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**Extraordinary Rendition and Torture  
What the Narratives of Victims Reveal and  
Require**

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## Extraordinary Rendition and Torture What the Narratives of Victims Reveal and Require

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### I. History of the Extraordinary Rendition Program

Extraordinary rendition, as it was practiced post-September 11, 2001, and as it is described in the pages that follow, connotes the latest iteration of a program that has a much longer history. Before briefly surveying the program's history, it is helpful to consider its definition. According to the Open Society Justice Initiative, no official U.S. government definition of the program exists,<sup>1</sup> despite the fact that it is the U.S. government that was responsible for designing and implementing it. The Open Society formulated its own definition as “the transfer—without legal process—of a detainee to the custody of a foreign government for purposes of detention and interrogation.”<sup>2</sup>

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<sup>1</sup> OPEN SOCIETY JUSTICE INITIATIVE, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 13 (2013), <https://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>.

<sup>2</sup> *Id.*

The lawful practice of arresting and forcibly transporting people from one place to another to face criminal prosecution is not a new phenomenon<sup>3</sup> and exists to this day.<sup>4</sup> The practice is often protracted and can require many steps and oversight, especially when it involves removing someone from one international jurisdiction to another. During the 1980s, when the U.S. government grew frustrated with the slow pace of extraditions they developed an alternative approach to circumvent the proper diplomatic channels.<sup>5</sup> In the case of *United States v. Alvarez-Machain*,<sup>6</sup> a Mexican medical doctor who was charged with the kidnap and murder of a U.S. Drug Enforcement Administration (“DEA”) agent was forcibly kidnapped while at his office in Guadalajara and flown by private airplane to Texas to face criminal charges, at the behest of the DEA.<sup>7</sup> Several years later when his case was before the Supreme Court, the Court held that despite the fact that Alvarez-Machain’s extradition occurred outside the bounds of the proscribed extradition treaty, it was nonetheless lawful.

Respondent and his *amici* may be correct that respondent’s abduction was ‘shocking,’ and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the

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<sup>3</sup> See, e.g., *Ker v. Illinois*, 119 U.S. 436, 437–38 (1886) (upholding the forcible and violent arrest, detention, and extradition of an American man from Peru to the United States to face charges of larceny and embezzlement); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (“This Court has never departed from the rule announced in *Ker v. Illinois*, 119 U.S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a ‘forcible abduction.’ No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.”).

<sup>4</sup> See, e.g., 18 U.S.C. § 3182 (2016) (providing for the extradition of fugitive criminals between states and territories within the United States); § 3184 (providing for the extradition of fugitives from foreign countries to the United States when authorized by treaty or convention).

<sup>5</sup> JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* 188 (2006).

<sup>6</sup> 504 U.S. 655 (1992).

<sup>7</sup> *Id.* at 657.

Executive Branch. We conclude however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico, and therefore the rule of *Ker v. Illinois* is fully applicable to this case. The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.<sup>8</sup>

After getting the green light from the judiciary this process, referred to then as rendition to justice,<sup>9</sup> was not only used to facilitate the prosecution of those involved with drug conspiracies, but also suspect terrorists.<sup>10</sup> One important characteristic that differentiates rendition to justice from its successor, extraordinary rendition, is that because suspects were transferred to the United States and prosecuted in the U.S. criminal justice system, suspects were afforded all of the traditional protections that extend to criminal defendants.<sup>11</sup>

With the rise of terrorism and the difficulties that abounded with obtaining formal criminal charges against suspected terrorists, the rendition to justice program was altered. The U.S. government, during the Clinton Administration, began to partner with third countries that ostensibly agreed to arrest, detain, interrogate, and prosecute terrorist suspects.<sup>12</sup> What took place in reality was quite different—most of the partnering countries were some of the world's most egregious abusers of human rights, including

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<sup>8</sup> *Id.* at 699–70 (internal citations to the record omitted).

<sup>9</sup> See OPEN SOCIETY, *supra* note 1, at 14 (“In 1986, in National Security Decision Directive 207, President Ronald Reagan reportedly authorized ‘renditions to justice’ into the United States for suspects to face criminal charges, but only from locations where the U.S. government could not secure custody through extradition procedures, for example in countries where no government exercised effective control; countries known to plan and support international terrorism; and international waters or airspace.”).

<sup>10</sup> See Margulies, *supra* note 5, at 188 (describing the renditions to justice of Ramzi Yousef in 1995 for his role in the first World Trade Center bombing as well as the renditions of those involved with the 1998 U.S. Embassy bombings in Kenya and Tanzania).

<sup>11</sup> See Margulies, *supra* note 5, at 188–89 (“[I]n the very case in which the Supreme Court approved the [rendition to justice] practice, involving a Mexican doctor . . . the defendant was acquitted at trial and released.”).

<sup>12</sup> See OPEN SOCIETY, *supra* note 1, at 14.

Egypt.<sup>13</sup> Michael Scheuer, who was intimately involved with designing the policy, testified before Congress:

I would not, however, be surprised if their treatment was not up to US standards. This is a matter of no concern as the Rendition Program's goal was to protect America, and the rendered fighters delivered to Middle Eastern governments are now either dead or in places from which they cannot harm America. Mission accomplished, as the saying goes.<sup>14</sup>

The terrorist attacks of September 11, 2001, provided the impetus needed to further alter and greatly expand the rendition program yet again, transforming it into what is now referred to as the extraordinary rendition program.<sup>15</sup> The goal was no longer criminal prosecution but instead simply detention and interrogation.<sup>16</sup> “After 9/11 the gloves came off,” described Cofer Black, former head of the CIA’s Counterterrorism Center, before Congress.<sup>17</sup> Another official remarked: “We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.”<sup>18</sup>

On September 17, 2001, six days after the attacks, President George W. Bush signed the Memorandum of Notification providing “unprecedented authorities, granting the CIA significant discretion in determining whom to detain, the factual basis for the detention, and the length of detention.”<sup>19</sup> Those captured were no longer rendered to the

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<sup>13</sup> *Id.*

<sup>14</sup> INTERNATIONAL BAR ASSOCIATION, EXTRAORDINARY RENDITIONS: AN INTERNATIONAL BAR ASSOCIATION HUMAN RIGHTS INSTITUTE BACKGROUND PAPER 54 (Jan. 2009), [http://www.ibanet.org/Human\\_Rights\\_Institute/About\\_the\\_HRI/HRI\\_Activities/Guantanamo\\_Extraordinary\\_renditions.aspx](http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/Guantanamo_Extraordinary_renditions.aspx) (citing Scheuer’s testimony before the U.S. House Committee on Foreign Affairs on Apr. 17, 2007).

<sup>15</sup> See OPEN SOCIETY, *supra* note 1, at 14–15.

<sup>16</sup> *Id.*

<sup>17</sup> Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations*, WASH. POST (Dec. 26, 2002), <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html>.

<sup>18</sup> *Id.*

<sup>19</sup> SENATE SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM 11 (Dec. 3, 2014).

custody of foreign governments, but were in many cases rendered to secret, U.S.-run prisons overseas, known as “black sites,” and the not-so-secret U.S.-run prison in Guantanamo Bay, Cuba.<sup>20</sup> The official justification for this approach echoed the theme articulated above by Michael Scheuer: “[T]he successful defense of the country requires that the [CIA] be empowered to hold and interrogate suspected terrorists for as long as necessary and without restrictions imposed by the U.S. legal system or even by the military tribunals established for prisoners held at Guantanamo Bay.”<sup>21</sup>

These extraordinary renditions were eventually coupled with the CIA’s Enhanced Interrogation Techniques. These techniques amounted to torture and abuse and included subjecting suspects to walling,<sup>22</sup> water dousing, waterboarding, stress positions,<sup>23</sup> wall standing,<sup>24</sup> cramped confinement in a box, insult slaps,<sup>25</sup> facial holds,<sup>26</sup> attention grasps,<sup>27</sup> forced nudity, sleep deprivation, exposure to cold temperatures, and dietary manipulation to name a few of the most common techniques.<sup>28</sup> After the Senate Select Committee on Intelligence reviewed the abuses and mistakes made between 2001 and early 2009 and reduced their findings and conclusions to a report that totals almost 7,000 pages, the Chairman of the Committee, Senator Dianne Feinstein, concluded

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<sup>20</sup> Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST (Nov. 2, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.

<sup>21</sup> *Id.*

<sup>22</sup> This technique involved “quickly pulling the detainee forward and then thrusting him against a flexible wall.” OPEN SOCIETY, *supra* note 1, at 16.

<sup>23</sup> Described as “forcing the detainee to remain in body positions designed to induce physical discomfort.” OPEN SOCIETY, *supra* note 1, at 16.

<sup>24</sup> “[F]orcing the detainee to remain standing with his arms outstretched in front of him so that his fingers touch wall four to five feet away and support his entire body weight.” OPEN SOCIETY, *supra* note 1, at 16.

<sup>25</sup> “[S]lapping the detainee on the face with fingers spread.” OPEN SOCIETY, *supra* note 1, at 16.

<sup>26</sup> “[H]olding a detainee’s head temporarily immobile during interrogation with palms on either side of the face.” OPEN SOCIETY, *supra* note 1, at 16.

<sup>27</sup> “[G]rasping the detainee with both hands, one hand on each side of the collar opening, and quickly drawing him toward the interrogator.” OPEN SOCIETY, *supra* note 1, at 16.

<sup>28</sup> See OPEN SOCIETY, *supra* note 1, at 16–17.

The major lesson of this report is that regardless of the pressures and the need to act, the Intelligence Community's actions must always reflect who we are as a nation, and adhere to our laws and standards. It is precisely at these times of national crisis that our government must be guided by the lessons of our history and subject decisions to internal and external review. Instead, CIA personnel, aided by two outside contractors, decided to initiate a program of indefinite secret detention and the use of brutal interrogation techniques in violation of U.S. law, treaty obligations, and our values.<sup>29</sup>

The personal narratives that are attached to this report serve to document just a few of the stories of the survivors of the U.S. extraordinary rendition program and enhanced interrogation techniques.

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<sup>29</sup> See SENATE SELECT COMMITTEE ON INTELLIGENCE, *supra* note 19, at Foreword.

## II. Torture and its Long-Term Effects

When considering its nature and manifestations, the examination of torture becomes a challenging endeavor. Torture does not limit itself to just one standard definition – it has in fact been defined and interpreted by a wide range of stakeholders across the human rights arena. Universally, however, it can be understood as being a means of “dismantling . . . a person’s identity and humanity.”<sup>30</sup> By instilling a climate of fear, the existence of torture is particularly concerning as it purports to annihilate a collective sense of community across society.<sup>31</sup>

The Center for Victims of Torture (“CVT”), which engages in research and services for torture survivors, operates at the forefront of the anti-torture movement by working to promote “truth, reform, accountability and redress for torture committed by the United States post-9/11” and to seek “indefinite detention at Guantanamo.”<sup>32</sup> The short and long-term effects of torture have been the subject of countless empirical studies – many of which have been conducted by the CVT – that pertain to experiences of trauma and solitary confinement. While not the only organization<sup>33</sup> of its kind, the CVT has developed clinical assessment tools to monitor the healing process of torture survivors for the purpose of

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<sup>30</sup> *Effects of Torture*, CTR. VICTIMS TORTURE 1 (2015), available at <http://www.cvt.org/sites/cvt.org/files/downloads/CVT%20Effects%20Torture%20April%202015.pdf>.

<sup>31</sup> *Id.*

<sup>32</sup> *Ending Torture in a Post 9/11 World*, CTR. VICTIMS TORTURE (accessed Apr. 9, 2017), <http://www.cvt.org/ending-torture> [https://perma.cc/44F5-4LKG].

<sup>33</sup> Although the CVT remains a leader in the torture rehabilitation movement, there are a number of other domestic and international organizations that also work to advance human rights on the legal front by conducting research and advocacy initiatives. These include, but are not limited to, the American Civil Liberties Union, Center for Constitutional Rights, Reprieve, Open Society Justice Initiative, Human Rights Watch, Amnesty International, Association for the Prevention of Torture, National Religious Campaign Against Torture, and Witness Against Torture.



gathering information about the effects of torture and the efficacy of current treatment methods.<sup>34</sup>

A 2015 study published by the CVT underscores the fact that torture is a “strong predictor of a broad range of debilitating and lasting physical and mental health conditions.”<sup>35</sup> The long-term physical effects of torture range from neurological damages to more systemic failures, such as abdominal pains, and cardiovascular and respiratory problems.<sup>36</sup> They also often include chronic headaches, musculoskeletal pains, scars, and hearing loss.<sup>37</sup> For many torture survivors who endure sustained suspension throughout the course of their detention, the “unnatural strain” they experience “can cause dislocation of muscles and ligaments” along with other muscular disorders.<sup>38</sup> Individuals who suffer habitual beatings are frequently left with internal bleeding and deep muscle bruising, as well as eye trauma.<sup>39</sup>

As far as the prolonged, systemic physical effects of torture are concerned, it is not uncommon for survivors to experience infectious diseases, arterial clogs, restricted blood flow, decreased enzyme activities, and memory loss.<sup>40</sup> Individuals who were habitually subjected to handcuffs, leg irons, and shackles suffer “scarring and severe skin

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<sup>34</sup> See generally *Research: Evaluating Torture Survivor Care*, CTR. VICTIMS TORTURE (accessed Apr. 9, 2017), <http://www.cvt.org/what-we-do/research> [<https://perma.cc/CXA9-VWXS>] (discussing the CVT’s evaluation and monitoring operations of the progress of torture survivors).

<sup>35</sup> Craig Higson-Smith, *Updating the Estimate of Refugees Resettled in the United States Who Have Suffered Torture*, CTR. VICTIMS TORTURE 1, 1 (2015), [http://www.cvt.org/sites/cvt.org/files/SurvivorNumberMetaAnalysis\\_Sept2015\\_0.pdf](http://www.cvt.org/sites/cvt.org/files/SurvivorNumberMetaAnalysis_Sept2015_0.pdf).

<sup>36</sup> See *supra* note 30, at 1.

<sup>37</sup> *Id.*

<sup>38</sup> Deborah M. Weissman et al., *Brief in Support of Abou Elkassim Britel’s Request for Reparations and an Official Apology for Extraordinary Rendition and Torture*, UNC SCH. L. HUM. RTS. POL’Y SEMINAR 1, 41 (2014), <http://www.law.unc.edu/documents/academics/humanrights/britelbrief.pdf>.

