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DENIAL OF JUSTICE:
THE UNITED STATES' FAILURE TO PROSECUTE SENIOR OFFICIALS FOR TORTURE[1]

Materials Submitted in Support of Hearing on

Human Rights Situation of People Affected by the U.S. Rendition, Detention, and Interrogation Program

before the Inter-American Commission on Human Rights

156th Ordinary Period of Sessions
October 23, 2015

Key Facts and Arguments

- Officials at the highest levels of the United States government created, designed, authorized, and implemented a sophisticated, international criminal program of torture and cruel, inhuman, or degrading treatment or punishment.

- In August 2014, President Barack Obama conceded that the United States tortured people as part of its "War on Terror." In December 2014, the Senate Select Committee on Intelligence released the Executive Summary of its report on the Central Intelligence Agency's detention and interrogation program, providing further evidence of state-sanctioned torture.

- The Inter-American Commission on Human Rights and other human rights authorities have called on the United States to conduct an in-depth and independent investigation into all allegations of torture and other cruel, inhuman, or degrading treatment or punishment, and to prosecute and punish those responsible.

- To date, the United States has declined to prosecute any senior officials for these crimes. Moreover, the United States has taken active steps to shield these officials from liability.

- The United States is thus in violation of its human rights obligations.

[1] This submission is an adaptation of the shadow report to the United Nations Committee Against Torture on the Review of the Periodic Report of the United States of America prepared and submitted by Advocates for U.S. Torture Prosecutions (Sept. 29, 2014). The original submission can be found at the following link: http://hrp.law.harvard.edu/wp-content/uploads/2014/10/CAT-Shadow-Report-Advocates-for-US-Torture-Prosecutions.pdf.

Key Sources

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Analysis

I. The U.S. government continues to shield from accountability high-level officials who created, designed, authorized, and/or implemented its criminal program of torture.

A. The U.S. government's criminal program of torture was authorized at the highest levels.

Officials at the highest levels of the U.S. government created, designed, authorized, and implemented a sophisticated, international criminal program of torture between 2001 and 2007.[2] In August 2014, President Obama conceded that the United States tortured people as part of its so-called "War on Terror,"[3] yet the current administration continues to shield senior officials from liability for these crimes, in violation of the Convention Against Torture ("CAT"), the International Covenant on Civil and Political Rights ("ICCPR"), the Charter of the Organization of American States ("OAS Charter"), and the American Declaration on the Rights and Duties of Man ("American Declaration").

The techniques in question, sometimes styled as interrogation techniques and sometimes as detention procedures, included near-drowning ("waterboarding"), sleep deprivation for days, and

[2] According to the Senate Intelligence Committee Report, the CIA's detention and interrogation operations officially commenced with then President George W. Bush's signing of a covert Memorandum of Notification (MON) that granted the CIA a wide latitude of previously unauthorized powers on September 17, 2001. *Executive Summary* in STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, U.S. SENATE SELECT COMM. ON INTELLIGENCE 11 (2014), http://fas.org/irp/congress/2014_rpt/ssci-rdi.pdf [hereinafter SENATE INTELLIGENCE COMM. REPORT]. While the last recorded use of torture by the CIA cited in that report was on November 8, 2007, the Committee found that the CIA continued to hold detainees until April 2008. *Findings and Conclusions* in SENATE INTELLIGENCE COMM. REPORT at 16. On January 22, 2009, President Obama issued Executive Order 13491, which ordered the closure of CIA detention facilities and prohibited the use of enhanced interrogation techniques. *Executive Summary* in SENATE INTELLIGENCE COMM. REPORT at 171.

[3] *See* Press Conference by the President, The White House (Aug. 1, 2014), http://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president ("With respect to the larger point of the RDI report itself, even before I came into office I was very clear that in the immediate aftermath of 9/11 we did some things that were wrong. We did a whole lot of things that were right, but we tortured some folks.") [hereinafter Press Conference by the President (Aug. 1, 2014)].

forced nudity.[4] They have caused many people intense suffering, including severe mental harm[5] and, in some cases, death.[6]

The post-9/11 U.S. torture program was breathtaking in scope. Two presidential administrations are implicated—one through design and implementation, the other primarily (though not by any means exclusively)[7] through its cover-up and obstruction of justice. The program was conducted in the U.S. Guantánamo Bay Military Base, Cuba, as well as in secret locations around the world in collaboration with fifty-four countries, including Bosnia-Herzegovina, Canada, Djibouti, Egypt, Indonesia, Iraq, Italy, Jordan, Libya, Lithuania, Mauritania, Morocco, Pakistan, Poland, Romania, Russia, Syria, Thailand, the United Arab Emirates, the United Kingdom (Diego Garcia), and Yemen.[8] The program was conceived and authorized at the highest levels in the

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[4] *See* U.S. Department of Justice, *Memorandum for John R. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A*, 9-15 (May 10, 2005), http://media.luxmedia.com/aclu/olc_05102005_bradbury46pg.pdf [hereinafter Bradbury Memorandum].

[5] See, e.g., PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, BROKEN LIVES: MEDICAL EVIDENCE OF TORTURE BY U.S. PERSONNEL AND ITS IMPACT 91-93 (2008), https://s3.amazonaws.com/PHR_Reports/BrokenLaws_14.pdf (discussing the "presence of ongoing psychiatric disorders that can reasonably be attributed to [detainees'] experiences while in detention at U.S. facilities"); James Ball, Guantánamo Bay files: Grim Toll on Mental Health of Prisoners, THE GUARDIAN (Apr. 14, 2011), http://www.theguardian.com/world/2011/apr/25/Guantánamo-files-mental-health-suicides; Tom Ramstack, Guantánamo Judge Rules 9/11 Suspect Should be Tried with Others, REUTERS (Aug. 13, 2014), http://www.reuters.com/article/2014/08/13/us-usa-Guantánamo-idU.S.KBN0GD 22J20140813 ("A military judge ruled on Wednesday that one of the men accused of plotting the Sept. 11, 2001, attacks on the United States must at least temporarily rejoin the other four defendants in a single trial despite concerns about his mental health.").

[6] *See, e.g.*, U.S. Army Criminal Investigations Command, *Army Criminal Investigators Outline 27 Confirmed or Suspected Detainee Homicides for Operation Iraqi Freedom, Enduring Freedom* (Mar. 25, 2005), http://www.cid.army.mil/Documents/OIF-OEF%20Homicides.pdf; Human Rights Watch, *Afghanistan: Killing and Torture by U.S. Predate Abu Ghraib* (May 21, 2005), http://www.hrw.org/news/2005/05/20/afghanistan-killing-and-torture-us-predate-abu-ghraib ("Human Rights Watch said that at least six detainees in U.S. custody in Afghanistan have been killed since 2002, including one man held by the CIA. …[N]o U.S. personnel have been charged with homicide in any of these deaths, although U.S. Department of Defense documents show that five of the six deaths were clear homicides."); Tim Golden, *The Bagram File: Afghan Prison Abuse*, N.Y. TIMES (May 20, 2005), http://www.nytimes.com/packages/html/international/20050520_ABU.S.E_FEATURE/index.html ("The story of two Afghans' brutal death at the Bagram U.S. military base comes from a nearly 2,000-page Army criminal investigation file, a copy of which was obtained by the New York Times.").

[7] *See, e.g.*, Shadee Ashtari, *Guantánamo Bay Prisoner Files Historic Lawsuit Against Obama Over Force-Feeding*, THE HUFFINGTON POST (March 11, 2014), http://www.huffingtonpost.com/2014/03/11/Guantánamo-bay-force-feed-lawsuit_n_4942839.html (describing force-feeding that entails strapping detainee to a chair, inserting a tube down his throat, and feeding him liquid food while the detainee vomits and/or defecates on himself, a process that often results in internal injuries and has been described by detainees as a painful and humiliating experience); Charlie Savage, *Judge Orders U.S. to Stop Force-Feeding Syrian Held at Guantánamo*, N.Y. TIMES (May 16, 2014), http://www.nytimes.com/2014/05/17/us/politics/judge-orders-us-to-stop-force-feeding-syrian-held-at-Guantánamo.html?_r=0.

[8] *See* Peter Foster, *British Gave 'Full Co-operation' for CIA Black Jail on Diego Garcia, Report Claims*, THE TELEGRAPH (Apr. 10, 2014), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10758747/British-gave-full-co-operation-for-CIA-black-jail-on-Diego-Garcia-report-claims.html; Jamie Doward, *UK Ambassador 'Lobbied Senators to Hide Diego Garcia Role in Rendition'*, THE GUARDIAN (Aug.16, 2014), http://www.theguardian.com/world/2014/aug/16/uk-ambassador-senators-hide-diego-garcia-rendition-cia; OPEN SOCIETY JUSTICE INITIATIVE, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 60-118 (2013), http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf.

