

**UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW
IMMIGRATION AND HUMAN RIGHTS POLICY CLINIC**

**A CALL TO UPHOLD THE CORE
UNIVERSAL PRINCIPLES OF
RESPONSIBILITY AND PROTECTION
OF HUMAN RIGHTS**

**EXTRAORDINARY RENDITION, TORTURE, AND NORTH CAROLINA
A BRIEFING BOOK**

**University of North Carolina School of Law
Immigration/Human Rights Policy Clinic
Faculty Advisor: Deborah M. Weissman**

**Prepared by:
Kristin Emerson
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<http://www.law.unc.edu/documents/clinicalprograms/ertorturencbriefweb.pdf>

INTRODUCTION

1. Following the events of September 11, 2001, United States officials ordered, facilitated and actively participated in the extraordinary rendition and torture of several individuals suspected of involvement with terrorism.¹ During extraordinary rendition, people who have been detained are secretly transported to locations outside the capturer's controlled territory.² After the transfer, those individuals may be held indefinitely, tortured during interrogation, and denied a fair trial (if one is held, although often times no trial is held). In fact, in most cases, individuals who are rendered in this manner are not charged with any crime, let alone terrorism-related crimes.³ As such, extraordinary rendition is a clear violation of international human rights law.⁴

2. In 2006, advocacy groups and general members of the public both in the United States and abroad became aware that Aero Contractors, a private North Carolina-based contractor headquartered in Johnston County, was operating many of the flights that transported detainees to their places of torture. These flights have come to be known as "Torture Taxis." Through the work of plane spotters, investigators, government officials, international institutions, U.N. bodies, and journalists, it is now known that Aero Contractors was directly involved in the extraordinary renditions of Binyam Mohamed, Abou Elkassim Britel, Khaled El-Masri, Bisher Al-Rawi and Mohamed Farag Ahmad

¹ Parliamentary Assembly of the Council of Europe, Report: Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report, ¶ 59, Doc. No. 11302 rev., (Jun. 11, 2007)(Rapporteur: Mr. Dick Marty)[hereinafter UN 2007 Report].

² Parliamentary Assembly of the Council of Europe, Report: Alleged Secret Detentions and Unlawful Interstate Transfers of Detainees Involving Council of Europe Member States, ¶¶ 35-37, Doc. No. 10957 (June 12, 2006)(Rapporteur: Mr. Dick Marty)[hereinafter UN 2006 Report].

³ Mark Gibney, *International Human Rights Law: Returning to Universal Principles*, 15 (Rowman & Littlefield Publishers 2008).

⁴ See *infra* Part Two.

Bashmilah.⁵ To date, Aero Contractors is still headquartered in Johnston County, with flights operating out of the Johnston County Airport.

3. There have been a number of efforts to investigate and gain accountability for the torture and suffering that occurred because of these flights.⁶ From lawsuits to initiatives that call for a federal commission of accountability, advocates for justice from all over the globe hoped to achieve transparency, reparations, and some form of justice for the individuals who were rendered. Unfortunately, as a body of evidence grows, hopes for achieving any form of accountability on the federal level diminish. At present, there is an absence of national and state leadership in calling for accountability for the extraordinary rendition and torture. Legislative and judicial efforts have failed to provide any remedy for the victims of acts that are clearly a violation of a myriad of international, federal and local laws.⁷

4. The United States, although never admitting to direct violations of human rights treaties, argues that because the capture, detention, and torture of individuals through extraordinary rendition occurred outside the territory of the United States, the human rights treaties that it has signed are not applicable. International institutions and experts have responded to the U.S. position on human rights and extraordinary rendition and have characterized it as “parochial, territorial, and ultimately self-serving.”⁸

5. Hence, local residents and concerned human rights advocates now call for the citizen-sponsored North Carolina Commission of Inquiry on Torture, with the hope of compiling

⁵ Scott Shane, Stephen Grey and Margot Williams, C.I.A. Expanding Terror Battle Under Guise of Charter Flights, N.Y. Times, May 31, 2005, available at <http://www.nytimes.com/2005/05/31/national/31planes.html> (last accessed 06/6/2012 at 11:18PM EST).

⁶ See *infra* Part Five.

⁷ See *infra* Parts Two and Three.

⁸ Gibney, *supra* note 3, at 2.

an official record and ultimately achieving accountability for the harms caused by extraordinary rendition.⁹

6. The idea for a local commission of inquiry was conceived in April 2010 following a three-day conference in Durham, NC, which focused on achieving accountability specifically for North Carolina's role in extraordinary rendition and, generally, for U.S.-led torture of the post-9/11 era. North Carolina Stop Torture Now, the Duke Human Rights Center, the Immigration & Human Rights Policy Clinic at the University Of North Carolina School Of Law, and the International Human Rights Law Society at Duke University Law School sponsored the conference.¹⁰

7. Local efforts to enforce international law are critical to the enforcement of human rights close to home. A North Carolina Commission of Inquiry can help to bring human rights home and make meaningful international laws and norms by “encouraging and facilitating institutional change” to end abusive practices that occur in our own backyard.¹¹

8. This briefing book calls for a return to the core universal principles of responsibility and protection of human rights that are at the heart of the founding of the United Nations and its first treaties that established laws and mechanisms for the protection of human rights, endeavors to which the United States has contributed and endorsed in word, if not deed.

⁹ See *Appendix # 1* for the full version of the call for a Commission of Inquiry.

¹⁰ *Id.*

¹¹ Columbia Law School, Human Rights Institute International Association of Official Human Rights Agencies, State and Local Human Rights Agencies: Recommendations for Advancing Opportunity and Equality Through an International Human Rights Framework, 1[hereinafter State and Local Human Rights Agencies].

9. This policy project/briefing book has two major goals: (1) to provide support in the creation of such a commission by presenting critical information about North Carolina's role in extraordinary rendition to potential endorsers, and (2) to document research and reports that bear on the issue and compiles legal and policy analyses for use by the commission.

10. Specifically, this briefing book includes an analysis of international human rights law, federal law and other accountability mechanisms. Part One of this briefing book summarizes the factual background of this controversy. Part Two describes the applicability of relevant provisions found in international law to the issue of extraordinary rendition and torture. Part Three explores attempted domestic legal avenues in achieving accountability for this issue including, federal statutes, civil suits, and proposed legislation. Part Four draws on the principles explored in the two preceding Parts and demonstrates the theories that establish liability for the State of North Carolina and its political subdivisions including Johnston County and the Johnston County Airport Authority, Aero Contractors, and private citizens as bystanders. Lastly, Part Five summarizes international accountability measures, compares those measures with domestic calls for accountability, and provides recommendations for the North Carolina Commission of Inquiry on Torture.

PART ONE

FACTUAL BACKGROUND

1. THE VICTIMS

11. These are the stories of the extraordinary renditions of five men and the inhumane treatment they suffered in the hands of their captors. Aero contractors provided the planes that transported these men to their places of torture. Aero enabled and contributed to the horrors they endured. For this reason, Aero should be held accountable.

12. The five men whose experiences are described here all endured similar pre-rendition processing. They were all traveling across state lines when they were detained. All of them were blindfolded, had their hands tied, their feet shackled, their clothes cut off, and all were forced to wear a diaper. All were photographed. Before they were forced to board Aero operated planes, their senses were restricted by their captors: their ears were either stuffed with cotton or they were forced to wear headphones, or their noses were covered. All of them additionally had hoods placed over their heads. Once inside the plane, all were forced either into a spread eagle position or onto their backs. Their mouths were taped shut. All were prevented from using the bathroom during the duration of the flight.

13. An abundance of strong evidence confirms that Aero transported several individuals to the place of their torture. Among them are Abou Elkassim Britel, Binyam Mohamed, Bisher Al-Rawi, Khaled El-Masri, and Mohamed Farag Ahmad Bashmilah. All five of these men were extraordinarily rendered on aircrafts operated by Aero (at that time registered with the Federal Aviation Administration as aircrafts N379P and N313P). What follows are their stories.

A. ABOU ELKASSIM BRITEL¹²

14. Abou Elkassim Britel was one of the victims of extraordinary rendition transported by the Aero – operated plane N379P. Mr. Britel, an Italian citizen of Moroccan descent, travelled from Italy to Pakistan for business reasons. On March 10, 2002, while traveling through that country, Pakistani authorities arrested and detained him. During his imprisonment, Mr. Britel was brought for interrogation before U.S. Intelligence agents in at least four separate occasions. In one of them, the U.S. officials who fingerprint and photographed him told him that if he did not cooperate, the Pakistani interrogators would kill him.

15. On the night of May 24th, after the last of these interrogations, Mr. Britel was handcuffed, blindfolded, and driven to an airport. Once there, the captors forced Mr. Britel into a small room and cut off his clothes. After removing his blindfold, four or five men completely dressed in black and wearing hoods over their heads proceeded to photograph Mr. Britel. They also placed a diaper on him and put clothes over the diaper. They then blindfolded Mr. Britel, shackled his hand and feet, chained him to the shackles, and dragged him into a small aircraft. The plane was later identified as registered with the FAA as N379P being operated at the time by North Carolina-based Aero Contractors.

16. Upon boarding the plane, Mr. Britel was forced to stay on his back, and instructed not to move. If he did move at all, his captors hit or kicked him. When he asked for permission to change positions, they taped his mouth shut. They did not allow him to use

¹² The following factual account is based in the declaration, IN RE ABOU ELKASSIM BRITEL, DECLARATION OF ABOU ELKASSIM BRITEL; Support of Plaintiffs' Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment ¶ 1, *Mohamad et. Al. v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (2008)(No. C 07-02798 JW); Biography of Abou Elkassim Britel, ACLU, available at <http://www.aclu.org/national-security/biography-plaintiff-abou-elkassim-britel> [last accessed 05/31/2012 at 10:20AM EST], (other versions on file with the authors). For news of Mr. Britel's release, see e.g., <http://kassimlibero.splinder.com/> (Italian).

of a bathroom during the entire nine hours flight. The next day the plane landed in Rabat, Morocco, at which point the American captors transferred Mr. Britel to the custody of Moroccan intelligence services. These agents took him to the notorious Témara prison. For the next eight and one half months Mr. Britel remained confined to a tiny cell completely cut off from the outside world. He was handcuffed, blindfolded, and severely beaten. At Témara, he was subjected to inhumane and degrading treatment. His captors threatened to cut off his genitals and threatened him with “bottle torture,” a technique where a bottle is forced into the victim’s anus. On February 11, 2003, he was released from Témara, without explanation or charges having been brought against him. Upon his attempt to return to Italy, he was detained once again by Moroccan authorities who accused him of terrorist activities. Mr. Britel was recently released from custody in Morocco following efforts to free him, including an official determination by the Italian government that he was at no time associated with terrorist activity.

17. Accountability for the extraordinary rendition of Mr. Britel is pending. North Carolina and its political subdivisions, as well as Aero have the responsibility to respond to these serious accusations. A plane operated by Aero, which is a corporation of North Carolina, transported Mr. Britel to places where he was tortured and subjected to cruel, inhumane, and degrading treatment. North Carolina and its political subdivisions as well as Aero must be held accountable.

B. BINYAM MOHAMED ¹³

18. Mr. Binyam Mohamed was another victim of extraordinary rendition who was taken to his place of torture, not once but twice, by Aero - operated planes. The first time he was transported, the plane was the N379P, the same jet that just a few months before had rendered Mr. Britel. The second time, the plane was a Boeing 737 business jet then registered with the FAA as N313P, also operated by Aero at that time.

19. Mr. Mohamed, an Ethiopian citizen and long time resident of the United Kingdom, was arrested on immigration charges in Pakistan in 2002 while attempting to get home to London. While detained in Pakistan, he was detained, interrogated, and badly abused. There is indisputable evidence that Mr. Mohamed was arrested and detained by agents of the United States in Pakistan.

20. In July 21st, 2002, the Pakistanis handed Mr. Mohamed to the exclusive custody of American officials. Americans agents, dressed completely in black and wearing masks over their heads, stripped Mr. Mohamed of all his clothes and photographed him. They also shackled and blindfolded him, and placed headphones over his ears. The captors forced Mr. Mohamed aboard the N379P. For the entire eight or ten-hour flight, Mr. Mohamed remained unable to move. The plane arrived in Rabat, Morocco, and Mr. Mohamed was transferred to the Témara prison, where he was brutally tortured.

21. On January 21st, 2004, Mr. Mohamed was again placed in a room where several people dressed in black stripped, photographed, handcuffed, and shackled him.

¹³ The following factual account is based in the declaration, IN RE BINYAM MOHAMED, DECLARATION OF CLIVE STAFFORD-SMITH (*Mr. Mohamad's lawyer*). A Biography of Binyam Mohamed is available at the ACLU's website, available at <http://www.aclu.org/national-security/biography-plaintiff-binyam-Mohamad> [last accessed 05/31/2010 at 10:00AM EST]; John F. Burns, Britain Discloses Date on Ex. Detainee, NY Times, Feb. 10, 2010, available at <http://www.nytimes.com/2010/02/11/world/europe/11britain.html> [last accessed 5/31/2012 at 11:45AM EST].

Afterwards, he was forced aboard another plane operated by Aero, this time the N313P. The plane left Morocco and landed in Kabul, Afghanistan.

22. Immediately upon landing in Afghanistan, Mr. Mohamed was taken to the CIA-run prison commonly known as “Dark Prison,” near the city of Kabul. In the Dark Prison, Mr. Mohamed also suffered tortured and other abuses. He was severely beaten and hung by his arms from a pole for days at a time. Loudspeakers played excruciatingly loud music and sounds, including the screams of women and children 24 hours a day. In September 2004, Mr. Mohamed was finally transferred from Afghanistan to Guantánamo Bay.

23. In 2009, the United States dropped all charges against Mr. Mohamed and he was flown back to Britain. Upon his arrival, Foreign Office lawyers of that country, under intense pressure from the United States, sought for more than a year to prevent the publication of information regarding Mr. Mohamed’s treatment while in United States custody. British courts ruled, however, that the information they were seeking to protect had to be released. Despite the fact that all charges were dropped against him, Mr. Mohamed was severely tortured and subjected to other inhumane treatment.

24. Because Aero operated the planes that rendered Mr. Mohamed to places where he would be tortured, Aero should be held accountable, as well North Carolina and its political subdivisions for enabling this North Carolina corporation.

C. BISHER AL-RAWI¹⁴

25. Mr. Bisher Al-Rawi was yet another victim of extraordinary rendition who transported by the Aero-operated plane N379P, also used to render Mr. Britel and Mr. Mohamed.

26. Mr. Al-Rawi, an Iraqi citizen living in the United Kingdom, decided to start a business endeavor in the Republic of Gambia, Africa. After the company was approved by the Gambian Embassy in the United Kingdom, he attempted to travel to Gambia from London. On November 1st, 2002, when trying to board the plane for Gambian, airport police arrested him on charges of carrying a “suspect electronic device” in his luggage. The object was, in fact, a store bought battery charger, as it was later discovered.

27. Four days later after the arrest of Mr. Al-Rawi, British authorities returned the charger to him and released him. While in custody, however, and although not true, a telegram was sent to the U.S. Central Intelligence Agency (CIA) stating that Mr. Al-Rawi was an Islamic extremist and that a search of his luggage “revealed a suspect electronic device.” Additionally, Mr. Al-Rawi flight’s information was sent to the CIA.

28. After these events, Mr. Al-Rawi secured another flight and went to Gambia, but upon his arrival there, he was arrested and interrogated by Gambian officials. He was subsequently taken to a “safe house,” where he was held in a very small, hot, and

¹⁴ The following factual account is based in the declaration IN RE BISHER AL-RAWI, DECLARATION OF BISHER AL-RAWI (one version on file with authors); 1st Amended complaint at 50, 198-204, *Mohamad et al. v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (2008) (No. C 07-02798). For news about Al-Rawi, *See e.g.*, MI5 enabled UK pair’s rendered: Telegrams sent by the British security service led to the “extraordinary rendition” of two UK residents now in Guantanamo Bay, BBC news has learned, British Broadcasting Company (BBC News), March 28, 2006, available at http://news.bbc.co.uk/2/hi/uk_news/politics/4851478.stm [last accessed April 2, 2011]; David Rose, How MI5 Had Me Kidnapped Me and Thrown Into A CIA Dark Prison, Mail Online, July 28, 2007, available at <http://www.dailymail.co.uk/news/article-471444/How-MI5-kidnapped-thrown-CIAs-Dark-Prison.html> [last accessed 5/31/2012 at 11:49AM EST].

windowless cell and interrogated by an American known as Mr. Lee and two other Gambian officials.

29. Mr. Al-Rawi was eventually taken to a dark room in an airport, where American individuals placed a hood over his head, cuffed his hands behind his back, and shackled his feet. After preparing him in this manner, Gambian officials handed Mr. Al-Rawi over to other individuals, who forced Mr. Al-Rawi into another dark room.

30. While in the dark room, several men and women wearing hoods over their heads removed Mr. Al-Rawi's handcuffs and shackles, and cut off his clothes. Then, they placed a diaper on him and put his clothes back. After cuffing and shackling him again, the captors arranged Mr. Al-Rawi in a restraining harness, and impaired both his hearing and his vision by placing something over his ears and both a blindfold and goggles over his eyes. Mr. Al-Rawi was then forced aboard the N379P, the same Aero - operated plane that transported both Mr. Britel and Mr. Mohamed to their places of torture. Just like the other victims, in the plane the captors placed Mr. Al-Rawi on a "stretcher-like platform and restrained," leaving him unable to move. Just like the other victims, he was denied food, water, and the use of a bathroom for total time of the trip, about nine hours.

31. The Aero – operated plane landed in Kabul, Afghanistan, where Mr. Al-Rawi was taken to the notorious "Dark Prison." For two weeks, he was isolated in a cold and dark cell, his legs shackled, with barely any food and water. Loud music and man-made noises that played 24 hours a day together with the screaming of the other prisoners significantly interfered with Mr. Al-Rawi's ability to sleep.

32. After two weeks of this treatment, Mr. Al-Rawi was transferred to the U.S. Bagram Air Base in Afghanistan, where U.S. officials subjected Mr. Al-Rawi to humiliation,

degradation, and physical and psychological torture. On February 7, 2003, the captors placed darkened goggles, a facemask, headphones, handcuffs and shackles on Mr. Al-Rawi, and transferred him to the U.S. prison in Guantánamo Bay, Cuba. On March 30, 2007, almost four and a half years after being arrested in Gambia, Mr. Al-Rawi was released from Guantánamo. No charges were ever filed against him.

33. Because Aero operated the planes that took Mr. Al-Rawi to places where he would be severely tortured and subjected to other inhumane treatment, Aero must be held accountable for its actions. Additionally, because North Carolina and its political subdivisions enabled Aero as a corporation of the state, they should also be held accountable.

D. MOHAMED FARAG AHAMD BASHMILAH ¹⁵

34. Mohamed Farag Ahmad Bashmilah was yet another victim of extraordinary rendition flown to his place of torture by the Aero Contractors - operated jet N379P.

35. Mr. Bashmilah, a citizen of Yemen living in Indonesia, travelled to Jordan intending to assist his mother who was scheduled to undergo heart surgery in that country. Prior to the trip, Mr. Bashmilah had lost his passport and the Yemenite Embassy had issued him a replacement. When he arrived at the Jordan airport on September 26th of 2003, however, airport officials questioned Mr. Bashmilah and confiscated the passport. At this time, he was not yet detained.

¹⁵ The following factual account is based in the declaration, IN RE MOHAMED FARAG AHMAD BASHMILAH, Declaration of Mohamed Farag Ahmad Bashmilah (on file with authors); A biography of Plaintiff Mohamed Farag Ahmad Bashmilah can be found in the ACLU's website, available at <http://www.aclu.org/national-security/biography-plaintiff-Mohamad-farag-ahmad-bashmilah> [last visited 5/31/12 at 12:04PM EST].

36. In the following days, and as directed by airport officials, Mr. Bashmilah visited the Jordanian General Intelligence Department (GID) with the purpose of recovering his passport. His visits were unsuccessful. Finally, when Mr. Bashmilah visited GID on October 21, 2003, GID officials detained, handcuffed, chained, blindfolded, and beat him. After driving him to his house, terrorizing his wife and mother, the agents returned Mr. Bashmilah to the GID facilities. During the next five days, Mr. Bashmilah remained captive in the GID facilities and was the victim of extensive abuse and mistreatment.

37. At five days, the Jordanian agents blindfolded and tied Mr. Bashmilah, and thereafter transported him to an airport. Once there, Mr. Bashmilah endured the same pre-rendition treatment that was inflicted in the other victims. Several people dressed in black and wearing hoods over their heads restrained, beat, stripped, and photographed him. They also subjected him to a roughly conducted anal cavity search, which caused him to briefly lose consciousness. The captors then diapered, dressed, shackled, and handcuffed Mr. Bashmilah, muffling his ears and then placing headphones on him, and blindfolding him. Chained and hooded, they forced Mr. Bashmilah into the Aero-operated N379P.

38. The plane landed in Kabul, Afghanistan, and Mr. Bashmilah was taken to a detention facility and interrogated by English speaking persons who used an Arabic interpreter. While in the detention facility, Mr. Bashmilah was severely maltreated. He was cuffed, shackled, and chained to a wall. His cell was cold, and loud music and noises were played twenty four hours a day. During the first fifteen days he was unable to remove the diaper placed on him before boarding the N379P. Guards kept him under constant surveillance and did not allow him to sleep. If he attempted to sleep, they would wake

him up every half an hour and require him to raise his hands to show them that he was still alive.

39. Mr. Bashmilah's mental state, already deteriorated due to the torture he suffered in Afghanistan, worsened even further. He was subsequently transferred to other cells, and to another facility, and then to Yemen, his home country, in May of 2005. The government of Yemen detained Mr. Bashmilah until March 27th, 2006, without bringing against him any terrorism related charges.

40. Despite the fact that he was never charged with a terrorism related offense, Mr. Bashmilah was severely tortured and subjected to other inhumane treatment. An Aero operated plane transported Mr. Bashmilah to places in which he would suffer such treatment. For this reason, Aero should be held accountable. Because North Carolina and its political subdivisions enabled the existence of Aero as a NC corporation, they should also be held accountable.

E. KHALED EL-MASRI¹⁶

41. Khaled El-Masri was another victim of extraordinary rendition transported by the Aero-operated jet N313P. Throughout this briefing book, we will describe many of the attempts for legal redress that have already been attempted in the case of Mr. El-Masri.

42. Mr. El-Masri, a German citizen of Lebanese ascent living in Germany, decided to take a vacation trip to Skopje, Macedonia. On December 31st, 2003, while travelling by bus through Serbia towards Macedonia, Mr. El-Masri was asked to show his passport at

¹⁶ The following factual account is based in the declaration in the IN RE KHALED EL-MASRI, DECLARATION OF KHALED EL-MASRI (on file with the author). A detailed account of his story can also be found in the Complaint of El-Masri v. Tenet, 479 F.3d 296 (2007), available at http://www.aclu.org/files/safefree/rendition/asset_upload_file829_22211.pdf [last accessed 9/23/2011 at 10:04PM EST].

the border station with Macedonia. Serbian officials questioned Mr. El-Masri about the passport and subsequently confiscated the passport.

43. After further interrogation by border officials, individuals who were dressed in civilian clothes and were brandishing guns took El-Masri to a hotel room in Skopje. They locked El-Masri in the room and held him captive, prohibiting him from leaving the room. He was further interrogated in English in the same room, for the next 23 days. When he requested to speak to somebody from the German Embassy, his request was denied.

44. On January 23, 2004, his captors led Mr. El-Masri outside the hotel room. Once outside, two men advanced towards him and restrained him by his holding down his arms, then handcuffed and blindfolded him. The captors forced Mr. El-Masri into a car, and drove him to a building, where he was led into a room.

45. Once in the room, several people proceeded to beat Mr. El-Masri. They also stripped him and subjected him to a roughly conducted cavity search. After being momentarily blinded by the flash of a camera when his blindfold were removed, Mr. El-Masri saw seven to eight individuals standing around him. They were completely dressed in black and wearing hoods over their heads. These individuals placed a diaper on Mr. El-Masri and then clothed him. They then blindfolded El-Masri, stuffed his ears and covered them with headphones, put something over his nose and a bag over his head. The captors then restrained El-Masri's movements by placing a belt around his waist, chaining his hands to the belt, and shackling him.

46. After preparing El-Masri in this manner, they forced him aboard the N313P, the same plane used for the extraordinary rendition of Mr. Mohamed. Inside the plane, guards

placed Mr. El-Masri's arms and legs in a spread-eagled position, and secured his legs to the sides of the plane. They also gave him two injections in his arms, and placed something over his nose that rendered him unconscious during most of the flight.

47. The Aero-operated plane landed in Kabul, Afghanistan. The captors took Mr. El-Masri to a prison nearby, where he was thrown into a cold and dark cell. He was given dirty, greenish-brown water to drink, with a strong scent that made him vomit when he drank it. During his stay in this prison, Mr. El-Masri was interrogated at least three times by individuals who identified themselves as Americans, and who threatened, insulted, pushed and shoved Mr. El-Masri.

48. On May 28th, 2003, almost five months after his abduction, Mr. El-Masri was released from prison and put on a plane to Germany. At that time, he was warned that, as a condition of his release, he was never to mention what had happened to him. He was never charged with any crimes as a result of his imprisonment.

49. Aero delivered Mr. El-Masri to places where he would be tortured and where he suffered inhumane and degrading treatment. For this reason, Aero should be held accountable for its actions. North Carolina, as well as its political subdivisions, enabled Aero as a corporation of the state. Thus, they should also be held accountable.

2. NORTH CAROLINA, JOHNSON COUNTY, AND AERO CONTRACTOR'S INVOLVEMENT

50. Both U.S. and North Carolina actors are directly involved in extraordinary rendition: they have planned and directed flights, facilitate the ownership, operation, and movement of the planes, own or lease aircraft carriers, and contract with corporations that plan the rendition flights, provide the planes, crew, and landing sites. It is clear that, at a

minimum, the state of North Carolina and its political subdivisions facilitate the existence of Aero Contractors and its operations as a corporation in the state of North Carolina.¹⁷

51. With regard to North Carolina's torture taxis, there is a chain of actors including the U.S. government, North Carolina and its political subdivisions, a North Carolina company, Aero and their pilots and crew, who transferred victims from countries outside the United States to another location where the person is tortured or otherwise treated inhumanely.

52. Media reports reveal that the CIA has maintained important infrastructure for its extraordinary rendition program in Johnston and Lenoir counties, North Carolina. The CIA contracted with Aero Contractors, which has been headquartered at the Johnston County Airport.¹⁸ There is an abundance of convincing evidence that ties Aero Contractors to the transport for torture of identified individuals including Binyam Mohamed, Khaled El-Masri, Bisher al Rawi, Abou el-Kassem Britel and Mohamed Farag Ahmad Bashmilah.¹⁹ All five of these men were extraordinarily rendered using two aircraft operated by Aero Contractors – registered as N379P and N313P.²⁰ It is difficult to know exactly how many people have been extraordinarily rendered because the program is veiled in secrecy and the U.S. government refuses to disclose the extent of its involvement. Furthermore, because of the lack of full transparency with regard to the

¹⁷ See *infra*, Part Four.

¹⁸ Scott Shane, *et al.*, *supra* note 5.

¹⁹ Partial List of Detainees Secretly Transported by Aero Contractors of North Carolina for Torture by or for the CIA., available at http://www.ncstoptorturennow.org/PDF_Archives/Partial_List_Detainee.pdf (prepared by N.C. Stop Torture Now, an organization that has worked since 2005 to end North Carolina's role in extraordinary rendition). See *The North Carolina Connection to Extraordinary Rendition and Torture*, available at <http://www.law.unc.edu/documents/clinicalprograms/finalrenditionreportweb.pdf> [last accessed 6/22/2012 at 10:49AM EST].

²⁰ Scott Shane, *et al.*, *supra* note 5.

government's extraordinary rendition program, it is possible that Aero continues to transport people for torture.

53. Additionally, despite the fact that the United States refuses to consider accountability measures or to fully disclose the events that transpired concerning these men, other governments have come forward with evidence of their involvement in extraordinary rendition and torture. Such information has included information about U.S. involvement in these human rights violations as well.²¹

²¹ See video of Binyam Mohamed, available at: <http://www.telegraph.co.uk/news/newsvideo/uk-politics-video/7206432/David-Miliband-on-Binyam-Mohamad-court-ruling.html> [last accessed 06/22/2012 at 10:50AM EST]; Burns, *supra* note 13 .

PART TWO

APPLICATION OF INTERNATIONAL LAW TO EXTRAORDINARY RENDITION ²²

1. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: HISTORY, AUTHORITY, SUBSTANTIVE PROVISIONS, EXTRAORDINARY RENDITION, AND APPLICABILITY TO THE UNITED STATES

A. HISTORICAL BACKGROUND

52. After the atrocities of World War II, the international community expressed a growing concern about the need to address human rights.²³ The United Nations was conceived out of this concern and the desire to prevent the abuses that had occurred during the war. In 1948, the General Assembly, the chief policy-making organ of the United Nations, adopted The Universal Declaration of Human Rights in order to clarify “human rights and fundamental freedoms.”²⁴

53. The United States was a lead actor in the creation and drafting of the instrument. Eleanor Roosevelt, widow of the former United States President, chaired the early eight-member drafting committee. After input from Member States, the Committee revised the draft declaration before submitting it to the General Assembly where each provision was again scrutinized and debated. Finally, on December 10, 1948, the General Assembly unanimously adopted the Universal Declaration.

²² This section of the briefing book relied on the research of the University of North Carolina Immigration/Human Rights Clinic Students Policy Project of 2010. This section credits Paula Kweskin, Taiyyaba Quereshi and Maraienne Twu for their work.

²³ See A United Nations Priority: Universal Declaration of Human Rights, ¶¶ 3, 6, available at www.un.org/rights/HRToday/declar.htm [last accessed 06/22/2012 at 10:53AM EST][hereinafter A United Nations Priority]. See also, George Annas, Human Rights Outlaws: Nuremberg, Geneva, and the Global War on Terror, 87 B.U.L. Rev. 427, 427 (April, 2007).

²⁴ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), pmb1.[hereinafter Universal Declaration].

54. In bringing together the international norms on human rights, the Universal Declaration was the first authority and guide to the rules on fundamental human rights.²⁵ Subsequent international human rights instruments adopted by the UN General Assembly build on the principles set out therein. The Universal Declaration is accepted nearly universally and serves as the foundation for the comprehensive network of legally binding treaties and international instruments governing the protection of human rights today.

B. AUTHORITY

55. The Universal Declaration is a resolution of the General Assembly of the United Nations.²⁶ The General Assembly resolutions are not binding on Member States. Thus, the Universal Declaration does not have a specific mechanism by which it manifests its legally binding effect on the State Members. Despite its lack of legally binding effect, however, the Universal Declaration, as a “common statement of mutual aspirations,”²⁷ represents a commitment to give effect to the espoused protections and foundational principles. “[T]he Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the

²⁵ Vojin Dimitrijevic, *Customary Law as an Instrument for the Protection of Human Rights*, Istituto Per Gli Studi Di Politica Internazionala 7,8 (2006). Professor Dimitrijevic is a recognized international law expert that is currently one of four members of the Executive Committee of the International Commission of Jurists. More information about the Commission can be found at the International Commission of Jurists website, available at http://www.icj.org/default.asp?nodeID=430&langage=1&myPage=About_us [last accessed 6/25/2012 at 3:20PM EST].

²⁶ The General Assembly was created in 1945 under the Charter of the United Nations. More information on the General Assembly is available at <http://www.un.org/en/ga/about/background.shtml> [last accessed 01/01/2012 at 10:56AM EST].

²⁷ A United Nations Priority, *supra* note 22, ¶ 2.

international community.”²⁸ The Universal Declaration “is the first instrument that should be consulted when attempting to identify the contemporary content of international human rights law.”²⁹

C.SUBSTANTIVE PROVISIONS

56. The Preamble of the Universal Declaration states the fundamental belief underlying the creation of the instrument:

“[I]n accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his or her economic, social and cultural rights, as well as his or her civil and political rights.”³⁰

57. Several specific guarantees are set out in the articles of the Universal Declaration. Article 3 guarantees the “right to life, liberty and security of person.” Article 5 prohibits torture and “cruel, inhuman or degrading treatment or punishment.” Article 6 guarantees that “everyone has the right to recognition everywhere as a person before the law” and Article 8 guarantees “the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Article 10 guarantees the right to “a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Article 11 establishes “the right to be presumed innocent until

²⁸ Int’l Conference on Human Rights, Apr. 22-May 13, 1968, Proclamation of Teheran 3, U.N. Doc. A/CONF.32/41 (May 1968).

²⁹ See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Int’l & Comp. L. 287, 353 (1996). See also, e.g., Michael John Garcia, Renditions: Constraints Imposed by Laws on Torture 21, Congressional Research Service (Sept. 8, 2009).

³⁰ Universal Declaration, *supra* note 24, pmbl.

proved guilty according to law in a public trial” consistent with due process of law, where the person has the opportunity to establish his or her defense.

58. Article 5’s right to be free from torture is fundamental to the Universal Declaration.³¹

The Human Rights Commission of the U.N. Economic and Social Council has stated that “the right to life, freedom from torture” have reached the status of customary international law and thus “cannot be open to challenge by any State as [it is] indispensable for the functioning of an international community based on the rule of law and respect for human rights and fundamental freedoms.”³²

D. EXTRAORDINARY RENDITION AND THE UNIVERSAL DECLARATION

59. Article 5 of the Universal Declaration unequivocally condemns torture, and therefore the torture to which victims of extraordinary rendition are subjected is prohibited by the Universal Declaration.³³ Moreover, extraordinary rendition violates other articles of the Universal Declaration.³⁴ The capture, detention, and torture of individuals through extraordinary rendition violate the rights to liberty and security expressed in Article 3. Furthermore, the transfer of individuals to other countries for the purpose of interrogation and torture violates Article 14, which guarantees “the right to seek and to enjoy in other countries asylum from persecution.”³⁵

³¹ See e.g. Hannum, *supra* note 29, at 344.

³² U.N. Econ. & Soc. Council, Comm. on Human Rights, Preliminary Report by the Special Representative of the Commission, Mr. Andres Aguilar, ¶¶ 14-15, U.N. Doc. E/CN.4/1985/20 (Feb. 1, 1985).

³³ For an argument that those who argue that torture is not prohibited under international law are “human rights outlaws”, See e.g., Annas, *supra* note 23, at 434.

³⁴ David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 Harv. Hum. Rts. J. 123, 131 (Spring 2006).

³⁵ *Id.* at 132.

60. Moreover, the denial of due process to the victims of extraordinary rendition violates Articles 6, 8, 10 and 11 of the Universal Declaration. Extraordinary rendition violates Article 6's right to be recognized as "a person before the law" because once rendered to another country and detained, individuals are often denied access to the judicial system, as well as denied access to counsel or the aid of their Embassy. By the same token, the prolonged and incommunicado detention that is common in extraordinary rendition violates Article 8's right to "an effective remedy by the competent national tribunals" Article 10's right to a fair and public hearing, and Article 11's right to be presumed innocent until proven guilty according to the law.

61. In sum, both the general spirit as well as specific provisions of the Universal Declaration presume extraordinary rendition as contrary to established principles of international human rights law present in the Universal Declaration.

E. APPLICABILITY TO THE UNITED STATES

62. As the leader of the drafting committee of the Universal Declaration, the United States understood the importance of the principles found within the Universal Declaration. Furthermore, past and present administrations have made reference to the Universal Declaration as a guide towards which the United States aspires. As recently as 2012, the U.S. government acknowledged its obligations under the Universal Declaration, stating that "a central goal of U.S. foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights."³⁶ The United States has also expressed its intention to have a leading role in the protection of human

³⁶ Human Rights, U.S. Dep't of State, ¶ 1, available at www.state.gov/g/drl/hr/ [last accessed 6/22/2012 at 11:01AM EST].

rights around the world. This intention was expressed in the 61st anniversary of the Universal Declaration, in the words of Senator Dick Durbin:

We take our treaty obligations seriously because it is who we are. The United States is a government of laws, not people, and we take our legal commitments very seriously. Complying with our treaty obligations also enhances our efforts to advocate for human rights around the world. [...] The reality is that the Universal Declaration of Human Rights remains an unfulfilled promise for many... But with leadership from the United States, we can make universal human rights a reality – both close to home, and around the world.³⁷

63. Despite the obvious public expression of commitment to human rights, however, the United States' engagement in the program of extraordinary rendition casts doubt on its commitment to the rights and freedoms found within the Universal Declaration. The United States has taken a position of “minimizing” the role of international law, particularly in regard to international rules that are designed to prevent violence.³⁸ One scholar takes this position as far as proposing that the practice of torture is actually part of a domestic practice of violence in maximum-security facilities.³⁹

64. Even if this is true, however, the fact remains that the United States is part of an international community and has assumed commitments, including being part of the United Nations and the Universal Declaration to name a few, expressing recognition of the right of individuals to be free from torture. Thus, even if the practice of extraordinary rendition is consistent with current domestic practices in the United State, it is not consistent with international laws to which the United States has promised to respect.

³⁷ Hearing of the Human Rights and the Law Subcommittee, Statement of Senator Dick Durbin, “The Law of the Land: U.S. Implementation of Human Rights Treaties.” Dec. 16, 2009, ¶¶ 14-16, available at http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da155368a&wit_id=e655f9e2809e5476862f735da155368a-0-0 [last accessed 6/20/2012 at 11:59AM EST].

³⁸ John T. Parry, *Torture Nation, Torture Law*, 97 Geo. L.J. 1001, 1051 (2009).

³⁹ *Id.* at 1056.

2. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: HISTORY, APPLICABILITY, AND SUBSTANTIVE PROVISIONS RELATED TO EXTRAORDINARY RENDITION

A. HISTORICAL BACKGROUND

65. Because the Universal Declaration lacked legal binding effect over member States, the United Nations members recognized that an enforceable international treaty was needed if the human rights included in the Universal Declaration were to be protected.⁴⁰

With that purpose in mind, the United Nations General Assembly drafted the International Covenant on Civil and Political Rights (ICCPR).⁴¹ The ICCPR was to serve as an effective instrument for the protection of human rights by requiring that the State parties to commit “to respect and ensure” human rights around the world.⁴² The United Nations adopted and ratified the ICCPR in 1966, and the treaty came into force in 1976. The majority of the countries of the world today are parties to the ICCPR.⁴³ The United

⁴⁰ See e.g., Christian Tomuschat, *International Covenant of Civil and Political Rights*, available in the United Nations Audiovisual Library of International Law’s website, at <http://untreaty.un.org/cod/avl/ha/iccpr/iccpr.html> [last accessed, 11/4/2011 at 11:04AM EST].

⁴¹ International Covenant on Civil and Political Rights, 999 UNTS 171, 6 ILM 368 (1966), pbml., available at <http://www2.ohchr.org/english/law/ccpr.htm> [last accessed, 10/21/2011 at 9:43AM EST]. [hereinafter ICCPR].

⁴² This general legal obligation is expressed in Article 2 of the ICCPR and explained in the General Comment 31 of the Committee, U.N. Human Rights Comm., General Comment No. 31: Nature of the General Legal Obligation on State Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) [hereinafter General Comment 31]. For a recent expression of the importance of the ICCPR regarding the protection of human rights See e.g., the opening comments in the United Nations Millennium Declaration of 2000, available at <http://www.un.org/millennium/law/iv-4.htm> [last accessed 01/02/ 2012 at 11:32AM EST] (stating that “the Covenant is a landmark in the efforts of the international community to promote human rights. It defends the right to life and stipulates that no individual can be subjected to torture, enslavement, forced [sic] labour and arbitrary detention or be restricted from such freedoms as movement, expression and association”).

⁴³ As of October 2011, there were 167 Member States to the ICCPR, and another 74 countries had signed the ICCPR. For updated information on the status of the treaty, See e.g., the United Nations Treaty Collection, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-4&chapter=4&lang=en#EndDec [last accessed 10/27/2011 at 3:33PM EST].

States ratified the ICCPR on June 8th of 1992, and the treaty came into force on September of that year.⁴⁴

66. The ICCPR created the “Human Rights Committee” (Committee) as the overseeing and interpreting body of the treaty.⁴⁵ As such, the Committee is a fundamental organ of the ICCPR.⁴⁶ Its functions, defined in Articles 28 to 45, include the clarification of the scope and meaning of the provisions of the treaty, through the issuance of “General Comments,” a procedure authorized by article 40(4) of the ICCPR.⁴⁷ Because the Committee’s authority, as well as that of its Comments and Recommendations, derives from the treaty itself, the parties to the treaty, and the United States, impliedly agree to be bound by the authority of the Committee.⁴⁸

67. The ICCPR draws on the principles of the Universal Declaration and, together with other instruments, is part of the International Bill on Human Rights. The ICCPR obligates the States parties “to strive for the promotion and observance” of “civil and political rights, as well as...economic, social and cultural rights,” including but not limited to

⁴⁴ When a country is a party to an international treaty, the country consents “to be bound by the treaty,” and thus the treaty is “in force” in that country. Vienna Convention on the Law of Treaties, art. 2(1)(g), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

⁴⁵ Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, available at <http://www2.ohchr.org/english/bodies/hrc/> [last accessed 05/05/ 2010 at 2:17PM EST].

⁴⁶ See Tomuschat, *supra* note 40.

⁴⁷ For an explanation of the complete substantive and procedural functions of the Committee See e.g., *Civil and Political Rights: The Human Rights Committee Fact Sheet*, from the Office of High Commissioner of Human Rights, available at <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf> [last accessed, 10/29/2011 at 2:31PM EST]. Updated information about the Committee can be found in its website, available at <http://www2.ohchr.org/english/bodies/hrc/> [last accessed 11/10/2011 9:56AM EST].

⁴⁸ For a review of the legal status of the comments See e.g., Conway Blake, *Normative Instruments in International Human Rights Law: Locating the General Comment*, Center for Human Rights and Global Justice Working Paper 17 (2008), available at <http://www.chrgj.org/publications/docs/wp/blake.pdf> [last accessed 1/5/2012 at 8:35AM EST]. All the general comments can be found at the Office of the United Nations High Commissioner of Human Rights, available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm> [last accessed 6/22/2012 at 11:12AM EST].

“freedom from fear and want.”⁴⁹ The Committee has defined the purposes of the ICCPR in this manner:

The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide efficacious supervisory machinery for the obligations undertaken.⁵⁰

68. A core provision of the Covenant relevant to extraordinary rendition is Article 7. Article 7 states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁵¹ This protection against torture and inhumane, cruel, and degrading treatment (CID) extends to the victims of extraordinary rendition.⁵²

The Committee has made clear this when it proclaimed that

“States parties must 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.”⁵³

B. GENERAL OBLIGATIONS

(I) OBLIGATION TO PROTECT ALL INDIVIDUALS UNDER A PARTY’S EFFECTIVE CONTROL

69. Article 2.1 states that

“[e]ach State Party to the present Covenant undertakes to respect and to ensure [the rights recognized in the Covenant] to all individuals within its

⁴⁹ ICCPR, *supra* note 41, pmb1.

⁵⁰ Hum. Rts. Comm. General Comment No. 24 (52), ¶¶ 11, 18–19, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994)[hereinafter General Comment 24].

⁵¹ ICCPR, *supra* note 41, art. 7.

⁵² U.N. Human Rights Comm., General Comment No. 20, ¶ 9, U.N. Doc. A/47/40 (1992)[hereinafter General Comment 20]; General Comment 31, *supra* note 42, ¶ 12.

⁵³ General Comment No. 20, ¶ 9. Some analysts argue that a prohibition on extraordinary rendition in the ICCPR can also be found in Article 9. *See e.g.* United Nations Press Release, Preliminary Findings on visit to United States by Special Rapporteur on Promotion and Protection of Human Rights while countering Terrorism, May 2007, [hereinafter Preliminary Findings], available at <http://www.unhchr.ch/huricane/hurricane.nsf/view01/338107B9FD5A33CDC12572EA005286F8?opendocument> [last accessed 6/22/2012 at 11:33AM EST].

territory and subject to its jurisdiction the rights recognized in the present Covenant.⁵⁴

70. The Committee has established that Article 2's language

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.⁵⁵

71. Thus, State parties have the obligation to ensure and respect the human rights of two types of individuals: those who are within a party's territory, and those who are under its jurisdiction, regardless of where they are located.⁵⁶ This latter category includes individuals outside the party's territory, regardless of how the control over that person was obtained, including detention or abduction.⁵⁷

72. The Committee's jurisdiction approach focuses less on where an individual is situated and more on who has control over that individual. A person may be under the jurisdiction of a State when the State is in "effective control" of that person, either because the person is within its territory or because the person is in the "direct personal control of the state."⁵⁸ A State party has "effective control" of an individual if he or she is within the direct personal control of the authorities of the State Party. If the effective control requisite is met, then the State party is bound by the ICCPR, and violations may be imputed to the State party regardless of whether they occur within that party's territory.⁵⁹

73. Furthermore, the concept of effective control is not limited to official actors or agents.

The ICCPR holds a State Party responsible for the human rights violations committed by

⁵⁴ ICCPR, *supra* note 41, art. 2.1.

⁵⁵ General Comment 31, *supra* note 42, ¶ 10. *See also*, Civil and Political Rights: The *Human Rights Committee Fact Sheet*, *supra* note 47.

⁵⁶ General Comment 31, *supra* note 42, ¶ 10.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* 55 (New York: ABCNY & NYU School of Law, 2004) [hereinafter *Torture by Proxy*].

actors other than the government itself, extending the liability to violations committed by private parties or entities.⁶⁰ Regarding the responsibility for the acts of private parties, the Committee has stated that:

[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights.⁶¹

74. Accordingly, even if the human rights violations are actually committed by actors others than the government itself, the State party is responsible for those violations.⁶²

75. The above-mentioned principles, when taken together, have great implications for the practice of extraordinary rendition. During extraordinary rendition, a certain State party may be involved in transporting the individuals, whereas agents of another may maintain the person in confinement, and actually inflict the acts of torture or CID. Some of the agents involved may be private parties and not official government agents. Some or all of the violations may occur outside a State Party's territory. Because of these principles, however, extraordinary rendition is not excused by any of these factors, and the violations are imputable to all the parties involved.

(II) OVERARCHING OBLIGATION TO RESPECT AND ENSURE HUMAN RIGHTS

76. Under Article 2 of the ICCPR, “[e]ach State Party to the present Covenant undertakes to respect and to ensure...the rights recognized in the present Covenant.”⁶³ Article 2 derives its meanings from the “obligation to promote universal respect for, and

⁶⁰ *Torture by Proxy*, *supra* note 59, at 59. Re-check this citation.

⁶¹ General Comment 31, *supra* note 42, ¶ 8.

⁶² *Torture by Proxy*, *supra* note 59, at 11.

⁶³ ICCPR, *supra* note 41, art. 2.1.

observance of, human rights and fundamental freedoms” contained in the Universal Declaration of Human Rights of the United Nations.⁶⁴ Because the parties promise each other to abide by this obligation, this obligation is contractual, and State parties are “obligated to every other State Party to comply with [the ICCPR] undertakings.”⁶⁵

77. Article 2 imposes on the State parties a duty not only to actively protect human rights, but also to refrain from violating them.⁶⁶ As a result, Article 2 establishes both a positive and a negative obligation.⁶⁷ The double character of this duty is consistent with established principles of international treaty interpretation. For example, Article 18 of the Vienna Convention, which governs the interpretation of treaties, establishes that once a State signs a treaty, that State has an obligation “to refrain from acts which would defeat the object and purpose of the treaty.”⁶⁸ Since the fundamental purpose of the ICCPR is to serve as an effective instrument against human rights abuses, Article 18 mandates that the parties to the ICCPR refrain from acts that would defeat the protection of human rights abuses, namely, that they refrain from violating human rights.

78. In addition, States parties ought not to limit the ICCPR guarantees “in a manner that would impair the essence of a Covenant right.”⁶⁹ This duty is consistent with Article 19 of the Vienna Convention. Article 19 establishes that State parties to a treaty may not avoid treaty obligations by signing, at the time of the treaty, any reservations, declarations, or statements to that effect.⁷⁰ Ultimately, valid reservations to a treaty may

⁶⁴ General Comment 31, *supra* note 42, ¶ 2.

⁶⁵ *Id.*

⁶⁶ General Comment 31, *supra* note 42, ¶ 6.

⁶⁷ *Id.*

⁶⁸ Vienna Convention, *supra* note 44, art. 18.

⁶⁹ General Comment 31, *supra* note 42, ¶ 6.

⁷⁰ The Vienna Convention, *supra* note 44, art. 2(d) (defining a reservation as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a

not defeat the purpose of that treaty.⁷¹ Under these principles, therefore, State parties to the ICCPR cannot justify their failure to “ensure and protect” human rights by reference to reservations purporting to disclaim that obligation. Reservations cannot be signed that circumvent this obligation either expressly or impliedly, whatever the excuse for not complying might be, because the obligation “to respect and ensure human rights” is fundamental to the ICCPR.⁷²

79. Finally, State parties to the ICCPR cannot avoid the treaty obligations by arguing that the violations were committed by branches of their government other than the branch representing the country at the international level. This limitation is established in Article 50 of the ICCPR, which states that the “provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”⁷³ The Committee has clarified the meaning of Article 50 in General Comment 31 by affirming that “the obligations of the Covenant...are binding on every State Party as a whole.”⁷⁴

Specifically, it has stated that

“All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local – are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility.”⁷⁵

treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”).

⁷¹ Vienna Convention, *supra* note 44, art. 19(c).

⁷² See General Comment 31, *supra* note 42, ¶ 4; Vienna Convention, *supra* note 44, art. 19(c).

⁷³ ICCPR, *supra* note 41, art. 50.

⁷⁴ General Comment 31, *supra* note 42, ¶ 4.

⁷⁵ General Comment 31, *supra* note 42, ¶ 4.

(III) OBLIGATION TO IMPLEMENT DOMESTIC LEGISLATION

80. The obligation of the State Parties to the ICCPR to respect and ensure the human rights of all persons within a State's jurisdiction is made effective by the obligation to implement domestic legislation. Article 2.2 requires that:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.⁷⁶

81. The Committee has made clear that excuses for violations such as the lack of domestic legislation are invalid reasons for violating the ICCPR. The Committee has expressed the view that:

The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.⁷⁷

82. Furthermore, Article 2's obligations are not exhausted by the implementation of domestic legislation. The Committee has made clear that

“Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to [sic] fulfill their legal obligations.”⁷⁸ “Appropriate measures to fulfill the obligation to implement include the provision of a domestic forum for those aggrieved by human rights violations.”⁷⁹

83. Furthermore, Article 2.3 states that State parties commit themselves:

“(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding

⁷⁶ ICCPR, *supra* note 41, art. 2.

⁷⁷ General Comment 31, *supra* note 42, ¶ 14.

⁷⁸ *Id.* at ¶ 7.

⁷⁹ *Id.*

that the violation has been committed by persons acting in an official capacity’ ... (b) To ensure that the competent authorities shall enforce such remedies when granted.”⁸⁰

84. Under the corresponding ICCPR provisions, and in light of the General Comments, therefore, the State parties of the Covenant have committed themselves not only to implement laws that make ICCPR violations illegal under domestic laws, but also to make sure that those laws provide an effective recourse for breaches of those obligations.

(IV) OBLIGATION TO INVESTIGATE AND ADDRESS VIOLATIONS OF THE ICCPR, AND OBLIGATION TO BRING TO JUSTICE THOSE INVOLVED IN GRIEVOUS VIOLATIONS

85. States must take “positive measures” to prevent that others, such as private parties, do not violate human rights, such as inflicting torture or cruel, inhuman, and degrading treatment.⁸¹ One of these positive measures is to investigate violations, and to investigate them “promptly, thoroughly and effectively through independent and impartial bodies.”⁸² These investigations must be exercised with due diligence to “prevent, punish, investigate, or redress the harm caused.”⁸³

86. The fact that a person is a government official does not excuse the State party from bringing that party to justice.⁸⁴ On the other hand, the duty to investigate and redress is not limited to violations committed by government officials. These obligations apply

⁸⁰ ICCPR, *supra* note 41, art. 2.3 (*emphasis added*). For greater detail on the scope of the obligation entailed by this key article, *See generally*, General Comment 31, *supra* note 42 .

⁸¹ *Id.* at ¶ 8.

⁸² *Id.* at ¶ 14.

⁸³ *Id.* at ¶ 8.

⁸⁴ *Id.* at ¶ 18.

regardless of whether the violations have been committed by the State itself, or by private persons or entities.⁸⁵ In the words of the Committee,

There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.⁸⁶

87. The duty to investigate and redress is especially important when the violations are recognized as criminal acts under domestic or international law, such as “torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6).⁸⁷

88. Finally, State Parties agree to be held responsible for failure to investigate, and failure to bring to justice those involved in grievous violations, such as involvement in extraordinary rendition, is a separate violation of the ICCPR.⁸⁸

89. In sum, the General Obligations of the State Parties under the ICCPR include:

(1) The Obligation to protect all individuals under a Party's effective control, regardless of whether the individuals are located within that party's territory, and regardless of whether the person in control of the individual is a government agent or official, or a private party.

(2) The Obligation to respect and ensure the ICCPR guarantees of all persons under effective control of the party, not only by actively protecting those guarantees but also from refraining from violating them. This obligation also encompasses the duty not to limit the ICCPR guarantees in any manner that would impair the “essence” of that right.

⁸⁵ *Id.* at ¶ 8.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ General Comment 31, *supra* note 42, ¶ 18.

The obligation extends to all branches of a government of a State party, including its political subdivisions.

(3) The Obligation to implement domestic legislation to give effect to the ICCPR guarantees. This duty is unqualified and of immediate effect, and cannot be excused with reference to social, political, or economic conditions that impair the fulfillment of the duty. Moreover, the satisfaction of this obligation includes the provision of effective domestic forums of redress for aggrieved victims of violations.

(4) The Obligation to investigate and redress possible violations of the ICCPR with due diligence, regardless of whether the actors allegedly involved are government officials or private actors. This obligation is especially important when the violations are considered criminal acts under either domestic or international law.

C. PROHIBITION OF EXTRAORDINARY RENDITION: ARTICLE 7

90. One of the critical guarantees created in the ICCPR is the right to be free from torture, and from cruel, inhuman, and degrading treatment.⁸⁹ Article 7 states that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁹⁰ This Article of the ICCPR protects individuals from treatment that is offensive to their individual dignity, and to their mental and physical integrity.⁹¹ As a core substantive provision of the ICCPR, State parties cannot abolish the rights guaranteed in Article 7, or modify them, not even in times of emergency, such as war, or for other reasons.⁹²

⁸⁹ ICCPR, *supra* note 41, pmbll..

⁹⁰ *Id.* at art. 7.

⁹¹ General Comment 20, *supra* note 52 (stating that the purpose of Article 7 is to “protect both the dignity and the physical and mental integrity of the individual”).

⁹² ICCPR, *supra* note 41, art. 4. For an interpretation of Article 4 and 7 *see* General Comment 20, *supra* note 52, ¶ 3. For a general reflection of the importance of Article 7, *See e.g.*, Meg Satterthwaite, *Rendered*

91. Article 7 includes an implied “non refoulement” obligation.⁹³ A non-refoulement obligation is a prohibition of the transfer of individuals by State parties, either by virtue of expulsion, return, or by extradition, to places where those individuals will be tortured. Article 7 impliedly encompasses (and prohibition) the extradition of individuals to other countries in order to be tortured, or to expose them to cruel, inhuman or degrading treatment.⁹⁴ In the words of the Committee:

[T]he article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.⁹⁵

92. This interpretation of Article 7 is consistent with the interpretation that other sources of international law have made of the article. For example, the International Court of Justice found that the Covenant extends to “acts done by a State in the exercise of its jurisdiction outside of its own territory.”⁹⁶ Likewise, the Human Rights Council of the United Nations, has said that

“[t]he removal of a person to a State for the purpose of holding that person in secret detention, or the exclusion of the possibility of review by domestic courts of the sending State, can never be considered compatible” with the obligations of the parties to the ICCPR.⁹⁷

Meaningless: Extraordinary Rendition and the Rule of Law, 75 Geo. Wash. L. Rev. 1333 [hereinafter *Rendered Meaningless*].

⁹³ See Comment 20, *supra* note 52, ¶ 9; Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee United States of America (10-28 July 2006), ¶ 16 [hereinafter *Concluding Observations 2006*].

⁹⁴ *Id.*

⁹⁵ General Comment 31, *supra* note 42, ¶ 12.

⁹⁶ Advisory opinion, I.C.J. Reports 2004 (9 July 2004), ¶ 111 (recognizing that jurisdiction of States is primarily territorial but that the Covenant extends to acts done by a State in the exercise of its jurisdiction outside its own territory).

⁹⁷ U.N. Human Rights Council, Thirteenth session, Agenda item 3 A/HRC/13/42, 19 February 2010, ¶ 38. The Human Rights council is part of the United Nations, and is currently comprised of representatives of

93. The Committee has determined that States Parties' obligation of non-refoulement applies in several situations. First, to the transfer of an individual with the "purpose" that the person be tortured or that he or she suffers cruel, inhuman or degrading treatment in the country of destination.⁹⁸ Second, to the transfer of an individual to a country where there is a "real risk" of torture or cruel, inhuman, or degrading treatment.⁹⁹ If real risk exists, "the State party itself may be in violation of the Covenant,"¹⁰⁰ regardless of whether torture or cruel, inhumane or degrading treatment actually occurs.¹⁰¹ Finally, the obligation applies if risk of irreparable harm exists in another country to which the person may subsequently be removed.¹⁰²

D. APPLICATION OF THE ICCPR: THE UNITED STATES, NORTH CAROLINA AND ITS POLITICAL SUBDIVISIONS, AND AERO CONTRACTORS ARE IN VIOLATION OF THE ICCPR DUE TO THEIR INVOLVEMENT IN EXTRAORDINARY RENDITION

(i) The United States Violates the ICCPR when denies applicability of the ICCPR obligations based on the non self-executing character of the ICCPR

94. The above-mentioned principles of the Vienna Convention categorically establish that parties to an international treaty must refrain from acts that are contrary to the purpose of that treaty.¹⁰³ The United States recognizes the Vienna Convention as international

47 countries. The Council has the mission to strengthen the promotion and protection of human rights around the world. More information about the Council is available at

<http://www2.ohchr.org/english/bodies/hrcouncil/> [last accessed 6/22/2012 at 11:55AM EST].

⁹⁸ U.N. Human Rights Comm., Communication No. 470/1991: *Kinder v. Canada*, U.N. Doc. CCPR/C/48/D/470/1991 (1993).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ This obligation exists regardless of whether the reason for the transfer is extradition, expulsion or return. General Comment 20, *supra* note 52, ¶ 9.

¹⁰² General Comment 31, *supra* note 42, ¶ 12.

¹⁰³ Vienna Convention, *supra* note 44, arts. 18 and 19.

customary law in treaty interpretation.¹⁰⁴ As early as 1900, the Supreme Court stated that international customary law “is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”¹⁰⁵ Thus, the principles of the Vienna Convention should govern the United States interpretation of its obligations under the ICCPR.¹⁰⁶

95. Based on these principles, the United States cannot engage in actions that defeat the main purpose of the ICCPR. The ICCPR is the “[c]ovenant is a landmark in the efforts of the international community to promote human rights. It defends the right to life and stipulates that no individual can be subjected to torture.”¹⁰⁷ Engaging in human rights abuses defeats the purpose of promoting human rights and for that reason the United States cannot engage in actions that defeat the promotion of human rights without violating the ICCPR. Since the practice of extraordinary rendition entails human rights violations, at minimum because of the torture or CID involved, it follows that the United States cannot engage in extraordinary rendition without violating its obligations under the ICCPR.

96. In its efforts to create an exception to the ICCPR’s applicability, however, the United States argues that it is relieved from following the ICCPR obligations, and thus free to

¹⁰⁴ See e.g., United Nations Human Rights Comm., Third Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/Q/3/Annex (Oct.21, 2005) [hereinafter U.S. Third Periodic Report to Human Rights Committee] (containing the second and third periodic reports of the United States because the two reports were submitted by the United States in one document). See also, e.g., Restatement (Third) of Foreign Relations Law § 111 (1987) (stating that customary international law is considered to be like common law in the United States, but it is federal law); *Rendered Meaningless*, *supra* note 92, at 1360.

¹⁰⁵ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹⁰⁶ For a discussion of the current view on the status of customary international law, See generally, Ved P. Nanda, David K. Pansius, *The Paquete Habana*, 4 *Litigation of International Disputes in U.S. Courts* § 9 (2011) (arguing that “[a] litigant seeking to employ international law to support a claim inevitably turns to *The Paquete Habana*.”).

¹⁰⁷ Millennium Declaration of 2000, *supra* note 42.

engage in extraordinary rendition, by the understandings, and declarations (RDUs) that it signed at the time of ratification.¹⁰⁸ It argues that because those RDUs establish that Articles 1-27, which contain the core substantive provisions of the ICCPR, are non self-executing, the ICCPR obligations are not binding on the United States.¹⁰⁹ The United States has used this argument whenever allegations of ICCPR violations arise, claiming that is exempted from the ICCPR obligations because Congress has not yet taken action to implement them.

97. Under United States law, when a treaty is not self-executing, the United States is not bound to follow the obligations of the treaty unless domestic legislation is implemented that makes the violation of the treaty illegal under domestic law.¹¹⁰ Under Article 18, however, the ICCPR is applicable to actions of the United States even without implementing legislation because the torture or CID involved in extraordinary rendition are contrary to the main purpose of the ICCPR, which is the promotion of human rights, including the right to be free from torture or CID expressed in Article 7. Therefore, the ICCPR obligations apply to the United States despite the RUDs, and despite the lack of implementing legislation.

98. This idea has been recently expressed by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while

¹⁰⁸ U.S. Reservations, Declarations, and Understandings, ICCPR, 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) [hereinafter RDUs].

¹⁰⁹ Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. U. J. Int'l Hum. Rts. 7, ¶ 3 (2005).

¹¹⁰ *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (defining “self-executing” treaty as one for which “no domestic legislation is required to give [it] the force of law in the United States”).

countering terrorism, Martin Scheinin, during a press conference held in Washington, D.C., on Friday, 25 May 2007.¹¹¹ Mr. Scheinin stated:

“The Special Rapporteur is aware of the reservations and declarations entered by the United States upon its ratification of the International Covenant on Civil and Political Rights and the Convention Against Torture. Under international law, reservations that are contrary to the object and purpose of a treaty are impermissible. The relevant treaty bodies, the Human Rights Committee and the Committee Against Torture, have requested that the United States withdraw its reservations and declarations relevant to this context. In light of this, the Special Rapporteur sees his mandate as requiring him to address the law and practice of the United States with reference to international treaty standards, without making an assessment of whether its reservations and declarations are permissible.”¹¹²

99. Thus, the ICCPR obligations apply to the United States, North Carolina and its political subdivisions, and Aero Contractor, independently of the non self-executing character of the treaty and its RDUs. The United States violates the ICCPR by denying its applicability to its actions based on the non self-executing character of the treaty. The engagement of the federal government, North Carolina and its political subdivisions, and Aero Contractors in human rights abuses violates the ICCPR.

(ii) The United States is in violation of the ICCPR because it has signed impermissible RDUs

100. To be valid, a reservation must be compatible with the object and purpose of a treaty.¹¹³ This is not only a Vienna Convention principle, but it is also the current cardinal rule in international treaty law.¹¹⁴ Whether the United States RDUs conform to

¹¹¹ Preliminary Findings, *supra* note 53.

¹¹² *Id.*

¹¹³ Vienna Convention, *supra* note 44, art. 19.

¹¹⁴ See Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 Am. J. of Int'l L. 531, 531 (July, 2002); Anthony Aust, *Modern Treaty Law and Practice* 110, 112 (2000).

this guiding principle has been the object to much debate.¹¹⁵ The position of the Committee is that the United States should withdraw at least two of the RDUs.¹¹⁶

101. The Committee's has expressed that the invalidity of an RDUs may come from the RDUs rendering ineffective the protections of the Covenant:

Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant.[...] [Moreover,][o]f particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts [...] all the essential elements of the Covenant guarantees have been removed.¹¹⁷

102. The United States RDUs purport to make Articles 1-27 non-self-executing. However, Articles 1-27 contain all the core substantive protections of the ICCPR, including Article 7's the right to be free from torture or CID, and are therefore central to the ICCPR. Violations of the ICCPR may go unpunished because they are not a violation of domestic laws. Thus, the United States RDUs regarding non self-executing character of the treaty is of such character as to "essentially render ineffective all Covenant rights" because "all the essential elements of the Covenant guarantees have been removed." Thus, the RDUs are impermissible under the principles of the Committee, and the ICCPR obligations are not defeated.¹¹⁸

¹¹⁵ *Id.* at 539.

¹¹⁶ *Id.*

¹¹⁷ See General Comment 24, *supra* note 50, ¶ 8. For an example of scholarly critique, *See generally*, Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 Am. J. Int'l L. 341, 346 (1995); John Cerone, *Out of Bounds? Considering the Reach of Human Rights Law*, (CHRGJ, Working Paper No. 5, 2006), available at http://www.chrgj.org/publications/docs/wp/WPS_NYU_CHRGJ_Cerone_Final.pdf [last accessed 6/22/2012 at 1:59PM EST].

¹¹⁸ See General Comment 24, *supra* note 50, ¶¶ 11, 18–19.

103. The RDUs are impermissible under the Vienna Convention principle as well. As noted above, Article 19 establishes that reservations to a treaty “may not be incompatible with the object and purpose of the treaty.”¹¹⁹ Under Article 19, if the RDUs allow the United States to engage in torture and extraordinary rendition, which are in fact violations of the ICCPR guarantees, those RDUs are void.¹²⁰

104. The concept that the RDUs exempt the United States from complying with the ICCPR obligations is therefore invalid. If, as the United States argues, the signed RDUs exempt the United States from ICCPR obligations, then the RDUs are void under the Vienna Convention and the Committee principles expressed above. Therefore, because extraordinary rendition is a violation of the obligations under the ICCPR, the United States’ engagement in extraordinary rendition is a violation of the ICCPR. On the other hand, if the United States intends that the RDUs be valid under Article 19, the RDUs must not free the United States to engage in human rights abuses, including extraordinary rendition. If the RDUs do not free the United States to engage in human rights abuses, however, then its involvement in extraordinary rendition violates the ICCPR. Thus, either the United States interpretation of the RDUs must change, or the RDUs themselves must be changed.

105. RDUs to the ICCPR are ineffective instruments to free the United States, or any other party, to commit human rights abuses, the prevention and accountability of which constitutes the very purpose of existence of the ICCPR. Thus, by their involvement in

¹¹⁹ Vienna Convention, *supra* note 44, art.19.

¹²⁰ World Organization for Human Rights USA, Statement to Senate Judiciary Committee, Subcommittee on Human Rights and the Law: *The Law of the Land: U.S. Implementation of Human Rights Treaties* ¶ 7, (Dec. 16, 2009).

extraordinary rendition, the United States, North Carolina and its political subdivisions, and Aero Contractors violate the ICCPR.

(iii) The United States violates the ICCPR by denying applicability beyond its de jure territory

106. As noted above, a State Party to the ICCPR must “respect and ensure” the Covenant’s guarantees to all persons within its effective control, even those outside the party’s own territory.¹²¹ Despite the clear language of the Committee in this regard, however, the United States’ position is that the ICCPR protects individuals within the State Party’s de jure territory only.¹²²

107. The United States maintains that all activities that happen outside its territory cannot be violations of the ICCPR because of the language in Article 2 with reference to territory. According to the United States, the phrase “and subject to its jurisdiction” creates territorial and jurisdictional requirements that must be met before an individual who has been subjected to torture or CID may claim the protection of the treaty. In the view of the United States, to come under the protection of the ICCPR an individual must both be within U.S. territory and within the jurisdiction of the United States. In the words of the Bush Administration:

The United States “[has] come to work under the assumption that their obligations under international human rights treaties extend no further than their own territorial borders.”¹²³ Specifically, the United States maintains that the ICCPR does not apply to the United States in actions committed outside the United States special maritime or territorial

¹²¹ General Comment 31, *supra* note 42, ¶ 10. *See also, Civil and Political Rights: The Human Rights Committee Fact Sheet, supra* note 47.

¹²² *Rendered Meaningless, supra* note 92, at 1359.

¹²³ *Gibney, supra* note 3, at 15, 57.

jurisdiction and to military operations during an international armed conflict.¹²⁴

108. Even if the United States “has come to work under the assumption” that the ICCPR applies only within its territory, this understanding is inconsistent with the Committee’s interpretation of the treaty and is therefore invalid.¹²⁵ The Committee, which is the official interpretative body of the treaty, has made clear that:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. 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.¹²⁶

109. The United States’ position regarding ICCPR applicability limited to its de jure territory is unsustainable in view of the Committee’s interpretation. Thus, the United States violates the ICCPR not only by engaging in practices prohibited by the treaty but also by denying applicability beyond its de jure territory.

(iv) The United States Violates the ICCPR by failing to investigate, and failing to bring to justice known perpetrators of human rights abuses

110. The Committee has expressed its concern regarding the United States actions after allegations of ICCPR violations regarding extraordinary rendition and torture or CID:

¹²⁴ *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical Policy, and Operational Considerations* (April 4, 2003) reprinted in *The Torture Papers: The Road to Abu Ghraib* 286, 346-59 (Karen Greensberg & Joshua Dratel, eds. 2005).

¹²⁵ The interpretations of the Committee are not binding with the State parties of the ICCPR. For a further discussion of the effects of the Committee’s opinions *See generally*, e.g., Goodman, *supra* note 114.

¹²⁶ Comment 31, *supra* note 42, ¶ 10.

The Committee notes with concern shortcomings concerning the independence, impartiality and effectiveness of investigations into allegations of torture and cruel, inhuman or degrading treatment or punishment inflicted by United States military and non-military personnel or contract employees, in detention facilities in Guantanamo Bay, Afghanistan, Iraq, and other overseas locations, and to alleged cases of suspicious death in custody in any of these locations.¹²⁷

111. The preceding comments of the Committee evidence the current state of affairs regarding the United States failure to comply with the ICCPR duty to investigate ICCPR violations and to bring to justice alleged perpetrators. The United States has violated the obligation to investigate allegations of torture, because only “limited investigation and lack of prosecution” has taken place in the case of alleged violations. The United States has also failed in its obligation to bring to justice the perpetrators of human rights abuses. The Obama Administration has taken the position that it will not bring to justice those involved in alleged violations of human rights during the previous administration. The executive power has not pushed for indictments or Congressional hearings on the topic. Because of these failures, the United States is in violation of the ICCPR.

(v) The United States Violates the ICCPR because it has failed to implement domestic legislation

112. Parties to the ICCPR have the obligation to make effective the ICCPR guarantees by implementing domestic legislation that make those rights effective under internal law.¹²⁸ Because of the crucial role of domestic legislation to make effective the ICCPR

¹²⁷ Concluding Observations, *supra* note 93, ¶ 14.

¹²⁸ ICCPR, *supra* note 41, art. 2.

rights, failure to pass federal laws and policies against violation of these rights is in itself a violation of the ICCPR.¹²⁹

113. The United States has violated the ICCPR obligation to implement domestic legislation to make the treaty effective because it has failed to enact legislation after over 40 years of ratifying the treaty. To this effect, the Committee has pointed to the deficiencies in current United States' laws in support of its conclusion that the United States has failed to enact implementing legislation. In particular, the Committee has signaled the inexistence of a

“Federal crime of torture...to fulfill its obligations under the Convention to prevent and eliminate acts of torture causing severe pain or suffering, whether physical or mental, in all its forms.”¹³⁰

114. The United States argues that the ICCPR obligations, such as the obligation to implement domestic laws, do not apply to actions by the United States because of the absence of implementing legislation. This argument impermissibly purports to avoid the obligation to implement because, as seen above, the ICCPR contains an affirmative obligation to implement. Failure to implement is a violation in itself. In fact, human rights experts called to testify in front of the Senate Judiciary Committee, Subcommittee on Human Rights and the Law, have called this failure to the attention of the Senate, noting that the United States' failure to pass federal laws and policies against extraordinary rendition falls short of treaty obligations under the ICCPR.¹³¹

115. The United States position is logically flawed. Its position is equivalent to saying that the United States violation of one obligation (the obligation to implement) justifies

¹²⁹ World Organization for Human Rights USA, *supra* note 120.

¹³⁰ Concluding Observations of the Human Rights Committee, *supra* note 93. It should be noted, however, that persuasive arguments exist that federal law does prohibit torture, which would provide additional support for accountability. See *infra* Part Three, 3B.

¹³¹ World Organization for Human Rights USA, *supra* note 120.

the violation of another obligation (engaging in practices that violate human rights). The circularity of the reasoning exposes its debility. More importantly, the Committee has made clear that excuses for violations such as the lack of domestic legislation are invalid reasons for violating the ICCPR. The Committee also stated that the provisions of the ICCPR apply to “all parts of federal states without exceptions.”¹³² The Committee has expressed the view that:

“The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.”¹³³

116. Because of the unqualified nature of this obligation, the United States’ engagement in extraordinary rendition is not excused because the failure to enact domestic laws may have been committed by parties others than the executive branch itself (the legislative power). The executive branch, the representative of the State Party in the international arena, may not discharge its obligations under the Covenant by pointing to the failure of another branch of government (the legislative power) to fulfill its obligations under the ICCPR to implement domestic legislation.¹³⁴ As a result, the United States is in violation of the unqualified obligation to implement domestic legislation and the use of impermissible grounds to avoid its obligations under the ICCPR is in itself a violation of the ICCPR.

117. With respect to the observation of the Committee that there is not a federal crime of torture under United States’ law, the United States argues that, because of the reservation signed to Article 7 (which prohibits torture), the United States need not enact a crime of

¹³² Comment 31, *supra* note 42, ¶ 4.

¹³³ *Id.*

¹³⁴ *Id.*

torture. The United States reservation regarding Article 7 of the ICCPR states that the article's provisions apply only

“to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution on the United States.”¹³⁵

118. Whether torture is prohibited under United States law is, however, a topic of great debate. Some even argue that torture is part of the practices of the United States and compatible with domestic laws: “[T]orture may be compatible with American values in practice and with the legal system we have constructed to serve those values.”¹³⁶ Others, on the other hand, claim that torture is prohibited by the United States Constitution and claim that “Accountability for torture is a legal, political, and moral imperative.”¹³⁷ In the beginning of 2012, a bill was signed by President Obama that authorizes indefinite detention and torture.¹³⁸

119. Because whether the right to be free from torture is already guaranteed under United States law is at least questionable, the United States argument that it need not implement additional legislation for protection of the Article 7 right to be free from torture cannot in and on itself end the discussion of whether additional protections against torture must be set in place. Thus, the United States is in violation of the ICCPR for failure to implement domestic legislation to execute its international commitments under the ICCPR.

¹³⁵ RDUs, *supra* note 108.

¹³⁶ Parry, *supra* note 38, at 1003. *See infra* Part Three, 3.B.

¹³⁷ ACLU, *Accountability for Torture*, available at <http://www.aclu.org/accountability> [last accessed, 1/4/2012, at 3:28PM EST].

