



UNC
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Human Rights Policy Lab

Assessing Recent Developments: Achieving Accountability for Torture

UNC School of Law

Human Rights Policy Seminar

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North Carolina Stop Torture Now

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EXECUTIVE SUMMARY

Following September 2001, the United States government declared a ‘war on terror’ and embarked upon a program of extraordinary rendition and unlawful prisoner transfers, interrogation by torture, and a global system of detention outside the law. Since that time, there has been a concerted and global effort to bring about accountability for the U.S. rendition and torture program, which violates all manner of moral and legal norms. Despite these efforts, the United States government has successfully obstructed torture victims from obtaining judicial remedy, largely through its invocation of the State Secrets Privilege. Moreover, it has refused to undertake any meaningful investigation for purpose of holding individuals accountable for what it now acknowledges to have been the commission of egregious human rights violations. It has declined to offer any form of remedy or repair to its victims.

New developments have reset the starting point for obtaining accountability and reparations. The U.S. submission to and appearance before the UN Committee Against Torture and the UN Human Rights Council, the release of the Senate Select Committee on Intelligence Report on Torture, decisions by international and foreign courts, diligent and persistent journalists who continue to expose and educate the public on a global level, as well as committed human rights advocates, have all served to encourage accountability and have moved us forward on these issues.

This policy report, *Assessing Recent Developments: Achieving Accountability for Torture*, reviews the efforts to obtain compliance with U.S. human rights obligations, transparency about the torture program, and relief for victims of torture. While the U.S. government continues to refuse to “look back” and continues to prevent torture victims from advancing their claims, it is nonetheless crucial to take stock of changed circumstances and

determine how they may best serve ongoing advocacy efforts on behalf of torture victims. We believe that the task of advocates is to press into service the recent U.S. commitments and disclosures, judicial theories, advocacy strategies, and expressed global concerns that point to accountability and remedy for torture.

This report provides an overview of recent developments as follows:

- **Section One: U.S. & International Human Rights Norms.** This section reviews the commitments made by the United States before UN Human Rights bodies. The United States recently appeared before the UN Committee on Torture and the UN Human Rights Council as part of the international treaty enforcement and monitoring processes. At each session, the United States made important declarations about its obligations to prevent torture and hold accountable those who violate the prohibition against torture. A U.S. government representative publicly announced before the UN Committee on Torture that the Convention Against Torture applies beyond U.S. borders and in situations of armed conflict, and offered the government's unequivocal "yes" that torture is prohibited as a matter of law anytime and anywhere.

Similarly, during its Universal Periodic Review wherein the United State was assessed regarding all of its human rights treaty obligations, a U.S. representative declared before the UN Human Rights Council that the government was committed to "holding accountable persons responsible for human rights violations and war crimes." These commitments provide victims, advocates, the UN and the entire world with expectations about transparency, accountability, and reparations that must be fulfilled.

- **Section Two: The Senate Torture Report.** Following a six year, forty million dollar investigation into the Central Intelligence Agency's (CIA) Detention and Interrogation Program against suspected terrorists in secret sites around the world, the Senate Select Committee on Intelligence released its findings in December 2014. This section reviews the 525-page executive summary of the report, entitled the Senate Select Committee on Intelligence's Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (the "Torture Report"). It provides information that relies on the government's own declassified information about how the program operated, including individual accounts of interrogation and wrongful detention, and details the "Enhanced Interrogation Techniques" (EITs) that were used on detainees.

The Senate Torture Report makes evident that these techniques were not only illegal under international and federal law, but they were also ineffective for the purpose of producing information about future threats to national security. The official government disclosure about the facts of the Detention and Interrogation Program serves to pierce the state secrets doctrine and should result in new opportunities for victims to litigate their torture claims in federal court.

- **Section Three: International and Foreign Courts.** Despite the failure of U.S. courts to provide a legal mechanism to investigate and review the actions of the U.S. government and the claims of those who suffered as a result of the CIA Detention and Interrogation Program, the international legal system has provided some opportunity for relief for the victims. This section reviews developments from the International Criminal Court (ICC), and decisions from the European Court of Human Rights, as well as cases from the United Kingdom and Australia.
 - Just a week prior to the release of the Senate Torture Report, the Office of the Prosecutor at the ICC released its own report in which it suggested that it was moving closer to opening up an official investigation into crimes committed in Afghanistan during the course of the CIA Program's operation.
 - Recent decisions of the European Court have adjudicated cases and determined facts that U.S. courts refused to consider, and while the United States is not party to the European Convention on Human Rights and therefore not bound by the European Court's decisions, it is not insulated from the impact these decisions will have on customary international law.
 - Similarly, the courts of the United Kingdom and Australia have adjudicated claims of torture victims against their governments for having participated in the torture program, whether as a host for a black site or by providing some other form of aid to the program.

The prosecutions, and condemnation at the international court level of all those involved in the CIA Program, manifest the general abhorrence of the torture program and a widespread desire to hold those responsible accountable. The factual revelations before international and foreign courts have served to erode the legitimacy of the state secrets privilege to shield accountability in U.S. courts. Just as importantly, the case holdings give the general public insight into how other courts with similar legal systems have addressed the issue of torture and the need for transparency and accountability. These cases demonstrate that justice for victims of torture and rendition is possible through adjudication, and debunk the idea that such adjudication would endanger national security.

- **Section Four: External Pressure from the Media & Civil Society.** The tension between the government’s asserted need for secrecy, and the constant push by news media and civil society groups for openness and transparency, can be used to overcome government efforts to thwart accountability. This section reviews the media’s traditional role as a watchdog of the government and demonstrates how it serves as an unofficial check on the Executive’s power when other branches of government have failed to do so. The sheer volume of media coverage of the CIA’s Detention and Interrogation program evidences the growing public demand for transparency and accountability.

Information released by the media that contains facts central to the claims of torture victims, and is available to the global public, raises the question: how can information made public knowledge by the media and other sources still be considered a state secret for the purpose of litigation? This section reviews the release of *Guantánamo Diary*, a firsthand account of Guantánamo detainee Mohamedou Ould Slahi, and the disclosure of facts about the Torture Program through the media. It encourages advocates to make use of the important role of the media in cases in which torture and the state secrets privilege are at issue.

- **Section Five: Accountability.** Persistent efforts to achieve accountability and reparations for torture victims often take more than one form. This section advocates for efforts to fully understand the conditions which led to such egregious human rights violations so that they are less likely to be repeated. It reviews statements made by U.S. government officials, such as that by Tom Malinowski, Assistant Secretary for Democracy and Human Rights and Labor, U.S. State Department who stated with regard to the Convention Against Torture, “[T]he test for any nation committed to this Convention and to the rule of law is not whether it ever makes mistakes, but whether and how it corrects them.” Assuming the truth of his declaration, the U.S. government should be eager to pursue some form of accountability.

This section sets forth the need to create a commission of inquiry in order to best illuminate how the U.S. government strayed so far from its moral and legal obligations. It reviews previous models of commissions of inquiry related to extraordinary rendition and torture, including Canada’s Commission of Inquiry in the case of Maher Arar, who was illegally rendered and tortured as a result of U.S. human rights violations, and describes other truth and inquiry initiatives including the German Parliamentary Inquiry, and stalled efforts by the United Kingdom.

It details domestic calls for accountability for the torture program, including Senator Patrick Leahy's 2009 call for a truth and reconciliation commission, the Center of Victims of Torture conference, the Constitution Project Bipartisan Task Force on Detainee Treatment, the ACLU's Blueprint for Accountability, and North Carolinian efforts to establish a commission of inquiry to examine North Carolina's role and responsibility in the torture program as a result of the state's support and facilitation of Aero Contractors, headquartered in Johnston County, NC, which flew rendition planes.

Additionally, it provides an overview of models in transitional justice (South African Truth and Reconciliation Commission, Peruvian Truth and Reconciliation Commission), and the Illinois Torture Inquiry and Relief Commission and Greensboro Truth and Reconciliation Commission.

- **Concluding Statement.** The new developments detailed in this report, including United States appearances before UN treaty bodies, the release of the Senate Torture Report, investigation and litigation in domestic, foreign and international courts, and the continued exposure and education by journalists about the issues of torture and extraordinary rendition, suggest new possibilities in the pursuit of accountability and justice for the victims of the Program. Recent disclosures, U.S. commitments, and legal interpretations suggest that it will be more difficult for the United States to maintain its position of refusing to account for the harms it has caused, while maintaining any semblance of credibility, and without forfeiting its ability to assert its place as a civilized society bound to the rule of law.

Advocates for accountability and justice can and should make use of these developments not only out of obligations to past victims, but also to ensure that torture is not used in the future. In accordance with its stated commitment to international human rights, the United States government must confront the human rights violations committed through its Torture Program, and provide acknowledgement and reparations for its victims. It is only after these past wrongs have been acknowledged and sincere efforts have been made to make the victims whole again that the United States can, in good conscience, look toward the future.

INTRODUCTION

Despite the fact that the United States is known to have subjected countless individuals to illegal detention and torture as the Bush administration carried out its “War on Terror”, the U.S. government continues to avoid providing transparency and accountability for its actions to its victims, to the American public, and to the world. It has refused to provide comprehensive, transparent investigations into the actions of U.S. officials or any meaningful form of acknowledgement of wrongdoing. It continues to preempt litigation of claims made by torture victims involving the actions of U.S. officials by invoking the state secrets privilege, an evidentiary principle in U.S. law that allows the government to prevent certain facts from being litigated if revealing them could potentially hamper national security.¹

Instead of addressing the previous administrations actions, President Obama adopted the approach of “look[ing] forward as opposed to looking backwards.”² When it comes to the claims of torture victims, this will result in serious negative consequences for both the victims of the torture program, who continue to suffer, and for the protection of human rights more broadly in the future. As the American Civil Liberties Union stated in a letter to the U.S. Justice Department, “[T]he failure to conduct a comprehensive criminal investigation would contribute to the notion that torture remains a permissible policy option for future administrations; undermine the ability of the United States to advocate for human rights abroad; and compromise Americans’ faith in the rule of law at home. . . .”³

¹ *Background on the State Secrets Privilege*, ACLU, <https://www.aclu.org/background-state-secrets-privilege> (last visited July 29, 2015).

² David Johnston & Charlie Savage, *Obama Reluctant to Look Into Bush Programs*, N.Y. TIMES, Jan. 11, 2009, http://www.nytimes.com/2009/01/12/us/politics/12inquire.html?pagewanted=all&_r=0.

³ Letter from the American Civil Liberties Union to Eric Holder, U.S. Attorney General (Dec. 22, 2014), *available at* https://www.aclu.org/files/assets/aclu_and_hrwh_letter_torture_special_prosecutor_-_12-22.pdf (requesting that a special prosecutor be appointed to conduct a criminal investigation of those involved in the events disclosed by the Senate Torture Report).

The objective of this Report is to assess recent developments, both domestic and international, regarding the issues of extraordinary rendition, unlawful detention, and interrogation by means of torture. These recent developments have provided a steady supply of information to general public regarding the facts behind U.S. action in the post-September 11th era. The accessibility of this information should preclude the United States from avoiding accountability for its actions and from continuing to claim that this information must be kept secret for national security reasons. The new developments detailed in this report have reset the starting point for obtaining accountability and reparations. The U.S. submission to and appearance before international legal bodies, the release of the Senate Select Committee on Intelligence Report on Torture,⁴ investigation of the CIA Detention and Interrogation Program by foreign and international bodies, litigation the facts of the program by foreign and international courts, and the continued exposure of new facts to the global public by the news media and civil society all can be utilized to demand accountability. The task at hand is to take stock of changed circumstances and to determine how they impact ongoing advocacy efforts on behalf of torture victims. We believe that it is the obligation of advocates to pressure the U.S. government with the recent disclosures, judicial theories, and expressed global concern that point to accountability and remedy for torture.

The Report begins by providing background on how the U.S. government up to this point has successfully evaded answering the claims of torture victims. Section One then discusses recent assertions made by the United States to two international oversight bodies, the United Nations Committee Against Torture and the United Nations Universal Periodic Review, regarding its commitment to human rights. The assertions made by the United States, as well as

⁴ Hereinafter "Torture Report."

the findings of the international bodies upon review of U.S. actions, provide strong support that the United States has international obligations which preclude it from continuing this pattern of evasion from accountability.

Section Two examines the Senate Torture Report, released in December 2014, detailing the findings and conclusions from the investigation done by the U.S. Senate Select Committee on Intelligence into the CIA's Detention and Interrogation Program. The summary of information contained in the Report about the program and its victims that is provided by this Section sets forth the general facts of the illegal use of torture by the U.S. government.

Section Three examines the legal approaches to accountability for torture that have been pursued in international and foreign arenas. The Section will analyze the discussion of facts concerning the CIA Detention and Interrogation that has occurred in international courts, including investigations that are underway in the International Criminal Court and recent holdings from the European Court of Human Rights. The Section also provides information about the discussion of related facts in litigation that has taken place in the United Kingdom and Australia, and examines the implications of decisions made in these foreign courts.

Section Four discusses the external pressure that the media and civil society can place on the U.S. government through its coverage of the CIA Detention and Interrogation Program. This Section considers revelations made by the media and how these revelations may be able to aid in surpassing the state secrets privilege, provide momentum to the demand for accountability, and fuel the efforts of advocates for torture victims. Thus, in addition to the international bodies and courts, information dissemination by the media and civil society groups has provided yet another source of pressure for government accountability by attracting public attention to the acts of torture committed and decreasing the availability of plausible deniability.

Finally, Section Five concludes the Report by providing an overview of the mechanisms available for pursuing accountability for the harms caused by the Torture Program.

It is our hope that this report will serve as a resource for victims and advocates in the pursuit of justice and accountability for the actions perpetrated by the United States government, foreign governments, and private entities who designed, implemented, or were otherwise complicit in the CIA's Rendition, Detention, and Interrogation Program.

DISMANTLING THE STATE SECRETS PROBLEM

In recent years, multiple allegations have been made in U.S. courts against the U.S. government, the Central Intelligence Agency (CIA), various government officials and government contractors by individuals that claim to have been subjected to torture, inhumane detention and extraordinary rendition as a part of U.S. tactics in the post-September 11th war on terrorism. However, even as more of the atrocities committed by U.S. officials during one of the darkest periods in American history have come to light, our judicial system has continued to deny the opportunity to hold those responsible accountable for their actions, or to provide the victims any chance of remedy or redress. This denial has been repeatedly issued under the auspices of the “state secrets privilege;” a court-made evidentiary principle that’s power has expanded to the point where its invocation by a member of the executive branch equates with a judicial dismissal. This Introduction will provide background information on the privilege for present victims and their advocates to understand the context in which their efforts to hold the government accountable will take place. It will explore the weaknesses in the privilege that may still allow our court system to be one of the means available for these individuals to receive acknowledgement and compensation for what they have suffered.

The state secrets privilege is an evidentiary principle intended to protect information the government possesses that, if revealed, “might compromise . . . our government in its public duties, or endanger” those furthering military and other foreign policy goals.⁵ Formally developed by the Supreme Court in *United States v. Reynolds*,⁶ the privilege was originally intended to prevent certain evidence from being litigated if the executive branch claimed that

⁵ *Totten v. United States*, 92 U.S. 105, 106 (1876).

⁶ *United States v. Reynolds*, 345 U.S. 1 (1953).

doing so would endanger national security. However, the Court in *Reynolds* made clear that in the event that the executive branch made a claim of privilege, the judiciary would review each invocation to determine its validity.⁷ This implies that the Court anticipated circumstances where the government might try to invoke the privilege to hide facts that were embarrassing or damaging, rather than central to national security.

The circumstances in *Reynolds* differ considerably from those in which the invocation of the privilege has become commonplace. In *Reynolds*, an Air Force aircraft crashed while it was testing secret electronic equipment.⁸ Three civilian observers onboard were killed.⁹ The plaintiffs, suing on behalf of the deceased, moved for the production of the Air Force's official accident investigation report and statements concerning the accident from the surviving crew members.¹⁰ The government refused to produce its official investigation report, insisting that the material could not be provided without seriously hampering national security and the development of military equipment.¹¹ However, the government acquiesced in one respect by offering the plaintiffs the opportunity to obtain statements from the surviving crew members.¹² The Supreme Court held that this dramatically reduced the necessity of the privileged document, because the plaintiffs had an available alternative for evidence from which to make the case.¹³ The Supreme Court's decision in *Reynolds* only discussed whether or not that particular piece of evidence was privileged; it did not entertain the possibility of the entire case being dismissed because the subject matter was too closely related to national security.¹⁴

⁷ *Id.*

⁸ *Id.* at 2–3.

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ *Id.* at 4.

¹² *Id.* at 11.

¹³ *Id.*

¹⁴ See Daniel Huyck, *Fade to Black: El Masri v. U.S. Validates The Use of State Secrets Privilege to Dismiss Extraordinary Rendition Claims*, 17 MIN. J. INT'L J. 435, 451 (2008).

Although the state secrets privilege was developed at common law, its treatment in *Reynolds* by the Supreme Court provided a formal acknowledgment and articulation of the principal.¹⁵ In its opinion, the Court attempted to establish the elements of the doctrine or necessary requirements for its invocation.¹⁶ The Court established that it was a government privilege that must be asserted by the government; courts should determine whether the disclosure in question would create an unreasonable risk to national security; and there should be a judicial balancing of necessity, weighing the plaintiff's need for the information to litigate the case, whether or not there was an availability of alternative evidence, and the reasonable danger it created for national security.¹⁷ However, the decision did not indicate that a successful claim of privilege by the government would require a complete dismissal of the action.¹⁸

I. THE STATE SECRETS PRIVILEGE, EXTRAORDINARY RENDITION AND TORTURE

Since September 11th, and even prior to that, the government has invoked the state secrets privilege in order to dismiss entire lawsuits, which is contrary to its intended purpose.¹⁹ Additionally, courts have usually been willing to take the executive branch at its word when it invokes the privilege.²⁰ The following cases illustrate how the United States has invoked the state secrets privilege to shield itself from accountability.

By invoking the state secrets privilege, the government has taken the position that if the case were to proceed, facts that threaten national security *may* be divulged.²¹ Continually invoking the state secrets privilege effectively preempts the litigation of torture claims; the

¹⁵ See Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 BROOKLYN L. REV. 201, 207 (2009).

¹⁶ Huyck, *supra* note 14, at 449, 456.

¹⁷ See Setty, *supra* note 15, at 207; Huyck, *supra* note 16, at 434.

¹⁸ Huyck, *supra* note 14, at 444.

¹⁹ *Id.*

²⁰ See *id.* at 451.

²¹ See Setty, *supra* note 15, at 207 (discussing the “reasonable danger” to national security standard used in application of the doctrine).

executive branch deliberately eludes accountability, usurping the role of the judiciary. Put another way, until now, the state secrets privilege has given U.S. officials suspected of committing acts illegal under domestic and international law the unchecked authority to dismiss charges against them, without consideration of whether or not those claims were well-founded. This vast and unintended expansion the state secrets privilege has turned the government into an unbeatable monolith.

Most recently, the U.S. Supreme Court has declined to review two high profile cases brought by torture victims.²² In both cases, the lower courts cited the state secrets privilege as justification for dismissing the cases.²³

A. El-Masri v. United States²⁴

Khaled El-Masri, a German citizen of Lebanese descent, brought action against the Director of the CIA, a corporate defendant, and unnamed employees of the CIA and of the corporate defendant.²⁵ He alleged that he was illegally detained, tortured, and subjected to other inhumane treatment by the defendants as part of the CIA's "extraordinary rendition" program.²⁶ After Macedonian agents captured and detained El-Masri, he was turned over to CIA agents.²⁷ The CIA held El-Masri for four months in Afghanistan.²⁸ He was released when the CIA realized that there had been a mistake concerning his identity, and El-Masri was not in fact a person of interest.²⁹

²² See *El Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007); *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).

²³ See *Mohamed v. Jeppesen Dataplan*, 539 F. Supp.2d., 1128, 1136 (N.D. Cal. 2008), *affm'd*, 614 F.3d 1070, 1084; *El Masri v. Tenet* 437 F. Supp.2d 530, 540–41 (E.D. Va. 2006), *affm'd*, 479 F.3d 296, 313 (4th Cir. 2007).

²⁴ *El Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

²⁵ *Id.* at 296.

²⁶ *Id.*

²⁷ Huyck, *supra* note 16, at 449.

²⁸ *Id.*

²⁹ *Id.*

The Fourth Circuit Court of Appeals received numerous published reports evidencing the existence and methodology of the CIA's program, through which El-Masri had been wrongfully detained.³⁰ In his claim in U.S. court, El-Masri maintained that the state secrets privilege could not be invoked because government officials, including CIA directors, had discussed the extraordinary rendition program in public forums.³¹ Nevertheless, the court dismissed the case upon the government's intervention as a defendant and assertion of the state secrets privilege.³² Despite the fact that a substantial amount of information had already been disclosed to the public concerning the practices employed by CIA operatives against persons such as El-Masri, the court held that the case posed an unreasonable risk of exposing state secrets. In particular, the court held that the evidence necessary to litigate the claim would expose how the CIA organizes its staff, how the CIA supervises sensitive intelligence operations, how the CIA director participates in the operations and is relayed information concerning progress, and how the CIA makes its personnel assignments.³³

The court did not elaborate on how this information differed from that contained in available public disclosures or what additional risk the particular information would create, claiming "even stating precisely the harm that may result from further proceeding in this case is contrary to national interest."³⁴ Thus, an evidentiary principle was used, before the case even reached the stage for the discovery of evidence, to preempt a potential claim against the government.³⁵ The government was shielded from any formal means of accountability, and El-Masri was denied a remedy for the infringement of his rights in U.S. court. In 2007, the

³⁰ *Id.*

³¹ *El Masri*, 479 F.3d at 301.

³² Huyck, *supra* note 14, at 454.

³³ *El Masri*, 479 F.3d at 309–10.

³⁴ Huyck, *supra* note 14, at 455.

³⁵ *Id.* at 454.

Supreme Court declined to review a petition filed on behalf of El-Masri by the American Civil Liberties Union.³⁶

B. Mohamed v. Jeppesen Dataplan³⁷

One of the even more recent cases in which the government successfully asserted the state secrets privilege against claims made by victims of extraordinary rendition and torture was in *Mohamed v. Jeppesen Dataplan*.³⁸ In *Jeppesen*, five plaintiffs brought claims that they were each apprehended by foreign governments and secretly transferred to detention sites in foreign countries to be detained and interrogated by U.S. or foreign officials.³⁹ The plaintiffs claimed that this program, which was operated by the U.S. government in concert with foreign government officials, used interrogation methods that were illegal under federal and international law.⁴⁰ The plaintiffs alleged that defendant Jeppesen Dataplan, Inc., a U.S. corporation, provided “flight planning and logistical support to the aircraft and crew of all flights transporting plaintiffs among the locations where they were detained and tortured.”⁴¹ The U.S. government intervened as a defendant before Jeppesen responded to the plaintiffs’ complaint.⁴² It is important to note that the details of the government’s involvement in the plaintiffs’ rendition and torture had already been established in almost two thousand pages of publicly available documents.⁴³

³⁶ Linda Greenhouse, *Supreme Court Refuses to Hear Torture Appeal*, N.Y. TIMES, Oct. 9, 2007, <http://www.nytimes.com/2007/10/10/washington/10scotus.html> [<http://perma.cc/4Y5P-ZG84>].

³⁷ *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070 (9th Cir. 2010).

³⁸ Galit Ragan, *Masquerading Justiciability: The Misapplication of State Secrets’ Privilege in Mohammed v. Jeppesen*, 40 GA J. INT’L & COMP. L. 423, 424 (2012).

³⁹ *Mohamed*, 614 F.3d at 1130. Plaintiffs included Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah, and Bisher al-Rawi. *Id.*

⁴⁰ *See id.* at 1073.

⁴¹ *See Ragan*, *supra* note 38, at 432.

⁴² *Id.*

⁴³ *Id.* at 436.

The Ninth Circuit was required to treat as true the following facts: (1) that the U.S. government operated an extraordinary rendition program involving the kidnapping and rendition of terrorism suspects to secret detention facilities;⁴⁴ (2) Jeppesen facilitated over seventy flights as a part of the U.S. government's extraordinary rendition program;⁴⁵ (3) at the secret detention facilities, detainees were subject to torture and other forms of cruel, inhuman, and degrading treatment in violation of both federal law and international law;⁴⁶ (4) detainees were transported to states where the use of torture in interrogations was routine;⁴⁷ (5) Jeppesen knew or reasonably should have known that it was facilitating rendition for people who would be subject to torture and abuse;⁴⁸ and (6) that the plaintiffs were detained, interrogated without counsel, and transported to foreign prisons where they were tortured.⁴⁹

Even though the Ninth Circuit treated as true the plaintiffs' claims that the government was responsible for their extraordinary rendition and torture, the majority still dismissed the claim based on the state secrets privilege. The court held that the program itself was not a state secret, but at least some matters related to the litigation created an unjustifiable risk of divulging state secrets.⁵⁰ More specifically, the litigation would not reveal the existence of the U.S. government's covert operations, but it would reveal *how the United States conducts* those operations.⁵¹ The court noted the following other possible remedies that the plaintiffs could pursue: independent assessment by the government of the merits of the plaintiffs claim; an investigation by Congress into the allegations; the enactment of a private bill that would grant

⁴⁴ D.A. Jeremy Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429, 435 (2012)

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Ragan, *supra* note 38, at 433.

⁵¹ *See id.* at 434.

compensation; or the enactment of remedial legislation authorizing appropriate causes of action and procedure to address claims.⁵² None of these remedies ever advanced past the stage of possibility.

The dissenting opinion in *Jeppesen* argued that the intention of the states secret rule was to allow defendants to refuse to answer certain allegations – not to refuse to file any responsive pleading whatsoever.⁵³ Thus, the evidentiary principle was transformed into an immunity doctrine.⁵⁴ In 2011, the Supreme Court declined to review the claim brought on behalf of these five victims of extraordinary rendition.⁵⁵

II. RECENT DEVELOPMENTS

Court decisions to side with the government when faced with claims such as those in *El Masri* and *Jeppesen* have been troubling, given that most, if not all, of the information needed for the victims to obtain relief was already public knowledge. Since that time, even more information regarding extraordinary rendition, detention, and torture has been disclosed. The more complete accounts of these U.S. practices further complicates, if not negates, the U.S. government's ability to invoke the state secrets privilege to preempt the litigation of these matters.

The CIA's post-September 11th use of illegal and inhumane tactics are now widely known, whether or not claims concerning these actions have been allowed a chance at litigation in a U.S. court. The release of the Senate Torture Report, rulings from the European Court of Human Rights, decisions released by other foreign courts, and the continuous public dissemination of more information by the media could open the door for remedy in U.S. courts.

⁵² *Id.*

⁵³ *Id.* at 435.

⁵⁴ *Id.*

⁵⁵ *Id.*

These recent developments raise an important question about future claims such as those dismissed in both *Jeppesen* and *El-Masri*—how can the government continue to claim that publicly available information is a government secret?

“I think the government will be hard pressed to say this information is a secret when we all have access to a 500-page document that details a good portion of what some of these men experienced”⁵⁶ While the torture report is not a guarantee that U.S. courts will begin hearing torture claims, it rings a bell that cannot be un-rung. Additionally, the decisions from the European Court are also public knowledge, and show that other countries were aware (or should have been aware) that the United States was engaging in human rights violations.

Recent proclamations made by the United States in regards to its commitment to human rights, combined with the dissemination of this information into the public domain, provide a promising new framework which advocates may use to demand accountability and acknowledgment for torture victims. The unequivocal statements that the United States has made condemning torture and reaffirming its commitment to abide by its legal obligations under international human rights law are irreconcilable with the “looking forward” approach that the Obama administration has taken up until now concerning the government’s use of torture. As damning as these facts are to the U.S. government, it cannot ignore them or pretend they do not exist anymore. By doing so, the United States falls far short of meeting its human rights obligations and there will be no conclusion left to draw than that the United States participation in international legal bodies is plagued with a reprehensible insincerity.

⁵⁶ Todd Ruger, *Senate Report Tests U.S. State-Secrets Defense*, ROLL CALL (Dec. 10, 2014, 3:08 PM), http://www.rollcall.com/news/senate_report_tests_us_state_secrets_defense-238606-1.html [<http://perma.cc/YYF7-HAAQ>].

SECTION ONE: THE U.S. & INTERNATIONAL HUMAN RIGHTS NORMS

Despite the failure of the U.S. domestic legal framework to hold the U.S. government accountable for instances of torture, the United States has recently made renewed commitments to do so under international human rights law. This Report presents the U.S. obligations under international human rights law and its recent statements concerning its commitment to those legal principles in the hope that it may serve as a new framework for advocates to use in obtaining accountability and acknowledgment from the U.S. government for torture victims.

In particular, the United States has made important assertions about its obligations to prevent torture and hold accountable those who violate the prohibition against torture under international human rights law. This Section will focus on two important international oversight bodies that the United States is a part of, explaining their review processes in depth, and it will group the most important U.S. statements about torture into distinct categories. This Section will demonstrate that because the United States has made these promises of upholding the United Nation's ban on torture, it must now take action, uphold its stated commitments, and fulfill all of its responsibilities under international legal bodies, if it is to have any credibility at home or on the international stage.

The failure of the U.S. government to adequately follow international laws and international human right principles has not gone unnoticed by the international community. The United States has voluntarily and legally subjected itself to review by certain bodies of the United Nations. Although the United States has not chosen to subject itself to the jurisdiction of international courts, it has continuous and ongoing legal obligations stemming from its ratification of certain international treaties. As a State Party to the U.N.'s Convention Against Torture and

Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) since 1994,⁵⁷ the United States has agreed to uphold an unequivocal ban on torture and must regularly report its progress to this Committee.⁵⁸ The United States recently completed its Periodic Review with the Committee on Torture (Committee)—a process that involves a written report, a hearing in Geneva, and a follow-up list of recommendations from the Committee.⁵⁹ The United States participated in its most recent review with the Committee in November of 2014.⁶⁰

In addition to the CAT review process, which focuses exclusively on the topic of torture, the United States must also undergo an additional full review of all of its human rights responsibilities. The United Nations Human Rights Council (UNHRC) conducts this review, and the process is known as the Universal Periodic Review (UPR).⁶¹ The United States submitted its report to the UPR in February of 2015, and participated in the review in May 2015.⁶²

I. CONVENTION AGAINST TORTURE

The U.S. hearing with the Committee took place on November 12-13, 2014, and the U.S. delegates made several critical assertions about the U.S. commitment to upholding the Convention.⁶³ This hearing was just weeks before the release of the Senate Intelligence

⁵⁷ See *Chapter IV.9 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-9&chapter=4&lang=en (last visited Mar. 3, 2015) [hereinafter UNITED NATIONS TREATY COLLECTION] (providing an updated list of the Signatories and Parties as well as their Declarations and Reservations). The U.S. signed CAT in 1988, and the Senate later ratified the treaty on October 21, 1994. *Id.*

⁵⁸ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter CAT], *available at* <http://www.hrweb.org/legal/cat.html>.

⁵⁹ See *2014 UN Committee Against Torture (CAT) Review of the U.S. Government*, CTR FOR CONST'L RIGHTS, <http://ccrjustice.org/cat> (last visited Apr. 2, 2015) (explaining the review process and providing links to the U.S. submission, transcripts, related news stories, shadow reports and other websites).

⁶⁰ *Sessions for CAT*, UN HUMAN RIGHTS, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CAT (last visited Apr. 28, 2015).

⁶¹ *Basic Facts about the UPR*, UN HUMAN RIGHTS, <http://www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx> (last visited Apr. 28, 2015).

⁶² Rep. of the U.S. Submitted to the U.N. High Commissioner for Human Rights in Conjunction with the UPR at 18 (Feb. 6, 2015) [hereinafter U.S. UPR Report 2015] *available at* <http://www.state.gov/j/drl/upr/2015/> at 18.

⁶³ See *generally Full Transcript: US Periodic Report to the UN Committee Against Torture*, JUST SECURITY (Nov. 12–13, 2014) [hereinafter Transcript], *available at* <http://justsecurity.org/17628/full-transcript-united-states->

Committee report on CIA torture, which officially unmasked the horrific nature of the Detention and Interrogation Program⁶⁴ used in the wake of September 11th to prevent future acts of terrorism.⁶⁵

Thus far, the Obama Administration has consistently refused to address its predecessor's use of torture and has maintained the opinion that it would rather "look[] forward than . . . look[] backwards."⁶⁶ Despite this policy, as a State Party to the Convention, the United States must fulfill its international treaty obligations with regard to torture. The government's promises to the Committee in November further reinforced its obligation to be in complete conformity with the provisions of the treaty as well as the recommendations it received from the Committee. In order to claim compliance with the treaty as the United States has, it is absolutely required by the Convention to "look backwards" and address past allegations of torture. This Part will provide relevant background information about the requirements of the Convention and the Committee's authority. It will then highlight the most important commitments made by the United States during its November CAT review process, and demonstrate that the United States must now follow through on its promises. This means, at a minimum, the United States must investigate the all allegations of torture, prosecute offenders under its jurisdiction, provide reparations to its victims, and ensure full transparency about the CIA torture program.

A. Background on CAT and the Committee's Authority

A Brief Summary of the Requirements of CAT

appearance-committee-convention-torture/ (providing a transcript of most of the United States' hearing with the Committee in November).

⁶⁴ See generally Torture Report, *supra* note 226.

⁶⁵ Greg Miller et al., *Senate Report on CIA Program Details Brutality, Dishonesty*, WASH. POST, Dec. 9, 2014, http://www.washingtonpost.com/world/national-security/senate-report-on-cia-program-details-brutality-dishonesty/2014/12/09/1075c726-7f0e-11e4-9f38-95a187e4c1f7_story.html.

⁶⁶ *Obama on Investigating Bush: I'm Looking Forward But "Nobody's Above the Law"*, HUFF. POST (Mar. 12, 2009, 5:12 AM), http://www.huffingtonpost.com/2009/02/09/obama-on-investigating-bu_n_165455.html? (providing a video and transcript of President Obama's news conference about the potential of a congressional "truth commission" in 2009).

The Convention has thirty-three articles in total, with the sixteen articles in Part I providing the primary mandates related to torture in situations of extraordinary rendition, the focus of this Policy Brief.⁶⁷ Part I begins by explicitly defining torture⁶⁸ and requiring every State to unequivocally prohibit its use.⁶⁹ Additionally, State Parties are prevented from transporting any individual to another State if “there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁷⁰ States are further required to establish and enforce preventative guidelines and procedures for all individuals involved in the interrogation or treatment of detainees.⁷¹

The Convention mandates that a State Party assert jurisdiction over any cases involving its own citizens—whether they are the alleged perpetrators or victims—as well as any violations that occur on its territory.⁷² All States with jurisdiction over a case must immediately begin a process of investigation and prosecution of any alleged offenders.⁷³ Likewise, states are required to implement safeguards for all victims of torture, guaranteeing individuals the right to bring their case to competent authorities and receive adequate redress and compensation.⁷⁴

The Binding Authority of CAT and the Committee Against Torture

There are 146 other countries that have similarly pledged to prohibit acts of torture by signing the Convention.⁷⁵ Upon ratifying this international treaty devoted to the worldwide

⁶⁷ See CAT, *supra* note 58, pt. I, arts. 1–16.

⁶⁸ *Id.* at art. 1.

⁶⁹ *Id.* at art. 2. Each State must enact some sort of legislative measure or other governmental mandate against the use of torture. *Id.* This provision allows for no exceptions to the ban, such as times of war or emergencies. *Id.*

⁷⁰ *Id.* at art. 3. This act of extradition is known as “refoulement.” *Id.*

⁷¹ See *id.* at art. 10.

⁷² See CAT, *supra* note 58, art. 5.

⁷³ See *id.* at arts. 5–8.

⁷⁴ See *id.* at arts. 13–15.

⁷⁵ For an updated list of the Signatories and Parties, as well as their Declarations and Reservations, see *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited Mar. 3, 2015).

eradication of torture,⁷⁶ State Parties agree to commit themselves to the authority of the UN Committee Against Torture, which is the overseeing and interpretative body of the treaty.⁷⁷ Because the Committee's authority is derived from the treaty itself, the Parties to the treaty impliedly agree to be bound by the Committee's authority.⁷⁸ Moreover, if a State wishes to provide a more official acquiescence to the authority of the Committee, it may choose to make a declaration under Article 21 of the Convention that it recognizes the competence of the Committee.⁷⁹ The United States made such a declaration in 1994 after the treaty was ratified.⁸⁰

In fact, leading up to this point, the United States considered itself a champion of ensuring the strength of the Convention, and it saw accountability as the treaty's key feature.⁸¹ The Senate Committee on Foreign Relations submitted a report in 1990 with recommendations about ratification in which it repeatedly explained the binding nature of the Convention and the accountability of violating State Parties.⁸² The Senate Committee urged ratification so that "the United States [would] be in a stronger position to prosecute alleged torturers and to bring to task those countries in the international arena that continue to engage in this heinous and inhumane practice."⁸³ The 1990 Senate report explained that during the negotiations, the United States was responsible for "strengthen[ing] the effectiveness of the Convention by pressing for provisions

⁷⁶ See CAT, *supra* note 58.

⁷⁷ See *id.* at arts. 17–24.