<sup>39</sup> See *id.* at 41.

<sup>40</sup> See *id.* at 41-42.

abrasions.”<sup>41</sup> Higher rates of head injury, amputations, and poorly healed fractures are also frequent physical impairments that can permanently result from torture.<sup>42</sup>

However, forms of torture are often described as being much more egregious in their psychological effects than in their physical or physiological effects. These include a range of offenses including verbal abuses, shaming and humiliation, being coerced into witnessing the torture, murder, and/or mutilation of loved ones, succumbing to ongoing threats against loved ones, and experiencing mock executions.<sup>43</sup> Shame in particular arises as a dominant emotion when victims have experienced forced betrayal and sexual assault (including rape) at the hands of their perpetrators.<sup>44</sup> However, because these and other methods of psychological torture do not leave visible scars, it often becomes increasingly difficult for survivors to seek any kind of redress for the pain they have incurred.<sup>45</sup> It also becomes a major challenge for them to disclose sensitive and personal information to medical practitioners, social workers, attorneys, and family members in the aftermath of their trauma, as they tend to feel extreme guilt and humiliation for having gone against a firm cultural and/or moral belief.<sup>46</sup>

Other established literatures communicate the ways in which an individual’s exposure to psychologically shocking episodes can severely impair his or her memory.<sup>47</sup>

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<sup>41</sup> *Id.* at 41.

<sup>42</sup> *Id.*

<sup>43</sup> *See supra* note 30, at 1.

<sup>44</sup> *See* Jane Herlihy & Stuart Turner, *Should Discrepant Accounts Given By Asylum Seekers Be Taken As Proof Of Deceit?*, 16 *TORTURE* 81, 85 (2006).

<sup>45</sup> *See supra* note 30, at 1.

<sup>46</sup> *See* Herlihy & Turner, *supra* note 44.

<sup>47</sup> *See generally* Elizabeth F. Loftus & Terrence E. Burns, *Mental shock can produce retrograde amnesia*, *MEMORY & COGNITION* 318 (1982) (detailing the methodology and results of three experiments in which some subjects were shown a brief film of a mentally shocking event, while others were shown a nonviolent version of that same film; subjects who saw the mentally shocking version demonstrated a poorer retention of the film to follow).

This phenomenon, more commonly referred to as “retrograde amnesia”, results from reoccurring incidents that affect the retrieval of information that is embedded in human memory.<sup>48</sup> A series of experiments dating from the early 1980s that attempted to shed light on the existence of retrograde effects of torture corroborated the theory that mental shock also disrupts memory-processing units that are used to store and recall information.<sup>49</sup> They demonstrated how “the type of details recalled of an event can depend on how distressing the event is to the witness.”<sup>50</sup>

Based on their exposure to psychologically disruptive events that operate outside the purview of typical human experience, it is no surprise that the vast majority of torture survivors suffer from major depression and post-traumatic stress disorder (“PTSD”). A common symptom of both effects is an individual’s impairment of concentration, though one may frequently find him or herself struggling to recall significant aspects of the trauma altogether.<sup>51</sup> Effects of depression on memory are typically implicated with a bias towards the recollection of events “with negative meaning for the self and a difficulty remembering specific events, preferring instead general descriptions of past periods.”<sup>52</sup> Traumatic memories share a common characteristic of being fragments, and usually sensory impressions, of the past.<sup>53</sup> In certain situations, they are often experienced in the present tense, and do not seem to be under one’s conscious control because they are triggered by sensations that cause him or her to evoke emotions felt at the time of the original experience itself.<sup>54</sup>

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<sup>48</sup> *Id.* at 318.

<sup>49</sup> *Id.* at 318-21.

<sup>50</sup> Herlihy & Turner, *supra* note 44, at 86.

<sup>51</sup> See Herlihy & Turner, *supra* note 44, at 85.

<sup>52</sup> *Id.*, at 86.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

An individual's likelihood of developing PTSD and experiencing its impact is magnified when he or she suffers a combination of torture techniques.<sup>55</sup> However, no isolated form of abuse can independently predict the likelihood of developing these long-term effects.<sup>56</sup> There are three main clusters of PTSD symptoms that are worth noting: (1) avoidance; (2) hyper-arousal; (3) negative alterations in mood or cognition; and (4) re-experience.<sup>57</sup>

Avoidance, or numbing, is a common symptom that is colored by feelings of dissociation, isolation, hopelessness, withdrawal, and emotional anesthesia.<sup>58</sup> Survivors often find themselves preoccupied with avoidance of their tortuous experiences altogether as a means of shifting the focus of their life to something entirely unrelated to it. For some, the sensation of dissociation disrupts their integrated functions of identity, memory, perception, and consciousness.<sup>59</sup> In one particular study of torture survivors who were experiencing PTSD, it was found that symptoms of avoidance and emotional numbing were more prominent when these individuals had suffered a history of sexual torture.<sup>60</sup>

Hyper-arousal can be viewed as a type of 'fight or flight' response in which survivors frequently find themselves having trouble concentrating due to their intense vigilance to their surroundings.<sup>61</sup> Negative alterations in mood or cognition is a fairly

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<sup>55</sup> See Devin Powell, *The Lingering Effects of Torture*, CTR. STUDY HUM. RTS. AM. para. 19 (2009), [http://humanrights.ucdavis.edu/in\\_the\\_news/the-lingering-effects-of-torture](http://humanrights.ucdavis.edu/in_the_news/the-lingering-effects-of-torture) [<https://perma.cc/8VTH-Z6QY>].

<sup>56</sup> *Id.*

<sup>57</sup> Skype Interview with Alison Beckman, Project Manager, The Center for Victims of Torture (Feb. 22, 2017).

<sup>58</sup> See Lynn Margolies, *Understanding the Effects of Trauma: Post-traumatic Stress Disorder (PTSD)*, PSYCH CENT. para. 5 (2017), <https://psychcentral.com/lib/understanding-the-effects-of-trauma-post-traumatic-stress-disorder-ptsd/> [<https://perma.cc/L8PQ-YGNM>].

<sup>59</sup> See Herlihy & Turner, *supra* note 44, at 85.

<sup>60</sup> *Id.*

<sup>61</sup> See *supra* note 28; see also Margolies, *supra* note 58, at para. 3.

newer symptom of torture recognized by the mental health community, but includes a series of negative thoughts or beliefs about a survivor's own self or the world around them.<sup>62</sup> In diminishing their own tortuous experiences with regards to someone else's, survivors resort to self-blame and guilt. It is also common for survivors to experience nightmares and flashbacks that relate to their trauma. Re-experiencing the trauma through means of intrusive thoughts or memories serve as triggers, irrespective of their willingness to forget the painful traces of their past.<sup>63</sup>

In addition to experiencing the symptoms and lasting effects of depression and PTSD, many torture survivors find themselves battling somatization, as well as the “existential dilemma” of how their core beliefs about the world at large have been severely undermined.<sup>64</sup> Somatic symptoms stem from an underlying depression and are “usually culture-specific expressions of emotional distress”.<sup>65</sup> They manifest themselves as a chronic condition in which a torture survivor experiences physical symptoms involving more than one part of his or her body, while no physical cause can in fact be traced.<sup>66</sup> Additionally, individuals who are grounded in a strong sense of faith and spirituality often find themselves struggling the most to reconcile their sense of reality after their experiences of ongoing torture.

The effect of solitary confinement – another dimension of torture – has also been a significant consequence and focus of concern. The vast majority of torture survivors have

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<sup>62</sup> See Sara Staggs, *Symptoms & Diagnosis of PTSD*, PSYCH CENT. para. 10 (2017), <https://psychcentral.com/lib/symptoms-and-diagnosis-of-ptsd/> [https://perma.cc/F59Z-QX68].

<sup>63</sup> See *supra* note 57.

<sup>64</sup> Herlihy & Turner, *supra* note 44, at 84.

<sup>65</sup> Richard F. Mollica, *Surviving Torture*, 351 NEW ENG. J. MED. 5, 7 (2004).

<sup>66</sup> *Somatization Disorder*, N.Y. TIMES para. 1 (accessed Apr. 9, 2017), <http://www.nytimes.com/health/guides/disease/somatization-disorder/overview.html> [https://perma.cc/YH9N-HABB].

experienced prolonged isolation and have suffered a range of negative psychological and physiological reactions as a result.<sup>67</sup> Under many circumstances of solitary confinement, psychological torture is said to affect the victim's physiological pain system altogether.<sup>68</sup> Some of the most common long-term effects of solitary confinement include dizziness, self-mutilation, perceptual distortions and hallucinations, hypersensitivity to external stimuli, rage and irrational anger, chronic depression, and appetite and weight loss.<sup>69</sup>

The long-term effects of pervasive torture are often irreversible. Torture has the unfortunate outcome of normalizing and perpetuating a culture of violence, and at the same time, it presents deleterious consequences for the individuals it involves.<sup>70</sup> These include, but are not limited to, "toxic levels of guilt and related self-harm" such as suicide.<sup>71</sup> Torture survivors also frequently struggle with establishing a sense of trust in others, including any individuals who are in a position of authority to help them heal and regain their willpower. Given the widespread impact of torture beyond the perpetrator and victim, the resources that describe the pernicious and long-term effects of torture should be widely available within the national and international policy domain. It is common knowledge that experiences of torture can shatter an individual's sense of existence, but it is crucial for the

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<sup>67</sup> Memorandum from Chelsea Matson, Humphrey Fellow, Center for Victims of Torture to Annie Sovcik, Director of the Washington Office, Center for Victims of Torture (Aug. 5, 2015) (on file with the Center for Victims of Torture).

<sup>68</sup> See generally Sarah Griffiths, *The pain of torture lasts FOREVER: Psychological trauma can permanently affect the way our body feels discomfort*, DAILY MAIL (Nov. 7, 2013, 11:47 AM), <http://www.dailymail.co.uk/sciencetech/article-2490857/The-pain-torture-lasts-FOREVER-Psychological-trauma-permanently-affect-way-body-feels-discomfort.html> [<https://perma.cc/2QAC-7KWM>] (discussing how POWs commonly suffer from 'dysfunctional pain perception and regulation' as long-term physiological effects of their torture).

<sup>69</sup> See *supra* note 67, at 1.

<sup>70</sup> See Danielle Celermajor & Glenn Carle, *Torture causes long-term harm to more than just the initial victims*, SYDNEY MORNING HERALD paras. 11-12 (2012), <http://www.smh.com.au/federal-politics/political-opinion/torture-causes-longterm-harm-to-more-than-just-the-initial-victims-20120517-1ytjz.html> [<https://perma.cc/KRU9-SELU>].

<sup>71</sup> *Id.* at para. 12.

extent of the impact to be known among decision makers so that they can better understand the inhumanity and dire consequences of the practice in its entirety, in addition to its illegality.

The survivors of torture whose narratives are embedded in this report all suffered unthinkable acts of psychological and physical torture. While some – such as Mamdouh Habib, Saifullah Paracha, Abdel Hakim Belhadj, Fatima Bouchar, and Mohamadouh Slahi – have appeared to be more resilient and public about their pains and sufferings than others, others have chosen to deal with their trauma in a more private fashion. In communicating all of their stories, however, it is our hope that acknowledging the extent of their torture will corroborate the fact that they all will endure effects of torture for an indefinite period of time, and that such acknowledgment provides some measure of relief.

### **III. The Role of Islamophobia in the Extraordinary Rendition and Torture Program**

The Extraordinary Rendition and Torture program was a clear violation of international norms, treaties, U.S. federal, and state laws. The details of the program also evinced rising Islamophobia in American foreign policy, which corresponded with a similar rise in hostility towards Muslims in America.

In the year 2001, following the attacks of September 11<sup>th</sup>, hate crimes against Muslims increased 1,600% compared to the prior year. In the foreword to their annual hate crime report, the FBI attributed that change to these attacks. The FBI reported that “data showed there were 481 incidents made up of 546 offenses having 554 victims of crimes motivated by bias toward the Islamic religion”.<sup>72</sup> Although President Bush swiftly denounced these crimes, at the same time, the United States began targeting Muslims at home and abroad.<sup>73</sup> After 9/11, the Bush Administration instituted the National Security Entry-Exit Registration System (NSEERS). NSEERS required the registration of all males 16 years of age or older from 25 listed countries. Each country on the list was majority-Muslim, with the exception of North Korea. Until the Obama Administration suspended activities in 2011, the United States monitored over 80,000 people using this program, disproportionately affecting Muslims.<sup>74</sup>

Islamophobia cannot be divorced from the government’s Extraordinary Rendition and Torture program. The religion of the detainees was a critical factor that motivated

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<sup>72</sup> FBI Uniform Crime Reporting, at <https://ucr.fbi.gov/hate-crime/2001>.

<sup>73</sup> Bush denounces Muslim harassment, September 17, 2001, at <http://www.cnn.com/2001/US/09/17/gen.hate.crimes/>.

<sup>74</sup> Nadeem Muaddi, The Bush-era Muslim registry failed. Yet the US could be trying it again, Dec. 22, 2016 <http://www.cnn.com/2016/11/18/politics/nseers-muslim-database-qa-trnd/>.



those who perpetrated torture and influenced their willingness to engage in such acts, the methods of torture that were used, and the extent of torture that was carried out. CIA officials stated their belief that it was necessary to enhance the torture of Muslim detainees based upon the government's interpretation of Islam. Indeed, it was more than just a tactic used by some interrogators; it was policy. During the Senate hearings on torture, CIA Director Michael Hayden testified:

This proposed program you have in front of you has been informed by our experience and it has been informed by the comments of our detainees. It's built on the particular psychological profile of the people we have and expect to get ~ al-Qa'ida operatives. Perceiving themselves true believers in a religious war, detainees believe they are morally bound to resist until Allah has sent them a burden too great for them to withstand. At that point—and that point varies by detainee—their cooperation in their own heart and soul becomes blameless and they enter into this cooperative relationship with our debriefers.<sup>75</sup>

The Senate report found no evidence of this claim, stating: “CIA records do not indicate that CIA detainees described a religious basis for cooperating in association with the CIA's enhanced interrogation techniques”.<sup>76</sup>

The CIA attempted to offer support for this belief with dubious anecdotes. A redacted CIA official testified that one detainee, Abu Zubaydah, actually expressed gratitude for this practice. The CIA official stated:

In terms of the totality of the experience, [Zubaydah's] advice was I may have been the first person, but you need to continue to do this because I will continue to be the religious believing person I am, but you had to get me to the point where I could have absolution from my god to cooperate and deal with your questions. So he thanked us for bringing him to that point, beyond which he knew his religious beliefs absolved him from cooperating with us.