¹³⁸ *Obama Says Bill Breaks With Our Values, Signs It Anyway*, The Atlantic, February 3rd, 2012, available at <http://www.theatlantic.com/politics/archive/2012/01/obama-says-bill-breaks-with-our-values-signs-it-anyway/250828/> [last accessed 1/4/2012, at 3:50PM EST].

(vi) The United States violates the ICCPR by failing to recognize a non-refoulement obligation

120. The concept of refoulement is especially important for the extraordinary rendition argument. An obligation of non-refoulement prevents a State from forcibly transferring individuals to other countries with the express purpose to torture them, or where a real risk of such torture or CID exists. Therefore, an obligation of non-refoulement absolutely prohibits extraordinary rendition.

121. The United States denies that the ICCPR includes an implied obligation of non-refoulement. It justifies its position on the fact that the ICCPR does not include an express obligation of “non-refoulement.” It purports to illustrate the importance of the absence of language of non-refoulement in the ICCPR by comparing this treaty to the Convention Against Torture (CAT), which in fact contains an express obligation of “non-refoulement.”¹³⁹ The United States argues that the absence of the words “non-refoulement” in the ICCPR is an expression of the intent of the parties to the ICCPR not to include such obligation. If the parties would have intended to include a non-refoulement provision, they would have included express language to this regard, it argues, as they did in CAT. The United States then concludes that “the totality of U.S. treaty obligations with respect to non-refoulement for torture are contained in the obligations of the United States assumed under the Convention Against Torture,”¹⁴⁰ and no international obligations concerning extraordinary rendition arise from the ICCPR.

¹³⁹ Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20, 14. 65 U.N.T.S. 113 [hereinafter “CAT”]. In CAT, non-refoulement is defined as “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” CAT, Art.3. See next section on CAT for a full discussion of Article 3.

¹⁴⁰ U.S. Dep’t of State, *List of Issues to Be Taken up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America* ¶ 10 [hereinafter U.S. Written Responses to

122. The non-refoulement obligation in the ICCPR imposes a wider prohibition on States parties than the non-refoulement provision in CAT. This is because whereas the non-refoulement prohibition in CAT is limited to torture, the non-refoulement obligation in the ICCPR prohibits transfers with not only the purpose or the real risk that the person be tortured but also with the purpose or the real risk that the person be inflicted other sorts of ill treatment (which might not quite rise to the more serious category of torture).¹⁴¹ Under the United States' view, the fact that the obligation in ICCPR is broader than in CAT is an impermissible expansion of the obligations under the ICCPR.¹⁴²

(vii) The United States violates the ICCPR when it denies the treaty independent significance

123. The role of the ICCPR as an instrument against human rights abuses was crucial for the United States' ratification of the treaty.¹⁴³ As expressed in the Senate discussions before ratification, the United States purported to achieve two main goals by becoming a party to the ICCPR.¹⁴⁴ First, to affirm the United States' commitment to the protection of human rights, and second, to obtain participation in the Human Rights Committee, and thus to have a more active role in the development and enforcement of human rights globally.¹⁴⁵ Therefore, when the United States signed and ratified the ICCPR, knowingly

HRC], [http:// www.state.gov/g/drl/rls/70385.htm](http://www.state.gov/g/drl/rls/70385.htm) [last accessed, 10/28/2011, at 10:22AM). A full discussion on the protections contained in CAT is included in the next section about CAT.

¹⁴¹ Article 7 of the ICCPR defines these other forms of ill treatment as "cruel, inhuman or degrading treatment."

¹⁴² U.S. Written Responses to HRC, *supra* note 140. As explained in the next section, the United States has signed the Convention Against Torture which explicitly includes a non refoulment provision. That treaty, however, only prohibits torture, but not CID.

¹⁴³ U.S. Written Responses to HRC, *supra* note 140 .

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

and freely accepted the obligation to protect and ensure human rights around the world as well as the other concomitant obligations established in the treaty.

124. The United States argument contains several flaws. First, under the guise of faithfulness to the text of the ICCPR, the United States denies the treaty its independent significance when it argues that the meaning of its Article 7 should be deciphered by looking to the text of another treaty, the CAT. This reasoning is flawed at its inception because the CAT was not even drafted at the time the ICCPR came into force, and therefore its text could not have served as reference by the drafters of the ICCPR to design the ICCPR provisions.

125. The United States argument is flawed also because it contains a logical fallacy. Just because another subsequent treaty imposes an express obligation of non-refoulement it does not necessarily follow that the ICCPR does not impose a non-refoulement obligation. In fact, non-refoulement clauses are contained in several international treaties.¹⁴⁶ The presence of this prohibition in one instrument does not automatically invalidate the obligation in another treaty.¹⁴⁷ The United States position renders the ICCPR meaningless because it deprives it from independent significance, denying its protections by pointing out to the existence of similar protections in other instruments.¹⁴⁸

(viii) The United States violates the ICCPR by rejecting the Committee's interpretative authority

¹⁴⁶ *Rendered Meaningless*, *supra* note 92, at 1355 (arguing that the practice of extraordinary rendition involves a “specific subset of antitorture standards set out in numerous human rights treaties: rules outlawing transfers to a risk of torture (rules prohibiting refoulement)”). For a discussion of the range of human rights implicated by extraordinary rendition, *See generally*, Weissbrodt & Bergquist, *supra* note 34.

¹⁴⁷ Add some examples of international treaties w/non refoulment clauses other than CAT.

¹⁴⁸ For the general idea that the ICCPR has been rendered meaningless by the United States, *See generally*, *Rendered Meaningless*, *supra* note 92.

126. The authority of the Committee as the interpretative body of the ICCPR is established in the ICCPR itself.¹⁴⁹ Interpretative differences in issues of international concern, such as extraordinary rendition, underscore the necessity of a neutral body to adjudicate competing interpretations of the treaty provisions. On the topic of non-refoulement, the Committee has ruled that there is in fact an implied obligation in the ICCPR. All parties to the treaty must abide to this official interpretation.

127. The authority of the Committee to rule on this matter need not be justified by the interpretations of the Covenant or other sources of international law. The fact that other reputable organs also interpret the ICCPR as containing a non-refoulement provision, however, reinforces the credibility of the Committee's interpretation and makes contrary interpretations even more suspicious.

128. The United States agreed to abide by the authority of the Committee by signing and ratifying the ICCPR. Despite having made extensive RDU's to other parts of the ICCPR, the United States did not object to the function of the Committee as interpretative authority of the ICCPR by presenting a reservation. Much to the contrary, in the discussions before ratification, participation of the United States in the monitoring Committee was seen as one of the major advantages for ratifying the ICCPR, since it was thought that it would assist the United States in playing a more active role in the implementation of the Covenant.¹⁵⁰

129. However, despite having agreed to the authority of the Committee, the United States interprets Article 7 with clear disregard of the Committee's interpretation as if, as a

¹⁴⁹ ICCPR, *supra* note 41, Part IV.

¹⁵⁰ See U.S. Senate Report on Ratification of The International Covenant on Civil and Political Rights, U.S. Senate Executive Report 102-23 (102d Cong., 2d Sess.), available at http://sitemaker.umich.edu/drwcasebook/files/senate_committee_on_foreign_relations_report_on_the_iccp_r.pdf [last accessed 10/29/2011 at 11:28PM EST].

State Party, it would have the same status as the Committee to decide the meaning of the terms of the treaty. The wording in the 1992 Senate report on ratification of the ICCPR illustrates the nonchalant position of the United States:

“We are familiar with the Committee's statement...[that the ICCPR contains an implied obligation of non-refoulement]...; [h]owever, the United States disagrees that States Parties have accepted that obligation under the Covenant.”

130. The United States position is inconsistent with the legal status of the Committee as the official interpretative body of the ICCPR. In fact, the United States disregard of the existence of an implied obligation of non-refoulement in the ICCPR has repeatedly caught the attention of the Committee, which has expressed that the

“The State party should take all necessary measures to ensure that individuals, including those it detains outside its own territory, are not returned to another country by way of inter alia, their transfer, rendition, extradition, expulsion or refoulement if there are substantial reasons for believing that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment.”¹⁵¹

131. Because the United States signed this treaty having acknowledged, if not encouraged the role assigned to the Committee in the ICCPR, the United States cannot disregard the Committee's interpretation of the provisions just because “it does not agree.” On the contrary, by signing the ICCPR, the United States has agreed that the Committee of Human Rights would perform this interpretative function and is bound by its interpretation that Article 7 does contain an implied obligation of non-refoulement.

(xix) The ICCPR Applies not only to the United States as a whole, but also to North Carolina and its political subdivisions, and to Aero Contractors

¹⁵¹ Concluding Observations 2006, *supra* note 93, ¶ 16.

132. The United States as well as North Carolina, and all of its political subdivisions, are responsible for the violations of the ICCPR committed by Aero Contractors. As noted above, ICCPR obligations are not limited to agent officials or to a single branch of the State Party government.

133. First, the United States as a whole as well as North Carolina and all of its political subdivisions are implicated in the violations committed by Aero Contractors because under the ICCPR, as noted above, the liability of a State party extends to violations of the ICCPR obligations committed by private parties.¹⁵² Second, North Carolina and its political subdivisions are responsible for the ICCPR violations committed by Aero Contractors by facilitating and failing to prevent and punish extraordinary rendition because all branches of a State party to the ICCPR must respect and ensure the ICCPR guarantees.¹⁵³

3. THE CONVENTION AGAINST TORTURE (CAT): GENERAL APPLICABILITY AND SUBSTANTIVE PROVISIONS RELATED TO EXTRAORDINARY RENDITION

A. INTRODUCTION

134. CAT is a firm declaration that torture has no place in society because it violates the dignity of its victims and destroys the fabric of human society.¹⁵⁴ CAT is a broad declaration of international ethical norms against the practice of torture as well as a set of legal obligations that govern the signing parties. The treaty requires member states to take legislative, administrative, and judicial measures, and thus seeks to prevent torture not

¹⁵² See e.g., General Comment 31, *supra* note 42, ¶ 8.

¹⁵³ *Id.* at ¶ 31.

¹⁵⁴ See CAT, *supra* note 139.

only when it takes place within a member state, but where a member state's nationals commit or conspire to commit torture anywhere else in the world.

B. GENERAL APPLICABILITY OF CAT TO THE UNITED STATES

135. President Ronald Reagan signed CAT on behalf of the United States on April 18, 1988. Upon signing the treaty President Reagan stated, "Ratification of the Convention by the United States will clearly express [the] United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today."¹⁵⁵ The signing, however, came with the declaration that the United States "reserves the right to communicate, upon ratification, such reservations, interpretative understandings, or declarations as are deemed necessary."¹⁵⁶ The Senate ratified the treaty on October 21, 1994 but subject to eight reservations.¹⁵⁷

136. Like the ICCPR, the U.S. Senate declared that Articles 1-16 were not self-executing and thus without effect within the United States unless Congress passed legislation to implement the provisions.¹⁵⁸ However, unlike the ICCPR, the United States enacted legislation to create enforcement mechanisms for the provisions of CAT.

¹⁵⁵ Ronald Reagan, United States President, *Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment* (May 20, 1988), available at <http://www.presidency.ucsb.edu/ws/?pid=35858#axzz1yY4uP6rg> [last accessed 6/22/2012 at 2:36PM EST].

¹⁵⁶ Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Office for the High Commissioner of Human Rights, Committee Against Torture, Status of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Reservations, Declarations and Objections Under the Convention, CAT/C/2/Rev.5, 22 January 1998, available at <http://www.unhchr.ch/tbs/doc.nsf/0/fa6561b18d8a4767802565c30038c86a?Opendocument> [last accessed 6/22/2012 at 2:41PM EST].

¹⁵⁷ *Id.*

¹⁵⁸ Michael Garcia, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Alien*, Cong. Res. Serv. 4 (March 2004), [hereinafter "CRS, 2004"], available at <http://www.fas.org/sgp/crs/natsec/RL32890.pdf> [last accessed 6/22/2012 2:45PM EST].

B. CAT ARTICLES DIRECTLY RELEVANT TO EXTRAORDINARY RENDITION

(i) Article 1 and Article 6: Defining Torture

137. Of first importance is the U.S. interpretation of Article 1's definition of torture.

CAT defines torture as:

‘[A]ny 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, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’¹⁵⁹

138. The definition of “torture” in Part 1, Article 1 of CAT has three aspects: (1) a triggering act against an individual, (2) performed for a particular purpose, (3) performed by a particular individual. Article 1 defines the basic triggering act as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a subject.”¹⁶⁰ To qualify as torture, the treatment inflicted on the victim must be for a particular purpose. CAT does not give an absolute standard; rather, it provides four examples when the triggering act would constitute torture: when “for such purposes as” (1) obtaining “information or a confession”, (2) punishing the suspect or a third party for an act he is known or suspected to have committed, (3) “intimidating or coercing” the subject or a third part or (4) “for any reason based on discrimination of any kind.”¹⁶¹ Finally, the treatment must be inflicted either by a public official or by person acting in an official capacity, or must be done by the consent or acquiescence of the state.

¹⁵⁹ CAT, *supra* note 139, art.1.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

139. Regarding Article 1's definition of torture, the Senate declared at ratification that a public official or someone acting in an official capacity could still be culpable for torture even if he only acquiesced to the act.¹⁶² Willful blindness that a person will be tortured may also constitute acquiescence.¹⁶³ The U.S. State Department interprets the definition of torture narrowly, understanding it to be an "extreme" practice beyond rough but not "severe" treatment such as police brutality.¹⁶⁴ Before President Bush's 2004 direction to the United States not to engage in torture, the Department of Justice theorized that specific intent to cause severe pain and suffering is required in order for an act to be considered torture; however, currently the Department of Justice deems it inappropriate to use a "specific intent" approach to evade the definition of torture."¹⁶⁵

140. CAT also defines and prohibits lesser actions that do not rise to the level of torture. Part I, Article 16 prohibits "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in [A]rticle 1."¹⁶⁶ Article 16, "is in the nature of a catch-all provision," and serves to forbid any lesser, though still revolting treatment.¹⁶⁷

(ii) Article 2: Non-derogability, Taking measures to Prevent Torture.

141. Article 2 requires that a Member State "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its

¹⁶² CRS, 2004, *supra* note 158, at 5.

¹⁶³ *Id.*, citing *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003).

¹⁶⁴ *Id.* at 4.

¹⁶⁵ Michael Garcia, *The U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, Congressional Research Service, 9-10 (January 2009), [hereinafter "CRS, 2009"], available at <http://www.fas.org/sgp/crs/intel/RL32438.pdf> [last accessed 6/22/2012 at 2:49PM EST].

¹⁶⁶ CAT, *supra* note 139, art. 16.

¹⁶⁷ M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 Case W. Res. J. Int'l L. 389, 394 (2006).

jurisdiction.”¹⁶⁸ Article 2 is non-derogable, meaning that it is absolute regardless of the political environment and that it cannot be limited, annulled or destroyed by any contingency, excuse, or defense.¹⁶⁹ Article 2’s non-derogation provision is as follows: “No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁷⁰

142. In interpreting Article 2, the U.S. Senate reiterated the importance of CAT’s non-derogation provisions in Article 2. This means that the Senate believes that no laws can be implemented contrary to CAT. The State Department has also stated that non-derogability is “necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms.”¹⁷¹ Additionally CAT destroys any chain of command excuse by stating that “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture.”¹⁷²

143. Similar to its arguments against applicability of the ICCPR, the United States argues that Article 2 does not apply to extraordinary rendition since the transfer and detainment takes place entirely outside the United States, and thus outside its territorial jurisdiction.¹⁷³ The United States argues that because Article 2 only requires States to prevent torture in “any territory under its jurisdiction” and that because extraordinary

¹⁶⁸ CAT, *supra* note 139, art. 2(1).

¹⁶⁹ See Jillian Button, *Sprited Away (Into a Legal Black Hole?): The Challenge of Invoking State Responsibility for Extraordinary Rendition*, 19 Fla. J. Int’l L. 531, 546 (2007).

¹⁷⁰ CAT, *supra* note 139, art. 2(2).

¹⁷¹ *President’s Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, S. Treaty Doc. No. 100-20 at 5, reprinted in 13857. U.S. Cong. Serial Set (May 23, 1988).

¹⁷² CAT, *supra* note 139, art. 2(3).

¹⁷³ *Rendered Meaningless*, *supra* note 92, at 1367.

rendition involves acts committed outside any formal territory of the United States, the extraordinary rendition program does not violate CAT.

144. The United States defines “territory under its jurisdiction” as an area “where a State exercises territory-based jurisdiction, that is, areas over which the State exercises at least de facto authority as the government.” This, however, is a narrow interpretation of “jurisdiction” which may violate the terms of the treaty, the object and purpose of which is to prevent torture throughout the world.¹⁷⁴ Working papers from the drafting phase of CAT indicate that the phrase “territory under its jurisdiction” was meant to encompass “territories under military occupation, to colonial territories and to any other territories over which a state has factual control.”¹⁷⁵

145. A government can have control over an act in two ways relevant to jurisdiction over extraordinary rendition: (1) by having control over the people involved, namely the individual who is the object of rendition (the “personal control” test) and (2) control over territory (the “effective control” test).¹⁷⁶ These tests are useful in analyzing whether the United States has control and jurisdiction over individuals and the facilities where the individuals are sent and tortured regardless of whether the process started on United States soil.

146. The extraordinary rendition meets the personal control test. While the individual is rendered on an Aero Contractors’ aircraft, Aero personnel have personal control over him. Thus, North Carolinian actors working for Aero are implicated in violating CAT.

147. The extraordinary rendition program would also meet the effective control test if it could be proven that the United States or North Carolinian actors have effective control

¹⁷⁴ See Vienna Convention, *supra* note 44, art. 19(3).

¹⁷⁵ *Rendered Meaningless*, *supra* note 92, at 1367.

¹⁷⁶ *Id.*

or influence over the territory where people are rendered and tortured. Evidence from past interrogations shows that the United States does, in fact, maintain control or at the very least, has a dominating influence tantamount to control over procedures used in these torture facilities and the facilities themselves.¹⁷⁷ The United States has been known to provide questions to interrogators.¹⁷⁸ For example, a high-ranking official of Yemen, a nation where individuals have been rendered, answered “yes” “without hesitation” when he was asked if the men would be released if the U.S. requested it.¹⁷⁹ Thus, the United States and Aero Contractors have effective control over the places where the victims are rendered and ultimately tortured.

(iii) Article 3: Non-refoulement

148. Article 3, known as the non-refoulement, or non-return obligation, states that

¹⁷⁷ See Amnest Int’l, *United States of America/Yemen, Secret Detention in CIA “Black Sites,”* Nov. 2005 (Yemen, Jordan), available at <http://www.amnesty.org/en/library/asset/AMR51/177/2005/en/3bbac635-d493-11dd-8a23-d58a49c0d652/amr511772005en.html> [last accessed 6/22/2012 at 3:17PM EST]. See also *United States v. Abu Ali*, 395 F. Supp. 2d 338, 343 (E.D. Va. 2005 (reporting that in Saudi Arabia, U.S. officials provided questions to Saudi interrogators and observed live interrogations through a two-way mirror); Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition Program*, New Yorker, Fe. 14 2005, at 106 (reporting that CIA officials would give Egyptian interrogators a list of questions in the morning, and receive a list of answers the same evening); Arie O’Sullivan, *Jordanian Intelligence Usurps Mossad as CIA’s Best Regional Ally*, Jerusalem Post, Nov. 13 2005, at 3 (“The CIA had technical personnel “virtually embedded” at [Jordanian General Intelligence Directorate] headquarters.”); Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*; “Stress and Duress” (“Thousands have been arrested and held with U.S. assistance in courtiers known for brutal treatment of prisoners, the official said; “noting that the CIA gives intelligence services in Egypt, Jordan, and Morocco list of questions in wants answered when it transfers suspect to them); Dana Priest & Joe Stephens, *Secret World of U.S. Interrogation; Long History of Tactics in Overseas Prisons Is Coming to Light*, Wash. Post, May 11, 2004, at A1: (the fate of terror suspects when detained in Saudi Arabia “ is controlled by Saudi-based joint intelligence task forces, whose members include officers from the CIA, FBI, and other U.S. law enforcement agencies.” But see *Abu Ali*, 395 F. Supp. 2d at 342 (rejecting the allegation that U.S. and Saudi officials were engaged in a “joint venture” in arresting, detaining, and interrogating the defendant, Abu Ali).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

“No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁸⁰

149. The Committee Against Torture (the treaty oversight committee)¹⁸¹ interpreted Article 3 to prohibit both “direct and indirect removal . . . meaning that a state cannot remove a person to a third country when it knows he would be subsequently removed to a country where he would likely face torture.”¹⁸²

150. The U.S. Senate declared that the Article 3 non-refoulement obligation applies only when it is “more likely than not” – or more than fifty percent likely – that an individual would be tortured in the receiving country.”¹⁸³ The Committee’s interpretation of standard of knowledge needed to meet Article 3, by comparison, does not require that the likelihood is “highly probable,” but just requires some knowledge “beyond mere theory or suspicion.”¹⁸⁴

151. The United States argues that extraterritorial, irregular renditions are not covered by Article 3’s language defining the means of transporting a person because the three specific terms used – “expel, return (‘refouler’) or extradite” – do not completely define the process of “rendition.”¹⁸⁵ The United States argues that seizing a person in one country and transferring him to another country would not constitute “expelling” the person because rendition does not constitute the act of throwing someone out of the country, but instead just transferring him or her. Additionally, the United States argues

¹⁸⁰ CAT, *supra* note 139, art. 3.

¹⁸¹ *Id.* art. 17.

¹⁸² CRS, 2004, *supra* note 158.

¹⁸³ *Id.* at 6. *See* Restatement of Law, Second, Torts, § 433(which says that to prove that a factor is “more likely than not” to produce the result, means that “[a] mere possibility of such causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced,” the court may not find that the standard has been met).

¹⁸⁴ *See* Committee Against Torture, General Comment on the Implementation of Article 3 in the Context of Article 22 of the Convention Against Torture, U.N. Doc. CAT/C/XX/Misc.1, 6 (1997).

¹⁸⁵ CAT, *supra* note 139, art. 3.

that so long as it does not transfer the suspect to a country where he is not a resident, he is not “returned.” Lastly, the United States maintains that if an individual’s rendition was not part of a formal extradition agreement, the transfer should not be considered an extradition.

152. The United States cannot ignore its non-refoulement obligation simply because “extraordinary rendition” is not specifically stated as a term of art in Article 3. The treaty drafters by including “extradition” in addition to expulsion and refoulement show an intention “to cover (and prohibit under Article 3) all measures by which a person is physically transferred to another State.”¹⁸⁶ The lack of explicit language regarding rendition “should not be construed as an affirmative decision to exclude such transfers from the scope of the treaty.”¹⁸⁷ Nor do diplomatic assurances from the receiving State release States from their obligations of non-refoulement.¹⁸⁸

153. As a logical matter, the non-refoulement provision must apply. A contrary interpretation would allow the circumvention of the purpose of the treaty in preventing torture by a mere technical interpretation of the language of the provision.

(iv) Article 4: No Complicity with Torture

¹⁸⁶ *Rendered Meaningless*, *supra* note 92, at 1368, citing *Human Rights Watch, The Road to Abu Ghraib* 11 (2004), available at <http://www.hrw.org/sites/default/files/reports/usa0604.pdf> [last accessed 6/26/2012 at 10:16AM EST]; *Torture by Proxy*, *supra* note 59, at 40 (quoting J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* 126 (1988)).

¹⁸⁷ *Rendered Meaningless*, *supra* note 92, at 1368.

¹⁸⁸ UN General Assembly, Torture and other cruel, inhuman or degrading treatment or punishment : resolution / adopted by the General Assembly, 19 February 2009, A/RES/63/166, available at: <http://www.unhcr.org/refworld/docid/49b0ef922.html> [last accessed 06/21/2012 at 10:02PM EST]; U.N. Human Rights Council Resolution 8/8, 28th meeting, 18 June 2008, adopted without a vote, ¶ 6 (d), available at http://ap.ohchr.org/Documents/E/HRC/resolutions/A_HRC_RES_8_8.pdf [last accessed 6/21/2012 at 10:11PM EST]. *See also* UN General Assembly, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council,” 9 January 2007, A/HRC/4/40, ¶¶ 52-56, available at <http://www.unhcr.org/refworld/pdfid/470b77b40.pdf> [last accessed 6/21/2012 at 10:20PM EST].

154. CAT expressly bans torture, and Article 4 implicitly prohibits complicity in acts of torture as it requires each State party to ensure that all acts of torture are criminal offenses under criminal law.¹⁸⁹ By failing to implement legislation to explicitly criminalize extraordinary rendition or prosecute actors involved in extraordinary rendition under existing legislation, the State is in violation of Article 4 for its complacency towards extraordinary rendition.

(v) Article 16: Preventing Torture and Other Cruel, Inhuman, or Degrading Acts that do not Amount to Torture

155. Article 16 requires a Member State to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”¹⁹⁰ Article 16 requires states to prevent the acts when “committed by or at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity.”¹⁹¹ These terms clarify that acts committed by the United States, North Carolina and its political subdivisions, and Aero contractors that may not amount to torture may also violate the treaty. Further, they demonstrate that the United States and North Carolina have an obligation to prevent Aero Contractors, acting in the behest of the CIA, from carrying out extraordinary rendition and torture.

D. EXTRAORDINARY RENDITION IS A VIOLATION OF GENERAL RULES OF ATTRIBUTION

¹⁸⁹ U.N. Human Rights Council, Thirteenth session, *supra* note 97, ¶ 39.

¹⁹⁰ CAT, *supra* note 139, art. 16.

¹⁹¹ *Id.* art. 16(1).

156. The United States is also responsible under general rules of attribution, which hold that “a State that aids or assists another State in the commission of an internationally wrongful act is internationally responsible if it does so knowing the circumstances and if the wrongful act would have been wrongful if it had been committed by the assisting State.”¹⁹² The Aero actors who kidnapped, or facilitated the kidnapping, or who otherwise delivered the five men to the hands of individuals of another State who then committed acts of torture thus aided that State in committing torture. Similarly, North Carolina and the United States aided in these acts.

157. Thus, the extraordinary rendition actors working for, facilitating, or otherwise allowing Aero Contractors to carry out these flights and acts of kidnapping are responsible for their actions, which were committed in violation of international norms of attribution.

4. CONCLUSION ABOUT THE APPLICATION OF INTERNATIONAL LAW TO EXTRAORDINARY RENDITION

158. The engagement of the United States in extraordinary rendition is directly against the spirit of the creation of the Universal Declaration. Extraordinary rendition also violates specific provisions of the ICCPR and CAT.

159. With respect to the ICCPR, the United States involvement in the practice of extraordinary rendition violates the ICCPR’s obligation to “respect and ensure” human

¹⁹² U.N. HUMAN RIGHTS COUNCIL, Thirteenth session, *Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances*, A/HRC/13/42, 26 January 2010, ¶ 41.

rights because the obligations of the treaty apply to the United States actions based on several principles.

160. The United States must follow the ICCPR obligations regardless of whether it signed RDUs deeming the treaty non-self-executing. The applicability is determined by principles of treaty interpretation that establish that members to a treaty must not engage into actions that are contrary to the object and purpose of the treaty, and that RDUs which deny the central purpose of a treaty are invalid. Because the main purpose of the ICCPR is to respect and ensure human rights, the engagement in human rights abuses that take place during extraordinary rendition are a violation of the ICCPR. Additionally, the “obligation to implement” domestic laws precludes the United States from relying on the lack of domestic legislation to violate the terms of the treaty by engaging in extraordinary rendition.

161. The obligation to “respect and ensure” the protection of human rights, and to abstain from actions violating these rights, binds the United States to respect and ensure the right to be free from torture, and from lesser forms of mistreatment or CID. States parties must abstain from exposing individuals to the dangers of these types of treatments upon return to another country (by way of extradition, expulsion, or refoulement). Because the United States, via Aero Contractors, exposed the individuals involved to the danger (and reality) of torture or CID by transferring to places where they received these type of treatments, the United States is responsible for these violations.

162. The United States is responsible for the human rights abuses committed during extraordinary rendition even if they were committed outside its de jure territory. The principle of “effective control” of a person binds the United States from actions

committed not only within its territory but also in circumstances in which it may be deemed to be in effective control of a person, including a person who has been abducted or detained.

163. The United States is responsible for the human rights abuses committed during extraordinary rendition even if they were committed by private parties because these violations are imputed to the State party as long as the individual was within the effective control of the party.

164. Furthermore, North Carolina and all its political subdivisions are responsible for the ICCPR violations committed by Aero Contractors because the ICCPR obligations are not limited to the executive branch of a State party, but they extend to all branches and all levels of government of the State party.

165. Lastly, the “obligation to investigate” actions of State agents, private actors, or entities involved in practices that violate the human right of individuals under the effective control of the United States violates the United States’ obligations under the ICCPR. Under these principles, the ICCPR applies to actions of the United States and

166. As part of the Bill of Rights of the United Nations, the ICCPR serves an indispensable and unique function in international jurisprudence. The United States itself, just like other over 160 countries, have signed this treaty with the specific purpose to further human rights around the world, and more specifically, to serve as an active participation in combating human rights abuses. The United States refusal to recognize that the meaning of the ICCPR should be found in the treaty itself and the interpretations of the Committee denies this historical role of the ICCPR and therefore is a violation of the ICCPR.

167. All these principles establish the applicability of the ICCPR to actions of the United States. Therefore, when the United States engages in human rights abuses, it violates its international obligations under the ICCPR.

168. Extraordinary rendition also violates several prohibitions of CAT. The Convention Against Torture, read alone, provides clear points of binding law for its Member States. By maintaining the extraordinary rendition program, the United States is at best an inciter of and conspirator in torture, and at worst, is an active and actual participant in the illegal acts.

169. Specifically, extraordinary rendition violates Article 2, 3, 4, and 16 of CAT as well as the general rules of attribution set forth by CAT. The practice of extraordinary rendition especially violates CAT's Article 3's explicit non-refoulement prohibition. Additionally, the United States misinterprets the territorial requirement under Article 2 of CAT. Treaty violations may still be imputed to the State based upon a control test where extraordinary rendition victims are actually under the control and thus jurisdiction of the United States during Aero flights.

170. As mentioned above, the Vienna Convention requires that State interpretations of treaty obligations must adhere to the object and purpose of the treaty as a whole. CAT's object and purpose come primarily from the Preamble but can also be extracted from the broad and protective language of the entire Treaty which has as its ultimate goal the prevention of the use of torture and other cruel, inhuman, or degrading treatment anywhere in the world. Reservations and interpretations of CAT that attempt to evade the treaty's core principles are considered made in bad faith or inconsistent with the object and purpose of the treaty and are thus invalid. Interpretations that try to create exceptions

so that acts, which would be prohibited in one location might escape the purview of the treaty in another location are violations of U.S. international obligations under the treaty.

171. By claiming that it has no jurisdiction over the areas where the individuals are captured and the torture occurs – despite its control over the individual and effective control over the facilities and interrogation – the United States is violating treaty obligations by defying its duty to uphold the objects and purposes of the treaty. North Carolina and Aero are similarly liable for such violations for facilitating and carrying out the acts prohibited by CAT. These parties to extraordinary rendition cannot claim lack of knowledge about the consequences that would befall the individuals who were rendered. The Senate, in interpreting CAT, has determined that outright knowledge is not required to commit torture. Willful blindness that a person will be tortured constitutes acquiescence.¹⁹³ Willful blindness by an Aero pilot or state and local government officials about illegal transfers of individuals for purposes of committing torture constitutes a violation of CAT.¹⁹⁴

172. The purpose behind CAT is to protect the “inherent dignity of the human person.”¹⁹⁵ Efforts by the parties to extraordinary rendition to avoid the treaty’s reach or to restrict the scope of relevant article provisions cannot logically succeed. Without an explicit repudiation of the treaty, the United States must still be held to its obligations. By any other interpretation, the United States not only falls short of its moral obligations it bound itself to when it ratified the treaty but also is actively violating the treaty by

¹⁹³ CRS, 2004, *supra* note 158, at 5 (citing *Zheng v. Ashcroft*).

¹⁹⁴ Bassiouni, *supra* note 167, at 412.

¹⁹⁵ CAT, *supra* note 139, pmb., (referring to its reliance on other foundational documents of international human rights law: The U.N. Charter, the Universal Declaration of Human Rights, the ICCPR, and the Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment).

establishing and participating in the program of extraordinary rendition. Extraordinary rendition violates the dignity and humanity of people of this world and thus violates CAT.

PART THREE

FEDERAL LEGAL STANDARDS FOR ACCOUNTABILITY IN EXTRAORDINARY RENDITION ¹⁹⁶

1. INTRODUCTION

173. This Part of the briefing book reviews U.S. federal laws and case law that apply to torture and extraordinary rendition. International law clearly forbids the use of torture and extraordinary rendition. Federal laws do so as well. Therefore, in addition to the provisions of international law, we must look to federal law to hold accountable those who are responsible for these acts. As entities within the jurisdiction of the United States, the applicability of federal law to the actions of North Carolina, Johnston County, and specifically Aero Contractors, is both straightforward and logical.

174. Several sources of U.S. federal law directly or indirectly address extraordinary rendition. The following sections will examine each source and review the way that each is relevant to extraordinary rendition, and whether these sources, as a group, set out theories of accountability for extraordinary rendition. By showing where federal law is strong and where it is less clear, this discussion can be used by the NC Commission of Inquiry on Torture to focus its efforts. The areas in which federal law strongly supports a prohibition against torture and extraordinary rendition can be used to support the Commission's work and the areas in which federal law is weaker or creates loopholes demonstrate where the Commission's efforts are truly needed.

175. Section I discusses how the Supremacy Clause of the Constitution mandates that federal law trump conflicting state law, and thus is a useful tool to argue that states must

¹⁹⁶ This section of the briefing book relied on the research of the University of North Carolina Immigration/Human Rights Policy Clinic Students Policy Project in 2009 and credits Caroline Smiley and Martá Brown for their work.

comply with federal laws prohibiting torture and extraordinary rendition. Section II analyzes the various federal laws Congress has passed relating to torture or extraordinary rendition. The subsections examine these laws for strengths and weaknesses (for example, loopholes in the laws) that must be considered when calling for accountability. Section III discusses the President's Obama 2009 Executive Orders and how they relate to ending human rights abuses at the detention facility at Guantánamo Bay, Cuba. Section IV examines federal bills that have not been enacted into law. Although these bills were not enacted, they can still be useful to a Commission of Inquiry because they reflect the increasing concerns that torture and rendition have no place in law or practice. Section V analyzes the use of federal courts for accountability and summarizes several relevant court cases that have challenged the United States' policies on torture and extraordinary rendition. Finally, Section VI emphasizes a Commission of Inquiry's importance in the context of the analysis of federal law.¹⁹⁷

2. THE CONSTITUTION

176. State and local actors, such as Johnston County or Aero Contractors, wishing to avoid liability for their roles in extraordinary rendition may wrongly cite the Supremacy Clause as a defense.¹⁹⁸ The Supremacy Clause of the United States Constitution assures

¹⁹⁷ Many thanks go to Marta Brown and Caroline Smiley, students from University of North Carolina School of Law's 2008-2009 Immigration and Human Rights Policy Clinic. Their publication, *The Interrogation and Detention Reform Act of 2008: A Critical Analysis*, serves as a model for this section of the briefing book.

¹⁹⁸ Indeed, students from the University of North Carolina School of Law's 2010-2011 Immigration and Human Rights Policy Clinic met with Johnston County officials. The officials claimed that the Supremacy Clause barred them from investigating the claims against Aero Contractors. Interview notes of meeting on file with authors.

that federal law is the “supreme law of the land” and that federal law trumps any conflicting state law:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and 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, anything in the constitution or laws of any state to the contrary notwithstanding.¹⁹⁹

177. Therefore, officials may believe that since national security is within the realm of the federal government’s responsibilities, what the Central Intelligence Agency (CIA) does with Aero Contractors in Johnston County is solely a federal matter, and any state or local action counter to this violates the Supremacy Clause. As the Constitution and federal law are the “Supreme Law of the Land,” state and local officials must follow it, including those statutes enacted which prohibit extraordinary rendition and torture as described below. Moreover, as further explained in Part Four, 2 B. below, treaties entered into by the authority of the United States also constitute the law of the land binding on states, localities, and private actors.

3. FEDERAL STATUTES

178. Congress has the power to legislate – to make federal laws – that apply to the United States.²⁰⁰ Over the past century, it has created multiple laws that have some effect on torture, extraordinary rendition, or treatment of immigrants and asylum seekers. The following subsection describes some of those statutes and how they relate to the accountability for the actions taken by Johnston County and Aero Contractors.

¹⁹⁹ U.S. Const. art. VI.

²⁰⁰ U.S. Const. art. I, § 8.

A. THE IMMIGRATION AND NATIONALITY ACT OF 1952

179. The Immigration and Nationality Act of 1952 (INA) created the current structure of immigration law as we know it today, dividing the responsibility of administering immigration between executive agencies.²⁰¹ A section of the statute “codifies the principle of *non-refoulement*.”²⁰² The INA states that “an alien may not be removed to a country if the alien’s life or freedom would be threatened in that country due to race, religion, nationality, membership in a social group, or political opinion.”²⁰³ Other sections of the INA bar those “suspected of committing acts of torture or providing material support to torturers from entering the United States.”²⁰⁴ A third section of the INA holds that if those suspected of committing the acts enumerated above are present in the United States, they may be subject to deportation.²⁰⁵

180. The principles embodied in the INA prohibit extraordinary rendition. First, because the INA expressly prohibits returning an alien²⁰⁶ to a country where the alien’s life or liberty would be threatened due to various reasons, it is more than reasonable to conclude that extraordinary rendition violates the INA. Aero Contractors who aided in the return of any individual to such circumstances is thus complicit with these prohibitions.²⁰⁷ These principles make clear that there is no place for torture or extraordinary rendition in the

²⁰¹ 8 U.S.C. § 1101 (2011).