⁷⁸ See generally Conway Blake, *Normative Instruments in International Human Rights Law: Locating the General Comment*, CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE (2008), available at <http://chrgj.org/wp-content/uploads/2012/07/blake.pdf>.

⁷⁹ See CAT, *supra* note 58, at art. 21.

⁸⁰ *United States Initial Reports of States Parties due in 1995*, at 1, available at <http://www.state.gov/documents/organization/100296.pdf>. See also S. EXEC. DOC 101–130, at 5 (1990) (explaining that originally, under the Reagan Administration when the U.S. had signed but not yet ratified the Convention, it submitted a reservation that it would not recognize the competence of the Committee). When the U.S. ratified the treaty under President H.W. Bush, it reversed positions and made the Article 21 declaration. *Id.*

⁸¹ See generally S. EXEC. DOC. NO. 101-30 (providing an explanation of the Senate Committee on Foreign Relations' position on ratifying CAT and general statements about the United States' policy against torture).

⁸² See *id.* at 2–3.

⁸³ *Id.* at 3–4.

that would ensure that torture is a punishable offense.”⁸⁴ Additionally, it stated that “[t]he strength of the Convention lies in the *obligation* of States Parties to make torture a crime and to prosecute or extradite alleged torturers found in their territory.”⁸⁵

While the legislative history makes it clear that the Convention was intended to be a binding instrument and the Committee its overseeing authority, Congress additionally passed a federal statute called the Torture Act in 1994.⁸⁶ The Senate Committee on Foreign Relations advised Congress to enact a torture statute because the Convention was not self-executing and needed an additional federal law implementing the obligations of the United States under the treaty.⁸⁷ Additionally, CAT itself requires State Parties to enact legislation that criminalizes acts of torture.⁸⁸

The Eleventh Circuit then provided judicial confirmation of the Convention’s authority as well when it heard a case brought under the Federal Torture Act.⁸⁹ In *United States v. Belfast*, the Eleventh Circuit explained that “Congress passed the Torture Act to implement the United States’ obligations under the Convention Against Torture,”⁹⁰ as is required by the treaty.⁹¹ The defendant, an American citizen, challenged the constitutionality of the Torture Act, claiming that the U.S. statute exceeded the scope of congressional authority.⁹² The Eleventh Circuit upheld the statute as a valid exercise of congressional power under the Necessary and Proper Clause.⁹³ It additionally concluded that the defendant’s ninety-seven year sentence under the statute was

⁸⁴ *Id.* at 2–3.

⁸⁵ *Id.* at 3 (emphasis added) (“Each State Party is *bound* to establish criminal jurisdiction over torture and to prosecute torturers”) (emphasis added).

⁸⁶ 18 U.S.C. § 2340 (1994).

⁸⁷ See S. EXEC. DOC., *supra* note 80, at 3.

⁸⁸ See CAT, *supra* note 58, at art. 4(1).

⁸⁹ See *United States v. Belfast*, 611 F.3d 783 (11 Cir. 2010).

⁹⁰ *Id.* at 802.

⁹¹ See *id.* See also CAT, *supra* note 58, at art. 4.

⁹² See *Belfast*, 611 F.3d at 783.

⁹³ *Id.*

an appropriate punishment for the several acts of torture he committed in Liberia while his father was president of the country.⁹⁴

In sum, all three branches of the American government have continuously affirmed the binding nature of CAT, as well as the authority of the Committee to ensure the compliance of State Parties. This consistent support that the United States has provided CAT in the past—particularly the United States’ eagerness to hold other countries accountable—is now being tested after the release of the Torture Report.⁹⁵ If the United States is to be taken seriously as a party to international treaties, it simply cannot ignore its previously unwavering commitment to CAT just because the alleged perpetrators are from the United States.

B. The United States’ Obligations Under CAT

Given the United States’ track record of strong support for the Convention combined with the recent undisputable evidence of torture committed after September 11th,⁹⁶ it is important to review the statements made by the U.S. delegation in its November hearing with the Committee. One important sentiment that the United States reiterated throughout its review process was its proclaimed respect toward the Committee and the insight the United States could gain from the Committee.⁹⁷ The United States explained that it views its report to the Committee not as an end, but as a means in itself toward improving human rights strategies.⁹⁸ It called the hearing with the Committee a “dialogue,” and expressed its appreciation for the opportunity to learn from the United Nations.⁹⁹ Ambassador Keith Harper, U.S. Representative to the Human Rights Council, stated that the U.S. delegates viewed their meetings with the

⁹⁴ *Id.*

⁹⁵ Torture Report, *infra* note 226.

⁹⁶ *See generally id.*

⁹⁷ *See* Transcript, *supra* note 63, at 2, 23, 53.

⁹⁸ *See* Transcript, *supra* note 63, at 1.

⁹⁹ *See id.* at 2.

Committee as a way to “present our efforts to implement the convention to you—but also an opportunity for us to learn from you.”¹⁰⁰

If the United States was sincere in its comments to the Committee, then the international community should expect—and even demand—that the United States address the evidence of torture confirmed by the information that has become available concerning the CIA’s programs of extraordinary rendition and detention and enhanced interrogation techniques in a way that is congruent with its own statements and the recommendations it received from the Committee. Each of the following subsections will examine a different category of issues discussed by the U.S. delegates and provide the relevant feedback it received from the Committee. The categories of statements will be reviewed as follows: (a) the United States commitment to the Convention generally, (b) extraterritoriality and the Law of Armed Conflict, (c) the treatment of detainees, and (d) the United States’ obligation to address past acts of torture by holding itself accountable and providing reparations to its victims.

In the United States’ Periodic Report to the Commission, government officials opened with a reiteration of its enduring and firm stance against the use of torture.¹⁰¹ “The absolute prohibition of torture is of fundamental importance to the United States,” it stated.¹⁰² To further illustrate its dedication to its obligations under the Convention, the government’s report included a quote from President Barack Obama’s 2009 address on national security:

“I can stand here today, as President of the United States, and say without exception or equivocation that we do not torture, and that we will vigorously protect our people while forging a strong and durable framework that allows us to fight terrorism while abiding by the rule of law.”¹⁰³

¹⁰⁰ *Id.*

¹⁰¹ See United States Periodic Report, U.N. Comm. Against Torture, U.S. STATE DEPT. at 2 (Aug. 12, 2013), available at <http://www.state.gov/j/drl/rls/213055.htm> [hereinafter U.S. Periodic Report 2013].

¹⁰² *Id.*

¹⁰³ *Id.*

Likewise, the U.S. delegates who participated in the subsequent hearing with the Committee took many opportunities to tell the committee about the United States' status as a world leader in implementing the Convention.¹⁰⁴ The delegates also spoke of the long history against the use of torture in the United States, calling it a concept that is “contrary to the founding documents of our country, and the fundamental values of our people.”¹⁰⁵ A Department of Justice official stated that the United States is “deeply committed to preventing violations of the prohibition against torture. . . ; to pursuing justice on behalf of victims; and to denying perpetrators safe haven in [its] country.”¹⁰⁶ They explained that “[t]here should be no doubt: the United States affirms that torture and cruel, inhuman, and degrading treatment and punishment are prohibited at all times in all places, and we remain resolute in our adherence to these prohibitions.”¹⁰⁷

In the Committee's Concluding Observations to the United States, the members also noted that the United States had made progress in its comprehensive commitment to the treaty and the ban on torture.¹⁰⁸ They commended recent Supreme Court rulings and Executive Orders as positive changes in United States legislation and jurisprudence related to torture.¹⁰⁹ However, as a general matter, the Committee focused much less attention on the positive aspects of the U.S. implementation of the Convention than it did on its requests for changes in U.S. torture policy.¹¹⁰

¹⁰⁴ See *Transcript*, *supra* note 63, at 1 (“[T]he United States took a leading role in the negotiations of the Convention Against Torture . . . more than thirty years ago. Our country's leaders have long championed the Convention, across the political spectrum.”).

¹⁰⁵ See *id.*

¹⁰⁶ *Id.* at 5.

¹⁰⁷ *Id.*

¹⁰⁸ See Committee Against Torture: Concluding Observations on the Third to Fifth Periodic Report of the United States of America, CAT/C/SR. 1276–77 (Nov. 20, 2014) [hereinafter Committee Concluding Observations], available at http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cat_concludingobservations_2014.pdf.

¹⁰⁹ *Id.*

¹¹⁰ See *id.* at 2.

The Committee shared many serious concerns it had about the State's interpretation of the treaty.¹¹¹

1. Extraterritoriality and the Law of Armed Conflict

The United States conveyed two very important changes in its interpretation of the treaty during its 2014 review process. First, it clarified its understanding that the prohibition against torture applied to State Parties beyond their own geographical bounds.¹¹² Additionally, it accepted that during times of war, when the Law of Armed Conflict applies, the ban on torture remains absolute.¹¹³ Acting Legal Advisor Mary McLeod addressed both of these issues when she stated:

The answer to the question “whether the United States will abide by the universal ban on torture and cruel treatment in armed conflict or beyond United States borders, including Bagram and Guantanamo?”, is unequivocally yes. For the reasons we discussed, these prohibitions are categorical. They bind the United States and its officials at all times everywhere.¹¹⁴

She also specifically clarified that “a time of war does not suspend operation of the Convention of Torture, which continues to apply even when a State is engaged in armed conflict.”¹¹⁵ These statements represented an important shift in the U.S. interpretation of its responsibilities under CAT. Government officials had formerly relied on legal memoranda that advised enhanced interrogation techniques—amounting to torture—could be used in locations outside of U.S. territory.¹¹⁶ Likewise, the United States previously maintained that these same techniques were not prohibited during a time of war under the Law of Armed Conflict.¹¹⁷

¹¹¹ *Id.* (“The Committee also regrets that the State party maintains a restrictive interpretation of the provisions of the Convention and does not intend to withdraw any of its interpretative understandings.”).

¹¹² *See* Transcript, *supra* note 63, at 52.

¹¹³ *See id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 4.

¹¹⁶ *See Annex One of the Second Periodic Report of the United States of America to the Committee Against Torture*, U.S. STATE DEPT. (Oct. 21, 2005) at III.B.1, available at <http://www.state.gov/j/drl/rls/55712.htm>.

¹¹⁷ *See id.*

These caveats to CAT's explicit prohibition of torture rested at least partly on a reservation that the United States made to Article 16 of CAT.¹¹⁸ This provision provides that Member States must also ban "other acts of cruel, inhuman or degrading treatment or punishment not amounting to torture."¹¹⁹ The United States submitted a reservation when it ratified the treaty in 1994, stating that it accepted Article 16 to the extent that it did not interfere with the existing constitutional meaning of cruel and inhuman treatment under the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution.¹²⁰ This reservation was later cited in the Department of Justice's Office of Legal Counsel's memoranda explaining the acceptable interrogation techniques that could be used under President Bush in territories outside of the United States and during a time of war.¹²¹

The CIA Detention and Interrogation Program was also justified by the U.S. interpretation of Article 2's jurisdictional requirement that "[e]ach State Party shall take . . . measures to prevent acts of torture in *any territory* under its jurisdiction."¹²² The United States' interpretation of this phrase was, and continues to be, "all places that the State party controls as a governmental authority."¹²³ This is a slight but important variation from the Committee's interpretation of the phrase: "all areas where the State party exercises, directly or indirectly, in whole or in part, *de jure* or *de facto* effective control, in accordance with international law."¹²⁴ While both understandings could be applied in the same manner, the U.S. interpretation leaves a small margin for variation. This is especially concerning given the United

¹¹⁸ *See id.*

¹¹⁹ CAT, *supra* note 58, art. 16.

¹²⁰ *See United States Initial Reports of States Parties due in 1995, supra* note 24, at 10.

¹²¹ *See* Committee Concluding Observations, *supra* note 108, at 3.

¹²² CAT, *supra* note 58, art. 2 (emphasis added).

¹²³ Committee Concluding Observations, *supra* note 108, at 3.

¹²⁴ *Id.*

States' recent history of using a small amount of leeway to justify tortuous or cruel treatment during a time of national crisis.

The Committee welcomed the U.S. delegate's statements about torture being prohibited at all times and in all places, and it applauded Presidential Executive Order 13,491, which revoked the legally flawed legal memoranda justifying the use of torture.¹²⁵ However, it reiterated that the United States' understanding of the treaty must be broadened so that it is in line with that of the Committee.¹²⁶ The United States asserted in its review that its reservation to Article 16 and its jurisdictional interpretation do not provide limitations to the effectiveness of the treaty, and it maintained that "torture is prohibited at all times, in all places, no matter what the circumstances."¹²⁷ If this is true, then the United States must revise its interpretations to match those of the Committee exactly, and it must withdraw its reservation to Article 16. Not doing so only raises the question of whether the United States can be trusted to apply the treaty properly in the event of any future conflict or crisis. But in the final analysis, the United States should not be heard to backtrack with regard to its unequivocal statement that torture is absolutely prohibited everywhere and always.

2. Treatment of Detainees

The U.S. delegates again cited Executive Order 13,491, as well as the Detainee Treatment Act of 2005 to demonstrate to the Committee that the treatment of detainees and conditions of detention have improved.¹²⁸ Acting Legal Advisor Mary McCleod from the State Department explained:

Any individual detained in any armed conflict, who is in the custody or under the effective control of the United States, or detained within a facility owned, operated

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ Transcript, *supra* note 63, at 26.

¹²⁸ *Id.* at 25.

or controlled by the United States, in all circumstances, must be treated humanely and must not be tortured or subjected to cruel, inhuman or degrading treatment or punishment.¹²⁹

Moreover, she explained that these national safeguards not only “ensure compliance with the treaty obligations of the United States, including this Convention,”¹³⁰ but also, they “take[] it further” than what is required by CAT.¹³¹ However, this broad statement is clearly in direct conflict with several continued practices of the United States that are considered torture—as defined by the Committee, which is the interpretive body of CAT. Because the United States has committed itself to the authority of the Committee, and because the United States claims to be in full compliance with CAT,¹³² it must abolish these practices immediately. The prevalent acts that qualify as torture or cruel and inhumane treatment include: (1) indefinite detention, (2) solitary confinement, (3) force feeding, and (4) methods of interrogation involving inadequate minimum sleep requirements or sensory deprivation.

First, indefinite detention is a common practice, particularly for detainees at Guantanamo Bay.¹³³ The United States justifies indefinite detention under the Law of Armed Conflict.¹³⁴ Accordingly, it maintains that these individuals are “enemy belligerents,” and it is allowed to “hold them until the end of hostilities.”¹³⁵ However, indefinite detention is a “*per se* violation of the Convention”¹³⁶ according to the Committee. Likewise, several members of the Committee expressed their serious concerns about the use of solitary confinement in detention centers, citing

¹²⁹ *Id.* at 26.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Transcript, *supra* note 63 and accompanying text.

¹³³ See Peter Finn & Anne E. Komblut, *Obama Creates Indefinite Detention System for Prisoners at Guantanamo Bay*, WASH. POST, (Mar. 8, 2011, 12:44 AM) <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/07/AR2011030704871.html>.

¹³⁴ See Transcript, *supra* note 63, at 29.

¹³⁵ *Id.*

¹³⁶ Committee Concluding Observations, *supra* note 108, at 6.

suicide, anxiety, depression, insanity, and hallucinations as some of the ill effects of this practice.¹³⁷ Moreover, several scientific studies have proven that the prolonged practice of solitary confinement is, by definition, torture.¹³⁸ These studies show that only a few days of isolation can cause long-term mental damage.¹³⁹

Because of the conditions of detention and the use of indefinite detention, particularly at Guantanamo Bay, detainees have engaged in hunger strikes.¹⁴⁰ The U.S. officials have responded to these protests by using force-feedings that are “allegedly administered in an unnecessarily brutal and painful manner.”¹⁴¹ This practice is undoubtedly prohibited by Article 16 of the Convention, which bans the use of “acts of cruel, inhuman or degrading treatment or punishment.”¹⁴² Moreover, the Committee specifically ordered the United States to immediately cease the use of force-feeding of detainees.¹⁴³

Finally, the United States relies on Appendix M of the Army Field Manual Human Intelligence Collector Operations, which provides guidelines for interrogation of detainees.¹⁴⁴ While the United States said in its CAT hearing that these interrogation techniques “are consistent with U.S. domestic and international legal obligations,”¹⁴⁵ the Committee disagreed.¹⁴⁶ In its Concluding Observations sent after the U.S. hearing, the Committee specifically addressed the interrogation techniques known as “physical separation” and “field expedient separation.”¹⁴⁷ The

¹³⁷ See Transcript, *supra* note 63, at 13, 19, 20, 23, 38, 42, 44, 50.

¹³⁸ See, *Solitary Confinement Should be Banned in Most Cases*, UN Expert Says, UN NEWS CENTRE (Oct. 18, 2011) <http://www.un.org/apps/news/story.asp?NewsID=40097#.VTCro2TBzGc>.

¹³⁹ *Id.* to scientific study

¹⁴⁰ See, e.g., *Hunger Strikes at Guantanamo*, N.Y. TIMES, Apr. 5, 2013, <http://www.nytimes.com/2013/04/06/opinion/hunger-strike-at-guantanamo-bay.html>.

¹⁴¹ Committee Concluding Observations, *supra* note 108, at 6.

¹⁴² CAT, *supra* note 58, art. 16.

¹⁴³ Committee Concluding Observations, *supra* note 108, at 6.

¹⁴⁴ See Transcript, *supra* note 63, at 30.

¹⁴⁵ *Id.*

¹⁴⁶ Committee Concluding Observations, *supra* note 108, at 7.

¹⁴⁷ *Id.*

Committee explained that the physical separation technique, which allows detainees to get only four hours of sleep per night over extended periods, is sleep deprivation, and this qualifies as a form of ill treatment.¹⁴⁸ Equally, the field expedient separation technique authorizes sensory deprivation that can result in psychosis, and could easily constitute torture or ill treatment.¹⁴⁹

In sum, the United States cannot claim that its detention practices are compliant with CAT unless and until it follows the Committee's recommendations. As a State Party to the Convention, the United States must acknowledge that the Committee's interpretation of what compliance with the Convention looks like clearly supersedes that of the United States. After its recent CAT review, the United States has been explicitly told to end the use of indefinite detention, solitary confinement, force-feeding, and specific interrogation techniques in order to be in compliance with the Convention, as it says it is. Given its unequivocal commitment to the treaty as manifested during the oversight hearing, and the unequivocal assurance that the United States understands its obligations to treat detainees humanely without ever subjecting them to torture or cruel, inhuman or degrading treatment or punishment, the United States must now begin to conform its behavior in all regards to the provisions of CAT.

3. The Responsibility to Look Back

a. U.S. Accountability

Two very important points that the United States made several times during its review process were its acknowledgement of past mistakes and its claims of improvement. During the hearing with the Committee, Mary McLeod made the following statement:

The United States is proud of its record as a leader in respecting, promoting, and defending human rights and the rule of law, both at home and around the world. But in the wake of the 9/11 attacks, we regrettably did not always live up to our

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

own values, including those reflected in the Convention. As President Obama has acknowledged, we crossed the line and we take responsibility for that.¹⁵⁰

Additionally, State Department Secretary Tom Malinowski said, “the test for any nation committed to this Convention and to the rule of law is not whether it ever makes mistakes, but whether and how it corrects them.”¹⁵¹ Ambassador Keith Harper spoke of the United States’ “great progress since [its] last appearance before [the] Committee,” and said it had “learned from the past, and . . . strengthened [its] implementation of the Convention.”¹⁵² Secretary Malinowski stated that the United States “continue[s] to try to implement the Convention in improved ways.”¹⁵³ He added, “[w]e make efforts to sanction those responsible. We support civil society organizations that campaign against torture, and that treat its victims.”¹⁵⁴ Statements such as these, and many others, strongly suggested that the United States was finally going to take responsibility for the torture involved in the CIA’s Program. Also promising were the delegates’ vows to the Committee that the United States was determined to hold the individuals who committed torture accountable through the legal system.¹⁵⁵

However, it bolstered these claims by referencing investigations and prosecutions of very few individuals, and none of the individuals were involved in the decision-making process of the CIA Detention and Interrogation Program.¹⁵⁶ The delegates also cited the investigation

¹⁵⁰ See Transcript, *supra* note 63, at 3.

¹⁵¹ *Id.*

¹⁵² *Id.* at 2.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 3.

¹⁵⁵ See, e.g., *id.* at 5 ([P]rosecutors . . . undertook several reviews and criminal investigations into specific allegations of detainee abuse.”).

¹⁵⁶ See *id.* at 31 ([T]he Department has conducted thousands of investigations since 2001 and prosecuted or disciplined hundreds of servicemembers for mistreatment of detainees and other misconduct.”); Ben Emerson, *UN Expert Calls for Prosecution of CIA, US Officials for Crimes Committed During Interrogations*, UN News Centre (Dec. 9, 2014), <http://www.un.org/apps/news/story.asp?NewsID=49560#.VTBeBmTBzGc>. As another example of cited prosecutions by the U.S. delegates, Deputy Assistant Attorney General David Bitkower provided the Committee with details about criminal prosecutions against individuals who had committed torture in situations unrelated to the Torture Program. See Transcript, *supra* note 63, at 5 (referring to Chuckie Taylor, Sulejman

done by Assistant U.S. Attorney John Durham as further efforts of accountability.¹⁵⁷ Durham’s investigation looked into 101 specific detainee allegations of mistreatment under U.S. custody and resulted in zero criminal charges.¹⁵⁸

During the hearing, the Committee members repeatedly expressed their dissatisfaction with the Durham investigation, and Deputy Assistant Attorney General David Bitkower noted that he “appreciate[d] the frustration the Committee must feel at the limited information that [the United States] can provide in the context of investigations that did not lead to public charges or prosecutions.”¹⁵⁹ He also denied the insinuations of the Committee that the United States “must not have been looking to find the truth.”¹⁶⁰ Bitkower then defended each step of Durham’s investigation, stating, “he used the same standards and same techniques that any federal law enforcement officer would use in the United States to investigate any allegation of serious crime.”¹⁶¹ Bitkower assured that Durham obtained all of the information he needed to make his decision not to initiate any prosecutions.¹⁶²

While the CAT hearing occurred before the release of the Torture Report, the Committee pushed back strongly and even explicitly talked through “the best standards of investigation” under CAT, stating:

Any investigations into possible ill treatment by public officials must comply with the criterion of thoroughness. And actually, to be considered credible, it must be capable of leading to: a determination of whether force or other methods used were or were not justified under the circumstances; and to the identification, if appropriate, to the punishment of those concerned. . . . It requires that all reasonable steps be taken to secure evidence concerning the incident including, *inter alia*, to identify and interview the alleged victims, suspects and eyewitnesses, [and] also to

Muhagic, and Guatemalan soldiers). Additionally, he spoke of the convictions of a U.S. soldier who raped and killed an Iraqi girl and government contractors who shot Iraqi civilians. *Id.*

¹⁵⁷ See Transcript, *supra* note 63, at 37, 49.

¹⁵⁸ See *id.*

¹⁵⁹ *Id.* at 49.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 50.

¹⁶² *Id.*

seize instruments which might have been used in ill treatment and also to gather forensic evidence.¹⁶³

This step-by-step explanation of how the United States should have investigated the allegations of detainee mistreatment very clearly portrays the Committee’s beliefs about the inadequacies of Durham’s investigation. Now that the Torture Report has been released, there is no longer any doubt that the Durham investigation was insufficient.

Under CAT, the United States must conduct an investigation that “compl[ies] with the criterion of thoroughness” as described by the Committee.¹⁶⁴ If the United States does not investigate properly, it will continue to be in violation of the Convention. The United States committed itself to this treaty when it ratified CAT in 1994.¹⁶⁵ It even argued for more robust enforcement and accountability mechanisms so that it could “bring to task those countries in the international arena that continue to engage in this heinous and inhuman practice.”¹⁶⁶

Moreover, in order to be in compliance with CAT—to which it is bound—the United States must investigate all allegations of torture *with the understandings* of the treaty that it acknowledged during its most recent CAT review. It must operate with the insight it shared with the Committee about the applicability of the treaty in all places and at all times. It must also adhere to the Committee’s guidance on the treatment of detainees when reviewing allegations of torture. Likewise, it must use this acumen to investigate and put a stop to the cruel and inhumane treatment that continues at detention centers today. And finally, the United States needs to use the Committee’s directions to determine whether the United States violated the non-refoulement provision of CAT and if it still continues to do so.

¹⁶³ *Id.* at 46.

¹⁶⁴ *See id.*

¹⁶⁵ *See supra* note 57 and accompanying text.

¹⁶⁶ *See* SEN. EXEC. DOC. 101-30. *See also* and accompanying text (explaining the eagerness of the United States to pass the Convention so that it could hold other countries accountable).

These investigations should inevitably lead to prosecutions and convictions of those responsible for committing torture and allowing torture to occur. The details of the Torture Report prove far beyond a reasonable doubt that U.S. officials violated CAT as well as a number of other international and United States laws. Additionally, through the course of these investigations, the United States will also be expected to examine the responsibility of any private individuals, businesses, organizations, or foreign governments under its jurisdiction that were complicit in the CIA's Torture Program. And similarly, prosecutions, convictions, and sentencing must ensue for any violations of the Convention that are discovered. In addition to investigations of torture, the United States must also provide full transparency about the Torture Program. All of these responsibilities of accountability are absolute requirements for the United States if it plans to continue as a Member State of CAT, particularly if it plans to act as any sort of example for the rest of the world. Now that the United States has pledged its commitments to the treaty, and asserted the importance of correcting its errors, it must take steps toward achieving a meaningful investigatory process lest its words have no meaning both domestically and globally.

b. Reparations

In addition to investigation allegations of torture for accountability purposes, a fundamental responsibility of the United States under the CAT is to provide reparations to its victims of torture.¹⁶⁷ During its hearing, the United States explained its position on remedies for victims by saying, "it would be anomalous under the law of war to provide individuals detained as enemy belligerents with a judicially enforceable individual right to a claim for monetary compensation."¹⁶⁸ It explained that Prisoner of War (POW) claims should be resolved on a

¹⁶⁷ See CAT, *supra* note 58, art. 14.

¹⁶⁸ Transcript, *supra* note 63, at 28.

State-to-State level where governments negotiate the terms of reparations rather than private lawsuits.¹⁶⁹

The Committee disagreed, stating the importance of viewing those illegally detained by the United States as victims, rather than as enemies under the laws of war.¹⁷⁰ Instead, its *victims* must be provided with “adequate compensation, and as full rehabilitation as possible.”¹⁷¹ While Associate Deputy Attorney General Robin Jacobson listed “a wide range of civil remedies for seeking redress in cases of torture,”¹⁷² the likelihood of success using these methods of redress is obviously fruitless in practice. The combined effect of requiring administrative exhaustion plus a showing of specific *physical* injuries results is a system in which torture victims are very unlikely to receive any redress whatsoever. A system for reparations that does not allow for any actual relief for victims is clearly in violation of CAT’s Article 14 mandate that a State Party “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation”¹⁷³ Thus, the United States should revise the opportunities it offers to victims for reparations so that it is line with the requirements of the treaty and the directions of the Committee that enforces it. Such practices would give meaning to U.S. assurances and commitments regarding compliance with its treaty obligations.

II. THE UNIVERSAL PERIODIC REVIEW

The U.N. Human Rights Council has a Working Group of forty-seven members who conduct the reviews with each Member State.¹⁷⁴ This Working Group reviews the human rights records of each of the 147 Member States of the U.N.,¹⁷⁵ and its founding document states its

¹⁶⁹ *See id.*

¹⁷⁰ *See id.* at 43.

¹⁷¹ Committee Concluding Observations, *supra* note 108, at 5.

¹⁷² Transcript, *supra* note 63, at 33.

¹⁷³ CAT, *supra* note 58, art. 14.

¹⁷⁴ *See Basic Facts About the UPR*, *supra* note 61.

¹⁷⁵ *See id.*

primary principle as “promot[ing] the universality, interdependence, indivisibility and interrelatedness of all human rights.”¹⁷⁶

During the United States’ first review with the UPR, held on November 5, 2010, it supported, in whole or in part, 173 of 228 recommendations from the other participating Member States.¹⁷⁷ Several of these recommendations related to subjects connected to torture such as detention practices and accountability.¹⁷⁸ The United States had its second review with the UPR in May 2015.¹⁷⁹ In its report, the United States provided updates about its improvements since 2010 and addressed many of the suggestions it received from other Member States and the Council during its last review.¹⁸⁰ In the UPR’s report, several participating Member States directly addressed the Senate Committee’s Report.

A. The Historical and Legal Framework of the UPR

The United Nations General Assembly created the U.N. Human Rights Council (UNHRC) on March 15, 2006.¹⁸¹ One of the UNHRC’s fundamental duties was to “[u]ndertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States. . .”¹⁸² To this end, the UNHRC created and implemented the Universal Periodic Review process.¹⁸³ The UNHRC

¹⁷⁶ Human Rights Council Res. 5/1, Rep. of the Human Rights Council, 5th Sess., June 11–18, 2007 U.N. GAOR, 62d Sess., Supp. No. 53, A/62/53 (June 18, 2007).

¹⁷⁷ See *UPR Recommendations Supported by the U.S. Government*, U.S. DEP’T OF STATE, <http://www.state.gov/j/drl/upr/recommendations/> (last visited Nov. 1, 2015).

¹⁷⁸ See *id.*

¹⁷⁹ Rep. of the U.S. to the Working Group on the UPR, 22nd Sess., May 4–May 15, 2015, U.N. Doc. A/HRC/WG.6/22/USA/1 (May 21, 2015) [2015 U.S. UPR Report].

¹⁸⁰ See *id.*

¹⁸¹ G.A. Res. 60/251, ¶ 1, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

¹⁸² *Id.* ¶ 5.

¹⁸³ H.R.C. Res. 5/1, *supra* note 176. The “Institution-Building” package created by the Council included the road map for the UPR. *Id.* Resolution 16/21 and Decision 17/119 further modified and refined the review process. H.R.C. Res. 16/21, A/HRC/RES/16/21 (Apr. 12, 2011); H.R.C. Dec. 17/119, U.N. Doc. A/HRC/DEC17/119 (July 19, 2011).

reviews each Member State every four and a half years.¹⁸⁴ It conducted its initial review cycle from 2008 to 2011, reviewing forty-eight states per year.¹⁸⁵ After evaluating and meeting with each Member State, the UNHRC then began its second cycle of reviews in 2012, which it will conclude in 2016.¹⁸⁶

Before a Member State's review, it submits information—generally in the form of a “national report”—about its human rights efforts to the UPR Working Group. Other independent experts on international human rights and stakeholders also submit reports about the human rights situation in that particular country.¹⁸⁷ The UPR Working Group reviews all of the submitted materials, and then conducts an interactive discussion with the State.¹⁸⁸ This discussion involves other Member States as well, allowing them to submit questions ahead of time or provide questions, comments, or recommendations throughout a State's review.¹⁸⁹ A few of the other Member States and the Working Group then collaborate with the State under review to produce an Outcome Report.¹⁹⁰ This report includes the questions and recommendations made during the review as well as the State's responses.¹⁹¹

B. UPR Reviews of the United States

Now more than ever, the United States must show its commitment to the global community. In the 2010 UPR review, Sweden offered a recommendation pertaining to detainee treatment that the United States accepted without reservation: “Ensure the full enjoyment of human rights by persons deprived of their liberty, including by way of ensuring treatment in

¹⁸⁴ See *Basic Facts About the UPR*, *supra* note 61.

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

maximum security prisons in conformity with international law.”¹⁹² Likewise, the United States accepted Norway’s recommendation without reservation to take measures to “. . . eradicate all forms of torture and ill-treatment of detainees by military or civilian personnel, in any territory of jurisdiction, and that any such acts be thoroughly investigated.”¹⁹³ The United States also took part in offering similar recommendations to other countries during the first UPR review cycle, telling states such as Equatorial Guinea and Iran to end the use of torture in detention facilities immediately.¹⁹⁴

The Torture Report provides clear evidence that the United States continued to disregard this responsibility—one that it not only agreed to do itself, but also admonished other countries to implement immediately. Furthermore, the lack of redress and accountability for inhumane treatment in U.S. detention centers suggests that the recommendation is still not realized. Despite this, the United States stated to the UPR Working Group during its most recent review that it is “fully committed to ensuring that individuals it detains in any armed conflict are treated humanely.”¹⁹⁵ Additionally, the U.S. National Report claimed that all of its detention operations comply with United States and international humanitarian law.¹⁹⁶ If the United States is going to make this claim, it must now actually follow through by admitting that it violated international humanitarian law when it tortured detainees in the wake of September 11th. Equally, it must

¹⁹² See Rep. of the Working Group on the UPR: U.S., 9th Sess., Nov. 1–Nov. 12, 2010, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011) [hereinafter 2010 Working Group Report on U.S.]; Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, Remarks at the Response of the United States of America to Recommendations of the United Nations Human Rights Council (Nov. 9, 2010), transcript available at <http://www.state.gov/s/l/releases/remarks/150677.htm>.

¹⁹³ See *UPR Recommendations Supported by the U.S. Government*, U.S. DEP’T OF STATE, <http://www.state.gov/j/drl/upr/recommendations/index.htm> (last visited Dec. 28, 2015) (Recommendation 139).

¹⁹⁴ See Rep. of the Working Group on the UPR: Equatorial Guinea, 6th Sess., Nov. 30–Dec. 11, 2009, ¶¶ 65, 70, U.N. Doc. A/HRC/13/16 (Jan. 4, 2010); Rep. of the Working Group on the UPR: Islamic Republic of Iran, 7th Sess., Feb. 8–Feb. 10, 2010, ¶¶ 19, 92, U.N. Doc. A/HRC/14/12 (Mar. 15, 2010).

¹⁹⁵ See Rep. of the Working Group on the UPR: U.S., 30th Sess., ¶ 160, U.N. Doc. A/HRC/30/12 (July 20, 2015) [hereinafter 2015 Working Group Report on U.S.].

¹⁹⁶ See U.S. UPR Report 2015, *supra* note 179, ¶ 87.

recognize that the use of indefinite detention, solitary confinement, force-feeding, and some of its interrogation practices are examples of torture or inhumane treatment of detainees that are still occurring. Finally, the United States must abandon its hypocrisy demonstrated so clearly on the international stage as evidenced by its failure to abide by the very recommendations offered to other states in the UPR review process.

The most meaningful ways that the United States can prove to the international community that it has finally put an end to its inhumane detention practices will be discussed in the following subsections. Notably, the three recommendations that are discussed are recommendations that the United States accepted during its last UPR. Therefore, there is no excuse for the United States to put off these obligations any longer. First, the United States should adopt the Optional Protocol of CAT. Next, it should invite the UN Special Rapporteur on torture to have unlimited access to U.S. detention facilities. And finally, the United States should close Guantanamo Bay, as it has been saying it will do for years.

1. The Adoption of the Optional Protocol of CAT

Many of the participating Member States recommended that the United States adopt additional human rights treaties, including the Optional Protocol to the Convention Against Torture (OP-CAT). In the 2010 Working Group Report, these states included Sudan,¹⁹⁷ Denmark,¹⁹⁸ France, Spain, Costa Rica, and Cyprus.¹⁹⁹ At that time, the United States supported the recommendation to ratify OP-CAT.²⁰⁰ However, four years later, the United States has neither signed nor ratified the Optional Protocol.²⁰¹ Member States repeated this

¹⁹⁷ 2010 Working Group Report on U.S., *supra* note 192, ¶ 92.6.

¹⁹⁸ *Id.* ¶ 59.

¹⁹⁹ *Id.* ¶ 92.

²⁰⁰ *See UPR Recommendations Supported by the U.S. Government, supra* note 193, at pt. 8.

²⁰¹ Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 57/199, U.N. Doc. A/RES/57, 199 (Jan. 1, 2003) [hereinafter OP-CAT].

recommendation in the 2015 Working Group on the United States, including Lebanon, Switzerland, Denmark, Estonia, the Czech Republic, Germany, Kazakhstan and Mauritius.²⁰²

The United States did not directly indicate whether or supported or did not support the recommendation to ratify OP-CAT in its response to this most recent UPR.²⁰³

The Optional Protocol endeavors to supplement CAT with additional preventative mechanisms.²⁰⁴ It acknowledges that “further measures are necessary” to realize the goals of CAT, and states its primary objective as “establish[ing] a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture.”²⁰⁵ The Subcommittee on Prevention of Torture (SPT) serves as the international oversight body, and each State Party is required to form a National Preventative Mechanism (NPM) to oversee compliance as well.²⁰⁶

The United States was one of only four Member States that voted against passing the treaty in the UN General Assembly in 2002.²⁰⁷ However, in its 2010 UPR, the United States agreed to adopt OP-CAT, calling it one of the treaties “which the Administration is most committed to pursuing ratification.”²⁰⁸ Now, after four years and one full UPR cycle, the United States has still not ratified the Optional Protocol for CAT.²⁰⁹ Despite having accepted the

²⁰² 2015 Working Group Report on U.S., *supra* note 195, ¶ 176.

²⁰³ Rep. of Working Group of the UPR on U.S.: Addendum, 30th Sess., U.N. Doc. A/HRC/20/12/Add.1 (Sep. 14, 2015).

²⁰⁴ See OP-CAT, *supra* note 201.

²⁰⁵ *Id.* at pt. I, art. 1.

²⁰⁶ See generally Blake, *supra* note 78.