U.S. government, including by then President George W. Bush,[9] then Vice President Dick Cheney,[10] then Director of the Central Intelligence Agency ("CIA") George Tenet,[11] then National Security Advisor Condoleezza Rice,[12] then Defense Secretary Donald Rumsfeld,[13] then Secretary of State Colin Powell,[14] and then Attorney General John Ashcroft.[15]

[9] In his memoir, President Bush not only admits that he authorized "enhanced interrogation techniques" (i.e. torture) but also defends their use in interrogation, stating, "Had I not authorized waterboarding on senior al Qaeda leaders, I would have had to accept a greater risk that the country would be attacked. In the wake of 9/11, that was a risk I was unwilling to take. My most solemn responsibility as president was to protect the country. I approved the use of the interrogation techniques." *See* GEORGE BUSH, DECISION POINTS 169 (2010). President Bush further relates a conversation he had with then CIA director George Tenet, in which the director asks for permission to use "enhanced interrogation techniques"–including waterboarding–on Khalid Sheikh Mohammed. In response to the request for permission, President Bush responded, "Damn right." *Id.* at 170.

[10] In an interview with *The Washington Times*, Vice President Cheney responded to questions regarding the authorization of tactics such as waterboarding and sleep deprivation by saying, "I signed off on it; others did, as well, too. I wasn't the ultimate authority, obviously. As the Vice President, I don't run anything. But I was in the loop. I thought that it was absolutely the right thing to do." Jon Ward, *Cheney Interview Transcript*, THE WASHINGTON TIMES (Dec. 22, 2008), http://www.washingtontimes.com/blog/potus-notes/2008/dec/22/cheney-interview-transcript/print/#ixzz3DsqSxGmG.

[11] *See* Letter from Attorney General Eric Holder to Senator John D. Rockefeller, IV, *Release of Declassified Narrative Describing the Department of Justice Office of Legal Counsel's Opinions on the CIA's Detention and Interrogation Program* 3 (Apr. 22, 2009), http://intelligence.senate.gov/pdfs/olcopinion.pdf [hereinafter Letter from Attorney General Holder to Senator Rockefeller] ("On July 17, 2002, according to CIA records, the Director of Central Intelligence (DCI) met with the National Security Adviser, who advised that the CIA could proceed with its proposed interrogation of Abu Zubaydah."); Jan Crawford Greenberg et al., *Sources: Top Bush Advisors Approved 'Enhanced Interrogation Techniques'*, ABC NEWS (Apr. 9, 2008), http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256 ("In dozens of top-secret talks and meetings in the White House, the most senior Bush administration officials discussed and approved specific details of how high-value al Qaeda suspects would be interrogated by the Central Intelligence Agency. […] The advisers were members of the National Security Council's Principals Committee, a select group of senior officials who met frequently to advise President Bush on issues of national security policy. […] At the time, the Principals Committee included Vice President Cheney, former National Security Advisor Condoleezza Rice, Defense Secretary Donald Rumsfeld and Secretary of State Colin Powell, as well as CIA Director George Tenet and Attorney General John Ashcroft.").

[12] *See* Letter from Attorney General Holder to Senator Rockefeller, *supra* note 11; *see also* Crawford Greenberg et al., *Sources, Top Bush Advisors Approved 'Enhanced Interrogation Techniques*', *supra* note 11.

[13] U.S. SENATE ARMED SERVICES COMM., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY 94-97 (2008), http://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf [hereinafter SENATE ARMED SERVICES COMM. REPORT]. In approving the use of "stress positions (like standing) for a maximum of four hours," the Secretary wrote: "However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?" *Id.* at 97.

[14] *See* Crawford Greenberg et al., *Sources, Top Bush Advisors Approved 'Enhanced Interrogation Techniques*', *supra* note 11.

[15] *See id.*

The CIA, with advice from Egyptian and Saudi intelligence officials,[16] designed an interrogation program premised on torture techniques and sought retroactive legal approval[17] from the Department of Justice. Government lawyers in the Office of Legal Counsel ("OLC") of the Department of Justice provided legal pretext for the use of torture, euphemistically termed "enhanced interrogation techniques."[18] The OLC justified the use of techniques like near-drowning ("waterboarding"), stress positions, sleep deprivation, and forced nudity[19] by adopting an "absurdly narrow" legal definition of torture, described by the former Dean of Yale Law School Professor Harold Koh as "so narrow that it would have exculpated Saddam Hussein."[20] Even as the composition of the OLC and the legal memos changed over the following years, the standard effectively allowing for the use of torture techniques remained in place through the end of the Bush administration.[21]

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[16] Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES (Oct. 4, 2007), http://www.nytimes.com/2007/10/04/washington/04interrogate.html?pagewanted=all ("With virtually no experience in interrogations, the C.I.A. had constructed its program in a few harried months by consulting Egyptian and Saudi intelligence officials and copying Soviet interrogation methods long used in training American servicemen to withstand capture.").

[17] CIA interrogators applied what came to be called "enhanced interrogation techniques" on at least one detainee prior to the Office of Legal Counsel's authorization of such techniques in the Yoo-Bybee Memorandum on August 1, 2002. Then CIA Director George Tenet has stated that just after capturing Abu Zubaydah on March 28, 2002, the "CIA got into holding and interrogating detainees…in a serious way" and sought policy approval from the National Security Council to begin an interrogation program. SENATE ARMED SERVICES COMM. REPORT, *supra* note 13, at 16. Abu Zubaydah's lawyer, George (Brent) Mickum, has stated unequivocally that his client "was tortured brutally well before any legal memo was issued." Jason Leopold, *Revealed: Senate Report Contains New Details on CIA Black Cites*, AL JAZEERA (April 9, 2014), http://america.aljazeera.com/articles/2014/4/9/senate-cia-torture.html. Abu Zubaydah confirmed in an interview with the International Red Cross that his interrogators water-boarded him only three months after he underwent surgery, ostensibly for injuries he sustained during his capture in March, 2002. INT'L COMM. FOR THE RED CROSS, REPORT ON THE TREATMENT OF FOURTEEN "HIGH-VALUE DETAINEES" IN CIA CUSTODY 9-10 (2007), http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf; *see also* ALI H. SOUFAN, THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL QAEDA 383 (2011) (discussing Abu Zubaydah's surgery in the days after his capture); Brent Mickum, *The Truth about Abu Zubaydah*, THE GUARDIAN (Mar. 20, 2009), http://www.theguardian.com/commentisfree/cifamerica/2009/mar/30/Guantánamo-abu-zubaydah-torture (mentioning that Abu Zubaydah had surgery to treat wounds sustained in his capture in Pakistan); *The CIA Interrogation Techniques: Abu Zubayda March 2001 – Jan. 2003* 113–14, https://www.aclu.org/sites/default/files/pdfs/natsec/20100415_CIArelease_destructionoftapes.pdf.

[18] U.S. Department of Justice, Office of Legal Counsel, *Memorandum for Alberto R. Gonzales, Counsel to the President* (Aug. 1, 2002), http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf [hereinafter 2002 Yoo-Bybee Memorandum].

[19] Bradbury Memorandum, *supra* note 4, at 9–15.

[20] Harold Koh, *A World Without Torture*, 43 COLUM. J. OF TRANSNAT'L L. 641, 648, 654 (2005). *See also* 2002 Yoo-Bybee Memorandum, *supra* note 18, at 1 ("Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture […] it must result in significant psychological harm of significant duration, e.g. lasting for months or even years."). For further, extensive critique of the 2002 Yoo-Bybee Memorandum's legal justification of torture, *see* SENATE ARMED SERVICES COMM. REPORT, *supra* note 13, at 31–35 and *infra* note 51.

[21] On December 30, 2004, after the memorandum was released and just prior to the confirmation hearings of Alberto Gonzales for the position of Attorney General, the Department of Justice withdrew the 2002 Yoo-Bybee Memorandum and replaced it with new legal guidance purporting to clarify the standard. However, in preparing that advice, the memorandum added one carefully worded footnote: "While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set

A CIA lawyer sent to Guantánamo to advise military command on "legal authorities applicable to interrogations" summarized the distorted standard concocted in these memos by explaining: "…it is basically subject to perception. If the detainee dies you're doing it wrong." [22] By the time the legal guidance was disseminated, these techniques were already being applied by the CIA to some prisoners.[23] An internal government investigation found evidence that the OLC memoranda had been drafted to achieve a pre-ordained result desired by the client.[24] A U.S. Senate report captured this scheme of high-level authorization by stating, "[t]he fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees."[25]

B. Instead of prosecuting senior officials responsible for the torture program, the United States has actively shielded them.