²⁰² Marta Brown & Caroline Smiley, *The Interrogation and Detention Reform Act of 2008: A Critical Analysis* 28, Univ. of NC School of Law, Immigration and Human Rights Policy Clinic, Apr. 2009 <http://www.law.unc.edu/documents/clinicalprograms/interrogationanddetentionreformactcriticalanalysis.pdf>.

²⁰³ *Id.* (citing 8 U.S.C. § 1231(b)(3)).

²⁰⁴ *Id.* (citing 8 U.S.C. § 1182(a)(3)(E)).

²⁰⁵ *Id.*

²⁰⁶ Many people correctly object to the term “alien” when referring to non-citizens. Since the statute uses the term “alien,” this briefing book will stay true to the language in the statute and use the term.

²⁰⁷ 8 U.S.C. §§1182(a)(3)(E), 1231(b)(3).

United States.²⁰⁸ Furthermore, the INA principles suggest that no entity that involves itself with torture should be allowed to dwell within the jurisdiction of the United States, a state, or its political subdivisions.

B. FEDERAL TORTURE STATUTE OF 1994

181. In 1994, Congress passed, and President Clinton signed into law, the Federal Torture Statute (Torture Statute).²⁰⁹ This law prohibits torture performed by a U.S. citizen acting under the color of the law outside the borders of the United States and its territories.²¹⁰ In addition, the statute defines torture to give us a clearer understanding of prohibited acts.

182. The purpose of the statute was to “bring the United States into compliance with the Convention Against Torture (CAT), which requires State Parties to establish jurisdiction over offenses committed by nationals of that State, or when an offender of any nationality is present in that State.”²¹¹ By defining what acts constitute torture, the statute is narrow enough to target specific acts and avoid ambiguity. Torture is defined as

“an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”²¹²

183. Several of the personal accounts of those who were subject to extraordinary rendition and torture describe their torturers as American officials.²¹³ Media accounts

²⁰⁸ The Aero pilots are individuals who could be found liable under the terms of the statute.

²⁰⁹ 18 U.S.C. § 2340-2340A (2011).

²¹⁰ *Id.*

²¹¹ Brown & Smiley, *supra* note 202, at 22.

²¹² *Id.*

²¹³ See *supra* note 14, DECLARATION OF BISHER AL-RAWI (“For more than two months, I was subjected to humiliation, degradation, and physical and psychological torture by U.S. officials at Bagram.”).

have identified Aero crews as American citizens, as have other reports and sources.²¹⁴ As Americans, these individuals are subject to the Torture Statute. Because they have committed acts that fall within the definition of torture under the statute's provisions, they are subject to criminal penalties, including fines, prison, and, if the victim has died, the death penalty.²¹⁵

184. The NC Commission of Inquiry can use the Federal Torture Statute to advance its cause in several ways. First, it can use the Torture Statute as clear evidence that torture has no place in America. Secondly, it can use the statute to demonstrate that, with its enactment, the United States has committed itself to follow international law and specifically it has demonstrate the intention to bring itself into compliance with the CAT, which explicitly bans torture.

C. WAR CRIMES ACT OF 1996

185. The War Crimes Act (WCA) was enacted in 1996.²¹⁶ The Act was introduced by North Carolina Congressman Walter Jones, whose primary concern was for Vietnam-era veterans who were prisoners of war.²¹⁷ He introduced the Act to allow prisoners of war “the opportunity to bring their persecutors to justice in U.S. courts.”²¹⁸ It defines “war

²¹⁴ See e.g., Steven Edelstein & Christina Cowger, Op-Ed., “State Secrets” that Mask Torture, News & Observer, Sept. 24, 2010, available at <http://www.newsobserver.com/2010/09/24/699263/state-secrets-that-mask-torture.html> [last accessed 6/26/2012 at 10:23AM EST]; Scott Shane et al., *supra* note 5.

²¹⁵ 18 U.S.C. § 2340A.

²¹⁶ 18 U.S.C. § 2441 (2011).

²¹⁷ Congressman Walter B. Jones, Biography, <http://jones.house.gov/Biography/> [last accessed Apr. 23, 2011).

²¹⁸ *Id.*

crime” and outlines punishments for acts of torture, or cruel, inhumane, and degrading treatment.²¹⁹

186. The WCA also works in conjunction with the Torture Statute by providing sanctions for violating the prohibitions contained in the Torture Statute. Sanctions can include life imprisonment or death; the death penalty is a possible sentence if the proscribed conduct results in the death of the victim.²²⁰ The WCA applies if either the victim or the perpetrator is a U.S. citizen or a member of the United States Armed Forces.²²¹

187. Together with the Torture Statute, the WCA provides an additional method of holding perpetrators of torture responsible for their actions, and could be used by the NC advocates. First, it can be used to show that U.S. citizens can be prosecuted as perpetrators, which could implicate those who tortured the individuals who had been extraordinarily rendered. In addition, the policy and intent behind the Act is significant for the prosecution of extraordinary rendition, in that it is determined for prisoners of war to seek justice in U.S. courts, thus, opening the doors of establishing causes of actions for foreign victims of extraordinary rendition.

D. FOREIGN AFFAIRS REFORM AND RESTRUCTURING ACT OF 1998

188. The Foreign Affairs Reform and Restructuring Act (FARRA) is another example of legislation designed to bring the United States into compliance with the CAT.²²² FARRA was enacted to announce the U.S. policy “not to expel, extradite, or otherwise effect the

²¹⁹ 18 U.S.C. § 2441 (2011).

²²⁰ *Id.*

²²¹ *Id.*

²²² Pub.L. 105–277, Div. G, 112 Stat. 2681–761 (1998).

involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, *regardless of whether the person is physically present in the United States.*”²²³

189. The United States has tried to exploit the fact that the statute does not specifically delineate the prohibition against extraordinary rendition, notwithstanding the logic and intent of the statute, which prohibits such acts. However, this interpretation of the statute is at odds with the policy statements issued by Congress. Although the regulations do not specifically prohibit extraordinary rendition by use of explicit terminology, Congress’ intent to bar the practice can be deduced by the FARRA policy statement, which reads that the United States will not involuntarily return individuals to a country where there is a strong risk of the individual being tortured.²²⁴

190. Based on this policy statement and the language of FARRA, U.S. law clearly bars any involvement in extraordinary rendition or torture. North Carolina and its political subdivisions including Johnston County as well as Aero Contractors would be implicated based on Congress’s intent to ban the practice, since they have participated in extraordinary rendition missions.

E. DETAINEE TREATMENT ACT OF 2005

191. In 2005, President Bush signed into law the Detainee Treatment Act (DTA), which prohibits the inhumane treatment of any prisoners, including those at Guantánamo Naval Base.²²⁵ The statute closed a glaring loophole present in the Torture Statute. Whereas the Torture Statute only prohibits what is statutorily defined as torture, the DTA prohibits

²²³ *Id.* at § 2242(a) (*emphasis added*).

²²⁴ *Id.* See Brown & Smiley, *supra* note 202, at 29.

²²⁵ Pub. L. 109-148, 119 Stat. 2739 (2005) (hereinafter Detainee Treatment Act).

lesser forms of punishment, “namely cruel, inhuman, or degrading treatment or punishment of detainees.”²²⁶ The DTA also requires that “uniform standards of interrogation” to be used.²²⁷

192. The DTA provides a clear mandate against torture and extraordinary rendition since it explicitly targets the treatment of detainees. It does not, however, set forth criminal punishments for violations of the Act. Moreover, the statute includes a safe harbor provision for perpetrators who were “just following orders.” Similarly, the DTA “also absolves interrogators of criminal and civil liability for conduct related to the interrogation of detainees suspected of international terrorism if the interrogations were ‘officially authorized and determined to be lawful at the time that they were conducted.’”²²⁸

193. Thus, although the DTA clearly prohibits extraordinary rendition and torture, the enforceability of its provisions is weakened by the Act’s lack of criminal consequences for violations, as well as the exceptions made for those who were just following the orders of their command and those who performed acts that were officially authorized and determined to be legal at the time of their occurrence.²²⁹ With these weaknesses, it is clear that the DTA cannot be relied on as a tool to prosecute perpetrators of torture and extraordinary rendition. However, the mandates against torture set forth in the statute establish a set of norms that should not be eclipsed by the statute’s omissions and deficiencies.

²²⁶ Brown & Smiley, *supra* note 202, at 23.

²²⁷ *Id.* (citing Detainee Treatment Act, *supra* note 225).

²²⁸ *Id.* at 23-24 (quoting Detainee Treatment Act, *supra* note 225).

²²⁹ *Id.*

F. SUMMARY OF FEDERAL LAWS

194. As seen in the subsections above, there are some federal statutes that create obstacles toward the effort to achieve accountability.²³⁰ And the statutes which do express a clear policy against extraordinary rendition and torture are not perfect – they have weaknesses and loopholes that officials can exploit. However, the greater weight of federal law leans heavily in the direction of prohibiting these inhumane practices and establishing human rights norms that should be respected.

195. The Federal Torture Statute is the most direct law available that enunciates the mandate against torture. It defines torture clearly, brings the United States into compliance with international law, and creates criminal sanctions for those guilty of torture. The other laws and initiatives, although they may not provide the same specific directive, demonstrate that there is a clear desire, if not intent, to ban torture and extraordinary rendition.

196. There are weaknesses in the implementation of these laws and loopholes where the perpetrators can avoid accountability. However, the principles embedded in the laws require that we do more to prevent extraordinary rendition and torture and that we demand accountability for the acts' occurrence. The Commission should make use of the norms and specific prohibitions and sanctions set forth in federal law as a guide to its accountability endeavors.

4. EXECUTIVE ORDERS

²³⁰ See e.g., Military Commission Act of 2006, Publ. L. No. 109-336, 120 Stat. 2600 (2006).

197. Although the Constitution reserves lawmaking power to the legislature,²³¹ over the years Presidents have issued Executive Orders to help them carry out their constitutional duty to ensure the law is executed.²³² This has been the case of President Barack Obama, who assumed the Presidency in 2009.

198. President Obama initially made use of this power to carry out the policy of his administration regarding detainee's policy. Very soon after his inauguration in January 2009, President Obama issued three Executive Orders that reflected an intention to comply with human rights obligations in regard to the so-called "war on terror." However, more recently, President Obama has reversed course on his administration's detainee policy. This section will discuss these Executive Orders and analyze their effectiveness at creating accountability for the perpetrators of extraordinary rendition and torture.

A. EXECUTIVE ORDER 13,491- ENSURING LAWFUL INTERROGATIONS

199. President Obama issued Executive Order 13,491 on January 22, 2009.²³³ The purpose of the Executive Order was to revoke President Bush's Executive Order 13,440, which limited the degree to which the CIA was required to comply with the Geneva Convention in its treatment of detainees.²³⁴ After the revocation, Obama's Order set interrogation standards for individuals within the control (or effective control) of the United States.²³⁵ It also required the CIA to close all detention facilities that it controls,

²³¹ U.S. Const. art. I, § 1.

²³² See U.S. Const. art II, § 3, cl. 4.

²³³ Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009).

²³⁴ Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 20, 2007).

²³⁵ Exec. Order No. 13,491, *supra* note 233. See also Brown & Smiley, *supra* note 202, at 25.

granted the Red Cross access to all detained individuals in U.S. custody, and required the creation of an interagency task force on interrogation and transfer policy.²³⁶

200. Subsequently to the Order, Attorney General Eric Holder created the Interrogation and Transfer Policy Task Force.²³⁷ The task force was charged with

[C]onducting a review of the appropriate means of interrogating individuals who may possess information about potential threats to the United States or United States interests. The Task Force is also responsible for examining the transfer of individuals to other nations in order to ensure that such practices comply with all domestic and international legal obligations and are sufficient to ensure that such individuals do not face torture or inhumane treatment. The Task Force has formed two interagency sub-groups (an Interrogation Working Group and a Transfer Working Group) to study these issues, which includes representatives from several agencies. This Task Force will prepare a report for the President with its findings and recommendations.²³⁸

201. On July 21st, 2009, the task force issued a preliminary report and in August of that year it issued the final report.²³⁹ The task force concluded that the Army Field Manual that regulates interrogations by the agents of the military was sufficient guidance for interrogators of other agencies.²⁴⁰ As one of its main recommendations, it recommended the formation of a group specialized in interrogations to interrogate “high value detainees.”²⁴¹ It also made recommendations destined to assure that the transfer of

²³⁶ *Id.*

²³⁷ U.S. Department of Justice, 100 days Progress Report, April 2009, available at <http://www.justice.gov/ag/progress-report.pdf> [last accessed 5/31/2012 at 2:41PM EST].

²³⁸ *Id.*

²³⁹ Department of Justice, “Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President,” press release, August 24, 2009, <http://www.usdoj.gov/opa/pr/2009/August/09-ag-835.html>. *See also, e.g., U.S. Task Force Report on Interrogations and Transfers*, 103 Am. J. Int’l L. 760, 760-61 (2009).

²⁴⁰ *Id.*, at 761.

²⁴¹ *Id.*

individuals to other countries does not expose the person to torture and comply with international law.²⁴²

202. Thus, in addition to calling for the closure of detention centers as well as advocating for human treatment of detainees, this executive order also sought to increase the effectiveness of interrogation techniques.²⁴³

B. EXECUTIVE ORDER 13,492 – REVIEW AND DISPOSITION OF INDIVIDUALS DETAINED AT GUANTÁNAMO AND CLOSURE OF DETENTION FACILITIES

203. On the same day that he signed the Order above-described, President Obama also issued Executive Order 13,492, which ordered the closure of the detention facility at Guantánamo Bay in Cuba and required the review of the legal status of all detainees.²⁴⁴

The closure was to go into effect within one year of the issuance of the Order. However, the administration has not lived up to its promise, and the detention facility remains open today.

204. In fact, in March of 2011, President Obama allowed the resumption of military trials for detainees held at Guantánamo.²⁴⁵ For a discussion of Obama’s most recent Guantánamo policies, see below for a further review of the newest Executive Order, which reverses the gains toward implementation of human rights obligations with regard to the “war on terror.” This reversal underscores the need for an Inquiry Commission

²⁴² *Id.*

²⁴³ Steve Peacock, *TRR Exclusive Report: FBI to Fund Interrogation Research Projects*, <http://thereveredreview.com>, April 9th, 2012, available at <http://thereveredreview.com/2012/04/trr-exclusive-report-fbi-to-fund-interrogation-research-projects/> [last accessed 5/31/2012 at 3:19PM EST].

²⁴⁴ Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009).

²⁴⁵ Scott Shane & Mark Landler, *Obama Clears Way for Guantánamo Trials*, N.Y. Times, Mar. 7, 2011, available at <http://www.nytimes.com/2011/03/08/world/americas/08guantanamo.html> [last accessed 6/26/2012 at 10:51AM EST].

dedicated to explore the obstacles to full implementation of President Obama's original Executive Order.

C. EXECUTIVE ORDER 13,493 – REVIEW OF DETENTION POLICY OPTIONS

205. The third Executive Order was announced by President Obama on January 22, 2009.²⁴⁶ This order complemented the President's order to close the facility at Guantánamo and required a "special interagency task force on detainee disposition."²⁴⁷ The task force's duty was to "develop policies for the detention, trial, transfer, release, or other disposition of individuals captured or apprehended"²⁴⁸

206. This Executive Order coincided with the previous two in that it purported to determine lawful avenues to handle the closing of the Guantánamo Bay detention facility and management the detainees. Obama was ambitious in his pledge to respect human rights and end torture, but unfortunately, he did not live up to his goals.

D. EXECUTIVE ORDER 13,567 – PERIODIC REVIEW OF INDIVIDUALS DETAINED AT GUANTÁNAMO BAY NAVAL STATION PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE

207. As noted above, in March of 2011, President Obama issued Executive Order 13,567, which reversed his prior ban on military trials for Guantánamo detainees.²⁴⁹ It also set up a new policy for reviewing detainees' cases.²⁵⁰ This Order establishes

²⁴⁶ Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 27, 2009).

²⁴⁷ Brown & Smiley, *supra* note 202, at 25.

²⁴⁸ Exec. Order No. 13,493, *supra* note 246.

²⁴⁹ Exec. Order No. 13,567, 76 Fed. Reg. 13,275 (Mar. 10, 2011).

²⁵⁰ *Id.*

Obama's failure to close the detention facility by January 2010 as he had pledged in Executive Order 13,491.

208. The Obama Administration, however, should not be faulted entirely for the failure to close the Guantánamo facility. Congress has not allowed the transfer of detainees to the United States mainland for civilian trials.²⁵¹ By allowing military trials to resume, the Obama Administration argues that it is attempting to move forward in trying the suspects held at the facility.

209. Military trials are flawed and do not always lead to justice.²⁵² The Guantánamo Naval Base detention facility is a dark symbol of the extraordinary rendition and torture enacted by American citizens.²⁵³ Since the Obama Administration and Congress have not taken affirmative steps to close Guantánamo, accountability is not likely to be gained through these avenues. Thus, the NC Commission of Inquiry must seek alternative means of securing accountability for the actions of Aero Contractors, Johnston County, and the State of North Carolina.

5. FEDERAL BILLS NOT ENACTED INTO LAW

210. Since 9/11, there have been many attempts to increase accountability and to expressly prohibit torture and extraordinary rendition through federal statutes. Unfortunately, many have not been enacted. The failed efforts described below are examples of laws that

²⁵¹ Shane, *supra* note 5.

²⁵² See e.g., David J. R. Frakt, *An Indelicate Balance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 Am. J. Crim. L. 315, 317 (2008) (“[T]he military commissions created by the [Military Commission Act] still fall well short of ‘affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’”) (quoting *Geneva Convention, Common Article 3*).

²⁵³ For example, Binyam Mohamed and Bisher Al-Rawi both acknowledge that after being extraordinarily rendered, they ended up at the detention facility in Guantánamo Bay, Cuba, where they were tortured. See *supra* note 14.

would have contributed to achieving some measure of accountability. However, even though they were not passed into law, they are significant in that they reflect Congress's increasing concerns that torture and rendition have no place in law or practice. That they were introduced demonstrates that members of Congress are raising the issue.

A. TORTURE OUTSOURCING AND PREVENTION ACT

211. In March of 2007, Massachusetts Representative Ed Markey introduced H.R. 1352, the Torture Outsourcing and Prevention Act.²⁵⁴ The purpose of this bill was “to prohibit the return or other transfer of persons by the United States, for the purpose of detention, interrogation, trial, or otherwise, to countries where torture or other inhuman treatment of persons occurs, and for other purposes.”²⁵⁵ The bill specifically banned extraordinary rendition, requiring the Secretary of State to compile a list of countries where “there are substantial grounds for believing that torture or cruel, inhuman, or degrading treatment is commonly used in the detention or interrogation of individuals,” and then barring transfer or removal of any individual in the United States’ custody, regardless of that individual’s nationality or physical location, to one of those designated countries.²⁵⁶

212. The wording of this bill was significant because it would have cast a net wide enough to include torture and lesser indignities, such as cruel, inhuman, and degrading treatment, thus avoiding some of the pitfalls that arise because of the flexibility of the definition of “torture.” Additionally, by expressly banning extraordinary rendition, this bill would have closed the legal loopholes of other laws which do not mention

²⁵⁴ Torture Outsourcing and Prevention Act, H.R. 1352, 110th Cong. (2007).

²⁵⁵ *Id.*

²⁵⁶ *Id.* The bill also applies to U.S. contractors, which would have been significant in holding Aero Contractors liable under the Act.

extraordinary rendition, an omission relied upon by perpetrators to argue that extraordinary rendition is not prohibited.

B. INTERROGATION AND DETENTION REFORM ACT OF 2008

213. In 2008, North Carolina Representative David Price introduced H.R. 591, the Interrogation and Detention Reform Act of 2008.²⁵⁷ Its purpose was to “improve United States’ capabilities for gathering human intelligence through the effective interrogation and detention of terrorist suspects and for bringing terrorists to justice through effective prosecution in accordance with the principles and values set forth in the Constitution and other laws.”²⁵⁸ In other words, the goal of the bill was to utilize new methods to fight terrorism within the confines of laws prohibiting torture.

214. The bill was ambitious in its aim to improve treatment of detainees, and demanded the upholding of human rights. Some of its requirements included a mandate to the President to develop a uniform policy of interrogation and detention standards, in compliance with the CAT and the Geneva Convention.²⁵⁹ The bill also mandated that all strategic interrogations be recorded, and prohibited the awarding of private contracts to handle interrogations and detentions.²⁶⁰ It also required a permanent closure of Guantánamo Bay within 180 days after the bill was signed,²⁶¹ and that all detainees in United States custody have access to the International Committee of the Red Cross.²⁶²

215. Because this bill explicitly purported to order the creation of interrogation and detainment guidelines according to CAT and the Geneva Convention, it would have

²⁵⁷ Interrogation and Detention Reform Act, H.R. 591, 111th Cong. (2008).

²⁵⁸ *Id.*

²⁵⁹ Brown & Smiley, *supra* note 202, at 37.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 36.

²⁶² *Id.* at 42.

meant a significant advancement toward U.S. compliance with its international obligations.

C. SUMMARY OF FEDERAL BILLS NOT ENACTED INTO LAW AND EXTRAORDINARY RENDITION

216. No real progress has been made through the enactment of new laws by which we can hold North Carolina and its political subdivisions and Aero accountable for these illegal and immoral acts, although the two bills that were proposed were intended to clarify that federal law does indeed prohibit torture and extraordinary rendition. Although their introduction is politically significant, the fact that they did not pass, notwithstanding our obligation to comply with international law, underscores the need for a Commission of Inquiry to investigate past violations of human rights during extraordinary rendition.

6. FEDERAL CASE LAW

217. This section will analyze the use of the federal court system for accountability for torture and extraordinary rendition. Victims of torture and extraordinary rendition have attempted to hold wrongdoers accountable in the federal court system. However, they have had a difficult burden because of the many political-legal strategies employed by the United States and its officials to avoid liability under international and federal law obligations. This section ends by reviewing several specific cases over the past decade.²⁶³

²⁶³ When reviewing this section, the reader should keep in mind that this is an analysis of federal case law through the lens of the United States' involvement in extraordinary rendition and torture, and does not attempt to theorize a victim's claim against a non-state actor or contractor. For a further review and more complete review of federal case law that deals with the question of extraordinary rendition and torture see UNC Immigration/Human Rights Policy Clinic, *Obligations and Obstacles: Holding North Carolina Accountable for Extraordinary Rendition and Torture*, forthcoming (2012) at <http://www.law.unc.edu/academics/clinic/ihrp/default.aspx> [hereinafter *Obligations and Obstacles*].

218. None of these cases described below achieved accountability or compensation for those individuals who suffered as a result of the U.S. program of extraordinary rendition and torture. Nevertheless, the cases are important to the efforts of a Commission of Inquiry for several reasons. First, each of these cases articulates valid and compelling legal theories set forth by victims of extraordinary rendition. Second, each case produced important facts about what specifically occurred to the individuals who were tortured. In each case, the victims provided much documentation and support evidencing the factual details of their renditions and torture. In addition, the cases illustrate the defenses asserted by the defendants and thus highlight the legal obstacles that a Commission of Inquiry is likely to confront. Thus, a review of these cases provides guidance for further accountability efforts.

A. OVERVIEW OF USING THE COURT SYSTEM FOR ACCOUNTABILITY

219. Suits against specific perpetrators of torture or extraordinary rendition can be useful for accountability efforts. Lawsuits proceed because an aggrieved individual seeks a remedy or to otherwise right a wrong committed by the defendant she brings into court; i.e., a lawsuit proceeds because there is a plaintiff versus a defendant. This adversary system can provide accountability by identifying wrongdoings and setting out theories of culpability against perpetrators. We cannot move forward with accountability until there is acknowledgement of past mistreatment. A lawsuit is well suited to accommodate this goal.²⁶⁴

²⁶⁴ For example, critics of the Bush Administration expressed hope for accountability in the form of suits against government officials. See e.g., Mark Sherman, *Ex-Bush Officials Face Lawsuits Over Their Actions*, The Associated Press, Sept. 29, 2009, available at http://www.boston.com/news/nation/washington/articles/2009/09/29/ex_bush_officials_face_lawsuits_over

220. Although there is no way to fully make amends or undo all the suffering the victims of extraordinary rendition have experienced, a key element of the civil suit is the possibility of obtaining compensation for the victims. Lawsuits, however, offer more than the possibility of compensation. As commentators have noted, damage awards are usually not nearly as important to victims as the act of making a public claim against the alleged perpetrator in the first place:

These suits are more symbolic than likely to succeed, in that they rely not on the verdict, but on the ability to make a claim against a policy-maker. . . . [L]itigants may not expect the courts to award them damages as much as they hope to remind the public that senior government officials have blessed an extraordinary rendition program, written opinions on tough interrogation techniques, or outed a covert agent.²⁶⁵

221. Of course, a lawsuit is not a panacea and cannot fully achieve accountability. Victims of torture and extraordinary rendition have run into many obstacles when trying to bring their claims in a lawsuit. The remainder of this subsection will discuss the roadblocks to justice that victims may encounter.

(i) Standing

222. To be able to sue in a U.S. court, the plaintiff may have standing. That is, he or she must have the right to sue others for the alleged wrong.²⁶⁶ A lawsuit filed by a victim of extraordinary rendition or torture who alleges that a federal government official violated his or her constitutional rights would be controlled by *Bivens v. Six Unknown Named*

[their actions/](#) [last accessed 6/26/2012 at 10:55AM EST] (“Critics of George W. Bush’s administration see the recent actions of the courts as a chance to wring a measure of accountability from the Bush White House — at a time when Obama expresses reluctance to look backward and Congress has shown little appetite for investigating the past”).

²⁶⁵ George D. Brown, *Accountability, Liability, and the War on Terror – Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 Fla. L. Rev. 193, 203 (2011) (quoting David Zaring, *Personal Liability as Administrative Law*, 66 Wash. & Lee L. Rev. 313, 335-39 (2009).

²⁶⁶ *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Agents of the Federal Bureau of Narcotics.²⁶⁷ That is, *Bivens* provides the right to sue, or standing, to victims of extraordinary rendition.

223. This is because “*Bivens* permits plaintiffs who assert constitutional violations to proceed directly against the relevant federal officials despite the lack of a statutory authorization analogous to § 1983.”²⁶⁸ Title 42, § 1983 of the United States Code makes relief available to individuals whose constitutional rights have been violated.²⁶⁹ However, victims of extraordinary rendition and torture cannot use § 1983 to base their cause of action because §1983 protects those who have an express federally protected right and remedy created by Congress only. As seen above, although there are federal statutes that prohibit torture and extraordinary rendition, none of those statutes gives rise to a statutory authorization to challenge violations of such rights in court. Thus, §1983 does not provide standing for victims of extraordinary rendition. Instead, standing can be obtained with *Bivens*, which establishes an implied authorization for relief when one’s rights have been violated.²⁷⁰

224. Victims of extraordinary rendition may face some challenges, however, in trying to obtain standing based on the *Bivens* decision. In its *Bivens* opinion, the Supreme Court indicated that “a *Bivens* action might not proceed if...a case presented ‘special factors counselling [sic] hesitation.’”²⁷¹ It is often claimed that suits brought by victims of extraordinary rendition or torture “bristle with such questions as judicial deference to the

²⁶⁷ 403 U.S. 388 (1971).

²⁶⁸ Brown, *supra* note 265, at 205.

²⁶⁹ 42 U.S.C. § 1983 (2011).

²⁷⁰ 403 U.S. at 397 (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury”) (citing *Marbury v. Madison*, 2 L.Ed. 60 (1803)).

²⁷¹ Brown, *supra* note 265, at 206 (quoting 403 U.S. at 396).

executive in matters of military affairs and national security.”²⁷² The U.S. government has relied on this type of argument, notwithstanding the obligation to investigate and prosecute torture.²⁷³ In fact, the case of *Arar v. Ashcroft*²⁷⁴ was dismissed under this line of reasoning and will be discussed below in this Part.

225. Since *Bivens* applies to actions against federal officials, the same challenges with bringing *Bivens* actions might not necessarily be present in actions against Johnston County or Aero Contractors. However, even if the plaintiffs could withstand the standing issues, suits against these entities would run into other obstacles.

226. In a case against Johnston County, officials might claim the qualified immunity defense, which is discussed below. Similarly, even if a victim sues Aero and a court determines that he has standing, the federal government would likely intervene in the case and allege the State Secrets Doctrine, discussed below, regardless of the fact that the victim is suing a non-government entity.

(ii) Immunity

227. The immunity defense is a defense relied upon by individuals that are sued for actions that they committed while performing their official duties. If sued for their actions, many government officials will claim qualified immunity and thus argue that on this basis they are insulated from liability. This could prevent the plaintiff from moving forward with his case.

²⁷² *Id.*

²⁷³ *Id.* (suggesting that “[t]hese are precisely the sorts of questions that seem to constitute ‘special factors counselling [sic] hesitation.’”).

²⁷⁴ 585 F.3d 559 (2d. Cir. 2009).

228. As a policy, qualified immunity has the goal of allowing public officials to be able to perform their duties with confidence, without hesitation, and without the fear that they will be sued by an unhappy citizen.²⁷⁵ The defense of immunity, however, serves to frustrate victims of extraordinary rendition and torture (as well as other victims) who are seeking accountability from wrongs committed by the public official because it allows a defendant to claim that he was merely “doing his job,” and therefore, should be immune from liability if those acts were wrongful.

229. The test that is currently used for qualified immunity creates loopholes that can be exploited by officials seeking to claim immunity from liability for actions that occurred outside the United States. The test to decide whether a particular public official can benefit from qualified immunity is a subjective one. It is based on the perception of the official of whether the plaintiff had rights that he was violating, and whether that perception was reasonable. Thus, “the defendant’s immunity is defined by reference to his perception of the plaintiff’s rights and whether that perception was reasonable.”²⁷⁶ Since extraordinary rendition and torture occur outside the United States, and the victims are nearly all non-citizens, it is likely that defendants would argue that victim rights are uncertain, and would challenge the idea that they (the defendants) “could have reasonably foreseen that they did.”²⁷⁷ Thus, a public official would likely attempt to benefit from qualified immunity by arguing that he reasonably believed that no rights of the victims were violated by his acts.

(iii) State Secrets Privilege

²⁷⁵ See Brown, *supra* note 265, at 218-19.

²⁷⁶ *Id.* at 218.

²⁷⁷ *Id.*

230. The State Secrets Privilege is a defense relied upon by the United States to ensure that no sensitive information may be divulged. This defense often destroys a victim's case against U.S. officials or private companies contracting with the United States. "The United States may prevent the 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.'"²⁷⁸ The Bush and Obama Administrations have both asserted this doctrine in extraordinary rendition suits.²⁷⁹ For an example of one suit dismissed because of the State Secrets Privilege, see the discussion of *Mohamed v. Jeppesen Dataplan, Inc.*²⁸⁰

231. Despite all of these defenses that the federal government is likely to assert, it is unclear whether a suit against Johnston County or Aero Contractors would encounter the same sort of problems. As a defendant, Aero Contractors in particular may not be able to assert those same defenses, since it is not a state or federal official. However, the case of *Mohamed v. Jeppesen Dataplan Inc.* reveals the stock U.S. response: the government would likely intervene and assert the State Secrets Privilege, and demand that the case be dismissed. In an action against Johnston County, the federal government might also intervene, alleging the State Secrets Privilege, and the local officials might be able to claim immunity.

B. SPECIFIC FEDERAL CASES ON EXTRAORDINARY RENDITION AND THEIR OUTCOMES

²⁷⁸ *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007) (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

²⁷⁹ Brown, *supra* note 265, at 227.

²⁸⁰ 563 F.3d 992 (9th Cir. 2009), *rev'd en banc*, 614 F.3d 1070 (9th Cir. 2010). See *Obligations and Obstacles*, *supra* note 263 for a fuller discussion of this case.

(i) *Arar v. Ashcroft* ²⁸¹

232. The present subsection describes the journey of the case of Maher Amar in the U.S. federal courts. Maher Arar, a dual Canadian-Syrian citizen, was traveling from Tunisia to Montreal on September 26, 2002.²⁸² His plane landed at New York’s JFK airport, and he was detained. He was later sent to Syria where he was tortured.²⁸³

233. Over a year later, he was released to Canada, and he sued the United States in early 2004.²⁸⁴ Arar sued under two different theories: 1) the United States had violated his Fifth Amendment Due Process Rights based on the condition of his detention, his denial of access to counsel and courts while in United States and Syrian custody, and his detention and torture in Syria; 2) the Torture Victim Protection Act.²⁸⁵

234. The Eastern District of New York dismissed the case, and a panel of Second Circuit Court of Appeals affirmed, holding that Arar “was not entitled to relief because of lack of subject matter jurisdiction and failure to state a claim under the Due Process Clause of the Fifth Amendment.”²⁸⁶ Later, the Second Circuit en banc affirmed the dismissal of the case, but on a different theory. It affirmed the Torture Victim Protection Act claim, but dismissed the constitutional claim based on *Bivens*.²⁸⁷ The court found that in the context of extraordinary rendition, “hesitation is warranted by special factors,” and thus,

²⁸¹ 585 F.3d 559 (2d. Cir. 2009), *cert. denied by* 130 S. Ct. 3409 (2010).

²⁸² *Id.* at 565.

²⁸³ *Id.* at 565-66.

²⁸⁴ *Id.* at 566.

²⁸⁵ *Arar v. Ashcroft*, 532 F. 3d 157 (2d Cir. 2008).

²⁸⁶ *Brown & Smiley*, *supra* note 202, at 26.

²⁸⁷ 585 F.3d at 563.

the *Bivens* action should not proceed.²⁸⁸ The Supreme Court denied certiorari on October 9th, 2007.²⁸⁹

235. Despite its failure hold U.S. officials accountable for their role in the torture of Arar, the case is still significant because “it marked the first time in the context of the ‘War on Terror’ that an individual has attempted to use the courts to seek relief for torture and rendition.”²⁹⁰

(ii) *Boumediene v. Bush*²⁹¹

236. The significance of the Supreme Court’s holding of the 2008 case discussed in this section cannot be overstated. In *Boumediene v. Bush*, plaintiffs were aliens detained in Guantánamo Bay, Cuba, who had been designated enemy combatants who had been denied the right to Habeas Corpus.²⁹² Habeas corpus is a constitutional right “a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2.”²⁹³

237. In this case, the Court found that Section 7 of the Military Commission Act, which denied Habeas Corpus rights to detainees at the Guantánamo Bay detention facility, was unconstitutional.²⁹⁴ Hence, Habeas Corpus review applied to persons held in Guantánamo.²⁹⁵

²⁸⁸ *Id.*

²⁸⁹ *El-Masri v. United States*, 552 U.S. 947 (2007)

²⁹⁰ Brown & Smiley, *supra* note 202, at 26.

²⁹¹ 553 U.S. 723 (2008).

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 728.

²⁹⁵ *Id.* at 733.

238. If Congress is going to suspend the right, the Court reasoned, an adequate substitute must be provided, and the [Detainee Treatment Act] did not provide an “adequate substitute.”²⁹⁶ Part of the Court’s justification was “based on the fact that Guantánamo Bay is subject to the territorial jurisdiction of U.S. courts by virtue of its special status as a permanent leasehold of the U.S. government, even though it is physically located in Cuba.”²⁹⁷

239. Legal scholars and practitioners have considered whether the rationale behind *Boumediene* can be extended to other areas around the world where non-citizens are held in U.S. custody. Although black-sites in countries like Syria are not under the United States’ control in the same manner that Guantánamo Bay is, there is an argument that the victims of torture and extraordinary rendition are under the effective control of the United States. In fact, as noted above, several of the victims recall their captors and torturers as being American.²⁹⁸

240. The difficulty with this theory lies in that the concept of the habeas suit to challenge detention is not the same as a tort suit challenging the harms from extraordinary rendition and torture: “The Supreme Court’s apparent assertiveness in habeas corpus cases such as *Boumediene* may not carry over to other forms of suits attacking anti-terrorism policies.”²⁹⁹ Another obstacle is that whereas the naval base at Guantánamo Bay has the formality of a lease, the black-sites are shrouded in secrecy and the United States does not have formal control over them (and the Administration may claim State Secrets Doctrine if challenged on the issue).

²⁹⁶ Brown & Smiley, *supra* note 202, at 27.

²⁹⁷ Colleen Costello, *Challenging the Practice of Transfer to Torture in U.S. Courts: A Model Brief for Practitioners*, 1 Northeastern Univ. L. J. 157, 163 (2008).

²⁹⁸ See Part One, above, and the affidavits referenced *supra* notes 12-16 of this briefing book.

²⁹⁹ Brown, *supra* note 265, at 197.

241. Although the *Boumediene* decision is hopeful for those mistreated by the United States, there is still far to go in order to achieve accountability by relying on the Court's holding in *Boumediene*. Thus, caution should be used if the NC Inquiry of Torture intends to use this case as legal precedent.

(iii) *El-Masri v. Tenet*³⁰⁰

242. The present subsection describes the legal journey of the claims of El-Masri in the U.S. courts.³⁰¹ In 2006, Khaled el-Masri filed suit against former CIA Director George Tenet for human rights abuses based on his kidnapping, extraordinary rendition, and secret detention and torture in Afghanistan for five months in 2004.³⁰² Also named in the suit were the corporations involved in the rendition of El-Masri, which he claimed were “liable for authorizing the use of aircraft they owned or operated for the transfer of suspected terrorists to detention facilities despite [their] knowledge that the suspected terrorists, including El-Masri, would be detained incommunicado, tortured and subjected to other cruel treatment.”³⁰³ El-Masri stated three causes of action: one *Bivens* claim, and two under the Alien Tort Statute.³⁰⁴ The United States intervened and asserted the State Secrets Privilege. The district court agreed and dismissed the suit.³⁰⁵ The Fourth Circuit affirmed the dismissal,³⁰⁶ and the Supreme Court refused to hear the case,³⁰⁷ leaving El-Masri without redress in the U.S. courts.

