⁵

Another common form of physical torture is suspension, which is executed by binding the hands and feet in various positions while the victim hangs for prolonged periods of time.²⁰⁶ Burning is also commonly implemented, as are various methods of asphyxiation.^{207 208} An alternative method involves tying a plastic bag filled with water, often contaminated with sewage water or chemicals, over the victim's head.²⁰⁹

Sexual assault is a severe form of physical torture with debilitating psychological effects. It is used as a means to humiliate and demean the victim.²¹⁰ Nudity enhances an individual's vulnerability and psychological shock as the victim feels helpless to protect himself from the constant threat of rape, sodomy, or abuse.²¹¹ Sexual torture and assault involves groping, mocking, sexual threats, or rape.²¹² For women, sexual threats also include the potential for becoming pregnant; men are at risk of becoming sterile or impotent.²¹³ For

²⁰² *Id.* at 29.

²⁰³ *Id.* at 31.

²⁰⁴ See *Torture Methods and their Medical Consequences*, *supra* note 200.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

all torture victims, there is always the threat of contracting human immunodeficiency virus (HIV) or other sexually transmitted infections.²¹⁴ Prisoners are often placed naked in cells with family members, friends, or strangers, and may be forced to sexually abuse each other.²¹⁵

2. Psychological torture

Psychological torture often leaves enduring effects on victims; in fact, the mental trauma may be more serious and last longer than the physical scars and injuries that result from physical torture. A commonly used psychological torture technique is solitary confinement. It isolates an individual, denying her any kind of social contact for extended periods at a time. While this method deprives the victim of any stimuli, torturers also often use sensory bombardment to overly expose the victim to certain stimuli, such as bright lights or extremely loud music for prolonged periods of time.²¹⁶

Psychological torture also takes the form of the insinuation of ongoing harm and promises to visit increasing pain on the victim or the victim's family. Torturers rely on chaos and random timing of interrogations and beatings in order to create a constant state of heightened anxiety and fear. Other commonly used forms of psychological torture include mock execution and amputations, and witnessing the torture of other prisoners.²¹⁷

D. Physical and Psychological Effects of Torture.

1. Physical Health Consequences

The physical effects of torture are usually extreme and long-lasting, if not permanent, and include joint pain, internal organ damage including but not limited to the effects of

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Adam Carinci, Pankaj Mehta, Paul Christo, *Chronic Pain in Torture Victims*, Current Pain and Headache Reports (Apr 2010), available at <http://link.springer.com/article/10.1007%2Fs11916-010-0101-2>.

sodomization, as well as other physical deformities.²¹⁸ The unnatural strain that results from sustained suspension can cause dislocation of muscles and ligaments, other muscular disorders, severe pain that does not lessen, and weakness of the limbs.²¹⁹ Victims often suffer from deep muscle bruising and internal bleeding from beatings.²²⁰ Victims often suffer from hearing loss as a result of beatings resulting in the rupture of the eardrum and ear trauma.²²¹ Eye trauma also commonly occurs from beatings.²²² The common use of leg irons, shackles, and handcuffs produces scarring and severe skin abrasions.²²³

Torture victims often suffer from impaired immune systems and a higher incidence of cancer, and show higher rates of head injury, which can lead to neurological symptoms and dysfunction.²²⁴ The frequent use of contaminated water during asphyxiation also significantly increases the probability of sickness and permanent ill effects on the torture victim.²²⁵ Other physical symptoms include headaches, dizziness, faintness, weakness, chest pain, tachycardia, trembling, soft tissue damage, and stomach and digestive problems.²²⁶ Additionally, physical impairments caused by torture such as amputations, deafness from the blasting of loud music, blindness, poorly healed fractures, infectious diseases, and malignancies, become a permanent tangible reminder of the fear and torture.²²⁷

²¹⁸ Manny Fernandez and Eric Schmitt, *No Ceremony for Bowe Bergdahl Upon Return to U.S. Soil* N.Y. Times, June 14, 2014 at A14 (quoting Dr. Jeffrey L. Moore, the clinical neuropsychologist, executive director of the Robert E. Mitchell Center for Prisoner of War Studies, noting that “[r]eturned prisoners of war can face a variety of long-lasting physical and mental challenges” including the consequences of injuries and illnesses such as “malnutrition and weight loss from having been starved, post-traumatic stress disorder, cognitive problems and early dementia brought on by torture”). Sanjay Gupta, *Torture Injuries*, CNNhealth.com (June 19, 2009) <http://www.cnn.com/2009/HEALTH/05/22/torture.health.effects/index.html?iref=24hours#cnnSTCVideo>.

²¹⁹ *Id.*

²²⁰ See *Torture Methods and their Medical Consequences*, *supra* note 200.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Christian Peacemaker Teams, cpt.org, <http://www.cpt.org/files/PP%20-%20Surviving%20Torture.pdf>.

The additional chronic stress suffered by torture victims on a daily basis can lead to hormonal dysfunction with deleterious health effects that endure, often permanently.²²⁸ Victims suffer stress-related arterial clogs, restricted blood flow, and other damage to the health of the heart.²²⁹ Victims of torture who suffer chronic stress are at risk of damaged brain cells, memory loss, damage to the hippocampus and thus to learning and memory, as well as other decreased enzyme activities with poor health outcomes.²³⁰

2. Psychological Ailments

Victims of torture suffer psychological symptoms that can often be worse, and last longer, than the physical symptoms. Experts observe that psychological damage can be “worse in the sense that [that] person can never recover from [torture], and may in the end, be in such despair and pain that they take their own lives, especially if they don’t have treatment or support around them.”²³¹ Studies show that the harm from torture techniques that did not involve physical pain was just as distressing, or more so, than from those that directly inflicted pain.²³² Further studies reveal that when abusive interrogation techniques are grouped together or inflicted sequentially, a victim will suffer mental disorders.²³³ When these abusive techniques are combined together, their effects compound and heighten the

²²⁸ *Stress: Portrait of a Killer*. Dir. John Hemingway. National Geographic, 2008.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Dr. Ellen Gerrity attests to the fact that the psychological effects from torture can often be worse than the physical effects. Elizabeth Landau, *Torture’s psychological impact ‘often worse’ than physical*, CNNhealth.com (May 22, 2009),

<http://www.cnn.com/2009/HEALTH/05/22/torture.health.effects/index.html?iref=24hours#cnnSTCText>.

²³² Metin Basoglu, a psychiatrist at King’s College London, used statistical techniques to single out the mental impacts of “cruel, inhuman, and degrading treatments” that ranged from threats and isolation to electric shocks and beatings on the feet. His work suggests that there are no distinctions between the harshness of physical torture versus psychological torture, and that the latter can often be more detrimental. His latest study looks for links between an individual’s perception of the severity of an experience and the likelihood of later developing post-traumatic stress disorder, the most common disorder associated with torture. Devin Powell, *The Lingering Effects of Torture*, ABC News (July 03, 2009), http://humanrights.ucdavis.edu/in_the_news/the-lingering-effects-of-torture.

²³³ *Id.*

likelihood that the victim will develop post-traumatic stress disorder (PTSD). Oftentimes, the threat and anticipation of pain is more terrorizing than the pain itself.²³⁴

Compared to someone who has not experienced such trauma, studies demonstrate distinct differences in the area of the brain of torture victims with PTSD, including brain functions that control attention and hypersensitivity to potential threats.²³⁵ Torture endures as significant and debilitating trauma because the victim has been stripped of his sense of control.

Victims forced to endure isolation are often deeply traumatized and often lose the ability to think logically and coherently.²³⁶ Studies show that even short-term solitary confinement can produce impairments.²³⁷ Prolonged and extreme isolation often has substantial psychopathological effects such as perceptual changes (hallucinations, general hyper-responsivity to external stimuli), anxiety, cognitive impairment (difficulties in thinking, concentration, memory), and impulse control problems.²³⁸ Consequently, the person in confinement becomes angry, confused, anxious, and depressed, resulting in hallucinations, paranoia, and even suicidal tendencies.²³⁹ Due to the profound ramifications of solitary confinement on torture victims, the UN Committee against Torture has concluded that sustained isolation is cruel, inhuman, or degrading treatment.²⁴⁰

Torture victims experience other psychological ailments including depression, flashbacks, sleep disorders, societal withdrawal, sexual dysfunction, and general confusion.²⁴¹ Victims suffer from severe anxiety, somatic symptoms of phobias,

²³⁴ *Id.*

²³⁵ Psychologist Claudia Catani examined the brains of torture survivors at the rehabilitation centers of the University of Konstanz in Germany. She used a technique that detects magnetic fields created by electrical activity in the brain and observed the brain activities of non-traumatized people to those who had experienced torture and people who had subsequently developed PTSD. *Id.*

²³⁶ Whittaker, *supra* note 198 at 273.

²³⁷ See *Torture Methods and their Medical Consequences*, *supra* note 200.

²³⁸ Whittaker, *supra* note 198 at 273.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Gupta, *supra* note 218.

suspiciousness, and fearfulness.²⁴² They tire quickly and easily, are unable to focus, and constantly think of their torture experiences.²⁴³ Suicidal tendencies are also more common with torture victims, especially those who experienced sexual torture methods.²⁴⁴

The threat of rape, sexual assault, and inappropriate groping lead to psychological insults, which are often the most injurious harm inflicted.²⁴⁵ The additional threat and risk of contracting HIV or other sexually transmitted infections from sexual torture can cause ostracism from the community and no future likelihood of marriage or having children.²⁴⁶ Sexual torture shatters cultural taboos, especially when sexual abuse and nudity is enforced among family members, friends, and strangers. It is thus emotionally taxing and demeaning to the victim. Moreover, as a general matter, victims of sexual torture do not wish to share an account of the experiences, thereby impeding their ability to recover and heal.²⁴⁷

As a result of the stress and anxiety, victims are more prone to various infections.²⁴⁸ Victims also suffer social stigma, which then creates even greater psychological dysfunction and impairs their ability to move beyond the torture experience.²⁴⁹

3. Impact on Victim's Life and Ability to Function

The comorbid presence of somatic, psychiatric, and social problems is common in torture victims and creates a major barrier in managing the chronic pain that ensues.²⁵⁰ This devastating triad leads to serious deterioration in all aspects of the victim's life. Fear and confusion is often the source of chronic pain associated with torture. Victims are unable to engage in social activities and are in a state of constant distress.²⁵¹ Persistent physical pain

²⁴² Whittaker, *supra* note 198 at 273

²⁴³ *Id.*

²⁴⁴ *Chronic Pain in Torture Victims*, *supra* note 217 at 75.

²⁴⁵ *See Torture Methods and their Medical Consequences*, *supra* note 200.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Chronic Pain in Torture Victims*, *supra* note 217.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

and psychological problems affect not only the victim's social life but further impair their ability to engage in productive work and maintain themselves financially.²⁵² The damaged sense of self resulting from torture impacts a victim's ability with regard to career, marriage, and children, and may result in a shortened life span.²⁵³

Torture victims have difficulty regaining a sense of trust in the world and their environment.²⁵⁴ They may even lose trust in themselves, particularly if they were forced to participate in humiliating actions that were designed to strip them of their humanity and dignity. This deep social mistrust can carry over to the next generation as children witness their parents' suffering and sense of shame.²⁵⁵ A torture victim may find it difficult to trust anyone, and may demonstrate outbreaks of anger and violence directed towards family members.²⁵⁶ They may lack the ability to trust those who assist their recovery, including healthcare workers and others who wish to provide aid and comfort. Disclosure of torture occurs only in a minority of cases.²⁵⁷ Guilt and shame from humiliation, including the victim's inability to withstand the torture, accompanied by the guilt from surviving, may also discourage disclosure of a victim's account of torture.²⁵⁸

E. Additional Challenges and Obstacles to Treatment

1. Disclosure, Acceptance, and Community Support

While the effects of torture may be well known, the methods and benefit of treatment regarding these consequences has not been well-established due to the lack of disclosure by victims in their accounts of torture. It is often difficult for torture victims to talk about their experiences; thus, they cannot easily participate in traditional counseling. As one expert has

²⁵² Amanda C de C Williams & Jannie van der Merwe, *The Psychological Impact of Torture*, British Journal of Pain (May 16, 2013), available at <http://bjp.sagepub.com.libproxy.lib.unc.edu/content/7/2/101.full.pdf+html>.

²⁵³ Petur Hauksson, *Psychological Evidence of Torture*, Council of Europe, Strasbourg (Nov. 06, 2003), available at <http://www.cpt.coe.int/en/working-documents/cpt-2003-91-eng.pdf>.

²⁵⁴ Landau, *supra* note 231.

²⁵⁵ *Id.*

²⁵⁶ Williams & Merwe, *supra* note 252 at 103.

²⁵⁷ *Id.* at 102.

²⁵⁸ *Id.* at 103.

observed, “[w]hat makes torture victims different is that the violence they have suffered was directed at them personally by other human beings whose avowed purpose was to destroy them.”²⁵⁹

Studies show that enabling the victim to verbalize his or her experiences is an important initial step towards the release from painful memories.²⁶⁰ It is crucial that the victim is “accepted because of his or her humanness and is given the freedom to manifest personal behavior or feelings without fear of judgment.”²⁶¹ Just as importantly, confidence in counselors or healthcare officials who wish to help is a foundational element for effective counseling.²⁶²

Torture victims require treatment in order to enable them to use their strengths and reclaim personal integrity, as well as a sense of control in their lives. Trust and support from the victim’s community is indispensable for restoring empowerment in the victim.²⁶³ Ultimately, for torture victims to have any chance of rebuilding their trust and relationships with the world and reintegrating into society, they must have sufficient social support. According to mental health professionals, societal integration is essential for torture victims in mending the shattered pieces of their lives.²⁶⁴ When torture victims are branded as terrorists, community support may be more difficult to achieve; thus, treatment modalities are often rendered less effective.

2. Inability to Trust: Psychologists’ Involvement in Torture

Victims of torture who suffered painful and degrading treatment, especially since September 11, face additional hurdles in their efforts to recover through psychological

²⁵⁹ Whittaker, *supra* note 198 at 274.

²⁶⁰ *Id.* at 275. Dr. Inge Kemp, head of the Copenhagen Rehabilitation Center for Torture Victims believes verbalization is usually the starting point towards healing. *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Mary Fabri, Marianne Joyce, Mary Black, and Mario Gonzalez, *Caring for Torture Survivors: The Marjorie Kovler Center*, available at <http://www.heartlandalliance.org/kovler/news/caringfortorturesurvivors.pdf>, at 167.

²⁶⁴ Landau, *supra* note 231.

counseling and therapy due to the now-common knowledge that some psychologists helped to effectuate torture. Existing evidence indicates that psychologists have been involved in torture and have provided “expert” advice with regard to which torture tactics to use during interrogations.²⁶⁵ Dr. Allen Keller, the director of the Bellevue/NYU Program for Survivors of Torture, who along with his colleagues testified at the U.S. Helsinki Commission briefing in July of 2008, disclosed evidence of physical and psychological torture during medical evaluations of former detainees of the Abu Ghraib prison and military detention center at Guantanamo Bay, Cuba.²⁶⁶ Dr. Keller found that psychologists were involved in the planning and implementation of tactics of torture. Indeed, reports of mental health professionals’ involvement in torture have led to criticisms of the American Psychological Association (APA), and are a shocking disclosure about the nature of illegal activities in the name of counter-terrorism. These disclosures have created distrust, if not fear, of mental health professionals and of the profession generally.

As with government officials and private contractors responsible for torture, psychologists who have served as the architects of torture policy have not been held responsible for their actions. The lack of professional censure is concerning, especially considering the debilitating psychological effects that torture causes its victims.²⁶⁷ This is particularly true given the APA’s mandate against the presence of psychologists in detention sites in violation of U.S. or international law, unless working for a third party on behalf of

²⁶⁵ Ellen Gerrity, assistant professor of psychiatry at Duke University, attests to the involvement of psychologists in determining which torture tactics to use in Guantanamo Bay. Along with others, she has written position papers insisting that the APA reevaluate and take a stronger stand against the use of mental health professionals in abusive interrogations. *Id.*

²⁶⁶ *Id.*

²⁶⁷ Members of the council of representatives of the American Psychological Association (APA) plan to submit a resolution that would enforce a 2008 vote prohibiting psychologists from participating in military interrogations altogether, including working at Guantanamo Bay, CIA black sites, and any other setting in violation of international law, except those psychologists who are solely providing treatment for fellow soldiers. Spencer Ackerman, *US Psychologists Renew Push for Ban on Assisting Military Interrogations*, *The Guardian* (Feb. 20, 2014), <http://www.theguardian.com/world/2014/feb/20/us-psychologists-push-ban-military-interrogations>.

detainees or treating military personnel—a mandate that has now been rendered meaningless.²⁶⁸

The involvement of mental health professionals poses significant challenges for torture victims' recovery processes. Having had psychologists involved in torture can damage survivors' abilities to recover altogether. When a torture victim is brought to safety and has to consult with a mental health professional in treating his/her physical and psychological wounds, it may provoke further trauma knowing that their care remains in the hands of the very profession that betrayed them when they were being tortured.²⁶⁹

II. The Torture of Abou Elkassim Britel

A. Britel Suffered Torture as Defined by CAT

Abou Elkassim Britel was the victim of torture and cruel, inhuman, and degrading treatment as defined under CAT. It may be impossible to know the full extent of violence and degradation he suffered. The acts committed against him were employed secretly and illegally by authorities for the purposes of causing him physical and psychological pain, humiliation, loss of self-will, self-control, and forcing him to provide information or otherwise “cooperate” with government officials, and falsely confess to acts associated with terrorism, notwithstanding the lack of evidence to connect him with any such deeds or relationships.

Section One above provides as complete a chronology of the suffering Britel experienced as he and his wife can presently provide. His narrative demonstrates that of the common methods of torture described above, Britel has experienced the overwhelming majority of such cruel and devastating techniques. In Pakistan, Britel was beaten with a cricket bat, hung

²⁶⁸ According to the APA's spokesperson, Kim Mills, the organization has always opposed torture and abusive interrogation techniques. Landau, *supra* note 231.

²⁶⁹ According to Rose Garcia-Peltoniemi, senior consulting clinician at the Center for Victims of Torture in Minneapolis, Minnesota, there is a tremendous need for educating psychologists about human rights and about the particular issue of torture and the use of torture in interrogations. She believes the reported behavior shows a tremendous lack of regard for the historical evidence and for science. *Id.*

for extensive periods of time, and terrorized by his torturers who repeatedly threatened to rape the women in his family.²⁷⁰ Upon being transferred into U.S. custody, Britel was handcuffed, blindfolded, and forced upon the Aero-operated N379P jet by CIA agents and Aero employees.²⁷¹ His captors sliced off his clothes and again blindfolded him, depriving him of sight. He was forced into painful, stressful, and unnatural positions. His hands and feet were shackled by chains; he was forced to remain motionless during the nine-hour flight to Morocco; and, he was beaten if he moved.²⁷²

In Morocco, for the first eight and a half months, Britel remained in total isolation within a tiny cell while deprived of adequate food or sleep. He was threatened with sexual assault and castration.²⁷³ After his second arrest, he was again threatened and tortured for the purposes of extracting a confession. He was, once again, held in isolation and always handcuffed. After his “trial” and “conviction,” Britel was transferred to a number of prisons where he endured severe beatings, often stripped of his clothes and left naked and exposed, and remained in isolation. He additionally suffered threats to his family; his wife was degraded and harassed on each visit to the prison to see him.

B. The Enduring Effects of Torture on Britel and his Family

As a result of the severe torture Britel suffered, he experiences nearly all of the sequelae described by experts who study the effects of torture. He continues to endure debilitating physical ailments including chronic dizziness and diarrhea. He has permanent damage to his left eye and ear.²⁷⁴ He has physical deformities including skin discoloration, bruises, deep marks on his wrists from handcuffs/shackles, and permanent hair loss on areas

²⁷⁰ American Civil Liberties Union (ACLU), *Biography of Plaintiff Abou Elkassim Britel*, www.aclu.org, <https://www.aclu.org/national-security/biography-plaintiff-abou-elkassim-britel>.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Biography of Plaintiff Abou Elkassim Britel*, *supra* note 270. ACLU Petition, *infra* note 275 at 3.

²⁷⁴ Dr. L. Vigna, *Clinical Report of Discharge*, Department of Preventive Medicine (Jan. 13, 2012).

of his body where he was repeatedly beaten.²⁷⁵ The inhumane conditions Britel was subject to have caused persistent pain in his bones, as well as chronic urinary tract infection, skin rashes, and a severely compromised immune system, as he often falls ill.²⁷⁶ He has weakness in his upper limbs and has difficulty carrying objects.²⁷⁷

Due to the blindfold and handcuffs forced upon Britel while he was being beaten during his extraordinary rendition flight to Morocco, the psychological trauma caused by the assaults upon his body have been magnified because he was prevented from anticipating and protecting himself against the abuse.²⁷⁸ Consequently, Britel suffers from a host of psychological ailments including irritability, difficulty sleeping, lack of appetite, mistrust of others, low self-esteem, depression, and post-traumatic stress disorder.²⁷⁹ Britel has difficulty with concentration, and suffers from amnesia.²⁸⁰

It is difficult for Britel to engage in therapy. Speaking about his experiences is extremely fatiguing and otherwise anxiety-producing for Britel.²⁸¹ The memories from his traumatic torture experience pervade his thoughts completely, thus significantly affecting his mood and ability to focus.²⁸² There are no mental health experts in his community to serve his needs, and while there is a qualified doctor in Milan, the office is too far away, as traveling exhausts him and unbearably increases his anxiety levels.²⁸³

Britel explains in a recent interview his current physical and psychological state:

“[M]y injuries are so profound that they bother me every moment of the day. I am always nervous [and] agitated. I forget things easily, even what day it is sometimes. I am used to drinking coffee after dinner, [but] sometimes I forget to do it. I realize that this inability to remember things is really serious and now

²⁷⁵ ACLU, *Petition Regarding Britel* (Jun 25, 2009), available at <https://www.aclu.org/files/pdfs/humanrights/nowakletter.pdf>

²⁷⁶ *Id.* at 5.