President Obama admitted that U.S. officials tortured people, using techniques that, in his estimation, "any fair-minded person would believe were torture."[26] Nevertheless, the United States has yet to impartially and thoroughly investigate and prosecute senior officials, despite longstanding calls by U.S. civil society and the previous Concluding Observations of the Committee Against Torture considered below. The government has chosen instead to abide by the empty mantra of "look[ing] forward as opposed to looking backwards,"[27] at times even

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forth in this memorandum." Daniel Levin, *Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable under 18 U.S.C. Sections 2340-2340A* n. 8 (December 30, 2004) https://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc96.pdf [hereinafter Levin Memorandum]. A 2005 Office of Legal Counsel memorandum, which established the legal standard that would remain in place through the end of the Bush Administration, concluded that "[I]nterrogators would not reasonably expect that the combined use of the interrogation methods under consideration…would result in severe physical or mental pain or suffering within the meaning of sections 2340-2340 of [the U.S. extraterritorial torture statute]." Steven G. Bradbury, *Memorandum for John A. Rizzo, Senior Deputy Counsel, Central Intelligence Agency, Re: Application on 18 U.S.C. 2340 and 2340A to the Combined Use of Certain Techniques in the Interrogation of High Value Al Qaeda Detainees* 69 (May 10, 2005).

[22] SENATE ARMED SERVICES COMM. REPORT, *supra* note 13, at 54–55 (quoting CIA lawyer Jonathan Fredman in an October 2, 2002 meeting at Guantánamo Bay Military Base, Cuba).

[23] *See, e.g., supra* note 17.

[24] OFFICE OF PROFESSIONAL RESPONSIBILITY, 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 227 (2009) [hereinafter OPR INVESTIGATION]. *But see* David Margolis, *Memorandum for the Attorney General, Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the OPR's Report of Investigation into the OLC's Memoranda Concerning Issues Relating to the CIA's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* 53 (Jan. 5, 2010) [hereinafter Margolis Memorandum] (declining to find on the preponderance of evidence that the CIA intended to obtain maximum license to engage in torture with impunity and Yoo was their willing facilitator). However, the Margolis Memorandum failed to consider the suppression of dissenting opinions of other government lawyers or the evidence that the torture of Abu Zubaydah had begun prior to the 2002 Yoo-Bybee Memorandum. *See supra* note 17; *infra* notes 54-56.

[25] SENATE ARMED SERVICES COMM. REPORT, *supra* note 13, at xii.

[26] *See* Press Conference by the President (Aug. 1, 2014), *supra* note 3.

[27] *See, e.g.*, 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.

referring to the prospect of torture prosecutions as a "witch hunt."[28] The legal rationales offered by U.S. officials in attempts to shield those responsible for torture, including those at the highest levels, are contrary to international law, in addition to being inconsistent, flawed, and facially inapplicable to many senior officials.

1. **The U.S. government does not seem to have criminally investigated senior officials for involvement in torture and ill-treatment of detainees.**[29]

   The United States' Fourth Periodic Report to the Committee on Human Rights concerning the ICCPR was either vague[30] or referred to investigations that, based on statements made by the government, would seem to exclude those in command.[31] In particular, the investigation called by Attorney General Eric Holder in August 2009 and led by prosecutor John Durham appeared to have an excessively limited mandate. According to Holder, Durham investigated only "possible CIA involvement"[32] and focused primarily on CIA interrogators, and whether they used "unauthorized interrogation techniques."[33]

   For reasons that are unclear, the Attorney General's stated rationales for declining to prosecute have been a moving target. In 2009, the Attorney General said that officials who *"acted reasonably* and *relied in good faith on authoritative legal advice*" (emphasis added) from the Justice Department, and conformed their conduct to that advice, would not face federal prosecutions for that conduct.[34] By 2011, the Attorney General's view of what merited prosecution had narrowed even further. He

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[28] *See, e.g.*, Bill Meyer, *Obama Intel Pick Says No Torture on His Watch*, THE CLEVELAND (Jan. 22, 2009), http://www.cleveland.com/nation/index.ssf/2009/01/obama_intel_nominee_says_no_to.html ("However, a senior adviser to Obama told The Associated Press Wednesday that there is no intention to conduct a 'witch hunt' so prosecutions for those activities are unlikely.").

[29] See section below responding to the U.S. 2013 CAT Report.

[30] U.S. DEPARTMENT OF STATE, FOURTH PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMM. ON HUMAN RIGHTS CONCERNING THE INT'L COVENANT ON CIVIL AND POLITICAL RIGHTS ¶532 (2011) [hereinafter FOURTH PERIODIC REPORT TO THE COMM. ON HUMAN RIGHTS] ("The bulk of the investigation and prosecution of allegations of mistreatment of detainees held in connection with counterterrorism operations, including administrative and criminal inquiries and proceedings, have been carried out by the Department of Defense and other U.S. government components that have jurisdiction to carry out such actions.").

[31] U.S. DEPARTMENT OF STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMM. AGAINST TORTURE ¶135 (2013) [hereinafter U.S. 2013 CAT Report]; FOURTH PERIODIC REPORT TO THE COMM. ON HUMAN RIGHTS ¶182, *supra* note 30.

[32] U.S. Department of Justice, *Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees* (June 30, 2011), http://www.justice.gov/opa/pr/statement-attorney-general-regarding-investigation-interrogation-certain-detainees [hereinafter *Statement of the Attorney General Regarding Investigation*].

[33] U.S. Department of Justice, *Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees* (Aug. 30, 2012), http://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees [hereinafter *Statement of Attorney General on Closure of Investigation*].

[34] U.S. Department of Justice, *Department of Justice Releases Four Office of Legal Counsel Opinions* (Apr. 16, 2009), http://www.justice.gov/opa/pr/department-justice-releases-four-office-legal-counsel-opinions [hereinafter *DOJ Releases Four OLC Opinions*].

began to refer to his prior statements regarding the OLC's legal memos as promises of protection to those who "*acted in good faith and within the scope of the legal guidance* given by the Office of Legal Counsel" (emphasis added).[35]

In dropping the references to reliance and reasonableness, Holder may have been suggesting that any behavior falling within the OLC's outlier definition of legality (whether done with knowledge of this legal guidance or not) would be protected, irrespective of whether an individual relied upon, reasonably believed in, or even knew of or had access to the contents of the memos.

The Justice Department ultimately closed these investigations without charge in 2012.[36] The December 2014 release of portions of the Senate Select Committee on Intelligence's study of the CIA's Detention and Interrogation Program does not seem to have prompted the Justice Department to initiate a new review.[37]

2. **The United States has not prosecuted any senior-level officials.** There have been military courts-martial and administrative proceedings for acts of torture, but these have been almost exclusively limited to low-level private contractors or soldiers. [38] In its recent Concluding Observations, the Human Rights Committee noted with concern that reported investigations have "result[ed] in only a meagre number of criminal charges being brought against low-level operatives" and recommended that perpetrators, "including, in particular, persons in positions of command," be

[35] *Statement of the Attorney General Regarding Investigation*, *supra* note 32; *see also Statement of Attorney General on Closure of Investigation*, *supra* note 33 (The Attorney General later referred to the review as "examin[ing] primarily whether any unauthorized interrogation techniques were used by *CIA interrogators*, and if so, whether such techniques could constitute violations of the torture statute or any other applicable statute." (emphasis added)).

[36] *Statement of Attorney General on Closure of Investigation*, *supra* note 33 ("AUSA John Durham has now completed his investigations, and the Department has decided not to initiate criminal charges in these matters.").

[37] *See* Naureen Shah, Complaint to the Inspector General of the U.S. Department of Justice, AMNESTY INTERNATIONAL 8 (21 September 2015) (internal citations omitted), https://www.amnestyusa.org/pdfs/OIG ComplaintAmnestyInternationalUSA.pdf ("Nine months have passed since the publication of the Senate Committee summary and the Senate's transmittal of the full report to the Justice Department. In that time, the Justice Department has provided inconsistent accounts of its review of the full Senate report to the public, Congress and a U.S. court. It has apparently failed to review the report. It has not established a process for assessing any new evidence of criminal wrongdoing that the full report provides.")