³⁰⁰ 437 F.Supp. 2d 530, 532-34 (E.D.Va. 2006), affirm; *El-Masri v. U.S.*, *supra* note 289. See *Obligations and Obstacles*, *supra* note 263 for a more in-depth review of this case.

³⁰¹ For a factual background on El-Masri, see Part One, *supra*.

³⁰² *Id.*

³⁰³ *Id.* at 534.

³⁰⁴ *Id.* at 534-35.

³⁰⁵ *Id.* at 541.

³⁰⁶ *El-Masri v. U.S.*, *supra* note 289.

243. Like *Mohamed v. Jeppesen Dataplan, Inc.* discussed below, the El-Masri case is significant in that the victim sued not only U.S. officials, but also the private companies which participated in his illegal rendition and torture. Although the defendant private companies are not state actors, they have been able to avoid liability by the United States' assertion of the State Secrets Privilege, thus frustrating the victims' use of the federal court system for accountability from both state and private actors.

(iv) *Mohamed v. Jeppesen Dataplan, Inc.*³⁰⁸

244. The present subsection discusses the case of several victims of extraordinary rendition, including Mr. MOHAMED, Mr. Britel, Mr. Bashmilah and Mr. Al-Rawi against private actors involved in their extraordinary rendition.

245. If the torture victims flown by Aero sued Aero for its role in their extraordinary rendition, the suit would look very similar to *Mohamed v. Jeppesen Dataplan, Inc.* *Jeppesen* is another State Secrets Privilege case, only this time, the defendant was solely a U.S. contractor. No U.S. officials were named in the suit.

246. In *Jeppesen*, five plaintiffs sued Jeppesen Dataplan, alleging that the company had

“played an integral role in the forced” abductions and detentions and “provided direct and substantial services to the United States for its so-called ‘extraordinary rendition’ program,” thereby “enabling the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities.” [The complaint] also alleges that Jeppesen provided this assistance with actual or constructive “knowledge of the objectives of the rendition program,” including knowledge that the plaintiffs “would be subjected to forced disappearance, detention, and torture” by U.S. and foreign government officials “contracted to provide

³⁰⁷ 128 S.Ct. 373 (2007). See *Obligations and Obstacles*, *supra* note 263 for a more in-depth analysis of this case.

³⁰⁸ 614 F.3d 1070 (9th Cir. 2010) (*en banc*), *cert. denied* by 131 S. Ct. 2442 (2011).

transportation services and logistical support for the U.S. government's extraordinary rendition program."³⁰⁹

247. The United States intervened and argued that the case should be dismissed, alleging that disclosure of information within the case could cause serious damage to U.S. national security, and therefore, the State Secrets Privilege mandated dismissal of the plaintiff's claims.³¹⁰ An en banc panel of the Ninth Circuit agreed, and the case was dismissed.³¹¹ The Supreme Court denied certiorari on May 16th, 2011.³¹²

248. Particularly frustrating for the victims and human rights advocates is the fact that the plaintiffs in *Jeppesen* provided an abundance of evidence that the renditions and torture occurred, and for purposes of the complaints, the Ninth Circuit treated all the evidence as true, yet the cases were still dismissed:

[T]he Ninth Circuit's position is that, even if it is true that Jeppesen conspired with the U.S. government to kidnap and perform acts of torture on plaintiffs, plaintiffs are without a remedy because it would undermine national security if the details of government involvement in international kidnapping and torture, which have already been established in 1800 pages of publicly-available documents submitted by plaintiffs, were to be revealed in the course of the litigation.³¹³

249. Due to the prevalence of the state secrets privilege, it is likely that if Aero's victims filed suit against the company for contracting with the United States and supporting its extraordinary rendition program, the United States would behave similarly and claim that the case cannot be litigated without jeopardizing state secrets and national security, and therefore, must be dismissed.

³⁰⁹ *Id.* at 1075 (quoting the plaintiffs' complaint).

³¹⁰ *Id.* at 1076.

³¹¹ *Id.* at 1073.

³¹² 131 S. Ct. 2442 (2011).

³¹³ Telman, D. A. Jeremy, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege* (March 3, 2011). Alabama Law Review, Vol. 63, 2011; Valparaiso University Legal Studies Research Paper No. 11-07. Available at SSRN: <http://ssrn.com/abstract=1776464> [last accessed 6/21/2012 at 11:18PM EST].

C. SUMMARY ABOUT FEDERAL CASE LAW AND EXTRAORDINARY RENDITION

250. In this subsection we have seen the government's resort to defenses to liability for its actions in its efforts to avoid accountability for acts prohibited by international and federal law. As a result of standing issues, qualified immunity claims, and the State Secrets Privilege, it can be expected that any suits filed will face these challenges despite the victims' overwhelming evidence that these atrocities occurred. Indeed, in every lawsuit that was filed, the victims provided sworn statements with voluminous documentation to support their claims, and the courts had to treat the claims as true, yet the governments' defenses prevailed. *Boumediene* was hopeful in that Guantánamo detainees are able to challenge their detentions, but this does not extend to those tortured and extraordinarily rendered outside of that specific facility.

251. The victims of extraordinary torture have not yet prevailed in federal court litigation; however, the principles articulated in the claims asserted by the plaintiffs, and the facts and evidence they submitted on behalf of their efforts to seek remedies provide insight and guidance to the ways to achieve justice. Although they could not proceed with their cases, the plaintiffs nonetheless articulated valid claims for justice. Additional suits may be brought in the hope that the courts will "get it right" and allow victims of extraordinary rendition and torture their day in court as required under law. Moreover, the Commission of Inquiry can use the claims, facts, and evidence as guidance in its efforts. The failure of the courts to proceed to a full adjudication of plaintiffs' claims demonstrates the imperative nature for citizens to call for accountability through other means.

7. CONCLUSION ABOUT THE FEDERAL LEGAL EFFORTS FOR ACCOUNTABILITY IN EXTRAORDINARY RENDITION

252. Marta Brown and Caroline Smiley summarize very well the problems with holding the perpetrators of extraordinary rendition and torture accountable under existing U.S. law:

Although the domestic law of the United States contains a number of provisions prohibiting torture and other human rights abuses, it lacks sufficiently inclusive guidelines to ensure that U.S. personnel do not engage in gross breaches of international norms. The current domestic framework in the United States is a patchwork of legislation, executive orders, and case law that contains numerous loopholes and fails to create sufficiently specific and enforceable standards. Moreover, the existing domestic framework should be more inclusive of the international legal obligations with respect to torture and extraordinary rendition.³¹⁴

253. There has been some progress, and indeed, some statutes articulate a clear mandate to prohibit torture and extraordinary rendition. The ideals are there; the practical implementation of a ban against these acts is not. Citizens cannot be satisfied with the current status quo with regard to accountability and must demand more. “A political system premised on limited government and accountability cannot allow the government and its contractors to refuse to answer for conduct that violates fundamental human rights and constitutional values.”³¹⁵ Therefore, if insurmountable obstacles block the use of lawsuits for justice, if there are too many loopholes and weaknesses in the federal statutes, if new bills that would strengthen the scheme of prevention and accountability cannot be enacted, it is then imperative that citizens choose an alternate mechanism by which to demand accountability for Aero’s actions.

³¹⁴ Brown & Smiley, *supra* note 202, at 30.

³¹⁵ Telman, *supra* note 313.

254. The importance of a citizens' Commission of Inquiry cannot be overstated. It can pick up where federal law has dropped off and charge forward with a call for accountability backed by the citizens of this state. Federal law should be in the background of the Commission's focus, especially the clear mandate for a prohibition on torture and extraordinary rendition and the requirement that the United States abides by customary international law.

PART FOUR
APPLYING THE LEGAL PRINCIPLES: NORTH CAROLINA, ITS POLITICAL
SUBDIVISIONS, AERO CONTRACTORS, AND NORTH CAROLINA CITIZENRY
ACCOUNTABILITY

1. INTRODUCTION

255. As explained in Part Two, the United States' participation in extraordinary rendition violates several human rights treaties. Besides the federal government, several other entities are also accountable for these violations, among others, the State of North Carolina and its political subdivisions, Aero Contractors, and the North Carolina citizenry.

256. Section I of this Part identifies and explains the sources of accountability for North Carolina and its political subdivisions. The section identifies four sources for liability. The first source of liability is found in the international treaties themselves, which impose an obligation to implement the rights they guarantee upon states and all of their political subdivisions. The second source of liability is the United States Constitution, which gives the federal government the power to bind the fifty states into international obligations and make treaties the supreme court of the land. The third source of liability is the so-called principle of "implementation gap", which states that states and local governments have a positive obligation to implement international treaties because of the structure of our federal system. The fourth source is the international case law and scholarly approaches of third party liability, which indicate that a government should be held accountable for its role and involvement in supporting those who perpetrate acts of torture.

257. Section II of this Part briefly summarizes the accountability of Aero Contractors as a private entity for engaging in extraordinary rendition. Section III outlines the bystander responsibility for the citizenry of North Carolina.

2. ACCOUNTABILITY OF STATES AND POLITICAL SUBDIVISIONS FOR THE VIOLATION OF HUMAN RIGHTS TREATIES

258. This section addresses the accountability of states and their political subdivisions in their role in supporting individuals or entities that violate the provisions of human rights treaties to which the U.S. is a party.

259. The fifty states and their political subdivisions obligation to comply with international treaties originates in three legal sources: international treaties and their obligation to implement their provisions at the sub-national level; the United States Constitution and the power it confers to the federal government to bind the entire nation into international obligations; and the positive obligation of the states to implement international treaties based on the structure of the federal system. The subsections below outline the obligations arising under each of these sources.

A. INTERNATIONAL TREATIES AND THE OBLIGATION OF IMPLEMENTATION AT THE SUB-NATIONAL LEVEL

260. As discussed in Part Two, various international treaties and binding international norms prohibit extraordinary rendition and torture. This section demonstrates why such prohibitions are applicable to North Carolina and its political subdivisions and make them responsible for the violations committed by Aero Contractors by aiding in the process of extraordinary rendition.

261. State and local governments play an essential role in a State party's compliance with human rights treaties.³¹⁶ This prominent role is dictated first and foremost by the treaties themselves, which require that local governments respect the rights the treaties guarantee. The subsections below outline the specific obligations imposed on local governments, including North Carolina and its political subdivisions, by the Universal Declaration, the ICCPR, and CAT. The section concludes with the application of these obligations to North Carolina and Johnson County for the involvement of Aero in extraordinary rendition.

(i) Universal Declaration of Human Rights

262. This subsection describes the responsibilities of North Carolina and its political subdivisions imposed by the United States signature of the Universal Declaration of Human Rights.

263. The Universal Declaration imposes a broad obligation to respect human rights at all levels of the government. Specifically, Article 30 of the Declaration imposes the obligation to respect its guarantees (which include the prohibition on torture of Article 5) on state and local governments by explicitly extending the prohibition to engage in activities that violate those guarantees to any "groups" or "persons." Article 30 states that:

"Nothing in this Declaration may be interpreted as implying for any *State, group or person* any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."³¹⁷

³¹⁶ State and Local Human Rights Agencies, *supra* note 11, at 6. *See Obligations and Obstacles*, *supra* note 263 for an indepth review of these concerns.

³¹⁷ Universal Declaration, *supra* note 24, art. 30 (*emphasis added*).

264. Thus, because the fifty states and their political subdivisions are both “groups” and “persons,” Article 30 explicitly prohibits state and local governments from engaging in human rights and human dignity violations.

265. The principle that the Universal Declaration must be respected at all levels of the government has broad acceptance in the United States. This is demonstrated by the fact that, over time, American jurisprudence has incorporated the notion that states are obliged to follow the Universal Declaration both impliedly and expressly.

266. An example of implied incorporation is the use of the term “dignity” in the Supreme Court’s understanding of the Bill of Rights.³¹⁸ The concept of human dignity and human rights was central to the Universal declaration.³¹⁹ Its Preamble’s very first sentence reads:

“Whereas 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”³²⁰

267. The term dignity, however, does not appear in the Constitution.³²¹ On the contrary, the incorporation of the term dignity in the Supreme Court’s understanding of the Bill of Rights is evidence of the influence of the Universal Declaration into American jurisprudence in general and into the Supreme Court in particular.³²²

³¹⁸ Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 Yale L.J. 1564, 1579 (2006).

³¹⁹ For a article discussing the concept of dignity in the Universal Declaration *See generally*, Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 Eur J.Int. Law 4, 655 (2008). *See also*, Resnik, *supra* note 318, at 1594.

³²⁰ Universal Declaration , *supra* note 24, pmbl.

³²¹ Resnik, *supra* note 318, at 1579.

³²² Resnik, *supra* note 318, at 1579. (“Dignity was also enshrined as a central principle in the U.N. Charter and the UDHR. Yet Supreme Court Justices rarely cited either the Charter or the UDHR as sources”).

268. Express invocation of the Universal Declaration's principles first arose in the 40's, most pronouncedly in the Supreme Court's jurisprudence about equality.³²³ The concept of equality is present in one way or another in every provision of the Universal Declaration.³²⁴ In a leading case involving the restriction of land ownership to certain minorities, Justice Black Murphy argued that the restriction was a violation of the equality of all people by stating:

Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.³²⁵

269. Thus, both the text of the Universal Declaration and American Jurisprudence, either expressly or impliedly, impose in state and local governments the obligation to respect the principles set out in the Universal Declaration. Since, as explained in Part Two, above, extraordinary rendition is a violation of the principles of the Universal Declaration, all levels of the governments of a State party to the United Nations Charter, including state and local governments, are prohibited from engaging in extraordinary rendition. Consequently, any political subdivision of a State party that engages in this practice violates this international agreement both in principle and in spirit.

³²³ For history and citations of the incorporation of the Universal Declaration in American jurisprudence *See generally*, Resnik, *supra* note 318.

³²⁴ For an article regarding the history of the concept of equality in international law *See e.g.*, Li Weiwei, "Equality and Non-Discrimination Under International Human Rights Law," Research Notes 03/2004, Norwegian Centre for Human Rights, University of Oslo (2004), available at <http://www.mittendrindaussen.vor.de/fileadmin/bilder/0304.pdf> [last accessed 6/26/2012] (stating that..."the principle of equality permeate the declaration. Of the thirty articles, some are in one way or another explicitly concerned with equality, and the rest implicitly refer to it by emphasizing the all-inclusive scope[of the Universal Declaration] ").

³²⁵ *Oyama v. State of California*, 332 U.S. 633, 673 (1948)(Justice Murphy, *concurring*).

(ii) International Covenant on Civil and Political Rights

270. This subsection describes the obligations that the ICCPR imposes on state and local governments, including North Carolina and its political subdivisions. The ICCPR imposes a general obligation to implement the ICCPR warranties, chief among which is the prohibition to engage in torture or CID.³²⁶ Article 50 of the ICCPR extends this obligation to state and local governments, by stating that:

“The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”³²⁷

271. Additionally, the ICCPR imposes specific obligations on state and local governments by requiring the availability of judicial remedies for ICCPR violations, which, given the federal structure of the United States, can only be provided by state governments.³²⁸ To this effect, Article 2 states that:

Each State Party to the present Covenant undertakes:

- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

272. Given that, in the U.S. federal system, some remedies such as criminal or civil sanctions are available at the state level only, Article 2 unequivocally requires compliance with the ICCPR at the state and local level.³²⁹ This has been confirmed by the Committee in its Comment 31, which states that:

³²⁶ ICCPR, *supra* note 41, Part II, art. 2, ¶ 1, Part III, art. 7.

³²⁷ *Id.* art. 50.

³²⁸ *Id.* art. 2, Part 3. *See also, e.g., State and Local Human Rights Agencies, supra* note 11, at 6.

³²⁹ Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. Rev. L. & Soc. Change 359, 362 (2006).

All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional, or local – are in a position to engage the responsibility of the State Party.³³⁰

273. The pivotal role of state and local governments for ICCPR compliance is underscored by the State members' responsibility for violations committed by state and local governments (as well as for violations committed by other branches of their governments). Underscoring this liability, the Committee has stated that:

The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility.³³¹

274. Furthermore, the ICCPR obligation to protect all individuals from human rights violations applies to violations committed by perpetrators other than traditional state actors or state parties.³³² In relevant part, the treaty states that:

Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, *notwithstanding* that the violation has been committed by persons acting in an official capacity.³³³

275. Thus, as a result of the general obligation to implement the ICCPR warranties imposed by Article 50 on state and local governments, Article 2's obligation to provide remedies for ICCPR violations at the civil and criminal level, and the liability of ICCPR members for violations committed at the state and local levels, both states and local governments must comply with ICCPR obligations, including the prohibition of Article 7

³³⁰ Comment 31, *supra* note 42, ¶ 4.

³³¹ *Id.*

³³² *Id.*, ¶ 8.

³³³ *Id.* (*emphasis added*).

of engaging in torture or CID. Additionally, because of the liability imposed on State members for the actions of non-state actors, if third parties violate the ICCPR, state and local government must assume responsibility for their actions.

(iii) Convention Against Torture

276. This subsection describes the obligations that CAT imposes on state and local governments, including North Carolina and its political subdivisions. CAT, like the ICCPR, prohibits State members from engaging in torture and CID at all levels of their domestic governments, even if the federal government is unable to fully control whether lower levels of governments engage in ICCPR violations.³³⁴

277. CAT also makes clear that all public officials, as well as those acting in an official capacity, must comply with its obligations. Article 16 states that:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.³³⁵

278. Thus, CAT makes no difference between officials at the federal and the state level, since all are subject to Article 16. In 2010, the United Nations General Assembly made this concept clear by stating that is indifferent for CAT purposes whether the violations have been committed by federal or state officials.³³⁶

³³⁴ CAT, Committee Against Torture, 36th Session, CAT/C/USA/CO/2 (July 25th, 2006).

³³⁵ CAT, *supra* note 139, art. 16.

³³⁶ U.N. General Assembly Resolution, Torture and other cruel, inhuman or degrading treatment or punishment, A/RES/64/153, 26 March 2010, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/471/01/PDF/N0947101.pdf?OpenElement> [last accessed 6/21/2012 at 10:30PM EST].

279. Moreover, Article 1 of CAT defines torture and CID to include acts committed by non-state actors if that actor acts with the instigation, consent, or acquiescence of a public official (or other person acting in official capacity). Specifically, Article 1 states:

“For the purposes of this Convention, torture means 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, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*³³⁷

280. Additionally, Article 16 of the CAT states:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, *when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*³³⁸

281. As interpreted by the CAT Committee, these provisions mean that only public officials can be prosecuted for CAT violations, but a public official need not have directly committed the acts in question.³³⁹ Multiple sources confirm that CAT covers “consent or acquiescence” of public officials.

282. The Special Rapporteur on Torture of the UN Commission on Human Rights has stated that the “consent or acquiescence” language “makes the State responsible for acts committed by private individuals which it did not prevent from occurring or, if need be,

³³⁷ CAT, *supra* note 139, Part I, art. 1, cl.1.

³³⁸ CAT, *supra* note 139, Part I, art.16, cl. 1.

³³⁹ William Paul Simmons, *Liability of Secondary Actors Under the Alien Tort Statute: Aiding and Abetting and Acquiescence to Torture in the Context of the Femicides of Ciudad Jurez*, 10 Yale Hum. Rts. & Dev. L.J. 88, 126-28 (2007); CRS, 2004, *supra* note 158, at 4.

for which it did not provide appropriate remedies.”³⁴⁰ Subsequent cases brought up to the Committee confirm the continued understanding of the Committee that CAT covers acquiescence of public officials.³⁴¹

283. The United States agrees with this interpretation. This understanding was already expressed at ratification, when the ratifying Senate declared that a public official or someone acting in an official capacity could still be culpable for torture even if he only acquiesced to the act.³⁴²

284. With respect to the meaning of “acquiescence”, the regulations enacted to implement CAT state that

Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.³⁴³

285. Additionally, the United States Senate, in interpreting CAT, has determined that outright knowledge is not required to be accountable for torture. Willful blindness that a person will be tortured constitutes acquiescence.³⁴⁴

286. Thus, under CAT, either state and/or public officials who “legalize,” “authorize,” or just merely “consent” or “acquiesce” to violations of the CAT are liable for the violations.³⁴⁵ Thus, it is not necessary that the public official has committed a violation of

³⁴⁰ *Id.*, at 125.

³⁴¹ This has been the interpretation in one of the most developed lines of cases on this issue, the non-refoulement cases in U.S. courts. *Id.* at 127 (citing as examples *Sadiq Shek Elmi v. Austl.*, Communication No. 120/1998, Comm. Against Torture, 22d Sess., ¶ 5.2, U.N. Doc. CAT/C/22/D/120/1998 (May 25, 1999)).

³⁴² See SEN. EXEC. RPT. 101-30, Resolution of Advice and Consent to Ratification (1990), at II.(1)(b).

³⁴³ 8 C.F.R. § 208.18.

³⁴⁴ CRS, 2004, *supra* note 158, at 5 (citing *Zheng v. Ashcroft*). Check if this is the way to put citing.

³⁴⁵ Simmons, *supra* note 339, at 124 (noting that “Instigation” and “consent or acquiescence” also appear in CAT’s Article 16 discussing states’ responsibilities to prevent torture as well as in Article 4 of the CAT Optional Protocol discussing state visits).

the provisions. CAT prohibits torture by any person as long as it is inflicted by, or at the instigation of, or with the consent or acquiescence of a public official, or any other person acting in an official capacity.³⁴⁶ Actions as passive as to count as “acquiesce” to acts of torture or CID are a violation of CAT. A public official or a person acting in an official capacity may be liable for violations committed by non-state actors at that person’s instigation, with his or her consent, or with his or her acquiescence.³⁴⁷

(iv) Conclusion Regarding the Obligations of State and Local Governments Under the Universal Declaration, the ICCPR, and CAT

287. As the subsections above demonstrate, international treaties and agreements by their terms directly impose obligations on state and local governments. The Universal Declaration extends its prohibition of engaging in actions that violate human rights to any groups or persons, which in turn includes state and local governments. The ICCPR imposes all of its obligations at the sub-national level, including its prohibition of engaging in acts of torture or CID. CAT prohibits torture or CID at all levels of a State party, and actions by any public official that legalize, authorize, consent, or acquiescence to them constitute CAT violations.

B. THE POWER OF THE FEDERAL GOVERNMENT TO BIND THE ENTIRE NATION, INCLUDING THE FIFTY STATES TO INTERNATIONAL OBLIGATIONS

³⁴⁶ *Id.* at 123-24 (“The extent of official involvement is the key question in my analysis. It is clear from the definition that torture need not be directly perpetrated by the public official but could be at the “instigation of” or with the “the consent or acquiescence” of an official”).

³⁴⁷ *Id.*

288. This subsection describes how the Constitution of the United States establishes that state and local governments are bound by international agreements, including those that prohibit extraordinary rendition and torture, by prescribing that treaties are binding on every state, every judge, and every court of the United States.

289. The federal government of the United States has the power to bind the entire nation into international obligations by entering into treaties with other nations. Such power is enumerated in Article 2, Section 2, Clause 2, of the United States Constitution, clause that has been denominated the “treaty clause.”³⁴⁸ Article VI, clause 2 recites:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and 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.”³⁴⁹

290. As a power of the federal government that is enumerated in the Constitution, the power to enter into international treaties is legitimately within the exclusive jurisdiction of the federal government.³⁵⁰ Thus, states cannot interfere with it.³⁵¹ The Constitution establishes that treaties entered into by the federal government pursuant to this power

³⁴⁸ U.S. Const., art. II, sec. 2, cl. 2.

³⁴⁹ U.S. Const. art. VI, cl. 2.

³⁵⁰ *Missouri v. Holland*, 252 U.S. 416 (1920)(holding that the treaty power is an enumerated power of the federal government).

³⁵¹ The prohibition of states entering into treaties is expressed in Section 10, Clause 1, of the United States Constitution, which reads: “No State shall enter into any Treaty, Alliance, or Confederation...”. A prominent case interpreting this prohibition is *United States v. Belmont*, 301 U.S. 324, 331 (1937) (stating that “[A]ll international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states”).

constitute the supreme law of the land.³⁵² Thus, treaties are part of the law of the states.³⁵³

They are binding in judges in every state.³⁵⁴

291. The power of treaties to bind states and local governments is illustrated by the line of Supreme Court cases noting the applicability of international law to the states. In three landmark cases, the Supreme Court cites to international law as persuasive authority.

These cases are *Roper v. Simmons*,³⁵⁵ *Atkins v. Virginia*,³⁵⁶ and *Lawrence v. Texas*.³⁵⁷

The U.S. Supreme Court has stated that: “[v]alid treaties of course ‘are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the

United States.’”³⁵⁸ Ratified treaties “prevail over previously enacted federal statutory law

(when there is a conflict) and over any inconsistent state or local law.”³⁵⁹ Judges must

regard treaties as superior to the constitution and laws of their individual states.³⁶⁰

³⁵² U.S. Const. art. VI, cl. 2. See e.g., *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981); *Z. & F. Assets Realization Corporation v. Hull*, 61 S.Ct. 351 (DCSD Tex. 1940); *Amaya v. Stanolind Oil & Gas Co.*, 62 F. Supp. 181 (DCSD Tex. 1945).

³⁵³ See e.g., *Skiriot v. Florida*, 313 U.S. 69, 72-73 (1941) (“International law is a part of our law and as such is the law of all States of the Union.”) (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)). For an analysis of the jurisprudence about international law and the laws of the states See e.g., Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 Mich. J. Int’l L. 301, 311 & n.52 (1999) (citing *Skiriot* and other cases as support for the proposition that citation of international law by the Court defeats the idea that American courts are not bound by international law).

³⁵⁴ *United States v. Schooner Peggy*, 5 U.S. 103 (1801) (“The Constitution of the United States declares a treaty to be the supreme law of the land; of consequence, its obligation on the courts of the United States must be admitted”).

³⁵⁵ 543 U.S. 551, 554 (2005) (“The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court’s determination that the penalty is disproportionate punishment for offenders under 18).

³⁵⁶ 536 U.S. 304, 316 (2002) (considering international law in analysis of constitutionality of death penalty for mentally retarded defendants).

³⁵⁷ 539 U.S. 558, 576-77 (2003) (considering international norms in holding Texas sodomy law unconstitutional).

³⁵⁸ *Holland*, *supra* note 350, at 434. Check if this is the way to cite to cases.

³⁵⁹ See e.g., *Gade v. National Solid Waste Management Ass’n.*, 505 U.S. 88, 108 (1992) (stating that “[i]f a conflict exists between federal and state law, the state law is invalid, and the federal law prevails”).

³⁶⁰ For a classic case already setting this proposition See e.g., *Ware v. Hylton*, 3 U.S. 199 (1796).

292. In sum, the power of the federal government to bind the entire nation, including every one of the fifty states, to international obligations means that the states must comply with those treaties. This obligation originates not only in the treaties themselves, but also in the Constitution, and the federal structure that it supports. Thus, since the federal government of the United States has entered into treaties that prohibit torture and extraordinary rendition, the federal government, the fifty states, and each one of their political subdivisions are prohibited from engaging in torture and extraordinary rendition.

C. THE POSITIVE OBLIGATION OF STATE AND LOCAL GOVERNMENTS TO COMPLY WITH INTERNATIONAL TREATIES

293. This section discusses how the federal system of government determines the states' and local governments' positive obligation to comply with international treaties. When local governments do not comply with this principle, the paradox of what has been called "the implementation gap" takes place.

294. Although treaties are often considered a means to curtail the abuse of State power and to protect against human rights violations at the international level, states and local governments are indispensable for the implementation of human rights treaties.³⁶¹ Even when the treaty is entered into only one part of the government, the executive power, the provisions of some treaties must be necessarily implemented by another.³⁶² This paradox is often referred as the "implementation gap" of treaties in a federal system.³⁶³

³⁶¹ Rick Lawson, *Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' Meet the Challenges of the 21st Century?*, in *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy*, 91, 91 (Monique Castermans-Holleman, Fried Van Hoof & Jacqueline Smith ed., 1998).

³⁶² Johanna Kalb, *Dynamic Federalism in Human Rights Treaty Implementation*, 84 Tul. L. Rev. 1025, 1029-30 (2010) (stating that "little effort has been directed thus far towards modeling an affirmative obligation for state participation in treaty implementation--notwithstanding that state

295. States have the positive obligation to implement international treaties because, in a federal system, entire areas of the law are under the exclusive jurisdiction of the states. Thus, if a treaty pertains to one or several of these areas, the participation of the states in the implementation of the provisions of the treaty is indispensable to enable the country to comply with the treaty. Treaties that have a ‘federalist clause,’ such as the ICCPR and the CAT, make this obligation even more unavoidable by alerting the other parties of the treaty, as well as states and local governments, of the domestic mechanisms of implementation of the treaty.³⁶⁴

296. Human rights treaties were written with the expectation that they would be implemented regionally and locally.

[H]uman rights treaties are intended to be implemented at the local level, with a great deal of input. For example, these treaties provide mechanisms and opportunities for reporting on conditions within communities (both positive and negative); training government officials and agencies as well as the community to promote equality and non-discrimination; conducting hearings to explore and examine the relevance of findings by international treaty bodies; and issuing recommendations for future action. They also provide a set of standards that local governments should adhere to in administering their own laws and policies.³⁶⁵

D. INTERNATIONAL CASE LAW AND SCHOLARLY APPROACHES TO THIRD PARTY LIABILITY FOR TORTURE

(i) International Case law Interpretation of Third Party Liability for Torture

action is arguably required, both pragmatically and doctrinally, if the United States is to comply with its international human rights treaty obligations”).

³⁶³ Davis, *supra* note 329, at 362.

³⁶⁴ Henkin, *supra* note 117, at 345 (“The ‘federalism’ clause attached to U.S. ratifications of human rights conventions has been denominated an ‘understanding,’ a designation ordinarily used for an interpretation or clarification of a possibly ambiguous provision in the treaty. The federalism clause in the instruments of ratification of the human rights conventions is not an understanding in that sense, but may be intended to alert other parties to United States intent in the matter of implementation”).

³⁶⁵ *State and Local Human Rights Agencies*, *supra* note 11, at 6.

297. With regard to general concepts of accountability for human rights violations within the territory of a state, international human rights case are also convincing sources. There is precedent, developed in international tribunals such as the Council of Europe's Court of Human Rights, which indicates that a government should be held accountable for its role and involvement in supporting those who perpetrate acts of torture. The case law indicates that even without literal and physical "control" of a person, a government should still bear some responsibility for its involvement in furthering a course of action that leads to human rights violations such as torture.

298. *Ocalan v. Turkey* is one of the leading cases often cited regarding when a government's involvement with torture should render it accountable for such human rights violations.³⁶⁶ In *Ocalan*, the European Court of Human Rights of the Council of Europe was presented with a complaint alleging acts of torture and other human rights violations.³⁶⁷ The victim, who had been evading Turkish Authorities in Kenya, was unknowingly transported by Kenyan Authorities to the Nairobi Airport to an aircraft where he arrested by Turkish officials and subsequently tortured.³⁶⁸

299. In *Ocalan*, the court addressed the accountability of Kenyan authorities for effectively "delivering" this individual into the hands of those who tortured him.³⁶⁹ The issue was whether Kenyan authorities could be found responsible for having delivered the individual into another country's control although they were not in "control" of the

³⁶⁶ *Ocalan v. Turkey*, ECtHR (App. No. 46221/99), at ¶¶ 96-101 (Mar. 12, 2003) *confirmed by the Grand Chamber judgment* (May 12, 2005).

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.* at ¶¶ 99-100.

individual when the acts of torture were perpetrated.³⁷⁰ The Court stated:

[A]t the material time the Kenyan authorities had decided either to hand the applicant over to the Turkish authorities or to facilitate such a handover...The Court is not persuaded...that... the Kenyan authorities had had no involvement in the applicant's arrest or transfer...While it is true that the applicant was not arrested by the Kenyan authorities, the evidence before the Court indicates that Kenyan officials had *played a role* in separating the applicant from the Greek Ambassador and in transporting him to the airport immediately preceding his arrest on board the aircraft.³⁷¹

300. The Court here indicates that a government does not have to be directly responsible for a human rights violation, such as torture, to still be held accountable for such violations. The Court states that the Kenyan authorities “played a role” in effectively “delivering” the victim into the hands of the Turkish Authorities. The “role” that the Kenyan government played in the *Ocalan* case is not identical to the role the State of North Carolina plays in the operation of Aero Contractors. However, the concept of third-party accountability is still persuasive. By licensing and approving Aero Contractor's operations in Johnston County, North Carolina, the State of North Carolina is supporting an entity within its borders that is responsible for the rendition and “delivery” of torture victims into the hands of their persecutors throughout the globe. It would certainly be accurate to describe the State's support as “playing a role” in Aero's activities of extraordinary rendition and torture.

(ii) Legal Theories on Accountability and Applicability of Human Rights Treaties

301. In addition to international treaties and court rulings, many theorists demonstrate

³⁷⁰ *Id.*

³⁷¹ *Id.*

the legal basis for state governments such as North Carolina to assume responsibility for their acts in aiding and supporting entities involved with torture and other human rights violations. They argue that agents and parties directly controlled by governments are not the only entities that a government should be liable for with regard to human rights violations.³⁷² They suggest, instead, that rather than a formal concept of agency, the nature of the “relationship” between the entity and the state should dictate accountability.³⁷³ “A state need not control third parties (i.e., non-agents), but it may have to exercise lesser degrees of influence.”³⁷⁴ As Monica Hakimi states:

Specifically, the state may have to influence third parties not to violate rights.... If a state suspects that someone in its territory is planning a killing spree, the interest in protecting potential victims favors requiring the state to restrain the suspect. But the interest in protecting the suspect (from undue state intrusion) justifies limiting the state's restraints.³⁷⁵

302. International scholars indicate that the human rights violations perpetrated by non-agents operating within a government’s territories can implicate the responsibility of the government.³⁷⁶ Others have discussed and summarized government accountability for private actors and entities in the context of the International Law Commission’s Draft Articles on human rights.³⁷⁷

Under normal circumstances...acts of private individuals are not imputable to the State. A State *may nevertheless be held responsible* under the Convention-for its own acts, that is-if it has *encouraged individuals to engage in acts contrary to human rights*...or if it has failed to ‘secure’ the rights and freedoms of the Convention in its domestic law...or again if it has failed to take ‘reasonable and appropriate measures of protection...’³⁷⁸

³⁷² Monica Hakimi, *State Bystander Responsibility*, 21 European J. Int’l L. 341, 357 (May 2010).

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ Lawson, *supra* note 361, at 96.

³⁷⁸ *Id.* at 115 (*emphasis added*).

303. In the case of North Carolina, the call for accountability does not turn on whether Aero Contractors is an “agent” of the government. It is sufficient that North Carolina has had continuous knowledge of Aero’s activities and has continued to support Aero through licenses and other governmental approval of its operations. These circumstances demonstrate that the State is failing to *control* an entity within its “territory” which is involved in the extraordinary rendition and torture of various persons. As explained by international human rights scholars, governments have an obligation to influence third parties to refrain from violating rights.³⁷⁹

304. North Carolina and its political subdivisions, by continuing to license Aero and otherwise facilitate their operations clearly have failed to fulfill those responsibilities. The principles set forth in the International Law Commission’s Draft articles make clear North Carolina’s obligations and suggest that North Carolina may be “encouraging individuals to engage in acts contrary to human rights” by continuing to license Aero Contractors operations.³⁸⁰

305. These principles demonstrates that according to international human rights treaties, human rights cases and scholarly analyses, there are convincing arguments that demonstrate North Carolina’s responsibility and accountability for facilitating Aero Contractors’ operations in the state. The next subsection considers the concept of Aero Contractors as a private entity that may be held responsible and accountable for the perpetration of human rights violations through its participation in the CIA’s program of extraordinary rendition and torture.

³⁷⁹ Hakimi, *supra* note 372, at 341.

³⁸⁰ Lawson, *supra* note 361, at 115.

3. PRIVATE INDIVIDUAL / ENTITY ACCOUNTABILITY FOR AERO

306. The present Section summarizes the legal bases that establish the liability of individuals or private entities, such as Aero Contractors, for violations of international treaties.

307. Based on the principles reviewed in previous sections of this briefing book, the first basis for establishing the liability of Aero is the fact that Aero is a corporation of North Carolina, and international treaties are binding in North Carolina. Torture is prohibited both by international laws and by federal law.³⁸¹ Both federal law and international laws are binding within the territory of the states.³⁸² Individuals and private entities are subject to the laws of the territories in which they are located.³⁸³ Thus, individuals and private entities are subject to the provisions of international treaties, which bind the states and their political subdivisions.³⁸⁴ As a consequence of these principles, when Aero engaged in extraordinary rendition, it violated all the international treaties that are binding in North Carolina and prohibit extraordinary rendition and torture.³⁸⁵

³⁸¹ See *infra* Part II through IV. This briefing book was substantially completed prior to the Fourth Circuit's decision in *Al Shimari v. CACI International*, a claim under the Alien Tort Statute. On May 11, 2012, the Court of Appeals sitting *en banc* panel issued an order dismissing the appeal of corporate contractors sued for torture, and remanded the case to the district court, leaving open the possibility of clarification of corporate liability for such acts. This decision follows that of *Mohamad v. Palestinian Authority* in which the Supreme Court held that the categorical word "individual" in the context of the Torture Victims Protection Act only referred to "natural persons," and did not include organizations that have engaged in human rights violations. *Mohamad v. Rajoub*, 634 F.3d 604, 609 (D.C. Cir. 2011), *rev'd sub nom. Mohamad v. Palestinian Authority*, No. 11-88, at 2-11 (U.S. Sup. Ct. Oct. 18, 2011). See *Obstacles and Obligations*, *supra* note 263 for a discussion of *Mohamad*. In light of each of these decisions, more analysis and follow-up is required to accurately assess the state of the case law.