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<sup>75</sup> Senate Intelligence Committee Study on CIA Detention and Interrogation Program (hereinafter Senate Torture Report) at 485-486 at <https://www.amnestyusa.org/pdfs/sscistudy1.pdf> .

<sup>76</sup> *Id.*

The Senate Report found no evidence in the CIA records for this claim.<sup>77</sup>

### Specific Practices

The 2009 Senate report on the treatment of detainees revealed practices specifically targeting religion:

A memo dated January 17, 2003 also described techniques "used" against Khatani between November 23, 2002 and January 16, 2003, including stripping, *forced grooming*, invasion of space by a female interrogator, treating Khatani like an animal, using a military working dog, and *forcing him to pray to an idol shrine*. These techniques are similar to techniques used in SERE [Survival, Evasion, Resistance, and Escape] school. In fact, JPRA [Joint Personnel Recovery Agency] training slides, identified by a JPRA instructor as those presented to interrogation personnel deploying for GTMO, identified "*religious disgrace*" and "invasion of personal space by a female" as methods to defeat resistance.<sup>78</sup>

In his book, *Guantanamo Diary*, that describes his ordeal as a victim of the torture program, Mohamedou Ould Slahi recalls the punishments for engaging in Muslim prayer. On one occasion, he was punched in the mouth for attempting to pray.<sup>79</sup> He was also prevented from taking part in tradition religious practices; in fact, his guards were given specific orders to take steps to deny him from engaging in certain religious activities.<sup>80</sup> They threatened him with beatings, and also threatened to dump ice water over him while he they held him in a freezing room. He recalls: "I was also forbidden to fast during the sacred month of Ramadan October 2003, and fed by force".<sup>81</sup>

Guards and Interrogators used the Quran to inflict psychological damage on Muslim detainees as well.

Former detainees say it has been handled with disrespect by guards and interrogators—written in, ripped or cut with scissors, squatted over,

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<sup>77</sup> *Id.*, at 487.

<sup>78</sup> *Inquiry Into the Treatment of Detainees in U.S. Custody* 88-89 (emphasis added) (2009).

<sup>79</sup> Mohamedou Ould Slahi, *Guantánamo Diary* 252 (2015)

<sup>80</sup> *Id.* at 334.

<sup>81</sup> *Id.* at 231.

trampled, kicked, urinated and defecated on, picked up by a dog, tossed around like a ball, used to clean soldiers' boots, and thrown in a bucket of excrement.<sup>82</sup>

In an article for *Commonweal Magazine*, Michael Peppard recalls the experience of Jumah al-Dossari to show an example of how interrogators exploited Islamic rules about ritual impurity to torment detainees:

“During al-Dossari’s torture, a female interrogator had his clothing cut off, then removed her own and stood over him. Just before wiping what she said was menstrual blood on his face, she kissed the crucifix on her necklace and said, ‘This is a gift from Christ for you Muslims.’”<sup>83</sup>

Peppard describes other practices aimed at this same goal:

A Guantánamo detainee informed Capt. Yee that a group of prisoners had been forced to “bow down and prostrate” themselves inside a makeshift “satanic” shrine, where interrogators made them repeat that Satan, not Allah, was their God. Others told of being draped in Israeli flags during interrogation, a claim corroborated by the FBI, while one interrogator explicitly told al-Dossari that “a holy war was occurring, between the Cross and the Star of David on the one hand, and the Crescent on the other.”<sup>84</sup>

The sentiment of a war against Islam carried over into other military practices too.

There were overt displays of animus such as the U.S. soldier defacing and firing on a Quran for target practice in Radhwaniya, Iraq.<sup>85</sup>

The military also routinely adopted “Crusader” imagery during the 2000s, evoking the medieval holy wars against Muslims. A marine squadron adopted the

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<sup>82</sup> Michael Peppard, *The Secret Weapon, Religious Abuse in the War on Terror*, Nov. 30, 2008 at <https://www.commonwealmagazine.org/secret-weapon>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *U.S. Soldier Uses Quran For Target Practice; Military Apologizes*, May 18, 2008, at <http://www.cnn.com/2008/WORLD/meast/05/17/iraq.quran/>

nickname and logo.<sup>86</sup> The sign prominently featuring a crusader outside an Army base in Hawaii.<sup>87</sup> There were framed posters of crusaders in an Air Force Base in Idaho.<sup>88</sup>

### **Current Relevance and Consequences**

The issue of Islamophobia remains relevant to the current administration. Mike Pompeo, the current director of the CIA, has made numerous statements about the Muslim community. In a 2013 speech on the House floor, Pompeo (incorrectly)<sup>89</sup> claimed Muslim leaders failed to condemn the Boston Marathon Bombing, stating “[i]nstead of responding, silence has made these Islamic leaders across America potentially complicit in these acts, and more importantly still, in those that may well follow.”<sup>90</sup> Following his 2013 remarks, in 2014, before a church group in Wichita, Pompeo stated “I can tell you, this threat to America is from people who deeply believe that Islam is the way.”<sup>91</sup> Despite acknowledging that it was a minority of Muslims, this rhetoric continued to advance the idea of the “War on Terror” as a battle between Islam and Christianity. On January 24, 2017, Mike Pompeo was confirmed as Director of the CIA.

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<sup>86</sup> Patrick Donohue, June 4, 2012, *Marine Squadron Again Abandons 'Crusaders' Moniker* <http://www.military.com/daily-news/2012/06/04/marine-squadron-again-abandons-crusaders-moniker.html>

<sup>87</sup> Bryant Jordan, *Crusader Knight Sign Taken Down at Hawaii Army Base*, Nov. 11, 2015 <http://www.military.com/daily-news/2015/11/17/crusader-knight-sign-taken-down-at-hawaii-army-base.html>

<sup>88</sup> Chris Rodda, *The Pentagon Most Certainly is Listening to Mikey Weinstein*, May 31, 2013 [http://www.huffingtonpost.com/chris-rodda/the-pentagon-most-certain\\_b\\_3368434.html](http://www.huffingtonpost.com/chris-rodda/the-pentagon-most-certain_b_3368434.html)

<sup>89</sup> Anai Roads, *Muslim Groups Respond to False Claims by Congressman Pompeo*, June 13, 2013, at [http://www.huffingtonpost.com/anai-roads/muslim-groups-pompeo\\_b\\_3431339.html](http://www.huffingtonpost.com/anai-roads/muslim-groups-pompeo_b_3431339.html).

<sup>90</sup> Pete Kasperowicz, *GOP Lawmaker: US Muslim Leaders 'Complicit' In Terrorist Attacks*, June 11, 2013, at <http://thehill.com/video/house/304743-gop-lawmaker-silence-on-terror-attacks-makes-islamic-leaders-potentially-complicit>.

<sup>91</sup> Lee Fang, *Trump CIA Pick Mike Pompeo Depicted War on Terror as Islamic Battle Against Christianity*, Nov. 23, 2106, at <https://theintercept.com/2016/11/23/mike-pompeo-religious-war/>

In 2015, then-candidate Donald Trump called for a ban on Muslim immigration to America. He released a statement “calling for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.”<sup>92</sup> This rhetoric continued throughout his campaign. At various times, Trump floated the idea of a “Muslim Registry” to track Muslims in America.<sup>93</sup>

One of President Trump’s first actions after taking office was his issuance of the controversial executive order banning persons from seven majority-Muslim countries from entering the United States. He stated, “I am establishing new vetting measures to keep radical Islamic terrorists out of the United States of America.” This order was challenged in federal court and its immediate implementation was halted.<sup>94</sup> Relevant to the rulings was Rudy Giuliani’s statement “So when [Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.’”<sup>95</sup> Trump issued a second, revised executive order in March 2017. Once again, federal courts halted the implementation, despite the new order appearing neutral on its face with regard to religion.<sup>96</sup> The Hawaii District court referenced both

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<sup>92</sup> Donald J. Trump, *Statement on Preventing Muslim Immigration*, Dec. 7, 2015, at <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>

<sup>93</sup> Alana Abramson, *What Trump Has Said About a Muslim Registry*, Nov. 18, 2106 <http://abcnews.go.com/Politics/trump-muslim-registry/story?id=43639946>.

<sup>94</sup> Dara Lind, *Trump's Refugee And Visa Ban Gets Another Big Defeat In Court*, Feb. 9, 2017 at <http://www.vox.com/2017/2/9/14547430/9th-circuit-muslim-ban>.

<sup>95</sup> Amy B. Want, *Trump Asked For A 'Muslim Ban,' Giuliani Says — And Ordered A Commission To Do It 'Legally'* [https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm\\_term=.6a67ffe2e4d4](https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.6a67ffe2e4d4).

<sup>96</sup> Adam Edelman, *Trump Suffers Second Defeat On Revised Travel Ban, As Another Federal Judge Slams Its Discriminatory Intent*, at <http://www.nydailynews.com/news/politics/trump-suffers-defeat-revised-travel-ban-article-1.2999678>.

the 2015 Trump statement and Giuliani statement in finding intent in a preliminary assessment.<sup>97</sup>

Both Trump and Pompeo have expressed their views on torture as well. Pompeo heavily criticized the 2014 Senate Report on Torture, stating “our military and our intelligence warriors—are heroes, not pawns in some liberal game being played by the ACLU and Senator Feinstein.”<sup>98</sup> He claimed the report made the United States less secure, and hurt its ability to “crush the Islamic jihad that threatens every Kansan and every American.”<sup>99</sup> Pompeo also opposed the administration’s handling of the rendition and torture program, writing “President Obama has continually refused to take the war on radical Islamic terrorism seriously—from ending our interrogation program in 2009 to trying to close Guantanamo Bay ...”<sup>100</sup>

During the 2017 confirmation hearings, Pompeo refused to affirmatively disavow torture. When asked if he would “refrain[] from taking any steps to authorize or implement any plan that would bring back waterboarding or any other enhanced interrogation techniques” he wrote:

I will consult with experts at the Agency and at other organizations in the US government on whether the Army Field Manual uniform application is an impediment to gathering vital intelligence to protect the country or whether any rewrite of the Army Field Manual is needed.<sup>101</sup>

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<sup>97</sup> *Ruling on Trump’s Second Travel Ban*, N.Y. Times, Mar. 15, 2017, at <https://www.nytimes.com/interactive/2017/03/15/us/politics/document-Order.html>.

<sup>98</sup> Heather Denker, *The Release of the Senate Report on CIA Activities Harms U.S. National Security*, Dec. 10, 2014, at <https://web.archive.org/web/20170126042550/http://pompeo.house.gov/news/documentsingle.aspx?DocumentID=398326>.

<sup>99</sup> *Id.*

<sup>100</sup> Press Release, *Statement of Rep. Mike Pompeo on ISIS Vote*, Sept. 17, 2016, at <https://web.archive.org/web/20141115201418/http://pompeo.house.gov/news/documentsingle.aspx?DocumentID=394228>.

<sup>101</sup> *Questions for the Record, Representative Mike Pompeo*, Jan. 18, 2017, at <https://www.intelligence.senate.gov/sites/default/files/documents/qfr-011217.pdf>.

President Trump has not been this ambiguous about his views on torture. During a 2016 campaign event in South Carolina, he said “Don’t tell me it doesn’t work — torture works. . . Half these guys [say]: ‘Torture doesn’t work.’ Believe me, it works.”<sup>102</sup> In 2015, regarding waterboarding, he even stated “If it doesn't work, they deserve it anyway, for what they're doing.”<sup>103</sup>

The fear of and antipathy toward Islam continues to pervade the United States today. Hate crimes against Muslims have surged to their highest levels since 2001.<sup>104</sup> In contrast to the Bush and Obama administrations, the current administration has yet to specifically denounce Islamophobia and the rise of hate crimes directed at Muslims in America. Ongoing commentary by the President and the Director of the CIA on both torture and Islam make clear that the intersection of Islamophobia and the Extraordinary Rendition and Torture program present ongoing threats to human rights concerns for Muslims throughout the world.

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<sup>102</sup> Jenna Johnson, *Trump Says ‘Torture Works,’ Backs Waterboarding And ‘Much Worse’*, Feb. 17, 2016 at [https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425\\_story.html?utm\\_term=.c804e9ae9d46](https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html?utm_term=.c804e9ae9d46).

<sup>103</sup> Jenna Johnson, *Donald Trump On Waterboarding: ‘If It Doesn’t Work, They Deserve It Anyway’*, Nov. 23, 2015, at [https://www.washingtonpost.com/news/post-politics/wp/2015/11/23/donald-trump-on-waterboarding-if-it-doesnt-work-they-deserve-it-anyway/?tid=a\\_inl&utm\\_term=.b294b473d41b](https://www.washingtonpost.com/news/post-politics/wp/2015/11/23/donald-trump-on-waterboarding-if-it-doesnt-work-they-deserve-it-anyway/?tid=a_inl&utm_term=.b294b473d41b)

<sup>104</sup> Azadeh Ansari, *FBI: Hate Crimes Spike, Most Sharply Against Muslims*, Nov. 15, 2016, at <http://www.cnn.com/2016/11/14/us/fbi-hate-crime-report-muslims/>

#### IV. The Cost of Torture

The United States and its agents have violated international, domestic, and North Carolina law through their program of systematic extrajudicial capture, extraordinary rendition, and enhanced interrogation. The violations of these laws extend beyond those mentioned in this report, and involve individuals both innocent and guilty of terrorist plotting, aiding, and abetting. These violations range from felony-level state law violations, to those acts classifiable as war crimes under the Geneva Conventions. The extent of the harms resulting from these acts extend further than the physical and psychological scars their victims carry with them, and reach those ordered to perpetrate such acts.