²⁰⁷ See KRISTIAN WILLIAMS, AMERICAN METHODS: TORTURE AND THE LOGIC OF DOMINATION 85 (2006). 127 States voted in favor and three voted against passing the treaty. *Id.*

²⁰⁸ See *UPR Recommendations Supported by the U.S. Government*, *supra* note 193.

²⁰⁹ OP-CAT, *supra* note 201.

recommendation in 2010, the status of its progress toward ratification is conspicuously and entirely absent from its 2015 report.²¹⁰

UPR-Info is a non-governmental organization (NGO) that promotes the UPR and conducts Mid-term Implementation Assessments for each Member State.²¹¹ In its 2013 assessment of the United States, several of the stakeholders that took part in the report protested that the United States had not yet made any progress toward ratifying OP-CAT.²¹² The Iraqi Commission on Human Rights, called joint1, urged that by failing to ratify OP-CAT, the United States would “continue[] to avoid being held responsible” and that it would evade accountability for “all the injustices and grave rights violations it committed in Iraq.”²¹³ Just Detention International (JDI) argued that OP-CAT would “provide urgently needed independent oversight of U.S. detention facilities.”²¹⁴

The fact that the United States has failed to take any steps toward implementing OP-CAT not only diminishes the state’s credibility, but it also calls into question many of the other assertions it made in its 2015 UPR Report. Moreover, it suggests that the conditions of detention centers and the treatment of detainees are in an even worse state than the rest of the world believes. This is a very concerning implication that the United States should want to remedy immediately.

²¹⁰ See U.S. UPR 2015 Report, *supra* note 179. The only discussion of OP-CAT is a statement that state and local government officials have recently served on U.S. delegations and presented reports on several treaties including OP-CAT. *Id.* ¶ 5. Section J of the Report is entitled “Treaties and international human rights mechanisms,” and in it, the United States discusses its commitment to other treaties such as the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). *Id.* ¶¶ 114–15.

²¹¹ See generally Mid Term Implementation (July 1, 2013) (providing stakeholders an opportunity to give a statement about the Member State’s progress since its last UPR). The United States refused to participate in this assessment or provide any explanation about its failure to implement nearly every recommendation it accepted in 2010. *Id.* at 3. (stating that the United States “did not respond to [UPR Info’s] enquiry”). At the time the report was published, it detailed that the United States had fully implemented only three recommendations, it partially implemented 28, and it failed to implement 153 recommendations. *Id.*

²¹² See generally Mid Term Implementation (providing stakeholders an opportunity to give a statement about the Member State’s progress since its last UPR).

²¹³ *Id.* at 32.

²¹⁴ *Id.* at 31.

If the detention centers and detention practices are in compliance with international standards, as the U.S. claims, then there is no reason for the delay in allowing oversight. Therefore, the United States must move forward with the ratification of OP-CAT, as it said it would in 2010. It is vital that the United States prove that its detention sites are now in compliance with CAT, and the only way to provide credible proof of its claims is by allowing oversight from an independent body. The release of the Torture Report provided the international community with an extremely disturbing view of United States' treatment of detainees, and U.S. oversight is simply not enough to assure the rest of the world that the detainees in sites like Guantanamo Bay are being treated humanely.

2. An Unrestricted Invitation to the Special Rapporteur

An additional way for the United States to prove that its detention centers are in compliance with international norms is to allow the UN Special Rapporteur on Torture, Juan Mendez, to visit the Guantanamo Bay detention camp without any limitations. In the United States' 2015 UPR Report, it explains the circumstances under which it has agreed to accommodate Mr. Mendez's request for a country visit to Guantanamo Bay.²¹⁵ The United States offered to allow him to observe the detention center "under the same conditions as other visitors."²¹⁶ This would permit the Special Rapporteur to visit only certain parts of the facility, and the United States rejected the possibility of Mr. Mendez speaking privately with any of the detainees.²¹⁷ Mr. Mendez refused the invitation, stating that the conditions were unacceptable, and sent a formal request to the U.S. government to reconsider its terms on May 15, 2013.²¹⁸

²¹⁵ See U.S. UPR Report 2015, *supra* note 179, ¶ 220.

²¹⁶ *Id.*

²¹⁷ U.N. Special Rapporteur on Torture, Statement at the Expert Meeting on the Situation of Detainees Held at the U.S. Naval Base at Guantanamo Bay (Oct. 3, 2013), [hereinafter Special Rapporteur on Torture Statement] available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&LangID=E>.

²¹⁸ *Id.*

The United States did receive the recommendation to invite the Special Rapporteur to its detention centers from other Member States in its first UPR.²¹⁹ It accepted, but only insofar as the limitations applied to his visit. What is more interesting, though, is that the United States recommended to other Member States that they should invite the Special Rapporteur to their detention sites. For instance, the United States told Zimbabwe in its first review cycle, “Invite the Special Rapporteur on torture and other mandate holders to conduct independent and impartial investigations.”²²⁰

If the United States wants to be taken seriously as an international actor in the UPR, or on any international stage, it must be able to fulfill the recommendations it makes to other Member States, as a general rule. Additionally, the United States is making it very difficult for the UN, the Special Rapporteur on torture, and the rest of the world to believe it when it says detainees are treated humanely at detention centers. This is not an implication that the United States can afford to let stand at a time when the international community is already very skeptical of its detention practices. The United States must immediately allow Mr. Mendez unrestricted access to Guantanamo Bay.

3. Closing the Guantanamo Bay Detention Camp

In both 2010 and 2015, at least seven Member States recommended to the United States that it promptly close its detention camp at Guantanamo Bay.²²¹ Similar to the recommendation to adopt OP-CAT, the United States accepted all of the recommendations to close Guantanamo, yet it has still not done so after more than four years. In its 2015 UPR Report, the United States

²¹⁹ See *UPR Recommendations Supported by the U.S. Government*, *supra* note 192.

²²⁰ Rep. of the Working Group on the UPR: Zimbabwe, 12th Sess., Oct. 3–Oct. 10, 2011, ¶ 95.11, U.N. Doc. A/HRC/19/14 (Dec. 19, 2011).

²²¹ See 2010 Working Group Report on U.S., *supra* note 192 (showing that Iran, Korea, Egypt, Ireland, China, Vietnam, Switzerland, and Venezuela all recommended closing Guantanamo Bay). See also 2015 Working Group Report on U.S., *supra* note 195, ¶ 176.

explained that the goal is still to close the detention center, but Congress has halted these efforts.²²² However, the report does not cite any of the Administration's efforts to work with Congress in order to get past the disagreement. When the United States agreed to close Guantanamo in its last UPR, this was presumably taking into consideration the fact that Congress would have to agree. The United States must close Guantanamo Bay, as it definitively said it would do and demonstrate to the public and the UN all efforts to achieve this end.

C. The United States' Responsibility to Address its Past Use of Torture

The United States agreed to several recommendations urging it to investigate allegations of torture and prosecute any perpetrators. For instance, it agreed to Libya's recommendation to "[m]ake those responsible for gross violations of human rights in American prisons and prisons under the jurisdiction of America outside its territory accountable."²²³ The United States responded generally to recommendations such as these stating, "We investigate allegations of torture, and prosecute where appropriate."²²⁴ Additionally, it said "we are committed to holding accountable persons responsible for human rights violations and war crimes."²²⁵ If the United States is going to make these claims, then it must provide more examples of prosecutions of offenders. It cannot continue to assert that it holds torturers accountable any longer until it investigates and prosecutes the individuals who were responsible for the Torture Program.

III. CONCLUSION

The United States' recent statements through the CAT and UPR review processes have provided the UN and the entire world with many expectations that now must be fulfilled.

²²² U.S. UPR Report for 2015, *supra* note 179, at 35.

²²³ See 2010 Working Group Report on U.S., *supra* note 192, ¶ 92.174; *UPR Recommendations Supported by the U.S. Government*, *supra* note 177.

²²⁴ *UPR Recommendations Supported by U.S. Government*, *supra* note 177.

²²⁵ *Id.*

Through both oversight mechanisms, the United States has asserted its full compliance with international obligations regarding torture, even claiming that it was a world leader for preventing the use of torture. However, the release of the Torture Report categorically confirms that the United States relied heavily on torture in the aftermath of September 11th. Although the Obama Administration has made progress to prohibit the use of torture, in choosing to ignore these atrocities, it still has not fulfilled its international obligations in terms of providing accountability. The United States must hold those accountable who committed terrible atrocities in the “War Against Terror.” It must create a transparent fact-finding process about the torture program, and it must make reparations to its victims. If it does not, it is setting an extremely dangerous precedent for the rest of world, and it will become an example for other countries, not as a champion of preventing torture like it claims, but as an example for future governments to recall and emulate when choosing to ignore human rights violations.

SECTION TWO: THE SENATE TORTURE REPORT

In the post-September 11th era, the government has invoked the state secrets privilege in order to dismiss claims brought to U.S. courts against U.S. officials for the various uses of torture on detainees in the period from approximately 2002 to 2006, during the “War on Terror”. However, the release of the Senate Intelligence Committee Report on the CIA’s Detention and Interrogation Program, coupled with recent decisions from international courts, has publicized evidence substantiating the allegations of torture claims. This Section will discuss the Senate Committee’s Report as one of the critical new developments for advocates of victims who are attempting to overcome the state secrets privilege, and to hold the government true to its unequivocal statements of commitment to human rights discussed in the previous section. The Section will detail the CIA’s Detention and Interrogation Program, using the information provided in the Senate Committee’s Report (hereinafter ‘The Torture Report’). It provides information on how the program operated and the “Enhanced Interrogation Techniques” (EITs) that were used on detainees. The Torture Report reveals that these techniques were not only illegal under international and federal law, but they were also ineffective for the purpose of producing information about future threats to national security. CIA misrepresentations to the Office of Legal Counsel, the Executive Branch, and the media about its use of the EITs and their effectiveness allowed the program to continue for years.

Following a six year, forty million dollar investigation into the Central Intelligence Agency’s (CIA) Detention and Interrogation Program against suspected terrorists in secret sites around the world, the Senate Select Committee on Intelligence released its findings in December 2014. The report, entitled the Senate Select Committee on Intelligence’s Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program (the “Torture Report”), was

the subject of great controversy throughout the process of its creation. The findings and conclusions detailed in the Torture Report, a 525-page executive summary (with redactions) of the full, still-confidential report, provide significant insight about the Program, its victims, as well as the misrepresentations and lies the CIA used to conceal the depth of the Program.

I. CIA DETENTION AND INTERROGATION PROGRAM

The Detention and Interrogation Program was implemented in the days following the September 11th 2001 terrorist attacks on the United States. On September 17, 2001, President George W. Bush signed a covert action Memorandum of Notification (MON) authorizing the CIA to capture and detain a specific category of individuals.²²⁶ More specifically, it authorized the Director of the CIA to “undertake operations designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities.”²²⁷ However, the MON did not reference the interrogation of such persons or interrogation techniques.²²⁸ The program allowed U.S. agents to specifically target individuals suspected of terrorism activities and gave approval for agents to “kill, capture, or detain” the individuals.²²⁹ Many of the individuals who were targeted and arrested under the Program were ultimately rendered to third countries and secret CIA “black sites” around the world.²³⁰ By the time that the CIA obtained the first detainee in March 2002, the CIA had expanded the authority granted under the MON to also allow for the detention of individuals who might not themselves pose a continuing serious threat of violence to the U.S., but could provide

²²⁶ SENATE SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM, S. REP. 113-228, at 11 (2d Sess. 2014) [hereinafter ‘The Torture Report’].

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 33.

²³⁰ *Id.* at 38.

information on such persons.²³¹ It was a secret program “aimed at taking terrorism suspects ‘off the streets.’”²³²

The program involved the rendition of many detainees before their detention and interrogation. Rendition is the practice of transporting suspected foreign terrorists or other individuals suspected of crimes to third party countries for interrogation and imprisonment.²³³ CIA rationalized that imprisoning and interrogating “suspects” in countries outside the United States enabled greater latitude for the CIA in its detention and questioning, because a detention facility within the United States would be subject to more oversight to ensure its compliance with federal laws.²³⁴ The program used detention facilities set up in several host countries around the world, including Thailand, Poland and Romania, among others.²³⁵ For the individuals who were victims of the CIA’s Program, rendition meant that they were held in isolation away from the United States and away from due process and the protections of the law. As Maher Arar, a Canadian engineer held for a year in Syria before being released without ever having been charged with a crime stated, “[t]hey [the U.S. government] are outsourcing torture because they know it’s illegal. Why, if they have suspicions, don’t they question people within the boundary of the law?”²³⁶

A. Establishing Black Sites

²³¹ *Id.* at 13.

²³² EUROPEAN CTR FOR CONSTITUTIONAL & HUMAN RIGHTS, *CIA EXTRAORDINARY RENDITION FLIGHTS, TORTURE AND ACCOUNTABILITY: A EUROPEAN APPROACH* 27 (2d ed. 2008).

²³³ Amy Zalman, Ph.D., *Extraordinary Rendition*, ABOUT NEWS, <http://terrorism.about.com/od/e/g/Renditon.htm> (last visited Oct. 30, 2015).

²³⁴ *Id.*

²³⁵ Greg Miller et al., *Senate Report on CIA Program Details Brutality, Dishonesty*, WASH. POST (Dec. 9, 2014), http://www.washingtonpost.com/world/national-security/senate-report-on-cia-program-details-brutality-dishonesty/2014/12/09/1075c726-7f0e-11e4-9f38-95a187e4c1f7_story.html [<http://perma.cc/3RC5-8WRN>].

²³⁶ Jane Mayer, *Outsourcing Torture*, NEW YORKER (Feb. 14, 2005), <http://www.newyorker.com/magazine/2005/02/14/outsourcing-torture> [<http://perma.cc/3LHZ-3VGW>].

The torture program's growth in 2003 began with a request for two detention sites abroad. In exchange for money, local governments cooperated with the CIA and allowed the agency to establish two sites, the locations of which have been redacted in the torture report summary. The Torture Report refers to these detention sites as Detention Site Black and Detention Site Violet, but does not further detail their locations.

In 2003, the U.S. ambassador in one of the countries housing these detention sites questioned the affect that the detention site would have on the United States' relationship with the country.²³⁷ His efforts to approach the State Department in order to make sure that U.S. government officials were aware of the potential impact a detention site could have on U.S. relations with his country were rebuffed. The CIA told him that this was impossible and that no one at the State Department was informed about the detention facility. When the ambassador responded with a request for documentation authorizing the program, including confirmation that the CIA's interrogation techniques met "legal and human rights standards," the agency requested that Deputy Secretary of State Richard Armitage intervene, presumably to quiet the ambassador.²³⁸ A year later, revelations about detainee abuse at Abu Ghraib revived the ambassador's concerns about the program and he once again sought documentation authorizing the detention program and detailing the methods used by interrogators.

The Torture Report mentions that it is unclear how the CIA resolved this ambassador's concerns with the program. Whatever the agency did to ease his concerns with the program worked. The Torture Report goes on to reveal that the ambassador later helped give a presentation about the detention program to local officials in that country, inaccurately representing that the

²³⁷ Torture Report, *supra* note 226, at 98.

²³⁸ *Id.*

interrogation measures employed at the black sites were instrumental in gathering intelligence from resistant detainees.²³⁹

The presentation that the ambassador and Station chief delivered at the black site included many of the same standard representations that the agency would make to U.S. policymakers.²⁴⁰ The presentation omitted descriptions of the techniques used at the black site, but did present them as effective, nonetheless.²⁴¹ Despite earlier concerns that the techniques employed were essentially torture, the ambassador joined the CIA's station chief at that black site in 2004 in representing that "[w]ithout the full range of these interrogation measures, [the CIA] would not have succeeded in overcoming the resistance of [Khalid Shaykh Muhammad] and other equally resistant [High Value Detainees]."²⁴²

In a different country, the CIA obtained approval from local political leadership to establish a black site prior to notifying the U.S. ambassador in that country.²⁴³ The CIA's Station chief at that black site requested that the CIA brief the U.S. ambassador about the torture program, believing that he would be questioned about the program by local political figures in that country.²⁴⁴ One official of that country who was made aware of the facility "was described as 'shocked,' but nonetheless approved."²⁴⁵

The number of detainees held in the black site continued to increase to the point that the CIA concluded it would need additional facilities in that country to support the growth of the program and enable the agency to interrogate multiple detainees at the same site.²⁴⁶ The CIA

²³⁹ *Id.* at 97.

²⁴⁰ *Id.* at 98.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

“developed complex mechanisms” to provide millions of dollars to that country in order to “show appreciation” for their leaders’ cooperation.²⁴⁷ In a heavily redacted description from the Torture Report, some combination of classified circumstances “complicated the arrangements” the CIA had for expanding the torture program in that country.²⁴⁸ When an official from that country sought an update on the plans for the expanded detention site, the CIA inaccurately told him “that the planning had been discontinued.”²⁴⁹

From the outset, the CIA either ignored or misinformed officials from the countries in which it wanted to establish additional black sites. The agency would later recycle the same misinformation and avoidance techniques that they used on other countries in order to mislead investigations originating within the United States.

B. The Operation of the Program

At the time that the CIA obtained their first detainee, they weren’t ready to implement an interrogation program. CIA officials enlisted the help of two psychologists, who had previously worked training members of the U.S. Air Force in the resistance of interrogation techniques.²⁵⁰ These two contract psychologists helped design and apply a set of “enhanced interrogation techniques” as the interrogation of the first detainee proceeded.²⁵¹ Furthermore, they maintained a central role in the program’s operation, assessment and management as it continued to abuse detainees with these enhanced interrogation techniques (EITs).²⁵² The techniques included sleep deprivation, facial slaps, placement in stress positions, confinement in small boxes, forced

²⁴⁷ *Id.* at 99.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Joseph Tanfani and W.J. Hennigan, *Two Psychologists’ Role in CIA Torture Program Comes into Focus*, LA TIMES (Dec. 14, 2014, 6:00 AM), <http://www.latimes.com/world/afghanistan-pakistan/la-fg-torture-psychologists-20141214-story.html#page=1> [<http://perma.cc/7RAT-U84F>].

²⁵¹ *Id.*

²⁵² *Id.*

nudity, waterboarding, and others.²⁵³ These techniques, along with extended isolation, lead to “psychological and behavioral issues” in prisoners, “including hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation.”²⁵⁴

The CIA began its first interrogation team training in November 2002.²⁵⁵ The class time totaled sixty-five hours of instruction and training.²⁵⁶ The chief of the CIA’s Counterterrorism Center (CTC) rebuffed a recommendation made by the CTC’s legal department for all of the EIT program’s personnel to undergo an assessment to determine their suitability for undertaking interrogation of detainees.²⁵⁷ Notwithstanding, the CIA Director, Michael Hayden, stated that, “[a]ll those involved in the questioning of detainees are carefully chosen and screened for demonstrated professional judgment and maturity.”²⁵⁸ However, this was clearly not the case. The committee found that a number of the interrogators’ backgrounds included information demonstrating their lack of suitability including workplace anger issues, prior inappropriate detainee interrogations, and sexual assault.²⁵⁹

It is difficult to imagine how the CIA could have administered the EIT program in a manner more at odds with laws and morals than how it carried out its torture program. The torture was so brutal that some of its own interrogators could not tolerate observing it or being a part of it. The CIA authorized individuals to act as interrogators, who were improperly vetted, inadequately trained, and whose histories indicated a propensity for lawlessness and brutality. It allowed torture techniques to be employed on victims some of whom were known to be innocent. Nor did the use of EITs lead to the dissemination of valuable intelligence. The CIA lied about the techniques used

²⁵³ *Id.*; Torture Report, *supra* note 226.

²⁵⁴ Torture Report, *supra* note 226, at 4.

²⁵⁵ *Id.* at 57.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 58–59.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

and about success of its torture program and were allowed to get away with distortions and egregious mendacity.

Despite concern among some CIA personnel who reported being disturbed and “profoundly affected” after witnessing waterboarding and other enhanced interrogation techniques,²⁶⁰ and express[ed] concern regarding their legality,”²⁶¹ Assistant Attorney General Jay Bybee supported the legality of enhanced interrogation tactics, writing that the techniques were not contrary to the laws against torture if there was no intent to cause pain.²⁶² After CIA briefings to the heads of the House Intelligence Committee in late 2002, the use of enhanced interrogation techniques continued.²⁶³

The Program grew quickly, both in terms of the number of suspects detained and in the degree of brutality used against detainees. Although the Program has been acknowledged publicly, the exact number of individuals subject to rendition and torture under the Program is unknown.²⁶⁴ While CIA Director Michael Hayden stated that the number was “mid-range, two figures,” the Senate Report confirms that the program had at least 119 detainees, and many have suggested that the number is much higher.²⁶⁵

It was only in the fall of 2003, and only for a period of twenty-five minutes, that Secretary of State Colin Powell and Defense Secretary Donald Rumsfeld were first briefed on the CIA’s Program.²⁶⁶ While CIA Director George Tenet is reported to have suspended the agency’s use of

²⁶⁰ Torture Report, *supra* note 226, at 44.

²⁶¹ See Jeremy Ashkenas *et al.*, 7 *Key Points From the C.I.A. Torture Report*, N.Y. TIMES, Dec. 9, 2014, http://www.nytimes.com/interactive/2014/12/09/world/cia-torture-report-key-points.html?_r=0.

²⁶² Letter from Jay Bybee, Assistant Attorney General, to John Rizzo, Acting General Counsel of the Central Intelligence Agency (Aug. 1, 2002), *available at* <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf>.

²⁶³ Joby Warrick & Dan Eggen, *Hill Briefed on Waterboarding in 2002*, WASH. POST (Dec. 9, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/08/AR2007120801664.html>.

²⁶⁴ Torture Report, *supra* note 226, at 33.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 119.

enhanced interrogation techniques in June 2004, the Principal Deputy Assistant Attorney General Steven G. Bradbury re-instituted these practices the following spring.²⁶⁷

In April 2006, approximately four years after the Program detained its first suspected al-Qa'ida operative, President Bush was reportedly briefed for the first time on the specific enhanced interrogation techniques being used by the CIA.²⁶⁸ In June 2006, the US Supreme Court held that “Common Article 3 of the Geneva Conventions does apply to detainees in U.S. custody.”²⁶⁹ The Article, which covers the rights of prisoners of war, declares that prisoners of war “shall be released and repatriated without delay after the cessation of active hostilities.”²⁷⁰ Later that year, in September of 2006, President Bush publicly affirmed the existence of CIA prisons abroad.²⁷¹ The map below provides an idea of how many countries hosted prisons as well as how many were involved in enabling the Program’s rendition flights.²⁷²

²⁶⁷ *Id.* at 344.

²⁶⁸ *Id.* at 40.

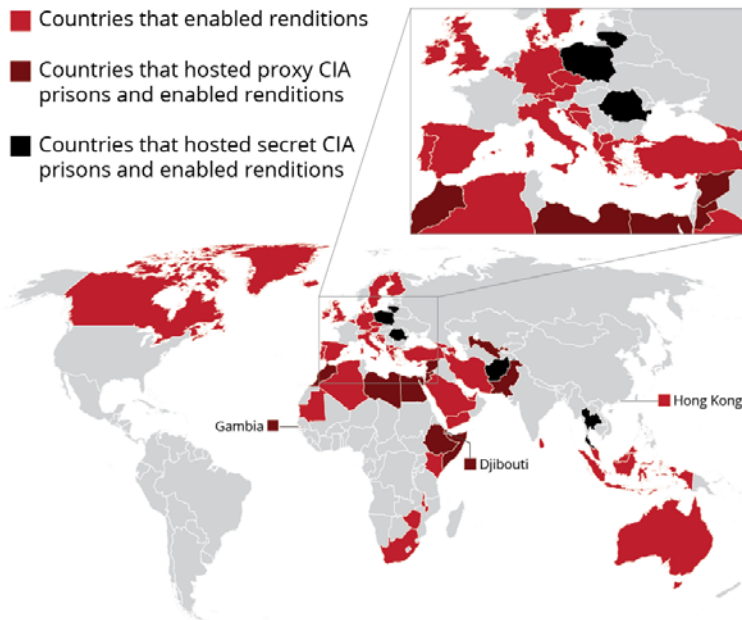
²⁶⁹ Hamdan v. Rumsfeld, 548 U.S. 577 (2006).

²⁷⁰ *Geneva Conventions*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/human-rights/geneva-conventions/p8778> [<http://perma.cc/74RD-87VR>] (last visited Oct. 31, 2015).

²⁷¹ Torture Report, *supra* note 226, at 406.

²⁷² Akbar Shahid Ahmed et al., *More Than a Quarter of the World’s Countries Helped the CIA Run Its Torture Program*, HUFF. POST (Dec. 9, 2014, 8:34 PM), http://www.huffingtonpost.com/2014/12/09/cia-torture-countries_n_6297832.html [<http://perma.cc/Q5SQ-5ZWK>].

Countries That Made The CIA Torture Program Possible



Note: Rendition here refers to the transportation, covertly and without due process, of a U.S. detainee to a non-U.S. facility where they will be held and interrogated.

Sources: The Washington Post, Open Society Justice Initiative, ACLU

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The CIA reportedly discontinued the use of enhanced interrogation techniques on detainees in November 2007 and ended its detention of terror suspects in April of 2008.²⁷⁴ After being sworn in as President in early 2009, Barack Obama signed executive orders to prohibit enhanced interrogations and shut down secret CIA prisons.²⁷⁵ Just two months later, on March 5, 2009, the Senate Intelligence Committee initiated an investigation into the Program.²⁷⁶ The Torture Report, a heavily redacted 525-page document, is an executive summary of the 6,700-page classified product of that investigation.

²⁷³ *Id.*

²⁷⁴ Torture Report, *supra* note 226, at 16.

²⁷⁵ *Id.* at 171.

²⁷⁶ *Id.* at 8.

It is important to note from the outset that the Torture Report does not ever use the word, “torture” to describe the coercive interrogation techniques that the CIA employed on its detainees. Instead, the report uses the term “enhanced interrogation techniques” or “EITs.” The term “EIT” is a euphemism. The CIA’s enhanced interrogation techniques and torture are synonymous. This part uses the term “enhanced interrogation technique” or “EIT” in the place of torture in order for the reader to get a better sense of the terminology used in the report. by the CIA are illegal under international law and the CIA knew this.

II. THE VICTIMS

A. Individual Accounts of Interrogation

Below are summaries of several of the individual accounts of the detainees who were subjected to the EIT program. They are useful not only because they demonstrate that the CIA did not gain any vital information from these detainees as a result of the interrogation, but to demonstrate the level of cruelty exhibited by the CIA while it was carrying out its EIT program.

1. Abu Zubaydah

In March of 2002, Abu Zubaydah became the first individual to be detained by the CIA on suspicion of being an al Qa’ida operative.²⁷⁷ At the program’s inception, there were few if any standards relating to conditions of confinement. The first standards that were promulgated permitted the shackling of prisoners in complete darkness and isolation with nothing but a bucket for human waste and no heating mechanism for the winter months.²⁷⁸

²⁷⁷ Associated Press, *Senate Torture Report: Terror Suspect Abu Zubaydah Was Guinea Pig*, TIME PICAYUNE (Dec. 10, 2014, 1:14 PM), http://www.nola.com/politics/index.ssf/2014/12/cia_torture_report_zubaydah.html [<http://perma.cc/3BAX-YNPF>].

²⁷⁸ Torture Report, *supra* note 226, at 61.

Over his four and a half years in custody, Zubaydah was subjected to “enhanced interrogation techniques” including at least eighty-three instances of waterboarding.²⁷⁹ The waterboarding technique, described by one medical officer present at a waterboarding session as a “series of near drownings,” is one of many enhanced interrogation techniques used by the CIA in the Program.²⁸⁰ Other techniques included sleep deprivation for up to a week, death threats, and forced rectal feeding.²⁸¹

The CIA detained Abu Zubaydah on March 28, 2002.²⁸² From early June 2002 throughout the month of July 2002, Abu Zubaydah was in solitary confinement.²⁸³ Shortly after being released from solitary confinement, he was subjected to the CIA’s EITs, including waterboarding.²⁸⁴ While Abu Zubaydah was being waterboarded he began to convulse, vomit, and expel liquid.²⁸⁵ The Report details that the CIA officers present at the site of Abu Zubaydah’s waterboarding had a difficult time tolerating Abu Zubaydah’s torture and began to manifest disapproval. CIA officers recounted that Abu Zubaydah’s waterboarding was, “visually and psychologically uncomfortable,” and that it “had a profound effect on all staff members present... to the points [where some] were in tears and choking up.”²⁸⁶ After Abu Zubaydah’s waterboarding, many within the CIA began to question the utility of the tactics being used by the CIA; some officers requested to be transferred.²⁸⁷

²⁷⁹ *Abu Zubaydah*, RENDITION PROJECT, <http://www.therenditionproject.org.uk/global-rendition/the-detainees/abu-zubaydah.html> [<http://perma.cc/8ZJH-3MMJ>] (last visited Oct. 31, 2015).

²⁸⁰ The Torture Report, *supra* note 226, at 86.

²⁸¹ *Id.* at 32, 83, 100. *See also* Ashkenas, *supra* note 261.

²⁸² Torture Report, *supra* note 226, at 204.

²⁸³ *Id.* at 206.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 44.

²⁸⁶ *Id.* at 44–45.

²⁸⁷ *Id.* at 45.

CIA records indicate that Abu Zubaydah provided the same information before, during, and after spending time in solitary confinement, and after being subjected to EITs.²⁸⁸ In fact, the report indicates that prior to the commencement of EITs on Abu Zubaydah, Abu Zubaydah provided the most valuable information, including the name and location of Khaled Shayk Mohammed.²⁸⁹

Additionally, the CIA did not follow its own protocols when its agent first tortured Abu Zubaydah. When deciding where to send Abu Zubaydah for interrogation, the CIA chose a country where diplomatic support would be required.²⁹⁰ Nevertheless, the CIA proceeded without informing the any of the agencies that would have relevant input in the decision of where to locate Abu Zubaydah, including the ambassador to the country where Abu Zubaydah was being detained.²⁹¹

2. Abd al-Rahim al-Nashiri

Abd al-Rahim al-Nashiri was captured by the United States in October 2002.²⁹² He provided information while he was in the custody of a foreign government, after which he was transferred to the CIA.²⁹³ While in CIA custody, Al-Nashiri was subjected to EITs; his interrogators then assessed Al-Nashiri as being cooperative.²⁹⁴ However, CIA headquarters disagreed that Al-Nashiri was being truthful and consequently they brought in a new interrogator.²⁹⁵

²⁸⁸ *Id.* at 206. *But See* David Cole, *Did the Torture Report Give the C.I.A. a Bum Rap?*, N.Y. TIMES, February 20, 2015, <http://www.nytimes.com/2015/02/22/opinion/sunday/did-the-torture-report-give-the-cia-a-bum-rap.html> (claiming that Abu Zubaydah was tortured by the F.B.I. before Abu Zubaydah was given to the C.I.A. for interrogation and gave substantial intelligence).

²⁸⁹ Torture Report, *supra* note 226, at 206.

²⁹⁰ *Id.* at 22.

²⁹¹ *Id.*

²⁹² *Id.* at 67.

²⁹³ *Id.* at 68.

²⁹⁴ *Id.* at 67.

²⁹⁵ *Id.* at 68.

The new “interrogator” was neither trained nor qualified to be an interrogator.²⁹⁶ He was described as “too confident... [with] a temper, [and] security issues.”²⁹⁷ Nonetheless, he was allowed to resume EITs on Al-Nashiri.²⁹⁸ The new interrogator and the chief of base, who was also not trained in or authorized to use EITs, threatened Al Nashiri with a cordless power drill, and a handgun.²⁹⁹ Al-Nashiri did not provide any further information during or after these interrogations.³⁰⁰

Later in 2003, the CIA decided to employ EITs on Al-Nashiri again.³⁰¹ Based on his observations of Al-Nashiri, and his objections to the brutality he witnessed, the CIA’s chief of interrogations said that he no longer wished to be associated with program due to serious reservations; that the EIT program was a “train wreck” waiting to happen, and that he would be retiring.³⁰² He intended for his concerns to be entered into the record at the detention site, or otherwise distributed although this does not appear to have happened.³⁰³

3. Gul Rahman

In November 2002, after a brutal interrogation, Gul Rahman, a CIA detainee, was left shackled to the wall in a position that required him to rest on the bare concrete floor.³⁰⁴ He was wearing nothing except for a sweatshirt.³⁰⁵ The CIA officer in charge he demanded that his

²⁹⁶ *Id.*

²⁹⁷ *See id.* at 59, 68. The report notes that the Committee found that several interrogators had backgrounds that included derogatory information workplace anger issues, prior inappropriate detainee, and sexual assault, and hired individuals with mental health and behavioral issues. *Id.*

²⁹⁸ *Id.* at 68.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* at 70.

³⁰² *Id.* at 70–71.

³⁰³ *Id.* at 71.

³⁰⁴ *Id.* at 59.

³⁰⁵ *Id.*

clothing be removed until he cooperated with his interrogators. The next morning he was found dead on the floor; the cause of death was believed to be hypothermia.³⁰⁶

This death of Gul precipitated some disagreement in the CIA as some held the belief that CIA detention facilities should have meet U.S. prison standards.³⁰⁷ Although, there were some sites that only barely passed the minimum standards set forth by the CIA, it should be noted that the CIA did improve the conditions at their detention sites to make them more bearable.³⁰⁸ As of 2003, most sites included space heaters and weekly medical evaluations.³⁰⁹ Some of the sites even included plumbing; however, detainees subject to EITs remained in small cells with buckets for human waste.³¹⁰

4. Khaled Shayk Mohammed

Khaled Shayk Mohammed was the self-confessed mastermind of the September 11, 2001 attacks on the world trade center. Khaled Shayk Mohammed was captured and detained in early March 2003, and first subjected to the EIT program on March 10, 2003.³¹¹ The EITs to which Khaled Shayk Mohammed was subjected violated protocols and went beyond even what the on-site medical personnel implicated in the illegal torture practices believed was appropriate. The CIA's staff physicians sent a set of guidelines to the medical personnel located at Khaled Shayk Mohammed's interrogation site.³¹² These guidelines provided information on waterboarding, including how long a waterboarding session could last, and how many times an individual could be waterboarded.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 62.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.* at 62–63.

³¹¹ *Id.* at 85.

³¹² *Id.* at 84.

Khaled Shayk Mohammed's first waterboarding session lasted for thirty minutes, ten minutes longer than the protocol described by the Office of Legal Counsel.³¹³ On-sight medical personnel protested that the water boarding had devolved into a series of "near drownings."³¹⁴ The Torture Report makes clear that the CIA violated the guidelines established by the medical staff at CIA headquarters. Khaled Shayk Mohammed was subjected to three waterboarding sessions in one day and four in a fourteen-hour period, a number that exceeded the protocol.³¹⁵ Furthermore, Khaled Shayk Mohammed's waterboarding was followed by placing him in a stress position.³¹⁶ This too was outside the approved EIT practices.³¹⁷

Two days later, on March 12, Khaled Shayk Mohammed was subjected to an especially cruel use of the EITs. The medical officer on site expressed concern about the degree of waterboarding and risks that it posed to Khaled Shayk Mohammed.³¹⁸ As a result of having been subjected to EITs on March 12th, Khaled Shayk Mohammed is reported to have provided information about a terrorist plot to attack Heathrow airport.³¹⁹ He later retracted this statement; CIA records do not indicate that this retraction was false.³²⁰ Moreover, the Report expresses skepticism about Khaled Shayk Mohammed's "information".³²¹

The next day, March 13th, Khaled Shayk Mohammed was interrogated with regard to knowledge he might have about al-Qa'ida's plans for future attacks within the United States. Khaled Shayk Mohammed's response was in the negative.³²² He was then subjected to an intensive

³¹³ *Id.* at 85.

³¹⁴ *Id.* at 86.

³¹⁵ *Id.* at 87.

³¹⁶ *Id.* at 85.

³¹⁷ *Id.*

³¹⁸ *Id.* at 86.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *See id.* at 86, 259 (describing it, for example, as "defective").

³²² *Id.* at 86.

waterboarding session.³²³ During this session it became apparent that Khaled Shayk Mohammed had learned the key aspects of the waterboarding process and knew that he could manage.³²⁴ By the end of the day on March 13, Khaled Shayk Mohammed had been subjected to waterboarding for five sessions within twenty-five hours.³²⁵ He was vomiting during and after the procedure.³²⁶

Khaled Shayk Mohammed was subjected to sleep deprivation and continuous waterboarding until March 24, 2003 when the CIA abruptly stopped the torture.³²⁷ Although they had ceased waterboarding and sleep deprivation, the CIA still believed that Khaled Shayk Mohammed was withholding information, thus demonstrating that the CIA did not believe the EIT program was effective.³²⁸ Indeed, members of Khaled Shayk Mohammed's interrogation team stated that the waterboarding interrogation technique was ineffective on Khaled Shayk Mohammed.³²⁹ A Khaled Shayk Mohammed interrogator stated that Khaled Shayk Mohammed had "beaten the system" and that Khaled Shayk Mohammed responded better to "creature comforts and a sense of importance" but poorly to confrontational approaches.³³⁰ Despite its ineffectiveness, Mohammed was subject to waterboarding 183 times during his detention.³³¹

5. Riduan bin Isomuddin a/k/a Hambali

Riduan bin Isomuddin, also known as Hambali, captured in August 2003, was interviewed by the CIA and assessed as cooperative without having been subjected to EITs.³³²

³²³ *Id.* at 86–87.