[38] One CIA contractor was convicted of felony assault and misdemeanor assault while working in Afghanistan. *See* Appendix B, *Military Personnel Alleged to Have Engaged in Wrongful Conduct in Connection with Detainee Mistreatment*. Appendix C contains a list compiled by The Constitution Project, an independent Task Force convened by civil society, from press accounts of court martial proceedings and transcripts of those proceedings where available. The highest-ranked military officials who were sanctioned seem to have been a Brigadier General and a Lieutenant Colonel, both of whom received only administrative sanctions. *See id*; *see also* Eric Schmitt, *Four Top Officers Cleared by Army in Prison Abuses*, N.Y. TIMES (Apr. 23, 2005), http://www.nytimes.com/2005/04/23/politics/23abuse.html?_r=0 ("Brig. Gen. Janis Karpinski, an Army Reserve officer who commanded the military police unit at the Abu Ghraib prison, was relieved of her command and given a written reprimand. She has repeatedly said she was made the scapegoat for the failures of superiors.").

prosecuted and sanctioned.[39]

In its 2015 U.S. Universal Periodic Review report to the Human Rights Council, the United States invoked the rationale of insufficient "admissible evidence" to sustain a conviction.[40] Attorney General Holder had earlier articulated the same rationale specifically in the context of Durham's restricted investigation, which, by that time, was limited to the deaths of two men in CIA custody and, by all appearances, did not consider the criminal liability of senior-level officials.[41] A rationale of insufficient evidence would be very difficult to defend in the context of officials who have left lengthy paper trails and even admitted in their published memoirs to authorizing the program.[42]

3. **Reliance on severely flawed legal advice cannot be invoked as a defense to torture.**[43] First, reliance on advice of counsel cannot be a defense if, as the evidence suggests, the OLC memoranda were reverse engineered in pursuit of a specific result. An internal government investigation found "evidence that the OLC attorneys were aware of the result desired by the client and drafted memoranda to support that result,

[39] HUMAN RIGHTS COMM., CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT OF THE UNITED STATES OF AMERICA at 3 CCPR/C/USA/CO/4, April 23, 2014 [hereinafter HUMAN RIGHTS COMM., CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT].

[40] U.S. DEPARTMENT OF STATE, REPORT OF THE UNITED STATES OF AMERICA SUBMITTED TO THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW ¶95 (2015), http://www.state.gov/documents/organization/237460.pdf [hereinafter U.S. 2015 UPR Report].

[41] *Statement of Attorney General on Closure of Investigation*, supra note 33 ("Based on the fully developed factual record concerning the two deaths, the Department has declined prosecution because the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt."). This statement raises serious questions as to what other kinds of evidence Durham might have found and the reasons the Department of Justice concluded that it would be inadmissible.

[42] *See, e.g.*, BUSH, *supra* note 9, at 168-181 ("Had I not authorized waterboarding on senior al Qaeda leaders, I would have had to accept a greater risk that the country would be attacked."); JOHN RIZZO, COMPANY MAN 181-191 (2014) ("Above all, I wanted a written OLC memo in order to give the Agency—for lack of a better term—legal cover.").

[43] In 2009, Attorney General Holder invoked reliance on legal advice as a rationale for protection from prosecution in his mandate for a preliminary review into the interrogation of detainees. *See* U.S. Department of Justice, *Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees* (August 24, 2009), http://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees [hereinafter *Statement of Attorney General Holder Regarding a Preliminary Review*]. This rationale has also been invoked by other high level officials, such as then General Counsel for the CIA John Rizzo. In his recent book, Rizzo states "An OLC legal memorandum - the Executive Branch's functional equivalent of a Supreme Court opinion - would protect the Agency and its people for evermore. It would be as good as gold, I figured confidently. Too confidently, as things would turn out." RIZZO, *supra* note 42, at 188. Furthermore, in 2005 President Bush signed into law the Detainee Treatment Act of 2005 ("DTA"), which provides a legal defense to U.S. personnel dealing with the detention or interrogation of detainees, as long as those detainees were alleged by the President to be engaged in terrorist activities and the conduct was "officially authorized and determined to be lawful at the time that it was conducted." Detainee Treatment Act, P.L. 109-148, 19 Stat. 2680 § 1004(a) (2005) [hereinafter *Detainee Treatment Act of 2005*]. In 2006, the Military Commissions Act ("MCA") amended the DTA to provide that the defense based on reliance on legal advice contained in the DTA "relates to acts occurring between September 11, 2001, and December 30, 2005." Military Commissions Act, P.L. 109-366, 20 Stat. 2600 § 8(b) (2006) [hereinafter MCA 2006].

at the expense of their duty of thoroughness, objectivity, and candor,"[44] supporting the United Nations Human Rights Committee's characterization of the advice as "legal pretexts."[45] As such, neither the senior government officials who sought the pretexts nor the lawyers who provided them can claim reliance in good faith. Nor can the rationale apply in those cases when the legal memoranda were issued after the fact, in what would seem like an effort to justify and shield from criminal or civil liability conduct that was already underway.[46]

Second, any reliance on the OLC memoranda would have been patently unreasonable.[47] As President Obama said in August, any "fair-minded person" would consider the conduct in question to be torture.[48] Thus, to state, for example, that the near-drowning of a captive is not torture is, and was, absurd. Indeed, prior to September 11, 2001, the practice had already been recognized as torture in the United States.[49] The conduct was "manifestly illegal," as the Human Rights Committee recognized in its 2014 review of the United States.[50] The OLC memoranda have been widely condemned by the legal academy.[51]

The OLC memoranda were also condemned by senior officials within the Bush administration, including Legal Adviser to the Department of State William Taft, who vehemently registered his dissent.[52] Later, senior-level concerns and legal advice

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[44] OPR INVESTIGATION, *supra* note 24, at 227. *But see* Margolis Memorandum, *supra* note 24, at 67 (determining that there was no applicable duty to provide thorough, objective, and candid legal advice; stating that whether Yoo intentionally or recklessly provided misleading advice was a close question and concluding that he had not done so).

[45] HUMAN RIGHTS COMM., CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT, *supra* note 39.

[46] *See supra* note 17.

[47] In April of 2009, Attorney General Holder made clear that those who acted reasonably and relied in good faith on legal advice would not be prosecuted. *See DOJ Releases Four OLC Opinions*, *supra* note 34. His later statements, however, require neither reasonability nor good faith reliance on the advice. *See Statement of Attorney General Holder Regarding a Preliminary Review*.

[48] *See* Press Conference by the President (Aug. 1, 2014), *supra* note 3.

[49] On January 21, 1968, *The Washington Post* published a front-page photo of a U.S. soldier waterboarding a Vietnamese detainee. Two months after this photo was posted, the solider was court martialed. *See* Eric Weiner, *Waterboarding: A Tortured History*, NPR (Nov. 3, 2007), http://www.npr.org/2007/11/03/15886834/waterboarding-a-tortured-history. In 1901, in the aftermath of the Spanish-American War, the United States convicted an Army major for waterboarding an insurgent in the Philippines, sentencing him to 10 years of hard labor. *See History of an Interrogation Technique: Water Boarding*, ABC NEWS (Nov. 29, 2005), http://abcnews.go.com/WNT/Investigation/story?id=1356870. In 1984, a Texas County Sheriff and his deputies were convicted in federal court for using "water torture" tactics on their prisoners. *See United States v. Lee*, 744 F.2d 1124, 1125 (5th Cir. 1984). In 2006, the U.S. Department of State recognized waterboarding techniques being practiced in Tunisia as torture, stating "The forms of torture and other abuse included: […] submersion of the head in water." *See* U.S. DEPARTMENT OF STATE, 2005 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: TUNISIA (March 8, 2006), http://www.state.gov/j/drl/rls/hrrpt/2005/61700.htm.

[50] HUMAN RIGHTS COMM., CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT, *supra* note 39.

[51] *See, e.g.*, JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 89–95 (2007) (describing the "nearly unanimous" condemnation of the 2002 Yoo-Bybee Memorandum and citing Professors Harold Koh, Jeremy Waldron, David Luban and Ruth Wedgwood); Koh, *supra* note 20, at 647–654 ("in my professional opinion, the Bybee Opinion is perhaps the most clearly erroneous legal opinion I have ever read").

[52] As early as January of 2002, the Department of State's Legal Adviser William Taft advised John Yoo that the legal analysis underlying the Office of Legal Counsel's opinion that the Geneva Conventions did not apply to

questioning the legality of the interrogation techniques in question were summarily quashed. Counselor of the Department of State Philip Zelikow reported that a memorandum he had written in opposition to the authorization of "enhanced interrogation techniques"[53] had been ordered collected and destroyed.[54] In late 2002, the Legal Counsel to the Chairman of the Joint Chiefs of Staff commenced an independent legal review into the legality of proposed interrogation techniques, prompted by serious concerns raised by senior military lawyers at the Air Force, the Navy, the Marine Corps, the Office of the Judge Advocate General, and the Criminal Investigation Task Force.[55] The Chairman of the Joint Chiefs of Staff (at the request of the General Counsel of the Department of Defense William Haynes II) quickly shut it down.[56] The deliberate sidelining and suppression of senior dissenting voices further underlines that the OLC memoranda were authored and applied as a legal pretext for what was known to be unlawful.