Beyond the blatant illegality of these acts, committing them has harmed the United States and its allies' mission against international terrorism. These acts created bad intelligence, a fact admitted to by senior intelligence officials and those involved in the torture program.<sup>105</sup> This bad intelligence was then erroneously relied upon as the basis for certain actions, which wasted resources and endangered the missions of other U.S. agencies and personnel.<sup>106</sup> Executive branch agencies, such as the F.B.I. and State Department, were denied access to information and supplied with false reports by the C.I.A. in an effort to conceal the extent of its interrogations and operations.<sup>107</sup> The result of such misrepresentations and denials of information was a significant reductions in the

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<sup>105</sup> Washington's Blog, *U.S. Government: Torture Doesn't Work*, Global Research (June 12, 2016), <http://www.globalresearch.ca/u-s-government-torture-doesnt-work/5530591>.

<sup>106</sup> S. SELECT COMM. ON INTELLIGENCE, 114TH CONG., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, FINDINGS AND CONCLUSIONS, at 7 (2014), available at <http://www.intelligence.senate.gov/sites/default/files/press/findings-and-conclusions.pdf> [hereinafter TORTURE REPORT].

<sup>107</sup> *Id.*



mission effectiveness of the F.B.I., Department of Defense, State Department, and Office of the Director of National Intelligence.<sup>108</sup>

Furthermore, committing these crimes against detainees created a propaganda coup which is being used by those with interests adverse to the national security of the United States.<sup>109</sup> Learning that the U.S. was espousing a moral high ground while simultaneously torturing and abusing innocent detainees directly aided Al Qaida and similar organizations recruit new members.<sup>110</sup> Moreover, it is suspected that the current head of ISIS, Abu Bakr al-Baghdadi, was radicalized as a result of his detention in the U.S.-run Camp Bucca.<sup>111</sup> It is against the best interests of the U.S. to create such an experiential basis for radicalization, and the faulty intelligence obtained as a result certainly is not an output worth such a cost.

Thus, the attempt by some officials to justify the United States' extraordinary rendition of suspected enemy combatants and plotters to "black sites," facilities where these individuals were subjected to enhanced interrogation techniques which often crossed into torture, is without basis. The thrust of these claims is that valuable intelligence was gathered from such actions, and that this information saved the lives of U.S. military personnel and civilians. Not only do these claims lack a factual foundation, but the enhanced interrogation program failed both uniformed members of the military

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<sup>108</sup> *Id.*

<sup>109</sup> Washington's Blog, *Torture: An Executive Summary* (Dec. 9, 2014), <http://www.globalresearch.ca/torture-an-executive-summary/5418955>.

<sup>110</sup> James I. Walsh and James A. Piazza, "Why Respecting Physical Integrity Rights Reduces Terrorism," *Comparative Political Studies*, forthcoming; Therese Postel, *How Guantanamo Bay's Existence Helps Al Qaeda Recruit More Terrorists*, *The Atlantic* (Apr. 12, 2014), <https://www.theatlantic.com/international/archive/2013/04/how-guantanamo-bays-existence-helps-al-qaeda-recruit-more-terrorists/274956/>.

<sup>111</sup> Martin Chulov, *Isis: the inside story*, *The Guardian* (Dec. 11, 2014, 1:00AM), <https://www.theguardian.com/world/2014/dec/11/sp-isis-the-inside-story>.

and civilians due to the reduced mission effectiveness and new threats to national security the program produced.<sup>112</sup>

First, the Uniform Code of Military Justice (UCMJ) prohibits the use of torture by military personnel, as well as any action constituting abuse of prisoners.<sup>113</sup> Second, the Army and Marine Corps Counterinsurgency Field Manual's section titled "Ethics" is violated by participating in acts of torture or abuse.<sup>114</sup> Specifically, the Field Manual states that "Article VI of the U.S. Constitution and the Army Values, Soldier's Creed, and Core Values of U.S. Marines all require obedience to the law of armed conflict. They hold Soldiers and Marines to the highest standards of moral and ethical conduct."<sup>115</sup>

Having military members present for, and involved in, the often-torturous extraordinary rendition and enhanced interrogation of detainees puts these individuals at risk of violating the UCMJ, and forces them to violate the values and standards they are sworn to protect. As Joint Chiefs Chairman, Marine General Dunford, put it, "When our young men and women go to war, they go with our values."<sup>116</sup> When ordered to be a part of these acts, then forced to live in silence while having the true nature and history of the events denied—all while knowing everything they were doing was against prisoner handling protocol and the core values of the U.S. armed services—living with what they have done becomes unbearable for many of these men and women.<sup>117</sup> As a result, the

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<sup>112</sup> See generally, Torture Report, *supra* note 106.

<sup>113</sup> Uniform Code of Military Justice art. 134 (2000).

<sup>114</sup> MCWP 3-33.5, *Counterinsurgency*, 7-5 (Dec. 15, 2006).

<sup>115</sup> Counterinsurgency, *supra* note 114.

<sup>116</sup> Richard Sisk, *Joint Chiefs Chairman Rejects Trump's Claims that 'Torture Works'*, Military.com (Feb. 25, 2016), <http://www.military.com/daily-news/2016/02/25/joint-chiefs-chairman-rejects-trumps-claims-that-torture-works.html>.

<sup>117</sup> Justine Sharrock, "We Live with Ghosts and Demons": Soldiers Who Took Part in Torture Suffer from Severe PTSD, *Alternet* (July 21, 2010), [http://www.alternet.org/story/147605/%22we\\_live\\_with\\_ghosts\\_and\\_demons%22%3A\\_soldiers\\_who\\_took\\_part\\_in\\_torture\\_suffer\\_from\\_severe\\_ptsd](http://www.alternet.org/story/147605/%22we_live_with_ghosts_and_demons%22%3A_soldiers_who_took_part_in_torture_suffer_from_severe_ptsd). (Ken Davis, an Abu Ghraib guard, states that, "A lot of soldiers,

harms inflicted go beyond those tortured, and extend to the long-term psychological health of guards and interrogators, with many showing the classic symptoms of post-traumatic stress disorder and other stress-related injuries.<sup>118</sup>

Despite the heavy physical and psychological toll taken on prisoners and the long-lasting psychological effects on guards and interrogators, the extraordinary rendition and enhanced interrogation failed to produce consistent, accurate intelligence.<sup>119</sup> Career agents, such as Willie J. Rowell, admit that extraction of information by force and intimidation is unproductive.<sup>120</sup> Typically, those subjected to torture will simply tell interrogators what they want to hear—regardless of the veracity of the information—just to stop the pain.<sup>121</sup>

Such assertions have been confirmed by the Senate Select Committee on Intelligence (Committee). The report compiled by the Committee on the interrogation practices used by U.S. agents reached the conclusion that the tortuous protocols used by the C.I.A. resulted in “extensive inaccurate information,” that was “inaccurate and deeply flawed.”<sup>122</sup> Furthermore, Senator John McCain, himself a victim of torture during the Vietnam war, concluded from “personal experience that abuse of prisoners will produce

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when we come back, are lost. It’s especially true for a unit accused of abuse, when you hear lies about what happened, and people deny what you saw. And now we live with ghosts and demons that will haunt us for the rest of our lives.”)

<sup>118</sup> Gregg Zoroya, *Voices: Moral injury is also a war wound*, USA Today (May 14, 2015, 9:28AM), available at <http://www.usatoday.com/story/news/nation/2015/05/13/torture-soldier-ptsd-moral-injury-iraq-special-forces-green-beret/70889282/>.

<sup>119</sup> Seymour M. Hersh *Torture at Abu Ghraib*, The New Yorker (May 10, 2004), available at <http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib>.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> S. Select Comm. on Intelligence, 114<sup>th</sup> Cong., Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, Executive Summary (2014) available at [http://www.intelligence.senate.gov/sites/default/files/press/executive-summary\\_0.pdf](http://www.intelligence.senate.gov/sites/default/files/press/executive-summary_0.pdf) [hereinafter EXECUTIVE SUMMARY].

more bad than good intelligence.”<sup>123</sup> The fact that subjecting Khalid Shaikh Mohammed, the man who proclaimed himself the mastermind behind the September 11, 2001 attacks, to waterboarding 183 times led to him repeatedly providing false intelligence confirms that such techniques failed when practiced.<sup>124</sup>

Using torture to extract information is a loss for the United States on all fronts: torture leaves lasting scars on those who are ordered to perpetrate it and are subjected to it; torture produces inaccurate intelligence; torture harms the reputation of the United States as a moral leader. Torture is unjustifiable under any circumstances, and has failed to yield any confirmed positive results for the United States. Acknowledging what has been done allows all of those involved to have their suffering acknowledged.

Acknowledging and revealing the extent of what was done allows us to learn from our mistakes and ensure such brutal, ineffective practices are never used again. Accepting the misdeeds committed as part of the extraordinary rendition and enhanced interrogation program allows the United States to reaffirm itself as a moral nation and return to its status as a global power that stands for what is good and right.

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<sup>123</sup> Brian Bennett, *Senate report says CIA torture methods yielded no useful intelligence*, LA Times (Dec. 9, 2014, 4:58PM), available at <http://www.latimes.com/nation/la-fg-torture-report-20141210-story.html>.

<sup>124</sup> *Id.*

## V. The Link Between Domestic Criminal Justice Reform and International Human Rights

The realms of international relations and United States domestic criminal justice reform, appear to be bifurcated bodies of law. However, the U.S. criminal and penal system—more specifically the principles and practices associated with mass incarceration and crime control—and its torture program and treatment of suspected terrorists in the so-called War on Terror are intertwined through similar underlying policy failures. The punitive turn that characterizes the U.S. efforts to achieve security and enforcement is manifested in both the failed War on Drugs on the domestic front, and the inhumane and chaotic detention methods used for suspected foreign terrorists. Further, this punitive approach has been coupled with a lack of a rehabilitative approach to reintegration, creating large at-risk populations in both a domestic and foreign setting. It is important to examine the link between these two law-related phenomena, and consider their methods and purposes, with the hope that greater understanding can lead to ideas for a just and humane approach to criminal justice and national security.

### *The Dangerous Other*

The United States has endured a drastic switch in police methodology since the early 1980's, moving from a model of community policing to that of “military policing.”<sup>125</sup> This model of policing was formulated to address a so-called domestic “War on Drugs”, purportedly aimed at reducing drug crime.<sup>126</sup> The War on Drugs, however, has been a massive failure. Instead of effectively targeting “kingpins”, or the heads and leaders of the drug trade, the policy has led to widespread incarceration of low-

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<sup>125</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW* 77 (The New Press rev. ed. 2012).

<sup>126</sup> *Id.*, at 61.

level offenders. Law Professor Michelle Alexander notes that “[i]n 2005 . . . four out of five drug arrests were for possession, and only one out of five was for sales. Moreover, most people in state prison for drug offenses have no history of violence or significant selling activity.”<sup>127</sup> Thus, those profiteers with significant responsibility for the problem of the drug trade—the kingpins and major dealers who control drug trafficking and who are monetarily enriched drug sales—are disproportionately punished compared to the “low-level” drug dealer who sells small quantities of drugs, or who often is arrested and jailed for possession of drugs.

In addition to ineffectively targeting major drug traffickers, the War on Drugs has also failed to adequately target truly “dangerous” drugs. Alexander notes that “arrests for marijuana possession—a drug less harmful than tobacco or alcohol—accounted for nearly 80 percent of the growth in drug arrests in the 1990s.”<sup>128</sup> In other words, this “war” has not only failed to address the causes of the U.S. drug problem, but also has been ineffective in detaining or otherwise responding to those actors involved in drug use more likely to cause social harm.

The War on Drugs has been enacted, since its inception, with a racially tinged tone and racist purpose.<sup>129</sup> African Americans are far less likely to deal or use drugs than whites. Yet the narrative associated with the War on Drugs has effectively stigmatized African-American drug users as “less than” and dangerous criminals not worth equal or humane treatment. As a result of the War on Drugs, African Americans are far more

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*, at 105 (“Indeed, not long after the drug war was ramped up in the media and political discourse, almost no one imagined that drug criminals could be anything other than black.”). Alexander further cites a study where 95% of respondents pictured a black drug user when asked to close their eyes and envision what a typical drug user looked like. *Id.*, at 106.

likely to be arrested and sentenced for drug crimes.<sup>130</sup> The result of the drug war has been to create the fear of a “dangerous other,” most often conceived as an African-American male, and has contributed to the U.S. soaring incarceration rate.<sup>131</sup>

The United States’ policy of excessive and racialized enforcement of crime extends beyond the drug war, and has created a “moral panic”<sup>132</sup> that associates African Americans with criminality.<sup>133</sup> In addition to furthering a system of mass incarceration, racialized crime control policies such as mandatory minimum sentencing, truth in sentencing, sentencing guidelines, and three strike policies serve as cause and consequences of the demonization of minority groups, especially African Americans.<sup>134</sup>

Law Professor Joseph Margulies has described the “punitive” switch in U.S. ideology, which has contributed to the phenomenon of mass incarceration.<sup>135</sup> Predictably, as Margulies observes, racialized crime control policies have resulted in a vastly unequal

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<sup>130</sup> According to Alexander, in at least fifteen states, African Americans are admitted to prison on drug charges at a rate from 20-57 times more than that of whites. *See* Alexander, *supra* note 125, at 98.

<sup>131</sup> *Id.* However, there are some criminal justice reform advocates who believe that this position is overstated. These critics, however, still recognize that mass incarceration is driven by an overzealous criminal justice system. Fordham Law Professor David Pfaff argues that overzealous prosecutors have increased the number of incarcerated individuals, despite reductions in both violent crime and violent crime arrests. *See* Eli Hager & Bill Keller, *Everything You Know About Mass Incarceration is Wrong*, THE MARSHALL PROJECT (Feb. 9, 2017, 5:46 PM), [https://www.themarshallproject.org/2017/02/09/everything-you-think-you-know-about-mass-incarceration-is-wrong?utm\\_medium=social&utm\\_campaign=sprout&utm\\_source=facebook#.q7pmSQE4G](https://www.themarshallproject.org/2017/02/09/everything-you-think-you-know-about-mass-incarceration-is-wrong?utm_medium=social&utm_campaign=sprout&utm_source=facebook#.q7pmSQE4G). Pfaff writes that in the 1990’s and 2000’s, “the probability that a prosecutor would file felony charges against an arrestee basically doubled, and that change pushed prison populations up even as crime dropped.” *Id.* In other words, despite arguments over the exact cause of mass incarceration, it is clear that the United States criminal justice policy has morphed into that of an aggressive policing policy that results in record numbers of prisoners.