³²⁴ *Id.* at 87.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.* at 94.

³²⁸ *Id.*

³²⁹ *Id.* at 213.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* at 108.

Despite this assessment, the CIA proceeded to use EITs on Hambali.³³³ Although, Hambali did give the CIA information while he was being subjected to EITs, he later recanted most of what he had said.³³⁴ The CIA found his recantations to be credible.³³⁵ As stated in the report, the CIA itself found that Hambali “had provided false information in an attempt to reduce the pressure on himself... and to give an account that was consistent with what [Hambali] assessed the questioners wanted to hear.”³³⁶ This admission regarding the lack of effectiveness of EITs, moreover, the likelihood that it produced false information, is enough by itself to demonstrate the lack of any redeeming quality in the CIA program.

6. Hassan Ghul

Following his capture and detention by the CIA in January 2004, Hassan Ghul was interrogated by a detention site interrogator who did not subject him to EITs. During the first two days of his interrogation, and before being subjected to EITs, Ghul gave the CIA twenty-one intelligence reports.³³⁷ The CIA found this information, provided before EITs were administered, to be entirely accurate and helpful and notably included Osama Bin Laden’s whereabouts³³⁸

Despite the value of information that Ghul gave to the CIA without subjecting him to torture, the CIA nonetheless decided to subject him to further interrogation using EITs in the belief that they could gain additional information.³³⁹ The CIA forced Ghul into a position with his hands above his head for two hours and subjected him to sleep deprivation to the point where Ghul was hallucinating.³⁴⁰ The “information” Ghul provided after EITs was of no use to the CIA.³⁴¹

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.* at 109.

³³⁷ *Id.* at 130.

³³⁸ *Id.* at 130–31.

³³⁹ *Id.* at 132.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 133.

7. Muhammed Rahim

According to the Torture Report, the last detainee to be tortured by the CIA was Muhammed Rahim.³⁴² Initially he was not cooperative, and refused to give the CIA information about terrorist attacks on the United States.³⁴³ Consequently, the CIA subjected Rahim to EITs.³⁴⁴ These included facial slaps, abdominal hold, facial hold, sleep deprivation, and withholding of solid food.³⁴⁵ During the sleep deprivation cycles, Rahim was forced to stand up and wear a diaper.³⁴⁶ Rahim did not provide the CIA with the answers that they desired while he was being subjected to EITs.³⁴⁷ In fact, Rahim did not give any intelligence reports during his detention with the CIA.³⁴⁸

B. Wrongful Detentions

On several occasions, the CIA subjected its detainees to EITs without authorization by CIA headquarters in violation of guidelines set out by the CIA.³⁴⁹ Detainees were subjected to techniques that were not authorized by CIA headquarters; moreover, at least seventeen detainees subjected to EITs without any prior authorization at all.³⁵⁰ In every case of the use of unauthorized techniques, or the use of techniques without authorization, the CIA headquarters was informed of the infraction after it had taken place; however, no CIA official took any corrective action.³⁵¹

In 2003, the CIA investigated the circumstances of a number of detainees being held in a particular country.³⁵² The CIA determined that some detainees should have been released, a fact

³⁴² *Id.* at 163.

³⁴³ *Id.*

³⁴⁴ *Id.* at 164.

³⁴⁵ *Id.* at 165.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 167.

³⁴⁹ *Id.* at 99.

³⁵⁰ *Id.* at 101.

³⁵¹ *Id.* at 104.

³⁵² *Id.* at 110. The country's name is redacted. *Id.*

that they had known for a long period of time -- in some cases for at least a year.³⁵³ These circumstances were allowed to happen because CIA personnel had “forgotten” to tell CIA headquarters that they were holding certain detainees, and had, presumably after a time, forgotten about the detainees themselves. Many of these detainees were kept in solitary confinement.³⁵⁴ In this instance, the CIA did give payments to some of the detainees who were wrongfully held; however, the unlawfulness of the circumstances cannot be diminished by the payment of damages.³⁵⁵

1. Khalid El-Masri

One of the more famous cases in the CIA’s rendition program is the CIA’s wrongful detention of Khalid El-Masri. The CIA rendered El-Masri from Germany to a foreign country,³⁵⁶ because they believed he had knowledge of key al-Qa’ida operatives who posed a “substantial threat of violence or death to U.S. persons or interests.”³⁵⁷ However, this justification did not comport with the standards articulated in MON, which stated that the detainee had be a “substantial threat of violence or death to U.S. persons or interests.”³⁵⁸ El-Masri was shocked and terrified; he was adamant that the CIA had wrongfully and erroneously kidnapped him, that is, that he was “the wrong person.”³⁵⁹ Eventually, after a dispute within the CIA, the National Security Council ordered that El-Masri be released.³⁶⁰

³⁵³ *Id.*

³⁵⁴ *Id.* at 111.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 128. The country’s name is redacted. *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 127.

³⁶⁰ *Id.* at 128. See also Amrit Singh, *European Court of Human Rights Finds Against CIA Abuse of El-Masri*, GUARDIAN (Dec. 13, 2012, 10:38 AM), <http://www.theguardian.com/commentisfree/2012/dec/13/european-court-human-rights-cia-abuse-khaled-elmasri> [<http://perma.cc/9CVH-BXGB>] (stating that the CIA brutally tortured El-Masri, who went on several hunger strikes in protest of his confinement, and when the CIA finally did get let El-Masri go, they let him off at the side of the road without explanation).

In fact, the CIA had wrongly detained El-Masri.³⁶¹ The CIA director however, decided not to take action against the CIA officer that detained him, because he thought that, “mistakes should be expected in a business filled with uncertainty...”³⁶²

C. Victims Not Included in the Torture Report

In 2005, *The Washington Post* reported that “more than twice as many prisoners were rendered by the CIA to foreign governments as were held by the agency.” This information would indicate, based on the 119 men known to have been detained, that at least 238 were in fact detained through the Program at non-CIA run sites.³⁶³ The names of these individuals and details of their rendition and torture were excluded from the Torture Report for multiple reasons, including the fact that they were detained in a site or sites other than those officially acknowledged as CIA operations. Following are three examples.

1. Abou Elkassim Britel

Abou Elkassim Britel, an Italian citizen born in Morocco,³⁶⁴ was one of the at least 238 individuals rendered and tortured through the Program and not included in the Torture Report. Britel, along with his wife, had a translation business.³⁶⁵ In March 2002, while on a business trip related to business research and development, Pakistani official arrested Britel.³⁶⁶ After enduring both psychological and physical torture in Pakistan in 2002 from March 10th until May 5th, Britel was kidnapped and extraordinarily rendered on board an Aero Contractors operated,

³⁶¹ Torture Report, *supra* note 226, at 128.

³⁶² *Id.*

³⁶³ Steven Watt, *Outsourced Terror*, SLATE (Dec. 19, 2014, 4:28 PM), http://www.slate.com/articles/news_and_politics/politics/2014/12/senate_torture_report_s_unnamed_victims_the_ci_a_had_hundreds_or_thousands.html [<http://perma.cc/4YCC-3M75>].

³⁶⁴ *Abou Elkassim Britel*, Rendition Project, <http://www.therenditionproject.org.uk/prisoners/britel.html> [<http://perma.cc/D9AK-DMKS>] (last visited Oct. 31, 2015).

³⁶⁵ Human Rights Policy Seminar, UNC School of Law, *Brief in Support of Abou Elkassim Britel’s Request for Reparations and an Official Apology for Extraordinary Rendition and Torture* at 6 (June 2014) [hereinafter Britel Brief] (citations omitted), available at <http://www.law.unc.edu/documents/academics/humanrights/britelbrief.pdf>.

³⁶⁶ *Id.* at 6–7.

CIA-owned Gulfstream V jet with registration number N379P.³⁶⁷ With the assistance of Jeppesen Dataplan, a flight planning and logistics firm, Britel was transported to Morocco and delivered to Témara prison under the control of Moroccan intelligence services where he was brutally tortured in ways similar to those described in the Torture Report.³⁶⁸ After a brief release and subsequent recapture, Britel was again subjected to torture and extreme cruelty, forced to sign a confession (which he had not been allowed to read) and then “tried” and convicted for terrorist acts.³⁶⁹

In January 2011, while serving his nine-year sentence, and after a full investigation by an Italian court that exonerated him of any acts of, or association with, terrorism, the King of Morocco finally issued a pardon for Britel under pressure from members of both the Italian and EU parliaments.³⁷⁰ On April 14, 2011, more than nine years after he was first arrested in Pakistan, Britel was released.³⁷¹

2. Ahmed Agiza

Many additional individuals with similar experiences were also not included in the Torture Report. Ahmed Agiza, an Egyptian citizen who had moved to Sweden and was in the process of gaining permanent residency, was arrested by Swedish police in December 2001.³⁷² In what is allegedly the Program’s first post-9/11 rendition operation,³⁷³ Agiza was turned over to the CIA

³⁶⁷ *Id.*

³⁶⁸ At least one source has suggested that Témara was also a secret CIA “dark site.” See Aida Alami, *Morocco Crushed Dissent Using a U.S. Interrogation Site, Rights Advocates Say*, N.Y. TIMES (Jan. 17, 2015).

³⁶⁹ *Abou Elkassim Britel*, *supra* note 364. See also Britel Brief, *supra* note 365, at 14, 16.

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Ahmed Agiza and Mohamed El-Zery*, RENDITION PROJECT, <http://www.therenditionproject.org.uk/global-rendition/the-detainees/ahmed-agiza-&-mohamed-el-zari.html> (last visited Oct. 31, 2015).

³⁷³ Watt, *supra* note 363.

by the Swedish police and transported to Egypt, where he was “held incommunicado by Egyptian Intelligence Services, interrogated, and mercilessly tortured.”³⁷⁴

3. Maher Arar

Another victim of the Program, Maher Arar, is a Canadian citizen of Syrian descent who was arrested in John F. Kennedy International Airport after returning from a holiday. Transported by the CIA to Syria, Arar was held for more than a year.³⁷⁵ During his detention, Arar, like Britel, experienced both physical and psychological torture, including being beaten with electric cable.³⁷⁶ After he was forced to falsely confess to attending a training camp in Afghanistan and endured further detention, Arar was finally released on October 4, 2003, without charge.³⁷⁷ Ultimately, an investigation into Arar’s arrest, detention, and torture concluded that the Canadian authorities were complicit in his arrest and the Canadian government subsequently issued an apology and provided compensation.³⁷⁸ However, Arar, and the facts of his extraordinary rendition and torture are omitted from the Senate Report.

Those individuals whose rendition and torture were revealed in the Report may have benefitted, albeit insufficiently, on the basis of the acknowledgement alone. The acknowledgement creates the possibility of the beginning of a process for these individuals seeking closure, accountability, and justice. Yet for individuals like Britel, Agiza, and Arar, whose names and stories do not appear in the Torture Report, the 525 pages released by the CIA provide them with no relief, and deprive them of a way to seek relief for their trauma and suffering. As victims of unspeakable horror and brutality, they are cloaked with greater

³⁷⁴ *Id.*

³⁷⁵ *Maher Arar*, RENDITION PROJECT, <http://www.therenditionproject.org.uk/global-rendition/the-detainees/maher-arar.html> (last visited Oct. 31, 2015).

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.*

invisibility and moved farther from a process of truth-seeking and reparations. The failure to include all victims is compounded by the refusal of all of the governments implicated in the Program to acknowledge their participation. These victims appear to have no redress or closure. Indeed, for Britel, though he was released after nine years of torture and detention in the Moroccan prison Témara, he now lives with a stigma attached to his name. With no acknowledgement of wrongdoing by the CIA in his case, he continues to suffer the taint of the label of “terrorist,” though wrongly applied. He has had trouble finding work, and even greater difficulty in his efforts to reintegrate back into daily life and social processes. He has been the victim of grave injustices at the hands of the CIA and the U.S. government, as well as the Pakistani, Italian and Moroccan governments and private companies like Aero Contractors and Jeppesen Dataplan, yet his injustice and suffering continue even after his release.

III. THE TICKING TIME BOMB

Although the inquiry with regard to the legality of the CIA Program starts and ends with the non-derogable legal prohibitions against torture, it is nonetheless too important to debunk the seriously flawed and dangerous basis upon which the CIA attempted to justify it. Indeed, before the CIA first implemented the EIT program, agency and other government attorneys researched the limits of coercive interrogation techniques.³⁷⁹ CIA attorneys drafted a memo wherein it indicated its intent to rely on the defense of necessity and anticipatory self-defense as valid legal defenses against charges of torture.³⁸⁰ In order for the necessity defense to work, the use of torture would have had to have “saved many lives.”³⁸¹ A CIA remarked the necessity and

³⁷⁹ See Torture Report, *supra* note 226, at 179.

³⁸⁰ *Id.*

³⁸¹ *Id.*

anticipatory self-defense strategies were justified because the “ticking time bomb” was a “real world scenario.”³⁸²

The ticking time bomb scenario is flawed and without credibility as a means to justify torture.³⁸³ This scenario is depicted as one where a terrorist, in the hands of authorities, has information about an imminent terrorist attack but he is unwilling to talk unless he is tortured.³⁸⁴ The assumptions upon which this scenario rests are unrealistic.³⁸⁵ Those who have studied justification for torture have demonstrated that the scenario has not and never will exist—it is merely a hypothetical.³⁸⁶

The most important take away is that in order for the use of EITs to be legal, it had to create results. It had to “thwart plots,” “save lives,” and “capture terrorists.” Whether torture produces intelligence cannot be the determining question when considering the human rights violations that took place as a result of the CIA’s extraordinary rendition and torture program. Torture is illegal and immoral. Yet it is worthwhile reviewing the Senate Report’s assessment of the effectiveness of torture tactics. In fact, a key finding is that the CIA’s use of its enhanced interrogations program was not an effective method of obtaining intelligence or gaining cooperation from its detainees.

A. Falsified Bases for Legal Justification

³⁸² *Id.* at 180.

³⁸³ ASSOC. FOR THE PREVENTION OF TORTURE, WHY WE MUST SAY NO TO TORTURE, ALWAYS (2007), available at http://www.apr.ch/content/files_res/tickingbombsscenario.pdf.

³⁸⁴ *Id.* at 1.

³⁸⁵ *Id.* at 4. The scenario rests on the assumptions that a planned attack is known to exist; the attack is imminent; many people will be killed; the perpetrator is in custody; the perpetrator has information that will prevent the attack; the torturer will obtain information in time to prevent the attack; no other means exist to obtain the information; torture is the only way to get this information. *See id.*

³⁸⁶ *See* Lisa Hajjar, *Does Torture Work? A Sociological Assessment of the Practice in Historical and Global Perspective*, 5 ANNU. REV. LAW SOC. SCI. 311, 313 (2009).

Between 2002 and 2007, the Department of Justice’s Office of Legal Counsel developed a series of memoranda on the legality of the CIA Detention and Interrogation. In providing its legal analysis on the techniques employed by CIA interrogators, the Office of Legal Counsel (OLC) relied on information provided to them by the CIA.

1. The 2002 OLC Memorandum

In an early memo regarding the interrogation of Abu Zubaydah in 2002, the OLC was explicit in its reliance on the CIA, stating:

“Our advice is based upon the following facts, which you have provided to us. We also understand that you do not have any facts in your possession contrary to the facts outlined here, and this opinion is limited to these facts. If these facts were to change, this advice would not necessarily apply.”³⁸⁷

At that time, the OLC advised that the CIA’s methods of interrogation would not violate prohibitions against torture found in the U.S. Code.³⁸⁸ The memorandum contained a legal analysis of the CIA’s proposed enhanced interrogation techniques. This analysis was limited only to the specific methods that the CIA had provided to the OLC.³⁸⁹ However, “[m]uch of the information the CIA provided to the OLC was inaccurate in material respects.”³⁹⁰

The CIA also made materially false factual representations to the OLC about the necessity of the enhanced interrogation techniques, which it relied upon in its 2002 memorandum justifying the CIA’s use of enhanced interrogation techniques on detainees within the program. Among the material misrepresentations were details about the interrogation of Abu Zubaydah that the Senate Report revealed to be unsupported and misleading as to the extent his involvement in terror plots and his knowledge of terrorist organizations.³⁹¹

³⁸⁷ *Id.* at 409.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 412.

³⁹⁰ *Id.*

³⁹¹ *Id.* at 409–10.

The CIA claimed that Zubaydah was a key figure in Al-Qa'ida, ranking as the “third or fourth man.”³⁹² The memorandum also reiterated false CIA claims that Abu Zubaydah was a crucial member in the planning and execution of the September 11 attacks,³⁹³ was trained in resisting traditional interrogation techniques,³⁹⁴ and that he was withholding additional information relating to future terrorist attacks.³⁹⁵ It asserted that Abu Zubaydah was in possession of knowledge that could be detrimental to the United States and that EITs were needed in order to extract this information. As the Torture Report unearthed, this was not the case. However, the assessment about Abu Zubaydah's role within Al-Qa'ida had been based on reporting that was recanted; this was brought to the attention of CIA officials several weeks prior to the OLC memorandum.³⁹⁶ In fact, there is no CIA evidence that supports any of these claims.

Moreover, the CIA broadly interpreted the 2002 memorandum as applying to other detainees besides Abu Zubaydah.³⁹⁷ Even though the memorandum stated explicitly that the legal advice applied specifically to Abu Zubaydah and the representations that the CIA made about him, the agency applied its enhanced interrogation methods that were outlined in the memorandum to other detainees whose involvement in terror activities varied considerably.³⁹⁸

In practice, however, the CIA applied the enhanced interrogation techniques in a manner that a Department of Justice attorney later concluded “was quite different from the [description] presented in 2002 [by the CIA].”³⁹⁹ Focusing on the discrepancies between the techniques outlined

³⁹² *Id.* at 410.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 411.

³⁹⁸ *Id.*

³⁹⁹ OFFICE OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF 'ENHANCED INTERROGATION TECHNIQUES' ON SUSPECTED TERRORISTS 140–41 (2009).

in the 2002 memorandum and the techniques actually used at black sites, the CIA's May 2004 Inspector General Special Review recommended to the CIA's office of General Counsel that they submit a request to the Department of Justice for formal legal guidance with the purpose of "revalidating and modifying, as appropriate, the guidance provided" in the 2002 memorandum.⁴⁰⁰

Assistant Attorney General Jack Goldsmith, upon receiving the Special Review, told the CIA that the OLC had never officially issued a legal opinion on whether the CIA's enhanced interrogation techniques met constitutional standards.⁴⁰¹ In light of these revelations about the CIA's deviation from techniques described in the 2002 memorandum and the lack of a formal opinion on the constitutionality of the program, Director George Tenet directed that the use of the CIA's "standard" and enhanced techniques be suspended pending further policy and legal review.⁴⁰²

2. Approval of EITs

Despite the suspension of enhanced interrogation techniques by Director Tenet, Attorney General Ashcroft stated at a July 2004 meeting of select National Security Council principals that the use of the CIA's enhanced interrogation techniques as outlined in the 2002 memorandum would be consistent with U.S. law and treaty obligations, with an exception for the use of the waterboard technique, pending further review.⁴⁰³ He reiterated these sentiments later that month at a National Security Council Principals Committee meeting, joined by Patrick Philbin and Daniel Levin from the Department of Justice.⁴⁰⁴ A major topic of discussion at these meetings was the proposed interrogation of detainee Janat Gul. In anticipation of the interrogation of Gul, the CIA

⁴⁰⁰ Torture Report, *supra* note 226, at 413.

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 414.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

revealed for the first time details relating to the use of “dietary manipulation, nudity, water dousing, the abdominal slap, standing sleep deprivation, and the use of diapers, all of which the CIA described as a ‘supplement’ to the interrogation techniques listed in the 2002 memorandum.”⁴⁰⁵ As described in the Torture Report, even these additional disclosures regarding the techniques employed differed greatly in practice from the way that the CIA described them to the OLC.⁴⁰⁶

Seeking approval for the use of additional enhanced interrogation techniques, CIA attorneys, medical officers, and other personnel met with the Department of Justice on August 13, 2004.⁴⁰⁷ Specifically, the CIA sought approval for the use of sleep deprivation, water dousing, and the waterboard. In assessing the medical ramifications of the implementation of each technique, the CIA made representations that the Torture Report found to be inconsistent with the application of these methods throughout the history of the CIA torture program.⁴⁰⁸ With respect to the interrogation of Janat Gul, the CIA’s Associate General Counsel, whose name is redacted in the Torture Report, sent a letter to the OLC that described Gul’s resistance to currently used enhanced interrogation techniques, and suggested that further interrogation would be ineffective unless they were able to add the concurrent use of “dietary manipulation, nudity, water dousing, and the abdominal slap.”⁴⁰⁹

The next day Acting Assistant Attorney General Daniel Levin informed CIA Acting General Counsel John Rizzo that the use of these four additional enhanced interrogation techniques did not violate any U.S. statutes, the Constitution, or any U.S. treaty obligations. This legal advice relied on the CIA’s representation that “there are no medical and physiological contraindications

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 415.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

to the use of these techniques” as they planned to employ them on Gul.⁴¹⁰ In fact, CIA records at the time indicated that this was grossly inaccurate, including indications that extended standing had already caused significant swelling to Gul’s lower extremities, Gul was experiencing visual and auditory hallucinations as a result of sleep deprivation, on-site interrogators did not believe enhanced pressures would increase Gul’s ability to recall and provide accurate information, and that interrogators believed that Gul was no longer withholding information.⁴¹¹

Nevertheless, there are no indications that the CIA informed the OLC that it had knowledge that Gul had no information about the pre-election threat that was the basis for the OLC’s approval of the use of enhanced interrogation techniques on the detainee in the first place.⁴¹² Based on the same fabrications that garnered the OLC’s approval for the use of the techniques on Gul, the OLC later advised the CIA that the use of enhanced interrogation techniques against Ahmed Khalfan Ghailani and Sharif al-Masri was justified since they were involved in “operational planning” for Al-Qa’ida.⁴¹³ In fact, as the Torture Report demonstrates, nothing contained in the CIA records support its request for approval by the OLC for the use of additional enhanced interrogation techniques on these individuals.⁴¹⁴

3. 2005-2007 OLC Memoranda

A March 2005 CIA memo to the OLC known as the “Effectiveness Memo”⁴¹⁵ was the basis for much of the OLC’s justification for approving the continued use of enhanced interrogation techniques after May of 2005. In correspondence with the OLC in 2005, the CIA represented that the techniques employed were aimed at avoiding significant physical pain. According to the CIA:

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 417.

⁴¹² *Id.* at 418.

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 425.

Medical officer [sic] can and do ask the subject, after the interrogation session has concluded, if he is in pain, and have and do provide analgesics, such as Tylenol and Aleve, to detainees who report headache and other discomforts during their interrogations. We reiterate, that an interrogation session would be stopped if, in the judgment of the interrogators or medical personnel, medical attention was required.⁴¹⁶

Among further false representations made by the CIA and relied upon by the OLC were assurances by the CIA that the use enhanced interrogation techniques would be limited to “High Value Detainees” who were senior members of Al Qaeda, who had “knowledge of imminent terror attacks,” or “direct involvement in planning and preparing” terrorist activities.⁴¹⁷ In practice, the CIA employed the enhanced interrogation techniques on detainees who were found to fall well outside of these criteria.⁴¹⁸

That OLC May 20, 2005 memorandum analyzed U.S. obligations under CAT, and relied heavily on the CIA’s false representations about the effectiveness of their interrogation program.⁴¹⁹ According to the Senate Intelligence Report:

The CIA “Effectiveness Memo” further stated that “[p]rior to the use of enhanced interrogation techniques against skilled resistors [sic] like [Khalid Sheikh Mohammed] and Abu Zubaydah—the two most prolific intelligence producers in our control—CIA acquired little threat information or significant actionable intelligence information.” As described in [the Senate Intelligence Report], the key information provided by Abu Zubaydah that the CIA attributed to the CIA’s enhanced interrogation techniques was provided prior to the use of the CIA’s enhanced interrogation techniques. KSM was subjected to CIA’s enhanced interrogation techniques within minutes of his questioning, and thus had no opportunity to divulge information prior to their use.⁴²⁰

Thus, the CIA not only misled the OLC in terms of the techniques that they were using, but they provided inaccurate information about the medical state of the detainees who had been subjected to enhanced interrogation techniques.⁴²¹

⁴¹⁶ *Id.* at 419.

⁴¹⁷ *Id.* at 425.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 426.

⁴²¹ *Id.* at 421.

In legal opinions put forth during 2006 and 2007, the OLC relied on the same false representations of the effectiveness of the torture program that the CIA used in seeking approval for the use of enhanced interrogation techniques.⁴²² The 2006 memorandum applied the recently passed Detainee Treatment Act to the confinement conditions at the black sites. That memorandum also relied on the same false effectiveness claims used in earlier OLC and CIA communications. The 2007 OLC memorandum additionally applied the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to the conditions of the CIA’s torture program.⁴²³

To support its conclusion that the use of EITs was “proportionate to the government interest involved” and would pass the “shocks the conscience” test under the Fifth Amendment of the Constitution, the OLC relied on outdated information purposefully provided to them by the CIA in order to conceal the true size of the program, and reiterated the false claims that the information gathered was “otherwise unavailable”.⁴²⁴ Additional false representations relied upon in the 2007 memorandum include assertions by the CIA that interrogators were highly trained in carrying out the techniques,⁴²⁵ that many detainees had been trained in interrogation resistance techniques,⁴²⁶ and that members of Congress supported the CIA torture program.⁴²⁷ This last representation was based on the CIA’s reasoning that members of Congress who subsequently voted for the Military Commissions Act reflected a general approval of the CIA’s use of enhanced interrogation techniques.⁴²⁸ The OLC memorandum noted that, based on CIA representations, “several members of Congress, including the full memberships of the House and

⁴²² *Id.* at 430–31.

⁴²³ *Id.* at 431.

⁴²⁴ *Id.* at 431, 434.

⁴²⁵ *Id.* at 434.

⁴²⁶ *Id.* at 433.

⁴²⁷ *Id.* at 435.

⁴²⁸ *Id.*

Senate Intelligence Committees and Senator McCain...were briefed...by the CIA...[and that] none of the Members expressed the view that the CIA interrogation program should be stopped, or that the techniques at issue were inappropriate.”⁴²⁹ On the contrary, Senator John McCain had informed the CIA in 2006 that he believed the CIA was engaged in “torture” when it employed enhanced interrogation techniques, including waterboarding and sleep deprivation.⁴³⁰

B. Manipulating the American Public

In mid-2004, through information leaks, the press started publishing stories about the CIA’s dubious activities and black sites.⁴³¹ These articles generally portrayed the program in a negative light. Accordingly, in April of 2005, the CIA determined that it was in their interest to present their “side of the story” about the use of EITs and torture.⁴³²

While the Torture Program was still classified, the CIA misrepresented the nature of the interrogations and the effectiveness of the program through controlled leaks to the media. CIA officials hoped to shape the media’s coverage of the interrogation program by feeding false information to news outlets for articles and interviews.⁴³³ Internal CIA communications revealed that the agency chose not to investigate Ronald Kessler despite the fact that his book, *The CIA at War*, contained classified information.⁴³⁴ The agency reasoned that “the book contained no first time disclosures” and that Kessler’s cooperation with the agency had been “blessed” by the CIA director, according to the CIA’s General Counsel at the time, John Rizzo.⁴³⁵

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ See *The CIA’s Prisoners*, WASH. POST, July 15, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A50490-2004Jul14.html> (discussing the issues of the CIA not letting ICRC visit detainees, the detainees being kept incommunicado, and the possibility that they may have been tortured).

⁴³² Torture Report, *supra* note 226, at 402.

⁴³³ *Id.* at 403.

⁴³⁴ *Id.* at 401.

⁴³⁵ *Id.*

After the *New York Times* published an article by Douglas Jehl⁴³⁶ that contained classified information about the torture program, some CIA officers and members of the House Permanent Select Committee on Intelligence expressed concern about the release of such secrets.⁴³⁷ However, since this information was reportedly based on information provided to Jehl by the CIA's Office of Public Affairs, there was no basis to report the author for an unauthorized disclosure of classified information.⁴³⁸

According to the Torture Report, “[b]oth the Kessler book and the Jehl article included inaccurate claims about the effectiveness of CIA interrogations, much of it consistent with the inaccurate information being provided by the CIA to policymakers at the time.”⁴³⁹ The Kessler book incorrectly states that the CIA's use of enhanced interrogation techniques on Khalid Sheikh Muhammad, in particular, was crucial in extracting information that led to the arrest of two suspected terrorists.⁴⁴⁰ As detailed elsewhere in the Torture Report, Khalid Sheikh Muhammad provided no such information.⁴⁴¹ Similarly, the Jehl article perpetuated the idea that the torture methods employed by CIA agents were effective in gathering information about future threats to the United States.⁴⁴² The article quoted a “senior United States official” who claimed that “[t]he intelligence obtained by those rendered, detained, and interrogated ha[d] disrupted terrorist operations....saved lives in the United States and abroad, and it has resulted in the capture of other terrorists.”⁴⁴³

⁴³⁶ Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, March 6, 2005, http://www.nytimes.com/2005/03/06/politics/rule-change-lets-cia-freely-send-suspects-abroad-to-jails.html?_r=0.

⁴³⁷ Torture Report, *supra* note 226, at 401.

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 402.

⁴⁴² *Id.*

⁴⁴³ *Id.*

As information about the torture program slowly emerged, CIA attorneys cautioned that the agency should be careful not to attribute the leaked classified information to officials within the intelligence agency.⁴⁴⁴ In 2005, the CIA drafted “an extensive document describing the CIA’s Detention and Interrogation Program for an anticipated media campaign.”⁴⁴⁵ Referring to the CIA’s own description of the torture program, one CIA attorney said “[the draft] makes the [legal] declaration I just wrote about the secrecy of the interrogation program a work of fiction....”⁴⁴⁶ Counsel for the CIA urged that they might eventually need to “confront the inconsistency [between CIA declarations] about how critical it is to keep this information secret,” while at the same time “planning to reveal darn near the entire program.”⁴⁴⁷

The CIA again cooperated with journalists for the purpose of sharing false information that eventually led to a *New York Times* article by David Johnston⁴⁴⁸ on the interrogation of Abu Zubaydah.⁴⁴⁹ Based on misrepresentation by the CIA, the article claims that “[i]t was clear that [Zubaydah] had information about an imminent attack and time was of the essence,” but that he was not cooperative until the CIA employed “tougher tactics.”⁴⁵⁰ It sets out the claims that it was these brutal interrogation tactics by the CIA led to critical information helping to “capture those responsible for the 9/11 attacks.”⁴⁵¹ These reports were inconsistent with CIA records about the interrogation.⁴⁵²

⁴⁴⁴ *Id.* at 404

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 405

⁴⁴⁷ *Id.*

⁴⁴⁸ David Johnston, *At a Secret Interrogation, Dispute Flares Over Tactics*, N.Y. TIMES (September 10, 2006), <http://www.nytimes.com/2006/09/10/washington/10detain.html?pagewanted=all>.

⁴⁴⁹ Torture Report, *supra* note, at 405–06.

⁴⁵⁰ *Id.* at 406.

⁴⁵¹ *Id.*

⁴⁵² *Id.*

The CIA reached out to Ronald Kessler again in 2007 for the purposes of refuting Kessler’s proposed narrative of the United States’ intelligence gathering operations.⁴⁵³ At the time, Kessler was working on a second book about the CIA’s torture program. Upon receiving a draft from Kessler, Mark Mansfield, the CIA’s director of public affairs, described the author’s narrative as “vastly overstating the FBI’s role in thwarting terrorism and, frankly, giving other [United States Government] agencies—including CIA—short shrift.”⁴⁵⁴ The agency met with Kessler about proposed changes to his story and succeeded in convincing the author to make “substantive changes” to his draft, including the statements that “the CIA could point to a string of successes and dozens of plots that were rolled up because of coercive interrogation techniques [to which Abu Zubaydah was exposed].”⁴⁵⁵ Kessler’s representations about the effectiveness of the CIA’s torture program were similar to representations made by the CIA to policymakers despite being inconsistent with CIA records.⁴⁵⁶ In fact, Kessler’s statements echoed representations made by President George W. Bush in a speech from September 6, 2006, based on incorrect information provided to him by the CIA, in which he attributed the capture of Kahlid Sheikh Muhammad to information gathered during the interrogation of Abu Zubaydah.⁴⁵⁷

The changes that Kessler made to his draft following a meeting with the CIA illustrate the duplicitous nature of the agency’s attempts to manipulate public opinion concerning CIA operations and looming Congressional investigations into the program. For example, his revised text warned that the media and members of Congress would try to undermine “the efforts of the heroic men and women who are trying to protect us.”⁴⁵⁸ Furthermore, the changes made

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* at 407.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* at 408.

following his meeting with the CIA warned that Congress might be “swayed by a misinformed public” and attempt to take away the “tools that are needed” to win the war on terror.⁴⁵⁹ He warned that “[t]oo many Americans are intent on demonizing those who are trying to protect us.”⁴⁶⁰ Ironically, Kessler, in direct cooperation with the CIA, was engaging in the same type of media manipulation and misinformation that he warned against.

C. A Formal Investigation

Through the duration of the CIA’s Program, the CIA produced very little information regarding the detainees, the interrogation techniques employed, and the locations of the detention sites, and much of what they did produce was inaccurate.⁴⁶¹ When the CIA did brief Senate Committee members on the program, they met only with Committee leadership and detailed records of these meetings do not exist.⁴⁶² However, by 2005, efforts to conduct a more formal and rigorous investigation into the program were underway.⁴⁶³ Led by Committee Vice Chairman, the legislative branch began to probe CIA officials about their secretive operations. CIA officials expressed concern internally about the possibility of their programs being brought to light, suggesting they “either get out and sell, or get hammered, which has implications beyond the media.”⁴⁶⁴

In late 2005, the CIA carried out the most egregious act of subterfuge contained in the Torture Report. A proposal by Senator Carl Levin for an independent review of the CIA’s Detention and Interrogation Program sparked fears that such an investigation would uncover incriminating videotapes of enhanced interrogation techniques being used on detainees.⁴⁶⁵ Over

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Id.* at 439–41.

⁴⁶³ *Id.* at 441.

⁴⁶⁴ *Id.* at 442.

⁴⁶⁵ *Id.* at 443.

objections by President Bush's White House Counsel and the Director of National Intelligence, the CIA destroyed two videotapes containing recordings of interrogations.⁴⁶⁶ The tapes, which documented the use of enhanced interrogation techniques on Abu Zubaydah and another detainee, were destroyed in accordance with internal CIA orders to protect the agents from exposure to liability.⁴⁶⁷ The CIA contended that the paper records of those interrogations contained more detail than the videotapes, so the destruction of the tapes should not be construed as an effort to destroy evidence.⁴⁶⁸ This blatant attempt to cover up evidence of detainee torture at the hands of CIA agents was a catalyst for the thorough Committee investigation into the Detention and Interrogation Program.

Months before the release of the Torture Report, Senator Diane Feinstein took to the Senate floor on March 11, 2014 and delivered an hour-long speech on the Committee's investigation into the program.⁴⁶⁹ Senator Feinstein sought to clarify information that was being disseminated by the media about the nature of the program and attempts by the CIA to hinder the Committee's investigation, including the destruction of the two videotapes.⁴⁷⁰ She touched on the CIA's consistent refusal to brief any members of the Committee "other than the Chairman and Vice-Chairman" until "hours before President Bush disclosed the program to the public."⁴⁷¹ In 2009, two Committee staffers began an informal review of thousands of CIA communications following the revelations that the CIA had acted to destroy videotaped interrogations. According

⁴⁶⁶ Diane Feinstein, Senator, Statement on Intel Committee's CIA Detention, Interrogation Report (Mar. 11, 2014) [hereinafter Feinstein Statement] (transcript available at <http://www.feinstein.senate.gov/public/index.cfm/2014/3/feinstein-statement-on-intelligence-committee-s-cia-detention-interrogation-report>).

⁴⁶⁷ Mark Mazzetti, *C.I.A. Destroyed 2 Tapes Showing Interrogations*, N.Y. TIMES, Dec. 7, 2007, <http://www.nytimes.com/2007/12/07/washington/07intel.html?pagewanted=all>.

⁴⁶⁸ Feinstein Statement, *supra* note 466.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

to Senator Feinstein, “the staff report was chilling.”⁴⁷² Even from this preliminary investigation, it became clear that “the conditions of confinement at the CIA detention sites were far different and far more harsh than the way the CIA had described them to us.”⁴⁷³

The Committee reacted swiftly, and voted 14-1 on March 5, 2009 to “initiate a comprehensive review” of the torture program.⁴⁷⁴ Even then, when it seemed that the CIA could no longer hide its torture program, the agency refused to fully cooperate. According to Senator Feinstein, the CIA’s cooperation with the investigation was unorthodox, including the agency’s decision to turn over millions of pages of internal documents about the torture program to the Committee “without any index, without any organizational structure.”⁴⁷⁵ Furthermore, she clarified that the CIA had repeatedly interfered with the Committee’s efforts by removing documents from Committee access after the documents had previously been made available to the Committee.⁴⁷⁶ She debunked claims by the media that the CIA hacked into Committee computers in order to discern which documents they were accessing. In fact, the CIA was actually able to flag the documents that the Committee was searching for on the search tool provided by the CIA at the request of the Committee.⁴⁷⁷ Nevertheless, her speech on the Senate floor laid bare the CIA’s attempts to avoid accountability. At first, the agency refused to answer requests for information about the torture program. When they were required to cooperate, the agency dumped over six million pages of unsorted documentation onto the Committee all at once.