²⁷⁷ Dr. Sarah Viola, *infra* note 281.

²⁷⁸ Basoglu contends that there are strong correlations between clusters of events and mental health outcomes. Powell, *The Lingering Effects of Torture*, *supra* note 232.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ Dr. Sarah Viola, *Clinical Notes Relative to Abou Elkassim Britel* (Oct. 10, 2011).

²⁸² *Id.*

²⁸³ *Id.*

I have to write down everything I do every day, even the little things. I tire easily, traveling exhausts me. [There is a] great deal of itching on my head. I sleep more hours than usual. I avoid taking psychopharmaceuticals. That which happened, happened. It is a reality that I have to accept. This does not mean I forgive those who did this damage.”²⁸⁴

Britel’s family has also suffered as a result of Britel’s extraordinary rendition and torture. Britel’s wife, Khadija Anna Lucia Pighizzini, explains that the problems from torture have “left traces, not only in [Britel’s] soul but also his heart. He’s fighting to stay alive.”²⁸⁵ During Britel’s torture ordeal and incarceration, Anna suffered constant fear, anxiety, and a sense of loss. She struggled day-to-day and was overcome with fear that her husband would be killed. The nine years of Britel’s kidnapping and detention have left her drained and aggrieved.²⁸⁶ Moreover, Anna has lost several friends and feels isolated due to the stigma now attached to her husband as a result of his having been associated with terrorism.²⁸⁷ Her husband, she has explained, is considered an Italian citizen who has been censored.²⁸⁸ The stigmatization has affected Anna’s family as well, as they have suffered the shame and loss of honor in their family name.²⁸⁹

Currently, Britel and his wife reside in Bergamo, Italy. They remain secluded from the rest of their community. Consequently, Britel is unable to find employment or regain a sense of stability in providing for himself and his family. Both Britel and Anna continue to struggle to rebuild their lives after such extensive and unjustifiable suffering. They wish for some form of justice. In order to clear his name and attain relief, Britel requests a rightful apology.

²⁸⁴ Interview by the UNC School of Law Human Rights Policy Seminar with Abou Elkassim Britel and Anna Lucia Pighizzini, in Chapel Hill, NC (Apr. 16, 2014) (Hereinafter, Interview-Human Rights Policy Seminar).

²⁸⁵ Nahal Zamani, an Advocacy Program Manager with the Center for Constitutional Rights, interviewed Britel’s wife while Britel remained incarcerated in a Moroccan prison in 2009. Nahal Zamani, *ACLU Interviews Wife of Rendition Victim Abou Elkassim Britel*, www.andyworthington.co.uk (Jun. 26, 2009), available at <http://www.andyworthington.co.uk/2009/06/26/aclu-interviews-wife-of-rendition-victim-abou-elkassim-britel/>.

²⁸⁶ *Id.*

²⁸⁷ Interview-Human Rights Policy Seminar, *supra* note 284.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

In Britel's own words: "I would like to tell all those responsible for what happened to me that my sufferings continue. It is not something I can turn off like a computer or a cell phone; it keeps hurting, and they must know this. ... I have been hurting for over twelve years and who knows for how many more I will have to suffer."²⁹⁰

III. The Healing and Beneficial Attributes of Apologies

A. General Benefits

Although apologies may not be regarded as a formal treatment method used by mental health experts and are commonly overlooked as a healing force, studies on apologies reveal that they can have beneficial healing effects on torture victims and their communities and may provide the first step towards societal integration. The practice of apologies dates back centuries in human history as a part of the process of repentance.²⁹¹ If humans are hardwired for violence, they are equally hardwired for reconciliation through apologies.²⁹²

Apologies have great social value, as they function as a social contract.²⁹³ They express the view that the harmony of the group is significantly more important than and valued over the victory of an individual, or in Britel's case, a group of clandestine authority figures.²⁹⁴ Apologies may be valued because they provide healing through several mechanisms. In that sense, apologies also reaffirm existing social values and norms:

Genuine apologies ... may be taken as the symbolic foci of secular remedial rituals that serve to recall and reaffirm allegiance to codes of behavior and belief whose integrity has been tested and challenged by

²⁹⁰ Interview by N.C. Stop Torture Now with Abou Elkassim Britel and Anna Lucia Pighizzini, Raleigh/Bergamo 00:31:56:01—00:32:46:06 KASSIM (Sept. 15, 2013).

²⁹¹ Aaron Lazare, a professor of psychiatry and Chancellor and Dean Emeritus at the University of Massachusetts Medical School, has studied over 2,000 apologies for 15 years and recognizes the importance of healing mechanisms as a core idea in understanding successful apologies. He believes that we can tip the balance from violence to reconciliation by understanding and encouraging the practice of apology. As such, Lazare proposes several ways in which apologies heal, contending that while some healing mechanisms may overlap, combining several of these mechanisms may be necessary for a successful apology. Aaron Lazare, *How Apologies Heal*, faithstreet (Nov. 16, 2007), <http://www.faithstreet.com/onfaith/2007/11/16/how-apologies-heal/7308>.

²⁹² *Id.*

²⁹³ Aaron Lazare, *Go Ahead, Say You're Sorry*, Psychology Today (Jan. 01, 1995), available at <http://www.psychologytoday.com/articles/200909/go-ahead-say-youre-sorry>.

²⁹⁴ *Id.*

transgression, whether knowingly or unwittingly. An apology thus speaks to an act that cannot be undone but that cannot go unnoticed without compromising the current and future relationship of the parties, the legitimacy of the violated rule, and the wider social web in which the participants are enmeshed.²⁹⁵

Resentment is a response to the violation of an expected norm, and the reaffirmation of the validity of the breached norms can mollify resentment not only of the individual victim but others similarly situated, the victim's family, and social networks. In this way, an apology may contribute to a more widespread reconciliation among affected individuals, families, and communities and creates prospects for greater respect and enhanced peace.²⁹⁶ Furthermore, by acknowledging the transgression of a moral norm, both parties affirm a similar set of values, which re-establishes a common moral ground.²⁹⁷ Similarly, as apologies reaffirm norms, they may encourage communities to adhere to such norms and enhance human rights values.²⁹⁸

B. Specific Benefits to Victims

Apologies involve an exchange of power. They may succeed because they involve the transfer of shame and power between the offender and the offended.²⁹⁹ The two parties switch positions such that the offended holds the balance of power, as he or she is in a position to either grant or withhold something the offender wants, the liberation that comes through forgiveness.³⁰⁰

By apologizing, you take the shame of your offense and redirect it to yourself. You admit of hurting or diminishing someone, and, in effect,

²⁹⁵ Greiff, *supra* note 299 at 131 (quoting Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation*. Stanford University Press (1991)).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ Pablo de Greiff, *The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted*, in *The Age of Apology: Facing Up to the Past*, (Mark Gibney, ed. (2008), available at <http://books.google.com/books?hl=en&lr=&id=pPXpiXQ45osC&oi=fnd&pg=PA120&dq=how+apologies+may+help+torture+victims&ots=JDRGX66GjJ&sig=JFLKYzgCLXBvIqPIYKXoStEQrIU#v=onepage&q=how%20apologies%20may%20help%20torture%20victims&f=false>).

³⁰⁰ *Id.* at 129.

say that you are really the one who is diminished—I'm the one who was wrong, mistaken, insensitive, or stupid. In acknowledging your shame you give the offender the power to forgive. The exchange is at the heart of the healing process.³⁰¹

Apologies validate that the offense actually occurred.³⁰² It is important for a torture victim to receive recognition and validation for their suffering and the injustice involved, which caused such trauma. It further enables the offending party to acknowledge what transgressions they committed and the torment it caused the victim.³⁰³ Research demonstrates that victims may have recurrent thoughts on whether they were responsible for the torture that occurred. Apologies help to clarify the designation of fault and provide affirmation that the victims are not at fault.³⁰⁴ Moreover, an effective apology provides a commitment of emotional and physical safety for the victim; thus, the victim may have an increased sense of security that the offense will never recur. This may alleviate a heavy burden of chronic fear that torture victims carry.

Apologies acknowledge that the victim has a legitimate reason to be hurt and offended, thereby restoring empowerment in the victim.³⁰⁵ Research corroborates the fact that receiving an apology can have a noticeable, positive physical effect on the body.³⁰⁶ Blood pressure declines, heart rates lower, and breathing grows steadier.³⁰⁷ Researchers also document that apologies increase empathy and heighten the ability to forgive.³⁰⁸ Studies also show that contemplating forgiveness decreases stress levels, blood pressure, and heart

³⁰¹ *Id.* at 130 (quoting Aaron Lazare, *Go Ahead, Say You're Sorry*, Psychology Today (1995) 40-43).

³⁰² *How Apologies Heal*, *supra* note 291.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ Beverly Engel, *The Power of Apology*, Psychology Today (July 01, 2002), available at <http://www.psychologytoday.com/articles/200208/the-power-apology>.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ Ph.D. holders, Michael E. McCullough and Everett L. Worthington, and Steven J. Sandage, M.S., studied the implications of an apology in increasing empathy towards an apologetic offender, thereby instilling the capacity to forgive. *Id.*

rates.³⁰⁹ Apologies thus aid in psychological healing through positive changes in affect, improvement to physical and mental health, and the restoration of a victim's sense of personal power.³¹⁰

B. Benefits to Offender

As a general matter, apologizing may be risky for the offender, as he or she risks social censure, loss of the relationship, and costly reparation; however, evidence that the offender pays a price in offering an apology can often be a healing force for the victim, and thus should help to restore the reputation of the offender.³¹¹ Benefits to the offending party have been documented, as an apology may express caring, sincerity, and courage on behalf of the offending party.³¹²

A substantial deterrent to apologizing consists of the mistaken notion that it conveys weakness and admission of guilt.³¹³ This misguided belief leads to the denying of offenses and the hope that nobody notices the violations committed if ignored completely. On the contrary, apologies signal strength and honesty because they involve the admission of wrongdoing.³¹⁴ Simultaneously, apologizing is an act of generosity by virtue of restoring the self-concept of the victim.³¹⁵ Certainly, it is an act of courage as it subjects the offending party to the emotional distress that accompanies shame and the risk of humiliation and rejection at the hands of the offended victim.³¹⁶

C. Benefit to Abou Elkassim Britel

³⁰⁹ A study conducted by Charlotte Witvliet, a psychologist at Hope College, revealed that when subjects thought about someone who had offended them, physical arousal soared, whereas when subjects were asked to empathize with their offenders and imagine forgiving them, their physical arousal decreased significantly. Everett L. Worthington Jr., *The New Science of Forgiveness*, GreaterGood (Sept. 01, 2004), available at http://greatergood.berkeley.edu/article/item/the_new_science_of_forgiveness.

³¹⁰ American Psychological Association, *Forgiveness: A Sampling of Research Results*, available at <http://www.apa.org/international/resources/forgiveness.pdf>.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Go Ahead, Say You're Sorry*, *supra* note 293.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

About Elkassim Britel deserves an apology and an admission and acknowledgement that he was wrongfully captured, rendered, detained, incarcerated, tortured, and otherwise subjected to cruel, inhuman, and degrading treatment. Moreover, he has asked for an apology. In the words of Britel:

“The wrong has been done, sadly. What I can ask now is some form of reparation, so that I can have a fresh start and try to forget, even if it won’t be easy. Many times as I walk among other people I feel utterly alone, I feel different from anybody else. Seeing [U.S. officials] behind bars [...] would be a relief. ... [However,] [f]irst of all, I want an apology; it is only fair to say that someone who has done something wrong must apologize. [T]hey also have to acknowledge that I was mistreated without cause. They called us terrorists, and now everybody sees us under a different light.”³¹⁷

An apology would validate the actual occurrence of Britel’s illegal extraordinary rendition and torture, and would affirm that he is not at fault, thereby providing him with a sense of empowerment. An apology would communicate a commitment of emotional and physical safety, and thus might help to provide Britel and his family with a sense of security in knowing that there was a promise that such an offense would never recur. This might help to alleviate any burden of chronic fear that Britel carries.

As the research on apologies reveal, receiving a well-deserved apology might enable Britel to improve his physical and mental health. An appropriate apology would help to reduce his stress levels, along with other psychological, and physical pain that he continues to suffer. It might allow him a sense of peace so that he could finally move on and look forward to his future.

An apology could serve as the essential first step for Britel to reintegrate himself into society. It would provide affirmation of his humanity. It would rightfully clear Britel’s name from the stigma of being branded a terrorist. It would enable his community to learn about the atrocities he was forced to endure, and offer to him and his family the support and

³¹⁷ Interview by N.C. Stop Torture Now with Abou Elkassim Britel and Anna Lucia Pighizzini, *supra* note 290 at 00:06:50:27—00:09:39:19 KASSIM).

acceptance they need. An apology might facilitate community support for Britel so that he had the opportunity to rebuild his shattered life, restart his career, provide for his family, and reintegrate into society.

Clinical treatment options for Britel might not only be costly, but the benefits of such treatment have not been well-documented because of the low prevalence of disclosure from torture survivors. Certainly, this is the current situation with Britel, who is unable to make use of clinical treatment, not only because there is no appropriate treatment close by, but because he suffers unbearable anxiety traveling to visit a therapist. In this circumstance, the offending parties should offer an apology which would require less of Britel, and put the onus of his recovery upon his torturers, who must acknowledge the past wrongs and claim responsibility for the harm they have caused.

After nine years of brutal, unjustified torture, it is difficult, if not impossible, to put a retribution price tag on the kind of traumatic and life-changing torment that Britel was forced to endure. Despite the pain and hardship he suffers, with sufficient support, empathy, and an apology, Britel may be able to make small steps towards restoration. Anna has stated: “We want to live our lives, and to reclaim our rights to live in dignity as citizens and human beings. We look towards the future; when truth will be heard, when our rights will be restored and when justice will finally be served.”³¹⁸ Pakistan, the United States including its contractor Aero, Morocco, and Italy, must apologize and facilitate Britel’s healing.

³¹⁸ Zamani, *supra* note 285.

SECTION FOUR
THE NATURE OF A POLITICAL APOLOGY

I. Political Apology: Characteristics and Implementation

Abou Elkassim Britel seeks an acknowledgment of and an apology for his past mistreatment by government officials and private actors who were responsible for his kidnapping, extraordinary rendition, torture, and detention. He desires political and social recognition as a means of repair and restoration to facilitate his recovery from the human rights violations he has suffered. He remains stigmatized and isolated as a consequence of having been treated as less than human. He is entitled to no less, both from a legal and moral perspective.

The goal of this brief is to obtain a special form of apology particularly from the governments of Pakistan, the United States, Morocco and Italy as well as from key international, national, state, and local actors, including citizens and human rights groups who bear some responsibility for the actions of their government that contributed to the unjustified torture and detainment of Abou Elkassim Britel. In order to realize this goal in a meaningful way and for a public and official recognition of harm to have meaning and usefulness, it is important to understand the key features of an apology. This section sets forth the characteristics and components of a meaningful political apology and thus forms the basis of the request for restoration and repair for Britel.

A. Defining Political Apology

An apology first requires an admission of wrongdoing.³¹⁹ In the case of Britel, those who were responsible for his extraordinary rendition, torture, and detention have an opportunity to contribute to the possibility that his life might improve by their

³¹⁹ Shlomo Hareli, Zvi Eisikovits, *The Role of Communicating Social Emotions Accompanying Apologies in Forgiveness*, Springer Science + Business Media, Inc., 190 (July 25, 2006), http://download.springer.com/static/pdf/933/art%253A10.1007%252Fs11031-006-9025-x.pdf?auth66=1396999832_7a8bda36993aa0e58ac5018416faea49&ext=.pdf

acknowledgement of wrongdoing. They might contribute to reversing the effects of the injustice he suffered, as well as improving their own legacy.

Political apologies, to be useful, must embrace certain elements. They are specified here as a roadmap in the hopes that those who were responsible for Britel's ordeal might offer a meaningful and effective apology. A proper apology ensures there is an opportunity for the victim to both accept and benefit from it.

1. Definition and Context

a. General characteristics

In general terms, an apology is an act of speech, whether oral or written, and serves as a message by which the apologizer endeavors to convey four key points to the victim(s):

- (1) that a wrong has been committed that is against social norms;
- (2) s/he is taking responsibility;
- (3) there is remorse; and
- (4) there is hope or promise that a similar offense will not occur again in the future.³²⁰

The importance of an apology is derived from the fact that it verifies that unjustified event or action occurred. The apologizer conveys his intention that this apologetic action provide a form of reparation and solace. In the best-case scenario, an apology can provide closure and a chance for the victim to move forward. An apology has the power to rehabilitate the victim from the negative effects resulting from the acknowledged offense. It can be seen as a step towards reparative justice and can help the victim pursue his or her journey to feeling whole once again. Moreover, if an apology fails to be reparative to the victim, an apology may still be important because of its moral and symbolic significance to all parties, including any unbiased observers.

b. The Apologizer

³²⁰ Seiji Takaku, Benard Weiner, Ken-ichi Ohbuchi, A Cross-Cultural Examination of the Effects of Apology and Perspective Taking on Forgiveness, 163-164 (2001)
<http://www.ffri.hr/~ibrdar/komunikacija/seminari/Takaky.%202001%20-%20Apology%20and%20forgiveness%20across%20cultures.pdf>.

Broadly defined, a political apology is one that is made “by a political or societal entity (such as governments, religious organizations or other bodies) for events that have harmed identifiable groups.”³²¹ Sometimes, it is the wrongdoer who issues an apology; however, in the context of political apologies, “a leader, or some other official, is offering an apology on behalf of the state or some other organization to victims, whether individuals or groups.”³²² Thus, it is not always the actual wrongdoer that is apologizing.

As noted above, the purpose of this policy brief is to seek an apology for Britel from the governments of the United States, Italy, Morocco, Pakistan, as well as the state of North Carolina and its political subdivisions including Johnston County, Aero Contractors (a private charter airplane company), and all other entities involved in the kidnapping, detainment, abuse, and torture of Abou Elkassim Britel. Each of these entities bears responsibility for the wrongdoing he has suffered.

c. Timing of an Apology

Apologies may be issued well after the harm was inflicted. Succeeding political leaders have often apologized for the bad acts committed by their predecessors. In Britel’s case, the fact that government administrations, public officials, and corporate actors may no longer be the same as those responsible for his torture does not suggest that an apology from current entities and individuals would not be warranted or helpful.

History demonstrates the need for apologies without constraints by time periods. For example, although it was President Franklin D. Roosevelt who, under Executive Order 9066, ordered and administered the internment camps in 1942,³²³ over thirty years had passed

³²¹ Rhoda E. Howard-Hassmann, *About This Site*, Apologies and Reparations Website, (2014), <http://political-apologies.wlu.ca/about.php>.

³²² Janna Thompson, *Apology, Justice and Respect: A Critical Defence of Political Apology*, Australian Association for Professional and Applied Ethics 12th Annual Conference (Sept. 30, 2005), <http://www.unisa.edu.au/Documents/EASS/HRI/GIG/thompson.pdf>.

³²³ *Executive Order 9066: The President Authorizes Japanese Relocation*, History Matters: The U.S. Survey Course on the Web, <http://historymatters.gmu.edu/d/5154/>.

before President Gerald Ford, on February 19, 1976 proclaimed that the internment was “wrong” and a “national mistake” and further declared, “it shall never be repeated” by the United States.³²⁴ In a remark made upon signing the proclamation, President Ford stated that, “We now know what we should have known then – not only was that evacuation wrong but Japanese-Americans were and are loyal Americans.”³²⁵ President Ford offered this apology on behalf of the Roosevelt Administration and the American people by “call[ing] upon the American people to affirm with [him] the unhyphenated American promise that we have learned from the tragedy of that long ago experience – forever to treasure liberty and justice for each individual American and resolve that this kind of error shall never be made again.”³²⁶

President Ford’s delayed apology demonstrates that the wrongs visited on victims of human rights violations do not dissipate in time and that the need for some sort of reparation endures despite the passage of years. The lesson offered by his apology is relevant to Britel. He was first captured in 2002 and then released from detention in April 2011. The United States and other governments implicated, as well as the international community, cannot move forward without acknowledging the harm caused by acts of extraordinary rendition and torture and without providing a form of remedy. It has been over three years since Britel’s release and his readjustment efforts continue to be difficult. The absence of any effective remedies detracts from his ability to recover from the brutality he suffered as a result of his kidnapping and torture and during his nine years of unjustified incarceration. An effective apology even at this time would help the process of healing and reintegration.

d. Beneficiaries of the Apology

³²⁴ See *Gerald R. Ford’s Remarks Upon Signing a Proclamation Concerning Japanese-American Internment During World War II*, Gerald R. Ford: Presidential Library & Museum, (August 3, 2000), <http://www.fordlibrarymuseum.gov/library/speeches/760111.htm>.