<sup>132</sup> Moral panics “arise as a consequence of specific social forces and dynamics. They arise because, as with all sociological phenomena, threats are culturally and politically constructed, a product of the human imagination.” Erich Goode & Nachman Ben-Yehuda, *Moral Panics: Culture, Politics, and Social Construction*, 20 Annual Review of Sociology 149, 151 (1994).

<sup>133</sup> ROSICH, KATHERINE J, RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM, American Sociological Association 5 (2007).

<sup>134</sup> *Id.* (“Evidence from public opinion polls and research studies indicates that whites widely believe that blacks are prone to criminality, causing whites to be fearful of blacks—especially of young black males.”).

<sup>135</sup> Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventative Detention of Suspected Terrorists*, 101 J. OF CRIM. L. & CRIMINOLOGY, 729, 734 (2011).

incarceration system: African Americans are eight times more likely to be incarcerated than whites.<sup>136</sup> Margulies, citing sociology Professor David Garland, denotes this trend as the “criminology of the dangerous other.”<sup>137</sup> Margulies writes that this classification of the “other” has created a social characteristic by which individuals categorize those they consider dangerous and influence how they respond to perceived deviance and risk.<sup>138</sup> This “otherization” propagated by policy and media, creates a culture of fear and deep misunderstanding particularly about the lives of African Americans.

The “otherization” of groups is similarly manifested in the ways that individuals are influenced to think about issues associated with terrorism. The United States has promoted a strategy for combating terrorists that takes a similarly scattershot method as the War on Drugs: it targets anyone with any connection to “terrorism” despite the lack of a clear definition of terrorist activity, regardless of how attenuated their association with terrorist activities may be, and without regard to the role they play—however unsuspecting or minimal. Margulies notes that such policies are manifested in “[t]he post-9/11 world [that] has produced a call for the preventive detention of suspected terrorists, by which I mean a system of indefinite detention based solely on predictions of future dangerousness without regard to past conduct.”<sup>139</sup>

In a recent interview, Retired Brigadier General (and psychiatrist) Steve Xenakis<sup>140</sup> noted that the demonization of any one that could possibly be associated with

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<sup>136</sup> *Id.*, at 734. Margulies notes that as of 2004, more than twelve percent of African American males between the ages of twenty-five and twenty-nine were in custody. *Id.* Further, in 2000, nearly one in five African American males under the age of forty-one who had not attended college was in prison or jail. *Id.*

<sup>137</sup> *Id.*, at 731.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*, at 730.

<sup>140</sup> Dr. Xenakis is a retired Brigadier General and psychiatrist, who has served as a senior advisor to the Department of Defense on neurobehavioral conditions and medical management, provided expert consultation to military attorneys, and provided inpatient care, substance abuse and alcohol treatment, and



so-called terrorism or terrorists without a clear definition of either term has led to widespread arrest of who he referred to as “low level” terrorists.<sup>141</sup> The United States has captured, detained, and tortured numerous individuals and labelled them as terrorists, without thoroughly determining whether they pose any risk, and if so, without taking any measure of such risk. Likening our methods to the failed War on Drugs, he believes that the government’s sweeping arrests of persons who can be categorized as low-level terrorists without a context for understanding their limited, and at times unsuspecting, involvement is akin to arresting low level drug users.<sup>142</sup> Xenakis states that the “low-level” terrorists are often young men without an understanding of the circumstances in which they have been placed and who are following orders of their elders and others who have control and influence.<sup>143</sup> Additionally, he noted that the term jihadists is misunderstood, and those who are so labeled often lack education, and whose worldview has been framed entirely from their religion and family, leaving little room for independence .<sup>144</sup> He explained that to many of these individuals, going on a jihad is similar to Americans going on a church mission.<sup>145</sup> He further noted that many persons swept up in the War on Terror are not only low-level, but are essentially minor cogs with little agency or understanding but yet are treated the same as those who planned and carried out acts of terror against the United States.

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community health services. While in the US Army, Dr. Xenakis served in multiple positions as a clinician and commander. Additionally, he serves as an anti-torture advisor for Physicians for Human Rights. *See Bio: Stephen Xenakis*, THE GEORGE WASHINGTON UNIVERSITY (last visited April 18, 2017), <https://summer.gwu.edu/bio-stephen-xenakis>.

<sup>141</sup> Interview with Steve Xenakis, Brigadier General (retired) in Washington, D.C. (Mar. 8, 2017).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

Indeed, the government's disproportionate and overly-aggressive response to low-level actors, often young and uninformed, may be analogous to the criminal justice system's treatment of low-level drug users and those who sell small quantities of street drugs. By claiming that individuals are terrorists or associated with terrorism, notwithstanding a limited involvement and lack of impact on national security, the government has unleashed a moral panic with regard to Muslims, and especially Muslim men in ways that are not dissimilar to the moral panic associated with African-Americans, and particularly African-American males who have been depicted as dangerous and violent drug abusers and dealers.

General Xenakis further stated his opinion that the War on Terror has been carried out in ways that have been harmful and ineffective. Instead of mischaracterizing low-level actors as terrorists, he believes the United States needs to identify who exactly poses a security threat, and target those individuals.<sup>146</sup> In other words, it remains important to properly identify a national security threat without casting broad aspersions on entire segments of a national, ethnic, or religious group.<sup>147</sup> The United States government has failed in this regard, and in this way, has created a monolithic conception of "terrorists" as demonic "others" of Muslim faith.

#### *Lack of Rehabilitation and Support*

In addition to the similar ways in which the United States targets and characterizes certain groups as criminals and terrorists, the United States pays little to no attention to these same individuals once they are released from custody. The lack of services or support leads to severe consequences. On the domestic front, the lack of re-

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

entry programs has created overwhelming burdens for prisoners released into their communities and contributes to the problem of recidivism. From a national security standpoint, the failure to address the consequences of prolonged torture and detention may pose reintegration problems for foreign detainees. Others worry about whether the release of individuals who suffered dehumanizing treatment exacerbates security threats.

Michelle Alexander notes that post-incarceration civil penalties “often make it virtually impossible for ex-offenders to integrate into the mainstream society and economy upon release.... Unable to drive, get a job, find housing, or even qualify for public benefits, many ex-offenders lose their children, their dignity, and eventually their freedom—landing back in jail after failing to play by rules that seem hopelessly stacked against them.”<sup>148</sup> Alexander points to a study that found that thirty percent of released prisoners within its sample were rearrested within six months of release and that within three years, nearly sixty-eight percent were rearrested for a new offense.<sup>149</sup> Margulies underscores this argument, writing that “the result of these policies is the near replication of the colonial state of ‘civil death,’ a condition in which a person is deprived of all political, civil, and legal rights, except those he may enjoy when he is inevitably prosecuted again.”<sup>150</sup> In other words, being branded a criminal can lead to a life of hardship and further crime, with our system insidiously designed to shepherd these individuals back into our penal system.

Similarly, the support system, or lack thereof, for foreign detainees is severely lacking. General Xenakis noted that the United States has a limited adjustment process

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<sup>148</sup> Alexander, *supra* note 125, at 54

<sup>149</sup> *Id.*, at 94.

<sup>150</sup> Margulies, *supra* note 135, at 737.

for detainees who are released although, as others have observed, they have medical and psychological problems due to the conditions of detention and tortuous interrogation they suffered.<sup>151</sup> He noted that some former detainees can only find support from local mosques, many of which may harbor anti-American sentiments due to the treatment of Muslims in the name of the “War on Terror.”<sup>152</sup> Moreover, these mosques provide food, shelter, and open arms whereas released detainees may find no other way to meet their these basic needs. Xenakis explained that the lack of infrastructure to provide for the basic transitional needs of persons released after detention in the “War on Terror” is dangerous and ill-advised. Xenakis noted that, “when you destabilize and traumatize a group of people, it has national security implications for two, three full generations.”<sup>153</sup> Former detainees are also often psychologically damaged, and face severe problems re-integrating back into society. Xenakis believes that the US has an obligation to these detainees, saying that “taking care of these people is taking responsibility, and that’s the moral ground we should stand on.”<sup>154</sup>

### *Conclusion*

Preventing crime and securing national security are compelling interests that should not be ignored. However, over-incarceration, detention, and gross human rights violations cannot be countenanced. If the United States continues to torture and detain individuals with no regard for human rights or dignity, it risks becoming the very terror it is attempting to thwart. General Xenakis noted this quandary, stating that the United

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<sup>151</sup> Interview with Steve Xenakis, Brigadier General (retired) in Washington, D.C. (Mar. 8, 2017).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

States needs to find a balance that acknowledges the need for national security, while also recognizing the vitality of transparency and respect for human rights.<sup>155</sup>

U.S. policies related to domestic criminals and terrorists are intertwined, fueled on the one hand by legitimate concerns for safety and security, but on the other, by a hyperbolic and irrational fear of the “other” as a perceived threat. As Margulies notes, “[t]here are no monsters, and no human can be reduced to the worst thing they have done. A man is infinitely more complex than the shots he fired and the pain he caused.”<sup>156</sup> The overzealous and blunt approach to criminality and national security has compounded their respective dangers. The United States must adopt a proportionate, rational, and nuanced approach to these issues, both as a method of adequately dealing with dangers, as well as to uphold our ideals as a transparent and democratic society with respect for human rights and dignity.

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<sup>155</sup> *Id.*

<sup>156</sup> Joseph Margulies, *A Defense of Shared Humanity: Criminal Justice and National Security*, VERDICT (Oct. 3, 2016), <https://verdict.justia.com/2016/10/03/defense-shared-humanity-criminal-justice-national-security>.

## VI. Government Contractor Liability

### Introduction

Lawsuits brought by the victims of the United States extraordinary rendition and torture program have largely been unsuccessful due to the use of the state secrets privilege.<sup>157</sup> Recently, one case brought by victims seeking remedy for extraordinary rendition (*Salim v. Mitchell*) not only survived the motion to dismiss phase but resulted in a significant settlement for the victims.<sup>158</sup> However, while the U.S. Government did not invoke the state secrets privilege in a motion to dismiss,<sup>159</sup> it did invoked the privilege to prevent C.I.A. officials from testifying, thus limiting maximum transparency in obtaining relief.<sup>160</sup> The outcome of this case may determine remedies available to the victims who are the focus of this project.

The defendants in *Salim v. Mitchell* were independent contractors “who designed, implemented, and personally administered an experimental torture program for the U.S. Central Intelligence Agency (‘CIA’).”<sup>161</sup> The conduct giving rise to this lawsuit is similar to that endured by those rendered by Aero, a North Carolina-based contractor responsible for the illegal rendition of many innocent persons. Although few cases of this sort have

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<sup>157</sup>Dror Ladin, *The Government’s Unprecedented Position in CIA Torture Lawsuit is Very Good News*, ACLU.ORG (Apr. 15, 2016, 11:00 AM), <https://www.aclu.org/blog/speak-freely/governments-unprecedented-position-cia-torture-lawsuit-very-good-news> (“In every previous lawsuit by CIA victims, the Bush and Obama administrations invoked the ‘state secrets privilege’ to shut down cases before they even got underway.”); see e.g., *El-Masri v. Tenet*, 437 F.Supp. 530, 541 (E.D. Va. 2006); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1093 (9<sup>th</sup> Cir. 2010).

<sup>158</sup> 183 F.Supp.3d 1121, 1133 (E.D. Wash. 2016). *On Eve of Trial, Psychologists Agree to Historic Settlement in ACLU Case on Behalf of Three Torture Victims*, Aug. 17, 2017 <https://www.aclu.org/news/cia-torture-psychologists-settle-lawsuit>.

<sup>159</sup> Ladin, *supra* note 1.

<sup>160</sup> James Risen, Sheri Fink & Charlie Savage, *State Secrets Privilege Invoked to Block Testimony in C.I.A. Torture Case*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/us/justice-department-cia-psychologists-interrogation-program.html>.

<sup>161</sup> Complaint and Demand for Jury Trial at 2, 6–7, *Salim v. Mitchell*, 183 F.Supp.3d 1121 (E.D. Wash. 2016) (No. 2:15-CV-286-JLQ).

been fully litigated, the arguments presented in *Salim v. Mitchell* can be evaluated within the framework created by civil rights litigation against federal contractors in other contexts.

### **Alien Tort Statute**

The use of contractors to perform detention and transportation of persons deemed dangerous by the U.S. has become increasingly common.<sup>162</sup> The outsourcing of a function, traditionally performed by the state, has required courts to determine the appropriate scope of liability when these contractors violate the civil rights of the persons they contracted to transport and/or imprison.<sup>163</sup>

Because the victims who were rendered by Aero were not citizens of the U.S. or present on American soil at the time their human rights were violated, the Alien Tort Statute is the most appropriate law under which to seek a remedy. The Alien Tort Statute (“ATS”) permits non-citizens to bring suit in U.S. courts for violations of the law of nations or a treaty of the United States.<sup>164</sup> Under the ATS, federal courts are authorized to recognize a common law cause of action for violations of clearly defined, widely accepted human rights norms.<sup>165</sup> The ATS extends jurisdiction to federal courts to adjudicate non-citizens’ claims for violation of those international law norms when the claims “touch and concern the territory of the United States.”<sup>166</sup>

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<sup>162</sup> See Barbara Kritchevsky, *Civil Rights Liability of Private Entities*, 26 CARDOZO L. REV. 35, 35 (2005) (discussing the increasing number of 1983 claims against private defendants); Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT’L L. 395, 396 (2009) (stating that “[t]he military-contractor phenomenon has mushroomed in recent years”).

<sup>163</sup> See Kritchevsky, *supra* note 6, at 36; Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C.L. REV. 989, 993 (2005).

<sup>164</sup> 28. U.S.C. § 1350.

<sup>165</sup> See *Sosa*, 542 U.S. at 732.

<sup>166</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (U.S. 2013).