D. Looking Back

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

The CIA made numerous representations about the plots thwarted as a result of EITs. They used these representations as proof that the EIT program was an effective means of gathering what would have otherwise been unobtainable information. The report chronicles the eight most frequently cited cases that the EIT program had thwarted plots, saved lives, and/or captured additional terrorists.⁴⁷⁸ In every single instance there was evidence that the CIA either had no justification to use EITs, the CIA could have obtained the information necessary to capture additional terrorists from other sources, or that the representations provided by the CIA were blatantly inaccurate.⁴⁷⁹

The CIA also asserted on multiple instances that all detainees provided information that resulted in intelligence reporting.⁴⁸⁰ However, this assertion was unsupported by CIA intelligence records.⁴⁸¹ At least seven of the thirty-nine detainees subjected to EITs produced no intelligence reports.⁴⁸² In most situations, detainees who were subjected to torture did not give the CIA any useful intelligence, and in other situations detainees fabricated information in order to bring about the cessation of the interrogation by torture. This is demonstrated by an analysis of the number of CIA detainees who were tortured and the number of intelligence reports that

⁴⁷⁸ *Id.* at 223. The eight most frequently cited examples of plots thwarted and terrorists captured as evidence of the effectiveness of the CIA's EIT program are: (1) The Thwarting of the Dirty Bomb/Tall Buildings Plot and Capture of Jose Padilla (2) The Thwarting of the Karachi Plots (3) The Thwarting of the Second Wave Plot and the Discovery of the al-Ghuraba Group (4) The Thwarting of the United Kingdom Urban Targets Plot and the Capture of Dhiron Barot, aka Issa al-Hindi (5) The Identification, Capture, and Arrest of Iyman Faris (6) The Identification, Capture, and Arrest of Sajid Badat (7) The Thwarting of the Heathrow Airport and Canary Wharf Plotting (8) Capture of Hambali. *Id.*

⁴⁷⁹ *Id.* at 225–26, The dirty bomb plot was still in its planning phases when it was thwarted, and the information necessary to thwart the dirty bomb came from a foreign government. Additionally, the plots were assessed by the intelligence community to be infeasible. *Id.*

⁴⁸⁰ *Id.* at 217.

⁴⁸¹ *Id.*

⁴⁸² *Id.*

these individuals provided to the C.I.A.⁴⁸³ Moreover, the falsity of the information provided by many of these detainees can be readily confirmed.

The overall number of CIA detainees subjected to EITs, when compared to the intelligence reports obtained from those individuals, shows that EIT program was ineffective. The report notes that of the thirty-nine detainees mentioned in the report who were subjected to the CIA's EIT program,⁴⁸⁴ thirty-six produced what was determined to be insignificant information.⁴⁸⁵ Twenty percent produced no intelligence reports, while forty percent produced fewer than fifteen intelligence reports out of a total of 5,874 reports.⁴⁸⁶ Of these 5,874 intelligence reports that the CIA recovered, an overwhelming majority came from twenty-five detainees.⁴⁸⁷ However, more than forty percent of the 5,874 intelligence reports came from just five detainees.⁴⁸⁸ Of these five detainees, two were subjected to enhanced interrogation techniques.⁴⁸⁹ Thus, the number of detainees held in the CIA's detention and interrogation program from whom a report was obtained was negligible in comparison to the whole. These figures paint an indisputably clear picture that, from a numerical standpoint, the use of EITs was an ineffective means of gathering intelligence.

The release of the summary of the Torture Report has shed light on some of the ways in which the CIA attempted to cover up the egregious human rights violations by the United States.

⁴⁸³ See Kennedy Elliot et al., *The 119 Detainees Held in Secret CIA Prisons*, WASH. POST (Dec. 9, 2014), <http://www.washingtonpost.com/wp-srv/special/national/cia-interrogation-report/numbers/> (“ According to CIA records, seven of the [thirty-nine] CIA detainees known to have been subjected to the CIA's enhanced interrogation techniques produced no intelligence while in CIA custody.”);

⁴⁸⁴ Torture Report, *supra* note 226, at 217.

⁴⁸⁵ See *id.* (noting that there were 119 detainees that were in the CIA's extraordinary rendition program; the CIA subjected 39 of these 119 detainees to EITs; the group of 119 detainees produced a grand total of 5,874 intelligence reports; and approximately 5228 of these intelligence reports came from five detainees, only three of which were subjected to EITs).

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

Even in its heavily redacted summary form, the Torture Report provides significant insight into the operations of the CIA's black sites and the various methods of brutal interrogation that were employed by its agents. The Torture Report also highlights the CIA's blatant attempts to mislead investigators even after details of the program were beginning to emerge. In fact, the Torture Report dedicates an entire thirty-page appendix at the end of the executive summary to quoting and refuting misrepresentations made by Director Michael Hayden to the Committee on April 12, 2007.⁴⁹⁰ Hayden's testimony in front of the Committee includes inaccuracies about every aspect of the torture program from the interrogation of Abu Zubaydah, the effectiveness of the techniques implemented, approval from the Department of Justice, and the legal basis for interrogations, to name a few.⁴⁹¹ Because of the repeated attempts by the CIA to mislead the public and Congress about the true nature of the detention and interrogation program, the credibility of the agency has been seriously weakened. Given the serious and repeated misrepresentations about egregious human rights violations, any further efforts by the U.S. government to thwart investigations into torture claims must give way to the need for full transparency and accountability.

IV. CONCLUSION

The Torture Report released to the public is 525 pages; the full report includes more than 6,700 pages.⁴⁹² Thus, there is critical information regarding the actions of the U.S. government and its victims that remains classified. Because many of the facts that are likely detailed in the full report have already been disclosed by the victims themselves through other public forums, in

⁴⁹⁰ *Id.* 462–95.

⁴⁹¹ *Id.*

⁴⁹² *Id.* at 456.

litigation in foreign and international courts, and in international reports,⁴⁹³ the argument that the release of the full report would present a national security risk is unsound. Further, even if details of the Program had not already been made public, transparency in the form of the declassification of the full report should be a greater priority to the U.S. government than its desire to keep hidden its illegal actions. The Torture Report details the significant misrepresentations the CIA made to the National Security Council and Department of Justice, as well as the CIA's efforts to avoid or impede oversight by Congress, the White House, and the CIA's Office of Inspector General. These findings demonstrate the necessity to provide a full accounting to victims like Abou Elkassim Britel, and to the public at large which is entitled to have access to the complete findings of the investigation revealed in the full report.

While the release of the Torture Report provides some critical information regarding the practices, victims, and parties involved in the CIA Program, it is an insufficient effort in the process of pursuing transparency, justice, and accountability. Not only is the Torture Report heavily redacted, it also completely omits many victims as well as details of the Program and the parties involved. Therefore, while the Torture Report's release is a critical new development, it presents even more questions. These questions must be answered in order to provide closure for victims, and accountability for the perpetrators, including CIA insiders, participating countries, and private entities. A full and complete factual accounting must be disclosed in order to gain a thorough understanding of the Program as a way to ensure it is never continued or repeated.

The Senate Committee observed that the CIA and the Executive Branch should use the Torture Report to make sure this system of human rights abuses is never repeated. For those

⁴⁹³ *Infra* Parts V & VI. See also University of North Carolina School of Law Immigration & Human Rights Policy Clinic, *A Call to Uphold the Core Universal Principles of Responsibility and Protection of Human Rights*. See also European court of Human Rights, *Case of El-Masri v. The Former Yugoslav Republic of Macedonia*, Dec. 13, 2012.

victims who were the subjects of abuse, the Torture Report provides official government admission of U.S. deviation from its human rights obligations- a valuable resource in the fight against the government's continued invocation of the state secrets privilege. Additionally, in light of the Torture Report, recent proclamations made by the United States to international legal bodies, discussed above, the United States cannot leave the events and victims detailed in this Report unacknowledged and still expect its assertions to maintain any credibility. If the U.S. government maintains its "looking forward" approach, the United States cannot expect international legal bodies to believe in its commitment to human rights obligations. The victims cannot move forward without an acknowledgement by the perpetrators of their wrongdoing. Nor can the U.S. government recover trust and respect from its citizens and the world.

SECTION THREE: INTERNATIONAL AND FOREIGN COURTS

I. INTERNATIONAL COURTS

Despite the failure of U.S. courts to provide a legal mechanism to investigate and review the actions of the U.S. government and the claims of the CIA Detention and Interrogation Program's victims, the international legal system has provided some opportunity of relief for the victims. The United States has not yet submitted to the jurisdiction of an international court, but it cannot escape the implications of the investigations and litigation they have pursued.

Investigations and litigation of claims have disclosed even more information to the public about the CIA's Detention and Interrogation Program in relation to claims against foreign governments that participated in the program, whether as a host for a black site or by providing some other form of aid to the program. The prosecutions and condemnation at the international court level of all those involved in the CIA Program signifies the general abhorrence with the Program in the international community and its recognition of the need to hold those responsible accountable. The factual revelations that have accompanied these developments seriously erode the legitimacy of using the state secrets privilege to shield accountability. Moreover, the treatment of these claims at the international level reaffirm that the U.S. recent assertions concerning its commitment to human rights will not be considered credible by the international community while the United States continues to refuse to acknowledge its victims.

A. The International Criminal Court

The United States may be reluctant to "look back" at the role it played in the abuse of detainees, but the international community still seeks accountability. Just a week prior to the release of the Senate Torture Report, the Office of the Prosecutor (OTP) at the International Criminal Court (ICC) released its own report in which it made clear that it was moving closer to

opening up an official investigation into crimes committed in Afghanistan during the course of the CIA Program's operation.⁴⁹⁴ The investigation would inevitably include the enhanced interrogation techniques used by the United States. The revelations could expose U.S. officials to a formal investigation, which in turn could potentially result in prosecution by the ICC. After the Senate Torture Report was released on December 9, 2014, Fatou Bensouda, the ICC's chief prosecutor, stated that she was looking "very, very closely" at the report.⁴⁹⁵ This part of the Section will discuss the ICC's preliminary investigation and the implication of its findings on both the state secrets doctrine and where it leaves the United States within the international community. It will also address whether the Senate Torture Report opens the possibility for the United States to face prosecution at the international level. First, a brief overview of the ICC's jurisdiction will be provided.

1. ICC Jurisdiction

The International Criminal Court is an international tribunal established by the Rome Statute.⁴⁹⁶ There are currently 123 states that are parties to the Rome Statute, also making them members of the ICC. Despite the fact that the United States ultimately failed to ratify the Rome Statute and thus is not a party to the ICC, the United States was influential participant in the creation of the statute and the development of its provisions.⁴⁹⁷ The Rome Statute grants the ICC with the jurisdiction to prosecute individuals for genocide, war crimes, crimes of aggression and crimes against humanity.⁴⁹⁸

⁴⁹⁴ The International Criminal Court, Office of the Prosecutor, Report on Preliminary Examination Activities 2014 (December 2, 2014), available at <http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>.

⁴⁹⁵ Middle East Eye, *ICC studying CIA torture report 'very, very closely'*, <http://www.middleeasteye.net/news/icc-studying-cia-torture-report-very-very-closely-1340834452>.

⁴⁹⁶ Megan A Fairlie, *The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage*, 29 BERKELEY J. INT'L L. 528, 532 (2011).

⁴⁹⁷ See *id.* at 531.

⁴⁹⁸ See *id.* at 532.

However, the ICC does not have universal jurisdiction.⁴⁹⁹ It can only exercise jurisdiction if the requirement of either personal or territorial jurisdiction are met.⁵⁰⁰ First, the ICC may exercise personal jurisdiction if the accused is a national of a state that has accepted the Court's jurisdiction.⁵⁰¹ Second, the Court may exercise territorial jurisdiction if the crime took place on the territory of a state that has accepted the Court's jurisdiction.⁵⁰² Thus, the ICC's territorial jurisdiction leaves open the possibility for nationals of states that are not parties to the Statute to be prosecuted by the ICC.⁵⁰³ The Court also only has jurisdiction over events occurring since July 1, 2002, when the Court began functioning.⁵⁰⁴ If a state becomes a member of the ICC after July 1, 2002, the Court only has jurisdiction over events that happened after the state joined the ICC.

The United Nations Security Council may refer a situation to the ICC Prosecutor, regardless of the nationality of the accused or the location of the crime.⁵⁰⁵ The alternative way in which an investigation may be initiated is by the independent determination by the Court's Prosecutor to investigate a situation.⁵⁰⁶ The ICC Prosecutor proceeds in four phases with any preliminary examination. First, there is an initial assessment to analyze the seriousness of the information received.⁵⁰⁷ Second, there is a "thorough factual and legal assessment" of whether there is "a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court[.]"⁵⁰⁸ Third, the Prosecutor assesses the gravity of the crimes and

⁴⁹⁹ The Rome Statute, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S 90 of the International Criminal Court, art. 13.

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*

⁵⁰² *Id.*

⁵⁰³ *See* Fairlie, *supra* note 496, at 533.

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

whether it is likely that a national investigation and prosecution would be conducted.⁵⁰⁹ The crimes must have been of a particularly serious nature because the crimes within the Court's jurisdiction are inherently grave. This phase of preliminary investigations also encompasses the ICC's principle of complementarity; the ICC is intended to be complementary to national courts and a case will not be admissible if there is a genuine investigation or prosecution into the situation at the national level.⁵¹⁰ If the crimes do not reach the appropriate gravity threshold, or if there is evidence of good faith national investigations into the matter, the ICC will likely be unable to proceed. Fourth, the prosecutor must determine whether an investigation would further the "interests of justice."⁵¹¹

2. U.S. Activities in Afghanistan

In 2013, Chief Prosecutor Bensouda sent a letter to U.S. officials describing evidence that the United States had abused more than twenty-four detainees in Afghanistan between 2003 and 2006.⁵¹² Bensouda invited the United States to provide more information regarding its interrogation techniques, and the EIT program more broadly.⁵¹³ The letter essentially gave the United States an opportunity to respond to what it is accused of doing. The letter is particularly significant because it indicates the ICC is scrutinizing American transgressions committed on Afghan soil.⁵¹⁴

⁵⁰⁹ *Id.*

⁵¹⁰ A case will be found inadmissible if "[t]he case is being investigated or prosecuted by a State that has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." The Rome Statute, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 U.N.T.S 90 of the International Criminal Court, art. 17(1)(a).

⁵¹¹ *Id.*

⁵¹² David Bosco, *Is the ICC Investigating Crimes By U.S. Forces in Afghanistan?*, FOREIGN POLICY (May 15, 2014), <http://foreignpolicy.com/2014/05/15/is-the-icc-investigating-crimes-by-u-s-forces-in-afghanistan/> [http://perma.cc/5673-9SRB].

⁵¹³ *Id.*

⁵¹⁴ *Id.*

However, U.S. officials refused to comment publicly on the issue. Later, in November 2013, Bensouda wrote that the ICC still sought “information to determine whether there is any reasonable basis to believe any such alleged acts, which could amount to torture or humiliating and degrading treatment, may have been committed as part of a policy” from the United States.⁵¹⁵ This statement could have a profound impact on the United States. If the ICC finds an official government policy of facilitating or condoning acts of torture, U.S. officials could potentially be implicated.

On December 2, 2014, Bensouda officially announced that the U.S. treatment of detainees in Afghanistan is under examination by the OTP.⁵¹⁶ Bensouda’s statements, as well as the 2014 Report on Preliminary Examination Activities, seem to suggest that the examination of the U.S. activities in Afghanistan have reached the third phase. This means that there is a reasonable basis to believe that U.S. forces committed war crimes within the ICC’s jurisdiction.

3. Implications

In light of the release of the Senate Torture Report, these statements raise two important questions. First, is the United States required to prosecute its citizens who are implicated in allegations of torture? The United States is a party to the Convention Against Torture (CAT), which means it has obligations under international law to at least make an investigation into allegations that its citizens committed torture. Refusing to do so could open it up to international prosecution. The second question is if the United States refuses to prosecute its citizens, can the ICC? There are several issues that could prevent such claims from ever reaching the ICC. The Court can prosecute crimes if they are committed in a state within its jurisdiction. While the

⁵¹⁵ *Id.*

⁵¹⁶ Ryan Goodman, *Int’l Criminal Court’s Examination of U.S. Treatment of Detainees Takes Shape*, JUST SEC. (Dec. 3, 2014, 12:06 PM), <http://justsecurity.org/17948/international-criminal-courts-examination-u-s-treatment-detainees-takes-shape/> [<http://perma.cc/R8L3-9F5L>].

United States has not accepted the ICC's jurisdiction, Afghanistan has, so the ICC could prosecute U.S. officials for crimes committed in Afghanistan. However, the ICC would only be able to prosecute crimes that happened in Afghanistan after 2003, when Afghanistan accepted the ICC's jurisdiction.

“Complementarity [the existence of good faith national investigations or prosecutions] was thought to be a barrier to ICC investigations into Western democracies with well-functioning legal systems. They have ‘nothing to fear’ from the ICC, jurists have often assured, because presumably they deal reasonably with their own crimes.”⁵¹⁷ So long as the United States refuses to accept accountability for claims of torture involving its citizens, cries for international prosecution will continue to grow louder.

B. The European Court of Human Rights

The European Court of Human Rights has heard several cases concerning the role other countries have played in the United States' EIT program. Recent decisions from the European Court erode the ability of the United States government to invoke the state secrets privilege to block litigation that would hold it accountable for extraordinary rendition, detention, and acts of torture. Although the United States is not party to the European Convention on Human Rights (ECHR) and therefore not bound by the European Court's decisions, it is not insulated from the impact these decisions will have on customary international law. The executive privilege that American courts have shown to the government is exactly what the European Court has tried to avoid in its decisions. The European Court recognized the government's ability to keep legitimate torture claims out of the courtroom by withholding certain key pieces of information

⁵¹⁷ Eugene Kontorovich, *The Torture Report and the Possibility of International Criminal Court Charges*, WASH. POST (Dec. 10, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/10/the-torture-report-and-the-possibility-o-international-criminal-court-charges/> [<https://perma.cc/KUE6-352U>].

by labeling that information “secret.” In the cases before the European Court, a deciding factor in each case was the availability of information regarding what the government intended to keep hidden.

1. **El-Masri v. Macedonia**

The first case the European Court heard concerning extraordinary rendition was *El-Masri v. Macedonia* in 2012.⁵¹⁸ Khaled El-Masri, a German citizen of Lebanese descent, was detained by Macedonian border officials and held for over three weeks in a hotel room without access to outside communication.⁵¹⁹ The Macedonian officials then handed El-Masri over to the CIA.⁵²⁰ The CIA flew El-Masri from Macedonia to a secret detention facility in Afghanistan, where he was held for over four months on the CIA’s mistaken belief that he was an al-Qaida operative of the same name.⁵²¹ When the CIA finally realized they had made a mistake, they blindfolded El-Masri and flew him to Albania, where they released him in the middle of a road.⁵²²

The European Court found that Macedonia violated several articles of the ECHR by detaining El-Masri and subsequently transferring him into the custody of the CIA.⁵²³ The European Court determined that Macedonia was responsible for El-Masri’s abuse not only while he was in their custody, but also for the abuse the CIA subjected him to.⁵²⁴ Macedonia’s conduct violated Article 3 of the ECHR, which prohibits torture and inhuman or degrading treatment.⁵²⁵

⁵¹⁸ See *El-Masri v. Former Yugoslav Republic of Macedonia*, App. no. 39630/09 Eur. Ct. H.R. (2012). See also *Secret Detention Sites*, EUR. COURT OF HUMAN RIGHTS, http://www.echr.coe.int/Documents/FS_Secret_detention_ENG.PDF [<http://perma.cc/G8DM-H96J>] (last visited October 30, 2015).

⁵¹⁹ See *El-Masri v. Former Yugoslav Republic of Macedonia*, App. no. 39630/09 Eur. Ct. H.R. ¶¶ 18–22 (2012).

⁵²⁰ *Id.* ¶¶ 21–22.

⁵²¹ *Id.* ¶ 31.

⁵²² *Id.* ¶ 32.

⁵²³ See *id.* at 80–81 (finding violations of Articles 3, 5, 8 and 13 of the European Convention of Human Rights).

⁵²⁴ See *id.* ¶¶ 206, 211, 220.

⁵²⁵ *Id.* ¶ 222.

The European Court noted two substantive Article 3 violations.⁵²⁶ First, it determined that El-Masri's treatment while being held at the hotel "amounted on various counts to inhuman and degrading treatment in breach of Article 3 of the Convention."⁵²⁷ Second, Macedonia violated Article 3 by transferring El-Masri to CIA custody.⁵²⁸ The CIA had not made a legitimate request for El-Masri's extradition when he was taken into CIA custody.⁵²⁹ The European Court is careful to note that evidence suggests that Macedonia had knowledge both of where the CIA planned to transfer El-Masri and the conditions he would be subjected to once he arrived there.⁵³⁰

The European Court found that Macedonia violated procedural aspects of Article 3 by failing to conduct an effective investigation into El-Masri's credible claim of torture.⁵³¹ When El-Masri brought his claim at the national level, it was rejected on the sole basis of assertions made by the Ministry of the Interior.⁵³² Agents of the Ministry of the Interior were suspected of having perpetrated the abuse against El-Masri, but the Macedonian prosecutor essentially took them at their word that they had not without further inquiry.⁵³³ The prosecutor did not interview El-Masri, nor did it seek out any information about the CIA plane that transferred El-Masri out of Macedonia.⁵³⁴ The decision not to investigate El-Masri's claim beyond mere government assertions fell far short of what the ECHR requires.⁵³⁵

⁵²⁶ *Id.* ¶ 223.

⁵²⁷ *Id.* ¶ 204.

⁵²⁸ *Id.* ¶ 211.

⁵²⁹ *Id.* ¶ 216.

⁵³⁰ *See id.* ¶ 217.

⁵³¹ *See id.* ¶¶ 193–94.

⁵³² *Id.* ¶ 189.

⁵³³ *See id.*

⁵³⁴ *See id.* ¶¶ 187–88.

⁵³⁵ *See id.* ¶¶ 186, 194.

It is important to note that the materials the European Court relied on when making its decision in this case were in public domain at the time of El-Masri's transfer.⁵³⁶ Not only does this indicate that Macedonia knew or should have known the kind of treatment the CIA would subject El-Masri to, but shows that the court is willing to rely on outside sources of information when the government refuses to provide any. This could potentially have ramifications on torture claims brought in U.S. courts. El-Masri raised a similar claim in the United States, but was rejected after the government invoked the state secrets privileged.⁵³⁷ Most other torture claims brought in the United States have been dismissed for the same reason.⁵³⁸ Here, however, the European Court is expressly rejecting the government's attempts to rely on secrecy in order to avoid accountability. "The concept of 'state secrets' has often been invoked to obstruct the search for truth. State secret privilege was also asserted by the US government in the applicant's case before the U.S. courts."⁵³⁹ The U.S. government is quick to assert that matters pertaining to its role in torture are complex and related to national security, therefore making them non-justiciable state secrets. Here, the European Court recognized that although the matters involved in torture claims might be related to national security concerns, this fact alone does not mean they will not be investigated. The European Court essentially stated that by invoking the state secrets privilege, the United States government is intentionally hampering the search for truth.

2. Al-Nashiri v. Poland & Abu Zubaydah v. Poland

On July 25, 2014, the ECHR ruled that Poland allowed the CIA to detain and torture two terrorism suspects in a secret prison on Poland's territory.⁵⁴⁰ Both *Al-Nashiri v. Poland*⁵⁴¹ and

⁵³⁶ *Id.* ¶ 218.

⁵³⁷ *See* El Masri v. United States, 479 F.3d 296 (4th Cir. 2007).

⁵³⁸ *See supra* Introduction and accompanying text.

⁵³⁹ *See* El-Masri v. Former Yugoslav Republic of Macedonia, App. no. 39630/09 Eur. Ct. H.R. ¶ 191 (2012).

⁵⁴⁰ *See* Husayn (Abu Zubaydah) v. Poland, App. No. 7511/13 Eur. Ct. H.R. 212–13; *Al-Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. ¶¶ 217–18.

⁵⁴¹ *Al-Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. (2014), *finalized* Feb. 16, 2015.

*Husayn (Abu Zubaydah) v. Poland*⁵⁴² involve allegations of torture, ill-treatment, and the secret detention of two men suspected of terrorist acts. Both Abd al-Rahim al-Nashiri and Zayn al-Abidin Muhammad Husayn Abu Zubaydah alleged that they had been held at a CIA “black site” in Poland.⁵⁴³ The men were suspected of having close connections to al-Qaida, making them “high value detainees” according to the CIA.⁵⁴⁴ Al-Nashiri and Abu Zubaydah alleged that the Polish government knowingly enabled the CIA to hold them in secret detention centers.⁵⁴⁵ The men further alleged that Poland allowed and enabled their transfer from detention centers on Polish soil to other detention centers, despite knowing of the likelihood that the men would continue to be abused.⁵⁴⁶ Finally, they alleged that Poland’s investigation into the circumstances surrounding their treatment, detention, and rendition was inadequate and ineffective.⁵⁴⁷

The European Court determined that Al-Nashiri and Abu Zubaydah had sufficient evidence to establish their account of the facts.⁵⁴⁸ Specifically, the European Court highlights that even though the Polish government was given time and opportunity to contest the facts set forth by Al-Nashiri and Abu Zubaydah, it did not.⁵⁴⁹ In fact, the European Court notes that there was “no discernable dispute between the parties as to the evidence from various sources which was admitted by the Court and summarized above.”⁵⁵⁰ Thus, the European Court concluded that

⁵⁴² *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13 Eur. Ct. H.R. (2014), *finalized* Feb. 16, 2015.

⁵⁴³ *See Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13 Eur. Ct. H.R. ¶ 3; *Al-Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. ¶ 3.

⁵⁴⁴ *See Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13 Eur. Ct. H.R. ¶ 83; *Al-Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. ¶¶ 45, 83.

⁵⁴⁵ *See Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13 Eur. Ct. H.R. ¶ 3; *Al-Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. ¶ 3.

⁵⁴⁶ *Id.*

⁵⁴⁷ *Id.*

⁵⁴⁸ *See Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13 Eur. Ct. H.R. ¶ 444; *Al-Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. ¶ 442.

⁵⁴⁹ *See Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13 Eur. Ct. H.R. ¶¶ 431–35; *Al-Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. ¶¶ 414, 415, 433, 487.

⁵⁵⁰ *Al-Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. ¶ 391 (2014).

Poland enabled the CIA to further its EIT program and was complicit in allowing the CIA to detain people on Polish soil, in direct contravention of the ECHR.⁵⁵¹

In both cases, the European Court determined that Poland failed to comply with its obligations under Article 38 of the ECHR.⁵⁵² Article 38 requires all states party to the convention to “furnish all necessary facilities” to ensure that an effective investigation can be undertaken by the ECHR.⁵⁵³ The European Court apparently interprets this to mean that an investigation is ineffective if the government refuses to provide certain facts to the court.

Like in *El-Masri*, the European Court found both substantive and procedural violations of Article 3 in both cases here.⁵⁵⁴ The Polish government knew or should have known that the CIA was operating a detention facility on Polish soil.⁵⁵⁵ The European Court held that if the Polish government was aware of the existence of this facility, it knew or should have known what kinds of practices the CIA engaged in at these facilities.⁵⁵⁶ According to the European Court, “this failure to inquire on the part of the Polish authorities, notwithstanding the abundance of publicly accessible information of widespread mistreatment of Al’Qaeda detainees in U.S. custody

⁵⁵¹ See *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13 Eur. Ct. H.R. ¶ 512; *Al-Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. ¶ 517.

⁵⁵² See *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13 Eur. Ct. H.R. ¶ 369; *Al-Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. ¶ 376.

⁵⁵³ European Convention on Human Rights art. 38, Nov. 4, 1950, E.T.S. 5 (“The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.”)

⁵⁵⁴ See *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13 Eur. Ct. H.R. ¶¶ 493, 514; *Al-Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. ¶¶ 499, 519. See also *El-Masri v. Former Yugoslav Republic of Macedonia*, App. no. 39630/09 Eur. Ct. H.R. ¶¶ 193–94, 204 (2012).

⁵⁵⁵ See *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13 Eur. Ct. H.R. ¶ 444; *Al-Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. ¶ 571.

⁵⁵⁶ See *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13 Eur. Ct. H.R. ¶ 444; *Al-Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. ¶ 571.

emerging already in 2002-2003 . . . could be explained in only one conceivable way.”⁵⁵⁷ The “one conceivable way” was that Poland was complicit in the CIA’s EIT program.⁵⁵⁸

The European Court is also careful to note that Poland’s failure to investigate torture claims cannot be viewed in a vacuum.⁵⁵⁹ The claims were well founded, and the implications of the claims were severe. Pursuant to the ECHR, Poland was obligated to conduct a timely, official investigation. “The protection of human rights guaranteed by the Convention, specifically in Articles 2 and 3, requires not only an effective investigation of alleged human rights abuses but also appropriate safeguards—both in law and in practice—against intelligence services violation Convention rights, notably in the pursuit of their covert operations.”⁵⁶⁰ This means that even if the intelligence service claims that their operations are secret, states are still obligated to investigate them when human rights are at stake. The European Court here seems to recognize something that U.S. courts don’t—that by claiming something is a “covert operation” or a “state secret”, intelligence agencies can bury facts that would otherwise implicate them in international human rights violations. Thus, the European Court is less willing to take government statements denying the allegations at face value, especially if it can be shown that publicly available information discloses what is purportedly a secret.

The substantive Article 3 violation stems directly from the procedural violation. Because Poland not only knew that the CIA’s EIT program existed, but also of the purposes of the program, it therefore also should have known that its compliance with the CIA would amount to an Article 3 violation.⁵⁶¹ The European Court determined that Poland “facilitated the whole

⁵⁵⁷ Husayn (Abu Zubaydah) v. Poland, App. No. 7511/13 Eur. Ct. H.R. ¶ 484; Al-Nashiri v. Poland, App. No. 28761/11 Eur. Ct. H.R. ¶ 490.

⁵⁵⁸ *Id.*

⁵⁵⁹ See Husayn (Abu Zubaydah) v. Poland, App. No. 7511/13 Eur. Ct. H.R. ¶¶ 364–65.

⁵⁶⁰ Al-Nashiri v. Poland, App. No. 28761/11 Eur. Ct. H.R. ¶ 498.

⁵⁶¹ See Husayn (Abu Zubaydah) v. Poland, App. No. 7511/13 Eur. Ct. H.R. ¶ 514; Al-Nashiri v. Poland, App. No. 28761/11 Eur. Ct. H.R. ¶ 519.

process, creating the conditions for it to happen, and made no attempt to prevent it from occurring.”⁵⁶² Echoing the ruling in *El-Masri*, the European Court held that even though Poland did not hold or swing the proverbial stick, it enabled the United States to do so.⁵⁶³

II. CASES FROM THE UNITED KINGDOM AND AUSTRALIA

This Part of the Section reviews several important cases from the courts of the United Kingdom (U.K.) and Australia (AU). Each case discussed in this section features facts similar to those of *Abou Elkassim Britel* and other victims of extraordinary rendition by U.S. agents. The comparable factual circumstances of the various cases are important because they demonstrate that foreign nations have been willing to try cases of torture and rendition in public courts and stand in stark contrast to the decisions of the U.S. federal courts, which, despite the analogous nature of the facts in *Britel*'s case, have refused to adjudicate claims related to the extraordinary rendition and torture program. The legal theories informing the U.S. government's arguments for dismissing cases or redacting facts in torture cases are likely to be deployed in future cases. Notably, the legal authorities relied upon by the U.K. and Australian courts to determine that torture and rendition cases are justiciable included careful analyses of holdings from the U.S. Supreme Court, and help to reveal U.S. law-based exceptions to the use of the state secrets doctrine, the legal strategy long used by the U.S. government to block torture litigation. That the U.K. and Australia relied on decisions by the U.S. Supreme Court demonstrates that torture victims seeking civil remedies in U.S. courts for rendition and torture have valid legal authorities from which to ground their arguments. The analysis of U.S. case law as it is used abroad may serve future plaintiffs as a model for framing their own arguments within courts of the United

⁵⁶² *Al-Nashiri v. Poland*, App. No. 28761/11 Eur. Ct. H.R. ¶ 517.

⁵⁶³ *See id.*

States. Moreover, the reasoning of the U.K. and AU courts stand as persuasive authority on their own and should be considered by U.S. courts going forward.

A. Brief Profiles of Relevant Cases

The cases discussed in this Part include *Habib v. Commonwealth of Australia*;⁵⁶⁴ *R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*;⁵⁶⁵ *Al Rawi v. The Security Service*;⁵⁶⁶ *Belhaj v. Jack Straw*;⁵⁶⁷ *Rahmatullah v. Ministry of Defense*.⁵⁶⁸ They are first briefly reviewed here to set the context for an in-depth discussion and analysis of their factual and legal implications, considered below in sections III and IV, respectively.

1. *Habib*: The Limits of Act of State Doctrine

Habib v. Commonwealth of Australia is a case decided and delivered by the Full Court of the Federal Court of Australia.⁵⁶⁹ Mamdouh Habib is an Australian citizen who attempted to raise tort claims against the Commonwealth for misfeasance in public office and the intentional infliction of harm.⁵⁷⁰ In his application to the court, Habib alleged that in October 2001 he was arrested and detained in Pakistan by Pakistani and U.S. agents for approximately one month.⁵⁷¹ In November 2001, he was transported from Pakistan to Egypt where he was interrogated and subjected to torture and violent interrogation.⁵⁷² In May 2002, Habib was taken to Bagram airbase in Afghanistan and then to Guantanamo Bay where he was detained until January

⁵⁶⁴ *Habib v. Commonwealth* [2010] FCAFC 12 (Austl.).

⁵⁶⁵ *R (Mohamed) v. Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA (Civ) 158 (Eng.).

⁵⁶⁶ *Al Rawi v. Security Service* [2011] UKSC 34 (Austl.).

⁵⁶⁷ *Belhaj v. Jack Straw* [2014] EWCA Civ 1394 (Austl.).

⁵⁶⁸ *Rahmatullah v. Ministry of Defence* [2015] EWCA Civ 843 (Austl.).

⁵⁶⁹ See *Habib v. Commonwealth* [2010] FCAFC 12 (Austl.).

⁵⁷⁰ *Id.* ¶ 2.

⁵⁷¹ *Id.* ¶¶ 15–18.

⁵⁷² *Id.*

2005.⁵⁷³ Habib claims that he was brutally harmed and mistreated throughout his detention and that Australian agents were complicit or participated in his detainment and mistreatment.⁵⁷⁴

The Commonwealth responded to Habib's claims by arguing that the court should dismiss the case. The Commonwealth argued that Habib's case was nonjusticiable due to the Act of State doctrine.⁵⁷⁵ In its most basic iteration, the Act of State doctrine states that sovereign States must respect the independence of other sovereign States and, accordingly, refuse to adjudicate any matter that necessarily judges the legality of actions by a foreign government in its own territory.⁵⁷⁶ The Commonwealth argued that, because adjudicating the legality of the Australian agents would indirectly judge the actions of the U.S., Egypt, and Pakistan, the court should dismiss this case.⁵⁷⁷ The court, however, disagreed and refused to dismiss the matter.⁵⁷⁸

It is important to understand how the interpretation of the Act of State doctrine by the Federal Court of Australia relates to efforts by the United States to block torture litigation in reliance of a different doctrine, e.g., the state secrets doctrine (or privilege). While the Act of State doctrine considers whether one country can adjudicate wrongdoings of another nation,⁵⁷⁹ the state secrets doctrine is based on a claim that the disclosure of certain evidence should be prohibited under circumstances deemed harmful to the interests of the nation.⁵⁸⁰

Both doctrines can have similar applications and effects as they pertain to the justiciability of torture claims, each providing a mechanism to block claims from going forward in the interest of national security concerns. U.S. jurisprudence explains that the Act of State

⁵⁷³ *Id.*

⁵⁷⁴ *Id.* ¶ 14.

⁵⁷⁵ *Id.*

⁵⁷⁶ *See id.* ¶ 22. *See also* Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

⁵⁷⁷ *Habib v. Commonwealth* [2010] FCAFC 12 ¶ 23 (Austl.).

⁵⁷⁸ *Id.* ¶¶ 23–24.

⁵⁷⁹ *See supra* 576 and accompanying text.

⁵⁸⁰ *See* Totten v. United States, 92 U.S. 105, 106 (1876).

doctrine is concerned with protecting the Executive Office in its decisions related to foreign affairs, and relatedly, to avoid causing hostile foreign relations.⁵⁸¹ As one scholar explains, courts created the Act of State doctrine to “effectuate general notions of comity among nations and among the respective branches of the Federal Government.”⁵⁸² Moreover, the Act of State doctrine applies in cases that implicate violations of international law as does the state secrets doctrine with regard to the subject matter of torture cases.⁵⁸³

Given the similarity in function between the two doctrines, the Federal Court of Australia’s interpretation of the Act of State Doctrine in *Habib* can provide significant support for those advocating redress for torture victims in U.S. courts. In defining the Act of State doctrine and its exceptions, the Australian court carefully analyzed several important decisions by the U.S. Supreme Court.⁵⁸⁴ The court observed from these decisions that the U.S. Supreme Court “rejected inflexible exceptions to the doctrine”:

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.⁵⁸⁵

⁵⁸¹ *Oetjen v. Central Leather*, 246 U.S. 297, 303 (1918) (identifying the purposes of the doctrine as avoiding ‘imperial[ing] the amicable relations between governments and vex[ing] the peace of nations).