³²⁵ *Id.*

³²⁶ *Id.*

An apology should be specifically directed to the individual or groups that suffered the harm for which the apology is offered. Additionally, an apology can be directed to victims' families or descendants as well as the specifically targeted victims.³²⁷ Political apologies are important because of the promises, responsibilities, and entitlements that are passed on to the next generation. An apology can serve as a vow that the government and citizens will take the responsibility for the past injustices committed, including those injustices from the distant past, and vow to not make similar mistakes and victimize succeeding generations. It is a trans-generational commitment.

A political apology not only benefits the victims of injustices and their descendants, but also advances the interests of the citizens and stature of the country of the wrong-doer. A political apology establishes "long-term commitments [which] promote political stability and individual security. They also contribute to moral relationships."³²⁸

An apology to Abou Elkassim Britel would not only benefit him, but his family, his community, other torture victims, the United States, and its citizens, as well as the governments and citizens of Pakistan, Morocco, and Italy. Britel was the direct victim of violent abuse and torture during his capture and incarceration but he did not suffer alone.³²⁹ Others suffered similar kidnapping and torture, while others were directly and indirectly affected by the program of extraordinary rendition and torture. Thus, the benefits of an apology inure to Britel, his family and community, and may help to establish an equilibrium that enhances stability and security to citizens in the United States and in the international realm. An apology will serve as a means of vindication for Britel and his family, and may

³²⁷ American Civil Liberties Union of Massachusetts, *Japanese-American Internment Camps*, Privacy Sunlight on Surveillance: Because Privacy Can't Protect Itself (2011), <https://privacysos.org/internment>. President Ford's apology for the Executive Order 9066 authorized by President Franklin D. Roosevelt included a \$1.6 billion reparations trust fund that was distributed to more than 80,000 internees and their heirs. In the event that an internee was deceased, their share was passed down to the heirs. *Id.*

³²⁸ See Thompson, *supra* note 322.

³²⁹ See Section One: Introduction to Abou Elkassim Britel: Victim of Extraordinary Rendition and Torture.

strengthen citizens' trust and security in their governments, and ultimately provide for greater social stability.

e. Apology as Symbolism

A political apology is not limited to providing compensatory or reparative justice by which to make victims whole again. It also serves to ameliorate the harm done because of its symbolic importance. Torture victims, such as Britel, can never be made whole again, regardless of the reparation or compensation awarded. Nonetheless, apologies are important acts that “take place outside the framework of justice” and can provide a meaningful sense of repair.³³⁰ The International Law Commission of the UN describes an apology as an appropriate response to injustice in cases where “[j]ustice in the form of restitution or compensation is not possible thus giving it a subordinate, auxiliary role in an account of justice among nations.”³³¹

Abou Elkassim Britel is asking for an apology because he has been foreclosed from raising formal legal claims that seek traditional findings of rights violations and compensation.³³² An apology would offer an acknowledgement of the wrongs he suffered and would serve as a symbolic message to Britel, his family, and his community that would be both a powerful and influential component in his recovery.

2. Factors that Establish a Genuine and Meaningful Political Apology

A political apology has obvious moral importance. In order for it to serve its purpose, the apology must be genuine. Otherwise, the value and significance of the political apology diminish and it serves little or no benefit to the victim, and in fact may contribute to the harm already endured.

Experts who study the phenomenon of political apology have observed that to be

³³⁰ See Thompson, *supra* note 322 at 2.

³³¹ *Id.*

³³² See Section Two: Opportunities and Obstacles to Redress

useful, those who offer an apology must be sincere about the process and successfully assure the victims that the apology is sincere. Generally, there are eight components of an authentic political apology.³³³ These components morally engage those in whose name the apology is made, and also serve to assure the victims that the apology is sincere. The eight components include:

- (1) a writing that is officially recorded;
- (2) a statement of the wrong in question;
- (3) an acceptance of responsibility;
- (4) an expression of regret;
- (5) a promise of nonrepetition;
- (6) an absence of any demand for forgiveness;
- (7) a nonappearance of any hypocrisy or arbitrariness; and
- (8) an undertaking -- through measures of publicity, ceremony, and concrete reparation."³³⁴

The goal is to develop and frame a genuine political apology so that the governments implicated in Britel's torture can adequately express regret for the wrongdoing in hopes to provide vindication for him and to mitigate the consequences of the harm he has endured.

a. Memorialization

A political apology must be memorialized in some manner, usually by writing. In circumstances such as those suffered by Britel, the consequences of the violence and egregious harms he suffered are not likely to be repaired, nor can compensation restore him or eliminate his ongoing grief and pain. The support of his family, while welcome and necessary, may not reverse what is surely permanent and serious trauma. Indeed, for torture victims such as Britel, the psychological and physical damages are irreversibly embedded in their day-to-day lives and identities. A memorialization of the apology is the least that can be

³³³ Matt James, *Chapter 9: Wrestling with the Past: Apologies, Quasi-Apologies and Non-Apologies in Canada, The Age of Apology: Facing Up the Past*, 139 (2008)
<http://books.google.com/books?hl=en&lr=&id=pPXpiXO45osC&oi=fnd&pg=PA137&dq=political+apologies+definition&ots=JDRB055EiI&sig=X5ziLuiPnvevI2lCgIlnfOSOX78#v=onepage&q=political%20apologies%20definition&f=false>.

³³⁴ *Id* at 139.

done and can serve as a tangible reminder of the victim's innocence and of the regret and sorrow of the apologizer and wrongdoer.

The memorialization should clearly state the wrongful act at issue for which the wrongdoing party is assuming responsibility. Additionally, it should clearly identify the apologizer as well as the party or groups to whom the apology is addressed. For the torture victims, such as Britel, it is important to clearly identify the involved parties. This will validate the innocence of torture victims and of the injustice that they endured.

In the context of a political apology given by the government, it is important that it be made publicly and that its contents be widely disseminated through public events. An apology can appear to be genuine when it is "adequately publicized" through public events that give "due attention to [the] ceremony" in order to "lend the apology dignity and seriousness of purpose."³³⁵

A genuine apology may establish a variety of good effects on social harmony, especially for the victims and their families, but also beyond. Its documentation should be formal, recorded, collected, and maintained for present and historical uses. For these reasons, an apology should be memorialized in writing. In the case of Britel, apologizers should perform a proper ceremony by making the memorialization of the apology public and genuine in order to reinforce its symbolic strength.

b. Articulating the Wrongful Deed(s)

As noted above, an apology must clearly identify the wrong. There are two conditions that are required in effectively communicating a genuine apology.³³⁶ The first condition

³³⁵ *Id* at 138.

³³⁶ Angelo Corlett, *Forgiveness, Apology, and Retributive Punishment*, Google Books: Responsibility and Punishment, 119 (2009), http://books.google.com/books?id=5QcQU76t_mYC&pg=PA186&lpg=PA186&dq=articulating+the+wrongful+deed+in+an+apology&source=bl&ots=RbJagWyrP0&sig=tUZxWEsaDxaJUj5-D1P6pOmb3Og&hl=en&sa=X&ei=qfxHU_DIH8imsASIsYGQCw&ved=0CDEQ6AEwAQ#v=snippet&q=admit&f=false.

“requires that the wrongdoer admit *to the victim* that what she did was indeed wrong and requires [an] apology.”³³⁷ The one offering the apology must show that they fully understand and admit that the wrongful and harmful conduct requires an apology through an admission of guilt and error.³³⁸ The second condition “requires that the wrongdoer explain to the victim why what she did to her was wrong. This is not the same as the wrongdoer’s rationalizing her actions, or trying to ‘explain away’ their significance regarding the perpetration of the wrongdoing and the harm it caused the victim.”³³⁹

It is crucial that both the victim and the apologizer have a common understanding of the injustice for which the apology is offered. Furthermore, because a political apology is often most beneficial when it is made publicly, its terms should be clear and relevant in order to serve as a public political statement and proclamation that a severe wrong has been committed.

For tortured prisoners such as Britel, who were accused of being terrorists, an apology must address their innocence. Britel and others in his circumstances have not only endured barbaric torture practices and psychological abuse, they also coped with the shame and disgrace of having being labeled a terrorist.³⁴⁰ These victims, long after release from imprisonment, feel the humiliation and ostracization from their community because of the stigma associated with being suspected of terrorist activities.³⁴¹ The message must be delivered not only to the victims, but to their families, community, and the world at large.

c. Acceptance of Responsibility, Statement of Regret, and Promises for Nonrepetition

The implications of the political apology bear on the willingness of the wrongdoer or apologizer to accept responsibility for the wrongdoing, express deep regret, and to promise

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ See Section One: Introduction to Abou Elkassim Britel: Victim of Extraordinary Rendition and Torture.

³⁴¹ *Id.*

that the wrongdoing will not be repeated. For example, President Gerald Ford, although he did not order the internment of the Japanese, was able to acknowledge and accept responsibility for such human rights violations on behalf of the United States. Although he apologized decades after the wrong, he was not limited in his ability to express deep remorse for the internment camps and acknowledge that they have become a shameful and regrettable part of the American history. Nor was he limited in his ability to vow that history ought not to repeat itself.

As one expert who has studied the characteristics and consequences of political apologies has observed, it is “a major undertaking and not an everyday event.”³⁴² A political apology is issued in hopes that it will be a turning point in the nation’s history. As such, the apology should be presented as a memorable public event in order for it to resonate as a historical landmark.³⁴³ An apology should signify meaningful policy or social changes. It is an attempt to provide assurance to the victims that they will never again endure the same wrongdoing. It is meant to provide a sense of security to the rest of the nation, that, they too will never endure similar wrongdoings.

An apology to Britel would have to account for many wrongdoings. His capture, torture, cruel and degrading treatment, and incarceration must be acknowledged. Remorse must be expressed. It is important that the memorialization of the apology to Britel articulates regret for what was done to him if there is any hope to regain the security and trust that he and many others have lost with respect to their government and key international actors.³⁴⁴

B. Political Benefits of an Apology

Studies have shown that there are more regrets to be had over situations where wrong-

³⁴² See Thompson, *supra* note 322 at 10.

³⁴³ *Id.*

³⁴⁴ See Section One: Introduction to Abou Elkassim Britel: Victim of Extraordinary Rendition and Torture.

doers failed to offer an apology rather than instances where an apology was offered.³⁴⁵ Individuals who have expressed regret for not apologizing often demonstrated behaviors of persistent remorse, self-punishing attitudes, and deep concern for the offended party as innocent of wrongdoing.³⁴⁶ Studies also demonstrate that people who apologize are more likely to be forgiven than those who do not apologize.³⁴⁷ Indeed, social exchange theory explains that “offenses create debts that must be repaid” through restoring fairness and efforts to create a balance.³⁴⁸ An offense creates an injustice gap, and that gap can be filled through behavioral or psychological methods. Restoration of the social balance can be created through an apology, where the perpetrator is “brought down” with a bended knee, while the victim is “lifted up” by helping them restore their sense of power.³⁴⁹

Psychologists have observed that after an offender apologizes, the offender appears to the community as: a) someone who is not as “bad” a person as the incident might otherwise have indicated; b) someone who has either repented or did not intend for the incident to occur; and c) someone who no longer needs punishment.³⁵⁰ The apology can heal the community by repairing the frayed relationship between the political entity and the victim. Social order depends on the commitment to certain behavioral norms. Thus, an apology helps reinforce social norms, discourages deviation, and teaches that the political entity’s committed breach was unjustified.

The governments of Pakistan, the United States, Morocco and Italy are not individuals, but they are made up of individuals and represent former decision-makers and actors who are individuals. Findings about apology from psychosocial research are relevant

³⁴⁵ Julie Juola Exline, Lise Deshea, and Virginia Todd Holeman, *Is Apology Worth the Risk? Predictors, Outcomes, and Ways to Avoid Regret*, Guilford Press Periodicals, 479 (2014), <http://guilfordjournals.com/doi/abs/10.1521/jscp.2007.26.4.479?journalCode=jscp>.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 481.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

for that reason. These governments, as well as key international, national, state, and local actors, including citizens and human rights groups who bear some responsibility for the actions of their governments that contributed to the unjustified torture and incarceration of Britel, can improve and work to restore their status as entities and individuals who function in good faith through the means of an apology. Although an apology may not ever make Britel whole again, this act may help re-establish the public's faith in the government and justice system as servants of public interest.

C. Conclusion

Apologies, when offered meaningfully, can assist the victim of human rights violations and establish moral, if not legal precedence in the national and international community. Apologies can be important for ideological and ethical reasons. Furthermore, apologies often reflect the call by various human rights organizations and citizen groups who support reparations and accountability based on the belief that an acknowledgement of government wrongdoing is due.³⁵¹

An apology can be sincere and thus helpful in ameliorating the harm caused by rights violation; or it may fail to include the essential components and thus exacerbate a victim's pain and suffering.³⁵² Based on the studies that offer guidance and recommendations as noted in this report, the governments and other actors implicated in Britel's extraordinary rendition and torture can issue a genuine and meaningful apology. Such an apology must take the form and include the elements described in this section to assure that the acknowledgement offered demonstrates that: (1) a wrong has been committed that is against social norms, (2) the apologizers are taking responsibility, (3) there is remorse, and (4) there is hope or promise that a similar offense will not occur again in the future.³⁵³

³⁵¹ Melissa Nobles, *The Politics of Official Apologies*, Cambridge University Press, 1 (2008) http://www.langtoninfo.co.uk/web_content/9780521693851_frontmatter.pdf.

³⁵² *Id* at 7.

³⁵³ *See supra* note 320.

A proper apology to Britel may facilitate his recovery and give effect to his warranted expectations of just treatment and respect.³⁵⁴ The facts are that Britel was unlawfully captured and incarcerated for nine years during which he was physically and mentally tortured without justification and in violation of his basic human rights. An apology may benefit Britel and his wife and contribute to the upholding of international norms that demand accountability for the egregious harms he has suffered.³⁵⁵

³⁵⁴ Melissa Nobles, *The Politics of Official Apologies*, *supra* note 351 at 7.

³⁵⁵ *Id.*

SECTION FIVE
THE STATE OF APOLOGY IN U.S. LAW

I. Apologies as Part of the Fabric of Law and Legal Practice

Apologies are commonplace in day-to-day interactions. Whether they signify remorse, an acceptance of blame, or common courtesy, simply put, apologies serve an important role in human communication. They have been offered with greater frequency with regard to legal claims, and are a growing part of the U.S. domestic legal framework where they have been used to effectively resolve civil claims. Formal apologies also have their place in the public sphere. There are historical examples of high-profile apologies delivered by the United States government as well as by states and localities for egregious human rights violations. Other governments also have made public apologies of historic significance. Whatever the circumstance where they are utilized, apologies have the potential to mitigate conflict and console people who have been wronged. A review of apologies in various settings is set forth here to provide guidance to all four governments, but particularly to the United States, with regard to Britel's request for a meaningful acknowledgement of the harm he has suffered.

II. Legal Apologies: Feasibility, Benefits, and Lessons in Civil Litigation

Apologies have gained acceptance in U.S. domestic jurisprudence as a way to resolve legal wrongs and repair harms that flow from such wrongs. They are increasingly employed in medical malpractice claims and other tort cases, thus establishing their normative function in civil legal matters as a way of resolving wrongs and providing remedy. Notwithstanding the significant difference in both subject matter and governing law, information regarding apologies in the context of civil claims provides guidance on the matter of an apology to Britel.

A. Lessons from Legal Apologies: Medical Malpractice Claims

The use of apologies in the realm of medical malpractice claims has been the subject of considerable study by scholars who have determined that they are legally useful and morally beneficial.³⁵⁶ These studies have shown that while the majority of physicians surveyed believed apologizing was the ethical thing to do after a medical error, many choose not to apologize for adverse medical outcomes for fear of litigation.³⁵⁷ Such concerns rendered the use of apology—of potential benefit to both the offender and the wronged party—an under-used remedy.³⁵⁸

However, as the benefits of an apology have been promoted, they have become an increasingly used tool to resolve malpractice cases. While an apology may entail admitting guilt, it also may serve to preclude litigation. Studies have shown that most patients who were injured because of a medical error responded that they would not have pursued a lawsuit had the physician apologized for the error.³⁵⁹ One study found that apologies by physicians resulted in faster settlements and lower damages.³⁶⁰ The fact that the apologizer affirmed the legitimacy of the violated rule and expressed remorse for the harm provided much needed relief to the victim.³⁶¹ Victims of medical error appreciate knowing that the physician feels remorse and will try not to make the same error in the future.³⁶²

B. Apologies in Other Tort Claims

³⁵⁶ See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. Cal. L. Rev. 1009, 1022 (1999); Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 Harv. Negot. L. Rev. 349, 358-9 (2008).

³⁵⁷ David Ollier Weber, *Who's Sorry Now*, Physician Executive, Mar. & Apr. 2006, at 6.

³⁵⁸ Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 Ohio St. J. on Disp. Resol. 829, 854 (2003) (noting that in a 2006 study of physicians who had made a medical error, the majority of physicians indicated that their primary reason for declining to apologize was fear of a malpractice lawsuit).

³⁵⁹ Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 Lancet 1609, 1609 (1994), available at http://ac.els-cdn.com/S0140673694930627/1-s2.0-S0140673694930627-main.pdf?_tid=86b0ad5e-c418-11e3-8941-00000aacb35e&acdnat=1397509717_e361cc03d11544b3d0210121f835a249.

³⁶⁰ Cohen, *supra* note 356, at 1022-23.

³⁶¹ Robbennolt, *supra* note 357, at 352.

³⁶² Cohen, *supra* note 356, at 1019.

The benefits of an apology in legal disputes are not limited to malpractice claims. A study of plaintiffs who have sought an apology in other tort cases demonstrates that plaintiffs seek this remedy for a variety of reasons.³⁶³ These include a sense of vindication, an acknowledgement of wrongdoing, education regarding the unlawfulness and harmful effects of the conduct, and addressing psychological needs of the parties.³⁶⁴ The value of an apology is derived from the fact that an offender is the only one who can provide the personal acknowledgement of wrongdoing and regret to the wronged party, a benefit that a court cannot provide.³⁶⁵

In the context of tort litigation, an apology can be “value-creating” for all parties involved. It can help to alleviate a victim’s anger from having been wronged while helping the issuer of the apology to feel less guilty.³⁶⁶ As in malpractice cases, apologies in other civil cases may result in tangible benefits to the offender in that an injured party may decide not to take further legal action against an offender who has apologized.³⁶⁷ Furthermore, while apologies can create meaning and goodwill between adverse parties, the absence of an apology to an offended party who believes he or she deserves one can escalate damage in the relationship.³⁶⁸

C. Diminishing the Risks of Apologies

There are many benefits to apologizing, yet lawyers and their offender clients may have concerns as to whether to an apology will be risky and open them up to liability.³⁶⁹ A client may not find psychological or other advantage from the acknowledgment of wrong-

³⁶³ Robyn Carrol, *Apologies as a Legal Remedy*, Sydney L. Rev. 317, 337 (2013).

³⁶⁴ *Id.* at 338-40.

³⁶⁵ Cohen *supra* note 356, at 1016.

³⁶⁶ *Id.* at 1015.

³⁶⁷ *Id.* at 1022. If the injured party decides to sue, an offender may look sympathetic to a judge or jury if he or she has already apologized. Apologizing is especially strategic when it comes to punitive damages, which may be awarded in response to a perceived lack of remorse on the part of the defendant. *Id.* at 1022-23.

³⁶⁸ *Id.* at 1046.

³⁶⁹ *Id.* at 1051.

doing that a sincere apology necessitates.³⁷⁰ More importantly, a victim may perceive an apology as insincere or purely strategic, and subsequently feel further insulted, rather than relieved. In cases that involve an insurance plan, an apology may void coverage.³⁷¹

However, many states have promoted apologies and have created legal safeguards in order to avoid limiting the meaningful benefits for both victims and offenders that an apology offers.³⁷² Tort litigation shows that U.S. laws tend to acknowledge the benefits of apologies and encourage the use of apologies in dispute resolution. Although defendants may find it baffling that admitting guilt often has the effect of decreasing the possibility of litigation and producing lower monetary awards, this phenomenon is actually quite logical and is in keeping with human traditions of hospitality and reciprocity. An apology provides meaning for a victim that monetary awards and judicial verdicts might never deliver.

This is certainly the case for Britel, who, as a result of being wrongfully imprisoned, tortured, and labeled a “terrorist,” faces ongoing social ostracism. At the same time, it is important to note that the fundamental rationale underlying the obligation to apologize to Britel should not rest on the ability of the United States to avoid formal legal liability. To the extent that it may be a persuasive factor and encourage the United States to do so, however, it is an important consideration.

III. Lessons from Past Apologies by the United States Federal Government

Past apologies by the United States have varied widely in scope, method, and consequence. The United States has apologized to foreign countries, to individual citizens and non-citizens, and to large and small groups of people. Apologies have manifested

³⁷⁰ See Cohen, *supra* note 356, at 1023.

³⁷¹ *Id.* at 1051.