*Al Shimari v. CACI Premier Technology and Contractor Liability*

The “touch and concern” analysis was recently applied by the Fourth Circuit Court of Appeals in *Al Shimari v. CACI Premier Technology, Inc.*<sup>167</sup> This case involves allegations of torture committed by U.S. citizens acting in their capacity as employees of an American corporation, CACI, while working at a military facility located abroad and operated by U.S. government personnel. Further, the employees were hired pursuant to a contract between CACI and the U.S. government and required to obtain security clearances from the U.S. Department of Defense.<sup>168</sup> The court began by acknowledging the presumption against extraterritorial application, but stated that the analysis required consideration of a “broader range of facts than the location where the plaintiffs actually sustained their injuries.”<sup>169</sup> It held that ATS provided jurisdiction to hear the claims based on:

(1) CACI's status as a United States corporation; (2) the United States citizenship of CACI's employees, upon whose conduct the ATS claims are based; (3) the facts in the record showing that CACI's contract to perform interrogation services in Iraq was issued in the United States by the United States Department of the Interior, and that the contract required CACI's employees to obtain security clearances from the United States Department of Defense; . . . and (5) the expressed intent of Congress, through enactment of the TVPA and 18 U.S.C. § 2340A, to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad.<sup>170</sup>

The Fourth Circuit did not decide whether the plaintiffs sufficiently stated or established claims under the ATS, but instead remanded to the district court to further develop the

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<sup>167</sup> 758 F.3d 516 (4<sup>th</sup> Cir. 2014).

<sup>168</sup> *Id.* at 528–29.

<sup>169</sup> *Id.* at 529.

<sup>170</sup> *Id.* at 530–531.



record regarding any “political questions” that might undermine the justiciability of the claims.<sup>171</sup>

*Eastman Kodak Co. v. Kalvin*

However, *Eastman Kodak Co. v. Kalvin*<sup>172</sup> addressed the sufficiency required to establish a claim under ATS.<sup>173</sup> This case arose out of a dispute over the exclusive rights to distribute Kodak products in Bolivia. Eastman Kodak Co. and its employee brought an ATS action against Bolivian distributor and distributor’s officer, alleging that employee was wrongfully imprisoned in Bolivia.<sup>174</sup> The court held that private entities were liable under ATS when their tortious conduct included a component of state action.<sup>175</sup>

*Salim v. Mitchell*

*Salim v. Mitchell* is the most recent attempt for victims of the CIA’s extraordinary rendition and torture program to hold those responsible accountable. The plaintiffs brought suit against James Elmer Mitchel and John “Bruce” Jessen: the independent contractors “who designed, implemented, and personally administered an experimental torture program for the U.S. Central Intelligence Agency (‘CIA’).”<sup>176</sup> The Defendants were accused of committing “(1) torture and cruel, inhuman, and degrading treatment; (2) non-consensual human experimentation; and (3) war crimes.”<sup>177</sup>

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<sup>171</sup> *Id.* at 537.

<sup>172</sup> 978 F.Supp. 1078 (S.D. Fla. 2006).

<sup>173</sup> *Id.* at 1091.

<sup>174</sup> *Id.* at 1079–83.

<sup>175</sup> *Id.* at 1092.

<sup>176</sup> Complaint *supra* note 161 at 6–7, *Salim v. Mitchell*, 183 F.Supp.3d 1121 (E.D. Wash. 2016) (No. 2:15-CV-286-JLQ), 2015 WL 5936374, ¶¶ 12–13. See *supra* note 158 for information pertaining to favorable settlement in this case.

<sup>177</sup> *Id.* at 8.

The alleged conduct violates international law norms that are implicitly and explicitly articulated in numerous international treaties and declarations.<sup>178</sup> The plaintiffs argued that the defendants’ conduct “touch and concern” the United States for several reasons. The reasons provided are similar to those cited in *Al Shimari v. CACI Premier Technology, Inc.*: defendants are U.S. citizens, their conduct was pursuant to contracts executed in the U.S, and resulted in aliens being tortured abroad while in U.S. custody. In a victory for victims of torture, the *Salim* case recently settled for unknown sums to be paid to the Plaintiffs.<sup>179</sup>

### **Moving Forward**

Aero’s conduct seems very similar to the conduct that gave rise to the ATS suits mentioned above, and likely subjects them to the same liability that may or may not exist for CACI, and did exist for Mitchell, and Jessen. However, the purpose of the commission is not focused on seeking remedies through litigation. It is focused on preventing North Carolina’s participation in any future conduct that contributes to the perpetration of torture or any other abuse of human rights.

The values of North Carolina are codified in its laws and constitution. North Carolina’s statutes against kidnapping<sup>180</sup> and interfering with Civil Rights under the U.S. and North Carolina Constitutions,<sup>181</sup> The North Carolina Constitution. Article 1, Section

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<sup>178</sup> Id.; see also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Jun. 26, 1987, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights art. 7, Mar. 23, 1976, 999 U.N.T.S. 171.

<sup>179</sup> Complaint, *supra* note 161, at 9. As this thematic overview was completed, the *Salim* case settled. See *supra* note 158.

<sup>180</sup> N.C. Gen. Stat. § 14-39.

<sup>181</sup> N.C. Gen. Stat. § 99D-1; see David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 368 (2003) (“equality between non-nationals and citizens would appear to be the constitutional rule.”). But see *Hernandez v. Mesa*, 785 F.3d 117 (5<sup>th</sup> Cir. 2015), *cert. granted*, *Hernandez v. Mesa*, 137 S.Ct. 291 (2016).

19 of the North Carolina Constitution states, “No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.”

The Senate’s report on the CIA’s Detention and Interrogation program names eighteen survivors and victims of the program who are known to have been rendered by Aero contractors. This North Carolina-based contractor helped transport innocent people who were abducted based on unjustified suspicions and subjected to inhuman treatment at dark sites around the world. The names provided in neither the Senate Report nor this report are exhaustive, but they are known.

Whatever the reason for the Aero’s cooperation in the illegal program in the past, it must stop now.

## VII. The United States' Legal and Moral Obligations to Provide Fair and Adequate Compensation for Released Detainees

### Introduction

According to a March 2017 American Civil Liberties Union Report, almost 800 detainees have been transferred from Guantánamo Bay to at least forty-five other countries.<sup>182</sup> However, the United States has not established a procedure to provide fair and adequate compensation for released detainees. A substantial number of former detainees have reported mistreatment post release that may constitute cruel, inhuman and degrading treatment or torture.<sup>183</sup>

The 2014 Shadow Report by the National Consortium of Torture Treatment Programs (NCTTP) prepared for United States' review before the United Nations observed:

“Torture is a deliberate and systematic dismantling of a person’s identity and humanity through physical or psychological pain and suffering. Torture survivors have been transformed by their traumatic experiences that have been consciously caused by other human beings and exacerbated by forced exile. Survivors of torture commonly demonstrate symptoms such as chronic pain in muscles and joints, headaches, incessant nightmares and other sleep disorders, stomach pain and nausea, severe depression and anxiety, guilt, self-hatred, the inability to concentrate, thoughts of suicide and posttraumatic stress disorder. Torture survivors can become immobilized by their distress, unable to function within their communities or contribute to their family’s well-being. These symptoms can be exacerbated by additional stressors including housing and food insecurity, the lengthy work authorization process that asylum seekers endure, detainment while seeking asylum protection, uncertain immigration status, extended delays with immigration courts, and family separation. These

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<sup>182</sup> ACLU, *Guantánamo by the Numbers* (2017) available at <https://www.aclu.org/infographic/guantanamo-numbers>.

<sup>183</sup> U.S. DEP'T OF STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA, 6 (Aug. 5, 2013), available at <http://www.state.gov/j/drl/reports/treaties/index.htm> [hereinafter U.S. PERIODIC REPORT]. See also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.S. Reservations, Declarations, and Understandings, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990), § II(1)(a), available at <http://www1.umn.edu/humanrts/usdocs/tortres.html>.

stressors can create further roadblocks for survivors in their efforts to reestablish a stable life following their torture.<sup>184</sup>

In order to treat these symptoms and the consequences that come with them, it is essential that survivors of torture are able to access comprehensive rehabilitative services.

Article 3 of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), states that “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.”<sup>185</sup> According to a 2013 Periodic Report to the United Nations Committee Against Torture concerning the implementation of the United States’ obligations under CAT, almost all of the detainees who have been released from Guantánamo have been released without charges, many after being detained for years.<sup>186</sup> In fact, in many cases, U.S. officials believed that there was never grounds for detaining some of these persons in the first place and a number of these individuals were continued to be held in error upon realizing their innocence.<sup>187</sup> For these reasons, the humanitarian as well as legal justification for providing former detainees with a remedy under the Convention is apparent.

### **Post-Release Reality**

*Post-Psychological Effects of Confinement at Guantánamo Bay leads to serious psychological injuries post-release.*

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<sup>184</sup> National Consortium of Torture Treatment Programs, *Shadow Report: Article 14 and the Right to Rehabilitation* (2014), available at <http://www.cvt.org/sites/cvt.org/files/attachments/u10/downloads/NCTTP-CAT-Article14-ShadowReport-2014Nov.pdf>

<sup>185</sup> See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 1, 2, 3, 14., Dec. 10, 1984, 1465 U.N.T.S. 85 United Nations Committee Against Torture, List of Issues Prior to the Submission of the Fifth Periodic Report of the United States of America, U.N. Doc. CAT/C/USA/Q/5 (Jan. 20, 2010).

<sup>186</sup> Human Rights Watch, *Guantánamo: Facts and Figures* (March 2017) available at <https://www.hrw.org/video-photos/interactive/2017/03/30/guantanamo-facts-and-figures>.

<sup>187</sup> Laurel E. Fletcher and Eric Stover, *Guantánamo and Its Aftermath: U.S. Detention and Interrogation Practices and their Impact on Former Detainees*, 65, November 2000 (Guantánamo Bay commander, Major General Michael Dunlavey, estimated that half the camp population was mistakenly detained).

Evidence suggests that the “complex cumulative trauma” of confinement at Guantánamo Bay produced long-term psychological damage in former detainees that rises to torture or cruel, inhuman and degrading treatment.<sup>188</sup> The system of confinement that detainees experienced included tactics that individually and collectively dehumanized detainees, such as sexual humiliation, short shackling and other extremely painful stress positions, exposure to extreme temperatures for long periods, desecration of the Quran, and prolonged isolation.<sup>189</sup> Conditions of confinement in Guantánamo Bay are likely to result in serious psychological injury post release that is consistent with torture and cruel, inhuman or degrading treatment under CAT and readily fits within the U.S. interpretation of “mental pain or suffering” as “prolonged mental harm.”

*The U.S. has failed to ensure that former detainees are not subject to abuse upon release.*

It is current law and stated U.S. policy not to transfer individuals to countries where they will be subjected to torture. In *Kiyemba v. Obama*, the government affirmed before the Supreme Court that “[t]he United States assesses humane treatment concerns in determining destinations for detainees at Guantánamo Bay, and follows a policy of not repatriating or transferring a detainee to a country where he more likely than not would be tortured.”<sup>190</sup> The government, however, has not extended this policy to situations in which a detainee fears mistreatment upon return that would not rise to the level of torture,

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<sup>188</sup> K. Alexa Koenig, Eric Stover, and Laurel E. Fletcher, *The Cumulative Effect: A medico-legal approach to United States torture law and policy*, 6 ESSEX HUM. RTS. REV. 145, 147 (2009).

<sup>189</sup> *Id.*

<sup>190</sup> *Kiyemba v. Obama*, 385 U.S. App. D.C. 198, 201, 561 F.3d 509, 512 (2009).

but would nevertheless entitle a detainee to “refugee” status under international standards.<sup>191</sup>

Based on a 2014 study of sixty-two former detainees undertaken by the Center for Constitutional Rights (CCR) and the Human Rights Center (“HRC”) at the University of California Berkeley, School of Law, data indicates that the United States failed to ensure that former detainees were not subjected to abuse upon release in violation of its treaty obligations under Article 3 of the Convention.<sup>192</sup> According to the report, of the sixty-two former detainees, ten reported being arrested by government officials upon arrival in their home countries and being incarcerated for periods ranging from three months to two years.<sup>193</sup> Some reported that they were detained without formal charges and then abused during their detention.<sup>194</sup> One former detainee who was imprisoned for a year and a half described his experience as “leaving one nightmare to go into another one.”<sup>195</sup> Another reported that he was held without formal charges, but was accused of being an American spy and was beaten by domestic security agents while he was in prison, and forced to take drugs that made him hallucinate so badly he saw “snakes coming from beneath the floor.”<sup>196</sup> A third former detainee said he was held for eight months before being released without a trial. During his initial interrogation, authorities demanded he confess that he was a member of a terrorist organization.<sup>197</sup>

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<sup>191</sup> Melissa J. Durkee, *Beyond the Guantanamo Bind: Pragmatic Multilateralism in Refugee Resettlement*, 42 Colum. Human Rights L. Rev. 697, 702 (2011).

<sup>192</sup> The United States’ Compliance with the United Nations Convention Against Torture with Respect to Guantánamo Bay Detainees and the Cumulative Impact of Confinement, the Abuse of Detainees Post Release, and the Right to Redress (2014).

[https://ccrjustice.org/sites/default/files/assets/files/BerkeleyLaw\\_CCR\\_CATShadowReport2014.pdf](https://ccrjustice.org/sites/default/files/assets/files/BerkeleyLaw_CCR_CATShadowReport2014.pdf)

<sup>193</sup> *Guantánamo and Its Aftermath*, *supra* note 187, at 62.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

## Fair and Adequate Compensation Required by Law

### *Former Detainees Are Entitled to Compensation for Significant Economic Losses and Consequential Damages Sustained as a Result of Their Torture.*

Most former detainees interviewed for the 2014 study stated that economic hardship that they and their families was one of the primary effects of their detention at Guantánamo Bay.<sup>198</sup> As captured in the words of one, “[t]he greatest need is financial because as a man, a son, and a father, I should support my family.”<sup>199</sup> Additionally, former detainees reported difficulty reestablishing family relationships as a consequence of their detention.

Under Article 14 of the Convention, affected immediate family or dependents of victims of torture and ill-treatment qualify for redress, including compensation.<sup>200</sup> Families of former detainees experienced economic loss while their loved ones were detained at Guantánamo Bay without due process and for an uncertain duration. The 2014 study also found that families of former detainees faced economic hardship from loss of money, property, and assets due to their efforts to secure a former detainee’s release from Guantánamo Bay. Virtually all Afghan former detainees, reported that their family’s wealth had diminished substantially as a result of their incarceration.