Third, President Obama's position that the President has the authority to overrule an OLC decision in favor of advice from other administration lawyers—as he did when he disregarded the OLC's determination that he needed Congressional authorization to continue air strikes on Libya[57]—only emphasizes that the ultimate authority to authorize the torture program lies with the President, not the OLC. This renders reliance claims invoked by President Bush even less convincing.

Fourth, the attorneys who authored the legal memoranda authorizing the use of torture in the interrogation of detainees cannot claim reliance on their own legal advice. Moreover, in authorizing torture through distorted and clearly flawed interpretations of a State Party's obligations under CAT, the issuing of the legal advice itself was a violation of CAT.

Taliban soldiers detained in Afghanistan was "seriously flawed". *See* Memorandum from William H. Taft, IV to John C. Yoo, *Your Draft Memorandum of January 9* (Jan. 11, 2002), http://www2.gwu.edu/~nsarchiv/torturing democracy/documents/20020111.pdf. Secretary of State Colin Powell raised his objections to the Office of Legal Counsel's legal advice directly with the President. *See* John Barry et al., *The Roots of Torture*, NEWSWEEK (May 24, 2004), http://www.globalpolicy.org/component/content/article/157/26905.html [hereinafter *The Roots of Torture*]. Jack Goldsmith, head of the Office of Legal Counsel from 2003 to 2004, found the Bybee and Yoo memoranda "riddled with error" and characterized them as a "one-sided effort to eliminate any hurdles posed by the torture law." *See* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 149 (2009). Daniel Levin, head of the Office of Legal Counsel from 2004 to 2005, described the 2002 Yoo-Bybee Memorandum as "insane". OPR INVESTIGATION, *supra* note 24, at 160.

[53] Internal Memorandum, *The McCain Amendment and U.S. Obligations under Article 16 of the Convention Against Torture* (February 15, 2006), http://www2.gwu.edu/~nsarchiv/news/20120403/docs/Zelikow%20Feb%2015% 202006.pdf.

[54] Statement of Philip Zelikow to the U.S. Senate Committee on the Judiciary12 (May 13, 2009), http://www2.gwu.edu/~nsarchiv/news/20120403/docs/Statement%20of%20Philip%20Zelikow.pdf ("I later heard the memo was not considered appropriate for a further discussion and that copies of my memo should be collected and destroyed").

[55] SENATE ARMED SERVICES COMM. REPORT, *supra* note 13, at 67-70.

[56] *Id.* at 70-72.

[57] *See* Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), http://www.nytimes.com/2011/06/18/world/africa/18powers.html?pagewanted=all.

4. **Finally, the prohibition against torture is absolute.** The United States' shielding of senior officials who authorized, acquiesced or consented to torture violates the principle of non-derogability as understood in the Committee Against Torture's General Comment No. 2[58] and places the United States in continued breach of its international human rights obligations. The Convention provides that neither exceptional circumstances nor an order from a superior officer may be invoked as a justification of torture.[59] In elaborating on the absolute character of the prohibition in its General Comment, the Committee described it as "essential that the responsibility of any superior officials … be fully investigated through competent, independent and impartial prosecutorial and judicial authorities."[60]

C. The U.S. government has gone to great lengths to block other efforts to secure accountability, belying any good faith commitment to upholding its human rights obligations.

1. **The U.S. government has blocked or failed to cooperate with pertinent criminal proceedings in foreign courts**, including those of France,[61] Spain,[62] and Italy.[63]

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[58] COMMITTEE AGAINST TORTURE, GENERAL COMMENT NO. 2: IMPLEMENTATION OF ARTICLE 2 BY STATES PARTIES, CAT/C/GC/2, January 24, 2008 at ¶5 ("The Committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability") [*hereinafter* COMMITTEE AGAINST TORTURE, GENERAL COMMENT NO. 2].

[59] *See, e.g.*, U.N. CONVENTION AGAINST TORTURE Article 2(3) ("An order from a superior officer or a public authority may not be invoked as a justification of torture.") [hereinafter CAT]; MANFRED NOWAK AND ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 123 (2008) ("a legal obligation to obey orders and lack of knowledge that an order to practise torture is unlawful does not relieve the defendant of criminal responsibility"). In the Committee's 1990 consideration of Colombia, a Committee member noted that a Penal Code provision that justified illegal acts of subordinates if done "in compliance with a lawful order given by a competent authority in due form of law" was incompatible with Article 2(3) of the Convention. The Committee subsequently noted with satisfaction the law's amendment (stating that due obedience will not justify offences of torture, genocide, forced disappearance and forced displacement) as a positive development. *See* COMMITTEE AGAINST TORTURE, REPORT OF THE COMMITTEE AGAINST TORTURE, CAT/A/45/44 at ¶322 (June 21, 1990) http://www.bayefsky.com//general/a_45_44.pdf; COMMITTEE AGAINST TORTURE, CONCLUSIONS AND RECOMMENDATIONS OF THE COMMITTEE AGAINST TORTURE, CAT/C/CR/31/1, February 4, 2004 at ¶3(b).

[60] COMMITTEE AGAINST TORTURE, GENERAL COMMENT NO. 2, *supra* note 58, ¶26.

[61] *See* CENTER FOR CONSTITUTIONAL RIGHTS, UNIVERSAL JURISDICTION: ACCOUNTABILITY FOR U.S. TORTURE, http://www.ccrjustice.org/case-against-rumsfeld (last accessed Oct. 18, 2015) ("In January 2012, the former investigating magistrate, Sophie Clement, issued a formal request, or 'letter rogatory', to the United States. According to news reports, the French investigative judge requested access to the detention camp at Guantánamo Bay, to relevant documents as well as to all persons who had contact with the three victims during their detention there. The United States still has not replied.").

[62] *See* Andreas Schüller and Morenike Fajana, *Piecing Together the Puzzle: Making U.S. Torturers in Europe Accountable* 3 (2014), http://www.statewatch.org/analyses/no-256-torture-schuller-fajana.pdf.

[63] *See* Jacey Fortin, *CIA Terror War Torture and Rendition Program: An Italian Spy is Sentenced to Jail – Can Tenet, Rumsfeld, Cheney, Ashcroft Be Next?*,INT'L BUSINESS TIMES (2013), http://www.ibtimes.com/cia-terror-war-torture-rendition-program-italian-spy-sentenced-jail-can-tenet-rumsfeld-cheney ("An additional 23 Americans, including former CIA Milan station chief Robert Lady, were convicted by the Italian court in absentia in 2009 […] But the administration of U.S. President Barack Obama worked with then-Italian Prime Minister Silvio Berlusconi to suppress the court's request for extradition.").

2. **The Bush and Obama administrations and the U.S. Congress have repeatedly blocked attempts at redress in civil courts by torture survivors and the relatives of torture victims.** The Department of Justice under both administrations has invoked jurisdictional and immunity doctrines to shield government officials from civil liability for torture, and U.S. courts have largely deferred to the government's arguments.[64] For its part, Congress has passed legislation intended to hinder civil suits of government officials who authorized or participated in torture. [65] The United States continues to defend its refusal to grant redress by saying that, while mechanisms for remedies are available in U.S. courts, the government "cannot make commitments regarding their outcome."[66]

   The United States' 2013 Periodic Report to the Committee Against Torture ("U.S. 2013 CAT Report") presents an incomplete and disingenuous portrait of the availability of civil remedies for torture committed abroad. The United States invokes jurisdictional and immunity doctrines to shield government officials from civil liability for torture,[67] thus preventing victims and survivors of U.S. torture from obtaining full redress, compensation and rehabilitation. For example, the United States has asserted—and federal courts have accepted—that government employees should be granted immunity because they acted "within the scope of their employment" when they used waterboarding, dietary manipulation, walling, long-time standing, sleep deprivation, and water dousing on detainees, and because it was not "clearly established under the law at the time" that such techniques constituted torture.[68] The government has also blocked redress for survivors by arguing that the judicial imposition of such liability threatened national security,[69] and by invoking a vast "state secrets" privilege that suppressed information necessary to the victims'

[64] *See* Appendix C for a non-exhaustive list of cases brought by people held in U.S. custody abroad alleging torture or cruel, inhuman, or degrading treatment or punishment.