³⁷² Thirty-five states have enacted legislation that provides legal safeguards for medical professionals to apologize. David H. Sohn and B. Sonny Bal, *Medical Malpractice Reform: the Role of Alternate Dispute Resolution*, 470 Clin. Orthop. Relat. Res. 1370–78 (May 2012), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3314770/>. These apologies may remain confidential and inadmissible in a lawsuit. Cohen, *supra* note 2, at 1030. Self-interest may be a factor in either type of apology, but ultimately, both apologies seek to offer remorse and give the victim an opportunity to heal.

admissions of guilt on the part of the government, acceptance of responsibility, statements of remorse, and more commonly in recent years, statements of regret.

The harms for which apologies have been offered fit broadly into three categories: (1) physical harms, including death, torture, slavery, medical experimentation, and wrongful detention; (2) psychological harms, including reputational harms, harms produced by wrongful detention, and degrading treatment of religious symbols; and finally, (3) harms resulting from incompetence, including mistakes, failure to act, and dishonesty. Many apologies address a combination of these types of harm; accordingly, they have had many different levels of import for the people who have been on their receiving end. Britel, wrongfully detained and transported, and physically and psychologically tortured, has been a victim of all of these types of harms at the hands of U.S. agents, as well as the governments of Pakistan, Morocco, and Italy.

A. Apologies to Citizens: Benefits and Lessons Learned

Most of the U.S. federal government's fault-accepting apologies in the past three decades have addressed atrocities it committed toward people within its borders. The apologies it has issued through legislation have included a 1988 apology for the internment of Japanese citizens, a 1993 apology to native Hawaiians, a 2005 apology to lynching victims, a 2008 and 2009 apology for slavery, a 2009 apology to Native Americans, and most recently, a 2012 apology to Chinese Americans for discriminatory laws.³⁷³

1. The Apology Letter Signed by President George Bush for the Internment of Japanese Americans.

During World War II, the United States' federal government forced over 120,000 Japanese Americans to live in internment camps because they were seen as a threat to

³⁷³ Moni Basu, *In Rare Apology, House Regrets Exclusionary Laws Targeting Chinese*, CNN BLOGS, June 19, 2012, <http://inamerica.blogs.cnn.com/2012/06/19/in-rare-apology-house-regrets-exclusionary-laws-targeting-chinese/>.

national security.³⁷⁴ Although about two-thirds of the internees were native-born American citizens, the United States treated them as foreign threats and the last camp was not closed until five months after World War II ended. In 1988, President Reagan signed the Civil Liberties Act into law as a formal apology for the internment of the Japanese Americans during World War II.³⁷⁵ In his apology letter, he acknowledged that the monetary award could not in any way restore these victims back to whole.³⁷⁶ He further stated:

We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II. In enacting a law calling for restitution and offering a sincere apology, your fellow Americans have, in a very real sense, renewed their traditional commitment to the ideals of freedom, equality, and justice.³⁷⁷

The 25th anniversary of the passage of the Act was celebrated in 2013 at the National Archives, where the text of the apology was placed next to the original order of internment demonstrating the “powerful juxtaposition of the journey from a wrong to a right.”³⁷⁸ Those Japanese Americans who were interned in the camps and campaigned for the apology noted the humiliation and shame they experienced and the need for action to right the wrong that was perpetrated against them.³⁷⁹ Survivors explained the purpose of the redress campaign was “less about the compensation for those who had already suffered and more about the next generation of Americans.”³⁸⁰ Said one survivor: ““You can make this mistake, but you also have to correct it — and by correcting it, hopefully not repeat it again.””³⁸¹

2. The United States Congress and President Bill Clinton Apologize to Native Hawaiians for the overthrow of Queen Liliuokalani.

³⁷⁴ Congressional Record, V. 153, PT. 3, 3725, February 5, 2007 to February 16, 2007.

³⁷⁵ Giuseppina Wright, *WWII Secret: Italian-Americans Internment As Alien Enemies*, Electronic Journal of Negotiation, Conflict Resolution and Peacebuilding (February 2014), <http://www.ejournalncrp.org/wwii-secret-italian-americans-internment-as-alien-enemies/>.

³⁷⁶ *Id.*

³⁷⁷ *Id.* Tetsuden Kashima, *Judgment Without Trial: Japanese American Imprisonment During World War II* 221 (2003).

³⁷⁸ Bilal Qureshi, *From Wrong To Right: A U.S. Apology For Japanese Internment*, Aug. 9, 2013, <http://www.npr.org/blogs/codeswitch/2013/08/09/210138278/japanese-internment-redress>.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*

During 1826 and 1893, the Kingdom of Hawaii and the United States had a mutually beneficial relationship through treaties and conventions that governed their commerce and navigation agreements.³⁸² However, the United States violated the treaties as well as other international laws regarding aggression when it used naval forces to invade Hawaii and forced Queen Liliuokalani to “yield to the superior force of the United States of America.”³⁸³ As a direct result, Hawaii was declared to be a protectorate of the United States on February 1, 1893.³⁸⁴

On January 17, 1993, during the five-day centennial commemoration, Hawaii Governor John Waihee ordered the U.S. flag not to be flown over any state or government buildings as a reminder to the United States of its involvement in the hostile overthrow of an independent monarchy.³⁸⁵ Soon thereafter, President Bill Clinton apologized to Hawaii for the 1893 overthrow of its independent monarchy.³⁸⁶ Congress and President Clinton signed a joint “Apology Resolution” in hopes of effecting reconciliation with the Native Hawaiians and acknowledging historic wrongs.³⁸⁷ The Resolution recounted the offenses committed by the United States in the early history of the nation.³⁸⁸ It further acknowledged that the overthrow of the government was illegal and suppressed the inherent sovereignty of the Native Hawaiians.³⁸⁹ Finally, it expressed a commitment to acknowledge the ramifications of the overthrow in furtherance of the reconciliation between the United States and the Native Hawaiian people.³⁹⁰

³⁸² Wright, *supra* note 375.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ Hawaiian Independence, *Hawaii Governor Bans U.S. Flag*, <http://www.hawaii-nation.org/flag-lowered.html>.

³⁸⁶ United States National Library of Medicine, National Institutions of Health, *1993: President Clinton Apologizes for 1893 Overthrow of Hawaiian Monarchy*, Native Voices: Native People’s Concepts of Health and Illness, <http://www.nlm.nih.gov/nativevoices/timeline/578.html>.

³⁸⁷ *Id.*

³⁸⁸ See *United States Public Law 103-150: 103d Congress joint Resolution 19 November 23, 1994*, Hawaiian Independence Home Page, *supra* note 385.

³⁸⁹ *Id.*

³⁹⁰ *Id.*

3. United States Congress apologizes to Native Americans

The 2009 apology to Native Americans is fairly typical of U.S. apologies that have been codified by legislation. The U.S. apology to Native Americans was a part of the Defense Appropriations Act of 2009, signed by President Obama. An excerpt of the resolution, a bipartisan effort, set forth the following:

- 3) recognizes that there have been years of official depredations, ill-conceived policies, and the breaking of covenants by the Federal Government regarding Indian tribes;
- (4) apologizes on behalf of the people of the United States to all Native Peoples for the many instances of violence, maltreatment, and neglect inflicted on Native Peoples by citizens of the United States;
- (5) expresses its regret for the ramifications of former wrongs and its commitment to build on the positive relationships of the past and present to move toward a brighter future where all the people of this land live reconciled as brothers and sisters, and harmoniously steward and protect this land together;
- (6) urges the President to acknowledge the wrongs of the United States against Indian tribes in the history of the United States in order to bring healing to this land; ...”³⁹¹

Although the apology explicitly noted that it was not intended to support claims against the government,³⁹² the senators who led the effort for the resolution and Native American groups have commended the apology, which, although “long-overdue,” serves as a significant step for the United States in terms of shifting public perceptions of Native Americans, and Native American perceptions of the federal government.³⁹³

The apology to Native Americans was a welcomed official proclamation; however, there was no public announcement when President Obama signed it into law.³⁹⁴ Initial drafts of the apology resolution apologized specifically for “past ill-conceived policies by the U.S.

³⁹¹ The Apology to Native Peoples of the United States, H.R.J.R. 111-118, Section 8113 (2009), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ118/html/PLAW-111publ118.htm>.

³⁹² John D. McKinnon, *U.S. Offers an Official Apology to Native Americans*, WALL STREET JOURNAL, Dec. 22, 2009, <http://blogs.wsj.com/washwire/2009/12/22/us-offers-an-official-apology-to-native-americans/>

³⁹³ Sean McCollum, *An American Apology, Long Overdue*, SOUTHERN POVERTY LAW CENTER, Jan. 6, 2010, <http://www.tolerance.org/blog/american-apology-long-overdue>.

³⁹⁴ Rob Capriccioso, *A sorry saga: Obama signs Native American apology resolution; fails to draw attention to it*, INDIAN LAW RESOURCE CENTER, Jan. 13, 2010, <http://www.indianlaw.org/node/529>

government toward the Native peoples of this land,” but revisions weakened the language of the apology.³⁹⁵ President Obama ultimately signed an apology for “many instances of violence, maltreatment, and neglect inflicted on Native peoples by citizens of the United States.”³⁹⁶ His public reading of the apology was on May 20, 2010, more than a year after the apology resolution passed. Five leaders from Native American tribes were present at this ceremony.³⁹⁷

5. U.S. Congress Apologizes for Slavery

Like the apology to Native Americans, the Senate’s 2009 apology for slavery, written into legislation, was a significant effort at rectifying an egregious historical wrong. It received more media attention than the U.S. apology to Native Americans; moreover, President Obama publicly praised the apology as “historic.”³⁹⁸ The Resolution acknowledges the enslavement of African Americans in U.S. states and the American Colonies; the fact that Africans were “forced into slavery,” and “brutalized, humiliated, dehumanized, and subjected to the indignity of being stripped of their names and heritage”; the separation of families; the “enmesh[ment]” of slavery into the “social fabric of the United States”; the post-slavery “virulent racism, lynchings, disenfranchisement, Black Codes, and racial segregation laws that imposed a rigid system of officially sanctioned racial segregation in virtually all areas of life”; the persistence of Jim Crow one hundred years after the abolition of slavery; and the fact that African Americans “continue to suffer from the consequences of slavery and Jim Crow laws [. . .] through enormous damage and loss, both tangible and intangible, including the loss of human dignity and liberty.”

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Barack Obama Praises Senate Slavery Apology*, TELEGRAPH, June 19, 2009, <http://www.telegraph.co.uk/news/worldnews/barackobama/5580749/Barack-Obama-praises-Senate-slavery-apology.html>.

Importantly, this apology also incorporated past apologies for slavery by U.S. officials. The resolution mentions President Bush's 2003 acknowledgement of the legacy of slavery in the United States. President Bush made this acknowledgement during a trip to Goree Island, Senegal, a former slave port. He stated that slavery

was . . . one of the greatest crimes of history . . . The racial bigotry fed by slavery did not end with slavery or with segregation. And many of the issues that still trouble America have roots in the bitter experience of other times. But however long the journey, our destiny is set: liberty and justice for all.³⁹⁹

The resolution also noted that President Clinton, in instituting a national dialogue about race, acknowledged the problems of racism as a continuing legacy of slavery.⁴⁰⁰ Finally, the resolution looked to apologies for slavery that Virginia, Alabama, Florida, Maryland, and North Carolina had issued, and explained that while an apology could not "erase the past," there were tangible ends that this formal apology to African Americans could accomplish. The apology could: (1) "help bind the wounds of the Nation that are rooted in slavery"; (2) "speed racial healing and reconciliation"; and (3) "help the people of the United States understand the past and honor the history of all people of the United States."⁴⁰¹

6. President Clinton's Apology for the Tuskegee Study

On May 16, 1997, President Clinton offered a formal apology for the U.S. Public Health Service Syphilis Study, known as the Tuskegee Study, which subjected 600 black men to medical experimentation, without informed consent, from 1932 to 1972. The study, which examined the long-term effects of untreated syphilis, withheld treatment for men diagnosed with syphilis. Clinton's apology has been lauded as meaningfully admitting fault and expressing empathy for victims.⁴⁰² In a formal ceremony that included some of the surviving

³⁹⁹ Concurrent Resolution Apologizing for the enslavement and racial segregation of African-Americans, June 18, 2009, SCON 26 RFH, 111th CONGRESS 1st Session, S. CON. RES. 26

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *E.g.*, Donna Franklin, *Beyond the Tuskegee Apology*, WASHINGTON POST, May 29, 1997 (explaining that the apology for the Tuskegee syphilis study could have the beneficial effect of helping African Americans re-gain trust in the healthcare system). The University of Tuskegee annually honors victims of the Tuskegee Study on

victims of the study and family members, President Clinton made a speech that not only accepted blame and stated that it was “time to end the silence,” but also acknowledged the pain and suffering of the survivors and promised to work to make changes in the future, including by providing a \$200,000 grant for Tuskegee University to establish a center for bioethics and research.⁴⁰³

One victim of the study, Herman Shaw, also spoke at the ceremony. He expressed gratitude for Clinton for inviting the survivors to the White House and for “doing [his] best to right this wrong tragedy and to resolve that Americans should never again allow such an event to occur.”⁴⁰⁴ Shaw explained his hopes that an apology could help America to put the tragedy of the Tuskegee study behind it, stating, “[I]t is never too late to work to restore faith and trust.”⁴⁰⁵

7. Lessons to be learned from U.S. formal apologies to its citizens.

The historical examples of U.S. official public apologies most importantly demonstrate their feasibility. Thus, Britel’s request does not require any break with precedent or the establishment of new and unheard-of practices. The examples also set in relief those practices that are more likely to achieve the goals of formal apologies.

the anniversary of Clinton’s apology. Robert Herriman, *Tuskegee University to Honor the 16th Anniversary of Clinton’s Apology*, EXAMINER, April 1, 2013, <http://www.examiner.com/article/tuskegee-university-to-honor-the-16th-anniversary-of-president-clinton-s-apology>.

⁴⁰³ An excerpt of Clinton’s apology, which precedes his remarks about concrete ways to move forward and make changes in the wake of the tragedy, including the following excerpt: “You did nothing wrong, but you were grievously wronged. I apologize and I am sorry that this apology has been so long in coming. [. . .] To Macon County, to Tuskegee, to the doctors who have been wrongly associated with the events there, you have our apology, as well. To our African American citizens, I am sorry that your federal government orchestrated a study so clearly racist. That can never be allowed to happen again. It is against everything our country stands for and what we must stand against is what it was. [. . .]” REMARKS BY THE PRESIDENT IN APOLOGY FOR STUDY DONE IN TUSKEGEE, May 16, 1997, available at <http://clinton4.nara.gov/New/Remarks/Fri/19970516-898.html>. Stephen Thomas, *Thomas: Tuskegee atonement begins with an apology*, 52(14) Emory Review, Dec. 6, 1999, http://www.emory.edu/EMORY_REPORT/erarchive/1999/December/erdeceMBER.6/12_6_99tuskegee.html

⁴⁰⁴ *Id.*

⁴⁰⁵ Jonathan Peterson, *Clinton Tells Tuskegee Survivors : ‘I Am Sorry’*, May 17, 2007, LA Times, http://articles.latimes.com/1997-05-17/news/mn-59624_1_tuskegee-university/

For example, the celebration of the apology to Japanese Americans who were wrongfully interned establishes the lesson that apologies should not be a one-time occurrence but must be recalled and re-commemorated to assure that lessons of righting wrongs endure and contribute to descendants of those who were harmed. Public announcements that include victims and their families, and that are not isolated events but are part of a process of national dialogue toward reconciliation and rectification are more likely to achieve the goals of an apology. Similarly, the apology to subjects of the Tuskegee study, which included funding for a Center on Bioethics and Research, may help to assure that racist research practices will not be repeated.

On the other hand, the formal apology to Native Americans, while codified, serves as an example of how even legislatively enacted acknowledgements of harm may still leave much to be desired for the people to whom it is addressed. As critics have observed, the public nature of the apology was delayed, and failed to address the intended recipients. They have contrasted President Obama's efforts with Canada's 2008 apology to its Native people.⁴⁰⁶ When Canada apologized to its Native Americans, its Prime Minister publicly asked all citizens to tune into a live broadcast of the apology, which he read in front of parliament and tribal leaders.⁴⁰⁷ This apology referred to specific ways Canada aggrieved its Native people, including through the assimilation of Native children in church-run boarding schools, where children were often abused.⁴⁰⁸ Canada also set aside monetary reparations for

⁴⁰⁶ Lise Balk King, *A Tree Fell in the Forest: The U.S. Apologized to Native Americans and No One Heard a Sound*, INDIAN COUNTRY TODAY MEDIA, Dec. 3, 2011, <http://indiancountrytodaymedianetwork.com/2011/12/03/tree-fell-forest-us-apologized-native-americans-and-no-one-heard-sound>.

⁴⁰⁷ *Id.*; see also DeNeen L. Brown, *Canadian Government Apologizes For Abuse of Indigenous People*, WASHINGTON POST, June 12, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/11/AR2008061100419.html> (“[Prime Minister] Harper rose on the floor of a packed House of Commons and condemned the decades-long federal effort to wipe out aboriginal culture and assimilate native Canadians into European-dominated society.”).

⁴⁰⁸ Ian Austen, *Canada Apologizes to its Indians*, N.Y. TIMES, June 12, 2008, http://www.nytimes.com/2008/06/12/world/americas/12iht-canada.4.13668939.html?_r=0.

the surviving students of these schools.⁴⁰⁹ The U.S. apology, critics argue, missed an opportunity to acknowledge specific transgressions against Native Americans, and to emphasize the importance of the apology through a celebrated public announcement.⁴¹⁰

Most importantly, if not most obviously, despite the examples of apologies for the human rights violations the U.S. has perpetrated, there has not been a ceasing of wrongs committed by the government. Lessons have not yet been fully learned and incorporated. For many, if not all victims of harm, the apologies are not enough. However, these shortcomings cannot be used to diminish Britel's right to the apology which he has requested and the obligation of the United States to provide him with one. As Herman Shaw noted, it is never too late to try to right the wrongs.⁴¹¹

B. Apologies to Non-U.S. Citizens: Benefits and Lessons Learned

Political apologies to foreign governments and their citizens have tended to be less formal than those offered to U.S. citizens. They have not been codified into U.S. law, and they often come from less highly ranked members of the government than the President. Apologies have worked as standard exchanges within international relations and as with apologies in the domestic sphere, apologies offered to international governments or their people have the potential to serve to accept blame, admit mistake, offer sympathy, and promise change. U.S. officials often offer such apologies after other governments have requested them, which makes them valuable tools of diplomacy. International apologies, like their domestic counterparts, are also important on a human level. Apologies can be very meaningful and identity-affirming for people who have been wronged, and thus do not exist in a vacuum of diplomatic relations.

1. General Examples of U.S. Apologies for International Wrongs

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *See supra* note 405.

Examples of United States apologies for harms occurring internationally have included the State Department's 1983 apology to France for protecting a Nazi from extradition;⁴¹² the State Department's 1989 apology to Nicaragua for forcibly entering its embassy during the Panamanian invasion;⁴¹³ Clinton's 1998 and 1999 apologies to Rwandans⁴¹⁴ and Guatemalans,⁴¹⁵ respectively; Clinton's 1999 apology for NATO's bombing of China's Belgrade embassy; U.S. Admiral Fallon's 2001 apology for the U.S.S. *Greeneville's* collision with a Japanese fishing vessel;⁴¹⁶ Bush's 2002 apology for the deaths of two Korean girls struck and killed by a U.S. military vehicle; Bush's 2008 apology to the Iraqi Prime Minister for an American soldier shooting the Koran (President Obama apologized for a similar incident in 2012);⁴¹⁷ and a U.S. commander's 2012 apology to South Korea for the handcuffing of three South Koreans by U.S. military police officers in a parking dispute.⁴¹⁸ These apologies covered a wide array of types of harms, although many of them involved civilian deaths.

2. War on Terror Apologies

In 2004, photos depicting U.S. soldiers abusing Iraqi prisoners surfaced in the media.⁴¹⁹ The photos documented vivid and disturbing acts of torture, including prisoners

⁴¹² Ryan Releases Report on Barbie: U.S. Apologizes to France for Hampering Barbie's Extradition by Lyin, TELEGRAPH, Aug. 17, 1983, <http://www.jta.org/1983/08/17/archive/ryan-releases-report-on-barbie-u-s-apologizes-to-france-for-hampering-barbies-extradition-by-lyin>.

⁴¹³ Gregory Katz, *U.S. Apologizes to Ortega*, SUN SENTINEL, Dec. 31, 1989, available at http://articles.sun-sentinel.com/1989-12-31/news/8902170894_1_ambassador-antenor-ferrey-troops-nicaraguan-embassy

⁴¹⁴ Associated Press, Text of Clinton's Rwanda Speech, CBS NEWS, 1998, available at <http://www.cbsnews.com/news/text-of-clintons-rwanda-speech/>

⁴¹⁵ John M. Broder, *Clinton Offers His Apologies to Guatemala*, N.Y. TIMES, Mar. 11, 1999, <http://www.nytimes.com/1999/03/11/world/clinton-offers-his-apologies-to-guatemala.html>.

⁴¹⁶ Doug Struck, *Apologies Resonate with Japanese*, CHICAGO TRIBUNE, Mar. 2, 2001, http://articles.chicagotribune.com/2001-03-02/news/0103020256_1_ehime-maru-uss-greenville-scott-waddle.

⁴¹⁷ *Bush Apology for Koran Shooting*, BBC NEWS, May 20, 2008, http://news.bbc.co.uk/2/hi/middle_east/7410367.stm.