³⁸² See *infra* Part IV.

³⁸³ U.S. Const., Amend. X (recognizing that the states have the power to enact laws and regulations within their territories to assure the safety, health, welfare, and morals of their communities). For a case applying this principle See *e.g.*, *Frank v. U.S.*, 129 F.3d 273 (2d Cir. 1997).

³⁸⁴ See *infra* next section on the liability of North Carolina and its political subdivisions.

³⁸⁵ For an explanation of the application of international treaties to the fifty states see Section I, *supra*.

308. The second basis that establishes liability for Aero, in addition to the accountability of governments such as the State of North Carolina, is the precedent in federal case law for the imposition of liability on private individuals and companies that knowingly commit violations of human rights norms. Companies such as Aero who are found to be involved in violating and enabling others to violate human rights are considered by some courts and scholars to be liable for those violations.

A. *KADIC V. KARADIC*: THE CASE

309. One of the most powerful pronouncements of the liability of private individuals and entities for human rights violations was enunciated in a decision handed down by the United States Court of Appeals for the Second Circuit in the case of *Kadic v. Karadic*.³⁸⁶ The issue in *Kadic* was whether a private individual could be held liable for egregious human rights violations including torture, rape, summary execution and other atrocities perpetrated on citizens of the state of Bosnia-Herzegovina.³⁸⁷ The defendant claimed that the plaintiffs had not alleged violations of human rights norms of international law “because such norms bind only states and persons acting under color of a state’s law not private individuals.”³⁸⁸ The Second Circuit, however, disagreed stating:

We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state *or as private individuals*.³⁸⁹

310. Furthermore, in addition to acknowledging that private parties can be held liable for human right violations, the Court goes beyond this conclusion to discuss the issue of

³⁸⁶ 70 F.3d 232 (2d. Cir. 1995).

³⁸⁷ *Id.* at 236-237.

³⁸⁸ *Id.* at 239.

³⁸⁹ *Id.* at 239 (*emphasis added*).

establishing when a private actor is actually acting on behalf of a state even it is difficult to attribute to private actions to the state.³⁹⁰ The Second Circuit discusses and suggests that private individuals acting “in concert with” or “with significant” aid of the “state” can be held accountable for human rights violations.³⁹¹ In the case of the Aero Corporation, Aero was acting as an agent on behalf of and “in concert” with the Central Intelligence Agency (“CIA”) and the United States Federal Government when it transported helpless persons to various countries where they were subsequently tortured. It can even be argued that the State of North Carolina has acted to provide “significant aid” to Aero Corporation through its acquiescence to the continued operation of Aero Corporation from the state-licensed Johnson County Airport in Smithfield, North Carolina. Thus, as a private actor, Aero would seem to fit under the accountability and liability theories espoused by the Second Circuit in *Kadic*. Aero’s status as a private entity should not shield them from liability for human rights violations.

B. *KADIC V. KARADIC*: SCHOLARLY APPROACHES

311. The Second Circuit’s discussion and conclusions in *Kadic* serve as convincing precedent regarding the imposition of liability for human rights violations on corporations such as Aero. Theorists have echoed this concept of holding private actors and private companies liable for human rights violations. Some have examined the human rights obligations of transnational corporations.³⁹² Recognizing that many human

³⁹⁰ *Id.* at 245.

³⁹¹ *Id.* at 245.

³⁹² David Weissbrodt, *Non-State Entities and Human Rights within the Context of the Nation-State in the 21st Century*, in *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy*, 175, 175 (Monique Castermans-Holleman, Fried Van Hoof & Jacqueline Smith ed., 1998).

rights treaties do not speak specifically about the human rights obligations of private entities such as corporations,³⁹³ they suggest that if there are to be no new regulations tailored to private corporations then current obligations that apply to states should be made to apply to private parties.³⁹⁴ “International human rights standards should be used to assist governments in respecting human rights themselves and in ensuring respect for human rights by non-State entities.”³⁹⁵

312. These human rights norms should be applied to private companies by the States they operate within and by the international community. Aero, as a corporation, may not be as large or operate in as many nations as a company such as Coca-Cola. Yet, that does not lessen the importance of applying current human rights obligations to non-state entities. If governments such as North Carolina, and the United States as a whole, are unwilling to hold companies such as Aero accountable for their violations of human rights then such violations are likely to continue and the legal norms that prohibit them may be rendered meaningless.

313. In contrast to such a stark but realistic picture of the human rights obligations of corporations as well as private individuals, other scholars discuss a concept of “Horizontal Human Rights.” They note that human rights treaties already conceive of certain obligations owed by private entities and companies.

314. Labor rights are an example of the first category. To be meaningful, labor protections must address not only governments, but also private employers. Thus, labor agreements typically specify duties that state parties are required to impose on private actors. Similarly, antidiscrimination treaties deal not only with discrimination by

³⁹³ *Id.* at 188.

³⁹⁴ *Id.* at 189.

³⁹⁵ *Id.* at 195.

governments, but also with discrimination by private actors, on the ground that the latter can be just as destructive of the protected rights.³⁹⁶

315. They recognize that such treaties like the Genocide Convention, are binding international treaties that apply to private and public institutions and persons alike.³⁹⁷

Many scholars recognize that human rights responsibilities of corporations are often “indirectly” enforced through the states that “control” them. However, the aforementioned description of the framework of private human rights duties further supports the concept of holding private individuals, entities and corporations accountable for human rights violations.

316. Companies such as Aero would be held accountable for their perpetration of human rights violations by either the United States or the State of North Carolina, where it has found a comfortable home. However, in the absence of governments taking responsibility for stopping a corporation such as Aero, it is important to remember that there is precedent for private entities being held accountable for their own human rights violations.

4. BYSTANDER RESPONSIBILITY FOR THE PEOPLE OF NORTH CAROLINA

317. This section considers accountability principles articulated in international human rights law and by international human rights theorists with regard to the responsibility of each individual North Carolina citizen as bystanders living in a community where Aero Contractors operates with impunity.

³⁹⁶ John H. Knox, *Horizontal Human Rights*, 102 Am. J. Int'l L. 23, 24 (2008) (citing ILO Convention No. 98, July 1, 1949; ILO Convention No. 105, June 25, 1957; ILO Convention No. 138, June 26, 1973).

³⁹⁷ *Id.* at 28.

A. THE NUREMBERG PRINCIPLES

318. The issue of bystander liability for acts violating international human rights norms is most often discussed with reference to mass atrocities perpetrated during war in cases such as the war crimes committed by Nazi Germany during World War II as well as those that occurred in Bosnia and Rwanda.³⁹⁸

319. The Nuremberg Principles were developed in the aftermath of the horrendous war crimes committed by Nazi Germany during World War II. However, as was mentioned before, they still have relevance in helping a civilian population consider its role and responsibility in preventing human rights violations such as those perpetrated by Aero Contractors through its participation in the CIA's program of extraordinary rendition and torture.

320. The Nuremberg Principles discuss the concept of bystander liability. They describe war crimes and crimes against humanity as well as the responsibility of complicit citizens:

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

- (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

(b) War crimes:

Violations of the laws or customs of war include, but are not limited to,

³⁹⁸ See Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 Mich. J. Int'l L. 1013, 1025 (2005).

murder, ill-treatment or deportation to slave-labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.³⁹⁹

321. Under the Nuremberg Principles, a government can be held liable for crimes against peace, war crimes or crimes against humanity. War crimes and crimes against humanity include: “ill-treatment...of civilian population” and “...other inhuman acts done against any civilian population, or persecutions...”⁴⁰⁰ Furthermore, Principle VII describes the “complicity” of the general population with regard to human rights violations.

B. SCHOLARLY APPROACH

322. Theorists have spoken at length as to how a people, such as the residents of North Carolina, should perceive their own role in holding perpetrators accountable for human rights violations. Many discuss the concept of whether criminal liability is appropriate, in some form or another, for those who are bystanders to acts or omissions of governments

³⁹⁹ Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950 U.N. GOAR, 5th Sess., Supp. No. 12.

⁴⁰⁰ *Id.*

involved directly or indirectly with human rights violations.⁴⁰¹ “Left outside of the legal definition of international crimes are bystanders to these egregious acts: the vast majority of individuals who are members of communities impacted by war but who are neither victims nor perpetrators of crimes.”⁴⁰² Many scholars emphasize that bystanders should not be held criminally liable for human rights violations: “International humanitarian law cannot and should not criminalize the conduct of bystanders.”⁴⁰³

323. The issue often confronted is that “[b]ystanders have ‘done’ nothing and therefore fall outside the ambit of criminal sanctions.”⁴⁰⁴ In addition to the problem of a bystander’s lack of “affirmative conduct,” some discuss a critical issue: Cooperation of bystanders in holding the responsible parties accountable. “Attempting to criminalize bystanders will also discourage bystanders from coming forward to testify against perpetrators.”⁴⁰⁵

324. However, even without criminal liability, bystanders’ involvement in the recognition of human rights violations by those in their communities is integral to ensuring that such violations are never repeated. “Without some form of reckoning with the past for all members of society, including the bystanders who simply acquiesced to the atrocities of the previous regime, a society may not be able to put its past injustices behind it to rebuild its future.”⁴⁰⁶

⁴⁰¹ See Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 Temp. L. Rev. 1, 82 (2006) (“Several authors have critiqued the international legal community’s preference for individual criminal prosecutions against high-level state actors, arguing that it ignores the mass complicity necessary for mass atrocity and it absolves the majority of perpetrators and bystanders”) (citing José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 Yale J. Int’l L. 365, 454 (1999)).

⁴⁰² Fletcher, *supra* note 398, at 1016.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 1030.

⁴⁰⁵ Waldorf, *supra* note 401, at 84.

⁴⁰⁶ Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in*

325. Additionally, other scholars discuss the importance of bystanders in re-building a community involved in war crimes and human rights violations.⁴⁰⁷

The choices bystanders make about how to remember what happened will shape the future of their communities. Bystanders can become guardians against a return to violence or they can throw their support behind efforts to destabilize peace. Bystanders are therefore a critical target of efforts to promote social re- construction.⁴⁰⁸

326. The “choices bystanders make” as to the memory of their communities is integral to promote “social re-construction.”⁴⁰⁹ The aforementioned theorists discuss the reality that legal liability for persons, such as the residents of North Carolina, for complicity with regard to human rights violations is unrealistic and possibly counterproductive. The real goal that should be recognized in the realm of bystander accountability is the motivation of a community to hold its government and other responsible parties accountable for supporting and furthering human rights violations. It is the role bystanders to human rights violations can play in developing a collective memory that will guard against future injustice.

C. APPLICATION OF PRINCIPLES OF BYSTANDER LIABILITY TO EXTRAORDINARY RENDITION AND NORTH CAROLINA

327. The people of North Carolina should consider their responsibility in preventing companies such as Aero Contractors, who perpetrate human rights violations, from operating close to their homes and communities. The operations of Aero Contractors’ continued rendition of persons around the globe to different countries as part of the CIA’s

East Germany and South Africa, 40 Colum. J. Transnat’l L. 89, 103 (2001).

⁴⁰⁷ Fletcher, *supra* note 398, at 1027.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

program of extraordinary rendition and torture has been reported in numerous publications.⁴¹⁰ Trevor Paglen and A.C. Thompson discuss the operations of Aero Contractors' in Smithfield, North Carolina:

“In town, the company Aero Contractors *operates in the open*. Aero does work for the CIA, and many of its employees live in town. Smithfield, you might say, is a company town...”⁴¹¹

328. Paglen and Thompson illustrate the reality of the situation in Smithfield: Aero Contractors does not operate in secret. Reports, such as those by Paglen and Thompson, have likely made residents of Smithfield and the entire State of North Carolina aware of the truth regarding a company operating in their midst. Yet, with notable exceptions, many residents of Smithfield as well as the rest of most of North Carolina have not pushed for accountability measures with regard to Aero Contractors actions.

329. Therefore, in the absence of action by the citizenry of North Carolina to hold a company supported by the State accountable for its actions, a question arises: How should the people of North Carolina perceive of their own responsibility with regard to the actions of a company such as Aero Contractors operating within their community?

330. It must be stated from the outset that what has occurred in Smithfield, North Carolina with regard to Aero Contractors and its involvement with the CIA's program of extraordinary rendition and torture is not a direct parallel to the aforementioned mass atrocities. Furthermore, although North Carolina residents are aware of the operations of Aero Contractors, it is not suggested that their complicity in such operations matches those of the citizens of the aforementioned countries and the related war crimes.

⁴¹⁰ See Trevor Paglen and A.C. Thompson, *A Town Called Smithfield, in Torture Taxi: On the Trail of the CIA's Rendition Flights*, 78 (2005).

⁴¹¹ *Id.* at 78. (*emphasis added*).

331. However, although the circumstances are not identical, the principles regarding bystander liability may still help citizens of North Carolina perceive a responsibility owed to those whose rights have been violated by raising awareness with regard to the operations of Aero Contractors. The extraordinary rendition and torture of innocent civilians certainly falls within the categories of ill-treatment, and inhuman acts of the Nuremberg principles as well as within other categories.

332. In the case of North Carolina, residents of Smithfield as well as the remainder of the State have been aware of their State's involvement, support and licensing of Aero Contractors for some time. The complicity of these residents with the continued operation of Aero Contractors does, in some sense, support their continued operation as an entity involved in human rights violations.

333. The residents of this State cannot repair the rights violated and the damage already done but they can become a formidable voice to exert pressure on the North Carolina government. In addition, they can participate in fostering a record and collective memory that will help prevent entities such as Aero Contractors from operating with impunity within their communities in the future. Residents of communities, such as Smithfield and North Carolina in general, have the power to become "guardians" against the reoccurrence of such events in the future.

334. For residents of North Carolina, part of this push toward awareness would hopefully involve the issuing of some kind of formal apology to those already harmed by the actions of Aero Contractors. Yet, the most important role that residents of Smithfield and those of North Carolina in general, can play in the process of assuming responsibility for the actions of Aero Contractors is the fostering of a collective

consciousness regarding these human rights violations that will prevent such acts from occurring in the future.

D. CONCLUSION: LIABILITY OF NORTH CAROLINA AND JOHNSON COUNTRY FOR THE ACTIONS OF AERO CONTRACTORS REGARDING EXTRAORDINARY RENDITION

335. Aero Contractors flew each of the flights that transported all the men whose stories are highlighted in this briefing book. Thus, Aero bears an enormous amount of responsibility for each of acts perpetrated against these individuals. However, the connection between Aero Contractors and the State of North Carolina is neither minimal nor inconsequential.

336. Under the Universal Declaration, the obligation to respect the Declaration's guarantees is broad enough to encompass the actions of a state such as North Carolina in supporting a company and group of persons actively engaged in activities including the extraordinary rendition and torture of individuals because the obligation applies not only to signing "states," but to "groups" and "persons." This obligation, thus, prohibits North Carolina and Johnson Country to participate in any manner in the abridgement of the right to be free from "torture."⁴¹² The state of North Carolina, together with its political subdivisions (Johnston County and Johnston County Airport Authority) by continuing to license and approve the operation of Aero Contractors, is in violation of this prohibition.

337. Under the CAT, actions of consent or acquiescence to torture or CID are prohibited. North Carolina not only has power over Aero as a corporation acting and operating from

⁴¹² *Id.*

within its boundaries, but it is also a party to authorizing and approving its continued operations.

338. Aero Contractors is based out of Smithfield, North Carolina, in Johnston County Airport, an airport operated by the Johnston County Airport Authority. As with many other companies functioning in a time of extensive regulation, Aero Contractors' operations are entirely dependent on a variety of approvals, permits, and licenses granted by the State of North Carolina, and its political subdivisions. There are records of dozens of building, fire and electrical permits as well as inspections and a myriad of other governmental authorizations that enable and support Aero as a company to continue its business operations in North Carolina.⁴¹³ These operations include contract work with the United States' government and the Central Intelligence Agency ("CIA") to "render" and transport various innocent individuals to "black sites" around the globe where they are inevitably tortured.

339. As noted above, Johnston County in North Carolina has issued permits and has conducted necessary government inspections of the facilities utilized by Aero Contractors.⁴¹⁴ Through this involvement, the County of Johnston and the State of North Carolina have played an integral role in supporting and furthering all of Aero's operations. The issue is not necessarily whether the State of North Carolina actively employed Aero as a state "agent" in terms of the company's involvement with torture. As seen above, international agreements prohibit the "consent" even the mere "acquiescence" of public officials, including state and county officials, to actions that

⁴¹³ See Selected Johnston County Permits and Inspections of Aero Contractors: Electrical Permit: #56966; Building Inspections: 12/19/01, 1/31/02; Electrical Inspection: 6/1/07; Fire Inspection: 8/22/02 (on file with authors).

⁴¹⁴ *Id.*

violate their provisions. Inasmuch as North Carolina and Johnson County have consented to and enabled the existence and functioning of Aero within the state, and since the company has contracted with the federal government to take part in the process of extraordinary rendition, both North Carolina and Johnson County bear third party liability for housing and supporting such a private company.

340. Under CAT, willful blindness by an Aero pilot or N.C. government officials about illegal transfers of individuals for purposes of committing torture does not mitigate violations of its provisions.⁴¹⁵ North Carolina, as a state bound by CAT, is accountable for its continued licensing and supporting of Aero Contractors. Aero's pilots, staff and any North Carolina State and local officials who (actually or constructively) knew of Aero's operations are effectively complacent in torture. NC Stop Torture has regularly communicated with state and county officials and has made numerous requests of these officials as well as Aero Contractors to cease participation in the extraordinary rendition program, or at a minimum investigate. These individuals cannot claim not to know of these matters.⁴¹⁶ Therefore, even if the support and enabling of Aero Contractors' participation in human rights violations is unintentional on the part of the State and Johnson County, such circumstances do not negate their obligations under international law and their responsibility to cease support for such an organization and its activities.

5. CONCLUSION REGARDING THE APPLICATION OF LEGAL PRINCIPLES: NORTH CAROLINA, ITS POLITICAL SUBDIVISIONS, AERO CONTRACTORS, AND NORTH CAROLINA CITIZENRY ACCOUNTABILITY

⁴¹⁵ Bassiouni, *supra* note 167, at 412.

⁴¹⁶ See NC Stop Torture Chronology, available at <http://www.ncstoptorturenw.org/resourceschronology.html> [last accessed 6/23/2012 12:50AM EST].

341. Aero Contractors operates from a hangar at the Johnston County Airport in Smithfield, North Carolina. They are a private entity, a company that contracts out its transportation services. One of its clients is the Central Intelligence Agency (“CIA”) of the United States government. The CIA has conducted, over the span of many years, a program of extraordinary rendition and torture with the indispensable participation of Aero Contractors.⁴¹⁷ Aero Contractors has “rendered” individuals, transporting them throughout the globe.⁴¹⁸ That act of “rendition” is aptly described as kidnapping, a violation of human rights in its own right. Furthermore, once these victims are transported to these various countries, they are subjected to vicious acts of torture.⁴¹⁹

342. Aero Contractors operates, effectively, as an “agent” of the United States federal government through the CIA. As an agent of the government, Aero is responsible for the kidnapping of innocent individuals and their transportation to places where they were tortured. Aero Contractors cannot be considered an “agent” of the government of North Carolina in the traditional sense of the word. However, North Carolina through Johnston County, a division of government under its control, has supported and furthered the operations of Aero Contractors.⁴²⁰ Johnston County has continually, over the span of countless years, granted important licenses and permits to Aero Contractors that have been necessary to its continued operation, including its participation in the CIA’s program of extraordinary rendition and torture.

⁴¹⁷ See Paglen and Thompson, *supra* note 410.

⁴¹⁸ See *Id.* at 80-81, 84.

⁴¹⁹ See *Id.* at 84.

⁴²⁰ See Selected Johnston County Permits and Inspections of Aero Contractors: Electrical Permit: #56966; Building Inspections: 12/19/01, 1/31/02; Electrical Inspection: 6/1/07; Fire Inspection: 8/22/02 (on file with authors).

343. In this Part, theories of accountability and responsibility for human rights violations as they pertain to the State of North Carolina, the people of North Carolina, and Aero Contractors itself through a discussion of international human rights treaties, international human rights cases, and the analysis of international human rights theorists. Treaties, cases and theorists convincingly argue that the State of North Carolina should consider its accountability for its relationship with Aero Contractors and that company's involvement in torture. Furthermore, many courts and theorists consider Aero Contractors to be responsible, as a private entity, for its perpetration of human rights violations. In concluding this section, important issues of bystander responsibility for the people of North Carolina have been illustrated through a discussion of the Nuremberg Principles as well as the remarks of various human rights theorists.

344. Even with convincing authorities such as international human rights treaties ratified by the United States and decisions handed down by powerful courts such as the United States Court of Appeals for the Second Circuit that implicate liability for private entities, the courts have been reluctant to act and to impose legal liability on entities such as Aero Contractors. Although it is certainly responsible for egregious human rights violations that should trigger harsh legal liability, the current political climate seems to render that an unlikely result.

345. However, that should not and will not weaken the resolve of an entity such as this Commission. The sources that this Part has discussed can also prove useful as a resource that the people of this State can turn to for guidance. These treaties, cases and theorists who discuss concepts of accountability can give form and substance to the call of this

Commission, and hopefully the people of this state, in a unified effort to see that North Carolina ceases to function as a haven for entities that commit human rights violations.

PART FIVE

COMPARABLE COUNTRY ACCOUNTABILITY INITIATIVES FOR HUMAN RIGHTS ABUSES

1. INTRODUCTION

342. As demonstrated in the previous parts of this briefing book, the practice of extraordinary rendition and torture implicates a multitude of legal consequences in both domestic and international law. Given the established legal foundations and previously discussed evidence of extensive human rights violations, many advocates and citizens continue to be concerned by the lack of a formal domestic investigation or accountability mechanism to address these violations. With all domestic accountability avenues exhausted, North Carolina residents now call for a local citizen's Commission of Inquiry on Torture.

343. To assist in the above-mentioned local commission, Section I of this Part provides a brief summary of domestic efforts in achieving accountability related to extraordinary rendition and torture. Section II describes previous and continued international accountability efforts, including both prosecution efforts and alternative models of seeking accountability.

344. As a corollary goal to compiling summaries of accountability efforts, Section III of this Part looks for models in other areas of human rights violations that might be useful in establishing a successful citizen's commission of inquiry in general. This Part concludes with specific recommendations for the North Carolina Commission of Inquiry on Torture.

2. DOMESTIC CALLS FOR ACCOUNTABILITY ON EXTRAORDINARY RENDITION AND TORTURE: A BRIEF OVERVIEW

A. TRUTH AND RECONCILIATION COMMISSION AS ADVANCED BY SENATOR PATRICK LEAHY (2009)

345. Over three years ago, at the 2009 Georgetown University Governmental Reform Symposium, Senator Patrick Leahy (D-VT) formally called for a national “reconciliation process and truth commission” to investigate U.S. involvement in various human rights abuses perpetrated during the global War on Terror.⁴²¹ In his proposal, Leahy cited the South African and Greensboro Truth and Reconciliation Commissions as potential models.⁴²²

346. Immediately following Leahy’s proposal, President Obama responded using somewhat evasive language:

“My administration is going to operate in a way that leaves no doubt that we do not torture, that we abide by the Geneva Conventions, and that we observe our traditions of rule of law and due process...but [], generally speaking, I’m more interested in looking forward than I am in looking backwards.”⁴²³

347. In the years since this formal exchange, it is generally accepted that Leahy’s proposal did not gain the necessary political momentum to achieve fruition.⁴²⁴ It has been suggested that this lack of momentum resulted from Leahy’s emphasis on a retroactive

⁴²¹ See Senator Patrick Leahy, *Restoring Trust in the Justice System*: The Senate Judiciary Committee’s Agenda in the 111th Congress, Remarks at the Marver H. Bernstein Symposium on Governmental Reform at Georgetown University (Feb. 9, 2009), available at <http://blogs.georgetown.edu/?id=39791> [last accessed 6/26/2012 at 11:25AM EST].

⁴²² *Id.*

⁴²³ President Barack Obama’s Comments on the Leahy Proposal for a Truth Commission, Remarks at the Marver H. Bernstein Symposium on Governmental Reform at Georgetown University (Feb. 9, 2009), available at <http://blogs.georgetown.edu/?id=39814> [last accessed 6/23/2012].

⁴²⁴ See generally Brown, *supra* note 265.

retributive approach as opposed to prospective repudiation.⁴²⁵ Additionally, unlike the South African and Greensboro commissions, questions of international obligations, jurisdiction, citizenship, and national security present unique legal and political obstacles to establishing formal commissions of inquiry designed to accommodate the characteristics of the global War on Terror.

348. Despite this challenge, domestic human rights advocacy organizations and concerned citizens continue to advocate for various forms of reconciliation efforts. The following subsections summarize these recent and continuing domestic efforts to end impunity and achieve accountability for U.S. involvement in extraordinary rendition and torture.

B. CENTER FOR VICTIMS OF TORTURE, AMNESTY INTERNATIONAL USA, AND THE OPEN SOCIETY INSTITUTE: ACCOUNTABILITY AND TACTICAL MAPPING (2010)

349. Partly in response to stunted attempts to instigate a unified formal accountability commission for U.S. involvement in extraordinary rendition and torture, the Center for Victims of Torture (CVT) along with Amnesty International USA and the Open Society Institute (OSI) proposed a conference which they hoped would help to identify a number of strategies to improve overall accountability efforts going forward.⁴²⁶ In September of 2010, the conference was held in Washington, D.C., with over 30 organizations in

⁴²⁵ See e.g., Jack Balkin, A Body of Inquiries, N.Y. Times, Jan. 10, 2009, at WK11, available at <http://www.nytimes.com/2009/01/11/opinion/11balkin.html> [last accessed 6/22/2012 at 4:34PM EST].

⁴²⁶ Center for Victims of Torture, *Final Report Accountability Tactical Mapping: A Project of the Center for Victims of Torture*, Amnesty International USA, and the Open Society Institute 3-4 (Nov. 2010).

attendance, whose involvement in the accountability movement varied from “[h]ill advocacy to litigation, from grassroots investigation to communications strategy.”⁴²⁷

350. For the greater part of the conference, attendees participated in two main exercises: “tactical mapping” and identification of a “spectrum of allies.”⁴²⁸ According to Nancy Pearson, Director of the New Tactics in Human Rights Project at CVT, tactical mapping is an exercise which allows participants to “build a common vision by defining the problem, defining the terrain (the circumstances in which the problem occurs), exploring and selecting tactics for problem solving, and developing a plan of action for implementation of the tactics selected.”⁴²⁹

351. For this exercise, attendees were divided into four preset groups, largely based on the nature of their efforts in the accountability movement thus far. The smaller groups then defined the key “central relationship” at the heart of the problem of attaining accountability for torture; this central relationship remained at the core of the map. The groups were then charged with identifying those individuals with both direct and indirect contact with the central relationship, and categorizing the nature of those relationships as either “power relationships,” “mutual relationships,” “exploitative relationships,” and “conflict relationships.”⁴³⁰ The finished product yielded four maps visualizing complex societal institutions and relationships that enable obstacles or conflicts in achieving accountability for torture.⁴³¹

352. The “spectrum of allies” exercise produced maps visually similar to the tactical maps, however the substance and purpose behind the former is to identify future allies

⁴²⁷ *Id.* at 8

⁴²⁸ *Id.* at 6

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.* at 24 (*Appendix 2: Tactical Maps*)

and “achievable goals” rather than obstacles and conflicts.⁴³² The participants were divided into the same preset groups and, beginning at the far left end of the spectrum, placed organizations and individuals identified as “active allies,” then subsequently continuing to the right end of the spectrum placed “passive allies,” “neutral parties,” “passive adversaries,” and “active adversaries” accordingly.⁴³³ At the conclusion of this exercise, participants were able to devise specific strategies and projects to budge allies toward the left end of the spectrum, from “passive” to “active.”⁴³⁴

353. Using data and insight gathered through the course of the aforementioned exercises, the participants produced tangible tactics and strategies to improve “communication, coordination, and collaboration in effectiveness” in the accountability movement.⁴³⁵ First, participants proposed an Accountability Coalition web space, a place where conference attendees can view and share information and electronic documents generated at the conference.⁴³⁶ Second, attendees proposed and later drafted a letter to Dianne Feinstein, chair of the Senate Select Committee on Intelligence (SSCI), which asks that she publicize a report on extraordinary rendition and torture and recommend an independent commission to investigate the matter further.⁴³⁷ The participants suggested other tactics that included launching national media campaigns, planning cooperation with European human rights groups, and local grassroots organization and training.⁴³⁸

⁴³² *Id.* at 7

⁴³³ *See Id.* at 28–31 (*Appendix 3: Spectrums of Allies*)

⁴³⁴ *Id.* at 7

⁴³⁵ *Id.* at 8

⁴³⁶ *Id.* at 8–9

⁴³⁷ *Id.* for full text of the letter *see Appendix 4: Letter to Sen. Feinstein*

⁴³⁸ *Id.* at 11

C. THE CONSTITUTION PROJECT BIPARTISAN TASK FORCE ON DETAINEE TREATMENT (2010)

354. The present subsection describes the formation of a task force on Detainee Treatment that is currently undergoing under the auspices of the Constitution Project. The Constitution Project (CP) is a group of “unlikely allies,” such as “experts and practitioners from across the political spectrum,” which works to reform the nation’s criminal system and to strengthen the rule of law “through scholarship, consensus policy reforms, advocacy, and public education.”⁴³⁹

355. The CP was formed in 1997 out of a concern for the multitude of constitutional amendments that were being proposed at that time, and with the goal of protecting the constitutional amendment process.⁴⁴⁰ Over time, the CP evolved in a group of dedicated members with the common goal of “strengthening access to justice, protecting civil liberties or ensuring governmental transparency and accountability.”⁴⁴¹

356. In late 2010, the organization launched a Bipartisan Task Force on Detainee Treatment. The task force consists of chair members of varying backgrounds and experience including: Asa Hutchinson, former Undersecretary of the Department of Homeland Security during the George W. Bush administration; Richard A. Epstein, Laurence A. Tisch Professor of Law, New York University Law School; Eleanor J. Hill, Staff Director of the Joint Congressional Inquiry on the September 11th attacks; Ambassador James R. Jones, former Member of Congress (D) for Oklahoma from 1973 to 1987 and Ambassador to México from 1993 to 1997; and Talbot “Sandy”

⁴³⁹ The Constitution Project, Mission, available at <http://www.constitutionproject.org/mission.php> [last accessed 5/26/2012 at 10:47M EST].

⁴⁴⁰ *Id.* Who we are, available at <http://www.constitutionproject.org/whoweare.php> [last accessed 5/26/12 t 10:52AM EST].

⁴⁴¹ *Id.*

D'Alemberte, past President of the American Bar Association and President Emeritus of Florida State University.⁴⁴²

357. On January 2011, the task force began its investigation phase.⁴⁴³ The main goal of the task force is to “bring to the American people a comprehensive understanding of what is known and what may still be unknown about the past and current treatment of detainees by the U.S. government, as part of the counterterrorism policies of the Obama, Bush, and Clinton administrations.”⁴⁴⁴ The investigation is expected to be complete in January 2013. After completing its report, the task force expects to deliver its finding to the political branches of the government with the hopes that accountability will be addressed. The task force’s goals are limited documentation building.

D. THE NATIONAL RELIGIOUS CAMPAIGN AGAINST TORTURE (2006)

358. This subsection describes the birth and development of a group that is currently calling for the formation of an inquiry commission on torture at the national level. In 2006, over 150 leaders of a multiplicity of faiths concentrated in the conference “Theology, International Law and Torture: A Conference on Human Rights and Religious Commitment” held by Princeton University.⁴⁴⁵ The purpose of the conference was “to better equip the multiple religious communities to take a more prominent role in the effort to end U.S.-sponsored torture.”⁴⁴⁶ The group that organized the conference,

⁴⁴² *Id.* at 1-2

⁴⁴³ Press release, The Constitution Project, Task Force on Detainee Treatment Launched, (Dec. 17, 2010), available at http://www.constitutionproject.org/pdf/TF_Launch.pdf [last accessed 6/23/2012 at 1:01AM EST].

⁴⁴⁴ *Id.* at 1

⁴⁴⁵ National Religious Campaign Against Torture, available at http://www.nrcat.org/index.php?option=com_content&task=view&id=36&Itemid=65 [last accessed 5/23/2012 at 10:36PM EST].

⁴⁴⁶ *Id.*

which had been created by Princeton's Professor of Theology at Princeton Theological Seminary, Dr. George Hunsinger, had met in Washington, DC, with a group of staff members of the legislature from multiple religious backgrounds, who were thinking about creating an "ongoing national religious anti-torture campaign."⁴⁴⁷ During the conference, the National Religious Campaign Against Torture (NRCAT) was launched.

359. The NRCAT is a "membership organization of religious organizations committed to ending torture that is sponsored or enabled by the United States."⁴⁴⁸ Until 2007, the NRCAT was part of the Churches' Center for Theology and Public Policy. In 2007, it separated into an independent organization, with its own staff. Rev. Richard L. Killmer became the Executive Director. As of May 2012, over 300 religious organizations have joined the NRCAT. More than a hundred of them are participating members, which contribute financially to the NRCAT and send a representative to the Participating Members Council. The NRCAT's work is overseen by a Board of Directors composed by twelve members. Over 60,000 individuals have endorsed the NRCAT statement.⁴⁴⁹

360. The NRCAT works closely with other anti-torture inter-religious organizations (such as the Washington Region Religious Campaign Against Torture, Los Angeles Region Religious Campaign Against Torture, Metro New York Religious Campaign Against Torture, Reclaiming the Prophetic Voice in Connecticut, the Bay Area Religious Campaign Against Torture in California, and the Washington State Religious Campaign Against Torture).⁴⁵⁰ The NRCAT also partners with state ecumenical agencies across the

⁴⁴⁷ *Id.*

⁴⁴⁸ NRCAT website, available at http://www.nrcat.org/index.php?option=com_content&task=view&id=442&Itemid=318 [last accessed 5/23/12 at 11:13PM EST].

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

states. In North Carolina, the NRCAT's partner is the North Carolina Council of Churches.⁴⁵¹

361. The mission statement of the NRCAT is entitled "Torture is a Moral Issue" and it reads:

Torture violates the basic dignity of the human person that all religions, in their highest ideals, hold dear. It degrades everyone involved -- policy-makers, perpetrators and victims. It contradicts our nation's most cherished ideals. Any policies that permit torture and inhumane treatment are shocking and morally intolerable.

Nothing less is at stake in the torture abuse crisis than the soul of our nation. What does it signify if torture is condemned in word but allowed in deed? Let America abolish torture now -- without exceptions.

362. NRCAT's agenda includes increasing the number of people in the U.S. who believe that torture is always wrong – without exception; advocating for an independent Commission of Inquiry that will recommend needed safeguards to ensure that U.S.-sponsored torture will not happen again; codifying into law the elements of President Obama's 2009 Executive Order halting torture; ending torture in U.S. prisons, especially the use of long-term isolation; urging the President to sign the Optional Protocol to the Convention Against Torture (OPCAT), which would both enhance the capacity of the U.S. to urge other countries to end torture and protect prisoners in this country; advocating for the State Department to prepare a "Torture Watch List" of countries engaged in torture and then to make U.S. assistance available to countries that work to end their use of torture; and working to end anti-Muslim bigotry in the U.S.⁴⁵²

⁴⁵¹ North Carolina Council of Churches, Rev. J. George Reed, Executive Director, 1307 Glenwood Ave # 156, Raleigh, NC 27605-3256. (919) 828-6501. Website: www.nccouncilofchurches.org [last accessed 6/23/2012 at 1:02AM EST].

⁴⁵² *Id.*

363. In its website, the NRCAT makes several calls for actions, some of them directed to either individuals or organizations, and others directed to faith-based organizations only. They include asking for an endorsement of the NRCAT's "Torture is a Moral Issue" statement online, activities to increase the awareness of congregations about the torture issue, contacting members of Congress to support the NRCAT's legislative agenda, purchasing resources from the site to support local efforts, and making financial contributions to the NRCAT.

364. The NRCAT states that the creation of "[a]n impartial, nonpartisan, and independent Commission of Inquiry is needed to seek the full truth about U.S. torture policies and practices since 9/11."⁴⁵³ This "commission on accountability" is necessary, according to the NRCAT, because "[w]e will better understand what safeguards are needed if we have a comprehensive understanding of what happened – who was tortured, why they were tortured, and who ordered the torture. As a nation we need the answers to those questions."⁴⁵⁴ As of May 2012, the petition calling for the formation of the commission has been joined by 19 organizations.⁴⁵⁵ The petition calls for the formation of a bi-partisan commission, which would conduct a "comprehensive review" of what and why torture happened, not only at the factual level, but also at the policy and decision-making levels.⁴⁵⁶ The commission would provide recommendations and require redress for the victims of US-sponsored torture.⁴⁵⁷

⁴⁵³ *Id.*, available at http://www.nrcat.org/index.php?option=com_content&task=view&id=277&Itemid=198 [last accessed, 5/23/2012 at 11:45PM EST].

⁴⁵⁴ *Id.*

⁴⁵⁵ For a list of the organizations that have signed the petition *see* the Commission on Accountability's website, available at <http://www.commissiononaccountability.org/> [last accessed 5/23/12 at 11:52PM EST].

⁴⁵⁶ Commission on Accountability's website.

⁴⁵⁷ *Id.*

E. CONCLUSION: THE SIGNIFICANCE OF DOMESTIC INITIATIVES FOR THE ORGANIZING COMMITTEE OF THE NORTH CAROLINA COMMISSION OF INQUIRY ON TORTURE

365. This subsection identifies features of the above-described initiatives that might be useful for the organizing Committee of the NC Commission of Inquiry on Torture.