[65] *See Detainee Treatment Act of 2005*, *supra* note 43 (giving immunity to U.S. personnel who used authorized "operational practices" in the detention and interrogation of detainees alleged to be engaged in terrorist activities); MCA 2006, *supra* note 43.

[66] U.S. 2015 UPR Report, *supra* note 40, at 37.

[67] *See* Appendix C.

[68] *See, e.g.*, *Padilla v. Yoo*, 678 F.3d 748, 750 (9th Cir. 2012); *Ali v. Rumsfeld*, 649 F.3d 762, 770, 774 (D.C. Cir. 2011) (holding that as government employees acting within the scope of their employment, the defendants were entitled to qualified immunity from tort claims brought under the Alien Tort Statute and the Fourth Geneva Convention); *Janko v. Gates*, 741 F.3d 136, 141 (D.C. Cir. 2014)

[69] *See, e.g.*, *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (declining to recognize a *Bivens* action against government officials allegedly responsible for Arar's extraordinary rendition to Syria, where he was allegedly tortured, because "such an action would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation."); *Ali v. Rumsfeld*, 649 F.3d 762, 773 (D.C. Cir. 2011) (declining to recognize a *Bivens* action against former Secretary of Department of Defense and three high-ranking Army officers allegedly responsible for the plaintiffs' torture in U.S. custody in Iraq and Afghanistan, because "ability of armed forces to act decisively and without hesitation in defense of liberty and national interests would have been disrupted and hindered."); *Rasul v. Myers*, 563 F.3d 527, 530 (D.C. Cir. 2009) (holding that government officials enjoyed qualified immunity from plaintiffs' *Bivens* claims).

claims.[70] For its part, the U.S. Congress has passed legislation limiting civil liability for government officials who perpetrated torture. For example, in 2006, Congress passed the Military Commissions Act, denying courts the ability to hear civil claims brought by an "enemy combatant" against the United States and its agents. [71] As recently as 2014, the U.S. government has successfully raised this defense in a number of cases brought by torture victims and survivors.[72] In turn, U.S. courts have deferred to Congress's authority over the military system of justice, refusing to exercise judicial scrutiny over military affairs.[73]

3. **The Bush and Obama administrations have also shielded torture psychologists from professional liability.** The CIA finances a $5 million insurance policy[74] to cover the potential legal bills of the two contract psychologists who designed the foundation of the Agency's interrogation program and allegedly conducted dozens of waterboarding sessions themselves.[75] The Defense Department created Behavioral Science Consultation Teams, staffed with psychologists and psychiatrists who also developed torture techniques, advised interrogators on how to exploit prisoners, and calibrated their pain.[76] To protect them from professional liability, the Defense Department promulgated policies asserting that these psychologists, because they

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[70] *See, e.g., El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007).

[71] MCA 2006, *supra* note 43 § 7 ("Except as provided in [the Detainee Treatment Act of 2005] no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.").

[72] *See, e.g., Janko v. Gates*, 741 F.3d 136, 141 (D.C. Cir. 2014) (dismissing a Syrian citizen's claims for injuries sustained in Afghanistan and Guantánamo Bay); *Ameur v. Gates*, 759 F.3d 317, 322 (4th Cir. 2014) (dismissing an Algerian citizen's claims for injuries sustained in Afghanistan and Guantánamo Bay).

[73] *See, e.g., Lebron v. Rumsfeld*, 670 F.3d 540, 550 (4th Cir. 2012) (recognizing that Congress has the "constitutionally authorized source of authority over the military system of justice" and determining that a *Bivens* remedy would be "plainly inconsistent with Congress' authority in military affairs").

[74] CBS/Associated Press, *AP: CIA Granted Waterboarders $5M Legal Shield*, CBS NEWS (Dec. 17, 2010), http://www.cbsnews.com/news/ap-cia-granted-waterboarders-5m-legal-shield/.

[75] *See, e.g.*, Katherine Eban, *Rorschach and Awe*, VANITY FAIR (July 7, 2007), http://www.vanityfair.com/politics/features/2007/07/torture200707 ("Two psychologists in particular played a central role: James Elmer Mitchell, who was attached to the C.I.A. team that eventually arrived in Thailand, and his colleague Bruce Jessen. […] Both worked in a classified military training program known as SERE—for Survival, Evasion, Resistance, Escape—which trains soldiers to endure captivity in enemy hands. Mitchell and Jessen reverse-engineered the tactics inflicted on SERE trainees for use on detainees in the global war on terror, according to psychologists and others with direct knowledge of their activities. The C.I.A. put them in charge of training interrogators in the brutal techniques, including "waterboarding," at its network of "black sites." In a statement, Mitchell and Jessen said, "We are proud of the work we have done for our country."); Amy Goodman, *The Story of Mitchell Jessen & Associates: How a Team of Psychologists in Spokane, WA, Helped Develop the CIA's Torture Techniques* (Apr. 21, 2009), http://www.democracynow.org/2009/4/21/the_story_of_mitchell_jessen_associates.

[76] SENATE ARMED SERVICES COMM. REPORT, *supra* note 13, at 14, Tab 7 "Counter Resistance Strategy Meeting Minutes" (June 17, 2008), http://www.levin.senate.gov/imo/media/doc/supporting/2008/Documents.SASC.061708.pdf.

were not "charged with the medical care of detainees,"[77] were not subject to a duty to limit or avoid harm.[78] The Defense policies "conflate[d] legal standards with ethical ones," effectively declaring ethical anything that did not violate criminal laws[79]—the same laws that the Justice Department was busy redefining. By building these shields, the United States successfully set the stage for immunity and impunity in the sphere of professional regulation as well. To date, none of the psychologists who played key roles in the torture program has been disciplined by a licensing board or professional association.[80]

4. Human rights bodies have called on the United States to prosecute offenders, and the United States has consistently defended its failure to prosecute.

In the wake of the release of the U.S. Senate Intelligence Committee Report, on December 12, 2014, the IACHR called on the United States to "investigate and punish acts of torture established in the [report]."[81] In its press release on the topic, the IACHR emphasized that the prohibition against torture is a *jus cogens* and *erga omnes* norm that is non-derogable under all circumstances.[82]

Furthermore, U.N. bodies have called for independent and impartial investigations of all perpetrators, including highest-level civilian and military officials since 2006.[83] These bodies include: the Committee Against Torture,[84] the Human Rights

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[77] *See* U.S. DEPARTMENT OF DEFENSE, INSTRUCTION 2310.08E, *Medical Program Support for Detainee Operations* 2 (June 6, 2006), http://fas.org/irp/doddir/dod/i2310_08.pdf [hereinafter INSTRUCTION 2310.08E].

[78] COLUMBIA UNIVERSITY INSTITUTE ON MEDICINE AS A PROFESSION & THE OPEN SOCIETY FOUNDATION, ETHICS ABANDONED: MEDICAL PROFESSIONALISM AND DETAINEE ABUSE IN THE WAR ON TERROR 58 (2013), http://www.imapny.org/wp-content/themes/imapny/File%20Library/Documents/IMAP-EthicsText Final2.pdf [hereinafter ETHICS ABANDONED].

[79] *See* INSTRUCTION 2310.08E, *supra* note 77; ETHICS ABANDONED at 64-65, *supra* note 78.

[80] *See* Appendix D for a representative list of the state licensing complaints filed and their disposition through dismissal in the state licensing organization and/or the U.S. courts.

[81] Press Release, Inter-American Comm'n on Human Rights, IACHR Calls on the United States to Investigate and Punish Acts of Torture Established in the Senate Intelligence Committee Report, ORGANIZATION OF AMERICAN STATES (December 12, 2014), http://www.oas.org/en/iachr/media_center/PReleases/2014/152.asp [hereinafter IACHR Press Release].

[82] *Id.*

[83] *See, e.g.*, COMM'N ON HUMAN RIGHTS, JOINT REPORT ON THE SITUATION OF DETAINEES AT GUANTÁNAMO BAY at 26, E/CN.4/2006/120 (Feb. 27, 2006) [hereinafter COMM'N ON HUMAN RIGHTS, JOINT REPORT ON THE SITUATION OF DETAINEES AT GUANTÁNAMO BAY]; HUMAN RIGHTS COMM., CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT: CONCLUDING OBSERVATIONS OF THE HUMAN RIGHTS COMM. (REGARDING THE UNITED STATES OF AMERICA) at 4, CCPR/C/USA/C0/3/REV.1 (Dec. 18, 2006) **[**hereinafter HUMAN RIGHTS COMM., CONCLUDING OBSERVATIONS 2006].