⁴¹⁸ Choe Sang-Hun, *U.S. General Apologizes for Dispute in Seoul*, N.Y. TIMES, July 8, 2012, http://www.nytimes.com/2012/07/09/world/asia/us-commander-apologizes-over-handcuffing-of-koreans.html?_r=0.

⁴¹⁹ Thom Shanker, *Bush Voices 'Disgust' at Abuse of Iraqi Prisoners*, N.Y. TIMES, May 1, 2004, <http://www.nytimes.com/2004/05/01/world/the-struggle-for-iraq-captives-bush-voices-disgust-at-abuse-of-iraqi-prisoners.html?ref=abughraib>.

being subjected to sexual abuse, a prisoner bound with wires, and a prisoner with an English slur written on his skin.⁴²⁰ Media outlets around the world condemned this torture, and under this scrutiny, President Bush offered an apology, speaking to Jordan's King Abdullah II, and stated:

“I was sorry for the humiliation suffered by the Iraqi prisoners and the humiliation suffered by their families. [. . .] I told him I was as equally sorry that people seeing those pictures didn't understand the true nature and heart of America [. . .] It's a stain on our country's honor and our country's reputation. I am sickened by what I saw and sickened that people got the wrong impression.”⁴²¹

This apology referred to acts of torture as “humiliat[ing]” for the prisoners and their families.

In addition to President Bush's apology for the abuses at Abu Ghraib, the U.S. government has issued several other “War on Terror” apologies. These have ranged from former U.S. government counterterrorism expert Richard Clarke's apology to the American people for policies that left the country vulnerable to terrorist threats, to various expressions of sympathy and monetary compensation for civilian casualties in Iraq.⁴²²

3. Lessons to be learned from U.S. Apologies to Foreign Governments or Foreign Citizens

President Bush's 2004 apology for the abuses at Abu Ghraib provides insight into public apologies that fail to fully accomplish their goals. Bush spoke his apology not to any of the individual Iraqi prisoners, and not even to Iraqi leaders, but instead to Jordan's King Abdullah II. Moreover, the language of the apology did not quite accept responsibility or acknowledge the level of abuse that the prisoners at Abu Ghraib suffered. While expressing regret for what happened to them, Bush also expressed regret for how the abuses promulgated worldwide misunderstanding of the United States. Bush's apology drew criticism for lacking

⁴²⁰ *Id.*

⁴²¹ Jarrett Murphy, *Bush 'Sorry' for Prisoner Abuse*, CBS NEWS, May 7, 2004, <http://www.cbsnews.com/news/bush-sorry-for-prisoner-abuse/>.

⁴²² Mark Gibney and Niklaus Steiner, *Apology and the American "War on Terror,"* THE AGE OF APOLOGY 287, 295 (2003).

in frankness, for not being directed at the victims themselves, and for the accompanying continued defense of Defense Secretary Donald Rumsfeld.⁴²³

The inappropriate use of apologies combined with prolonged government justification of war actions, including invading Iraq, has made apologies problematically unpredictable.⁴²⁴ The United States has failed to establish with consistency “what wrongs prompt acknowledgement and apologies,” and “what wrongs do not.”⁴²⁵ For example, the United States has issued restitution payments and apologies for individual civilian deaths in Iraq but has not similarly acknowledged Afghani casualties.⁴²⁶ The inconsistency of apology can lead to a level of national cognitive dissonance, disconnecting specific harms from their greater causes, effects, and from a sense of social responsibility:

“[A]s a nation we somehow believe that saying, ‘We are sorry’ to some Iraqis who have been harmed in the course of fighting means that we do not need to say, ‘We are sorry’ to the Iraqi people, generally, for the cruel and incompetent way in which the war and the ensuing occupation have been carried out.”⁴²⁷

The United States should learn from its previous War on Terror apologies. Britel deserves an apology from the U.S. government—one that accepts responsibility for rendering and torturing him, admits that he was innocent, and offers remorse for his suffering. Such an apology will illuminate, rather than obfuscate, actions that the United States took in the course of the War on Terror, which continue to have devastating consequences for innocent victims of extraordinary rendition. As noted from the examples above, such an apology has historical precedent, and it would greatly benefit Britel, who has exhausted other legal remedies for the wrongful and illegal torture he experienced at the hands of U.S. agents.⁴²⁸

⁴²³ Bill Nichols, Bush Apologizes as Pressure Rises on Rumsfeld, USA TODAY, May 6, 2004, http://usatoday30.usatoday.com/news/world/iraq/2004-05-06-us-abuse_x.htm.

⁴²⁴ *Id.* at 287-88.

⁴²⁵ *Id.*

⁴²⁶ *Id.* at 294-95.

⁴²⁷ *Id.* at 295.

⁴²⁸ See *infra* Part II (explaining that Britel has been denied traditional forms of legal recourse, and thus alternative forms of acknowledgement and repair, such as an apology, are required as a matter of human rights obligations).

C. Apologies by State and Local Governments and Private Actors

State and local governments and private entities also have both the responsibility and the authority to issue Britel an apology. Historically, individual states and local governments have issued apologies in the same way as has the federal government and cover all manner of wrongs. For example, government-issued apologies in the past year alone have addressed wrongs such as the misconduct of government employees (e.g., Governor Christie’s 2014 apology for his staff’s “revenge-closing” of highway lanes)⁴²⁹ to apologizing for state-inflicted torture.

1. The City of Chicago: Rahm Emanuel’s Apology for Era of Torture

Rahm Emanuel’s 2013 apology sets an important example for apologizing to victims of torture. His apology addressed an era in the Chicago Police Department, under ex-commander Jon Burge, during which many African American men were tortured into giving false confessions for crimes.⁴³⁰ Emanuel explained in a public statement that he believed the settlement offered to victims “is a way of saying all of us are sorry about what happened here in the city,” and was meant to bring closure after the “dark period” of the decades of torture of prisoners.⁴³¹ A defense attorney representing many of the victims expressed their appreciation for the apology, explaining, “We’re grateful that Mayor Emanuel has heeded our demand for an apology and would acknowledge that the Chicago police torture scandal is a dark stain on the history of the city and that he is sorry for it.”⁴³² While these victims of the torture also received monetary compensation, the apology was both necessary and meaningful for their full recovery.

⁴²⁹ Rebecca Kaplan, *Christie Apologizes for Bridge Controversy, Fires top Aide*, CBS NEWS, Jan. 9, 2014, <http://www.cbsnews.com/news/christie-apologizes-for-bridge-controversy-fires-top-aide/>.

⁴³⁰ John Burge, *Mayor ‘Sorry’ for Torture Era*, CHICAGO TRIBUNE, Sept. 11, 2003, http://articles.chicagotribune.com/2013-09-11/news/chi-city-council-settles-burge-torture-cases-for-123-million-20130911_1_burge-victims-burge-era-torture-era.

⁴³¹ *Id.*

⁴³² *Id.*

2. North Carolina's Apologies

In recent years, North Carolina has often apologized for past misdeeds and brutalities. In 2007, North Carolina apologized for slavery and issued a resolution accepting responsibility for its role in slavery and urging its citizens to “eliminate racial prejudices, injustices, and discrimination from our society.”⁴³³

North Carolina has also apologized for its past practices of sterilization and eugenics.⁴³⁴ It is estimated there were over 7,600 victims of forced sterilization in North Carolina.⁴³⁵ In 2011, on the heels of a flurry of lawsuits and scholarly investigations into sterilizations that occurred between 1945 and 1974, Governor Purdue admitted, “The state owes something to the victims.”⁴³⁶ In 2013, North Carolina passed a bill promising compensation to victims of sterilization.⁴³⁷ North Carolina has thus set an important example in terms of acknowledging the importance of an apology in moving forward from the scars that linger after transgressions.

3. Lessons Learned from State and Local Apologies

Human rights obligations exist not only at the federal level, but states and localities too must uphold these norms. In the case of Britel, his torture was vitally facilitated by Aero Contractors based at the Johnston County Airport in North Carolina. Britel and other survivors of extraordinary rendition and torture have attempted to obtain accountability from

⁴³³ S.J.R. 1557 (N.C. 2007), available at

<http://www.ncleg.net/Sessions/2007/Bills/Senate/PDF/S1557v3.pdf>.

⁴³⁴ This was part of an effort to stop men and women from having children if they were mentally retarded, mentally ill, epileptic, promiscuous, or otherwise determined to be unable to raise children. Ann Doss Helms, *NC eugenics payments bring hope for some victims*, NEWS OBSERVER, Jul. 27, 2013,

<http://www.newsobserver.com/2013/07/27/3062619/nc-eugenics-payments-bring-hope.html/>.

⁴³⁵ *Id.*

⁴³⁶ Kim Severson, *Thousands Sterilized, a State Weighs Restitution*, N.Y. TIMES, Dec. 10, 2011,

<http://www.nytimes.com/2011/12/10/us/redress-weighed-for-forced-sterilizations-in-north-carolina.html?pagewanted=all>.

⁴³⁷ *Id.*

local entities.⁴³⁸ The examples of apologies by a state and/or its political subdivisions demonstrate their political feasibility, the obligations, and the benefits that flow from local acknowledgements of harm.

IV. Apologies Offered by Other Countries and International Institutions

Other governments and foreign institutions have offered public apologies in related matters. They provide examples of circumstances where they are useful and how best to issue statements of that are most likely to mitigate harm. Two such examples are reviewed below.

A. Argentina's Apology for Support of Nazis

Argentine President Fernando De La Rúa apologized for his country's role in World War II and the massacre of hundreds of Jews as a result of Argentina's participation in and support of the Nazi Regime.⁴³⁹ President De La Rúa expressed his deep regret, and stated his desire that this act of contrition be the means to establish precedence in the prevention of any other forms of xenophobia and racism in the world. It was the first time that the Argentine government acknowledged Argentina's "historical behavior towards its Jewish minority community."⁴⁴⁰

B. United Nations Apology to Rwanda

The Secretary General Kofi Annan apologized on behalf of United Nations for the absence of adequate protection during the 1994 genocide in Rwanda. He did so after an independent investigation he authorized found that the massacres could have been prevented if the United Nations has intervened earlier and provided "safe havens" to those in danger.⁴⁴¹

⁴³⁸ See letter from Khadija Anna Lucia Pighizzini to Johnson County Commissioners, North Carolina, seeking an acknowledgement and apology for the torture of her husband, at <http://www.quakerhouse.org/Quaker-House-on-Torture-and-Aero-Contractors.html>

⁴³⁹ Ruti Teitel, *Chapter 5 The Transitional Apology*, Google Books, 108, available at <http://books.google.com/books?hl=en&lr=&id=R-xXxCOXlkAC&oi=fnd&pg=PA101&dq=President+George+Bush+Apology+Letter+Japanese+Internment&ots=sFJExrzx3o&sig=KP0RFz8DGtUBSt36mecbR2-Nt9k#v=onepage&q&f=false>.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 110.

With this apology, Secretary General Annan recognized the failure to discharge humanitarian obligations in Rwanda affected the entire international community and that meaningful change would require a shift in UN policies and practices and in global politics to assure that the mass slaughter of the civilians would never occur again.

V. Conclusion

The United States federal government, North Carolina, and Aero Contractors should apologize to Britel. The responsibility to offer an apology to Britel derives from the fact that he was kidnapped by a team of pilots based in Johnston County, N.C., at offices and a hangar housed at a county airport.⁴⁴² Federal agents kidnapped him in Pakistan and transported him in a manner that violated international norms and amounted to cruel, inhuman, and degrading treatment, if not torture. They delivered him to a Moroccan prison known for barbaric and inhumane practices. He was transferred from prison to prison in Morocco, and suffered from egregious torture for nine terrifying years. He has not recovered.

Because the United States government and local governments have a tradition of offering apologies to people victimized by government agents and policies, rendering an apology to Britel would be in keeping with its historical precedents, both for the federal government and for the state of North Carolina. More importantly, apologizing to Britel is the right thing to do, both legally and morally.

⁴⁴² Deborah Weissman et. al., *The North Carolina Connection To Extraordinary Rendition and Torture*, UNC LAW, Jan. 2012, available at <http://www.law.unc.edu/documents/clinicalprograms/finalrenditionreportweb.pdf>.

SECTION SIX
INTERNATIONAL LAW AND THE OBLIGATION TO OFFER AN APOLOGY

I. Defining Extraordinary Rendition

When considering the suffering of a fellow human being at the end of an unrelenting sequence of injustices, it is perhaps natural to fixate on the single worst rights violation he or she endured. So follows the tendency to reduce analysis of extraordinary rendition solely to a discussion of torture: its efficacy, its effects on the victims, and its legality. It is clear that extraordinary rendition implicates fundamental human rights from the outset; in tragic cases, like Britel's, the sequence of violations culminates in brutal torture.

Scholars have posited a number of formal definitions of extraordinary rendition. Some experts have suggested that it is important to distinguish between the constituent elements of extraordinary rendition and the rationales behind its practice. Those constituent elements include: (1) any form of deprivation of liberty, (2) arbitrary and incommunicado detention, and (3) no access to any form of judicial process or review.⁴⁴³ Potential rationales include: (A) to detain a dangerous suspect and avert his or her participation in an attack, and (B) to extract intelligence information from the detainee.⁴⁴⁴ This construction acknowledges the existence of the many human rights violations involved in extraordinary rendition, including but not limited to torture. Through this lense, the web of international obligations breached by this practice coalesces. Abou Elkassim Britel was a victim of torture. Both Britel and his wife were, and continue to be, victims of numerous other human rights violations.

II. International Obligations Implicated by Extraordinary Rendition

⁴⁴³ Nikolaus Kyriakou, *The International Convention for the Protection of All Persons From Enforced Disappearance and its Contributions to International Human Rights Law, With Specific Reference to Extraordinary Rendition*, 13 MELB. J. INT'L L. 424, 448 (2012).

⁴⁴⁴ *Id.*

International law explicitly prohibits torture and the cruel, inhuman, or degrading treatment or punishment of any individual. These rules bind all states as customary norms.⁴⁴⁵ Many states have also committed themselves to these principles by ratifying important treaties that echo and extend these prohibitions.

Extraordinary rendition also implicates other human rights norms, including violations of the right to liberty and security, the right to be treated with humanity and with respect for one's inherent dignity, the right of access to a court, and the right against enforced disappearance.⁴⁴⁶

A. Customary International Law & Human Rights Norms Concerning Torture

The Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly in 1948.⁴⁴⁷ The document is a product of the cooperation of a number of drafting nations, led by the United States. Its underlying philosophy is captured in its opening words: “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world”⁴⁴⁸ The UDHR includes a series of articles meant to codify these “equal and inalienable rights.” Of particular importance to the current analysis are Articles 3, 5, and 8. Article 3 states that, “[e]veryone has the right to life, liberty, and security of person.”⁴⁴⁹ Article 5 extends this idea: “[n]o one shall be subjected to torture, or to cruel inhuman or degrading treatment or punishment.”⁴⁵⁰ Finally, Article 8 sets out a “. . . [r]ight to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted . . . by law.”⁴⁵¹

⁴⁴⁵ See *infra* Part 0.

⁴⁴⁶ Kyriakou *supra* note 443, at 449.

⁴⁴⁷ Universal Declaration of Human Rights (hereinafter UDHR), G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at Art. 3.

⁴⁵⁰ *Id.* at Art. 5.

⁴⁵¹ *Id.* at Art. 8.

As a general matter, declarations of the UN General Assembly do not have binding character under international law. The UDHR has, however, been recognized by many legal scholars, human rights bodies, and international jurists as a codification of customary international law.⁴⁵² Alternatively, the UDHR has been considered an essential explication of the binding human rights provisions included in the UN Charter.⁴⁵³ The extraordinary rendition program and the actions undertaken against Britel constitute violations of the legal norms set out by the UDHR.⁴⁵⁴

B. Treaties Concerning Torture

Contributing to the vital importance of the UDHR has been the incorporation of its core principles into numerous international treaties. The International Covenant on Civil and Political Rights (ICCPR) is one such instrument. A second treaty incorporating and expanding important concepts from the UDHR is the Convention Against Torture (CAT).

1. International Covenant on Civil and Political Rights

The ICCPR entered into force in 1976, requiring parties to “ensure the equal right of men and women to the enjoyment of all civil and political rights set forth . . . in the present covenant.”⁴⁵⁵ Article 7 of the ICCPR adopts the UDHR’s prohibition regarding torture: “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁴⁵⁶ This language has been clarified by the Human Rights Committee, the

⁴⁵² Weissman, *et al.*, *Obligations and Obstacles: Holding North Carolina Accountable for Extraordinary Rendition and Torture* (hereinafter *Obligations and Obstacles*), UNC Immigration and Human Rights Policy Clinic, 19 (2012), available at <http://www.law.unc.edu/documents/clinicalprograms/obligationsandobstaclesncreport.pdf>, citing Michael John Garcia, Cong. Research Serv., *Renditions: Constraints Imposed by Laws on Torture*, 21 (2009), available at <http://www.fas.org/sgp/crs/natsec/RL32890.pdf>.

⁴⁵³ Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law* (need page). See also *Filartiga v. Pena-Irala*, 630 F. 2d 876, 890 (1980) (holding that “the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind”); Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law* 98 EJIL 15 (2004) (discussing *Prosecutor v. Anto Furundzija*, a case heard at the International Criminal Tribunal for the former Yugoslavia which identified the prohibition of torture as a jus cogens norm).

⁴⁵⁴ For a detailed account of the harms inflicted upon Britel, see *supra* Section One.

⁴⁵⁵ International Covenant on Civil and Political Rights (hereinafter ICCPR), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

⁴⁵⁶ *Id.* at Art. 7.

principle interpretive body of the ICCPR, as requiring state parties to “not expose individuals to the danger of torture, or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”⁴⁵⁷

Article 2 paragraph 1 of the ICCPR indicates that a state party to the covenant must ensure these rights to all individuals “within its territory and under its jurisdiction.”⁴⁵⁸ The UN Human Rights Committee, the ICCPR oversight body, interprets this language to include individuals within the control of a state actor as well as those found within the state’s territory.⁴⁵⁹ Furthermore, in paragraph 3 each state party “undertakes to ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy, notwithstanding that the violation has been by persons acting in an official capacity.”⁴⁶⁰

The United States has both signed and ratified the ICCPR, as have other sovereign nations connected to Britel’s case, including Italy, Pakistan and Morocco.⁴⁶¹ The United States, in particular, has sought to limit its obligations through a number of controversial reservations, understandings and declarations (RUDs).⁴⁶²

2. Convention Against Torture

The Convention Against Torture entered into force in 1987, stating as its ultimate goal “to make more effective the struggle against torture and other cruel, inhuman or

⁴⁵⁷ Obligations and Obstacles *supra* note 452; citing U.N. Human Rights Comm., *General Comment No. 20* ¶ 9, U.N. Doc. A/47/40 (1992).

⁴⁵⁸ ICCPR Art. 2(1).

⁴⁵⁹ UN Human Rights Comm., *General Comment No. 31* ¶10, CCPR/C/21/Rev.1/Add.13 (2004) (“This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”). This understanding contradicts the unique outlier position of the United States, which interprets this language as applying only to individuals that are both found within its territory and under its jurisdiction.

⁴⁶⁰ ICCPR Art. 2(3).

⁴⁶¹ See UN Treaty Collection, International Covenant on Civil and Political Rights *available at* https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en.

⁴⁶² See Weissman, *et al.*, *A Call to Uphold the Core Universal Principles of Responsibility and Protection of Human Rights: Extraordinary Rendition, Torture, and North Carolina*, UNC Immigration and Human Rights Policy Clinic, 43–48, *available at* <http://www.law.unc.edu/documents/clinicalprograms/ertorturenbriefweb.pdf> (discussing the invalidity of U.S. RUDs).

degrading treatment or punishment throughout the world.”⁴⁶³ Article 1 of CAT defines torture as any act satisfying the following three requirements: (1) causing “severe pain or suffering, whether physical, or mental . . . ,” (2) undertaken for such purposes as obtaining information or a confession, intimidation, coercion, punishment, or discrimination of any kind, and (3) inflicted by, or at the instigation or with the consent of, a public official or person acting in an official capacity.⁴⁶⁴

Part I adopts and extends the prohibitions laid out in the UDHR. Article 2 requires each member state to take effective measures to prevent acts of torture under its jurisdiction, and explicitly states that, “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability, or any public emergency, may be invoked as a justification for torture.”⁴⁶⁵ The non-derogable nature evidenced in Article 2 is a key element of CAT, applied broadly to provisions throughout the instrument.

Article 3 addresses “refoulement,” prohibiting any member state from expelling, returning, or extraditing an individual to “another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” The *substantial grounds* analysis is further clarified by Article 3 paragraph 2, which requires competent authorities to take into account, “all relevant considerations including . . . the existence in the [other] State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”⁴⁶⁶ The principle interpretive body of CAT, the Committee on Torture, understands that *substantial grounds* requires only a “mere theory or suspicion” of possible torture, rather than a “high probability.”⁴⁶⁷ The refoulement prohibition is also non-derogable. In 2004, the

⁴⁶³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT), G.A. res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987.

⁴⁶⁴ *Id.* at Art. 1

⁴⁶⁵ *Id.* at Art. 2

⁴⁶⁶ *Id.* at Art. 3(2)

⁴⁶⁷ Obligations and Obstacles *supra* note 452 at 25, citing Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT’L L. 309, 321 (2006) (citing the U.N.