Several former detainees who had been freed to Uruguay demonstrate one example of the struggle to assimilate after being released from Guantanamo. Through a 2015 protest in front of the U.S. Embassy in Uruguay, former detainees expressed their frustrations over a lack of U.S. assistance during their reintegration. While Uruguay has

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<sup>198</sup> *Guantánamo and Its Aftermath*, *supra* note 187, at 66.

<sup>199</sup> *Id.*

<sup>200</sup> United Nations Committee Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment General Comment No. 3: Implementation of Article 14 by State Parties, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012), ¶ 1



committed to providing some assistance, it faced political pressure and stigma for its willingness to assist former detainees. In response, the United States says it does not owe anything to these men who were released after years of torture. A State Department official responded, “these individuals were lawfully detained under the 2001 Authorization for Use of Military Force, as informed by the laws of war. The United States has no obligation to provide compensation for their lawful detention.”<sup>201</sup>

*Former Detainees Are Entitled to Rehabilitation for Psychological and Physical Harm Suffered as a Result of Their Torture.*

Victims who suffered torture and abusive treatment have a right to rehabilitation under Article 14 of the Convention. Rehabilitation should be holistic and “include medical and psychological care as well as legal and social services.”<sup>202</sup> Rehabilitation for victims “should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society.”<sup>203</sup>

Former detainees have not received treatment for the psychological and physical harm suffered as a result of their detention at Guantánamo Bay. Since leaving Guantánamo Bay, almost two-thirds of former detainees reported experiencing emotional difficulties they attribute to their confinement.<sup>204</sup> According to one, “I realized that I didn’t return to this life as intact as I thought I had.”<sup>205</sup> They suffer Post-Traumatic Stress Disorder (“PTSD”), depression, development of a quick temper, memory loss, disturbing dreams, feelings of isolation from others, and mental deterioration. Many former

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<sup>201</sup> Shane Romig, *Why Uruguay Took Six Guantanamo Detainees But Isn't Considering More*, May 12, 2015 at

<http://www.csmonitor.com/World/Americas/2015/0512/Why-Uruguay-took-six-Guantanamo-detainees-but-isn-t-considering-more-video>.

<sup>202</sup> CAT, *supra* note 185.

<sup>203</sup> *Id.*

<sup>204</sup> *Guantánamo and Its Aftermath*, *supra* note 187, at 78.

<sup>205</sup> *Id.*

detainees have vivid memories of being short shackled, exposed to extreme temperatures, and exposed to violence by guards.

Despite their physical and mental ailments, few former detainees have been treated for their symptoms following their release. Several former detainees reported that they were unable to pay for medicine prescribed by personnel.<sup>206</sup> One former detainee had to seek to borrow funds for medicine.<sup>207</sup> As victims of torture and abuse, these individuals are entitled to rehabilitation under Article 14 of the Convention.

### **Suggested Recommendations**

The comprehensive study completed by CCR and the HRC at UC Berkeley also included the following recommendations:

*The U.S. government should establish a comprehensive reintegration program for former detainees, either on its own or under the auspices of the United Nations.*<sup>208</sup>

The program should provide immediate financial assistance and support former detainees to secure long-term, sustainable livelihoods. Mental and physical health services should be made available to former detainees and offered in conjunction with livelihood support to address the relationship of economic harms to mental health issues. Social stigma should be mitigated through issuance of an official apology and the creation of an individual process through which former detainees may clear their names.

*The U.S. government should establish a fair and adequate procedure to compensate former detainees for torture and other ill-treatment.*<sup>209</sup>

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<sup>206</sup> *Id.* at 68.

<sup>207</sup> *Id.*

<sup>208</sup> The United States' Compliance with the United Nations Convention Against Torture with Respect to Guantánamo Bay Detainees and the Cumulative Impact of Confinement, the Abuse of Detainees Post Release, and the Right to Redress, *supra* note 192, at 2.

<sup>209</sup> *Id.*

A large majority of former detainees who have been transferred after being cleared for release were never convicted of a crime and were unjustly detained for years under conditions designed to dehumanize, degrade, and instill despair. These individuals are entitled to fair and adequate compensation, both under the Convention, U.S. federal laws, and according to principles of fundamental fairness.

*The United States should increase funding substantially for rehabilitative services in an effort to reach as many survivors as possible.*

In its 2005 CAT report, the United States noted that, “in addition to monetary compensation, States should take steps to make available other forms of remedial benefits to victims of torture, including medical and psychiatric treatment as well as social and legal services.”<sup>210</sup> Regrettably, the vast majority of survivors in the United States have not received rehabilitative services, and current levels of funding have forced many torture treatment programs to scale back or shut down their operations entirely.<sup>211</sup>

*The United States should request assistance from the United Nations High Commissioner for Refugees ("UNHCR"), the organization responsible for supervising and coordinating international refugee protection under conventions to which the United States is a party.*<sup>212</sup>

Ideally, the United States would comply with the Refugee Convention's requirement that each potential refugee in Guantanamo be afforded a refugee status determination. Under the Refugee Convention, if a detainee is found to be a "refugee" and is neither excludable nor expellable, the executive should grant asylum or withhold removal in the United States until it is possible to repatriate the detainee. In such a utopian scenario, the United States would have performed the review and completed the

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<sup>210</sup> Second Periodic Report of the United States of America to the Committee Against Torture 2005, at <https://www.state.gov/documents/organization/62175.pdf>.

<sup>211</sup> See *supra* note 192.

<sup>212</sup> See Durkee, *supra* note 191, at 699.

transfer immediately after each detainee was "cleared for release," so as to comply with the Geneva Convention's prohibition on arbitrary detention. This will facilitate a quicker end to the chapter of U.S. history shadowed by Guantanamo, and demonstrate U.S. commitment to international law and institutions--thereby supporting the U.S. claim to global moral leadership.<sup>213</sup>

### **Conclusion:**

Under international human rights law, notably the ICCPR and CAT, governments have obligations to ensure the right to an effective remedy for victims of serious human rights violations, including torture. A victim's right to an effective remedy requires the government to take the necessary investigative, judicial, and reparatory steps to redress the violation and provide for the victim's rights to knowledge, justice, and reparations.<sup>214</sup> The government is under a continuing obligation to provide an effective remedy; there is no time limit on legal action. Although these violations did not take place in the United States, they occurred while the individuals were under the effective control of U.S. security forces.

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<sup>213</sup> *Id.*

<sup>214</sup> Laura Pitter, *US: Ex-Detainees Describe Unreported CIA Torture* (2016) available at <https://www.hrw.org/news/2016/10/03/us-ex-detainees-describe-unreported-cia-torture>.

## VIII. Relief for Torture Victims and its Barriers

Victims of torture, including those who were rendered and tortured through the United States CIA Extraordinary Rendition and Torture Program, deserve redress for the human rights violations committed against them. Redress is also mandated under international law treaties to which the United States is a party.<sup>215</sup> Victims have historically accessed two main kinds of relief: legal remedies and apologies. Each is valuable in different ways, and each has its own barriers.

### Legal Remedies

#### *Benefits and Successes*

Many victims have attempted to obtain legal remedies through court systems both in the United States and abroad. There have been select successful cases abroad that demonstrate the value of obtaining legal relief, and other cases that are still pending.

In the United States, as of this writing, one case on behalf of CIA Torture Program victims has been allowed to proceed.<sup>216</sup> The American Civil Liberties Union (ACLU) filed suit against CIA-contracted psychologists James Mitchell and Bruce Jessen, on behalf of three men who were tortured using methods developed by the psychologists.<sup>217</sup> Mitchell and Jessen developed a torture program based on so-called “learned helplessness” experiments from the 1960s with the goal of psychologically

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<sup>215</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment, art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85 (requiring State Parties to ensure in their legal system “that a victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation”); International Covenant on Civil and Political Rights, art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 (requiring that each State Party undertakes “to ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy”); Universal Declaration of Human Rights, art. 8, Dec. 10, 1948, 217 A (III) (granting that “everyone has the right to an effective remedy”).

<sup>216</sup> American Civil Liberties Union (ACLU), *Court Rules ACLU Lawsuit Against CIA Torture Psychologists Can Proceed* (April 22, 2016), <https://www.aclu.org/news/court-rules-aclu-lawsuit-against-cia-torture-psychologists-can-proceed>.

<sup>217</sup> *Id.*

destroying people in the hopes that they would be unable to resist interrogation.<sup>218</sup> They also helped the CIA to adopt torture as an official policy, took part in torture sessions, and oversaw implementation of the program.<sup>219</sup> They received millions of dollars for their assistance.<sup>220</sup> In April 2016, U.S. District Court Senior Judge Justin Quackenbush rejected the psychologists’ motion to dismiss, allowing the case to proceed.<sup>221</sup> The ACLU has observed that “this is a historic win in the fight to hold the people responsible for torture accountable for their despicable and unlawful actions.”<sup>222</sup> Because of this ruling, “CIA victims will be able to call their torturers to account in court for the first time.”<sup>223</sup> As a result of the settlement in this case, victims received significant monetary damages and acknowledgement.<sup>224</sup>

In addition to the case against Mitchell and Jessen, the Center for Constitutional Rights (CCR) obtained a positive resolution in a legal challenge to the United States for the torture in Abu Ghraib and other prisons in Iraq.<sup>225</sup> In 2008, the CCR filed a federal action on behalf of 72 Iraqi civilians who were tortured in Iraq against U.S.-based private contractor L-3 Services, Inc., and Adel Nakhla, a former employee of the company.<sup>226</sup> After several years of litigation, a confidential settlement was reached in October 2012.<sup>227</sup> This has been described as “the first positive resolution to a U.S. civil case

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Rick Anderson, “Why a Judge Let a Suit Continue Against Psychologists Who Designed Torture Techniques,” LA TIMES (Feb. 8, 2017), <http://www.latimes.com/nation/la-na-cia-torture-20170120-story.html>; *see infra* notes 20-23, 27-30 and accompanying text.

<sup>225</sup> Center for Constitutional Rights (CCR), *Al-Quraishi, et al. v. Nakhla and L-3 Services* (July 15, 2015), <https://ccrjustice.org/home/what-we-do/our-cases/al-quraishi-et-al-v-nakhla-and-l-3-services>.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

challenging detainee treatment outside the United States in the larger ‘war on terror’ context.”<sup>228</sup>

Abroad, more cases have been allowed to proceed or were successfully resolved for torture victims. The following are only some examples. In 2012, the highest criminal court in Italy convicted 23 American citizens, 22 of whom were CIA agents, for the kidnapping and transfer of a Muslim cleric to torture.<sup>229</sup> Italy initiated extradition proceedings against one of the CIA agents, Sabrina De Sousa, to serve a sentence of four years in prison.<sup>230</sup> However, the President of Italy issued her a pardon in February 2017.<sup>231</sup> While De Sousa and the other convicted individuals are unlikely to serve prison time because Italy did not further seek their extradition, this serves as a sign that countries outside of the United States have condemned the CIA’s actions.<sup>232</sup> It is also the only successful prosecutions of Americans who were part of the CIA Torture Program.<sup>233</sup>

Fatima Bouchar and Abdel Hakim Belhadj are a couple who were captured, rendered on planes that were operated by Aero Contractors out of Johnston County, North Carolina to Libya, and tortured there as part of the CIA Torture Program. They filed suit in the High Court of Justice of England and Wales against former foreign secretary of the UK Jack Straw and members of UK intelligence agencies.<sup>234</sup> The UK

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<sup>228</sup> *Id.*

<sup>229</sup> Andrea Vogt, “Italy Upholds Rendition Convictions for 23 Americans,” THE GUARDIAN (Sept. 19, 2012), <http://www.theguardian.com/world/2012/sep/20/italy-rendition-convictions-americans/print>.

<sup>230</sup> Stephanie Kirchgaessner, “Ex-CIA officer faces extradition to Italy after final appeal rejected,” THE GUARDIAN (June 8, 2016), <https://www.theguardian.com/world/2016/jun/08/ex-cia-officer-sabrina-de-sousa-extradition-italy--appeal-rejected-rendition>.

<sup>231</sup> Stephanie Kirchgaessner, “Ex-CIA officer pardoned for role in 2003 kidnapping of terrorism suspect,” THE GUARDIAN (Feb. 28, 2017), <https://www.theguardian.com/world/2017/feb/28/ex-cia-agent-sabrina-de-sousa-pardoned-abu-omar>.

<sup>232</sup> *Id.*

<sup>233</sup> Judith Sunderland, “Dispatches: Italy Stands Alone on Justice for CIA Abuses,” HUMAN RIGHTS WATCH DISPATCHES (March 12, 2014), <https://www.hrw.org/news/2014/03/12/dispatches-italy-stands-alone-justice-cia-abuses>.

<sup>234</sup> *Belhaj v. Straw* [2014] EWCA (Civ) 1394 [8].

government attempted several times to thwart the proceedings, but the UK Supreme Court recently acknowledged that the case could proceed.<sup>235</sup> The Court held that officials could not claim “state immunity” or avoid trial based on the “foreign acts of state” doctrine.<sup>236</sup>

Khaled El-Masri, another victim of the CIA Torture Program who was rendered on planes operated by Aero Contractors, was also successful in his efforts to obtain relief from the European Court of Human Rights.<sup>237</sup> In 2009, El-Masri filed an application to the Court against Macedonia for its role in his abduction and torture.<sup>238</sup> In 2012, the Grand Chamber of the Court delivered its judgment, finding Macedonia responsible for several violations of the European Convention.<sup>239</sup> It then ordered that Macedonia pay El-Masri €60,000.<sup>240</sup>

Cases against private contractors involved in the program can be successful as well. The CCR filed a suit in 2008 against U.S.-based government contractors CACI International, Inc. and CACI Premier Technology, Inc on behalf of Iraqi torture victims detained in Abu Ghraib.<sup>241</sup> It was initially dismissed on “political question” grounds in 2015.<sup>242</sup> On appeal, however, the Fourth Circuit Court of Appeals reinstated the case which is currently proceeding through depositions and briefing.<sup>243</sup>

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<sup>235</sup> Owen Bowcott & Ian Cobain, “Jack Straw and UK Government Must Face Kidnap and Torture Claims, Court Rules,” *The Guardian* (Jan. 17, 2017), <https://www.theguardian.com/world/2017/jan/17/libyan-dissident-abdel-hakim-belhaj-wins-right-to-sue-uk-government-over-rendition>.