⁵⁸² Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS. 19, 32 (2008).

⁵⁸³ *See id.* at 31.

⁵⁸⁴ *See Habib v. Commonwealth* [2010] FCAFC 12 ¶¶ 91–96 (Austl.). *See also* *Sarei v. Rio Tinto PLC*, 456 F.3d 1069 (9th Cir. 2006) (internal quotation marks omitted) (“As a result, an action may be barred if (1) there is an official act of a foreign sovereign performed within its own territory; and (2) “the relief sought or the defense interposed in the action would require a court in the United States to declare invalid the foreign sovereign's official act. ... If these two elements are present, we may still choose not to apply the act of state doctrine where the policies underlying the doctrine militate against its application.”); *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (“The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts of a recognized sovereign power committed within its own territory.”); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 605–07 (9th Cir. 1977) (recounting history of doctrine); *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 404 (1990) (“The doctrine reflects the concern that the judiciary, by questioning the validity of sovereign acts taken by foreign states, may interfere with the executive's conduct of American foreign policy.”).

⁵⁸⁵ *Habib v. Commonwealth* [2010] FCAFC 12 ¶ 75 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)).

The court also discussed the so-called “*Sabbatino* factors,” which U.S. courts have used to determine whether or not the Act of State doctrine is engaged.⁵⁸⁶ The four factors are: (1) international consensus on the legality of the circumstances at issue; (2) implications for foreign relations; (3) the continued existence of the accused government; and (4) whether or not the violations alleged were in the public interest.⁵⁸⁷ The Australian court laid out these factors by examining their application in *Doe I v. Unocal Corp.*,⁵⁸⁸ and the U.S. court’s conclusion that the act of state doctrine did not bar the claim in that case.⁵⁸⁹

In *Habib*, the court concluded that,

[i]n terms of the U.S. jurisprudence, the *Sabbatino* factors show that, first, the prohibition on torture is the subject of an international consensus. Second, Australia’s “national nerves”, as the Commonwealth intimated, might be attuned to the sensibilities of its coalition partners but this has to be weighed in a context where the prohibition on torture forms part of customary international law and those partners themselves are signatories to an international treaty denouncing torture.... Fourth, and as in *Unocal*, it would be difficult to contend that the alleged violations of international law identified in Mr. Habib’s claim were in the public interest.⁵⁹⁰

In sum, the court held that the Act of State doctrine did not prevent the court from exercising jurisdiction in the matter because the doctrine is inapplicable where there is a strong public interest in the adjudication of the matter and where there are violations of fundamental human rights.⁵⁹¹ This holding is an important development in the Act of State doctrine’s international treatment, and also implicates the state secrets doctrine because it functions to limit

⁵⁸⁶ *See id.* ¶ 95.

⁵⁸⁷ *See id.*

⁵⁸⁸ *Doe I. v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

⁵⁸⁹ *Habib v. Commonwealth* [2010] FCAFC 12 ¶ 95.

⁵⁹⁰ *Id.* ¶ 115.

⁵⁹¹ *Id.* ¶¶ 110–111, 114, 131–132.

the applicability of such doctrines that thwart the justiciability of certain claims where there is reason to believe that national and international norms of human rights have been violated.⁵⁹²

2. Mohammed: The Public Interest in Open Justice

R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs is a case decided by the Court of Appeal of England and Wales in which the court ordered the government to release evidence of MI5⁵⁹³ complicity in torture of a British resident, Binyam Mohamed.⁵⁹⁴ The government objected to the release of information, arguing that disclosure could endanger British national security.⁵⁹⁵ Key to the court's decision to release evidence over the government's objection was the fact that the United States had already disclosed details regarding Mohamed's rendition and torture in *Farhi Saeed Bin Mohamed v. Barack Obama* and that those details were judicially determined to be matters of fact.⁵⁹⁶

Like Habib and Britel, Mohamed was also arrested by Pakistani officials.⁵⁹⁷ In April 2002, Mohamed was detained at Karachi airport. Mohamed was detained for three months in Pakistan during which time he claims to have been brutally mistreated.⁵⁹⁸ In July 2002, U.S. agents transported Mohamed to Morocco; he was detained there for an additional eighteen months.⁵⁹⁹ During his eighteen-month detention, Mohamed claims to have been subjected to various forms of torture and degrading treatment by Moroccan officials.⁶⁰⁰ In January 2004,

⁵⁹² Stephen Tully, *Habib v. Commonwealth: Clarifying the State of Play for Acts of State?*, 32 SYDNEY L. REV. 711, 716–721 (2010).

⁵⁹³ MI5, also known as the Security Service, is a British intelligence agency primarily engaged in issues of national security. The agency's activities and function in British government is analogous to the work of the C.I.A.

⁵⁹⁴ *R (Mohamed) v. Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA (Civ) 158 (Eng.).

⁵⁹⁵ *Id.* at [2].

⁵⁹⁶ Mohamed's testimony regarding his rendition and torture was a crucial component of the plaintiff's claim that he had been similarly tortured. Mohamed's mistreatment was, therefore, judicially found to be a matter of fact by courts of the United States. Accordingly, the U.K. government's national security interest was lost. [2010] EWCA (Civ) 65 [24] (internal citations omitted).

⁵⁹⁷ [2010] EWCA (Civ) 65 [61].

⁵⁹⁸ *Id.*

⁵⁹⁹ *Id.*

⁶⁰⁰ *Id.*

Mohamed was rendered to Kabul, Afghanistan, where he claims he was subjected to further mistreatment by U.S. forces before being transferred to Guantanamo Bay, Cuba in September 2004.⁶⁰¹

Mohamed's case arose before the U.K. Court of Appeals in an appeal by the U.K. Foreign Secretary from the Divisional Court.⁶⁰² The Divisional Court had granted Mohamed access to forty-two documents relating to the conditions of his detainment and the use of torture which Mohamed would use to defend charges brought against him in the United States.⁶⁰³ On appeal, the Foreign Secretary argued that the documents should remain confidential because the United States had not consented to revelation.⁶⁰⁴ Additionally, the Foreign Secretary argued that the documents should be kept confidential under public interest immunity because disclosure risked the possibility of serious harm to national security and damage to the intelligence relationship between the U.K. and the US.⁶⁰⁵ Ultimately, the court was not persuaded by the Foreign Secretary's arguments.⁶⁰⁶

In affirming the decision of the lower court, the court held that releasing the requested information would not reveal information that posed a serious harm to the public interest or national security.⁶⁰⁷ Moreover, because the mistreatment to which Mohamed had been subjected was no longer secret in U.S. courts, the public interest open justice, and in knowing the proceedings of the court, was not outweighed by the national interests cited by the Foreign Secretary.⁶⁰⁸

⁶⁰¹ *Id.*

⁶⁰² R (Mohamed) v. Secretary of State for Foreign & Commonwealth Affairs [2010] EWCA (Civ) 65 [61]-[64] (Eng.)

⁶⁰³ *Id.*

⁶⁰⁴ *Id.*

⁶⁰⁵ *Id.* at [138]-[139].

⁶⁰⁶ *Id.*

⁶⁰⁷ *Id.* at [139].

⁶⁰⁸ *Id.*

The principle that emerges from the *Mohamed* case provides an important perspective on how the state secrets doctrine is applied in U.S. courts, because the common law principles that underlie the British judicial system are substantially the same as those that underlie the U.S. judicial system. In determining whether the court should exclude evidence in the name of national security, it is important for the court to consider whether the information has already been revealed in the open proceedings of other jurisdictions. Applying the principle of the *Mohamed* court to the state secrets doctrine after recent revelations should substantially weaken the government's argument that torture and rendition cases must be dismissed as a matter of national security.

3. Al Rawi: The Public Interest in Open and Natural Justice

In *Al Rawi v. Security Service*, six claimants who were detained at various locations alleged tort claims before the British Court for the complicity of British agents with U.S. authorities in the claimants' unjust detention and mistreatment.⁶⁰⁹ The claimants pled many causes of action, including breach of the Human Rights Act of 1998.⁶¹⁰ They named as defendants the British Security Service, the Secret Intelligence Service, the Foreign and Commonwealth Office, and Home Office on the theory that these agencies had been complicit with carrying out their detention and mistreatment.⁶¹¹ In this case, the court struggled to balance the public interest inherent in open proceedings with the State's claims for closing hearings to the public in the interest of national security.⁶¹² Ultimately, the court found that the public interest in transparent proceedings is weightier than the interests in national security under the circumstances of this case.⁶¹³

⁶⁰⁹ *Al Rawi v. The Security Service* [2010] EWCA (Civ) 482 [5] (Eng.).

⁶¹⁰ *Id.*

⁶¹¹ *Id.* at [5].

⁶¹² *Id.* at [7]–[8].

⁶¹³ *Id.* at [11]–[13].

Unlike any of the other cases examined in this section, the state agreed to litigate part of the claimants' case in an "open defense" where the state denied any mistreatment and liability for detention. However, the State refused to grant access to all potential evidence. Instead, the government argued that part of the case should proceed in a highly unusual fashion termed a "closed material proceeding" (CMP).⁶¹⁴ The CMP would bifurcate the trial into an "open" trial, which operates as any normal trial, and a "closed" trial which would employ special measures to prevent disclosure of materials deemed sensitive to national security from being revealed directly to the claimants or published in the public record.⁶¹⁵ Al Rawi and his co-plaintiffs argued that the trial should proceed in the usual manner and that Public Interest Immunity (PII) should apply to prevent disclosure of government materials that were genuinely sensitive.⁶¹⁶ PII requires that the court evaluate all relevant evidence and withhold it only if the court concludes that the disclosure of the particular piece of evidence is genuinely important to national security.⁶¹⁷

Despite the government's claim that a closed material procedure was appropriate in this case because of the sensitivity of the materials and the significant costs of PII, the court did not grant CMP.⁶¹⁸ Although the court was divided on the question of whether it had the authority to authorize CMP generally, it was unanimous in rejecting the government's argument.⁶¹⁹ Indeed, most of the judges found that granting CMP in this case would violate the principles of open justice and natural justice, which, respectively, state that trials and judgments should be accessible to the public and that a person has the right to know and respond to the case against him or her.⁶²⁰

⁶¹⁴ *Id.* at [1]–[4].

⁶¹⁵ Al Rawi v. The Security Service [2010] EWCA (Civ) 482 [1]–[4] (Eng.).

⁶¹⁶ *Id.* at [8]–[10].

⁶¹⁷ *Id.* at [46].

⁶¹⁸ *Id.*

⁶¹⁹ *Id.*

⁶²⁰ *Id.* at [14]–[21], [52].

The analysis in *Al Rawi* is also relevant to the application of the state secrets doctrine, and provides arguably useful guidance for how U.S. courts should balance the various interests involved in resolving torture and rendition claims. The government's theory in *Al Rawi* sought to achieve a similar outcome as that achieved by application of the state secret doctrine—to exclude evidence from trial and prevent the plaintiffs from confronting evidence. The principle that emerges from *Al Rawi* is that transparent judicial procedures where parties confront relevant evidence should be substantially preferred to closed procedures because denying open proceedings would violate the most fundamental principles of justice.⁶²¹ Because of the substantial similarity between the common law systems of the United Kingdom and the United States, denying parties the opportunity to bring claims of torture to court under the state secrets doctrine can be assumed to be a violation of the fundamental common law right to participate in one's own judicial proceedings.

4. Belhaj: Act of Foreign State, State Immunity, and Choice of Law

Belhaj was an influential member of a Libyan group opposed to Colonel Gaddafi in 1990s, which forced Belhaj to flee from Libyan intelligence agencies to Afghanistan in 1998 and later to China in 2003.⁶²² In 2004, fearing that he and his wife were no longer safe in China, Belhaj sought asylum in the United Kingdom.⁶²³ In February 2004, Belhaj and his pregnant wife attempted to board a commercial flight from Beijing to London and were detained at by Chinese border authorities, held for two days before, and then deported to Kuala Lumpur.⁶²⁴ British agents became aware that Belhaj was being held in Malaysia and they informed the U.S. and

⁶²¹ *Id.* at [30]–[40].

⁶²² *Belhaj v. Straw* [2014] EWCA (Civ) 1394 [8].

⁶²³ *Id.*

⁶²⁴ *Id.*

Libyan agents of his whereabouts.⁶²⁵ In early March, the U.S. government sent a series of faxes to the Libyan authorities detailing U.S. arrangements for Belhaj's extradition from Malaysia and transfer to U.S. custody, emphasizing U.S. commitment to rendering Belhaj to Libyan custody.⁶²⁶ On March 7, 2004, Malaysian authorities allowed Belhaj and his wife to board a plane to London via Bangkok, plans which the Malaysian government had communicated to the United States.⁶²⁷ Once Belhaj and his wife arrived in Bangkok, Thai officials took them to U.S. agents, who detained Belhaj and his wife before separately transferring them to Tajoura Prison in Libya.⁶²⁸

On March 18, 2004, when Belhaj had been surrendered to Libyan authorities, British agents contacted Libyan authorities to congratulate them on the successful rendition of Belhaj.⁶²⁹ Belhaj and his wife were tortured and subjected to violent interrogation throughout their captivity.⁶³⁰ Belhaj's wife, however, was released from custody on June 21, 2004 after she delivered a child.⁶³¹ It was not until March 23, 2010 that Belhaj was finally released.⁶³² During his years spent in Libyan custody, on at least two occasions, Belhaj was interrogated and subjected to cruel and dehumanizing punishment by British Intelligence Officers.⁶³³

In a claim brought before the legal system in the United Kingdom, Belhaj sought declarations of illegality and damages stemming from the acts and omissions of British officials during their unlawful detention in Libya.⁶³⁴ Belhaj's case arrived to the British Court of Appeals

⁶²⁵ *Id.* at [9].

⁶²⁶ *Id.*

⁶²⁷ *Id.* at [9]–[10].

⁶²⁸ *Id.* at [10]–[14].

⁶²⁹ *Id.* at [13].

⁶³⁰ *Id.* at [14]–[17].

⁶³¹ *Id.* at [14].

⁶³² *Belhaj v. Straw* [2014] EWCA (Civ) 1394 [17].

⁶³³ *Id.* at [16].

⁶³⁴ *Id.* at [20].

after the lower court determined that his claim was non-justiciable due to the Act of State Doctrine.⁶³⁵ The judge concluded that this had potential to jeopardize international relations and national security interests.⁶³⁶ The lower court found that because foreign actors were involved in the captivity and injury inflicted upon Belhaj and his wife, the court could not issue a judgment without also issuing a judgment about the legality of the acts of foreign state actors.⁶³⁷

On appeal, the court was tasked with answering three important questions: first, whether state immunity barred the court's treatment of the case;⁶³⁸ second, whether the Foreign Act of State doctrine applied in Belhaj's case;⁶³⁹ and third, whether the alleged violations, if justiciable, should be judged according to U.K. law or the law governing the territories in which the alleged misconduct took place.⁶⁴⁰ The British Court of Appeals did not find that the doctrine of state immunity had been violated, emphasizing that state immunity is only triggered when there is an affirmative attempt to compel non-consenting states to the jurisdiction of the court.⁶⁴¹

The court additionally held that the Act of State doctrine did not apply because the allegations implicated significant violations of human rights which triggered a human rights exception that limits the foreign act of state doctrine.⁶⁴² Lastly, the court agreed with the lower ruling that the causes of actions are governed by the law of the place where the conduct occurred.⁶⁴³

Like the court in *Habib*, in *Belhaj*, the court reached its conclusion after a careful review of U.S. jurisprudence with regard to the doctrine.⁶⁴⁴ Moreover, it considered the applicability of

⁶³⁵ *Id.* at [26].

⁶³⁶ *Id.*

⁶³⁷ *Id.*

⁶³⁸ *Id.* at [32]–[48].

⁶³⁹ *Id.* at [51]–[81].

⁶⁴⁰ *Id.* at [134]–[160].

⁶⁴¹ *Id.*

⁶⁴² *Id.* at [54], [81]–[102].

⁶⁴³ *Id.* at [31].

⁶⁴⁴ *Belhaj v. Straw* [2014] EWCA (Civ) 1394 [52], [53], [59]–[63], [66] (QB).

the act of state doctrine pursuant to U.S. legal interpretation in the context of issues such as torture, concluding that the doctrine would not preclude litigation of such an important issue given international consensus with regard to its unequivocal prohibition.⁶⁴⁵ The court's reasoning here directly relates to the obligations of the U.S. courts to allow torture claims to proceed notwithstanding the government's effort to thwart them via the state secrets doctrine.

The *Belhaj* decision significantly weakens the U.S. government's efforts to invoke the state secrets doctrine for yet an additional reason. In its decision to allow these claims to go forward, the court carefully considered the Commonwealth's claims that doing so would significantly endanger the U.K.'s "international relations and national security interests," and impair its intelligence activities in the future.⁶⁴⁶ While acknowledging some differences between U.S. and U.K. jurisprudential principles with regard to the separation of powers, the court was emphatic and unequivocal that it the courts could not be deprived of jurisdiction in these matters that raise such egregious human rights violations.⁶⁴⁷

[N]otwithstanding the evidence of Dr. Bristow that there is a risk that damage will be done to the foreign relations and national security interests of the United Kingdom, we do not consider that in the particular circumstances of this case these considerations can outweigh the need for our courts to exercise jurisdiction.⁶⁴⁸

Finally, one of the more important findings made by the court in *Belhaj* refers to the fact that the United States never made any claim to state immunity and never communicated any concern with regard to the litigation underway.⁶⁴⁹ The failure on the part of the United States to raise objections in *Belhaj*, notwithstanding the inevitable release of facts and information that it has sought to repress in its domestic courts, necessarily weakens its efforts to do so in the future.

⁶⁴⁵ *Id.* at [94].

⁶⁴⁶ *Id.* [103]–[111].

⁶⁴⁷ *Id.* at [113], [116].

⁶⁴⁸ *Id.* at [120].

⁶⁴⁹ *Id.* at [49].

The U.S. government should welcome the adjudication of its role as a human rights violator within the bounds of its own courts and considered by the parameters of its own rule of law.

5. Rahmatullah: State Immunity and Foreign Acts of State

In *Rahmatullah v. Ministry of Defense*, the British High Court held that neither the doctrines of state immunity nor of foreign act of state bar the civil tort claims of Rahmatullah against the British government.⁶⁵⁰ The factual background of Yunus Rahmatullah's case is similar to that of the *Belhaj* case. In February 2004, British forces detained Rahmatullah in Iraq.⁶⁵¹ He was promptly transferred to American custody.⁶⁵² By March 2004, U.S. agents had transported Rahmatullah to Bagram Airbase in Afghanistan.⁶⁵³ Rahmatullah was held without trial or process at Bagram Airbase for ten years following his detention.⁶⁵⁴ Rahmatullah alleges that throughout his detention, he was subjected to repeated acts of torture.⁶⁵⁵ He was released from custody on June 17, 2014.⁶⁵⁶

Upon his release in Pakistan, Rahmatullah filed a civil case against the British Ministry of Defense and the Foreign and Commonwealth Office.⁶⁵⁷ In his complaint, Rahmatullah sought damages under common law torts and alleged that his detention violated the Human Rights Act of 1998.⁶⁵⁸ In response to Rahmatullah's allegations, the government argued that the doctrines of state immunity, foreign act of state, and Crown act of state barred adjudication over the tort claim.⁶⁵⁹ As in *Belhaj*, the court in this case did not find that state immunity applied.⁶⁶⁰ The

⁶⁵⁰ *Rahmatullah v. Ministry of Defense* [2014] EWHC 3846 (QB).

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⁶⁵² *Id.*

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⁶⁵⁶ *Id.* at [1]–[4], [21].

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⁶⁵⁸ *Id.* at [5]–[6].

⁶⁵⁹ *Id.* at [7].

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court did not find that the United States was directly or indirectly impleaded by the case because the United States had no property rights at stake in the litigation.⁶⁶¹ Without property rights at stake, the court found that sovereign immunity was inapplicable.⁶⁶² With regard to the claim that foreign act of state doctrine required judicial abstention, the court held that it could decide the case because they were competent to do so and where it is necessary to the determination of the claimant's domestic legal rights.⁶⁶³

As with *Habib* and *Belhaj*, the court in *Rahmatullah* closely scrutinized U.S. jurisprudence with regard to the act of state doctrine for purposes of determining the justiciability of the claims.⁶⁶⁴ It concluded:

The issues raised by these claims are not “political” in either of the two senses identified by the Supreme Court in *Shergill v Khaira*. They do not require the court to attempt to adjudicate on the legality of decisions and acts of sovereign states on the international political stage which are governed, not by law, but by power politics. The issues raised are simply whether private law rights of individuals have been violated. Such issues fall squarely within the constitutional competence of courts and involve the application of purely legal standards.⁶⁶⁵

The court considered evidence that proceeding with this case would harm the U.K.'s national security but held that abstaining in this case based on the government's fear of damage to U.K.'s intelligence relationship with the United States would undermine the constitutional duty of the court to adjudicate worthy claims and resolve disputes.⁶⁶⁶ Additionally, the court noted that Mr. Thomas Pickering, a former U.S. diplomat, provided his opinion that allowing Mr. Rahmatullah's case to proceed

“is highly unlikely to cause damage to the relations or national security cooperation between the US and UK.” The reasons given included Mr. Pickering's opinion that to

⁶⁶¹ *Id.* at [94]–[95].

⁶⁶² *Id.*

⁶⁶³ *Id.* at [164]–[175].

⁶⁶⁴ [2014] EWHC 3846 [[98–[101], [104], [112], [113], [126], [127] (QB).

⁶⁶⁵ *Id.* at [141].

⁶⁶⁶ *Id.* at [164]–[175].

assert that such a process will cause offence to the US “is to misunderstand the value the United States places on the rule of law and an unbiased and open judicial system.”⁶⁶⁷

The submission by former Ambassador Pickering who also served as Undersecretary of State should serve to preclude further efforts on the part of the United States to deny torture victims their day in court or otherwise risk a mockery of the very notion of U.S. rule of law and its commitment to “an unbiased and open judicial system.”⁶⁶⁸

B. Implications for U.S. State Secrets Doctrine

Several notable patterns emerge from the facts of the cases discussed above: first, no state involved in extraordinary rendition acted alone. Second, whether the individuals were held in U.S.-operated sites or under the direction of other countries, the United States was the coordinating force behind each of the various cases. Third, individuals that were subjected to extraordinary rendition and torture were denied basic human rights. This part will explore the implications of each of these common patterns.

The facts demonstrated by these cases corroborates the information that is now publicly available in the United States: the United States often relied on the cooperation from other countries around to world to carry out integral aspects of the process of rendition and torture.⁶⁶⁹ The coordination among various governments was part of the U.S. strategy to evade responsibility. The courts’ analyses in these cases, however, show the international sentiment that the interconnectedness necessary to carry out torture and rendition created shared responsibility among these governments for the victims of the CIA’s program. Indeed, in each of the cases, the courts rejected the notion that national security or the risk of implicating other sovereigns precluded the courts from adjudicating the claims. Moreover, cases like *Rahmatullah*

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⁶⁶⁹ *But see supra* Section II.

and *Belhaj*, show the courts' particular unwillingness to allow governments to shield themselves with the state secrets or act of state doctrine when it comes to violations of human rights laws.

The second recurring factual pattern is that the United States bears much of the responsibility for coordinating rendition and torture. Whether the individuals were held in U.S.-operated facilities such as Bagram Airbase and Guantanamo Bay, Cuba, or held in prisons operated by other countries such as Tajura Prison in Libya, it is clear that the United States was profoundly involved at every instance. Not only does this confirm the predominant role that the United States played in orchestrating extraordinary rendition and facilitating torture, the facts that the courts discussed are now undeniably available in reliable public forums, whether the United States acknowledges them or not. In light of such revelations, the U.S. government's state secrets argument is fundamentally weakened in any case where U.S. involvement can already be proved by publicly available facts.

Lastly, several courts justified their exceptions to sovereign immunity and foreign act of state doctrines because they recognized that the experiences that individuals involved in these cases endured were human rights violations that could not be allowed to go without adjudication.⁶⁷⁰ The various forms of abuse suffered by the claimants in each of the cases and the prolonged detention of claimants without process were repeatedly noted by the courts involved in adjudicating these cases as violations of the most basic principles of constitutional order.⁶⁷¹ The conclusion by various courts that the abuse to which victims of extraordinarily rendition were subjected to amounts to human rights violations raises significant questions about the limits of justice in U.S. courts. That foreign courts have publicly determined that rendition

⁶⁷⁰ See *Rahmatullah v. Ministry of Defense* [2014] EWHC 3846 (QB); *Belhaj* [2014] EWCA (Civ) 1394 (Eng.), *Habib* [2010] FCAFC 12 (Austl.)

⁶⁷¹ *Id.*

and torture by the United States were acts of human rights violations means that the state secret doctrine cannot be used to exclude evidence that has already been established as fact—indeed, that torture is a violation of human rights can be assumed to be properly admissible by judicial notice.

C. Reframing the State Secret Doctrine as a Jurisdictional Rule

The following subsections examine how the courts applied the legal doctrines of foreign act of state, sovereign immunity, redaction and disclosure, and choice of law to the common facts discussed above. This part is meant to highlight the common strategies used by U.K., Australian, and U.S. governments to avoid litigation of the issue before the courts and how the foreign courts dealt with the governments' claims. As noted above, importantly, the decisions of the British and Australian courts are particularly persuasive when considering the application of the state secret doctrine in the United States because the British and Australian courts relied on a careful analysis of American case law and the fundamental principles of a common law justice system. Part V will analyze how the decisions and strategies of the court can be applied by legal practitioners and other advocates in the United States to overcome the state secrets doctrine.

The British and Australian cases demonstrate that in addition to overcoming government efforts to limit disclosure of facts, governments will also challenge the very jurisdiction of the court. Although cases like *Habib, Mohamed*, and *Al Rawi* deal specifically with jurisdictional questions different from, and do not directly discuss the state secrets doctrine, they confront legal theories that intend to achieve the same outcome—to limit access to the court by excluding evidence or parties. Because of the shared common law structure of the British and Australian courts, the courts' reasoning against closed trials is instructive to U.S. courts because the state secrets doctrine implicates the same principles. Additionally, the rationale informing U.K. and AU

courts on matters of jurisdiction is applicable to the application of the state secret doctrine in U.S. courts because of the distinctly jurisdictional nature that the doctrine has taken on in recent decades, particularly in cases involving reparations for torture.⁶⁷²

Although U.S. courts have not dismissed torture cases for lack of jurisdiction, it is not an unlikely theory should the state secrets doctrine be overcome. Prospectively, the danger of theories that require courts to dismiss cases for lack of jurisdiction or justiciability issues is that once the claim has been dismissed, the error is incurable and jurisdiction can never be achieved even if evidence in support of the claim exists. In contrast, where a court finds that the state secrets doctrine applies, the claim is not necessarily barred and, at least theoretically, could be sustained if the plaintiff can find evidence other than that which the government has successfully omitted from trial.

Given the high stakes involved in questions of justiciability and jurisdiction, the following subsections give foremost attention to an analysis of the articulation and application of the courts of the U.K. and AU concerning foreign act of state and state immunity doctrines. The remaining subsections focus on an examination of the courts' analysis of information disclosure and choice of law issues. As noted above, the principles the foreign courts have used to overcome government efforts to suppress information are, in many instances, drawn from U.S. legal authority and thus can be applied directly in U.S. courts; moreover, many of the underlying assumptions of the principles are certainly part of the U.S. justice system. Perhaps more importantly, the overriding importance of remedying human rights violations should be as applicable to the courts of the United States as they are to the courts of the U.K. and Australia.

1. The State Secrets Doctrine as a Rule of Judicial Abstention

⁶⁷² See *supra* Introduction.

The foreign act of state doctrine and sovereign state immunity doctrines were substantial questions in *Rahmatullah*, *Belhaj*, and *Habib*. In each case, the assigned court struggled with determining whether a decision on the claim presented would necessarily be a judgment on the legality of actions taken by foreign states in their own territory.⁶⁷³ Particularly in *Belhaj* and *Habib*, the courts had to evaluate whether the presented claims would violate the sovereign immunity of the governments involved because—as the government asserted—the foreign states had not consented to prosecution in foreign courts.⁶⁷⁴ Realizing the important interests on both sides, the courts applied the foreign act of state and sovereign immunity doctrines with care.

Ultimately, the courts held that the foreign act of state doctrine does not apply when valid claims of torture and human rights violations by the government exist.⁶⁷⁵ In evaluating whether proceeding on the claims would violate the sovereign immunity of foreign states, the courts found that among other factors, that dismissing the case would violate international law because potential human rights claims might be rendered permanently nonjusticiable.⁶⁷⁶ Although *Belhaj*, *Rahmatullah*, and *Habib* analyzed and applied laws of judicial abstention, the analysis is relevant to the evidentiary standard of state secrets because U.S. courts have applied the state secrets doctrine in ways that functionally render it a doctrine of abstention.

In reaching the conclusion that the foreign act of state doctrine does not apply where meritorious allegations of human rights violations exists, *Belhaj*, *Rahmatullah*, and *Habib* relied heavily on U.S. Supreme Court decisions, especially *Underhill v. Hernandez*⁶⁷⁷ and *Banco*

⁶⁷³ See *Rahmatullah v. Ministry of Defense* [2014] EWHC 3846 (QB); *Belhaj v. Straw* [2014] EWCA (Civ) 1394 (QB); *Habib v. Commonwealth* [2010] FCAFC 12 (Austl.).

⁶⁷⁴ See *Habib v. Commonwealth* [2010] FCAFC 12 (Austl.); *Belhaj v. Straw* [2014] EWCA (Civ) 1394 (QB).

⁶⁷⁵ *Belhaj* [2014] EWCA (Civ) 1394 [54], [81]–[102]; *Habib* [2010] FCAFC ¶¶ 12, 100, 109.

⁶⁷⁶ *Id.*

⁶⁷⁷ *Underhill* was an American citizen living in Venezuela at a time of political revolution. *Underhill* requested an exit passport from the Venezuelan government in order to escape perceived threat of violence against him. The passport was repeatedly denied, however *Underhill* found an alternative means to return to the United States. Upon reentry, *Underhill* sued the Venezuelan government for damages related to the passport denial and delay.

Nacional de Cuba v. Sabbatino.⁶⁷⁸ Both *Underhill* and *Sabbatino* remain valid, legally binding precedent.⁶⁷⁹ Although the U.S. Supreme Court has not explicitly held that either *Underhill* or *Sabbatino* create an exception to the foreign act of state doctrine where human rights allegations exist, the U.K. and AU courts cite language and other U.S. court materials that are supportive of the possibility for a human rights exception in the United States.⁶⁸⁰ Indeed, the U.K. courts relied specifically on the “*Sabbatino* factors” to conclude that a human rights exception was supported by law.⁶⁸¹

Accordingly, the decisions of U.K. and AU courts in *Belhaj v. Jack Straw* (U.K.), *Rahmatullah v. Ministry of Defense* (U.K.), and *Habib v. Commonwealth* (AU) support a human rights exception to the foreign act of state doctrine.⁶⁸² The fact that foreign courts interpreting U.S. case law found that the possibility of a human rights exception to foreign act doctrine is not foreclosed by the principles of U.S. case law is an important observation because it demonstrates that U.S. courts could and should arrive at the same decision.⁶⁸³ Of course, the foreseeable rejoinder is that the state secret and act of state doctrine are fundamentally different: one is an evidentiary rule and the other is a rule of judicial abstention. However, as illustrated by recent

Establishing the principle of foreign act of state, the Supreme Court held that the case could not be adjudicated because the Venezuelan government acted as a sovereign within its own territory. 168 U.S. 250 (1897).

⁶⁷⁸ (After Cuba nationalized the sugar industry, it took control of the privately owned property of Americans who had invested in Cuba. American investors sued in U.S. Court to recover damages and compensation for the nationalized properties. Applying the foreign acts of state doctrine, the Supreme Court held that adjudicating on the matter would necessarily require the Court to determine the legality of a government’s action within its own territory and the case was, therefore, non-justiciable in any U.S. court. 376 U.S. 398 (1964).

⁶⁷⁹ See *W.S. Kirkpatrick & Co. Inc. v. Evtl. Tectonics Corp. Int’l*, 493 U.S. 400 (1990).

⁶⁸⁰ *Habib v. Commonwealth* [2010] FCAFC 12 ¶ 75 (Austl.) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427–28 (1964)) (finding that a human rights exception could be inferred from the “multi-factorial” analysis employed by the *Sabbatino* Court.).

⁶⁸¹ See *id.*

⁶⁸² See *id.*

⁶⁸³ See *id.*

applications of the state secret doctrine, it is clear that the doctrine has transcended its traditional evidentiary nature and morphed into a rule of judicial abstention.⁶⁸⁴

The human rights exception becomes particularly important when the state secret doctrine is used as a jurisdictional bar that prohibits U.S. courts from resolving torture claims. As noted above, the foreign act of states doctrine has similar foundational concerns as the state secrets doctrine, particularly because the state secret doctrine has been employed not as an evidentiary rule but as a jurisdictional bar.⁶⁸⁵ When successfully employed by the government, both doctrines act as rules of judicial abstention that render the court unable to resolve claims of torture that are otherwise fully supported by sound legal theories and factual circumstances. Indeed, the state secret doctrine is so commonly employed as means of preventing jurisdiction that classification of the doctrine as evidentiary is an empty formality—a relic of the doctrine’s origins.⁶⁸⁶ Therefore, as a functionally jurisdictional doctrine, the same U.S. Supreme Court cases and legal authority that supported a human rights exception in *Habib* and *Belhaj* should support a similar human rights exception to the state secret doctrine.⁶⁸⁷

At this point, torture victims in the United States have been obstructed by use of the state secrets doctrine; however, there are many torture victims who were rendered to third countries by the United States where they were tortured by foreign agents and individuals. Prospectively, in the likelihood that additional litigation is brought forth that implicates the actions of foreign

⁶⁸⁴ See *supra* Introduction.

⁶⁸⁵ See *supra* Introduction.

⁶⁸⁶ *Id.*

⁶⁸⁷ *Habib v. Commonwealth* [2010] FCAFC 12 ¶¶ 96, 102 (Austl.) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 389, 401 (1964)); *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp.*, 493 U.S. 400, 404; Restatement (Third) of Foreign Relations Law of the United States § 443 (1987) (“A claim arising out of an alleged violation of fundamental human rights—would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts”); *Belhaj v. Straw* [2014] EWCA (Civ) 1394 [116] (QB) (citing obligations under UN Convention Against Torture—to which the United States is a party—the court found that it could not deny jurisdiction in light of the “abhorrent nature of torture and its condemnation by the community of nations”);

governments, the lessons of the U.K. and AU cases will provide important legal insight and value. Indeed, advocates litigating in the United States for reparations for torture victims should point to cases including *Underhill* and *Sabbatino* to argue for a human rights exception to the foreign act of state doctrine. Establishing a human rights exception to immunity and foreign act of state doctrine is important because a human rights exception is not currently recognized in U.S. law. Establishing the exception would make it easier for victims of torture and extraordinary rendition to seek redress in U.S. courts.

2. Redactions and Disclosure of Evidence and Facts

Of particular relevance to overcoming the state secret doctrine are *R (Mohamed) v. Secretary of State* (U.K.) and *Al Rawi v. The Security Service* (U.K.), which allowed litigation to proceed in accordance with common law principles shared by both the British and American justice systems and denied altered judicial proceedings that limited transparency. Although neither *Mohamed* nor *Al Rawi* depended on U.S. legal authority, it relied on broad principles fundamental to the function and fairness of common law legal systems.

Citing the principles of “Open” and “Natural” justice, the British courts determined that the rule of law demands transparent trials in which the parties involved have an equal right to present and dispute evidence. The principles of Open and Natural justice are analogous to the principles informing the Due Process clause of the Fifth Amendment and the Confrontation clause of the Sixth Amendment. Because the principles of Open and Natural justice are as crucial to the U.S. justice system as they are to the British system, the same principles that demanded public and transparent trials with complete access to all evidence to both parties in British courts should

prohibit the application of the state secret doctrine in a way that violates the principles of Open and Natural justice.⁶⁸⁸

In contrast to the act of state and immunity doctrines, the U.K. government did not depend on cases and legal authorities developed by the U.S. Supreme Court to support its arguments against disclosure and traditional judicial proceedings. Instead, the U.K. government used jurisdiction-specific authority to suppress the release of government documents by arguing that national security and foreign relations concerns justified wholesale denial to evidence the government considered secret or proceedings that were closed to the general public and to the opposing party.⁶⁸⁹

In *Al Rawi* and *R (Mohamed)*, U.K. courts rejected the government's arguments by relying on the fact that much of the information that the government sought to suppress was already in the public record and that the legal principles of Open and Natural justice demanded transparency in the courts of the commonwealth.⁶⁹⁰

In *Al Rawi*, the government attempted to prevent the respondent from accessing material that would support his defense against criminal allegations adjudicated in Guantanamo Bay because it was concerned that disclosing information without the permission of the United States would have harmful effects on their information-sharing relationship.⁶⁹¹ Moreover, the government argued that in the interests of national security and foreign relations, the Supreme Court should grant the respondent an alternative hearing referred to as a "closed material procedure."⁶⁹² The closed material procedure is an ex-parte procedure in which the respondent is

⁶⁸⁸ See Louis F. del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM. J. COMP. L. 1, 3 (2010); *Smith v. Alabama*, 124 U.S. 465, 478 (1888).