UN Special Rapporteur on Torture noted that the Article 3 prohibition is “an inherent part of the overall absolute and imperative nature of the prohibition of torture and forms of ill-treatment.”⁴⁶⁸

Article 14 of CAT requires each state party to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”⁴⁶⁹ Article 16 of CAT adopts similar prohibitions as those explicated above against cruel, inhuman, or degrading treatment or punishment.⁴⁷⁰

The United States has both signed and ratified CAT, as have other sovereign nations connected to Britel’s case, including Pakistan, Morocco, and Italy.⁴⁷¹

C. Other International Obligations Implicated by Extraordinary Rendition

Though violations of the prohibition against torture often take center stage in the analysis of extraordinary rendition, other human rights are implicated. These include violations of the right to liberty and security, the right to be treated with humanity and with respect for one’s inherent dignity, and the right of access to a court.

The sources of these rights are set out under the UDHR and ICCPR. UDHR Article 3 states that, “[e]veryone has the right to life, liberty and security of person.”⁴⁷² That provision

Comm. Against Torture, Report of the Committee Against Torture, Annex IX, U.N. Doc. A/53/44 (Sept. 16, 1998)). See *supra* Part I.H.

⁴⁶⁸ Obligations and Obstacles *supra* note 452 at 26, citing Jillian Button, *Spirited Away (Into a Legal Black Hole?): The Challenge of Invoking State Responsibility for Extraordinary Rendition*, 19 FLA. J. INT’L L. 531, 548 (2007) (quoting the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 28, delivered to the Security Council and the General Assembly, U.N. Doc. A/59/324 (Aug. 23, 2004)).

⁴⁶⁹ CAT Art. 14.

⁴⁷⁰ *Id.* at Art. 16.

⁴⁷¹ See UN Treaty Collection, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-9&chapter=4&lang=en. The United States, in particular, has sought to limit its obligations under CAT through controversial RUDs, which have been challenged as invalid. See Weissman, *et al.*, *supra* note 462.

⁴⁷² UDHR Art. 3

is echoed by ICCPR Article 9(1).⁴⁷³ The right to a trial, and the right to be treated with humanity and dignity arise from ICCPR Articles 9(4) and 10(1) respectively.⁴⁷⁴

Finally, the right against enforced disappearance, an outgrowth of the right to liberty and security, is implicated. This international norm prohibits any form of deprivation of the liberty of a person, by the agents of a state, followed by a refusal to acknowledge the deprivation or a concealment of the fate or whereabouts of that person.⁴⁷⁵ The implication of this right in extraordinary rendition is fundamentally important, as it recognizes that those abducted are not the only victims. So too are the close family members of the detainees, tortured by the denial of any knowledge of the location or well-being of their loved ones.

1. Enforced Disappearance – Treaty and Customary International Law

The International Convention for the Protection of All Persons from Enforced Disappearance (CPED) was first opened for signature by the UN in 2007.⁴⁷⁶ Its construction parallels that of CAT, with Article 2 providing a definition of “enforced disappearance”:

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.⁴⁷⁷

Like CAT concerning torture, CPED adopts a non-derogable prohibition of enforced disappearance, and creates legal responsibilities for member states and an interpretive body.⁴⁷⁸ CPED has not been widely adopted as of yet,⁴⁷⁹ thus it is important also to consider the customary legal nature of the prohibition against enforced disappearance.

⁴⁷³ ICCPR Art. 9(1).

⁴⁷⁴ *Id.* at Arts. 9(4), 10(1).

⁴⁷⁵ Kyriakou *supra* note 443, at 450–451.

⁴⁷⁶ See UN Treaty Collection, International Convention for the Protection of All Persons from Enforced Disappearance, available at <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&msgid=IV-16&chapter=4&lang=en>.

⁴⁷⁷ International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter CPED), Dec. 20, 2006, Doc.A/61/448 1, Art. 2.

⁴⁷⁸ *Id.* at Art. 2(1).

⁴⁷⁹ Morocco has both signed and ratified the treaty, and Italy is a signatory. See *supra* FN 37.

In determining the customary nature of a human rights norm, some scholars have noted that repeated violations do not necessarily offer conclusive evidence of the absence of a customary norm where there also exists an escalating response by the international community.⁴⁸⁰ Relevant to the customary nature of the right against enforced disappearance was the international reaction to the epidemic of disappearances taking place in Latin American countries in recent history. Many states around the world denounced and protested these governments' repeated violations, as enforced disappearance became a common tool to silence dissidents. UN materials "indicate[] that the international community as a whole regarded the prohibition of enforced disappearance as a rule of customary law."⁴⁸¹ Further evidence of customary legal status follows from jurisprudence of regional human rights bodies including the Inter-American Court of Human Rights, the European Court of Human Rights, and the Human Rights Committee.⁴⁸² In a decision in 2006, the Inter-American Court stated that, "[t]he prohibition of the forced disappearance of persons . . . has attained the status of *jus cogens*."⁴⁸³ Though national legislation criminalizing enforced disappearance is generally found only in Latin American countries, perhaps evidencing the development of a regional customary norm, its prohibition has been cited as a distinct human rights norm in four international instruments in the past 18 years. The balance of state practice supports one conclusion: the prohibition against enforced disappearance has reached the level of customary international law.⁴⁸⁴

2. The Link between Enforced Disappearance and Extraordinary Rendition

⁴⁸⁰ Kyriakou *supra* note 443, at 432.

⁴⁸¹ These materials include "an avalanche" of UN resolutions and concerted actions, including importantly UN Resolution 33/173 and 47/133, treating enforced disappearance as a universal issue, and citing implication of the human rights outlined in the UDHR and ICCPR.

⁴⁸² Kyriakou *supra* note 443, 434.

⁴⁸³ Goiburú v. Paraguay (2006) Inter-Am Court HR (ser C) No 153.

⁴⁸⁴ Kyriakou *supra* note 443, 434-36.

Many victims of the extraordinary rendition program have been subjected to torture, and cruel, inhuman or degrading treatment. Many of them have also been held for long periods incommunicado, with no recognition by the governments involved. This certainly was true in Britel's case.

Where the nature and location of detention is acknowledged, at least some of the suffering of the loved ones connected to the detainee may be relieved. In such cases other human rights violations may then take center stage, allowing focus to be placed on subjects such as torture. Later acknowledgement of detention does not, however, compensate for or repair the harm inflicted by the concealment of a loved one's deprivation of liberty. Both Britel, and his wife, were injured above and beyond the serious bodily injury inflicted on Britel by CIA agents, Aero Contractors, Pakistani soldiers and Moroccan prison keepers. Such human rights violations are captured by the prohibition of enforced disappearance, and coincide with broader protections of the ICCPR and UDHR.

III. Application of International Obligations to State & Local Governments, and Private Entities acting on behalf of a State

The Supremacy Clause of the U.S. Constitution states that, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁴⁸⁵ This provision grants ratified treaties status equivalent to federal statutes in U.S. Domestic law.

A legal distinction is made between treaties that are considered self-executing and those deemed non-self-executing. Self-executing treaties require no further legislative act beyond ratification to be read into U.S. domestic law. Non-self-executing treaties arguably require additional legislation through which the U.S. Congress embodies the provisions of the

⁴⁸⁵ U.S. Constitution Art. VI, cl. 2.

treaty in domestic legal form. Of the treaties discussed in this paper, the United States has signed and ratified both the ICCPR and CAT. The U.S. government controversially considers both of these treaties to be non-self-executing.⁴⁸⁶ The reservations, understandings, and declarations asserting that position have been contested as impermissible both by the relevant treaty bodies and international legal scholars.⁴⁸⁷ No additional legislation has been enacted to incorporate the provisions of the ICCPR into U.S. domestic law. The United States has also recently adopted a position interpreting the ICCPR as being inapplicable to its actions outside of its territory. This position has been criticized by international legal scholars, former rapporteurs, and the UN Human Rights Committee.⁴⁸⁸

Alternatively, federal statutes addressing torture as required by CAT have been adopted. Primary among them is the Torture Convention Implementation Act (commonly known as the “Federal Torture Statute” or “FTS”), which was enacted to expand U.S. jurisdiction to torture cases committed outside of U.S. territory. The FTS criminalizes both torture, and conspiracy to commit torture, by any national of the United States or any national of a foreign state present in the United States.⁴⁸⁹ The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) also implements CAT provisions, particularly the Article 3 prohibition against expulsion, extradition, or refoulement of an individual to a country where there are substantial grounds for believing the person would be subjected to torture.⁴⁹⁰

Where the supremacy clause arguably creates binding authority in both the ICCPR and CAT, it is clear that the broad provisions of the FTS and FARRA, and the domestic

⁴⁸⁶ Weissman, *et al.*, *supra* note 462, at 43–48.

⁴⁸⁷ *Id.*

⁴⁸⁸ See *infra* Section Seven.

⁴⁸⁹ 18 U.S.C. § 2340A (2006).

⁴⁹⁰ Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681–822 (1998) (codified at 8 U.S.C. § 1231 note (2006)), *available at* <http://www.gpo.gov/fdsys/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf>.

implementations of CAT, are binding on all parties involved. Both local and state governments have breached domestic law by knowingly providing material support to extraordinary rendition operations, specifically in the provision of facilities and operating licenses to the company, planes, and pilots complicit in the rendition of Britel. That support also renders these government actors complicit in the breach of U.S. international obligations. The reach of the FTS and FARRA extends as well to the private owners and operators of Aero Contractors, who acted on behalf of the CIA and the U.S. government to abduct and transport Britel to a nation infamous for its use of torture.⁴⁹¹

A. International Legal Framework of State Responsibility

The treaties and customary principles discussed above provide a framework of primary legal rules that are implicated in Britel's case, and extraordinary rendition generally. Some of those instruments also specifically create secondary rules that are triggered after a breach of an individual's human rights, including rules that require the breaching state to provide some form of remedy. Such rules serve to supplement the general framework of State Responsibility, a rich body of law that has developed to answer the question: "What are the consequences when a state breaches its international obligations?"

1. The Draft Articles of State Responsibility

The Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter "Draft Articles") were adopted by the International Law Commission in 2001. They are the culmination of efforts stretching over 40 years to codify the international law regarding State Responsibility.⁴⁹² The Draft Articles are designed to mirror in effect the Draft Articles of Treaty Interpretation which, with minimal changes, were later adopted internationally as the Vienna Convention on the Law of Treaties.⁴⁹³

⁴⁹¹ See *supra* Part I.D.

⁴⁹² International Law Commission, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (hereinafter Draft Articles), 1 (James Crawford, ed., 2002).

⁴⁹³ *Id.* at 57–60.

Part I of the Draft Articles outlines the circumstances giving rise to State Responsibility. Chapter I sets out three primary requirements from which the law of state responsibility follows. Article 1 states that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”⁴⁹⁴ Article 2 clarifies that an “internationally wrongful act” encompasses any action or omission that is, (a) attributable to the State, and (b) constitutes a breach of an international obligation of the State.⁴⁹⁵ The source of the obligation is immaterial.⁴⁹⁶ Article 3 states that an act is characterized as internationally wrongful based solely on the application of international law, without regard to the internal law of any state.⁴⁹⁷

Acts are attributable to a State if they are carried out by an organ of the State (Article 4),⁴⁹⁸ or by any person or group acting under the direction or control of that State (Article 8).⁴⁹⁹ Where these requirements are fulfilled, as they were in the case of Britel’s extraordinary rendition, State responsibility arises. State responsibility and the resulting obligations arise under international law independently of their invocation by another State.⁵⁰⁰ Thus the principles discussed in the following section are applicable regardless of whether an injured State affirmatively seeks redress for harms caused by an internationally wrongful act.

(a). Content of the Law of State Responsibility

Part II of the draft articles details the content of the law of State responsibility.

Chapter I “comprises six articles, which define in general terms the legal consequences of an

⁴⁹⁴ *Id.* at Art. 1.

⁴⁹⁵ *Id.* at Art. 2. The commentary to Article 2 considers the view that a third element, ‘damage to another state’ is required: “[W]hether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure.”

⁴⁹⁶ *Id.* at 83, (*Commentary* to Article 2, ¶ 6.)

⁴⁹⁷ *Id.* at Art. 3.

⁴⁹⁸ *Id.* at Art. 4.

⁴⁹⁹ *Id.* at Art. 8.

⁵⁰⁰ *Id.* at 254 (Introductory Material to Part Three Chapter 1).

internationally wrongful act of a State.”⁵⁰¹ Articles 28 and 29 note the legally binding nature of the consequences set out in the draft articles, and clarify that such consequences “are without prejudice to, and do not supplant, the continued obligation of the responsible State to perform the obligation breached.”⁵⁰² Article 30 continues consideration of the underlying breach, by requiring cessation and assurances of non-repetition.⁵⁰³

Article 31 is a key provision. It provides that a responsible State is obligated to make “full reparation for the injury caused by the internationally wrongful act.” Injury is defined as including “any damage, whether material or moral, caused by the internationally wrongful act.”⁵⁰⁴ Closely tied to this obligation for reparation are Articles 34–37, which describe in detail the forms that such reparation may take. Article 34 states that full reparation “shall take the form of restitution, compensation and satisfaction, either singly or in combination.”⁵⁰⁵

These forms of reparation exist in a hierarchy. Restitution is defined in Article 35 as the “re-establish[ment of] the situation which existed before the wrongful act was committed.”⁵⁰⁶ Given an internationally wrongful act, the responsible State must make restitution to the extent that it is (a) not materially impossible, or (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.⁵⁰⁷ The responsible State is obligated to provide compensation for any damage not “made good by restitution.”⁵⁰⁸ This includes any financially assessable damage. Finally, the responsible State is under an obligation to “give satisfaction for the injury caused by the act insofar as it cannot be made good by restitution or compensation.”⁵⁰⁹ Satisfaction may

⁵⁰¹ *Id.* at 191 (Introductory Material to Part Two Chapter 1).

⁵⁰² *Id.* at Arts. 28–29.

⁵⁰³ *Id.* at Art. 30.

⁵⁰⁴ *Id.* at Art. 31.

⁵⁰⁵ *Id.* at Art. 34.

⁵⁰⁶ *Id.* at Art. 35.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at Art. 36.

⁵⁰⁹ *Id.* at Art. 37.

include: acknowledgement of the breach, an expression of regret, a formal apology or another “appropriate modality.”⁵¹⁰ Satisfaction must not be “out of proportion to the injury” nor “take a form humiliating to the responsible State.”⁵¹¹

The use of apology is further refined in the commentary to Article 37. The authors state that apology is a common form of satisfaction that may be given by an appropriate official or even the head of State.⁵¹² A number of cases before the International Court of Justice have resulted in an order for apology, which the authors note can “do much to resolve a[n international] dispute.”⁵¹³ In the *LaGrand* case the Court considered an apology to be required but not sufficient, where German visitors to the U.S. were detained and later executed without being allowed to contact their nation’s consulate: “where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties.”⁵¹⁴

Thus, a State responsible for an internationally wrongful act must first, so far as possible, return the situation to what it was before the act, then for any damage not remedied by such restitution it must provide monetary compensation where possible. Finally, it must provide satisfaction—which may include a formal apology—for those harms which cannot be rectified through restitution or compensation.

(b). Scope of Obligations

Article 33 identifies the meaningful scope of a State’s responsibility subsequent to an internationally wrongful act.⁵¹⁵ It states that obligations arising from State responsibility may

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

⁵¹² *Id.* at 231–234.

⁵¹³ *Id.*

⁵¹⁴ *LaGrand (Germany v. United States of America), Merits*, judgment of 27 June 2001, para. 123.

⁵¹⁵ Draft Articles at Art. 33.

be owed to another State, to several States, or to the international community as a whole.⁵¹⁶ The party owed such obligations is determined based on the “character and content of the international obligations and on the circumstances of the breach.”⁵¹⁷ The inclusion of “several states” anticipates the possibility that failure to comply, for example, with an “integral” obligation in a multilateral treaty may constitute an internationally wrongful act against all other states party to that treaty.⁵¹⁸ A similar situation arises where a State breaches a “legal regime established under customary international law.”⁵¹⁹ Obligations may be owed to the international community as a whole where the violation is of a nature that implicates the interests of all nations.

Article 33 also introduces the idea that the scope of obligations required by the law of State responsibility “does not prejudice those rights which may accrue directly to any person or entity other than a State.”⁵²⁰ The commentary explains that where an obligation of reparation exists towards a State, such reparation may accrue to the benefit of a person or persons. Specifically concerning a “breach of an obligation under a treaty concerning the protection of human rights,” the “individuals concerned should be regarded as the ultimate beneficiaries and in that sense the holders of relevant rights.”⁵²¹

(c). Circumstances Precluding Wrongfulness

In the analysis of a breach of international obligations, it is important to consider a number of circumstances which the law of State responsibility identifies as precluding wrongfulness. The articles of Part I Chapter 5 set out six situations where state responsibility will not arise, despite the existence of a breach of international obligation.

⁵¹⁶ *Id.*

⁵¹⁷ *Id.* at 207–208.

⁵¹⁸ *Id.*

⁵¹⁹ *Id.* (Comment 1).

⁵²⁰ *Id.*

⁵²¹ *Id.* (Comment 3).

Relevant to the present case are Articles 21 and 25, addressing self-defense and necessity respectively. Article 21 states that the “wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.”⁵²² Article 25 provides that a State may take action contrary to its international obligations where it “is the only means for the State to safeguard an essential interest against a grave and imminent peril.”⁵²³ This is limited in two ways: (1) necessity can only be invoked where the breach does not impair an essential interest of a State or States towards which the obligation exists, and (2) necessity may not be invoked where the underlying obligation excludes the possibility of invoking necessity.⁵²⁴ It follows that where the internationally wrongful act arises from the violation of a treaty obligation non-derogable for any reason, such as those found in the CAT, these circumstances precluding wrongfulness should not apply.

It is outside the scope of this policy brief to thoroughly analyze the position of the U.S. government regarding the law of war and its application to activities taken after the events of September 11, 2001. It is sufficient for the purposes of these provisions of the law of State responsibility that at the time of his rendition Britel was not a part of any impending threat to any State, group, or person. This is supported both by the fact that his rendition seems to have been conducted for the collection of information alone, by his complete absolution of any terrorists ties by the Italian and Moroccan authorities, and by the fact that the United States has never accused him of any wrongdoing.⁵²⁵ Furthermore, many of the international obligations breached in the process of Britel’s extraordinary rendition are explicitly non-derogable—they do not allow a breach for any reason, including reasons relating to war or public emergency.

⁵²² Draft Articles, Art. 21.

⁵²³ *Id.* at Art. 25.

⁵²⁴ *Id.*

⁵²⁵ See *supra* Section One. Britel has been pardoned by the Moroccan government.

Also of note is Article 55 concerning *lex specialis*. It states that the draft articles do not apply “where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”⁵²⁶ Arguments in favor of extraordinary rendition have claimed that the law of war (or international humanitarian law) acts as *lex specialis* rendering human rights treaties inapplicable to these abductions, acts of torture, violations of human dignity, and transfers of individuals to States known for torture. Such theories rely additionally on characterizing detainees as *unprivileged combatants*, offering them none of the protections of the Geneva Conventions that govern armed conflict. Some scholars have described this construction as a *legal vacuum*, which renders the victims of extraordinary rendition unprotected either under the law of war, or under general international law.⁵²⁷ Comprehensive analysis of these arguments is beyond the scope of this policy paper. However, it must be noted that many of the international obligations breached during the extraordinary rendition of Britel are non-derogable. Furthermore, recognition of certain human rights as *jus cogens*—as has been done by the ICTY regarding torture, and the Inter-American Court of Human Rights regarding enforced disappearance—short-circuits any argument allowing for the violation of those rights.⁵²⁸

IV. The Case for Apology

The details of Abou Elkassim Britel’s extraordinary rendition have been discussed in detail in Part A. The tragic circumstances of his abduction, his treatment at the hands of CIA officers, and his eventual transfer and prolonged, torturous detention in a Moroccan prison

⁵²⁶ Draft Articles, Art. 55.

⁵²⁷ Margaret Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEORGE WASHINGTON LAW REVIEW 1333, 1400 (2007).

⁵²⁸ See Judgment, *Furundzija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, § 3(c) (holding that the prohibition on torture has reached *jus cogens* status); *Goiburú* [2006] Inter-Am Court HR (ser C) No. 153 (“[t]he prohibition on forced disappearance of persons and the corresponding obligations to investigate and punish those responsible has attained the status of *jus cogens*”).

shock the conscience. That injustice is multiplied by the lack of any recognition or remedy offered by any of the governments involved.⁵²⁹

It can be hoped that these acts raise deep moral questions for the agents and pilots directly involved. No less do they challenge the moral norms of the people in whose name they have been committed—those represented by the governments authorizing abduction, torture, and rendition. What is clear is that these acts implicate a web of international legal obligations. Under international law, breached obligations give rise to State responsibility which in turn requires reparation. Even were that not the case, the nations involved in the extraordinary rendition of Britel—particularly the United States—can benefit from addressing these harms directly in the form of an official apology.