[84] *See* COMM. AGAINST TORTURE, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION: CONCLUSIONS AND RECOMMENDATIONS OF THE COMM. AGAINST TORTURE (REGARDING THE UNITED STATES OF AMERICA), CAT/C/USA/CO/2, July 25, 2006 at 7 [hereinafter COMM. AGAINST TORTURE, CONSIDERATION OF REPORTS UNDER ARTICLE 19] ("The State party should take immediate measures to eradicate all forms of torture and ill-treatment of detainees by its military or civilian personnel, in any territory under its jurisdiction, and should promptly and thoroughly investigate such acts, prosecute all those responsible for such acts, and ensure they are appropriately punished, in accordance with the seriousness of the crime.").

Committee,[85] the Special Rapporteur on torture, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on health, the Special Rapporteur on freedom of religion, and the Working Group on Arbitrary Detention.[86]

The Committee Against Torture recommended in 2006 that the United States "promptly, thoroughly, and impartially investigate any responsibility of senior military and civilian officials authorizing, acquiescing or consenting, in any way, to acts of torture committed by their subordinates."[87] The United States did not respond to this recommendation in its Response to Specific Recommendations Identified by the Committee.[88] The Committee raised the issue again in Question 23 of its 2010 List of Issues, requesting information on "[s]teps taken to ensure that all forms of torture and ill-treatment of detainees by its military or civilian personnel, in any territory under its de facto and de jure jurisdiction, as well as in any other place under its effective control, is promptly, impartially and thoroughly investigated, and that all those responsible, *including senior military and civilian officials authorizing, acquiescing or consenting in any way to such acts committed by their subordinates are prosecuted* and appropriately punished, in accordance with the seriousness of the crime" (emphasis added).[89] Additionally, the Committee requested information on "[t]he mandate of the prosecutor in charge of the preliminary review [initiated by Attorney General Holder in 2009 and undertaken by Assistant U.S. Attorney John Durham] into whether U.S. laws were violated by CIA officers and contractors during the interrogation of detainees at places outside the United States, including Guantánamo Bay," "on the outcome of this investigation and, if applicable, on the steps taken to hold the responsible persons accountable."[90]

The U.S. 2013 CAT Report continued in this vein. In responding to the Committee's Question 23(a) regarding the obligation to investigate acts of torture, the United States entirely failed to address the Committee's specific request for information related to investigations and prosecutions of "senior military and civilian officials."

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[85] *See* HUMAN RIGHTS COMM., CONCLUDING OBSERVATIONS 2006, *supra* note 83 ("The Committee notes with concern shortcomings concerning the independence, impartiality and effectiveness of investigations into allegations of torture and cruel, inhuman or degrading treatment or punishment inflicted by United States military and non-military personnel or contract employees in detention facilities in Guantánamo Bay, Afghanistan, Iraq, and other overseas locations, and to alleged cases of suspicious death in custody in any of these locations. […] The State party should conduct prompt and independent investigations into all allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment inflicted by its personnel (including commanders) as well as contract employees, in detention facilities in Guantánamo Bay, Afghanistan, Iraq and other overseas locations.").

[86] *See* COMM'N ON HUMAN RIGHTS, JOINT REPORT ON THE SITUATION OF DETAINEES AT GUANTÁNAMO BAY, *supra* note 83 ("The Government of the United States should ensure that all allegations of torture or cruel, inhuman or degrading treatment or punishment are thoroughly investigated by an independent authority, and that all persons found to have perpetrated, ordered, tolerated or condoned such practices, up to the highest level of military and political command, are brought to justice.").

[87] COMM. AGAINST TORTURE, CONSIDERATION OF REPORTS UNDER ARTICLE 19, *supra* note 84, ¶19.

[88] U.S. RESPONSE TO SPECIFIC RECOMMENDATIONS IDENTIFIED BY THE COMM. AGAINST TORTURE, http://www.state.gov/documents/organization/100843.pdf [hereinafter LIST OF ISSUES].

[89] *Id.* at ¶23(a).

[90] LIST OF ISSUES, *supra* note 88, ¶23(b).

Instead, the report pointed to 100 low-level service members that have been court martialed for mistreatment of detainees.[91]

The report also offered little of substance in response to the Committee's question about Durham's mandate, stating only that the prosecutor was tasked with examining "whether federal laws were violated in connection with interrogation of specific detainees at overseas locations."[92] As discussed above, however, Attorney General Holder's statements suggest a much more restricted mandate,[93] aimed at shielding those who "acted in good faith and within the scope of the OLC's legal guidance." But Holder never defined "good faith," nor did he seem to give Durham the room to examine whether the guidance itself was given in good faith.

The sheer breadth of this legal shield cannot be overstated. Ultimately, no prosecutions resulted from this preliminary review.[94]

The report also lists several statutes as establishing criminal sanctions for torture, none of which the United States has actually used to prosecute senior-level officials for the torture of detainees in U.S. custody abroad.[95] Furthermore, the report conspicuously omits reference to the War Crimes Act (18 U.S.C. 2441) in its list of laws that provide jurisdiction to prosecute for the torture and ill-treatment of detainees. This omission is the latest in a series of steps taken by the United States to water down or evade its obligation to prosecute war crimes.[96] Despite these attempts

[91] U.S. 2013 CAT Report, *supra* note 31, ¶129.

[92] *Id*. ¶135.

[93] *See Statement of Attorney General Eric Holder on Closure of Investigation*, *supra* note 33.

[94] In the investigations that Durham decided to pursue regarding two detainees who died while in U.S. custody, he ultimately declared that the *admissible* evidence was not sufficient to sustain a conviction beyond a reasonable doubt. *See Statement of the Attorney General Regarding Investigation into the Interrogation*, *supra* note 32. Information on the two investigations: Detainee Rahman died of hypothermia and detainee al-Jamadi died of asphyxiation, a result of his being hung by his arms. *See* Adam Serwer, *Investigation of Bush-era Torture Concludes With No Charges*, MOTHER JONES (2012), http://www.motherjones.com/mojo/2012/08/durham-torture-cia-obama-holder.

[95] *See* U.S. 2013 CAT Report, *supra* note 31, ¶127. *See also* U.S. DEPARTMENT OF STATE, *COMMON CORE DOCUMENT OF THE UNITED STATES OF AMERICA* §158 (2011), http://www.state.gov/j/drl/rls/179780.htm. In fact, the Department of Justice has prosecuted only a single person for perpetrating torture under the extraterritorial torture statute: Roy M. Belfast, son of Charles Taylor, the former president of Liberia. *See United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010).

[96] Enacted in 1996, the War Crimes Act allowed for the prosecution of war crimes—which it defined as any violation of the Geneva Conventions—when either the victim or the perpetrator was a U.S. national or a member of the U.S. armed services. War Crimes Act, 18 U.S.C. 2441 (1996). The MCA narrowed the scope of the War Crimes Act in order to exclude all conduct save a set of domestically-defined "grave breaches": torture; cruel or inhuman treatment; performing biological experiments; murder, mutilation, or maiming; intentionally causing serious bodily injury; rape; sexual assault or abuse; and hostage-taking. MCA 2006, *supra* note 43 § 6(b). Further, the MCA sought to immunize military and intelligence personnel from criminal prosecution for acts of torture or cruel or inhuman treatment committed as part of certain "authorized interrogations" committed between September 11, 2001, and the enactment of the Detainee Treatment Act in 2005. *Id.* §8.

to provide immunity, the War Crimes Act remains a possible avenue for prosecution.[97]

As a result, the Committee Against Torture's 2014 Concluding Observations continued to express "concern over the ongoing failure on the part of the [United States] to fully investigate allegations of torture and ill-treatment of suspects held in U.S. custody abroad, evidenced by the limited number of criminal prosecutions and convictions."[98] The Committee Against Torture also reiterated its concern about the failure to prosecute and punish perpetrators and "urge[d]" the United States to:

> (a) [c]arry out prompt, impartial and effective investigations wherever there is reasonable ground to believe that an act of torture and ill-treatment has been committed . . . ; (b) [e]nsure that alleged perpetrators and accomplices are duly prosecuted, ***including persons in positions of command and those who provided legal cover to torture*** [emphasis added], and, if found guilty, handed down penalties commensurate with the grave nature of their acts ...; … (d) [u]ndertake a full review into the way the CIA's responsibilities were discharged in relation to the allegations of torture and ill-treatment against suspects during U.S. custody abroad. In the event of a re-opening of investigations, the State party should ensure that any such inquiries are designed to address the alleged shortcomings in the thoroughness of the previous reviews and investigations.[99]

Likewise, the Human Rights Committee's Concluding Observations on the Fourth Periodic Report of the United States specifically recommended that "persons in positions of command [be] prosecuted and sanctioned,"[100] and that the "responsibility of ***those who provided legal pretexts for manifestly illegal behavior*** [emphasis added] should also be established."[101]

Most recently, in its 2015 UPR Report, the United States maintained that it investigates allegations of torture and prosecutes "where appropriate"[102] and that it supports recommendations calling for "vigorous investigation and prosecution of any serious violations of international law, ***as consistent with existing U.S. law, policy,***

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[97] WORLD ORG. FOR HUMAN RIGHTS USA & AMERICAN UNIVERSITY, WASH. COLLEGE OF LAW INT'L HUMAN RIGHTS CLINIC, INDEFENSIBLE: A REFERENCE FOR PROSECUTING TORTURE AND OTHER FELONIES COMMITTED BY U.S. OFFICIALS FOLLOWING SEPTEMBER 11TH 115-117 (2012), http://www.wcl.american.edu/clinical/documents/Indefensible_A_Reference_for_Prosecuting_Torture.pdf.