366. At the outset, the tactical mapping exercise should serve to identify the politically equivalent members for the NC local circumstance. Ultimately, the conference yielded three key strategies that advocates should employ in North Carolina's accountability efforts. First, the mapping exercise can be used as a "coordinating tool" between multiple organizations to establish a more comprehensive plan for tracking key relationships and interventions required to achieve accountability.⁴⁵⁸

367. Additionally, the mapping can be used as a "documenting tool," a means to monitor the progress of the local movement, "enabling the actors to identify points of strength and weakness to deploy resources and activities dynamically."⁴⁵⁹ Lastly, the information gleaned from a tactical mapping exercise can be used as a training tool, as additional local advocates are recruited into the efforts. Employing these tactics locally can help advocates immensely, but it will be most effective if maps and strategies are regularly updated and shared with all organizations involved in the local accountability movement.

368. Additionally, some lessons might be learned from the CP's Bipartisan Task Force on Detainee treatment. Because the goals of the CP's task force are limited to documentation building, the task force does not address the ultimate goal NC local community efforts of seeking accountability after findings are published. However, the

⁴⁵⁸ Douglas A. Johnson and Nancy L. Pearson, *Tactical Mapping: How Nonprofits Can Identify the Levers of Change*, *The Nonprofit Quarterly* 92 (Summer 2009).

⁴⁵⁹ *Id.*

initial organization of the task force as a bi-partisan group is a useful model for the local accountability movement.

369. In light of the tactical mapping recommendations, a bi-partisan accountability movement and commission would allow for broader influence and greater productivity of the accountability movement. It would increase the reach and effectiveness of the anti-torture campaign, as well as augment the legitimacy of the ultimate call for accountability. Thus, it is recommended that a local North Carolina commission seeking to obtain accountability for acts of torture be comprised of bi-partisan members with connections to a variety of actors within the social and political spectrum of the state.

370. Finally, the NRCAT's efforts might be significant for the North Carolina movement for several reasons. First, the fact that some actors at the national level are also calling for inquiry commissions reinforces the legitimacy of the call for action of the NC actors. NC local accountability efforts might benefit from connecting with other organizations, such as the NRCAT, calling for such commissions, to share strategies and tactics.

371. Additionally, the existence of other groups calling for inquiry commissions should be part of the campaign theme of NC advocates, to increase the legitimacy of calling for an inquiry commission as opposed to opt for more traditional models of investigation.

372. Second, the organizing committee may want to look into the social foundation of the NRCAT and try to imitate some of its features. The NRCAT is comprised by a multitude of (religious) organizations, which are themselves organized in congregations. This gives the NRCAT a fabulous advantage in getting the word out: religious leaders are provided with materials that they can distribute into their already formed congregations, with whom they already have legitimacy. Even if the NC movement cannot completely

replicate this strategy, it might still be able to look into ways of connecting with other NC organizations with an established membership. These organizations may then be provided with materials similar to those created by the NRCAT for those organizations to distribute amongst their members.

373. Last but not least, the professional, streamlined, and organized website of the NRCAT might be something that the NC organizers may want to imitate. To be noted is the quality of the NRCAT's website, together with the specific calls for actions contain therein, including materials to be printed and/or downloaded, as well as the specific website dedicated to the call for accountability commission of the NRCAT.

3. INTERNATIONAL ACCOUNTABILITY MEASURES ON EXTRAORDINARY RENDITION AND TORTURE

374. As noted in previous parts of this briefing book, achieving formal accountability for extraordinary rendition and torture in the U.S. is sure to face unique challenges due to the nature of the "Global War on Terror," the remedies for which do not fit neatly into traditional jurisdictional, legal, and political boundaries. For this reason, it is helpful to identify international accountability initiatives and compare those efforts as potential models for a domestic scheme.

375. The following sections provide a brief overview of accountability initiatives, including prosecution efforts in Italy, Poland, Spain, Canada, the United Kingdom, and Germany, as well as discuss the particularized challenges and solutions advanced by each region. Additionally, these sections explore various models of transitional justice commissions created in other parts of the world to achieve wide-spread accountability:

the South African Truth and Reconciliation Commission (TRC), the Peruvian Truth and Reconciliation Commission (PTRC); the Illinois Torture Inquiry and Relief Commission, and the Greensboro Truth and Reconciliation Commission (GTRC) in the hopes that knowledge can be gained by their examples and put to use by the proposed N.C. Commission of Inquiry.

A. PROSECUTION FOR EXTRAORDINARY RENDITION

376. This subsection highlights several prosecution efforts for extraordinary rendition around the world both in international and country-specific forums. Especial attention is devoted to developments concerning the extraordinary rendition of El-Masri. El-Masri's journey highlights the practical difficulties associated with obtaining redress for the crime of extraordinary rendition and torture, and the lack of results that, unfortunately, seems to be the most common outcome of those efforts.⁴⁶⁰

377. The rest of this section describes the legal journeys in specific forums, including international ones, of other victims of extraordinary rendition as well as country level prosecution efforts against public officials.

(i) Prosecution for Extraordinary Rendition: International Forums

⁴⁶⁰ For an excellent source of information on the El-Masri case, including copies of original legal documents, *See e.g. The El Masri case*, European Center for Constitutional and Human Rights, <http://www.ecchr.de>, available at http://www.ecchr.de/el_masri_case.html [last accessed 5/28/2012 at 12:33PM EST]. *See also*, William Fisher, *Kidnapped in Macedonia, Tortured in Afghanistan, and Dumped in Albania: The Forgotten Case of Khaled Ed-Masri*, Eslkevin's Blog, May 16th, 2012, available at <http://eslkevin.wordpress.com/2012/05/16/the-forgotten-el-masri-case-reveals-usa-bullying-of-its-allies/> [last accessed 5/27/2012 at 4:21PM EST]. The most recent updates on the El-Masri investigation can be found at Darian Pavli, *Mistaken Identity, Abuse And Rendition: Khaled El-Masri Finally Has Day In Court*, The Guardian, May 15, 2012, available at <http://www.guardian.co.uk/law/2012/may/15/el-masri-rendition-european-court> [last accessed 7/1/2012 at 9:33 PM EST].

378. International forums have been the choice of victims disappointed with the lack of results at the national level. This subsection describes the procedural posture of two cases brought on behalf of extraordinary rendition victims in international forums. The first forum is the European Court of Human Rights, in which lawyers for El-Masri brought claims against Macedonia. The second forum is the Inter-American Commission of Human Rights, where ACLU brought a suit on behalf of several Iraqi and Afghan victims of extraordinary rendition.⁴⁶¹

European Court of Human Rights (2010): El-Masri v. “The Former Yugoslav Republic of Macedonia”⁴⁶²

379. This subsection describes the latest attempt of El-Masri’s lawyers to obtain redress for the atrocities committed against him in the course of his extraordinary rendition. It comes after several unsuccessful attempts to obtain relief in individual countries, some of which are described below in the next subsection. About El-Masri, a recent blog post sadly states that “[t]o the pitifully few who have followed him over the years, Khaled El-Masri is the man who arguably holds the world’s record of unsuccessful attempts to get

⁴⁶¹ Petition Alleging Violations of the Human Rights of Thae Mohavimed Sabar, Sherzad Kamal Khalid, Ali Hussein, Mehboob Ahmad, Said Nabi Siddiqi, and Haji Abdul Rahman by the United States of America with a request for investigation and hearing on the merits, March 19, 2012, available at http://www.aclu.org/files/assets/iachr_sabar_petition_0.pdf (last accessed 5/26/12 at 1:30PM EST)[hereinafter Sabar et.al. petition].

⁴⁶² *El-Masri v “The Former Yugoslav Republic of Macedonia,”* Written Submission on behalf of Amnesty International and the International Commission of Jurists, pursuant to Article 36 § 2 of the European Convention on Human Rights and Rule 44 § 3 of the Rules of the European Court of Human Rights Application No.39630/09. Documents related to the case can be found at the website of the ECHR, available at <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=97351345&skin=hudoc-pr-en&action=request> (last accessed 5/26/12 at 12:3PM EST). A webcast of the hearing can be found in the ECHR website, at http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?id=20120516-1&lang=en&flow=high (last accessed 5/26/2012 at 12:40PM EST). *See also*, Press Release, Forthcoming hearing in May 2012, European Court of Human Rights, ECHR 186 (2012), available at http://www.rwi.uzh.ch/lehreforschung/alphabetisch/jaag/lehrveranstaltungen/Press_Release_El-Masri.pdf [last accessed 5/26/12 at 12:14PM EST].

his “day in court.” He has knocked on courtroom doors all over the US and some overseas venues as well, and has each time been rebuffed.” The case described below is about El-Masri’s claims against the state of Macedonia.⁴⁶³

380. On May 16, 2012, the European Court of Human Rights (ECHR) heard the case, *El-Masri v. "the former Yugoslav Republic of Macedonia"*.⁴⁶⁴ This was the first time in which a court conducted a full hearing on the merits of El-Masri’s claims.⁴⁶⁵ It was also the first case against a country belonging to the European Union to come before the ECHR.⁴⁶⁶ Not less importantly, it is the first case in which an international human rights court will issue an opinion on the merits of a claim that involves evidence of the participation in extraordinary rendition of European Union members.⁴⁶⁷ The ECHR is expected to later issue an opinion on this case.⁴⁶⁸ As of April 2012, many other cases regarding extraordinary rendition were pending with the ECHR.⁴⁶⁹

Inter-American Commission of Human Rights (2012): Petition Alleging Violations of Human Rights of Mohaivimed *et al.*⁴⁷⁰

⁴⁶³ Frank Jordans, *Khaled El-Masri, Mistaken Terror Suspect, Targets Macedonia Over Afghanistan CIA Secret Prison Case*, May 16th, 2012, available at http://www.huffingtonpost.com/2012/05/16/khaled-el-masri-mistaken-terror-suspect-secret-prison_n_1521257.html [last accessed 5/28/2012 at 12:01PM EST].

⁴⁶⁴ *El-Masri v. "the former Yugoslav Republic of Macedonia"* (no. 39630/09).

⁴⁶⁵ Darian Pavli, *Mistaken Identity, Abuse and Rendition: The Khaled El-Masri Case at the European Court* (May 9th, 2012), available at <http://blog.soros.org/2012/05/mistaken-identity-abuse-and-rendition-the-khaled-el-masri-case-at-the-european-court/> [last accessed 5/26/12 t 12:25PM EST].

⁴⁶⁶ Jamil Dakwar, *Victim of Torture and CIA Rendition Gets His First Day in Court — in Europe*, ACLU, available at <https://www.aclu.org/blog/national-security-human-rights/victim-torture-and-cia-rendition-gets-his-first-day-court-europe> [last accessed 5/26/12 at 12:16PM EST].

⁴⁶⁷ Press Release, *Amnesty International, Public Statement by Amnesty International and the International Commission of Jurists, European Court of Human Rights hears key case concerning European complicity in the US-led secret detentions and renditions programme*, May 16th, 2012, available at <http://www.amnesty.eu/en/press-releases/all/0567-0567/> [last accessed 5/27/2012 at 4:00PM EST].

⁴⁶⁸ *Id.*

⁴⁶⁹ For a list of pending cases with the ECHR, *See e.g.*, Factsheet, *Terrorism, European Court of Human Rights*, Press Unit (April 2012), available at http://www.echr.coe.int/NR/rdonlyres/13BF0C6A-F463-4CE9-B79F-9E9F3EF67B8F/0/FICHES_Terrorisme_EN.pdf (last accessed 5/26/12 at 12:59PM EST).

⁴⁷⁰ *Sabar et. al. Petition*, *supra* note 461.

381. Another international forum in which an extraordinary rendition case was filed is the Inter-American Commission of Human Rights (IACHR). It was filed on March of 2012 by the ACLU on behalf of several victims of extraordinary rendition and torture that were held in Iraq and Afghanistan between 2003 and 2004.⁴⁷¹ The plaintiffs in this lawsuit were also the plaintiffs in the dismissed case of *Ali v. Rumsfeld* against the U.S. federal government.⁴⁷²

382. In the case against the Inter-American Commission, the ACLU asked that body to investigate fully into the violations against the victims, and, as relief, it asked for an apology to the victims from the U.S. government. The case is now pending before the Inter-American Commission.⁴⁷³

(ii) Prosecution for Extraordinary Rendition: Country-Specific Forums

383. Country-specific forums are another avenue where victims of extraordinary rendition and torture have sought to find redress. Some of those cases have been dismissed, a few have been ruled on, and most are still ongoing. Below is a sample of non-U.S., country-specific cases.

Spain: El-Masri

384. This subsection describes the fate of El-Masri's claims against Spain as well as the developments in the political context that brought this investigation to its current phase.

⁴⁷¹ *Id.*

⁴⁷² *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (*rehearing in banc denied June 21st, 2011*).

⁴⁷³ *Press Release*, Afghans & Iraqis Tortured by U.S. Military Bring Case Before International Human Rights Tribunal, ACLU, March 19th, 2012, available at <http://www.aclu.org/human-rights/afghans-iraqis-tortured-us-military-bring-case-international-human-rights-tribunal> [last accessed 12:25PM EST].

385. In June of 2006, after the Council of Europe issued a report that found that several European countries had participated in the CIA extraordinary rendition program, Spain announced that it would investigate the allegations that flights connected to extraordinary rendition stopped on Spanish soil, more specifically, in Mallorca Island.⁴⁷⁴ Later that year, the Spanish Foreign Minister Miguel Angel Moratinos confirmed to a European Parliament Committee that extraordinary rendition planes might have in fact used Spanish territory as a stopover.⁴⁷⁵ One of those flights was the one that rendered El-Masri to Macedonia, where he was tortured.⁴⁷⁶

386. In May of 2010, almost over four years later and only after Germany issued arrest warrants for some CIA agents involved in the El-Masri case (below), a Spanish prosecutor asked a Spanish judge to issue arrest warrants for 13 CIA agents involved in the rendition of El-Masri.⁴⁷⁷ There has been little, if any available news coverage of the issuance of such warrants.⁴⁷⁸

387. In 2009, while the above-mentioned investigation was ongoing, El-Masri filed a civil suit against the government of Macedonia, naming the Macedonia Ministry of

⁴⁷⁴ See U.N. 2006 Report, *supra* note 2. For related news, See *e.g.*, Jaime Jansen, Spain court launches investigation into CIA rendition flights, www.jurist.org, June 12, 2006, available at <http://jurist.org/paperchase/2006/06/spain-court-launches-inveigation.php> [last accessed 5/26/12 at 3:38PM EST].

⁴⁷⁵ Rapporteur: Giovanni Claudio Fava, Working Document No 9 on certain European countries analysed during the work of the Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, July 2007, available at <http://www.statewatch.org/news/2007/feb/ep-rendition-and-detention-wd-no-9.pdf> [last accessed on 5/26/12 at 3:33PM EST].

⁴⁷⁶ Parliamentary Council of Europe, Flight logs related to the Successive Rendition Operations of Binyam Mohamed and Khaled El-Masri in January 2004, Doc. 10957 (June 2006), in *Appendix #1*.

⁴⁷⁷ Ximena Marinero, Spain prosecutor requests arrest warrants for CIA rendition agents, www.jurist.org, available at <http://jurist.org/paperchase/2010/05/spain-prosecutor-requests-arrest-warrants-for-cia-rendition-agents.php> [last accessed 5/26/2012 at 3:55PM EST].

⁴⁷⁸ See *Fact Sheet, CIA Renditions*, April 2012, <http://www.soros.org/sites/default/files/factsheet-rendition-20120510.pdf> [last accessed 6/27/12 at 3:02 PM EST].

Interior as a defendant. To this date, and despite his efforts, El-Masri has not been able to be heard in a Macedonia court.⁴⁷⁹ The case is still pending.⁴⁸⁰

Germany: El-Masri

388. In December of 2005, a journalist broke the news that Germany was investigating several extraordinary rendition allegation cases, including the one of El-Masri.⁴⁸¹ In January of 2007, a German prosecutor in Munich issued arrest warrants for 13 U.S. citizens CIA agents involved in the extraordinary rendition of El-Masri.⁴⁸² Later that year, however, when U.S. officials announced that they would not recognize the validity of the warrants if the German government formally requested the extradition of the CIA agents to Germany, the then-Justice Minister Brigitte Zypries announced that she would not present the U.S. with a formal request for extradition.⁴⁸³

389. In 2008, civil rights lawyers filed a civil suit on behalf of El-Masri and against the German government demanding reconsideration of the extradition requests of 2007.⁴⁸⁴

On December 11, 2010, however, an administrative court dismissed the case.⁴⁸⁵

⁴⁷⁹ Bill Fisher, *Kidnapped in Macedonia, Tortured in Afghanistan, and Dumped in Albania: The Forgotten Case of Khaled El-Masri*, May 15, 2012, available at <http://my.firedoglake.com/billfisher/2012/05/15/kidnapped-in-macedonia-tortured-in-afghanistan-and-dumped-in-albania-the-forgotten-case-of-khaled-el-masri/> [last accessed 5/26/12 at 4:17PM EST].

⁴⁸⁰ Lee Ferran, *The CIA and the Case of Mistaken Rendition*, ABC News, May 17th, 2012, available at <http://abcnews.go.com/Blotter/khaled-el-masri-cia-case-mistaken-rendition/story?id=16363012#.T8KM9NWwyf4> [last accessed 5/27/2012 at 4:26PM EST].

⁴⁸¹ *German man to file suit over US 'kidnapping'*, Reuters, November 9, 2005, available at <http://www.commondreams.org/headlines05/1109-10.htm> [last accessed 5/27/2012 at 4:34PM EST].

⁴⁸² Brett Murphy, *Germany issues arrest warrants in CIA extraordinary rendition case*, January 31st, 2007, available at <http://jurist.org/paperchase/2007/01/germany-issues-arrest-warrants-in-cia.php> [last accessed on 5/26/2012 at 4:39PM EST].

⁴⁸³ Jeannie Shaw, *US Rejects Germany Bid For Extradition Of CIA Agents In El-Masri Rendition*, Sept 22nd, 2007, available at <http://jurist.org/paperchase/2007/09/us-rejects-germany-bid-for-extradition.php> [last accessed 5/26/12 at 4:42PM EST].

⁴⁸⁴ *German Sues For CIA Extradition*, June 2008, available at <http://news.bbc.co.uk/2/hi/europe/7444406.stm> [last accessed 5/26/2012 at 4:55PM EST].

390. Three years after the announcement that Germany would not formally request extradition from the U.S., and thirteen days before El-Masri's civil suit against the German government was dismissed, communications between the U.S. and the German government were leaked that revealed that the U.S. had pressured Germany into not prosecuting the CIA agents.⁴⁸⁶

Poland: Secret Black Sites

391. This subsection describes the procedural posture of a Polish investigation regarding the existence of black sites in Poland. This investigation, initiated by Polish prosecutors in 2008, is significant because it is the first one in which a member of the European Union has charged a local public official for the atrocities committed during extraordinary renditions within its territory.⁴⁸⁷

392. As of 2005, human rights groups and international organizations already suspected that Poland had housed the largest black site prison in Europe during the "War on Terror."⁴⁸⁸ In 2006, after conducting preliminary investigations, the Council of Europe issued a report about black sites used for extraordinary rendition located in countries

⁴⁸⁵ Carrie Schimizzi, *Germany Court Rejects El-Masri CIA Rendition Suit*, December 11, 2010, available at <http://jurist.org/paperchase/2010/12/german-court-rejects-el-masri-cia-rendition-suit.php> [last accessed on 5/26/12 at 4:56PM EST].

⁴⁸⁶ Zach Zaggar, *Leaked Cables Reveal US Urged Germany Not To Prosecute CIA Officials For Rendition*, Nov. 3rd, 2010, available at <http://jurist.org/paperchase/2010/11/leaked-cables-reveal-us-urged-germany-not-to-prosecute-cia-officials-for-rendition.php> [last accessed 5/26/12 at 4:17PM EST].

⁴⁸⁷ *Human Rights Groups Welcome Polish Report On CIA Prisons*, Reuters, March 28th, 2012, available at <http://www.reuters.com/article/2012/03/28/us-poland-cia-idUSBRE82R10120120328> [last accessed 5/27/12 at 2:31PM EST].

⁴⁸⁸ Nishat Hasan, *Poland Had Main CIA Prison IN Europe, HRW Says*, www.jurist.org, Dec.2005, available at <http://jurist.org/paperchase/2005/12/poland-had-main-cia-prison-in-europe.php> [last accessed 5/27/12 at 12:56PM EST].

thorough Europe, one of them in Poland.⁴⁸⁹ In 2007, the European Parliament's investigating committee concluded that the Polish government, just like other eleven European Union governments, was aware of the existence of secret prisons and rendition flights.⁴⁹⁰

393. It was not until 2008, however, that the Polish government announced that it had begun investigating the possible existence of black sites within its boundaries.⁴⁹¹ This announcement came only after the prosecution reportedly took hold of a memo issued by the Polish intelligence Service confirming the existing of such sites.⁴⁹² Since then, several positive developments have taken place in this case.

394. In September of 2010, several human rights groups acting on behalf of Guantánamo prisoner Abd Al-Rahim al-Nashiri sued the Polish government over CIA-led torture.⁴⁹³ In December of the same year, lawyers for another victim of extraordinary rendition and Guantánamo prisoner, Abu Zubaydah, also initiated actions against the Polish government.⁴⁹⁴ A month after the action on behalf of Abu Zubaydah had been launched,

⁴⁸⁹ See U.N. 2006 Report, *supra* note 2. See also, Jaime Jansen, *EU Parliament To Launch CIA Prisons Probe*, December 15, 2005, available at <http://jurist.org/paperchase/2005/12/eu-parliament-to-launch-cia-prisons.php> [last accessed 5/26/2012 at 10:25AM EST], and Helena Spongenberg, *EU States Complicit In CIA Abductions, New Report Says Eu Observer*, June 7, 2006, available at <http://euobserver.com/843/21783> [last accessed 5/27/12 at 11:13AM EST].

⁴⁹⁰ Directed by Rapporteur: Giovanni Claudio Fava, Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, A6-0020/2007 (Jan. 2007).

⁴⁹¹ *Secret Memo Confirms Existence of CIA Prison, Polish Paper Says*, available at <http://www.dw.de/dw/article/0,2144,3621313,00.html> [last accessed on 5/27/12 at 11:39AM EST]; Andrew Gilmore, Poland investigating claims of CIA secret prison, www.jurist.org, September 05, 2008, available at <http://jurist.org/paperchase/2008/09/poland-investigating-claims-of-cia.php> [last accessed 5/27/12 at 11:40AM EST]; *Polish Prosecutors Probe Possible CIA Jail*, Reuters, Sept. 2008, available at <http://uk.reuters.com/article/2008/09/05/uk-poland-cia-prisons-idUKL557283920080905> [last accessed 5/27/12 at 1:06PM EST].

⁴⁹² *Id.*

⁴⁹³ May Carolan, *Guantánamo Prisoner Sues Poland Over CIA Torture*, on 23 September 2010, available at http://www.reprieve.org.uk/blog/2010_09_22_blog_CIA_Poland/ [last accessed 5/27/12 at 1:15PM EST].

⁴⁹⁴ International lawyers will today launch legal action in Poland on behalf of Abu Zubaydah, the first victim of the CIA's experimental torture programme, regarding crimes committed in the CIA's 'most

the Polish prosecutor recognized him as a victim in Poland's ongoing investigation of secret prison sites, and later added al-Nashiri as a victim as well.⁴⁹⁵ The prosecution had recognized the victim's claim that they had been imprisoned in a secret prison in Poland was both credible and serious.⁴⁹⁶

395. Most recently, in January of 2012, Polish prosecutors investigating the existing of secret prisons in Poland charged the former intelligence chief, Zbigniew Siemiatkowski, with complicity in CIA over the abuse of prisoners in Poland's secret prison.⁴⁹⁷ Since the investigation started, human rights groups have confirmed that at least six planes associated with the CIA rendition program landed in Poland in 2003.⁴⁹⁸ Former CIA Executive Director A.B. Krongard confirmed that Poland's secret prison was "the most important one" of the CIA's illegal secret prisons.⁴⁹⁹

important' secret prison in Stare Kiejkuty, Poland, www.reprive.org, December 16th, 2010, available at http://www.reprive.org.uk/press/2010_12_16abuzubaydahpressconferencewarsaw/ [last accessed 5/27/12 at 1:22PM EST]; *Polish Prosecutors Urged to Probe CIA torture Talk*, *Reuters*, December 16th, 2010, available at <http://www.washingtontimes.com/news/2010/sep/22/polish-probe-urged-of-cia-black-site-torture/> [last accessed 5/27/12 at 1:28PM EST].

⁴⁹⁵ Guantánamo prisoner Abu Zubaydah has been granted all-important 'victim' status in the pending criminal investigation into a CIA black site in Poland, following a complaint brought by Polish lawyer Bartłomiej Jankowski working with INTERIGHTS, Reprieve and Joe Margulies, www.reprive.org, January 20, 2011, available at http://www.reprive.org.uk/press/2011_01_20abuzubaydahvictimstatusrelease/ [last accessed 5/27/12 at 1:31PM EST].

⁴⁹⁶ *Polish Prosecutors Urged to Probe CIA torture Talk*, *Id.* Abd al Rahim was also recognized victim status in the investigation. Poland Charges former intelligence chief over secret CIA prison site, www.theguardian.co.uk, March 28th, 2012, available at <http://www.guardian.co.uk/world/2012/mar/28/poland-cia-terror-suspect-torture> [last accessed 5/27/2012 at 2:00PM EST].

⁴⁹⁷ *Poland Charges Former Intelligence Chief Over Secret CIA Prison Site*, March 28th, 2012, available at <http://www.guardian.co.uk/world/2012/mar/28/poland-cia-terror-suspect-torture> [last accessed 2:18PM EST].

⁴⁹⁸ Carrie Schimizzi, *Rights Groups Confirm CIA Extraordinary Rendition Planes Landed in Poland*, www.jurist.org, Feb. 22nd, 2010, available at <http://jurist.org/paperchase/2010/02/rights-groups-confirm-cia-extraordinary.php> [last accessed 5/27/12 at 1:02PM EST]; Nicholas Kulish and Scott Shane, *Flight Data Show Rendition Planes Landed in Poland*, www.nytimes.com, February 23rd, 2010, available at <http://www.nytimes.com/2010/02/23/world/europe/23poland.html> [last accessed 5/27/12 at 1:09PM EST].

⁴⁹⁹ On the 10th anniversary of the CIA's seizure of its torture 'guinea pig' Abu Zubaydah, Poland has emerged as the first government to charge one of its own officials over the abuse of prisoners in the European secret prison system, March 28th, 2012, available at

396. The groups suing Poland were “hopeful that the proceedings in Poland [would] inspire further legal action in other European black sites, such as Romania and Lithuania.”⁵⁰⁰ Human rights groups have praised the initiative of Poland in charging a public official for actions connected to the CIA extraordinary rendition program.⁵⁰¹ Poland is the first member of the European Union to charge a public official for torture within its territory.⁵⁰² Meanwhile, current public officials of the Polish government continue to deny the existence of secret prisons in Poland.⁵⁰³ The investigation is ongoing.

Italy: The Abu Omar Case

397. The case of the Imam of Milan Hassan Mustafa Osama Nasr (also known as Abu Omar) is one of the best-documented cases of extraordinary rendition.⁵⁰⁴ Abu Omar was an Egyptian cleric who was granted political asylum in Italy in 2001, after fleeing Egypt because he was a member of a group prosecuted as a terrorist organization in Egypt.⁵⁰⁵ Before Abu Omar became the victim of extraordinary rendition, he was being followed

http://reprieve.org.uk/press/2012_03_28_10_years_zubaydah_poland/ [last accessed 5/27/2012 at 2:27PM EST].

⁵⁰⁰ *Id.*

⁵⁰¹ *Human Rights Groups Welcome Polish Report On CIA Prisons*, Reuters, March 28th, 2012, available at <http://www.reuters.com/article/2012/03/28/us-poland-cia-idUSBRE82R10120120328> [last accessed 5/27/12 at 2:31PM EST].

⁵⁰² *Id.*

⁵⁰³ *Id.*

⁵⁰⁴ Information about the Abu Omar case, available at http://en.wikipedia.org/w/index.php?title=Abu_Omar_case&oldid=481326195 [last accessed May 26, 2012].

⁵⁰⁵ *Europe: Open Secret: Mounting Evidence of Europe's Complicity in Rendition and Secret Detention*, Amnesty International, EUR 01/023/2010, p.18 (November 2010), available at <http://www.amnesty.org/en/library/asset/EUR01/023/2010/en/3a3fdac5-08da-4dfc-9f94-afa8b83c6848/eur010232010en.pdf> [last accessed 5/28/2012 at 2:59PM EST].

by the Italian authorities for suspicions of involvement in terrorism.⁵⁰⁶ This fact would become crucial in the subsequent investigation of his extraordinary rendition.

398. Abu Omar was abducted in 2003 in Milan, transferred to Germany and then to Egypt, where he claims that he was tortured.⁵⁰⁷ In 2004, he was released from confinement into the city of Alexandria, with the condition that he did not communicate with his family and friends, the media, or human rights groups.⁵⁰⁸ When he violated this condition and phoned home, his calls were tapped by the Italian investigators who were previously following him, which eventually led the investigators to identify the CIA team involved in his rendition.⁵⁰⁹

399. As evidence mounted that the Italian government was aware of the kidnapping of Abu Omar, the investigation turned into the prosecution of both CIA agents and Italian officials.⁵¹⁰ In 2005, the Italian prosecutors indicted in absentia 26 CIA agents, and issued arrest warrants for 22 of them.⁵¹¹ The Italian prosecutors requested that the Italian government pursued the extradition of the American suspects, but the government

⁵⁰⁶ Rapporteur: Giovanni Claudio Fava, European Parliament, Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, WORKING DOCUMENT No 7 on 'extraordinary renditions', 16/11/2006, available at <http://www.statewatch.org/cia/documents/working-doc-no-7-nov-06.pdf> [last accessed 6/23/2012 at 1:44AM EST].

⁵⁰⁷ *Extraordinary Rendition, Flights, Torture and Accountability: A European Approach* European Center for Constitutional and Human Rights, January 2009, pp. 80-81, available at [http://www.therenditionproject.org.uk/pdf/PDF%20103%20\[ECCHR,%20Jan%202009.%20Rendition,%20Flights,%20Torture%20and%20Accountability%20-%20European%20Approach\].pdf](http://www.therenditionproject.org.uk/pdf/PDF%20103%20[ECCHR,%20Jan%202009.%20Rendition,%20Flights,%20Torture%20and%20Accountability%20-%20European%20Approach].pdf) [last accessed 5/27/2012 at 5:28PM EST].

⁵⁰⁸ *Id.*, at 82.

⁵⁰⁹ *Id.*, at 82-83. Stephen Grey, *Ghost Plane. The True Story Of The CIA Torture Program*, Chapter 9. The Italian Job," (2009) (noting that his calls were also tapped in Egypt, which arrested Abu Omar again, and held him until 2007, when he was released with the condition that he does not leave the city of Alexandria).

⁵¹⁰ De Paolo Biondani and Guido Olimpio. July 11, 2006 Corriere della Sera, "Un centro segreto Cia-Sismi," available at http://www.corriere.it/Primo_Piano/Cronache/2006/07_Luglio/10/sismi.shtml [last accessed 6/28/2012 at 10:42PM EST] (Italian).

⁵¹¹ Italy warrants for 22 purported CIA operatives, December 23rd, 2005, CNN World, available at http://articles.cnn.com/2005-12-23/world/italy.warrants2_1_prosecutor-armando-spataro-purported-cia-operatives-justice-minister-roberto-castelli?_s=PM:WORLD [last accessed 5/27/2012 at 5:45PM EST].

declined.⁵¹² The trials commenced in absentia, without the presence of the American defendants.⁵¹³

400. In 2009, the Italian court handed out the convictions of 23 U.S. citizens, 22 CIA agents and one military official, and two Italian military intelligence agents.⁵¹⁴ The cases of eight defendants, three U.S. citizens and five Italians, were dismissed when diplomatic immunity, for the American citizens, and state secrets, for the Italians, were invoked.⁵¹⁵ Most of the convicted were given prison sentences, as well as ordered monetary restitutions to the victims (Abu Omar was awarded 1 million euros, and his wife 500,000 euros).⁵¹⁶ The prosecutor has appealed the dismissed cases, questioning the appropriateness of the use of the doctrines of diplomatic immunity and state secrets to this particular case.⁵¹⁷

401. The case of Abu Omar is significant because it produced the very first indictments for extraordinary rendition.⁵¹⁸ The convictions obtained, however, may not stand on safe ground. As Amnesty International points out, trials in absentia are legal under Italian law, but not under the international human rights law applicable to this case.⁵¹⁹ Thus, if the

⁵¹² *Extraordinary Rendition, Flights, Torture and Accountability: A European Approach* European Center for Constitutional and Human Rights, January 2009, pp. 80-81, available at [http://www.therenditionproject.org.uk/pdf/PDF%20103%20\[ECCHR,%20Jan%202009.%20Rendition,%20Flights,%20Torture%20and%20Accountability%20-%20European%20Approach\].pdf](http://www.therenditionproject.org.uk/pdf/PDF%20103%20[ECCHR,%20Jan%202009.%20Rendition,%20Flights,%20Torture%20and%20Accountability%20-%20European%20Approach].pdf) [last accessed 5/27/2012 at 5:28PM EST], at 84.

⁵¹³ *Open Secret*, *supra* note 505 .

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ Barry, Colleen, "Italy convicts Air Force O-6 in CIA kidnap case", *Military Times*, November 4, 2009, available at http://www.airforcetimes.com/news/2009/11/airforce_italy_case_110409/ [last accessed 6/28/2012 at 10:44AM EST]; *Open Secret*, *supra* note 505 (clarifying that the monetary sums are preliminary, because the exact sum is to be determined in the civil proceedings were are set to start after the criminal trial and all appeals have ended).

⁵¹⁷ *Open Secret*, *supra* note 505.

⁵¹⁸ *Italian Judge Convicts 23 In CIA Kidnap Case*, available at http://www.msnbc.msn.com/id/33620676/ns/world_news-europe#.T8Eez9Wwyf4 [last accessed 5/26/12 at 2:20PM EST].

⁵¹⁹ *Id.* 8

convicted were to be detained on the grounds of the outstanding warrants, they might be entitled to a new trial, under a different judge.⁵²⁰ Furthermore, because the crimes of torture and complicity to torture are not codified under Italian law, the only charges that the prosecution was able to file and prove were those of kidnapping and complicity for kidnapping.⁵²¹ Thus, none of the accused in the case of Abu Omar against the Italian government was held responsible for his extraordinary rendition, for his transport to Egypt, or for the torture that he therein endured.⁵²²

(iii) Conclusion About International Prosecution of Extraordinary Rendition

402. As noted in this subsection, prosecution efforts against the crimes involved in extraordinary rendition are far from having a predictable result. Most of the cases illustrated have not yet yield tangible results. Moreover, in the international area as well as in the domestic arena, the doctrines of immunity and state secrets often stand in the way of meaningful redress.

403. Given the uncertainty surrounding traditional legal models of accountability, it might be necessary to inquire beyond traditional models of prosecution to find solutions that fit the needs of those seeking to address the wrongs involved in extraordinary rendition. The next subsection describes some of those alternative models.

B. ALTERNATIVE MODELS OF ACCOUNTABILITY

(i) Canada: Commission of Inquiry Into de Actions of Canadian Officials in Relation to Arar Maher

⁵²⁰*Id.*

⁵²¹*Id.*

⁵²²*Id.*

404. The following subsection describes an inquiry commission organized by Canada to investigate the abuses that the Canadian citizen Arar Maher suffered in the process of his extraordinary rendition.

405. In 2002, Canadian citizen Arar Maher was abducted while in New York's Kennedy Airport, and was subsequently transported to Syria, where he was tortured and imprisoned for almost a year.⁵²³ Beginning in 2004, a Canadian special commission of inquiry was established to investigate the Canadian involvement with the extraordinary rendition, detention, and torture of Arar Maher. Justice Dennis O'Connor was appointed Commissioner of Inquiry.

406. Justice O'Connor was a professor at the University of Western Ontario from 1980 to 1998.⁵²⁴ From 1980 to 1984, he served as chief negotiator for the Government of Canada in the Yukon Indian Land Claim.⁵²⁵ He later served as an elected benchler of the Law Society of Upper Canada from 1987 to 1995, leading to his appointment to the Ontario Court of Appeal in 1998.⁵²⁶ He was appointed associate chief justice of Ontario in 2001.⁵²⁷ Prior to his appointment on the Arar Inquiry, Justice O'Connor served as Commissioner of the Walkerton Inquiry.⁵²⁸

407. In July of 2006, when the Arar factual inquiry was concluded, the commission published a 376-pages report entitled, Report of the Events Relating to Maher Arar:

⁵²³ See e.g., *The Maher Arar Story*, Amnesty International, available at <http://www.amnestyusa.org/about-us/amnesty-50-years/50-years-of-human-rights/the-maher-arar-story> [last accessed 5/29/2012 at 1:31PM EST]; Editorial, *The Unfinished Case of Maher Arar*, N.Y. Times, Feb. 18, 2009, at A26 (discussing the Canadian government's treatment of Arar).

⁵²⁴ Brief Biographical Note of Associate Chief Justice Dennis O'Connor, available at <http://www.ontariocourts.on.ca/coa/en/judges/oconnor.htm> [06/26/2012 at 11:34AM EST].