A. Breach of International Obligations including Extraordinary Rendition & Torture Constitute Internationally Wrongful Acts

The human rights treaties and customary laws discussed above create a web of protection for fundamental human rights at an international level. The first moment of Britel's abduction in Pakistan constituted a breach of those protections, followed by long years of brutal human rights violations. The actions of Pakistani officials in the abduction and temporary detention of Britel breach obligations under CAT, ICCPR, and customary international law. His subsequent mistreatment by CIA agents from the United States constitutes a similar breach. The rendition of Britel to Morocco at the hands of those CIA agents and by the pilots and planes of Aero Contractors was yet another breach. The ultimate violation in this sequence of breaches rising to the level of internationally wrongful acts was Britel's incommunicado detention and torture in a Moroccan prison. Italian officials were complicit throughout by providing erroneous information about Britel and failing to exercise their obligation to communicate with and protect him.

⁵²⁹ See *supra* Sections One and Two.

Each of these breaches implicates a right to remedy provided by the relevant treaties. Those obligations serve to supplement the State responsibility that arises under customary international law as codified by the Draft Articles. For each breach of an international obligation, the governments of Pakistan, Morocco, Italy, and most importantly, the United States are required under international law to provide reparations. The rights to such reparations may fall in the hands of the injured State, in this case Italy, but must accrue to Britel as the injured individual. Above and beyond these multiple sources of obligation towards Britel, however, exist a plurality of internationally wrongful acts affecting the interests of those States party to CAT and the ICCPR, and finally to the international community as a whole. Each of these obligations is listed in **Figure 1** below.

Figure 1: Table of international obligations implicated in extraordinary rendition of Britel

Obligation	Source	Binding on	States in breach	Obligation owed to
The right to life, liberty, and security of person.	Int'l Custom (as codified in UDHR Art. 3)	All States	United States, Pakistan, Morocco	Britel
	ICCPR Art. 9(1)	United States, Pakistan, Morocco, Italy (more)	United States, Pakistan, Morocco	Britel
Prohibition of torture.	Int'l Custom (as codified in UDHR Art. 5)	All States	United States, Pakistan, Morocco	Britel
	ICCPR Art. 7	United States, Pakistan, Morocco, Italy (more)	United States, Pakistan, Morocco	Britel
	CAT Art. 2 <i>*Non-derogable</i>	United States, Pakistan, Morocco, Italy (more)	United States, Pakistan, Morocco	Britel
Prohibition on cruel, inhuman or degrading treatment.	Int'l Custom (as codified in UDHR Art. 5)	All States	United States, Pakistan, Morocco	Britel

	ICCPR Art. 7	United States, Pakistan, Morocco, Italy (more)	United States, Pakistan, Morocco	Britel
	CAT Art. 16 <i>*Non-derogable</i>	United States, Pakistan, Morocco, Italy (more)	United States, Pakistan, Morocco	Britel
Prohibition on refoulement w/ substantial grounds to believe individual will be tortured.	CAT Art. 3 <i>*Non-derogable</i>	United States, Pakistan, Morocco, Italy (more)	United States, Pakistan	Britel
Right to an effective remedy if fundamental rights violated.	Int'l Custom (as codified in UDHR Art. 8)	All States	United States	Britel
	ICCPR Art. 2	United States, Pakistan, Morocco, Italy (more)	United States	Britel, All States party to ICCPR
Obligation to ensure legal system provides redress to victims of torture, including full rehabilitation to extent possible.	CAT Art. 14	United States, Pakistan, Morocco, Italy (more)	United States	Britel, All States party to CAT
Right to a fair trial.	ICCPR Art. 9(4)	United States, Pakistan, Morocco, Italy (more)	United States, Pakistan, Morocco	Britel
Right to be treated with humanity and dignity.	ICCPR Art. 10(1)	United States, Pakistan, Morocco, Italy (more)	United States, Pakistan, Morocco	Britel
Prohibition on Enforced Disappearance	Int'l Custom.	All States	United States, Pakistan, Morocco	Britel
	CPED Art. 2	Morocco	Morocco	Britel

Jus Cogens – No person shall be subjected to torture.	Non-derogable	All States	United States, Pakistan, Morocco	Britel, Int'l Community
Jus Cogens – No person shall be subjected to enforced disappearance.	Non-derogable	All States	United States, Pakistan, Morocco	Britel, Int'l Community

B. Apology is the Appropriate Reparation under International Law

The UDHR, ICCPR, and CAT are unanimous in their call for States to provide an effective remedy for those whose fundamental rights are violated. CAT specifies that for victims of torture or cruel, inhuman, or degrading treatment, the remedy must provide rehabilitation so far as it is possible.⁵³⁰ This core idea matches the purpose of reparations as required under the law of State responsibility: to return the injured party, to the extent possible, to the position it was in before the breach of international obligation.

The brutal chain of human rights violations that constitute extraordinary rendition harms the victim, and his family, on multiple levels. As discussed in Part B.2, some of that harm takes the form of a lasting, psychological injury. Perhaps the greatest harm, and the greatest injustice, lies in the consequences that follow those targeted for extraordinary rendition long after their detention and torture ends. Britel, though found to have no connections to any terrorist groups or terrorist activities, continues to live in the shadow of an onerous stigma affecting every part of his life.

These harms are unique. Their effect cannot be repaired by restitution, for no responsible party can act to reverse Britel's rendition. Nor can compensation alone provide relief. No official body has acknowledged responsibility for targeting Britel, nor for the act of his abduction, torture and rendition. The appropriate reparation under the law of State

⁵³⁰ See *supra* note 464.

responsibility is satisfaction; and for the reasons above, that satisfaction should most appropriately include an official apology. Such an apology, if adequately constructed, could substantially address many of the numerous obligations that the United States, and those States complicit in the extraordinary rendition program, have incurred.⁵³¹ C. The Effect of Apology on International Law

The nature of international law provides that every action of a State can inform and potentially change that law. This section seeks to address a potential concern of the United States, or other parties, regarding the issuance of an apology to Britel; specifically, an official apology may be constructed that, (1) legitimately addresses Britel's needs, (2) takes a step towards fulfilling obligations arising under the law of State responsibility, and (3) does not have a future effect on the formation of customary international law, or the interpretation of treaties.

The key to the construction of an apology which will meet all of these concerns is that Britel's goal and the purposes for an apology under international law coincide: the goal is the rehabilitation of one man's life, and the mere acknowledgement of the actions that were taken against him.

Some scholars have considered the normative effect of official apologies, indicating that explicit construction can preclude these acts from being considered state practice.⁵³² Similar language, disclaiming any effect on the accepted interpretation of treaty obligations, can serve to prevent an apology from being considered as informative of the issuing State's interpretation of its treaty obligations.⁵³³

Conclusion

⁵³¹ See *supra* Section Four.

⁵³² See Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 Va. J. Int'l L. 433, 453–461 (2006).

⁵³³ *Id.*

The governments of the United States, Pakistan, Morocco, and Italy each played a role in the extraordinary rendition and detention of Abou Elkassim Britel. Agents of these governments grossly violated Britel's human rights. Both customary international law, and international treaties voluntarily entered into by these states, explicitly prohibit such violations. Furthermore, the relevant international law creates parallel obligations for these governments to provide a remedy to victims of human rights violations such as torture, rendition to torture, and enforced disappearance. It is clear that one purpose of such remedy is to undo the harm to the victim, so far as it is possible. This is evidenced both by the language of the CAT and in the international law of state responsibility.

Years have passed since Britel has been released to his home in Bergamo, Italy. Yet he continues to feel the effects of his psychological and physical torture every moment of his life. Perhaps worse is the stigma of the "terrorist accusation" that now follows him and his wife, effectively ostracizing them from their community. An Italian investigation concluded that Britel has no terrorist ties, and he has been pardoned by the Moroccan authorities. The United States has never accused Britel of any wrongdoing. The stigma that haunts every aspect of Britel's life continues to exist because none of the governments involved has acknowledged the harm that was done to him. Britel's rendition, detention, and torture were violations of international law. International law demands that the states responsible make reparations, and that those reparations restore Britel and his wife, so far as possible, to the peaceful way of life they enjoyed before this terrible injustice. The United States, Morocco, Pakistan, and Italy each must acknowledge its role in these violations. International law requires that the four governments offer apology to relieve the continued suffering that these violations have wrought. Aside from the legal obligation to offer an apology, to do so is in the best interest of these countries. This is especially true regarding the United States due to

its position in the international community and because of the importance of international reciprocity.

SECTION SEVEN
STATE RESPONSIBILITIES, RECIPROCITY, AND A FOCUS ON THE ROLE OF THE UNITED STATES

I. Introduction: What is Reciprocity?

... as long as every man holdeth this right of doing anything he liketh, so long are all men in the condition of war. But if other men will not lay down their right as well as he, then there is no reason for any one to divest himself of his; for that were to expose himself to prey, which no man is bound to, rather than to dispose himself to peace. This is that law of the Gospel: 'whatsoever you require that others should do to you, that do ye to them.' And that law of all men, quod tibi fieri non vis, alteri ne feceris.

Thomas Hobbes, *Of Man, Being the First Part of Leviathan*,
Ch. XIV, 1901

The concept of reciprocity in international law is foundational to international law and diplomacy.⁵³⁴ As one scholar describes it, reciprocity is “a condition theoretically attached to every legal norm of international law.”⁵³⁵ Reciprocity can have different meanings in different theoretical contexts: it can, for example, “refer either to a policy pursued by a single actor or to a systemic pattern of action.”⁵³⁶ Succinctly defined, reciprocity is the “giving of benefits to another in return for benefits received.”⁵³⁷

As a principle, reciprocity attaches to international negotiations and agreements. For example, in the agreement signed between the former Soviet Union and the United States in 1972, then President Richard Nixon and then President of the Supreme Soviet, Leonid Brezhnev, explicitly agreed that discussions and negotiations “would be conducted in a spirit of reciprocity, mutual accommodation, and mutual benefit.”⁵³⁸

Reciprocity has been deeply rooted in the American political tradition. In the context of international trade, the concept of reciprocity appears as early as 1778, wherein “the first

⁵³⁴ See, e.g., INGRID DETTER, *THE LAW OF WAR* 400 (2000) (“Reciprocity is at the root of the international legal system itself.”).

⁵³⁵ ELIZABETH ZOLLER, *PEACETIME UNILATERAL REMEDIES* 15 (1984).

⁵³⁶ Robert O. Keohane, *Reciprocity in International Relations*, 40 *INT’L ORG.* 3 (1986)

⁵³⁷ Unda D. Moum, David A. Schaefer, Jessica L. Collett, *The Value of Reciprocity*, 70 *Soc. Psych. Q.*, 199 (2007), available at <http://www3.nd.edu/~jcollet1/pubs/2007-70b.pdf>.

⁵³⁸ Keohane, *supra* note 536, at 2, citing Alexander L. George, *Political Crises*, in Joseph S. Nye, ed., *THE MAKING OF AMERICA’S SOVIET POLICY* (1984).

commercial treaty signed by the United States...with France...contained a provision for reciprocal trade concessions.” Nearly a century later, the political advantages of reciprocity in trade were reflected in political principles and emphasized in various foreign trade policies and statements.⁵³⁹

Not only is reciprocity a crucial element of international commercial exchange, but, more importantly, it underlies international social exchange. As anthropologists have observed, “the principle of reciprocity is the basis on which the entire social and ethical life of civilization rests.”⁵⁴⁰ Although it is difficult to pinpoint precisely what equivalences are being traded and conceded in reciprocal relations, roughly put, reciprocity results in exchanges where “the actions of each party are contingent on the prior actions of the others in such a way that the good is returned for good, and bad for bad.”⁵⁴¹ Moreover, the existence of reciprocity between states can serve as an indication that each state has both rights and duties to “help those who have helped them” and “not injure those who have helped them.”⁵⁴² Reciprocity underlies international law and provides a framework that facilitates the acknowledgement and enforcement of judgments, creating and incentivizing reciprocal visa and travel relationships, and comity in extradition.

For the purpose of this section, reciprocity is examined primarily within the context of international human rights law. Such an examination reveals that in order for reciprocity to serve its purpose, every nation must do its part to uphold international norms, and, when they fail to do so, it is critical that nations make appropriate reparations. By torturing Abou Elkassim Britel during his flight from Pakistan to Morocco,⁵⁴³ by transporting Britel to

⁵³⁹ *Id.* at 3.

⁵⁴⁰ SERGE-CHRISTOPHE KOLM & JEAN MERCIER YTHIER, HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY: FOUNDATIONS 276 (2006) (quoting Richard Thurnwald).

⁵⁴¹ Keohane, *supra* note 536, at 8.

⁵⁴² Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOC. REV. 165, 170 (1960).

⁵⁴³ See *supra* Section One.

Témara Prison in Morocco,⁵⁴⁴ where Britel was once again subjected to brutal physical torture horrendous torture, and by limiting Britel's ability to find any redress in the United States court system,⁵⁴⁵ the United States has failed to uphold basic international norms and has violated international law. In doing so, the United States has undermined the principle of reciprocity that ensures international cooperation and adherence to international norms. An apology is fundamental both to the restoration and repair of Britel's dignity, as well as to the principle of reciprocity. By acknowledging the ways in which United States conduct with respect to Britel violated international norms, the United States will not only give meaning to the principle of reciprocity, but also, it will serve to strengthen the foundations of international law.

II. Reciprocity, International Law, and American Exceptionalism

*Intuitively, people sense that law is more than a reflection of state interests or a measure of who has the biggest stick. If law were nothing more than enforcement by self interested states, the very concept would not be needed.*⁵⁴⁶

As explained in Part I, the principle of reciprocity encourages the trading of interests for advantages.⁵⁴⁷ In the context of international law, this creates a system that incentivizes international adherence with customary international law and discourages state behavior that deviates from international norms. Although it is clear how this plays out in examples of international trade agreements and purely economic terms, a more complex conception of reciprocity underlies the social obligations of nations within international society, one that touches on moral duty in addition to material benefit:

When there exists what we call a “practice of legality” – actors will be able to pursue their purposes and organize their interactions through law. These features of legality are crucial to generating a distinctive legal legitimacy and a sense of commitment . . . among those to whom law is addressed. They create legal obligation.”⁵⁴⁸

⁵⁴⁴ See *supra* Section One.

⁵⁴⁵ See *supra* Section Two.

⁵⁴⁶ JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW, 2 (2011).

⁵⁴⁷ *Id.* at 37.

⁵⁴⁸ *Id.* at 7.

Thus, there is a moral obligation for states to obey international law, which can be described as an “internalized commitment” rather than a sanctioned duty.⁵⁴⁹ Upholding this obligation, in turn, allows positive relationships between states to develop, and ultimately, create international cooperation critical to the resolution of international problems. In order for international human rights law to be upheld and for human rights standards to be moved forward, it is imperative that there be an international commitment among states that certain human rights norms will not be violated.

The United States’ “exceptionalist” position, however, significantly compromises the goals of international human rights law. Although the United States often justifies its position by arguing that the incorporation of international law poses a risk to United States sovereignty, Yale law professor and former legal advisor to the United States Department of State, Harold Hongju Koh, argues that, to the contrary, “the selective internalization of international law into U.S. law need not affront U.S. sovereignty.”⁵⁵⁰ Rather, Koh continues, “the process of visibly obeying international norms builds U.S. ‘soft power,’ enhances its moral authority, and strengthens U.S. capacity for global leadership in a post-September 11 world.”⁵⁵¹

Indeed, the United States prides itself on being a moral leader in the international community, and in some respects, rightfully so. Since 1945, the United States has played an integral role in fostering cooperation within the international community, ranging from its support of the United Nations to the drafting of the Universal Declaration of Human Rights in 1948.⁵⁵² The United States has also been a key actor in many international movements to promote democracy, public health, women’s rights, and myriad other international public

⁵⁴⁹ *Id.* at 27 (further explaining the work of Lon L. Fuller on law and morality).

⁵⁵⁰ Harold Hongju Koh, *On American Exceptionalism*, STAN. L. REV., 1479, 1480 (2003).

⁵⁵¹ *Id.*

⁵⁵² MICHAEL IGNATIEFF, *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 1 (2005).

goods.⁵⁵³ The belief among many in the United States is thus that “human rights, if not exactly an American invention, are best defined as we understand and practice them in the United States.”⁵⁵⁴ However, the United States is “simultaneously a leader and an outlier.”⁵⁵⁵ Although the U.S. has played, and continues to play, a fundamental role in shaping international law, it often refuses to play by those very same rules.

In ignoring international norms, the United States compromises the principle of reciprocity and significantly damages its international reputation. As Koh describes, “in the cathedral of international human rights, the United States is so often seen as a flying buttress, rather than a pillar, willing to stand outside the structure supporting it, but unwilling to subject itself to the critical examination and rules of that structure[.]”⁵⁵⁶ Such a position has several consequences.

One consequence is that the United States simply cannot maintain the moral authority to pursue a human rights agenda while simultaneously violating human rights domestically.⁵⁵⁷ In recent times, the U.S. has been seriously reproached for its own human rights record. Recently, for example, the United States was sharply criticized during a United Nations human rights committee for violations that included “everything from detention without charge at Guantánamo, drone strikes and NSA surveillance, to the death penalty, rampant gun violence and endemic racial inequality.”⁵⁵⁸ The committee, which sought to ensure the United States’ compliance with an international treaty to which the U.S.

⁵⁵³ *Id.*

⁵⁵⁴ Edward S. Greenberg, *In Order to Save It, We Had to Destroy It: Reflections on the United States and International Human Rights*, in HUMAN RIGHTS AND AMERICAN FOREIGN POLICY 40 (Fred E. Baumann, ed., 1982)

⁵⁵⁵ *Id.* at 2.

⁵⁵⁶ Koh, *supra* note 550, at 1484-85 (quoting Louis Henkin).

⁵⁵⁷ *See id.* at 1486 (“This appearance of hypocrisy undercuts America’s ability to pursue an affirmative human rights agenda. Worse yet, by espousing the double standard, the United States often finds itself co-opted into either condoning or defending other countries’ human rights abuses, even when it previously criticized them (as has happened, for example, with the United States critique of military tribunals in Peru, Russia’s war on Chechen “terrorists,” or China’s crackdown on Uighur Muslims)”).

⁵⁵⁸ Ed Pilkington, *US criticized by UN for human rights failings on NSA, guns and drones*, THE GUARDIAN (March 13, 2014), <http://www.theguardian.com/world/2014/mar/13/us-un-human-rights-abuses-nsa-drones>.

is a signatory, the International Covenant on Civil and Political Rights, noted that the United States is not meeting international human rights standards in several arenas.⁵⁵⁹

Another disturbing consequence, moreover, is that “by opposing the global rules, the United States can end up undermining the legitimacy of the rules themselves, not just modifying them to suit America's purposes” and, in doing so, make those same international rules and protections unavailable for its own use later.⁵⁶⁰ In order for the United States to remain a leader in international human rights, and just as importantly, for human rights norms to remain a salient and applicable legal concept, it is absolutely critical that the United States abandon its exceptional posture and apologize for its human rights violations.

It is internationally known that the United States has violated human rights norms through the many documented instances of torture that have followed September 11th, 2001.⁵⁶¹ Not only is there international awareness of the horrifying instances of torture at Abu Ghraib and Guantanamo Bay, but also the United States’ involvement with extraordinary rendition has been well-documented and condemned by international and intergovernmental organizations such as the United Nations, the Council of Europe, and the European Parliament, as well as by reputable non-governmental organizations such as Amnesty International and the American Civil Liberties Union (“ACLU”).⁵⁶² In addition to

⁵⁵⁹ Trymaine Lee, *UN Watchdog condemns US for Human Rights Failures*, MSNBC, Mar. 14, 2014, <http://www.msnbc.com/msnbc/us-condemned-un-human-rights-failures>.

⁵⁶⁰ Koh, *supra* note 550, at 1487.

⁵⁶¹ See The Pew Global Attitudes Project, *No Global Warming Alarm in the U.S., China: America’s Image Slips, But Allies Share U.S. Concern Over Iran, Hamas 4*, June 13, 2006, <http://pewglobal.org/reports/pdf/252.pdf>. Between 1999 and 2006, “America’s global image has again slipped and support for the war on terrorism [] declined even among close U.S. allies like Japan.” *Id.* the survey also found that despite major gaps in international public knowledge to major events and issues, “[r]eports about U.S. prison abuses at Abu Ghraib and Guantanamo have attracted broad attention in Western Europe and Japan – more attention, in fact, than in the United States. Roughly three-quarters of Americans (76%) say they have heard of the prison abuses, compared with about 90% or more in the four Western European countries and Japan.” *Id.*

⁵⁶² Human Rights Council Report: Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism [A/HRC/13/42] p. 3, Jan. 6, 2010; U.N. Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, General Comment¶1,p10., U.N.Doc.A/HRC//7/2, (Jan.10,2008). Comm. on Legal Affairs and Human Rights, Alleged Secret Detentions And Unlawful Inter-State Transfers Involving Council Of Europe Member States,¶ 27 Doc. 10957 (June 12, 2006) (prepared by Rapporteur Dick Marty, Switzerland, Alliance of Liberals and Democrats

the international consciousness of extraordinary rendition generally, the harrowing experience of Abou Elkassim Britel has been the subject of a number of international reports, as well as an important part of the Mohamed v. Jeppesen Dataplan⁵⁶³ lawsuit.⁵⁶⁴ It is indispensable for the United States to recognize that the very legitimacy of international laws banning the use of torture is compromised if the United States does not acknowledge its violations and injustices towards specific individuals with a meaningful apology.