<sup>236</sup> *Id.*

<sup>237</sup> Open Society Foundations, *El-Masri v. Macedonia* (Jan. 23, 2013), <https://www.opensocietyfoundations.org/litigation/el-masri-v-macedonia>.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Center for Constitutional Rights (CCR), *Al Shimari v. CACI et al.* (Mar. 9, 2017), <https://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al>.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*



This is not an exhaustive list of the successful cases that have been resolved for victims over the years. It is meant to illustrate the fact that there have been select positive resolutions, and to demonstrate the value of legal redress.

### *Barriers to Relief*

There have been, however, many barriers to obtaining legal redress, particularly in U.S. courts. The United States has failed to investigate the CIA torture program, and no member of the CIA has ever been charged or prosecuted for the violations in the U.S. judicial system.<sup>244</sup> Future prosecution of CIA officials may be challenging.<sup>245</sup> The Military Commissions Act of 2006 may serve as an obstacle as it attempts to provide immunity to government officials who have authorized acts that violate the Convention Against Torture since 1997.<sup>246</sup>

There have also been several cases brought against different groups of defendants that have been dismissed. For example, the ACLU brought a case on behalf of five victims of extraordinary rendition against Jeppesen Dataplan, Inc., a company that provided support for at least 70 flights for the CIA program that transported prisoners overseas to be tortured.<sup>247</sup> In February 2008, the suit was dismissed at the trial court level; however, on a motion filed by the United States government as intervenors.<sup>248</sup> The matter was dismissed in deference to the government's claim that the case would reveal

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<sup>244</sup> Petition Alleging Violations of the Human Rights of Khaled El-Masri by the United States of America to the Inter-American Commission on Human Rights, Organization of American States 26-27 (Apr. 9, 2008) (hereinafter "El-Masri Petition to the IACHR.")

<sup>245</sup> *Id.* at 27.

<sup>246</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006). The Act may immunize for degrading and humiliating treatment but not torture or cruel and inhumane treatment. *See* Human Rights Watch, Q and A: Military Commissions Act of 2006, 10, at <https://www.hrw.org/legacy/background/usa/qna1006/usqna1006web.pdf>.

<sup>247</sup> *See* Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010).

<sup>248</sup> *Id.* at 1076.

state secrets and jeopardize relationships with other nations that had cooperated with the program.<sup>249</sup> In September 2010, the United States Court of Appeals for the 9<sup>th</sup> Circuit affirmed the dismissal, and in May 2011 the Supreme Court denied certiorari.<sup>250</sup>

Similarly, in 2006, El-Masri has filed suit in the United States against several United States public officials and private entities for his rendition and torture.<sup>251</sup> The United States asserted the state secrets privilege, and the district court dismissed the claim.<sup>252</sup> The Fourth Circuit affirmed the dismissal, deferring to the government's claim that there was a reasonable danger that the proceeding would lead to disclosure of military matters that should be not divulged.<sup>253</sup>

Some cases against private military contractors have been dismissed as well. As noted earlier, private contractors benefited financially by providing services in Iraq and Afghanistan that assisted with the torture that occurred in Abu Ghraib. The CCR filed a federal class action against private contractors CACI International, Inc. and Titan Corporation (later L-3 Services) in 2004.<sup>254</sup> In 2011, a federal appeals court in Washington, D.C. dismissed the case based on a "battlefield preemption" to the Federal Tort Claims Act.<sup>255</sup> The majority also dismissed the Alien Tort Statute claims of the case, including claims of torture, because the contractors were not "state actors."<sup>256</sup>

This is not an exhaustive list of the cases that have been filed on behalf of torture victims over the years, nor of the reasons that cases have been dismissed. It is meant to

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<sup>249</sup> *Id.* at 1073.

<sup>250</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 131 S. Ct. 2442 (2011) (cert denied).

<sup>251</sup> *See El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

<sup>252</sup> 28 U.S.C.A. § 517.

<sup>253</sup> *El-Masri*, 479 F.3d at 302.

<sup>254</sup> Center for Constitutional Rights (CCR), *Saleh, et al. v. Titan, et al.* (June 29, 2016), <https://ccrjustice.org/home/what-we-do/our-cases/saleh-et-al-v-titan-et-al>.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*; *but see* Center for Constitutional Rights (CCR), *Al Shimari v. CACI et al.*, *supra* note 241.

serve as a representative sample of both, to illustrate the fact that there have been many different barriers to legal relief. However, although lawsuits have been dismissed, this does not foreclose “nonjudicial relief.”<sup>257</sup> This includes actions by the executive branch, legislative branch, or citizen commissions, each of which can assist victims in obtaining transparency, accountability, and relief.<sup>258</sup>

## Apologies

### *Benefits and Successes*

When successful, legal challenges can provide monetary compensation. However, torture victims also often express that apologies from their perpetrators would be valuable as a form of relief—in fact it is often the most sought-after form of reparations. A Constitution Project report based on interviews with former detainees found that “the most common refrain among former (uncharged and released) detainees seems to be the request for an apology for their treatment.”<sup>259</sup> Abou Elkassim Britel, a victim of extraordinary rendition and torture through the CIA Torture Program, expressed this sentiment eloquently and said, “the wrong has been done, sadly. What I can ask now is for some form of reparation so that I can have a fresh start and try to forget, even if it won’t be easy . . . I want an apology. It is only fair to say that someone who has done something wrong must apologize.”<sup>260</sup> Similarly, Bouchar and Belhadj explicitly refused

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<sup>257</sup> Mohamed v. Jeppesen, 614 F.3d at 1091; *but see* Center for Constitutional Rights (CCR), *Al Shimari v. CACI et al.*, *supra* note 241.

<sup>258</sup> *See infra* Part III.

<sup>259</sup> The Constitution Project, *The Report of the Constitution Project’s Task Force on Detainee Treatment*, 280 (2013).

<sup>260</sup> Brief in Support of Abou ElKassim Britel’s Request for Reparations and an Official Apology for Extraordinary Rendition and Torture, Submitted to the Special Rapporteur of the Convention Against Torture by the UNC School of Law Human Rights Policy Seminar, 1 (June 2014) (hereinafter “Brief for Britel”).

to drop the case mentioned above unless the United Kingdom gave them an official apology.<sup>261</sup>

Studies on apologies have also found that they have beneficial healing effects on torture victims and their communities.<sup>262</sup> They offer victims a sense of dignity and some restoration of power as a result of the acknowledgment that violations occurred, and further an acknowledgment that victims have a legitimate reason to feel violated.<sup>263</sup> Generally, there are eight factors that make an authentic political apology: (1) a writing that is officially recorded; (2) a statement of the wrong in question; (3) an acceptance of responsibility; (4) an expression of regret; (5) a promise of nonrepetition; (6) an absence of any demand for forgiveness; (7) a nonappearance of any hypocrisy or arbitrariness; and (8) an undertaking -- through measures of publicity, ceremony, and concrete reparation.<sup>264</sup>

The United States has apologized for other violations over its history, with varying degrees of success.<sup>265</sup> This history indicates that a genuine political apology is feasible, and that apologies may have real benefits.<sup>266</sup> For example, in 1997, President Clinton offered a formal apology for the Tuskegee Study that subjected 600 black men to medical experimentation regarding syphilis without informed consent.<sup>267</sup> President

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<sup>261</sup> Bowcott & Cobain, *supra* note 235.

<sup>262</sup> See, e.g., Aaron Lazard, *How Apologies Heal*, FAITHSTREET (Nov. 16, 2007), <http://www.faithstreet.com/onfaith/2007/11/16/how-apologiesheal/7308>.

<sup>263</sup> Brief for Britel, at 53-55.

<sup>264</sup> MATT JAMES, CHAPTER 9: WRESTLING WITH THE PAST: APOLOGIES, QUASI-APOLOGIES AND NON-APOLOGIES IN CANADA, *THE AGE OF APOLOGY: FACING UP THE PAST* 139 (2008).

<sup>265</sup> Brief for Britel, at 75-81 (for example, apology for the internment of Japanese Americans, apology to Native Hawaiians for the overthrow of Queen Liliuokalani, apology to Native Americans, apology for slavery).

<sup>266</sup> *Id.* at 81.

<sup>267</sup> *Id.* at 80.

Clinton's apology has been regarded as meaningful and empathetic.<sup>268</sup> He held a formal ceremony that included surviving victims and family members, accepted blame, acknowledged that suffering of the victims, and promised to make changes.<sup>269</sup> He also gave Tuskegee University a \$200,000 grant to establish a center for bioethics and research.<sup>270</sup>

Other countries have apologized to victims of extraordinary rendition and torture as well. Canada, for example, issued an apology to Maher Arar, a victim of rendition and torture in Syria who was found later to be "completely innocent."<sup>271</sup> Arar, while he was returning from the United States to his home in Canada, was extraordinarily rendered by the United States government to Syria.<sup>272</sup> The U.S. government erroneously suspected him of being a terrorist.<sup>273</sup> He was detained in Syria for almost a year, where he was tortured.<sup>274</sup> Although the torture did not occur in Canada, the then Prime Minister of Canada, Stephen Harper, issued a formal apology to Arar in 2007 for the role Canada played in facilitating Arar's extraordinary rendition and torture.<sup>275</sup> The apology was issued on behalf of the Canadian government, "for any role Canadian officials may have

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<sup>268</sup> Donna Franklin, "Beyond the Tuskegee Apology," WASHINGTON POST (May 29, 1997), [https://www.washingtonpost.com/archive/opinions/1997/05/29/beyond-the-tuskegee-apology/f753a195-38e1-4c74-bbf9-1a75f0386c9e/?utm\\_term=.15047b0dd976](https://www.washingtonpost.com/archive/opinions/1997/05/29/beyond-the-tuskegee-apology/f753a195-38e1-4c74-bbf9-1a75f0386c9e/?utm_term=.15047b0dd976).

<sup>269</sup> REMARKS BY THE PRESIDENT IN APOLOGY FOR STUDY DONE IN TUSKEGEE (May 16, 1997), <https://clinton4.nara.gov/New/Remarks/Fri/19970516-898.html>.

<sup>270</sup> Stephen Thomas, *Thomas: Tuskegee atonement begins with an apology*, EMORY REVIEW (Dec. 6, 1999), [http://www.emory.edu/EMORY\\_REPORT/erarchive/1999/December/erdecember.6/12\\_6\\_99tuskegee.html](http://www.emory.edu/EMORY_REPORT/erarchive/1999/December/erdecember.6/12_6_99tuskegee.html).

<sup>271</sup> Rebecca Leung, "His Year in Hell," CBS NEWS (Jan. 21, 2004), <http://www.cbsnews.com/news/his-year-in-hell-21-01-2004/>.

<sup>272</sup> Jane Mayer, "Outsourcing Torture," THE NEW YORKER (Feb. 14, 2005), <http://www.newyorker.com/magazine/2005/02/14/outsourcing-torture>.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> CBC News, "Harper's Apology 'Means the World': Arar," CBC NEWS (Jan. 26, 2007), <http://www.cbc.ca/news/canada/harper-s-apology-means-the-world-arar-1.646481>.

played in what happened to Mr. Arar.”<sup>276</sup> Harper also provided Arar with a C\$10.5 million settlement for his suffering and a million for legal costs.<sup>277</sup> Canada’s apology was very meaningful to Arar because it confirmed his innocence.<sup>278</sup> It also serves as an example for other countries, particularly the United States.

### *Barriers to Apology Relief*

There are, unfortunately, barriers to obtaining apologies as well, particularly in the United States. The United States has been reluctant to acknowledge the human rights violations it has committed, let alone issue any apologies to the victims.<sup>279</sup> The United States appears to be unwilling to admit that extraordinary rendition and torture occurred. It has successfully suppressed the full report on the CIA Rendition and Torture program issued by the Senate Select Intelligence Committee on Torture, and has made no use of the release of the Committee’s redacted summary report, preferring instead to move on as though the torture that individuals have suffered could be forgotten without meaningful reparation and repair efforts. The failure of the United States to apologize further suggests that they hold to the belief that apologizing conveys weakness.<sup>280</sup> Government officials may fear costly reparations or harming relationships with other countries that were involved in torture.<sup>281</sup> These concerns are misplaced. Apologizing indicates strength and honesty through the admission of wrongdoing, and an empathy toward the victims as people.<sup>282</sup> It also indicates that the United States stands by the values of human rights

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<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> El-Masri Petition to the IACHR, at 24-25.

<sup>280</sup> Aaron Lazare, *Go Ahead, Say You’re Sorry*, *Psychology Today* (Jan. 1, 1995), <https://www.psychologytoday.com/articles/199501/go-ahead-say-youre-sorry>.

<sup>281</sup> American Psychological Association, *Forgiveness: A Sampling of Research Results* (2008), available at <https://www.apa.org/international/resources/publications/forgiveness.pdf>.

<sup>282</sup> Lazare, *supra* note 280.

norms and treaties including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention Against Torture, and that it takes seriously constitutional and statutory provisions it has enacted to prohibit torture.

### Conclusion

Torture victims have historically struggled to obtain redress for the human rights atrocities committed against them. Legal relief and apologies are only two of the most prominent forms of redress that have been sought. There are other remedies that could be developed to support victims. As the Ninth Circuit noted in *Mohamed v. Jeppesen*, although there may be obstacles for relief through the judicial system, other branches of government can provide accountability. For example, investigations by Congress and remedial legislation could offer redress from the legislative branch.<sup>283</sup> Congress has the power to investigate abuses of the executive branch, and it can attempt to use that power to keep the President, CIA, and other executive agencies accountable for its actions. Congress can also enact remedial legislation that can provide causes of action and procedures to address future claims filed by torture victims.<sup>284</sup> Citizen commissions can also provide transparency and relief to victims through accountability hearings and advocacy.

These remedies should be considered moving forward, and barriers to judicial relief and obtaining apologies should be addressed. Victims of torture have suffered some of the most horrendous human rights violations. Their pain and suffering should be acknowledged, and they should be compensated as effectively and efficiently as possible.

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<sup>283</sup> *Mohamed v. Jeppesen*, 614 F.3d at 1091.

<sup>284</sup> *Id.* at 1092.