⁶⁸⁹ *Al Rawi v. Security Service* [2010] EWCA (Civ) 482 (Eng.); *R (Mohamed) v. Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA (Civ) 65 (Eng.)

⁶⁹⁰ *Id.*

⁶⁹¹ *Al Rawi v. Security Service* [2010] EWCA (Civ) 482 [22]–[25] (Eng.).

⁶⁹² See *id.* at [1]–[4].

absent, but is assigned a “special advocate” who could represent the interests of the respondent without discussing the facts of the trial.⁶⁹³ The government would be able to present evidence that is secret both to the respondent and the general public. Al Rawi responded by arguing that suppression of the materials and closed proceedings would violate his fundamental rights to confront evidence against him and to be present at his own trial.

The court vehemently rejected the government’s argument.⁶⁹⁴ The court repeatedly asserted that permitting a closed material proceeding under the circumstances of this case would undermine fundamental principles of justice.⁶⁹⁵ The court found that it is a fundamental right of parties involved in litigation to be present at their own trial and to be able to dispute and confront evidence presented against them.⁶⁹⁶ In reaching its conclusion, the Court relied on the principles of Open and Natural justice discussed a year earlier in *Mohamed*.⁶⁹⁷

In *Mohamed*, the Court articulated the principle of Open Justice as representing “an element of democratic accountability” that underlies the rule of law.⁶⁹⁸ The principle of open justice requires that court proceedings be open to the public so that the court may be held accountable to its adherence to the law.⁶⁹⁹ In *Al Rawi*, the Court further articulated the principles of open and natural justice as requiring that parties involved in a legal controversy have a right to know the case against them and the evidence on which it is based; the opportunity to confront the allegations and evidence presented by an opposing party; and call witnesses and evidence to support each side of the case.⁷⁰⁰

⁶⁹³ *Id.*

⁶⁹⁴ *Id.* at [30]–[40].

⁶⁹⁵ *Id.* at [30]–[32].

⁶⁹⁶ *Id.*

⁶⁹⁷ *Id.* at [17] (citing *R (Mohamed) v. Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA (Civ) 65 [38]–[39] (Eng.)).

⁶⁹⁸ *R (Mohamed) v. Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA (Civ) 65 [39] (Eng.)

⁶⁹⁹ *Id.*

⁷⁰⁰ *Al Rawi v. Security Service* [2010] EWCA (Civ) 482 [30]–[40](Eng.).

In reaching its decisions in *Mohamed* and *Al Rawi*, the court did not depend on a definite line of legal precedent. Instead, the Court focused on the principles that inform the structure of the justice system. The Court probed into the reasons for having courts and adversarial form of advocacy. Although the principles that the Court derived were not specific to any U.S. or U.K. case, the United States acknowledges similar principles in the theories that underlie Due Process under the Fifth and Sixth Amendments. Because the decision of the U.K. courts were not confined to the holdings of specific cases, their applicability in U.S. courts is predicated on the fact that the U.S. and U.K. judicial systems are designed to uphold the same valued of transparency and fairness.

3. Choice of Law Issues

Choice of law is a doctrine courts utilize most often when multiple jurisdictions are involved in a single case. Choice of law doctrine is applied to determine which of the various legal structures will be applied to resolve the controversy at hand. *Rahmatullah* provides the clearest statement of the choice of law doctrine: generally, the applicable law is that of the country in which the events of the tortious action occurred. Where the elements of the alleged tort occurred in different countries, the applicable law depends on the type of tort: claims of personal injury or death are governed by the law of the location where injury occurred; causes of action for damage to property depend on the law where the property was damaged; all other causes of action are governed by the law of the country in which the most significant elements occurred.⁷⁰¹

In *Rahmatullah*, as in *Al Rawi*, the court dismissed every argument the government raised to prevent litigation or to substantially limit access to evidence but granted the government's argument that the controlling law in both cases was other than the law of the Commonwealth.⁷⁰²

⁷⁰¹ *Rahmatullah v. Ministry of Defense* [2014] EWHC 3846 [23] (QB).

⁷⁰² *Id.* at [23]–[26].

Although it was a victory for the government over the arguments of the claimants that applying the law of a foreign state would adversely affect their claims, the courts determined that applying the law of a different country does not adversely affect the claimants where the law of the other jurisdictions are either the same or offer more “appropriate” relief than the law of the Commonwealth.⁷⁰³

The choice of law inquiry is the final hurdle for victims of torture and rendition seeking redress through the courts. The decision of the U.K. and AU courts to apply the law of the jurisdiction where a the substance of the claim arose only if that jurisdiction provides substantially similar relief as the Commonwealth is important because it demonstrates that the government may not use choice of law doctrine to evade legal responsibility for act of torture perpetrated abroad.

III. CONCLUSION

Given the general aversion of U.S. federal courts to the application of international law and norms, the U.K. and AU cases discussed in this part may be especially effective as tools for advocacy and legislative policy-making. The cases may be useful for furthering civil society’s concern about the use of torture in the CIA Detention and Interrogation Program. The cases can be used to raise awareness about the continued injustice of torture as well as Raising public awareness of the issue of torture and the lack of remedy for those that were subjected to cruel interrogation tactics without any justifiable basis can help raise political pressure on state and federal representatives. Moreover, public awareness of the issue of torture ensures that the issue is not forgotten in an effort to “move forward.” The cases of the U.K. and AU are important because they serve to show Americans what government accountability for unjustified acts of

⁷⁰³ *Id.*

torture looks like and shows, in stark contrast, how much remains to be done in the United States to bring justice to those who were victimized.

Most importantly, the holdings and discussions of the cases to give the general public insight into how other courts with similar legal systems have confronted the issue. These cases demonstrate that justice for victims of torture and rendition is possible through adjudication and that domestic prohibitions against torture promote government accountability. The willingness of foreign courts to try these cases not only demonstrates that the values of transparency and accountability are fundamental to the proper function of a democratic government, but also discloses facts that were not available in the public record at the time the U.S. courts dismissed torture victims' cases based on the state secrets doctrine. In addition to the public judicial disclosure of facts relevant to Britel's and other torture cases, the decisions of the U.K. and AU courts demonstrates that the legal theories used by the United States to prevent the adjudication and litigation of torture claims can be overcome.

SECTION FOUR: EXTERNAL PRESSURE FROM THE MEDIA & CIVIL SOCIETY

This Section considers the potential influence that the media and civil society have to place pressure on the government in support of efforts to attain accountability and transparency for the CIA Detention and Interrogation Program. The tension between the government's asserted need for secrecy, and the constant push by news media and civil society groups for openness and transparency can be used to overcome government efforts to thwart accountability. The media's traditional role as a watchdog of the government⁷⁰⁴ may serve as an unofficial check on the Executive's power when other branches of government have failed to do so. Furthermore, the modern role of the media that has emerged in the information age, characterized by an increased ease in the discovery and global dissemination of classified information, calls into serious question what level of "secrecy" is required by the state secrets privilege.

The news media's coverage of government action during the "War on Terror" has provided a powerful example of the important role that the media plays in the exchange of information between the government and the public. The sheer volume of media coverage for the CIA's Detention and Interrogation program evidences the growing public demand for transparency and accountability. The direct flow of this information from the government to the public has been in large part stunted by a problematic pattern of unnecessary secrecy, but the investigative journalism has to some extent been able to circumvent this obstacle. As a result of the media disclosures about detainee mistreatment and torture, courts may have new reason to reject the government's claim of state secrets in its efforts to block claims by torture victims for

⁷⁰⁴ *Amid Criticism, Support for Media's Watchdog Role Stands Out*, PEW RESEARCH CTR (Aug. 8, 2013), <http://www.people-press.org/2013/08/08/amid-criticism-support-for-medias-watchdog-role-stands-out/> [<http://perma.cc/B2B5-LLJ2>].

relief and reparation. This is particularly true given the media disclosures of official government documents, voices of victims, and information from foreign and international bodies.

Even in the case of information that was already released by the government into the public domain, media coverage has at times ensured the global accessibility and acknowledgment of this information. Since the release of the Torture Report, media sources throughout the world synthesized for the public the critical information that the report provided about the gruesome experiences of detainees and the human rights violations carried out by the government. The media also provided important coverage of the global response that demonstrated that the state of the reputation of the United States as a defender of human rights undeniably is in need of repair.

Along with other developments and disclosures discussed in previous Sections, information released by the media that contains facts central to the claims of torture victims, and is available to the global public, raises the question: how can information made public knowledge by the media and other sources still be considered a state secret for the purpose of litigation? This Section argues that facts disclosed by the media, especially those that are confirmed by an official source or easily authenticated, should be considered information that is public knowledge and therefore not a secret. Any threat to national security caused by the release of information is unavoidable once the information has been disclosed to the public; after this point, claims of a threat to national security should no longer be available to shield the government from providing relief to victims of the CIA's Detention and Interrogation Program.

A. The Role of the Watchdog

“The Government’s power to censor the press was abolished so that the press would remain forever free to monitor the Government.”⁷⁰⁵ The constitutional guarantee of the freedom of the press ensures its continued ability to monitor the government and expose government action to public scrutiny – a function that has caused the media to commonly be referred to as a “watchdog” of the government. When the privileges and powers of the Executive Branch remain largely unchecked by the judiciary, as this paper has demonstrated is the situation at present, the watchdog role provided by a free and aggressive press may provide an alternative constraint.⁷⁰⁶

Media sources regularly gain access to classified information – information that government officials would prefer to keep out of the public sphere.⁷⁰⁷ In the digital age, the leaking of state secrets, and subsequent dissemination to the public, has become somewhat of an everyday occurrence.⁷⁰⁸ Increased government efforts to classify information in the aftermath of September 11th have been met by media and civil society with equal increments in efforts to gather and publish classified information. Disclosure of classified information by the media and advocacy groups, whether the information was obtained through a leak, mistake, etc., has led to the public exposure of several questionable practices, including the mistreatment of prisoners at the U.S.-run prison, Abu Ghraib, Guantanamo Bay detainees, and detainees at foreign black sites.⁷⁰⁹

1. Abu Ghraib Prisoners

⁷⁰⁵ N.Y. Times v. Sullivan (J. Black, concurring).

⁷⁰⁶ Danielle L. Nottea, *The State Secrets Privilege: Distinguishing State Secrets in the Age of Information*, 42 SW. L. REV. 701, 734 (2013).

⁷⁰⁷ *See id.* At 732.

⁷⁰⁸ *See id.* at 735.

⁷⁰⁹ Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 255 (2008).

The public attention that results from media coverage can play a significant role as an impetus for change in executive policies when the other branches of government have been unable to check executive power.⁷¹⁰ A noteworthy example of the effect that the media can have on the Executive Branch is the above-mentioned mistreatment of prisoners at Abu Ghraib. A 2004 publication by CBS News exposed the torture of prisoners at U.S.-run Abu Ghraib in Iraq by U.S. troops.⁷¹¹ Most notably, the publication included pictures that served not only as irrefutable evidence of the abuse but also produced a significant public reaction. Other media organizations continued with this story and published previously secret statements of witnesses from Abu Ghraib and additional photos of abuse were also published.⁷¹² At the time of the publication, the Bush Administration was already aware of the allegations of abuse at Abu Ghraib and the likelihood that the allegations were in fact true.⁷¹³ However, the administration had attempted to manage the matter internally and quietly.⁷¹⁴ The public attention generated by the media coverage of the events prompted the administration to change course and publicly acknowledge, condemn what had occurred, and initiated more serious measures to remedy the situation.⁷¹⁵ It is noteworthy to mention that there was already some information about the abuse available to the public as early as 2003, yet the public remained largely unaware of it until the publication by CBS was released in 2004.⁷¹⁶ This demonstrates the critical role that the media has not only in disclosing confidential information, but also in generating public attention and reaction to information that is already public.

⁷¹⁰ Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L. J. 1255, 1282 (2005).

⁷¹¹ *See id.*

⁷¹² *See id.*

⁷¹³ *See* Monica Hakimi, *The Media As Participants in the International Legal Process*, 16 DUKE J. COMP. & INT'L L. 1, 7 (2006).

⁷¹⁴ *See id.*

⁷¹⁵ *See id.*

⁷¹⁶ *See id.*

2. Guantanamo Diary⁷¹⁷

Another important development related to media reporting is the release of Guantánamo Diary, the firsthand account of Guantánamo detainee Mohamedou Ould Slahi. After turning himself in to the police of his native Mauritania, Slahi was detained there and then rendered to Jordan at the hands of U.S. officials on a North Carolina Aero Contractors plane⁷¹⁸ before being transferred to Guantánamo in 2002, where he has since remained although he has never been formally charged with a crime by the U.S. government.⁷¹⁹ The book is his narrative account of the detention and torture he has suffered.⁷²⁰ The fact that the efforts of Slahi's legal team overcame government objections, and ultimately succeeded in the publication of his story, demonstrates the growing reluctance of judiciary to allow the government to hide behind a complete cloak of secrecy regarding allegations of torture. The publication is one of the most recent events indicating the continued momentum toward transparency, and the possibility to initiate a movement to humanize detainees and galvanize efforts to ensure detainees receive appropriate due process guarantees.

Although Slahi completed his manuscript in 2005, Guantánamo Diary was finally published until January 2015.⁷²¹ The government initially prevented the manuscript's release to the public by deeming it classified information.⁷²² In 2012, after a seven-year legal battle, Slahi's lawyers finally overcame this obstacle, on the condition that the government would

⁷¹⁷ MOHAMEDOU OULD SLAHI, *GUANTÁNAMO DIARY* (Larry Siems ed., 1st ed. 2015).

⁷¹⁸ *Planespotting: A Good Resource for Understanding Rendition Circuits, North Carolina Links*, N.C. STOP TORTURE NOW, <http://www.ncstoptorturenw.org/resourcesplanespotting.html>.

⁷¹⁹ *Tell the U.S. Government to Free Slahi*, ACLU ACTION, <https://action.aclu.org/secure/free-slahi> (last updated Nov. 24, 2015).

⁷²⁰ See generally SLAHI, *supra* note 717.

⁷²¹ *Id.* at xii.

⁷²² Larry Siems, *Guantánamo Diary: How A Classified, Handwritten Manuscript Became An Extraordinary Book*, *GUARDIAN* (Jan. 16, 2015, 1:12 PM), available at <http://www.theguardian.com/world/2015/jan/16/guantanamo-diary-a-classified-handwritten-manuscript>.

redact information before the book reached the public.⁷²³ The victory of Slahi's lawyers over the government's objection on the basis that the manuscript contained classified information indicates a growing reluctance in U.S. courts to allow the Executive Branch so much secrecy in this context.⁷²⁴

The release of the book so close in time to the Senate Report has built upon the already increasing momentum toward disclosure, and the government's waning ability to keep all information regarding the Torture classified. Activists can capitalize on the momentum gained by the victory in court of Slahi's lawyers and subsequent publication of his manuscript to pressure the government to release more information regarding the program, such as the remainder of the Torture Report, which will eventually lead to the government's inability to invoke state secrets regarding the privilege in litigation, as well as increase transparency to help with accountability efforts. The book itself also puts more facts out into the public sphere, shedding light on rendition circuits, cross-government cooperation to detain him, and torture tactics by U.S. military and government officials at Guantánamo.⁷²⁵ *The Guardian* has also created an interactive website around the narrative, thus, further pushing facts about the torture program into the realm of public knowledge and discussion.⁷²⁶

Additionally, this unprecedented humanization of a detainee can serve as a platform to increase advocacy efforts, as the narrative paints a picture of someone readers can relate to - even like. The public has been advised that "the worst of the worst" are at Guantánamo, but the

⁷²³ Britta Sandberg, *Guantanamo Prisoner Diary: 'We're Gonna Teach You About American Sex,'* DER SPIEGEL, <http://www.spiegel.de/international/world/excerpts-from-guantanamo-diary-of-mohamedou-ould-slahi-a-1013724.html>. The legal victory was won on Freedom of Information Act grounds. *Id.*

⁷²⁴ Slahi's lawyers won on Freedom of Information Act (FOIA) grounds indicating that FOIA may be a good pressure point to exploit going forward in arguing for public disclosure.

⁷²⁵ See SLAHI, *supra* note 717, *passim*.

⁷²⁶ *Guantánamo Diary*, GUARDIAN, <http://www.theguardian.com/world/guantanamo-diary> (last visited April 15, 2015).

narrative contained within Guantánamo Diary's pages reveal a highly intelligent man with a sharp wit and a deep sense of humor, who wrote his own habeas petition and speaks four languages, learned to speak, write, and read in English through his torture and detention.⁷²⁷

Widespread reading of his account may lead to more of a public push for disclosure and accountability, not to mention the release of Slahi who remains in Guantánamo, as people begin to see detainees as humans instead of the savage “other,” an image portrayed and perpetuated by the media and government officials.

The publication of Guantánamo Diary is a beacon of hope, showing the results of a hard fought seven-year legal battle, and can be used by advocates as a link for society to relate to detainees on a human level and inspire the public to get more involved in their fate by holding the government accountable for what they have done and ensuring something similar will never happen again.

B. Media Disclosures & State Secrets

The state secrets doctrine is premised on the fact that the government may intervene if a lawsuit will result in the divulgence of facts that are a threat to national security.⁷²⁸ However, in *Jeppesen*, for example, it was unclear which facts the court thought would threaten national security if divulged.⁷²⁹ The court only mentioned that they fall into at least one of the following categories: information that would confirm or deny Jeppesen or any other private entity assisted the CIA, information about cooperation of foreign governments, the scope or operation of the torture and detention program, or any other information that would tend to reveal intelligence

⁷²⁷ See SLAHI, *supra* note 717, at xlvi.

⁷²⁸ See *supra* Introduction for a discussion on how the privilege has become much more broadly construed than this over time and is now used to preclude entire lawsuits, though initially meant to block only certain pieces of privileged evidence.

⁷²⁹ 614 F.3d 1070, 1086 (9th Cir. 2010) (en banc), cert. denied 131 S. Ct. 2442 (2011).

activities, sources, or methods of CIA clandestine operations.⁷³⁰ However, since then, many facts have been divulged about the Torture Program in the media, especially after the recent release of the Torture Report.⁷³¹

“The first step in determining whether a piece of information constitutes a ‘state secret’ is determining whether that information actually is a ‘secret.’”⁷³² Although the Supreme Court has not yet addressed this issue, several federal courts have considered the effect that media disclosures have on the use of the state secrets privilege. Courts have recognized that when factual statements are publicly reported by the media, it “does not necessarily mean that the facts it relates to are true and are not a secret.”⁷³³ In *Hepting v. AT&T*,⁷³⁴ the court acknowledged extensive media coverage could play a role in precluding the finding that information or statements are “secrets” for the purposes of the state secrets privilege.⁷³⁵ In that case, the court instructed that “[i]n determining whether a factual statement is a secret for purposes of the state secrets privilege, the court should look only at publicly reported information that possesses substantial indicia of reliability and whose verification or substantiation possesses the potential to endanger national security.”⁷³⁶ In *El-Masri*, the court also indicated that media coverage

⁷³⁰ *Id.*

⁷³¹ See, e.g., Press Release, ACLU, Senate Torture Report Shows Need For Accountability (Dec. 9, 2014), available at <https://www.aclu.org/news/senate-torture-report-shows-need-accountability?redirect=national-security/senate-torture-report-shows-need-accountability> (discussing how too much information has been released into the public forum for the government to avoid accountability). The ACLU’s own efforts through FOIA litigation have released 100,000 pages of information the government would claim is “secret,” available in a searchable online database at https://www.thetorturedatabase.org/search/apachesolr_search. *Id.* It is also important to note media involvement from the very beginning in exposing the CIA program. See Scott Shane, Stephen Grey, & Margot Williams, *C.I.A. Expanding Terror Battle Under Guise of Charter Flights*, NY TIMES (May 31, 2005), http://www.nytimes.com/2005/05/31/national/31planes.html?pagewanted=all&_r=1&. For a list of several other media sources disclosing facts on the CIA torture and rendition program almost a decade before the release of the Senate Report, see IMMIGRATION AND HUMAN RIGHTS SEMINAR, UNC SCHOOL OF LAW, THE NORTH CAROLINA CONNECTION TO EXTRAORDINARY RENDITION AND TORTURE 42 (2012).

⁷³² *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 986 (2006).

⁷³³ See *id.* at 990.

⁷³⁴ 439 F. Sup. 2d 974, 996–97 (N.D. Cal. 2006) (discussing whether state secrets privilege precludes judicial review of a terrorist surveillance program).

⁷³⁵ *Id.* at 990–91.

⁷³⁶ *Id.*

could have an effect on the viability of the state secrets privilege, but held that more information outside of the scope of what had already been disclosed would have to come out if the case were to be litigated, thus foreclosing litigation.⁷³⁷ In *Terkel v. AT&T*,⁷³⁸ the court acknowledged that the media publications did make facts ‘public knowledge’ in some capacity, but that to overcome invocation of a state secrets privilege, the facts disclosed in the media must be confirmed or denied by an official source.⁷³⁹

The accessibility of information released by the media, particularly information related to the events already disclosed by the government in the Torture Report, that encompasses both official government admissions as well as additional details, makes skeptical the claim that further discussion of this information would create a national security threat. Many scholars argue that there is no rationale for suggesting that the discussion of these facts in litigation can pose an additional threat to national security.⁷⁴⁰ Allowing the state secrets privilege in these situations where the information has already been disclosed has been criticized as “making a mockery of the concept of legitimate secrecy.”⁷⁴¹

C. Conclusion

Given previous judicial acknowledgement of the important role of the media in cases in which the state secrets privilege is at issue, the widespread media coverage of the CIA Detention

⁷³⁷ *El Masri*, 479 F.3d at 308–10. This is an improper use of the privilege in any regard. *See supra* Introduction. This should not foreclose the whole case but only prevent that particular evidence from being disclosed. *Id.*

⁷³⁸ 441 F. Supp. 2d 899 (2006).

⁷³⁹ *Id.* at 912–14. In *Terkel*, plaintiffs argued that the government should not be able to invoke the state secrets privilege to preclude a lawsuit when there was media coverage of the NSA surveillance program at issue. *Id.* Plaintiffs offered coverage of the program in reputable newspapers such as the *New York Times* and the *Chicago Tribune* that had reported on the program to prove that the information needed for the plaintiffs to seek relief was public knowledge and not a state secret. *Id.* at 911.

⁷⁴⁰ *See* Nottea, *supra* note 706, at 735; Nathan Freed Wessler, *Government Wins Right to Pretend That Cables Released By Wikileaks Are Still Secret*, ACLU (July 23, 2012, 12: 28 PM), <https://www.aclu.org/blog/future/government-wins-right-pretend-cables-released-wikileaks-are-still-secret>.

⁷⁴¹ Wessler, *supra* note 740.

and Interrogation Program, and the need to encourage and protect the watchdog function of the media, the courts are now better poised to consider media disclosures as a more important factor in overcoming state secrets than in the past. Additionally, there is an abundance of commentary from international human rights bodies, tribunals, and scholars that indicate that the government should not be able to successfully invoke the state secrets doctrine to block litigation for relief for torture victims now that so much information is in the public domain.⁷⁴² Courts litigating these cases in the future have even more reason to reshape the law in a way that mitigates the aggrandizement of national security, the encroachment of civil liberties, and the obstruction of human rights claims, and brings back a balance of power – one way to do this is to allow the freedom of press to serve its intended check on the government. The government does not own facts, and once they have been released by the media (at least from a credible source) there should be a reasonable period after which those facts can no longer be considered as threats to national security if litigated, especially when this results in the denial of the public demand for accountability and the victim’s right to seek redress.

⁷⁴² *See supra* Sections I, III.

SECTION FIVE: ACCOUNTABILITY

While re-opening litigation is one way to seek relief for victims of the CIA extraordinary rendition program, an accountability commission is another way to do so. Because the “post 9/11 era” environment that was a catalyst for the egregious human rights violations of the CIA torture and extraordinary rendition program may be here to stay, it is vital to fully understand the conditions which led to those violations to ensure they are not repeated.⁷⁴³ A commission of inquiry can illuminate how the government strayed so far from its legal obligations against torture. Its findings could help create procedures to avoid future situations in which an intention to protect national security results in violations of international, as well as domestic, obligations.

There are models to consider, including Canada’s Commission of Inquiry in the case of Maher Arar. The commission is widely hailed as a success because of government participation and its refusal to deem the state as the sole arbiter of what constituted state secrets that could block relief of the torture victim, showing the need for government involvement in an accountability effort while also emphasizing the need for a watchdog. As Maher Arar himself remarked, accountability is not about seeking revenge, but making our institutions better and a model for the rest of the world. A failure to hold those in the government responsible for such rampant disregard of those obligations regarding the CIA torture and extraordinary rendition program would send a message of impunity that would encourage future human rights violations. This is not the message that the United States, an alleged champion of global human rights,

⁷⁴³ As Pope Francis aptly phrased this need when referring to the Armenian genocide: “Concealing or denying evil is like allowing a wound to keep bleeding without bandaging it.” Jim Ardley & Sebnem Arsu, *Pope Calls Killings of Armenians ‘Genocide,’ Provoking Turkish Anger*, N.Y. TIMES, Apr. 12, 2015, <http://www.nytimes.com/2015/04/13/world/europe/pope-calls-killings-of-armenians-genocide-provoking-turkish-anger.html?ref=world>.

should be sending. President Obama’s policy of “looking forward” to prevent torture in the future can only be done by investigating what went wrong in the past.

As Tom Malinowski, the Assistant Secretary of Democracy Human Rights and Labor U.S. Department of State said in his opening remarks to the Committee on Torture in November 2014, “[T]he test for any nation committed to this Convention and to the rule of law is not whether it ever makes mistakes, but whether and how it corrects them.”⁷⁴⁴ The following models outline international efforts for accountability regarding the torture program, domestic calls for accountability, and historical transitional justice models to ascertain how the United States could efficiently develop an accountability model going forward.

I. EFFORTS TOWARDS ACCOUNTABILITY IN OTHER COUNTRIES⁷⁴⁵

A formal domestic accountability mechanism to investigate extraordinary rendition and torture is sure to face unique challenges due to the nature of the “Global War on Terror” which has resulted in abuses against victims, the remedies for which do not fit neatly into traditional jurisdictional, legal and political boundaries. For this reason, it is helpful to identify international accountability initiatives and compare those efforts as potential models for a domestic scheme. The following section will provide a brief overview of accountability initiatives completed and/or underway in Canada, the United Kingdom, and Germany, as well as discuss the particularized challenges and solutions advanced by each region.⁷⁴⁶

⁷⁴⁴ Tom Malinowski, Assistant Secretary, Democracy Human Rights and Labor, U.S. Department of State. Opening Statement at Committee Against Torture, 2013 Periodic Report Discussion (Nov. 12, 2014) (transcript available at <https://geneva.usmission.gov/2014/11/12/malinowski-torture-and-degrading-treatment-and-punishment-are-forbidden-in-all-places-at-all-times-with-no-exceptions/>).

⁷⁴⁵ This part of the paper was adapted from a previous policy report on accountability mechanisms written by Leah Patterson on April 2, 2011. Some sections were transposed, some were updated and edited, and some are completely new. The fact that so many updates and additions were needed for international as well as domestic accountability efforts for extraordinary rendition and torture is reflective of the progress made by human rights advocates in their push for accountability and serves as a reminder that efforts should be continued. The authors hope that even more updates and revisions to this section will be needed soon.

⁷⁴⁶ *See id.* This whole paragraph adopted from her paper verbatim.

A. Canada's Commission Of Inquiry

Canada's accountability efforts have been regarded as the most successful to date. Beginning in 2004, a special commission of inquiry was established to investigate Canadian involvement in the rendition, detention and interrogation of Maher Arar. Maher, a Canadian citizen, was abducted while in New York's Kennedy Airport in 2002 and involuntarily transported to Syria where he was tortured and imprisoned for almost a year.⁷⁴⁷ Justice Dennis O'Connor led the Commission.⁷⁴⁸ He was given a two-part mandate: to initiate a factual inquiry to investigate the events surrounding the rendition and torture of Arar,⁷⁴⁹ and to formulate policy recommendations for future actions of the Royal Canadian Mounted Police to avoid similar occurrences in the future.⁷⁵⁰ While keeping sensitive material subject to national security behind closed doors, maximum possible public disclosure of relevant information was encouraged.⁷⁵¹

⁷⁴⁷ See Editorial, *The Unfinished Case of Maher Arar*, N.Y. TIMES, Feb. 18, 2009, at A26 (discussing the Canadian government's treatment of Arar) [hereinafter 'Editorial'].

⁷⁴⁸ Justice O'Connor was a professor at the University of Western Ontario from 1980 to 1998. From 1980 to 1984, he served as chief negotiator for the Government of Canada in the Yukon Indian Land Claim. He later served as an elected bencher of the Law Society of Upper Canada from 1987 to 1995, leading to his appointment to the Ontario Court of Appeal in 1998. He was appointed associate chief justice of Ontario in 2001. Prior to his appointment on the Arar Inquiry, Justice O'Connor served as Commissioner of the Walkerton Inquiry, which investigated a contaminated drinking water supply in Walkerton, Ontario in 2000. See *Brief Biographical Note of Associate Chief Justice Dennis O'Connor*, ONTARIO COURTS, <http://www.ontariocourts.ca/coa/en/archives/judges/oconnor.htm> (last visited Dec. 28, 2015).

⁷⁴⁹ COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 12 (2006), available at http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf [hereinafter ARAR REPORT]. The factual inquiry specifically investigated: (i) the detention of Mr. Arar in the United States, (ii) the deportation of Mr. Arar to Syria via Jordan, (iii) the imprisonment and treatment of Mr. Arar in Syria, (iv) the return of Mr. Arar to Canada, and (v) any other circumstance directly related to Mr. Arar that the Commissioner considers relevant to fulfilling this mandate. *Id.* at 280.

⁷⁵⁰ The "Policy Review" for future actions of the Royal Canadian Mounted Police were based on: (i) an examination of models, both domestic and international, for (ii) an assessment of how the review mechanism would interact with existing review mechanisms. *Id.* at 280–81.

⁷⁵¹ In the interest of national security, the Commissioner was expected to take the following precautions when dealing with sensitive material subject to national security concerns: (k) the Commissioner be directed, in conducting the inquiry, to take all steps necessary to prevent disclosure of information that, if it were disclosed to the public, would, in the opinion of the Commissioner, be injurious to international relations, national defence or national security and, where applicable, to conduct the proceedings in accordance with the following procedures, namely, (i) on the request of the Attorney General of Canada, the Commissioner shall receive information *in camera* and in the absence of any party and their counsel if, in the opinion of the Commissioner, the disclosure of that information would be injurious to international relations, national defence or national security, (ii) **in order to**

This was made possible by allowing the Commissioner access to all confidential information and documents for in camera inspection with the discretion of what could be disclosed to the public without causing harm to national security.

The inquiry's report, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, published in July 2006, found that Canadian officials provided unconfirmed information to the United States regarding Arar and that he, in fact, had no connection to terrorist activities.⁷⁵² Canada offered Arar a formal apology and compensation worth millions of U.S. dollars.⁷⁵³ The report details both the rules of procedure that were used in conducting the factual inquiry and final policy recommendations to prevent future abuses.⁷⁵⁴

One reason for the relative success of the Canadian inquiry was its refusal to designate the state as the sole arbiter for determining what constituted legitimate "state secrets" or "national security interests."⁷⁵⁵ An analysis by the Council of Europe suggests that the Canadian Commission "found a workable solution that safeguards both accountability and true national security interests."⁷⁵⁶ Also contributing to the inquiry's success was the underlying national consensus on the function and principle underlying accountability. As Maher Arar aptly stated, "[A]ccountability is not about seeking revenge. It is about making our institutions better and a

maximize disclosure to the public of relevant information, the Commissioner may release a part or a summary of the information received *in camera* and shall provide the Attorney General of Canada with an opportunity to comment prior to its release, and (iii) if the Commissioner is of the opinion that the release of a part or a summary of the information received *in camera* would provide insufficient disclosure to the public, he may advise the Attorney General of Canada, which advice shall constitute notice under section 38.01 of the Canada Evidence Act. *Id.* at 283 (emphasis added).

⁷⁵² *Id.* at 98.

⁷⁵³ See Editorial, *supra* note 747.

⁷⁵⁴ See ARAR REPORT, *supra* note 749, at 280–81.

⁷⁵⁵ PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, SECRET DETENTIONS AND ILLEGAL TRANSFERS OF DETAINEES INVOLVING COUNCIL OF EUROPE MEMBER STATES: SECOND REPORT, para. 329 (Jun. 11, 2007).

⁷⁵⁶ *Id.* The commissioner described procedural challenges in conducting this factual inquiry and identified three competing interests: "making as much information as possible public, protecting legitimate claims of national security confidentiality (NSC), and ensuring procedural fairness to institutions and individuals who might be affected by the proceedings." See ARAR REPORT, *supra* note 749, at 279.

model for the rest of the world. Accountability goes to the heart of our democracy. It is a fundamental pillar that distinguishes our society from police states.”⁷⁵⁷

The Arar Inquiry and its reasons for success serve as a model for U.S. accountability mechanisms to investigate extraordinary rendition and torture at both the national and state levels. The Arar Inquiry exemplifies the importance of demanding more than simply a blanket assertion of state confidentiality or “state secrets” by state officials in any accountability inquiry with government involvement. Any inquiry aspiring to be as efficient should also be led by an experienced, impartial judge to avoid findings potentially tainted by interested government parties. As was the case with Arar and Justice O’Connor, any judge leading an accountability effort with regard to the U.S. torture program should also be given access to all relevant evidence in order to make accurate findings, with the discretion to disclose what was possible without threatening national security, and the mandate to release the maximum amount possible. A thorough investigation must balance national security safeguards against the necessity for transparency. The Arar commission was both explicit and consistent in its purpose and procedure for inquiry; any commission should strive to develop similar resolute guidelines so the public can actively follow and engage in the proceedings. Additionally, a commission should publish a detailed report of its findings for widespread distribution. The continued electronic availability of the Arar report perpetuates a model and fuels a collective international movement for accountability on this issue.

B. German Parliamentary Inquiry

In June of 2009, the German Parliament issued a report summarizing findings of a three-year inquiry into German involvement in the extraordinary rendition, detention and mistreatment

⁷⁵⁷ Marty, Dick, *Canada’s Arar Probe is a Model for Europe*, GLOBE & MAIL (Aug. 14, 2007), <http://www.theglobeandmail.com/news/national/canadas-arar-probe-is-a-model-for-europe/article1080060/>.

of German nationals Khaled el-Masri and Muhammad Zammar, and German resident Murat Kurnatz.⁷⁵⁸ Though the inquiry found that it was unable to substantiate any culpability of German officials or the German government,⁷⁵⁹ this was due to an unconstitutional failure by a segment of the German government to cooperate fully with the investigation, according to the German Constitutional Court.⁷⁶⁰ Amnesty International argued that “the government’s actions restricting the information available to the inquiry were unconstitutional [and] the legitimacy of the inquiry and its conclusions have been fatally undermined.”⁷⁶¹ Furthermore, the February 2010 UN Joint Study on Secret Detention specifically identified Germany as a country that “knowingly... [took] advantage of the situation of secret detention by sending questions to the State which detains the person or by soliciting or receiving information from persons who are being kept in secret detention.”⁷⁶² In light of the June 2009 German Constitutional Court decision that the inquiry findings were flawed because of unconstitutional government actions and the 2010 UN Joint Study on Secret Detentions finding of German involvement, human rights advocates have called for continuing investigation into the outstanding human rights issues to bring Germany in compliance with its international obligations, and contend that prospective legislation alone does not fully provide accountability for victims of human rights abuses.⁷⁶³

Despite relative obstacles to achieving accountability for victims by parliamentary inquiry, the inquiry report was ultimately successful in achieving proposed legislative reforms

⁷⁵⁸ AMNESTY INTERNATIONAL, OPEN SECRET: MOUNTING EVIDENCE OF EUROPE’S COMPLICITY IN RENDITION AND SECRET DETENTION 16 (2010), available at http://www.therenditionproject.org.uk/documents/RDI/101100-AI-Open_Secret.pdf [hereinafter ‘Open Secret’].

⁷⁵⁹ *Id.* at 17 (citing Press Release, Federal Constitutional Court, Limited Grant of Permission to Testify and Refusal to Surrender Documents to BND Committee of Inquiry Partly Contrary to Constitutional Law, No. 84/2009, (July 23, 2009), available at <http://www.bundesverfassungsgericht.de/en/press/bvg09-084en.html>).

⁷⁶⁰ See OPEN SECRET, *supra* note 758, at 17.

⁷⁶¹ *Id.*

⁷⁶² *Id.*

⁷⁶³ See OPEN SECRET, *supra* note 758.

with regard to oversight mechanisms for the German federal secret service, which were later enacted by parliament.⁷⁶⁴ This success highlights the notion that a formal state inquiry can be an important political mechanism not just in achieving accountability retrospectively but for shaping domestic policy prospectively. Most importantly, the struggles faced by the German parliament did not impede the continued push for state inquiry and accountability. Protracted efforts in Germany contribute to the global recognition that accountability mechanisms are necessary and should serve to inspire such a mechanism in the United States.