⁵²⁵ *Id.*

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ *Id.*

Analysis and Recommendations.⁵²⁹ The extensive inquiry ultimately concluded that Canadian officials provided unconfirmed information to the United States regarding Arar and that he, in fact, had no connection to terrorist activities.⁵³⁰ Canada offered Arar a formal apology and compensation worth millions of U.S. dollars.⁵³¹

408. The commissioner of the Canadian Commission was given a two-part mandate.⁵³²

First, to initiate a “factual inquiry,” which would specifically investigate:

- a. the detention of Mr. Arar in the United States,
- b. the deportation of Mr. Arar to Syria via Jordan,
- c. the imprisonment and treatment of Mr. Arar in Syria,
- d. the return of Mr. Arar to Canada, and
- e. any other circumstance directly related to Mr. Arar that the Commissioner considers relevant to fulfilling this mandate.⁵³³

409. Second, the Commissioner was directed to produce a “Policy Review” directed at future actions of the Royal Mounted Canadian Police based on:

- a. an examination of models, both domestic and international, for
- b. an assessment of how the review mechanism would interact with existing review mechanisms.⁵³⁴

410. In the interest of national security, the Commissioner was expected to take the following precautions when dealing with sensitive material subject to national security concerns:

- a. on the request of the Attorney General of Canada, the
 1. Commissioner shall receive information in camera and in the
 2. absence of any party and their counsel if, in the opinion of the
 3. Commissioner, the disclosure of that information would be injurious

⁵²⁹ *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Ara, Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006), available at http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf [last accessed 6/21/2012 at 11:17PM EST]] [hereinafter Arar Report].

⁵³⁰ *Id.* at 9.

⁵³¹ *Tortured Man Gets Apology From Canada*, *The Washington Post*, January 27th, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/26/AR2007012601717.html> [last accessed 5/29/2012 at 1:48PM EST].

⁵³² Arar Report, *supra* note 529, at 10, 280-281.

⁵³³ *Id.* at 11, 280-281.

⁵³⁴ *Id.*

4. to international relations, national defence or national security,
- b. in order to maximize disclosure to the public of relevant information,
 1. the Commissioner may release a part or a summary of the
 2. information received in camera and shall provide the Attorney
 3. General of Canada with an opportunity to comment prior to its
 4. release, and
- c. if the Commissioner is of the opinion that the release of a part or
 1. a summary of the information received in camera would provide
 2. insufficient disclosure to the public, he may advise the
 3. Attorney General of Canada, which advice shall constitute notice
 4. under section 38.01 of the Canada Evidence Act.⁵³⁵

411. At least one explanation for the relative success of the Canadian inquiry was its refusal to designate the state as the “sole arbiter” for determining legitimate “state secrets” or “national security interests.”⁵³⁶ The commissioner described procedural challenges in conducting this factual inquiry and identified three competing interests: “making as much information as possible public, protecting legitimate claims of national security confidentiality (NSC), and ensuring procedural fairness to institutions and individuals who might be affected by the proceedings.”⁵³⁷ In fact, the Commissioner, who was an experienced judge, was given access to all confidential information and documents for an in camera inspection. The commissioner later redacted some NSC protected information from the public version of the final report.⁵³⁸ An analysis by the Council of Europe suggests that the Canadian Commission “appears to have found a

⁵³⁵ Arar Report, *supra* note 529, at 283.

⁵³⁶ See Committee on Legal Affairs and Human Rights, *Secret Detentions And Illegal Transfers Of Detainees Involving Council Of Europe Member States: Second Report, Explanatory Memorandum*, 7 June 2007, ¶ 329, available at http://www.assembly.coe.int/CommitteeDocs/2007/EMarty_20070608.htm#P20_203 [last accessed 6/21/2012 at 10:57PM EST].

⁵³⁷ Arar Report, *supra* note 529, at 279.

⁵³⁸ See *Explanatory Memorandum*, *supra* note 536.

workable solution that safeguards both accountability and true national security interests.”⁵³⁹

412. The fact that in Canada there was a national consensus on the function and principle underlying accountability suggests another explanation for the success of the Commission. As Maher Arar aptly stated, “accountability is not about seeking revenge. It is about making our institutions better and a model for the rest of the world. Accountability goes to the heart of our democracy. It is a fundamental pillar that distinguishes our society from police states.”⁵⁴⁰

(ii) The United Kingdom: Torture Inquiry

413. The following subsection describes the efforts of the UK to install an inquiry commission to investigate the role of the UK in the process of extraordinary rendition.

414. On July 6, 2010, United Kingdom Prime Minister David Cameron announced that it would initiate a formal inquiry into UK involvement in the detention, ill-treatment, and extraordinary rendition of individuals suspected in the Global War on Terror.⁵⁴¹ The inquiry came in response to evidence that strongly suggested UK involvement in human rights abuses in Afghanistan, Egypt, Kenya, and Pakistan, just to name a few.⁵⁴² One of

⁵³⁹ *Id.*

⁵⁴⁰ *Id.* (quoting, A message from Maher Arar available at <http://www.maherarar.ca>)

⁵⁴¹ *Open Secret, supra* note 505, at 33 (stating that there is “[m]ounting evidence of Europe’s complicity in rendition and secret detention”).

⁵⁴² *Id.* at 34.

the sources of this evidence was the high court hearing in the treatment of Binyam Mohamed.⁵⁴³

415. According to Amnesty International, evidence gathered and presented in several high profile cases suggested that UK personnel

- were present and/or participated in the interrogations of detainees and/or
- provided information that led other countries to apprehend and detain individuals when the UK knew or ought to have known that individuals would be at risk of torture and/or unlawful detention and/or
- forwarded questions to be put to individuals detained by other countries in circumstances in which the UK knew or ought to have known that the detainees concerned had been or were at risk of being tortured and/or whose detention was unlawful.⁵⁴⁴

416. The inquiry commenced its work under the guidance of Sir Peter Gibson, a retired barrister and judge who was at the time of his nomination to the inquiry, in 2010, on his second term as the intelligence services commissioner.⁵⁴⁵ In his capacity as intelligence services commissioner, Gibson reviewed the activities of the home secretary and British intelligence and reported directly to the prime minister on agency compliance with new guidelines for the treatment of interrogation of detainees abroad.⁵⁴⁶

417. In the beginning of 2010, many NGOs began expressing concern that the U.K. inquiry was amounting to nothing more than a “whitewash.”⁵⁴⁷ Specifically, NGOs were concerned that a continued premium on alleged national security concerns and secrecy would not counteract “any appearance of [the government's] ongoing collusion in or

⁵⁴³ Richard Norton-Taylor, *The Gibson Inquiry: A Chance For Truth Possibly Lost Forever*, The Guardian, available at <http://www.guardian.co.uk/world/2012/jan/18/gibson-inquiry-chance-lost-analysis?INTCMP=ILCNETTXT3487> [last accessed 5/29/2012 at 2:04PM EST].

⁵⁴⁴ *Id.* at 35

⁵⁴⁵ *The Detainee Inquiry*, Panel Members, available at <http://www.detaineeinquiry.org.uk/people/panel-members/> [last accessed 5/29/2012 at 2:11PM EST]. Haroon Siddique, *Torture Inquiry: Who is on the panel?*, Guardian, Jul. 7, 2010, at Main section 7.

⁵⁴⁶ *Id.*

⁵⁴⁷ See Editorial, *The Gibson Torture Inquiry: A Whitewash Won't Wash*, Guardian, Feb. 24, 2011, at Main section 36; Ian Cobain, *Torture Inquiry Is Legally Flawed, Say Rights Groups As Ngos Ponder Boycott*, Guardian, Feb. 24, 2011, at Main section 8.

tolerance of unlawful acts.”⁵⁴⁸ Most notably, the human rights advocates contended that if the inquiry did not become more public, the UK would not be in compliance with its international domestic legal obligations.⁵⁴⁹

418. Human rights organizations worked relentlessly to remedy this concern. For example, upon the UK announcement to conduct a formal inquiry into this issue, Amnesty International, along with eight other Nongovernmental Organizations (NGOs), supplied recommendations to Sir Peter Gibson regarding inquiry rules of procedure and scope. The groups strongly urged, among other things, that “the inquiry be as transparent as possible; with all hearings open to the public except when absolutely required by the sensitive nature of the evidence.”⁵⁵⁰

419. On January 18th, 2012, the U.K. government announced that it would end the work of the Commission.⁵⁵¹ The decision came after evidence kept mounting about the U.K.’s involvement in the process of extraordinary rendition, and a week after a police investigation was begun on the UK involvement on extraordinary renditions to Libya. Media sources report that the commission had become a “convenient pigeonhole,” as sources refused to talk about their involvement and expressed that they would only “talk to Gibson.”⁵⁵² The position of Amnesty International was that this inquiry “Gibson

⁵⁴⁸ Open Secret, *supra* note 505.

⁵⁴⁹ See e.g., *United Kingdom: Detainee Inquiry Terms of Reference and Protocol Fall far Short of Human Rights Standards*, Amnesty International, Public Statement, EUR 45/011/2011 (August 2011), available at <http://amnesty.org/en/library/asset/EUR45/011/2011/en/db699f17-6f5a-4b71-9b22-67e6270e97bd/eur450112011en.html> [last accessed 5/29/2012 at 2:39PM EST].

⁵⁵⁰ *Id.* at 37.

⁵⁵¹ *Statement On The Detainee Inquiry*, January 18th, 2011, UK Parliament Website, available at <http://www.parliament.uk/business/news/2012/january/statement-on-the-detainee-inquiry/> [last accessed 5/29/2012 at 2:33PM EST].

⁵⁵² Richard Norton-Taylor, *supra* note 543.

Detainee Inquiry 'was never fit for purpose.'⁵⁵³ UK officials have expressed that they intent to hold a judge-led inquiry after the police investigations have finished.⁵⁵⁴

(iii) German Parliamentary Inquiry (completed in July 2009)

420. The following subsection describes the results of a German parliamentary inquiry into the German involvement in the extraordinary rendition, detention and mistreatment of German national Khaled el-Masri, German resident Murat Kurnatz, and German national Muhammad Zammar.

421. The process began in 2006, after evidence from multiple sources had identified Germany as one of European countries involved in extraordinary rendition. El-Masri, being a German citizen, was called to testify before the inquiry, where he hinted that German intelligence service participated in his rendition.⁵⁵⁵ In June of 2009, the German Parliament issued a report summarizing conclusions of the inquiry. The parliament had been unable to substantiate any culpability of German officials or the German government.⁵⁵⁶

422. According to the German Constitutional Court, this shorting was due to an unconstitutional failure by a segment of the German government to cooperate fully with the investigation.⁵⁵⁷ In commenting on the inquiry, Amnesty International stated that “the government’s actions restricting the information available to the inquiry were

⁵⁵³ *Gibson Detainee Inquiry 'Was Never Fit For Purpose,'* Amnesty International, 18 January 2012, available at http://www.amnesty.org.uk/news_details.asp?NewsID=19900 [last accessed, 5/29/2012 at 2:37PM EST].

⁵⁵⁴ *Id.*

⁵⁵⁵ *El-Masri Testifies Before German Parliament*, www.spiegel.de, June 23rd, 2006, available at <http://www.spiegel.de/international/0,1518,423199,00.html> [last accessed 5/29/2012 at 3:19PM EST].

⁵⁵⁶ *Id.* at 16.

⁵⁵⁷ *Id.*

unconstitutional [and] the legitimacy of the inquiry and its conclusions have been fatally undermined.”⁵⁵⁸

423. After the inquiry had been concluded, the United Nations published the February 2010 UN Joint Study on Secret Detention, which specifically identified Germany as a country that

“knowingly... [took] advantage of the situation of secret detention by sending questions to the State which detains the person or by soliciting or receiving information from persons who are being kept in secret detention.”⁵⁵⁹

424. Based on this study, and the results of 2009, Amnesty International has called for continuing investigation into the outstanding human rights issues to bring Germany into compliance with its international obligations.⁵⁶⁰

425. The report of the 2009 inquiry had proposed oversight mechanisms for the German federal secret service.⁵⁶¹ Despite the inquiry’s failure to address accountability for victims of extraordinary rendition, the report was ultimately successful in achieving proposed legislative reforms when those reforms were later enacted by the parliament.⁵⁶²

(iv) Concluding Thoughts About Inquiry Commissions in Canada, the U.K., and Germany

426. This subsection identifies traits of the initiatives in Canada, the UK, and Germany that might be useful for the organizers of the NC Commission of Inquiry on Torture. In particular, Canada’s Arar Inquiry should serve as a model for U.S. accountability

⁵⁵⁸ *Id.* at 18

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.*

⁵⁶² *Id.*

mechanisms to investigate extraordinary rendition and torture at both the national and state levels.

427. The Arar commission was both explicit and consistent in its purpose and procedure for inquiry. Any commission should strive to develop similar resolute guidelines so the public can be actively follow and engage in the proceedings. Additionally, a commission should publish a detailed report of its findings for widespread distribution. The continued electronic availability of the Arar report perpetuates a model and fuels a collective international movement for accountability on this issue. The Arar Inquiry also exemplifies the importance of demanding more than simply a blanket assertion of state confidentiality or “state secrets” by state officials in any accountability inquiry. A thorough investigation must balance national security safeguards against the necessity for transparency.

428. Despite its ultimate demise, the UK inquiry commission example suggests that there are major benefits to be gained from creating a State or local Commission that is structured to receive commentary and suggestions from human rights NGOs. Perhaps it would serve the commission well to have a formal mechanism for communication by NGO’s who endorse the commission to submit previous reports, findings, and recommendations to contribute to the commission’s purpose.

429. The German parliamentary inquiry has both positive and negative aspects. Nevertheless, the fact that the reforms of the inquiry were ultimately adopted by the legislature constitutes an important achievement. For the organizers of the NC inquiry on Torture, this success highlights the notion that a formal state inquiry can be an important political mechanism not just for achieving accountability retrospectively, but also for

shaping domestic policy prospectively. Most importantly, the struggles faced by the German parliament did not impede the continued push for state inquiry and accountability. With the consistent efforts of human rights organizations and the recent decision by the German Constitutional Court, it appears this issue will remain at the forefront of German domestic politics. The protracted efforts in Germany contribute to the global recognition that accountability mechanisms are necessary and should serve to inspire Commission members to continue their efforts in North Carolina.

C. OTHER MODELS IN TRANSITIONAL JUSTICE

430. Except for the particularized success of the Canadian model of inquiry, the examples set by both the UK and Germany leave room for improvement in achieving accountability for U.S. involvement in extraordinary rendition and torture. Thus, it should be helpful to study strategies and tactics in achieving widespread accountability even where commissions deal with accountability outside the scope of this briefing book. After all, as Senator Leahy astutely observed, “[the challenges of 9/11 are] no more improbable than the truth that came to light and laid the foundation for reconciliation in South Africa, or in Greensboro, North Carolina.”⁵⁶³

431. Thus, this section provides a brief history and analysis of varying models for transitional justice commissions: the South African Truth and Reconciliation Commission (TRC), the Peruvian Truth and Reconciliation Commission (PTRC); the Illinois Torture Inquiry and Relief Commission, and the Greensboro Truth and Reconciliation Commission (GTRC).

⁵⁶³ See Sen. Patrick Leahy, *supra* note 421.

C. OTHER MODELS IN TRANSITIONAL JUSTICE

(i) Government-Sponsored Commissions South African Truth and Reconciliation Commission

432. This section describes distinctive features of the South African Truth and Reconciliation Commission (SATRC). The SATRC is a well-known accountability model that provided for accountability and a peaceful transition from apartheid to democracy in South Africa.⁵⁶⁴ During apartheid, violence and human rights abuses were widespread, and all sectors of society were involved in one way or another.⁵⁶⁵ The SATRC was part of a national movement of reconciliation of two worlds that had been separated during apartheid, and thus involved much more than the commission itself, because the commission was part of a socio-political process of transitional justice that involved the process of an entire nation delved into the complexity of establishing a democracy anew after a tortured past.⁵⁶⁶

433. The SATRC was divided into three distinct subject matter committees: the Human Rights Violations Committee, the Reparations and Rehabilitation Committee, and the Amnesty Committee.⁵⁶⁷ The first committee was primarily tasked with compiling an

⁵⁶⁴ See e.g., Anurima Bhargava, *Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission*, 102 Colum. L. Rev. 1304 (2002).

⁵⁶⁵ Department of Justice and Constitutional Development of the Republic of South Africa, The Truth and Reconciliation Official Website, available at <http://www.justice.gov.za/trc/> [last accessed 5/29/2012 at 7:51PM EST].

⁵⁶⁶ Suffolk University, College of Arts & Sciences, Center for Restorative Justice, *What is Restorative Justice?*, available at <http://www.suffolk.edu/research/6953.html> [last accessed 5/29/2012 at 8:14PM EST]; Madeleine Fullard and Nicky Rousseau, *Truth-Telling, Identities and Power in South Africa and Guatemala*, Research Brief, June 2009, available at <http://ictj.org/sites/default/files/ICTJ-Identities-TruthCommissions-ResearchBrief-2009-English.pdf> (last visit 5/29/2012 at 8:19PM EST).

⁵⁶⁷ Bhargava, *supra* note 564, at 1306.

extensive factual record of apartheid by conducting victim hearings, while the latter two committees implemented recommendations and remedies.⁵⁶⁸

434. At the initiation of the SATRC, the leaders of the movement went into great trouble to explicitly define “political crimes,” i.e. those crimes that would be included within the scope of the investigation.⁵⁶⁹ The ultimate definition of “political crimes” included a list of factors that committee members considered and determined so that there was agreement about parameters of the investigation and the nature of the wrongdoing under investigation.⁵⁷⁰ A necessary component of the SATRC’s success was the general provision in South Africa’s provisional Constitution of 1993 granting amnesty for criminal actions perpetrated during apartheid.⁵⁷¹ It is important to note that this amnesty provision applied only to those individuals who provided “‘full disclosure of all relevant facts’ and demonstrated that the act was ‘associated with a political objective.’”⁵⁷²

435. The SATRC coexisted with the contradictions that itself generated. William Kentridge, direction of the commission, clearly expressed it when he said: “A full confession can bring amnesty and immunity from prosecution or civil procedures for the crimes committed. Therein lies the central irony of the Commission. As people give more and more evidence of the things they have done they get closer and closer to amnesty and it gets more and more intolerable that these people should be given amnesty.”⁵⁷³ Whether

⁵⁶⁸ *Id.*

⁵⁶⁹ See generally Promotion of Nat’l Unity & Reconciliation Act 34 of 1995 § 20 (S. Afr.).

⁵⁷⁰ *Id.* at § 20(3)

⁵⁷¹ *Id.*

⁵⁷² *Id.* (quoting § 20(1) of Promotion of Nat’l Unity & Reconciliation Act 34 of 1995).

⁵⁷³ Kentridge, William, “*Director’s Note*,” in *Ubu and the Truth Commission*, by Jane Taylor, p. xiv, Cape Town: University of Cape Town Press (2007).

South Africans have been healed by this commission remains a question of debate, but it is generally thought that the SATRC was successful.⁵⁷⁴

Peruvian Truth and Reconciliation Commission: La Comisión de la Verdad y la Reconciliación

436. The present subsection describes the development of another government-sponsored inquiry commission, this time in Peru, South America, called the Peruvian Truth and Reconciliation Commission (CVT).

437. The CVT was initiated by the Peruvian government in response to two decades of violence, between 1980 and 2000, created by an internal conflict between the Peruvian government and several armed opposition forces, namely the Communist Party of Peru (Shining Path), and the Tupac Amaru Revolutionary Movement (MRTA).⁵⁷⁵

438. The commission can be accurately described primarily as a “truth-seeking” operation, in which victim and perpetrator stories were identified through the course of public hearings and compiled in a final commission report (which became public in 2003).⁵⁷⁶ The goal of the CVT was largely non-retributive. The prevalent view was that the truth-finding process would correct the erroneous historical record and preserve faith

⁵⁷⁴ See e.g., Suffolk University, College of Arts & Sciences, Center for Restorative Justice, What is Restorative Justice?, available at <http://www.suffolk.edu/research/6953.html> [last accessed 5/29/2012 at 8:14PM EST]; Madeleine Fullard and Nicky Rousseau, Truth-Telling, Identities and Power in South Africa and Guatemala, Research Brief, June 2009, available at <http://ictj.org/sites/default/files/ICTJ-Identities-TruthCommissions-ResearchBrief-2009-English.pdf> (last visit 5/29/2012 at 8:19PM EST). Cfr. Barrow, Greg, South Africans reconciled?, October 30, 2008, BBCNews, available at http://news.bbc.co.uk/2/hi/special_report/1998/10/98/truth_and_reconciliation/142673.stm [last accessed 5/29/2012 at 8:35PM EST] and Bell, Terry and Dumisa Buhle Ntzebeza, "Unfinished Business: South Africa, Apartheid and Truth," (2003).

⁵⁷⁵ Amnesty International, *Peru: The Truth And Reconciliation Commission - A First Step Towards A Country Without Injustice* (Aug. 2004) [hereinafter First Step].

⁵⁷⁶ Jill E. Williams, *Legitimacy and Effectiveness of a Grassroots Truth and Reconciliation Commission*, 72 Law & Contemp. Probs. 143 (2009).

in accountability and justice.⁵⁷⁷ The CVT's stated purpose was to "promote national reconciliation, the rule of justice and the strengthening of constitutional regime" in response to the human rights atrocities that had taken place.⁵⁷⁸

439. During its investigation phase, over 800 members of the CRV traveled to the 24 geographic subdivisions across Peru and collected almost 17,000 first-hand testimonies.⁵⁷⁹ The CVT also conducted public hearings across the nation collecting 400 testimonies relevant to 300 specific cases of human rights abuses.⁵⁸⁰

440. The public hearings were essential to the Peruvian healing process. As Amnesty International observed, "the public hearings and the coverage of them in the media helped not only to make large sections of the population aware of the scale of the human rights violations and abuses committed during the conflict but also to give the survivors back their dignity by giving them the opportunity to be heard, very often for the first time."⁵⁸¹

Illinois Torture Inquiry and Relief Commission

441. This subsection describes another government-sponsored commission, this time in the State of Illinois, United States. This commission came about when, in 2006, public awareness about police abuse in the City of Chicago that took place between 1980 and 2000 increased as a result of a grass roots group known as Black People Against Police Torture ("BPAPT").⁵⁸²

⁵⁷⁷ Jocelyn E. Getgen, *Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report*, 29 B.C. Third World L.J. 2 (2009) .

⁵⁷⁸ *Id.* (citing Supreme Decree 065-2001- PCM art. 1).

⁵⁷⁹ *Id.* at 3

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.* at 4

⁵⁸² State of Illinois, Torture Inquiry and Relief Commission's Website, at <http://www2.illinois.gov/itrc/Pages/History.aspx> [last accessed 5/30/2012 at 10:13AM EST].

442. In 2009, and much as a result of the work of the BPABT, the Illinois legislature signed into law the Public Act 096-0223, which institutionalized a formal investigative commission and hearing process for “criminal cases of persons who claimed to have been tortured into confessing to a crime, and the confession was used to convict them of that crime.”⁵⁸³ The state-sponsorship of the Commission has largely been seen as a remedy of “last resort” for victims who have exhausted all other legal avenues in Illinois’ criminal justice system.⁵⁸⁴ The commission began receiving claims in April of 2011.

443. The Commission has eight members, many of them figures with connections to the political establishment.⁵⁸⁵ One of them is Judge Timothy Evans. Judge Evans was elected as Chief Judge in 2001, making him the first African-American Chief Judge for the Cook County Circuit Court in Chicago.⁵⁸⁶ Going forward, Judge Timothy Evans will have the authority to re-open criminal hearings upon a formal recommendation by the hearing.

444. The commission is not unlike the model for the newly enacted North Carolina Innocence Inquiry commission, which serves as an independent state sponsored alternative forum for fact-finding and ultimately granting exonerations of false convictions.⁵⁸⁷ However, some have expressed concern that the Illinois Commission should provide an avenue for hearing victim and perpetrator testimony, which is

⁵⁸³ *Id.*

⁵⁸⁴ Tracy Siska, *Illinois Torture Inquiry and Relief Commission, Better as a Truth Commission?* Chicago Justice Project, <http://www.chicagojustice.org/articles/illinois-torture-inquiry-and-relief-commission> [last accessed 6/26/2012 at 11:36AM EST].

⁵⁸⁵ *Id.* See also, e.g., Cal Skinner, *State Senator Dan Duffy Targets \$80,000 Torture and Inquiry Relief Commission Exec Who Worked 7 Hours*, March 16th, 2012, McHenry County Blog, available at <http://mchenrycountyblog.com/2012/03/16/state-senator-dan-duffy-targets-80000-torture-and-inquiry-relief-commission-exec-who-worked-7-hours/> [last accessed 5/30/2012 at 10:20AM EST].

⁵⁸⁶ Timothy Evans, *Elected Chief Judge Of Circuit Court In Cook County, IL*, Jet, Oct. 1, 2001, at 52, available at http://findarticles.com/p/articles/mi_m1355/is_16_100/ai_78966464/ [last accessed 6/26/2012 at 11:36AM EST].

⁵⁸⁷ See generally, North Carolina Innocence Inquiry Commission (NCIIC) at <http://www.innocencecommission-nc.gov/about.html> [last accessed 6/26/2012 at 11:37AM EST].

necessary in achieving accountability. Additionally, the Commission has come under criticism because of its lack of enforcing powers, since the commission may refer cases to the court for re-opening, but lacks any authority to actually cause the judge to re-open cases.⁵⁸⁸

445. Early in 2012, public outcry broke about the Illinois commission, which critics observed was “stalled, bogged down by complicated state rules and not enough money,”⁵⁸⁹ and that as of February of that year, it had not met for six months or reviewed a single case.⁵⁹⁰

(ii) Citizen Commission: Greensboro Truth and Reconciliation Commission

446. This subsection describes an Inquiry Commission organized by citizens of Greensboro, North Carolina, United States, in regard to the violent events that took place in November 3rd, 1979, in the city of Greensboro.

447. In November 3rd, 1979, the city of Greensboro was the site of a violent confrontation against members of the Ku Klux Klan and the Nazi movement, and a group of communist protesters that were demonstrating against the Ku Klux Klan. The police was absent from the scene, and the fight resulted in five demonstrators death, ten wounded and many more frightened and traumatized.⁵⁹¹

⁵⁸⁸ Ryan Haggerty, *Wheels Of Justice Grind Slowly At Commission Aiming To Help Burge Accusers State Panel Preparing To Review Its First Cases This Summer*, Chicago Tribune, March 12, 2011, available at http://articles.chicagotribune.com/2011-03-12/news/ct-met-burge-torture-commission-20110312_1_burge-accusers-chicago-police-cmdr-burge-victims [last accessed 5/30/2012 at 10:31AM EST].

⁵⁸⁹ Karen Hawkins, *Illinois Torture Panel Broke: Commission To Investigate Police Torture Running Out Of Money*, Huff Post Chicago, February 7th, 2012, available at <http://www.huffingtonpost.com/2012/02/07/illinois-torture-panel-br n 1260723.html> [last accessed 5/30/2012 at 10:40AM EST].

⁵⁹⁰ *Id.*

⁵⁹¹ Greensboro Truth and Reconciliation Commission Report Executive Summary, Presented to the residents of Greensboro, the City, the Greensboro Truth and Community Reconciliation Project and other public

448. Nearly 20 years following the shooting, Greensboro residents, inspired by the South African and Peruvian TRC, initiated the citizen commission Greensboro Truth and Reconciliation Commission (GTRC) to take public testimony and examine the causes and consequences of the massacres.⁵⁹² Although the murders were documented by several by-standing media outlets gathering news footage of the protests, all-white juries acquitted the shooters in North Carolina trials and the state never formally admitted any fault.⁵⁹³

449. The idea for GTRC came at a uniquely relevant time for the Greensboro community, whose continued struggle with “police-community trust” seemed to stagnate and alienate many individuals and groups in that area.⁵⁹⁴ The truly distinctive characteristic of this proposed commission was the complete lack of state sponsorship, which meant that the commission would not retain any Subpoena power or authority to grant the protections of amnesty.⁵⁹⁵

450. However, this perceived lack of “official authority” did not dampen the meaningful pursuit for truth and justice. According to Jill E. Williams, executive director of the Commission, the GTRC kept with the South African model and “conducted its research and community outreach by taking private statements, holding public hearings, and conducting documentary research.”⁵⁹⁶

451. Because the commission was strongly supported by the victim’s surviving family members, some opponents expressed initial worry about the potential for bias in the

bodies on May 25, 2006, available at http://www.greensborotrc.org/exec_summary.pdf [last accessed 5/30/2012 at 11:19AM EST].

⁵⁹² Williams, *supra* note 576.

⁵⁹³ *Id.*

⁵⁹⁴ *Id.*

⁵⁹⁵ See generally, Greensboro Truth and Reconciliation Commission, Final Report(2006), available at <http://www.greensborotrc.org> [last accessed 6/26/2012 at 11:38AM EST] [hereinafter Greensboro Final Report].

⁵⁹⁶ Williams, *supra* note 576, at 145.

commission's formulation and final recommendations. However, arguably, the success of the citizen commission can be attributed to its forward-looking mandate and independent selection process, which ensured community-wide legitimacy.

452. The spirit and mission of the GTRC can be summed up in an excerpt from its mandate, which reads: "there comes a time in the life of every community when it must look humbly and seriously into its past in order to provide the best possible foundation for moving into the future based on healing and hope. Many residents of this city believe that this time is now."⁵⁹⁷

D. CONCLUDING THOUGHTS ON ALTERNATIVE MODELS OF ACCOUNTABILITY AND EXTRAORDINARY RENDITION

453. This subsection concludes Part Five by highlighting features of the above-described commissions that might be useful to the organizing committee of the NC Commission of Inquiry on Torture.

454. The first feature that is worth mentioning is some of the commissions' significant efforts to define key terms at the outset of their work. As previously mentioned, establishing clear definitions of central terms is a crucial element at the initiation of an accountability commission. We can glean examples from the "Illinois Torture Inquiry and Relief Commission Act" which clearly defined both "claim of torture" and "victim" in its implementing legislation.⁵⁹⁸ Similarly, to develop a concrete collective

⁵⁹⁷ *Id.* (citing *Mandate for the Greensboro Truth and Reconciliation Commission* 1 (2003)), available at <http://www.greensborotrc.org/mandate.doc> [last accessed 6/26/2012 at 11:39AM EST].

⁵⁹⁸ See 775 Ill.Comp. Stat. 40 (2010) (defining "claim of torture" as a claim on behalf of a living person convicted of a felony in Illinois asserting that he was tortured into confessing to the crime for which the person was convicted and the tortured confession was used to obtain the conviction and for which there is

understanding of the Greensboro commission's goals, early in the initiation of the GTRC, members drafted a mandate in which they defined "truth" and "reconciliation."⁵⁹⁹

455. Along the same lines of the Greensboro and Illinois commissions, it would be helpful for a NC local inquiry on extraordinary rendition and torture to define "torture," "extraordinary rendition," "conspiracy," "accountability," and "truth," at the outset, as well as other key terms that are not yet concretely established. These definitions would provide guidelines to commissioners so that the inquiry remains consistent and relatively objective in scope.

456. Another feature worth highlighting is the division of primary responsibilities in subcommittees of the South African Commission. This feature of the SATRC provides a good model for a citizen inquiry into extraordinary rendition and torture. For example, one committee could take victim and witness testimony and issue a report of the findings, while another committee could be tasked with implementing recommendations and disseminating information to unaware citizens and key public figures.

457. Specifically helpful to our challenge in achieving accountability is the local nature of the Greensboro inquiry. The GTRC modeled itself in part after the SATRC and the CVT, but ultimately, it kept to a local model and implemented two key practices that were successfully utilized by the GTRC: (1) taking statements from a broad range of people and (2) engaging the public through hearings and discussion forums.⁶⁰⁰ Although local citizen commissions like the GTRC lack the state-sponsored authority to compel testimonies, the GTRC used "moral persuasion" as a surprisingly powerful tool in

some credible evidence related to allegations of torture committed by Commander Jon Burge or any officer under the supervision of Jon Burge).

⁵⁹⁹ *Id.* at 19 (for a definition of specific terms).

⁶⁰⁰ Greensboro Final Report, *supra* note 595, at 14.

inspiring forthcoming participation by seemingly uncooperative community members.⁶⁰¹

These strategies should be kept in mind as North Carolinians again endeavor to move forward with a commission of inquiry.

458. Very important is the Peruvian commission as a model for establishing an extensive fact-finding operation.⁶⁰² The CVT serves as an ambitious model for all truth commissions seeking to “end impunity, attend to the needs of victims, initiate state investigations and systematic reforms, gain a critical perspective to confront internal conflict, and condemn individuals and institutions for abuses.”⁶⁰³

459. This model of “truth-seeking” and extensive fact-finding is particularly helpful for specific application to a domestic accountability inquiry of extraordinary rendition and torture because it would finally allow victims’ stories to be told. As previously highlighted, efforts to engage full- fledged criminal investigations of United States officials involved in these human rights abuses have been largely stunted and ignored. Thus, it becomes even more important that the victims’ stories be heard publicly and collectively released in a report to gather political support for a domestic accountability movement.

460. When properly instituted, the truth commission models addressed above can allow a community to gain a detailed understanding of the institutional gaps and instrumental players which led to the initial failures in government performance. Under both the South African and Peruvian truth commission models, victims and responsible actors are

⁶⁰¹ *Id.* at 15

⁶⁰² First step, *supra* note 575, at 2-3

⁶⁰³ *Id.*

prompted to provide testimony. This process serves to set straight the historical record, initiate policy reform and restore citizen faith in justice and accountability.⁶⁰⁴

461. Finally, it is important to remember that the detention of non-citizens outside U.S. territory makes accountability for extraordinary rendition and torture ultimately different from accountability for nation-wide violations, such as those that took place in the apartheid.⁶⁰⁵ Thus, scholars have suggested that the SATRC model should be distinguished from a domestic inquiry commission on extraordinary rendition and torture,⁶⁰⁶ because “we are not trying to coax former adversaries together to build a new nation; rather, we need to renew our commitment to human rights and the rule of law and prevent future abuses.”⁶⁰⁷ It has thereby been suggested that any model for accountability would have to be accompanied by a repudiation of “secret laws,” or laws carried out in secret to facilitate counter-terrorism tactics following 9-11.⁶⁰⁸

⁶⁰⁴ Bhargava, *supra* note 564.

⁶⁰⁵ *Id.*

⁶⁰⁶ *See e.g.* Brown, *supra* note 265.

⁶⁰⁷ *See e.g.* Balkin, *supra* note 425 .

⁶⁰⁸ *Id.*

GENERAL CONCLUSION

North Carolina Citizen's Commission of Inquiry seeks accountability for actions of the State of North Carolina including its political subdivisions, and Aero Contractor's role in the extraordinary rendition and torture of many individuals. In particular, this commission seeks to raise awareness about human rights violations under both international and domestic law perpetrated by Aero Contractors and the corresponding failure of North Carolina and its citizens to curtail Aero's operations. This briefing book proposes a legal framework by which to consider the obligations of countries, states, and individuals to abstain from extraordinary rendition and torture and describes existing accountability models that may help guide the North Carolina Citizen's Commission of Inquiry.

The first Part of this briefing book makes a factual account of the extraordinary renditions of five men, and that are representative of the stories of many others who have been extraordinary rendered also. Part Two of this briefing book reviewed the international treaties and norms that apply to extraordinary rendition and torture. It set forth international obligations of governments and individuals to refrain from torture and rendering individuals to countries or places where they were likely or certain to be tortured. Such principles include the United Nations Declaration of Human Rights, the International Covenant on Civil and Political Rights ("ICCPR") and the Convention Against Torture ("CAT") as well as commentary by the United Nations Human Rights Committee. The analysis offered by these instruments illustrates the obligations of governments to abstain from and protect against extraordinary rendition and torture.

Following this analysis of the International legal norms, Part Three of this briefing book addressed the domestic law issues that pertain to extraordinary rendition and torture. A discussion of the U.S. Constitution and its supremacy over conflicting state law demonstrated how states must comply with federal laws that prohibit extraordinary rendition and torture. An analysis of federal laws and President Bush's recent executive orders yielded indications of the strengths, weaknesses of both as to prohibiting extraordinary rendition and torture. This section also discusses several attempts through domestic litigation to challenge the United States' policies on extraordinary rendition and torture.

Part Four of this briefing book sought to apply many of the international and domestic human rights obligations with reference to third-party accountability of the State of North Carolina, the direct accountability of Aero Contractors, and bystander responsibility of the citizenry of North Carolina for extraordinary rendition and torture. This analysis attempted to synthesize the obligations and responsibilities of North Carolina, Aero Contractors, and the people of North Carolina through a discussion of International human rights treaties, domestic and international court rulings, as well as the interpretation of these obligations by human rights scholars. In particular, the bystander responsibility obliges the people of North Carolina to take proactive steps, including lobbying the North Carolina government to hold Aero Contractors accountable for its actions. Creating such a movement is an integral aspect of this Commission's goal of accountability.

Part Five of this briefing book discusses the various accountability models that have been developed both nationally and internationally. This portion of the briefing

book begins with domestic efforts for accountability, such as those of Senator Leahy. It continues by analyzing the more successful efforts of Commissions of Inquiry in other countries such as Canada, the United Kingdom, and Germany. This section focuses on the different models for accountability Commissions ranging government sponsored inquiries to citizen commissions.

This briefing book has attempted to illustrate the legal foundation for this Commission's call for accountability. Additionally, it has attempted to outline the various accountability models that have been developed around the country and throughout the world to guide this Commission as it takes its next steps toward formalizing its inquiry. With regard to North Carolina and Aero Contractors' accountability, it will be necessary to think normatively, taking current human rights obligations and applying them in a new form to prevent these horrendous acts from occurring in the future.

The Commission must also focus on the citizens of North Carolina, raising awareness of their role as bystanders in developing a collective memory of extraordinary rendition, torture and its history in North Carolina. The legal foundation for accountability exists. Various accountability models illustrate the different paths that the Commission can take to realize those legal principles. This briefing book can serve as a resource for the Commission in its ongoing mandate for accountability for extraordinary rendition and torture in the State of North Carolina.