III. The United States, International Law, and Torture

As more fully set out in Section Six above, the norm prohibiting torture is supported by both international law and widely held international understandings. The United States has played an important role in shaping those international understandings. For example, a year after the adoption of the Torture Convention by the United Nations, the Second Circuit Court of Appeals allowed a Paraguayan national to bring an action in U.S. Federal Court against the Paraguayan official who tortured and killed her brother in *Filartiga v. Pena*

for Europe) [hereinafter Marty Report 2006]; Comm. on Legal Affairs and Human Rights, Secret Detentions And Illegal Transfers Of Detainees Involving Council Of Europe Member States: Second Report, ¶ 182 Doc. 11302 rev. (June 11, 2007) (prepared by Rapporteur Dick Marty, Switzerland, Alliance of Liberals and Democrats for Europe); Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners 2006/2200(INI), Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Rapporteur: Giovanni Claudio Fava, Jan. 20, 2007; Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, Rapporteur: Giovanni Claudio Fava, Jan. 6, 2006, p. 4, http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/617/617722/617722en.pdf; Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, Rapporteur: Giovanni Claudio Fava, Nov. 16, 2006, Table 5, p. 9, <http://www.statewatch.org/cia/documents/working-doc-no-8-nov-06.pdf>; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Arts. 5(1)(b), 5(1)(1) Dec. 10, 1984, S. Treaty Doc. No 100-20 (1988) 1465 U.N.T.S 85, 23 I.L.M. 1027 (1984); Comm. on Human Right, Report of the Working Group on the Use of Mercenaries, U.N. Doc. E/CN.4/2006/11/Add.1 (March 3, 2006); ACLU Obtains Detailed Official Record of the Torture Program, http://www.aclu.org/human-rights_national-security/aclu-obtains-detailed-official-record-cia-torture-program; American Civil Liberties Union, ACLU Fact Sheet on “Air CIA,” <http://www.aclu.org/national-security/aclu-fact-sheet-air-cia>; Amnesty International, USA: Below the Radar –Secret Flights to Torture and ‘Disappearance’ 23, 29, AMR/51/051/2006 (2006); European Center for Constitutional and Human Rights, CIA Extraordinary Rendition Flights, Torture and Accountability—A European Approach, (Manfred Nowak, Special Rapporteur on Torture, Preface, (2009); Reprieve, “Human Cargo”: Binyam Mohamed and the Rendition Frequent Flier Programme 22-35 (2008) (reporting about a number of Pilots who flew planes for Aero Contractors).

⁵⁶³ See *supra* Section Two.

⁵⁶⁴ See *supra* note 562.

Irala.⁵⁶⁵ Although the torture had taken place in Paraguay, both the plaintiff, Dolly Filartiga, and the official, Américo Norberto Peña Irala, were in the United States at the time of the suit.⁵⁶⁶ Initially, the district court dismissed the suit “for lack of jurisdiction on the ground that violations of the law of nations ‘do not occur when the aggrieved parties are nationals of the acting state.’”⁵⁶⁷ Throughout the opinion, the Second Circuit acknowledged that torture by officials “is now prohibited by the law of nations” and that the “prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens.”⁵⁶⁸ In the opinion’s conclusion, the Court emphasized the “common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture.”⁵⁶⁹

The Court went on to explain the importance of reinforcing international norms against torture:

Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.⁵⁷⁰

⁵⁶⁵ 630 F.2d 876 (2d Cir. 1980). While the recent U.S. Supreme Court decision in *Kiobel v. Royal Dutch Petroleum Co.* 133 S. Ct. 1659 (2013) cast significant doubt on the jurisdictional holding of *Filartiga*, it did not case doubt on the understanding of torture as a violation of international law.

⁵⁶⁶ Dolly Filartiga was in the United States as an asylum seeker. Américo Norberto Peña Irala was in the United States on a visitor’s visa. See International Crimes Database project, *Dolly M.E. Filartiga and Joel Filartiga v. Americo Norberto Peña-Irala*, <http://www.internationalcrimesdatabase.org/Case/995/Filartiga-v-Pe%C3%B1a-Irala/> (last visited April 14, 2014).

⁵⁶⁷ *Filartiga v. Peña-Irala*, 577 F.Supp. 860, 863 (E.D.N.Y.1984).

⁵⁶⁸ *Id.* at 884

⁵⁶⁹ *Id.* at 890

⁵⁷⁰ *Id.*

The decision informed the enactment of the Torture Victim Protection Act of 1991 (“TVPA”), which codified the holding in *Filartiga*.⁵⁷¹ Through this legislation, as well as its 1994 ratification of the United Nations Convention Against Torture (CAT),⁵⁷² the United States proclaimed its strengthened commitment to human rights. Discussing the TVPA, the late human rights activist, former congressman, and law professor Robert Drinan wondered if “other nations [would] follow the progressive example of the United States....”⁵⁷³ and noted that “many nations follow the legal developments in the United States and sometimes emulate them.”⁵⁷⁴ Drinan went on to say that “the TVPA is a timid beginning by the United States – the prime architect of the United Nations and the principal cheerleader for its efforts to promote and protect human rights,” and is a law that, “like the Civil Rights Act of 1964, has the potential to transform a nation and a world.”⁵⁷⁵

However, the United States has since back-pedaled on its strong stance against torture.⁵⁷⁶ Following the events of September 11, 2001, Vice-President Cheney vowed to use “any means at our disposal” to fight what was already being described as the “War on Terror.” In doing so, the United States largely disregarded international law such as the Geneva Convention Relative to the Protection of Civilian Persons in Time of War and greatly blurred the distinction between civilians and combatants;⁵⁷⁷ in 2002, then-President George

⁵⁷¹ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (hereinafter TVPA) (allowing victims of official torture and extrajudicial killing a private right of action in federal court).

⁵⁷² See The United Nations, *Treaty Collection, Chapter IV, 9. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* New York, 10 December 1984, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (indicating the countries that have signed and/or ratified the CAT).

⁵⁷³ ROBERT J. DRINAN, THE MOBILIZATION OF SHAME 101 (2001). *Kiobel* cannot stand for the proposition that the United States does not consider itself a leader or example in matters pertaining to international human rights. See e.g., FACT SHEET: Obama Administration Leadership on International Human Rights, Dec. 2013 at <http://www.whitehouse.gov/the-press-office/2013/12/04/fact-sheet-obama-administration-leadership-international-human-rights>.

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.* at 103.

⁵⁷⁶ See *Kiobel v. Royal Dutch Petroleum Co.* 133 S. Ct. 1659 (2013).

⁵⁷⁷ See generally, Kate Martin & Joe Onek, “Enemy Combatants,” *The Constitution and the Administration’s War on Terror*, “American Constitution Society for Law and Policy (2004), available at <http://www.acslaw.org/pdf/enemycombatants.pdf>.

W. Bush denied Al Qaeda prisoners the protections of the Geneva Convention through executive order.⁵⁷⁸ The United States' disregard for international law resulted in a dire lack of protections for prisoners and gross human rights violations. Suspects believed to have a connection to Al Qaeda were subjected to waterboarding; some were subjected to waterboarding as many as 183 times.⁵⁷⁹ Although the Senate report on the CIA's use of torture remains largely classified, information leaked on April 11, 2014 indicates that the CIA's techniques "included waterboarding, which produces a sensation of drowning, stress positions, sleep deprivation for up to 11 days at a time, confinement in a cramped box, slaps and slamming detainees into walls."⁵⁸⁰ The leaked report found that the CIA's techniques were "brutal and far worse than the agency communicated to policymakers."⁵⁸¹ Previously, the U.S. Senate panel that reviewed some of the abuses concluded that such abuses were "the direct result of Bush administration detention policies, not individual guards or interrogators,"⁵⁸² thus, these human rights violations were in fact U.S. policies.

One of the most outrageous developments in United States human rights jurisprudence during this time was that the internationally accepted definition of torture was

⁵⁷⁸ See Karen DeYoung, *Bush Approves New CIA Methods*, WASHINGTON POST, July 21, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001264.html> (describing a 2007 executive order asserting that "the CIA program will now comply with a Geneva Conventions prohibition against 'outrages upon personal dignity, in particular humiliating and degrading treatment' in light of the 2002 determination "that members of al-Qaeda and the Taliban, as well as other allegedly terrorist captives, were 'enemy combatants' rather than prisoners of war covered by the 1949 Geneva Conventions."); see also Erich Lichtblau, *Gonzales Speaks Against Torture During Hearing*, N.Y. TIMES, Jan. 7, 2005, available at <http://www.nytimes.com/2005/01/07/politics/07gonzales.html?pagewanted=print&position=> (describing the questions by both Democrats and Republicans concerning Gonzales's previous positions, including his 2002 belief that "Al Qaeda and the Taliban in Afghanistan were not subject to the full protections of the Geneva Convention").

⁵⁷⁹ See Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, 8-13 (May 30, 2005), available at http://ccrjustice.org/files/05-30-2005_bradbury_40pg_OLC%20torture%20memos.pdf (describing some of the torture techniques used by the CIA and their frequency).

⁵⁸⁰ Ali Watkins, Jonathan S. Landay, & Marisa Taylor, *CIA's use of harsh interrogation went beyond legal authority, Senate report says*, MCLATCHY D.C. (April 11, 2014), <http://www.mcclatchydc.com/2014/04/11/224085/cias-use-of-harsh-interrogation.html#storylink=cpybipartisan>.

⁵⁸¹ Bradley Klapper, *Leaked report: CIA misled Bush administration on 'brutal' interrogation techniques*, PBS NEWSHOUR (April 11, 2014), <http://www.pbs.org/newshour/rundown/leaked-documents-show-cia-misled-bush-administration-brutal-enhanced-interrogation-techniques/>.

⁵⁸² See John Byrne, *Bush officials authorized torture of US citizen, lawyers say*, THE RAW STORY (Jan. 30, 2009), http://rawstory.com/news/2008/Bush_officials_authorized_torture_of_US_0130.html.

itself disregarded by United States officials. In an August 2002 memo from then-Assistant Attorney General Jay S. Bybee to Alberto R. Gonzales, the language of the United States statute ratifying the U.N. Convention Against Torture interpreted torture as “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death,”⁵⁸³ a gross departure from any internationally recognized definition of torture, as well as the definition of torture codified by the TVPA.⁵⁸⁴

Some have argued that the administration’s flagrant disregard of international law in its detainee policy may have been informed by the United States’ own reciprocity calculations:⁵⁸⁵ that the United States made a “common-sense policy judgment” and decided that the United States had no interest in compliance with Article 3 of the Geneva Convention “because al Qaeda itself clearly had no interest in complying either” and that “Al Qaeda’s behavior towards captured Americans or other westerners” would not change regardless of the conditions of detention.⁵⁸⁶

However, the Bush administration’s reciprocity calculation was inaccurate. Even if the administration were correct in its assessment that changes in its detainee policy would not

⁵⁸³ See Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President 1 (Aug. 1, 2002), available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf> (Part I.B of the memo examines the possible definition of “severe” in the definition of torture as “severe physical or mental pain or suffering” and concludes that “severe” indicates that the pain must rise to such a level that “would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions.”)

⁵⁸⁴ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (defining torture as “any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from— (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.”).

⁵⁸⁵ Michael D. Gottesman, Reciprocity and War: A New Understanding of Reciprocity’s Role in Geneva Convention Obligations, pg. 148, arguing that “there is evidence that officials have considered the reaction their decisions on detainee policy would invite, and they have defined the scope of potential reactors narrowly.”

⁵⁸⁶ Eric Posner, *Apply the Golden Rule to al Qaeda?*, WALL ST. J., July 15, 2006, at A9.

have affected the treatment of U.S. troops, the way the United States behaves has far-reaching consequences. As one former Infantry Platoon Leader explained:

[T]he fight over Article 3 concerns not only Al Qaeda and the war in Iraq. It also affects future wars, because when we lower the bar for the treatment of our prisoners, other countries feel justified in doing the same. Four years ago in Liberia, in an attempt to preserve his corrupt authority, President Charles Taylor adopted the Bush administration's phrase "unlawful combatants" to describe prisoners he wished to try outside of civilian courts. Today Mr. Taylor stands before The Hague accused of war crimes...The success of America's fight against terrorism depends more on the strength of its moral integrity than on troop numbers in Iraq or the flexibility of interrogation options.⁵⁸⁷

Then-Secretary of State Colin Powell expressed similar concerns and indicated that finding that the Geneva Conventions did not apply to the conflict in Afghanistan would "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific conflict and in general."⁵⁸⁸ Neal Katyal, who represented Osama Bin Laden's bodyguard, stated that "for every one piece of hate mail he has received, "there are 10 supportive e-mails from [American] troops, saying, 'Thank you for defending me and my cause, because if I'm caught in some other country, what's going to save me from a beheading, except for the fact that the U.S. plays by rules?'"⁵⁸⁹ Simply put, "[w]hen treaties provide reciprocal benefits, the United States clearly gains from the enforcement of the agreements by other parties to the treaty.

⁵⁸⁷ Paul Rieckhoff, *Do Unto Your Enemy*, N.Y. TIMES, Sept. 25, 2006, at A25, available at <http://www.nytimes.com/2006/09/25/opinion/25rieckhoff.html>. See also Michael D. Gottesman, *Reciprocity and War: A New Understanding of Reciprocity's Role in Geneva Convention Obligations*, pg. 177 (arguing that "U.S. detainee policy could invite adverse responses through indirect reciprocity. Perhaps the most straightforward way this would happen is as follows: Countries in future conflicts may see the United States as a bad actor because it stretched its conception of Geneva obligations in this conflict, and those countries will return the expected bad behavior.)

⁵⁸⁸ Memorandum from Colin Powell, Secretary of State, to Counsel to the President and Assistant to the President for National Nat'l Sec. Affs. (Jan. 26, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf>.

⁵⁸⁹ T.R. Goldman, *How an Overachieving Law Professor Toppled the President's Terror Tribunals*, LEGAL TIMES, (Aug. 9, 2006) available at, <http://www.law.com/jsp/article.jsp?id=1155027927847&slreturn=20140127212040>
http://www.kuwaitifreedom.org/media/editorial/How_an_Overachieving_Law_Professor_Toppled_the_President_Terror_Tribunals.php

Indeed, for the 4.5 million Americans who live overseas and the 60 million who traveled abroad last year . . . the ability to enforce treaty-based rights abroad is essential.”⁵⁹⁰

The United States’ departure from moral human rights norms has significant and worrisome implications. In his 2009 remarks, President Barack Obama stated:

“From Europe to the Pacific, we’ve been the nation that has shut down torture chambers and replaced tyranny with the rule of law. That is who we are. And where terrorists offer only the injustice of disorder and destruction, America must demonstrate that our values and our institutions are more resilient than a hateful ideology.”⁵⁹¹

However, the United States of America cannot merely demonstrate its values and adherence to international human rights norms through rhetoric. Rather, in order to truly show that the U.S. is worthy of being known as the “nation that has shut down torture chambers”⁵⁹² rather than the nation that has instituted them, the United States must take a strong stance against its prior actions and acknowledge the injustices that many individuals have endured because of U.S. policy.

In order for its self-conception as an international beacon of human rights to ring true, it is essential that the United States itself adhere to the rules of the international community it inhabits. A solid first step would be for the United States to gain international legitimacy by adhering to its obligations under the international treaties that it has ratified, for example, the International Covenant for Civil and Political Rights (“ICCPR”) and the Convention Against Torture (“CAT”).⁵⁹³ Specifically, the United States must correct its position on extraterritoriality, the extent to which a treaty applies outside of a state’s borders. As of 1995, the U.S. has articulated that the ICCPR⁵⁹⁴ is inapplicable to its operations abroad and

⁵⁹⁰ Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L. L. 52, 55 (2011).

⁵⁹¹ President Barack Obama, Remarks By the President on National Security, The White House Office of the Press Secretary, May 21, 2009, *transcript available at*, <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>

⁵⁹² *Id.*

⁵⁹³ *See supra* Section Six

⁵⁹⁴ *See* Charlie Savage, *U.S. Seems Unlikely to Accept That Rights Treaty Applies to Its Actions Abroad*, N.Y. Times (March 6, 2014), *available at*, <http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept->

has asserted a comparable position with respect to its CAT obligations.⁵⁹⁵ Despite overwhelming persuasive legal arguments against the United States' position on extraterritoriality with respect to the ICCPR, the U.S. continues to assert the view that Article 2(1) of the Covenant, which states that each state “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,”⁵⁹⁶ reflects only the responsibility of the United States to uphold the ICCPR with respect to individuals both within its territory and subject to its jurisdiction.⁵⁹⁷ The U.S. has asserted a similar position with respect to the applicability of CAT outside of its borders.⁵⁹⁸ This, in turn, has allowed the United States to make the legally suspect argument that it is not responsible for the human rights violations that have taken place outside its borders at CIA black sites and other detention facilities.⁵⁹⁹ However, as Harold Koh explained while he served as the Legal Adviser to the U.S. Department of State, both of these positions are untenable.⁶⁰⁰ As Koh explains:

that-rights-treaty-applies-to-its-actions-abroad.html (explaining the U.S.'s stance on ICCPR obligations). *See also Testimony of John B. Bellinger III*, Privacy and Civil Liberties Oversight Board (Mar. 19, 2014), available at http://justsecurity.org/wp-content/uploads/2014/03/Bellinger_PCLOB_comment_3-17-14.pdf (senior legal official for the U.S. government's testimony describing the U.S. position that the ICCPR does not apply extraterritorially, despite the fact that “U.N. Human Rights Committee and many other countries do not agree with the longstanding U.S. interpretation” *Id.* at 2).

⁵⁹⁵ *Id.*

⁵⁹⁶ ICCPR, Art. 2(1)

⁵⁹⁷ Letter to the Editor from Manfred Nowak, *What does extraterritorial application of human rights treaties mean in practice?*, <http://justsecurity.org/2014/03/11/letter-editor-manfred-nowak-extraterritorial-application-human-rights-treaties-practice/> (Mar. 11, 2014) (explaining the position of the former UN Special Rapporteur on Torture regarding the impracticality of the United States position on extraterritoriality).

⁵⁹⁸ Harold Hongju Koh, *Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict* (Jan. 21, 2013), available at <https://s3.amazonaws.com/s3.documentcloud.org/documents/1053901/state-department-cat-memo.pdf> (explaining the U.S. position despite the fact that “CAT obligates State Parties to criminalize ‘all’ acts of torture, wherever they occur” *Id.* at 1).

⁵⁹⁹ THOMAS McDONNELL, *THE UNITED STATES, INTERNATIONAL LAW, AND THE STRUGGLE AGAINST TERRORISM* 55 (2010) (explaining the United States' position on extraterritoriality in human rights treaties and the rejection of this position by the UN Committee on Human Rights).

⁶⁰⁰ *See* Harold Hongju Koh, *Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights* (Oct. 19, 2010), available at <http://justsecurity.org/wp-content/uploads/2014/03/state-department-iccpr-memo.pdf> (arguing that under the ICCPR, “A state incurs obligations to respect Covenant rights – i.e., is itself obligated not to violate those rights through its own actions or the actions of its agents – in those circumstances where a state exercises authority or effective control over the person or context at issue.” *Id.* at 4); Koh, *Memorandum Opinion on the Geographic Scope of CAT*, *supra* note 598.

“The international trend toward recognizing some form of extraterritorial application of human rights treaty obligations -- however exceptional and limited -- has left the United States increasingly isolated in its legal positions in relation to the allies with which it collaborates. Our isolation has hobbled our cooperation with those allies in important respects, and has damaged our international reputation for a commitment to human rights and humane treatment.”⁶⁰¹

⁶⁰¹ Koh, *Memorandum Opinion on the Geographic Scope of CAT*, *supra* note 598 at 3.

CONCLUSION
THE NEED FOR AND THE OBLIGATION TO PROVIDE A PUBLIC OFFICIAL APOLOGY FOR
ABOU ELKASSIM BRITEL

The moral and legal principles that bear on Abou Elkassim Britel's horrific experiences with torture, extraordinary rendition, a deprivation of due process, and an abrogation of his humanity require redress. His ordeal has been well-documented. His efforts to obtain legal redress through formal legal processes have been wrongfully precluded. He seeks a public official apology for which there are both precedent and substantial grounds to believe will bestow benefit upon him, his wife and family, and international human rights norms. His right to an apology is firmly embedded in international law.

Although the United States cannot undo its previous human rights violations, it can nonetheless serve the goals of the treaties it has signed and the norms pertaining to basic human dignity it claims to uphold. It can further the principle of reciprocity which is foundational to international human rights law by acknowledging its violations in a meaningful way and attempting to make reparations to those who have been harmed as a result of its disregard for human rights norms. Thus far, not only has the United States created multiple barriers to accountability and redress for the victims of its human rights violations, but it has failed to truly acknowledge the violations themselves. In order for the United States to maintain its position as a moral leader and a staunch defender of human rights and dignity, it is critical that it step back from its exceptionalist posture, acknowledge its actions, and apologize. Without such an apology, the international community can only assume that the United States does not adhere to the same rules that it attempts to promulgate, and, as a result, the very integrity of the rules themselves is compromised. The United States has a laudable, historic role in the international human rights system; in order to maintain this role, and in order to ensure that the reciprocal benefits of an international community

committed to human rights continue, the United States must issue an apology to Abou El

Kassim Britel. To repeat his own poignant words:

“The wrong has been done, sadly. What I can ask now is for some form of reparation so that I can have a fresh start and try to forget, even if it won’t be easy I want an apology. It is only fair to say that someone who has done something wrong must apologize.”

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