C. The United Kingdom

In 2010, UK Prime Minister David Cameron, Deputy Prime Minister Nick Clegg, and then Justice Secretary Ken Clarke committed to an independent judge-led inquiry to uncover the extent of UK involvement in the CIA torture program.⁷⁶⁵ It seemed that the first UK attempt at accountability, an inquiry led by retired judge Sir Peter Gibson, would follow through on this promise – but its efficacy was thwarted by imposition of government limitations on classified information.⁷⁶⁶ The inquiry stalled after evidence of UK involvement in rendering two Libyan opposition leaders was uncovered, and ultimately concluded prematurely to focus investigation efforts there before moving forward with accountability.⁷⁶⁷

⁷⁶⁴ *Id.*

⁷⁶⁵ *Spy Agency Watchdog ‘Incapable of Holding Gov’t to Account’ - Human Rights Group*, REUTERS (Feb. 24, 2015) <http://rt.com/uk/235191-security-services-impunity-britain/> [hereinafter REUTERS].

⁷⁶⁶ *UK: Broken Promise on Torture Inquiry*, HUMAN RIGHTS WATCH (Dec. 21, 2013), <http://www.hrw.org/news/2013/12/21/uk-broken-promise-torture-inquiry>.

⁷⁶⁷ During the inquiry’s investigations, evidence of UK and M16 involvement in the rendition of two Libyan opposition leaders and their families to Tripoli in 2004 was unearthed. Ian Cobain & Richard Norton-Taylor, *UK Inquiry on Rendition and Torture to be Handed to ISC*, GUARDIAN (Dec. 18, 2013), <http://www.theguardian.com/world/2013/dec/18/inquiry-rendition-torture-isc>. In the face of suspending indefinitely or concluding, the commission was concluded. *Id.* The report was submitted to the UK government in June 2012 and published on December 9, 2013. See *UK: Broken Promise on Torture Inquiry*, *supra* note 766. Though findings were precluded by stunted investigatory attempts and premature closure, the report did include a helpful tool for moving forward- a list of approximately 27 outstanding questions, for which it was unable to gain access to pertinent information in order to answer, that would need to be answered to formulate a fully accurate report. *Id.*

A second attempt at accountability for British involvement in the CIA rendition and torture program began in 2013.⁷⁶⁸ Government officials, reluctant to pick up the Gibson inquiry where it left off, backed off on their previously voiced strong commitment to an independent judge-led inquiry and instead chose the UK parliament's intelligence and security committee (ISC) and Chairman Sir Malcom Rifkind to lead a parliamentary inquiry.⁷⁶⁹ The inquiry has been marred by partiality and corrupt leadership, with Rifkind resigning in February 2015 due to accusations of misconduct. Though it is still underway,⁷⁷⁰ human rights advocacy groups are now reapplying pressure on the UK government to halt the ISC inquiry and follow through on its promise of an independent judicial inquiry.⁷⁷¹

Rifkind's resignation, combined with the momentum for government accountability in the wake of the Senate Torture Report, prompted Britain's Bureau of Investigative Journalism (further highlighting the importance of the need for media as a government watchdog) and a university research initiative called the Rendition Project to begin a project working to uncover relevant information that was redacted in the Report and information in the six thousand pages of still unreleased content.⁷⁷²

While the process has certainly had its shortcomings, the UK deserves acclaim for its steps toward state accountability for detainee treatment. Though the thwarted Gibson inquiry and ongoing ISC inquiry have many faults and are not as successful an accountability process as

⁷⁶⁸ Rowena Mason, *British Torture Inquiry 'Not Afraid to Embarrass PM,'* GUARDIAN (Dec. 14, 2014), <http://www.theguardian.com/us-news/2014/dec/14/british-mps-redacted-material-senate-torture-report>.

⁷⁶⁹ *Id.* Upon inception, there were doubts expressed by many non-governmental groups that the commission would be able to serve the role as an independent objective body, as many of its participants are formal government officials. *Id.* Human rights advocates also cited past ISC failures to hold UK intelligence agencies accountable in the past as a reason why they were not fit for the task at hand, calling for an independent judicial inquiry as the only way to achieve full accountability. See *UK: Broken Promise on Torture Inquiry*, *supra* note 766.

⁷⁷⁰ As of December, 2015.

⁷⁷¹ See *UK: Broken Promise on Torture Inquiry*, *supra* note 766.

⁷⁷² See REUTERS, *supra* note 765.

Canada's inquiry, the United States should still look to the UK as an example of a democratic world power making progress (however halting it may be) to hold itself accountable for human rights transgressions as a result of the CIA detention, rendition, and interrogation program. The urgency to create a mechanism of accountability is greater with regard to the U.S. government, which has been largely in control of the torture and wrongful detention of individuals believed to be associated with terrorism. Indeed, the United States has even more of a reason to start an accountability path as soon as possible.

This process also shows the enormous importance and influence that human rights advocacy groups and the media can have for accountability efforts through all stages of the process: in the United States, we have seen this as a precursor to any formal accountability, and now in the UK we are seeing this in the wake of two failed efforts. As non-governmental organizations⁷⁷³ have endeavored to investigate government wrongdoings and prompt the government to initiate its own undertaking in the absence of any current government initiative in the United States, Britain's Bureau of Investigative Journalism and Rendition Project are now doing so after a lack of government ability to do so after two ineffective attempts, further prompted by the Senate Torture Report. Non-governmental groups and the media can capitalize on this to remain vigilant in their watchdog efforts, as even if the U.S. government finally initiates an accountability mechanism, they must remain vigilant to ensure a full and fair process.

⁷⁷³ Such as the ACLU, Reprieve, Amnesty International, North Carolina Stop Torture Now, UNC School of Law Human Rights Policy Seminar, Human Rights Watch, Center on Constitutional Rights, Constitution Project, Open Society Foundation, Physicians for Human Rights, Human Rights First, American University Washington College of Law, Center for Human Rights & Humanitarian Law, Torture Abolition and Survivors Support Coalition (TASSC), Open the Government, National Religious Campaign Against Torture, Center for the Victims of Torture, Witness Against Torture, Global Justice Clinic, Center for Human Rights & Global Justice, NYU School of Law, Columbia Law School Human Rights Institute and others.

While the success of the Canadian Inquiry demonstrates the need for government participation for any meaningful attempts at accountability, the failures of these UK attempts also qualify that need, demonstrating the necessity not only for government participation, but for a neutral and independent body to preside over any accountability attempt. To be most efficient in its accountability efforts, the United States should learn from the failures of the UK, get it right the first time, and not waste time and resources on non-impartial inquiries that run into too many “state secrets”-like obstacles to be efficient.

II. AN OVERVIEW OF DOMESTIC CALLS FOR ACCOUNTABILITY

A. Truth and Reconciliation Commission as advanced by Senator Patrick Leahy (2009)

At the 2009 Georgetown University Governmental Reform Symposium, Senator Patrick Leahy (D-VT) formally called for a national “reconciliation process and truth commission” to investigate U.S. involvement in various human rights abuses perpetrated during the global War on Terror.⁷⁷⁴ In his proposal, Leahy cited the South African and Greensboro Truth and Reconciliation Commissions as potential models.⁷⁷⁵ Immediately after this proposal, President Obama responded using somewhat evasive language: “[m]y administration is going to operate in a way that leaves no doubt that we do not torture, that we abide by the Geneva Conventions, and that we observe our traditions of rule of law and due process...but [], generally speaking, I’m more interested in looking forward than I am in looking backwards.”⁷⁷⁶

⁷⁷⁴ See Sen. Patrick Leahy, Chairman, Senate Judiciary Committee, Address at the Marver H. Bernstein Symposium: Restoring Trust in the Justice System (Feb. 9, 2009) (transcript *available at* <http://explore.georgetown.edu/news/?ID=40073>).

⁷⁷⁵ *Id.*

⁷⁷⁶ Pres. Barack Obama, Remarks at the Marver H. Bernstein Symposium on Governmental Reform at Georgetown University: Comments on Leahy Proposal for Truth Commission (Feb. 9, 2009) (transcript *available at* <http://blogs.georgetown.edu/?BlogID=2>).

In the years since this formal exchange, it is generally accepted that Leahy's proposal did not gain the necessary political momentum to achieve fruition.⁷⁷⁷ It has been suggested that this lack of momentum resulted from Leahy's emphasis on a retroactive retributive approach as oppose to prospective repudiation.⁷⁷⁸ Additionally, unlike the South African and Greensboro commissions described below, questions of international obligations, jurisdiction, citizenship and national security present unique legal and political obstacles to establishing formal commissions of inquiry designed to accommodate the characteristics of the global War on Terror. Despite this challenge, domestic human rights advocacy organizations, and concerned citizens continue to rise to the occasion. The subsequent sections summarize these recent and continuing domestic efforts to end impunity and achieve accountability for U.S. involvement in Extraordinary Rendition and torture.

B. Center for Victims of Torture Conference

In response to stunted attempts to instigate a unified formal accountability commission for U.S. involvement in Extraordinary Rendition and torture, the Center for Victims of Torture (CVT) along with Amnesty International USA and the Open Society Institute (OSI) held a conference to identify a number of strategies to improve overall accountability efforts going forward.⁷⁷⁹ Advocacy groups in attendance assessed potential obstacles to accountability and strategized how to overcome them and push forward with accountability efforts, and identified potential future allies and achievable goals through "tactical mapping" and a "spectrum of allies"

⁷⁷⁷ See generally George D. Brown, *Accountability, Liability, and the War on Terror – Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193, 203 (2011).

⁷⁷⁸ See, e.g., Jack Balkin, *A Body of Inquiries*, N.Y. TIMES, Jan. 10, 2009, <http://www.nytimes.com/2009/01/11/opinion/11balkin.html>.

⁷⁷⁹ The conference was held in Washington, D.C. with over 30 organizations in attendance whose involvement in the accountability movement varied from "[h]ill advocacy to litigation, from grassroots investigation to communications strategy." CENTER FOR VICTIMS OF TORTURE, FINAL REPORT ACCOUNTABILITY TACTICAL MAPPING 3–4, 8 (Nov. 2010).

identification exercise.⁷⁸⁰ Participants produced tangible tactics and strategies to improve “communication, coordination, and collaboration in effectiveness” in the accountability movement.⁷⁸¹ First, participants proposed an Accountability Coalition web space, a place where conference attendees can view and share information and electronic documents generated at the conference.⁷⁸² Second, attendees proposed and later drafted a letter to Dianne Feinstein, then chair of the Senate Select Committee on Intelligence (SSCI), which asked that she publicize a report on Extraordinary Rendition and torture and recommend an independent commission to investigate the matter further.⁷⁸³ The participants suggested other tactics which included: launching national media campaigns, planning cooperation with European human rights groups, and local grassroots organization and training.⁷⁸⁴

Ultimately, the conference yielded three key strategies that accountability advocates can and should employ in our continuing local and national U.S. accountability efforts. First, a similar mapping exercise can be used as a “coordinating tool” between multiple organizations to

⁷⁸⁰ For the greater part of the conference, attendees participated in two main exercises: “tactical mapping” and identification of a “spectrum of allies.” *Id.* at 6. According to Nancy Pearson, Director of the New Tactics in Human Rights Project at CVT, tactical mapping is an exercise which allows participants to “build a common vision by defining the problem, defining the terrain (the circumstances in which the problem occurs), exploring and selecting tactics for problem solving, and developing a plan of action for implementation of the tactics selected.” *Id.* For this exercise, attendees were divided into four preset groups, largely based on the nature of their efforts in the accountability movement thus far. The smaller groups then defined the key “central relationship” at the heart of the problem of attaining accountability for torture; this central relationship remained at the core of the map. The groups were then charged with identifying those individuals with both *direct* and *indirect* contact with the central relationship, and categorizing the nature of those relationships as either “power relationships,” “mutual relationships,” “exploitative relationships,” and “conflict relationships.” *Id.* The finished product yielded four maps visualizing complex societal institutions and relationships which enable obstacles or conflicts in achieving accountability for torture. *Id.* at 24 (*APPENDIX 2: TACTICAL MAPS*). The “spectrum of allies” exercise produced maps visually similar to the tactical maps, however the substance and purpose behind the former is to identify future allies and “achievable goals” rather than obstacles and conflicts. *Id.* at 7. The participants divided into the same preset groups and beginning at the far left end of the spectrum placed organizations and individuals identified as “active allies,” then subsequently continuing to the right end of the spectrum placed “passive allies,” “neutral parties,” “passive adversaries,” and “active adversaries” accordingly. *See Id.* at 28–31 (*APPENDIX 3: SPECTRUMS OF ALLIES*).

⁷⁸¹ *Id.* at 8.

⁷⁸² *Id.* at 8–9.

⁷⁸³ *Id.* For full text of the letter, see *APPENDIX 4: LETTER TO SEN. FEINSTEIN*.

⁷⁸⁴ *Id.* at 11.

establish a more comprehensive plan for tracking key relationships and interventions required to achieve accountability.⁷⁸⁵ Additionally, it can be a documenting tool, a means to monitor the progress of the local movement, “enabling the actors to identify points of strength and weakness to deploy resources and activities dynamically.”⁷⁸⁶ Lastly, the information gleaned from a tactical mapping exercise can be used as a training tool as additional local advocates are recruited into the efforts. Employing these tactics locally can help advocates immensely, but it will be most effective if maps and strategies are regularly updated and shared with all organizations involved in the local accountability movement. Further, participants interested in accountability should collaborate to identify key campaigns and programmatic initiatives to be locally implemented.

C. The Constitution Project Bipartisan Task Force on Detainee Treatment

The Constitution Project (TCP) was among the long list of organizations in attendance at the September Accountability and Tactical Mapping conference (discussed above).⁷⁸⁷ The task force was a bi-partisan effort, comprised of “former high-ranking officials with distinguished careers in the judiciary, Congress, the diplomatic service, law enforcement, the military, and other parts of the executive branch, as well as recognized experts in law, medicine and ethics...conservatives and liberals, Republicans and Democrats.”⁷⁸⁸ The task force’s objective was to “bring to the American people a comprehensive understanding of what is known and what

⁷⁸⁵ Douglas A. Johnson & Nancy L. Pearson, *Tactical Mapping: How Nonprofits Can Identify the Levers of Change*, NONPROFIT QUARTERLY 92 (2009).

⁷⁸⁶ *Id.*

⁷⁸⁷ See CENTER FOR VICTIMS OF TORTURE, *supra* note 779, at 5.

⁷⁸⁸ Virginia E. Sloan, President, The Constitution Project, The Constitution Project’s Task Force on Detainee Treatment, The Task Force, Acknowledgments (April 16, 2013), <http://detainee-taskforce.org/the-task-force/supportersacknowledgements/>.

may still be unknown about the past and current treatment of detainees by the U.S. government, as part of the counterterrorism policies of the Obama, Bush and Clinton administrations.”⁷⁸⁹

In 2013, after two years of investigation, the task force released its report with findings and recommendations regarding detainee treatment.⁷⁹⁰ Among the critical findings, the Task Force unequivocally stated “U.S. forces, in many instances, used interrogation techniques on detainees that constitute torture. American personnel conducted an even larger number of interrogations that involved “cruel, inhuman, or degrading” treatment. Both categories of actions violate U.S. laws and international treaties. Such conduct was directly counter to values of the Constitution and our nation.”⁷⁹¹

The task force also found that diplomatic assurances that the receiving countries would not torture suspects proved unreliable in several notable rendition cases, although the full extent of diplomatic assurances obtained is still unknown. The Task Force believes that ample evidence existed regarding the practices of the receiving countries that rendered individuals were “more likely than not” to be tortured.⁷⁹² These findings demonstrate the incomplete nature of the Senate Report that did not include information about individuals rendered to foreign custody.⁷⁹³

The Constitution Project’s Task Force on Detainee Treatment offered recommendations that included establishing a mechanism to provide “as thorough as possible an understanding of what occurred during this period of serious [9/11 related] threat – and a willingness to acknowledge any shortcomings – [which would] strengthen [] the nation and equip [] us to

⁷⁸⁹ Press Release, The Constitution Project, Task Force on Detainee Treatment Launched (Dec. 17, 2010), *available at* http://www.constitutionproject.org/pdf/TF_Launch.pdf.

⁷⁹⁰ *See* THE REPORT OF THE CONSTITUTION PROJECT’S TASK FORCE ON DETAINEE TREATMENT, THE CONSTITUTION PROJECT (2013), *available at* <http://detaineeataskforce.org/read/index.html#/1/zoomed> [hereinafter DETAINEE TREATMENT].

⁷⁹¹ *Id.* at 26.

⁷⁹² *Id.* at 34.

⁷⁹³ *See* DETAINEE TREATMENT, *supra* note 790.

better cope with the next crisis ones after that. Moving on without such a reckoning weakens our ability to claim our place as an exemplary practitioner of the rule of law.”⁷⁹⁴ The Task Force Report found that “[t]he high level of secrecy surrounding the rendition and torture of detainees since September 11 cannot continue to be justified on the basis of national security.”⁷⁹⁵

D. American Civil Liberties Union (ACLU) Blueprint for Accountability

The ACLU has published a Blueprint for Accountability that makes five recommendations for moving forward.⁷⁹⁶ First, the Attorney General should appoint a special prosecutor.⁷⁹⁷ Second, Congress must reform the CIA. Third, the United States must officially acknowledge its wrongdoing, and apologize and provide compensation to victims.⁷⁹⁸ Fourth, the Obama administration should publicly honor the courage of government officials who objected to the unlawful but state sanctioned Torture Program in order to encourage future public servants in a similar situation to report and not engage in such abuse.⁷⁹⁹ Fifth, additional information from the 6,000 pages of the actual Torture Report, beyond the mere 525 page executive summary that was released, should be made public to facilitate transparency.⁸⁰⁰

E. North Carolina Stop Torture Now

The government, after being approached various times over the past several years, has refused to organize, much less partake, in any sort of formal accountability. However, this does not foreclose the possibility for accountability, and North Carolina Stop Torture Now in

⁷⁹⁴ *Id.* at 19.

⁷⁹⁵ *Id.* at 38.

⁷⁹⁶ THE U.S. TORTURE PROGRAM: A BLUEPRINT FOR ACCOUNTABILITY, ACLU (2014), *available at* https://www.aclu.org/sites/default/files/assets/torture_accountability_blueprint.pdf.

⁷⁹⁷ *Id.*

⁷⁹⁸ *Id.*

⁷⁹⁹ *Id.*

⁸⁰⁰ *Id.* See also, “No More Excuses: A Roadmap to Justice for CIA Torture” by Human Rights Watch. <https://www.hrw.org/report/2015/12/01/no-more-excuses/roadmap-justice-cia-torture>

conjunction with the UNC School of Law Human Rights Policy Seminar has recommended a citizen-led inquiry absent government cooperation.

One recommended possibility would be an accountability commission that is nationally coordinated and includes multiple phases, chapters, or foci. For example, while local government hosting of rendition aviation might be one point of inquiry, another could be the role of health professionals, and yet another could be the role of media, film, and TV in shaping public acceptance of torture. An accountability process would begin to get at the roots of how a nation supposedly committed to democracy and human rights could instead commit itself systematically, and with the involvement of so many levels of society, to secret detention and torture.

III. ADDITIONAL MODELS IN TRANSITIONAL JUSTICE

A. With Government Sponsorship

1. South African Truth and Reconciliation Commission (SATRC)

There are several important principles that can be drawn from the 1996 SATRC model, which provided for accountability and a peaceful transition from apartheid to democracy.⁸⁰¹ First, SATRC was divided into three distinct subject matter committees: the Human Rights Violations Committee, the Reparations and Rehabilitation Committee, and the Amnesty Committee.⁸⁰² The Human Rights Committee was primarily tasked with compiling an extensive record by conducting victim hearings, while the latter two committees implemented

⁸⁰¹ See, e.g., Anurima Bhargava, *Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission*, 102 COLUM. L. REV. 1304 (2002). It should be noted that a necessary component of the SATRC's success was the general provision in South Africa's constitution granting amnesty for criminal actions perpetrated during apartheid (only) if an individual provided 'full disclosure of all relevant facts' and demonstrated that the act was 'associated with a political objective.' See e.g. Balkin, *supra* note 778 (quoting § 20(1) of Promotion of Nat'l Unity & Reconciliation Act 34 of 1995).

⁸⁰² See Bhargava, *supra* note 801, at 1306.

recommendations and remedies.⁸⁰³ Similarly, a division in a citizen inquiry (were government accountability not an option) into extraordinary rendition and torture would be efficient. For example, one committee could take victim and witness testimony and issue a report of the findings, while another committee would be tasked with implementing recommendations and disseminating information to unaware citizens and key public.

Secondly, at the initiation of the SATRC, leaders went to great trouble to explicitly define “political crimes,” i.e. those crimes that would be included within the scope of the investigation.⁸⁰⁴ The ultimate definition of “political crimes” included a list of factors that committee members considered and determined so that there was agreement about parameters of the investigation and the nature of the wrongdoing under investigation.⁸⁰⁵ Similarly, in an accountability inquiry, the overseeing body should clearly define key terms such as “torture,” “extraordinary rendition,” “diplomatic assurances,” “conspiracy” etc., to provide guidelines to commissioners so that the inquiry remains consistent and relatively objective in scope.

However, scholars have urged that an effective domestic inquiry commission on extraordinary rendition and torture must be distinguished from the SATRC,⁸⁰⁶ because “we are not trying to coax former adversaries together to build a new nation; rather, we need to renew our commitment to human rights and the rule of law and prevent future abuses.”⁸⁰⁷ The detention of non-citizens outside U.S. territory is another factor that makes accountability for ER and torture different from accountability for apartheid.⁸⁰⁸ Thus, any effective model for accountability must

⁸⁰³ *Id.*

⁸⁰⁴ *See* Promotion of Nat’l Unity & Reconciliation Act 34 of 1995 § 20 (S. Afr.).

⁸⁰⁵ *Id.*

⁸⁰⁶ *See, e.g.,* Brown, *supra* note 777.

⁸⁰⁷ *See, e.g.,* Balkin, *supra* note 778.

⁸⁰⁸ *Id.*

be accompanied by a repudiation of “secret laws,” or laws carried out in secret to facilitate counter-terrorism tactics following September 11, 2001.⁸⁰⁹

2. Peruvian Truth and Reconciliation Commission⁸¹⁰

The CVT is an especially helpful model for accountability that does not seek retribution, but truth, public disclosure, and public restoration of faith in the justice system.⁸¹¹ The CVT sought to end impunity, attend to the needs of victims, initiate state investigations and systematic reforms, gain a critical perspective to confront internal conflict, and condemn individuals and institutions for abuses in the wake of human rights atrocities in Peru spanning two decades.⁸¹² It accomplished this primarily through a “truth-seeking” operation in which victim and perpetrator stories were identified through the course of public hearings and compiled in a final commission report.⁸¹³

The CVT model provides guidance for establishing an extensive fact-finding operation.⁸¹⁴ During its investigation phase, over eight hundred members of the CRV traveled to the twenty-four geographic subdivisions across Peru and collected almost seventeen thousand first-hand testimonies.⁸¹⁵ The CVT conducted public hearings across the nation, collecting four hundred testimonies relevant to three hundred specific cases of human rights abuses.⁸¹⁶ The

⁸⁰⁹ *Id.*

⁸¹⁰ La Comisión de la Verdad y Reconciliación [hereinafter CVT].

⁸¹¹ Jocelyn E. Getgen, *Untold Truths: The Exclusion of Enforced Sterilizations from the Peruvian Truth Commission's Final Report*, 29 B.C. THIRD WORLD L.J. 2 (2009) (citing Supreme Decree 065-2001- PCM art. 1).

⁸¹² *Id.* The stated purpose of the government-sponsored CVT was to “promote national reconciliation, the rule of justice and the strengthening of constitutional regime” in response to the human rights atrocities occurring between 1980 and 2000. *Id.*

⁸¹³ Jill E. Williams, *Legitimacy and Effectiveness of a Grassroots Truth and Reconciliation Commission*, 72 LAW & CONTEMP. PROBS. 143 (2009).

⁸¹⁴ AMNESTY INT’L, PERU: THE TRUTH AND RECONCILIATION COMMISSION - A FIRST STEP TOWARDS A COUNTRY WITHOUT INJUSTICE 2–3 (2004) [hereinafter First Step], available at <https://www.amnesty.org/en/documents/amr46/003/2004/en/>.

⁸¹⁵ *Id.* at 3.

⁸¹⁶ *Id.*

public hearings were essential to the Peruvian healing process. As Amnesty International observed, “the public hearings and the coverage of them in the media helped not only to make large sections of the population aware of the scale of the human rights violations and abuses committed during the conflict but also to give the survivors back their dignity by giving them the opportunity to be heard, very often for the first time.”⁸¹⁷

This model’s elements of “truth-seeking” and extensive fact-finding are particularly helpful for specific application to a domestic accountability inquiry of torture claims, because it would finally allow for victims’ stories to be told – often a necessary part of their healing process. It becomes even more important that the victims’ stories be heard publicly and collectively released in a report to gather political support for a domestic accountability movement. Such fact-finding and public disclosure of the stories of victims would also likely lead to a government acknowledgement of its actions if the inquiry were to be done with government sponsorship, as in the CVT model. This provides not only accountability to individual victims, but also accountability and transparency for the public that is especially necessary when it comes to a government’s human rights violations. Even if an inquiry based on a CVT model were to be done without government sponsorship, it would add to the momentum against circumventing accountability efforts, and allowing the government to invoke state secrets doctrine, by putting more information into the public sphere.

3. Illinois Torture Inquiry and Relief Commission (ITIRC)

The ITIRC can serve as a model of state-sponsored action to support accountability efforts when traditional mechanisms of accountability have proved fruitless, which could be useful guidance in the context of torture claims against the U.S. government. In 2009, the

⁸¹⁷ *Id.* at 4.

Illinois legislature signed into law Public Act 096-0223,⁸¹⁸ which institutionalized a formal investigative commission and hearing process in response to a twenty-year history of police abuses and allegations of torture under Commander Jon Burge.⁸¹⁹ The state's sponsorship of the commission was seen as a remedy of "last resort" for victims who have exhausted all other legal avenues in Illinois' criminal justice system.⁸²⁰

Though the ITIRC accountability process, which found credible evidence of torture in the Chicago Police Department, was ultimately defunded,⁸²¹ it was important in setting the groundwork for the May 2015 Chicago City Council ordinance providing comprehensive accountability measures for the torture victims.⁸²² On May 6, 2015, almost three years after the ITIRC's defunding, the persistence of grassroots organizations in their push for torture accountability resulted in the Chicago City Council's approval of an accountability ordinance for Burge's torture victims.⁸²³ The ordinance is the first of its kind and draws from CAT and global human rights practices.⁸²⁴ Under the ordinance, the city will pay eligible survivors from a special fund, offer psychological counseling to victims and their family members, create a public

⁸¹⁸ Public Act 096-0223, 96th Gen. Assemb. (Ill. 2009).

⁸¹⁹ See Tracy Siska, *Illinois Torture Inquiry and Relief Commission, Better as a Truth Commission?* CHI. JUSTICE PROJECT, <http://www.chicagojustice.org/articles/illinois-torture-inquiry-and-relief-commission> (last visited Nov. 2, 2015).

⁸²⁰ See *id.*

⁸²¹ G. Flint Taylor, *The Illinois Torture Inquiry and Relief Commission – Defunded but Not Forgotten*, HUFF. POST (Sept. 25, 2012), http://www.huffingtonpost.com/g-flint-taylor/illinois-torture-inquiry-relief-commission_b_1911108.html [<http://perma.cc/23SR-9QXQ>].

⁸²² Aamer Madhani, *Chicago City Council Approves Reparations for Police Torture Victims*, USA TODAY (May 6, 2015, 5:45 PM), <http://www.usatoday.com/story/news/2015/05/06/chicago-city-council-torture-reparations-jon-burge/70885118/>.

⁸²³ Kristen Gwynne, *Chicago to Pay \$5.5 Million in Reparations for Police Torture*, ROLLING STONE (May 6, 2015), <http://www.rollingstone.com/politics/news/chicago-to-pay-5-5-million-in-reparations-for-police-torture-victims-20150506> [<http://perma.cc/JN5L-VSKR>].

⁸²⁴ Adeshina Emmanuel, *Human Rights Practices Inform Chicago Ordinance in Police Torture Case*, CHI. REPORTER (May 6, 2015), <http://chicagoreporter.com/human-rights-practices-inform-chicago-ordinance-in-police-torture-case/> [<http://perma.cc/LUZ6-NMUH>].

monument to memorialize the victims, and teach students about the police department's human rights violations as part of the Chicago public high school curriculum.⁸²⁵

As Chicago mayor Rahm Emanuel aptly remarked “This is another step, but an essential step toward righting a wrong.”⁸²⁶ The ordinance's approval, the culmination of persistent grassroots efforts spanning several years, serves as a potent reminder inspiration for those pushing for torture accountability that persistence pays off, and the passage of time should not dissuade those who seek justice for torture victims. The comprehensive measures to be implemented serve as a model for the multi-faceted manner in which torture accountability must be approached, integrating both backward and forward looking elements. The incorporation of an official apology is indispensable to the healing process. Providing measures such as counseling to address the continuing effects and future harms stemming from torture instead of solely recognizing and apologizing for what has been done in the past is also vital for torture accountability. Educating the community and its future leaders about torture violations that have already occurred is an integral step toward ensuring those same violations are not repeated.

Thus, the ITIRC accountability efforts and subsequent Chicago Ordinance provide especially useful insight to the U.S. government's current situation in the aftermath of the CIA Program.⁸²⁷ Chicago's measures also serve as a powerful example to follow for American government actors to publicly recognize their shortcomings in the global human rights arena and take steps to amend them, improve, and begin a healing process for torture victims and the community.

B. Without Government Involvement/Citizen Commissions

⁸²⁵ *Id.*

⁸²⁶ *Id.*

⁸²⁷ *See id.* (“Chicago has taken a historic step to show the country, and the world, that there should be no expiration date on reparations for crimes as heinous as torture.”)(quoting Steven Hawkins, Executive Director, Amnesty International USA, Statement).

1. Greensboro Truth and Reconciliation Commission (GTRC)

The GTRC serves as a model for a citizen sponsored accountability effort that includes a truth-seeking component, initiated after all-white juries in North Carolina acquitted members of a group of American Nazi and Klansmen who shot five communist party protest marchers and wounded ten others, and the state never formally admitted any fault.⁸²⁸ Greensboro residents, inspired by the South African and Peruvian commissions, initiated a citizen Truth and Reconciliation Commission to take public testimony and examine the causes and consequences of the massacres twenty years after the actual incident, during an especially tense time of civilian-police relations.⁸²⁹

A distinctive characteristic of this proposed commission was the complete lack of government sponsorship, which meant that the commission had no subpoena power or authority to grant the protections of amnesty.⁸³⁰ However, this perceived lack of “official authority” did not dampen the meaningful pursuit for truth and justice. The GTRC kept with the South African model and “conducted its research and community outreach by taking private statements, holding public hearings, and conducting documentary research.”⁸³¹ The success of the citizen commission is also attributable to its forward-looking mandate and independent selection process, which ensured community-wide legitimacy.⁸³²

The GTRC serves as a model for citizen-led inquiries and methods for effectiveness without state sponsorship. It is also especially instructive for parties pushing for local

⁸²⁸ MANDATE FOR THE GREENSBORO TRUTH AND RECONCILIATION COMMISSION 1 (2003) [hereinafter GTRC Mandate] available at <http://www.greensborotrc.org/mandate.php>.

⁸²⁹ See Williams, *supra* note 813.

⁸³⁰ See *id.* at 144.

⁸³¹ See *id.* at 145.

⁸³² See *id.* at 148.

accountability efforts, such as NCSTN’s call for accountability in North Carolina, home to Aero Contractors, a corporation that flies the notorious “torture taxis.”⁸³³ Though GTRC modeled itself after the SATRC and the CVT, it kept to a local model and implemented two key practices: (1) taking statements from a broad range of people and (2) engaging the public through hearings and discussion forums.⁸³⁴ Although local citizen commissions like the GTRC lack the state-sponsored authority to compel testimonies, the GTRC used “moral suasion” as a surprisingly powerful tool in inspiring forthcoming participation by seemingly uncooperative community members.⁸³⁵ Additionally, early in the initiation of the GTRC, members drafted a mandate in which they endeavored to develop a collective understanding of what “truth” and “reconciliation” meant in terms of the Commission’s goals.⁸³⁶ Similarly, it will be helpful for a local inquiry on extraordinary rendition and torture to define “accountability” and “truth” at the outset, as well as other key terms that are not yet concretely established.

The GTRC, established twenty years after the shootings and subsequent acquittals, also serves as a reminder that it is never too late to begin accountability efforts, and only then can effective healing truly begin for victims, their families, and the community. An excerpt from the mandate reads, “There comes a time in the life of every community when it must look humbly and seriously into its past in order to provide the best possible foundation for moving into a future based on healing and hope. Many residents of Greensboro believe that for this city, the

⁸³³ See Joby Warrick, *Ten Years Later, CIA ‘Rendition’ Program Still Divides N.C. Town*, WASH. POST (Feb. 9, 2012), https://www.washingtonpost.com/world/national-security/ten-years-later-cia-rendition-program-still-divides-nc-town/2012/01/23/gIQAwrAU2Q_story.html.

⁸³⁴ GREENSBORO TRUTH AND RECONCILIATION COMMISSION FINAL REPORT: INTRODUCTION 14 (2006) [hereinafter GTRC Report Introduction] available at <http://www.greensborotrc.org/introduction.pdf>.

⁸³⁵ *Id.* at 15.

⁸³⁶ See *id.* at 19; GTRC Mandate, *supra* note 828.

time is now.”⁸³⁷ Similarly, many U.S. citizens believe the time to hold our government accountable for its human rights violations with regard to the CIA’s torture program is now.

IV. CONCLUSION

There is a great deal of wisdom to be extracted from previous accountability efforts as advocates move forward in their push for accountability for the Torture Program. Several vital lessons are to be learned from the successes and failures of other accountability efforts, with respect both to the Torture Program and other international and domestic governmental human rights violations. Grassroots efforts can make all the difference in whether a government is held accountable, and thus advocates should be patient and persistent in their efforts. Accountability can move forward without government involvement if necessary as a last resort, although a more meaningful effort would involve government officials in admitting the harm done. It is never too late to seek accountability for a wrong done, in part because a community cannot begin to truly move forward until it has looked back at what went awry in its past to ensure that history will not repeat itself.

⁸³⁷ GTRC Mandate, *supra* note 828.

CONCLUDING STATEMENT

As this report has detailed, there have been several significant developments in the global arena on the issues of torture and extraordinary rendition. These new developments, from the United States appearances before UN treaty bodies, the release of the Senate Torture Report, investigation and litigation in domestic, foreign and international courts, and the continued exposure and education journalists bring to the issues of torture and extraordinary rendition, suggest new possibilities in the pursuit of accountability and justice for the parties and victims of the Program.⁸³⁸

Recent disclosures, U.S. commitments, and legal interpretation suggest that it will be more difficult for the United States to maintain its position of refusing to account for the harms it has caused, while maintaining any semblance of credibility, and without forfeiting its ability to assert its place as a civilized society bound to the rule of law. Advocates for accountability and justice can and should make use of these developments not only out of obligations to past victims, but also to ensure that torture is not used in the future.

In accordance with its stated commitment to international human rights, the United States government must confront the human rights violations committed through its Torture Program, and provide acknowledgement and reparations for its victims. It is only after these past wrongs have been acknowledged and sincere efforts have been made to make the victims whole again that the United States can, in good conscience, look toward the future. As one international human rights law expert stated, “[w]hile it can take various forms and be implemented through

⁸³⁸ Recently, a lawsuit was filed on behalf of torture victims against two psychologists contracted by the CIA to design, implement, and oversee the agency’s post-9/11 torture program. *See Salim v. Mitchell – Lawsuit Against Psychologists Behind CIA Torture Program*, Oct. 13, 2015 available at <https://www.aclu.org/cases/salim-v-mitchell-lawsuit-against-psychologists-behind-cia-torture-program>.

various mechanisms, reparation for acts of torture committed during the CIA's detention and interrogation program would play an important role in upholding the law, deterring future violations, and coming to terms with the past, which are all necessary before it becomes possible to honor President Obama's commitment to looking 'forward, as opposed to looking backwards.'⁸³⁹

Although President Obama has stated this preference for moving forward, he has created a false dichotomy, acting as though looking forward precludes accountability. "The nation cannot move forward in any meaningful way without coming to terms, legally and morally, with the abhorrent acts that were authorized, given a false patina of legality, and committed by American men and women from the highest levels of government on down."⁸⁴⁰

⁸³⁹ Nathalie Weizmann, *State Responsibility and Reparation for Torture as a Violation of IHL*, JUST SECURITY (Dec. 10, 2014, 9:16 AM), <https://www.justsecurity.org/18232/state-responsibility-reparation-torture-violation-ihl/> [<https://perma.cc/755V-KBEN>].

⁸⁴⁰ Editorial Board, *Prosecute Torturers and Their Bosses*, N.Y. TIMES (Dec. 21, 2014), http://www.nytimes.com/2014/12/22/opinion/prosecute-torturers-and-their-bosses.html?_r=0.