[98] COMM. AGAINST TORTURE, CONCLUDING OBSERVATIONS ON THE THIRD TO FIFTH PERIODIC REPORTS OF UNITED STATES OF AMERICA, CAT/C/USA/CO/3-5, ¶12 (Dec. 19, 2014).

[99] *Id.*

[100] HUMAN RIGHTS COMM., CONCLUDING OBSERVATIONS ON THE FOURTH PERIODIC REPORT, *supra* note 39.

[101] *Id*.

[102] U.S. 2015 UPR Report, *supra* note 45, at 37.

and practice [emphasis added]." [103] The Report goes on to say that it "reject[s] those parts of these recommendations that amount to unsubstantiated accusations of ongoing serious violations by the United States."[104]

II. The U.S. government's continued shielding of high-level officials responsible for its criminal program of torture violates inter-American and other human rights standards.

A. The IACHR considers the prohibition against torture to be a jus cogens *norm.*

The IACHR considers that "[a]n essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations *erga omnes*" and also "qualified the prohibition of torture as a norm of *jus cogens*."[105] The jurisprudence of the Inter-American Court also consistently emphasizes that the "absolute prohibition against torture, whether physical or psychological, is now part of the international *jus cogens.*"[106] As such, the prohibition on torture can be modified only by "a subsequent norm of general international law having the same character."[107] The Court has also emphasized that the prohibition against torture is non-derogable, "even in the most difficult circumstances, such as war, threat of war, the fight on terrorism and any other crime."[108]

The IACHR considers that the United States, as a member of the Organization of American States (OAS) that has ratified the OAS Charter, is bound to respect the rights protected under the American Declaration.[109] The IACHR has interpreted articles I, XXV, and XXVI of the

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[103] *Id*.at 36.

[104] *Id*.

[105] Report On The Situation Of Human Rights of Asylum Seekers Within The Canadian Refugee Determination System, Inter-American Comm'n on Human Rights, OEA/Ser.L/V/11.108, doc. 40 rev. ¶ ¶118, 154 (2000) [hereinafter Inter-American Comm'n Canada Country Report]. *See also* Report on Terrorism and Human Rights, Inter-Am. Comm'n on Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. §III.C ¶ 155 (22 Oct. 2002) [hereinafter IACHR Report on Terrorism and Human Rights]; INTER-AMERICAN COMM'N ON HUMAN RIGHTS, TOWARDS THE CLOSURE OF GUANTANAMO, OAS/Ser.L/V/II, Doc. 20/15 ¶ 111 [hereinafter IACHR Guantanamo Report].

[106] *Case of Baldeón-García v. Peru,* Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 117 (Apr. 6, 2006). *See also Case of the Miguel Castro-Castro Prison v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 271; *Case of Caesar v. Trinidad and Tobago*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 59.

[107] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331 art. 53 [hereinafter Vienna Convention].

[108] *Case of Lori Berenson-Mejía v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 119, ¶ 100 (25 Nov. 2004). *See also Case of De La Cruz-Flores v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 115, ¶ 125 (18 Nov. 2004); ASS'N FOR THE PREVENTION OF TORTURE AND CTR. FOR JUSTICE AND INT'L LAW, TORTURE IN INTERNATIONAL LAW: A GUIDE TO JURISPRUDENCE 112 (2008), https://cejil.org/sites/default/files/torture_in_international_law.pdf [hereinafter APT & CEJIL].

[109] *See Jessica Gonzalez et al. v. United States*, Admissibility Report, Inter-Am. C.H.R., Case 1490-05, Report No. 52/07, OEA/Ser.L/V/II.130 Doc. 22, rev. 1, ¶ 37 (July 24, 2007); Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 45 (July 14, 1989).

American Declaration to prohibit torture and CIDT absolutely.[110] Article 5(2) of the ACH, which the U.S. has signed but not ratified,[111] explicitly prohibits torture.[112]

The Commission, referencing both the American Declaration and CAT, has also clarified that the *jus cogens* prohibition on torture prohibits states from sending individuals to places where "substantial grounds of a real risk of inhuman treatment are at issue."[113] The IACHR emphasized that the prohibition stands even if the person is "suspected or deemed to have some relation to terrorism."[114]

B. As a jus cogens *norm, the prohibition against torture implies an* erga omnes *duty to prosecute, which the United States has failed to fulfill.*

Proper accountability, including criminal prosecution of senior officials authorizing acts of torture, is essential for the observance of the United States' human rights obligations. It is also critical to preserving the meaning of the peremptory norm against torture.

As a *jus cogens* norm, the prohibition against torture implies an *erga omnes* obligation to prosecute.[115] An *erga omnes* obligation is a duty that is owed to the entire international community and falls upon all states, regardless of what international conventions they have or have not ratified.[116]

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[110] IACHR Report on Terrorism and Human Rights, *supra* note 105, at ¶¶ 149–50, 155.

[111] Organization of American States, *American Convention on Human Rights: Signatories and Ratifications*, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

[112] American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143, art. 5 (2) ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."). The IACHR explained in *Mary and Carrie Dann v. United States*, "in interpreting and applying the Declaration, it is necessary to consider its provisions in the context of the international and inter-American human rights systems more broadly, in the light of developments in the field of international human rights law since the Declaration was first composed" and that these "developments" may "be drawn from the provisions of other prevailing international and regional human rights instruments. . . in particular the American Convention on Human Rights which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration." Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R. Report No. 75/02, doc. 5 rev. 1, ¶ 96—97 (2002).

[113] Inter-Am. Comm'n Canada Country Report, *supra* note 105 ¶ 154.

[114] *Id*.

[115] *See* M. Cheriff Basiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMPORARY PROBLEM 63, 65–66 (1996).

[116] *See* International Justice Resource Center, *Torture* [hereinafter IJRC], http://www.ijrcenter.org/thematic-research-guides/torture/.

The right to a remedy is well established under inter-American norms. Article XVIII of the American Declaration enshrines that right,[117] and Articles 8 and 25 of the ACHR affirm it.[118] The Inter-American Commission and Court have interpreted the ACHR right to a remedy to imply a duty to investigate and prosecute.[119]

The U.S. government's failure to adequately investigate and prosecute senior officials authorizing the post-9/11 criminal program of torture puts the United States in breach of multiple additional legal obligations. The United States' shielding of senior officials who authorized, acquiesced or consented to torture violates the principle of non-derogability as understood in the Committee Against Torture's General Comment No. 2[120] and places the United States in continued violation of its obligations under CAT. Additionally, the Human Rights Committee has interpreted the ICCPR to "include an obligation to investigate and prosecute violations of the Convention" by combining the Article 7 prohibition of torture and the article 2(3) right to remedy.[121] Article 8 of the UDHR also calls for a right to a remedy.[122]

C. Lack of accountability generates a culture of impunity.

The implementation of the U.S. government's criminal torture program was widespread and systematic.[123] The program was an integral part of the broader post-9/11 rendition, detention, and interrogation program, which—via practices including extraordinary rendition—constituted an intricate web of compounding violations of fundamental human rights.[124] Extraordinary rendition

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[117] *See, e.g., Jessica Lenahan (Gonzalez) et al. v. United States*, Merits, Inter-Am. Comm'n H.R., Case 12.626, Report No. 80/11, ¶ 171–176 (July 21, 2011); *Maya Indigenous Community v. Beliza*, Inter-Am. Comm'n H.R., Case 12.053, Report 40/04, OEA/Ser.L/V/II.122, doc. 5, ¶¶ 174—175 (2004).

[118] *See id.*; *see also Maria Da Penha Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/*V*/II.111, Doc. 20, rev. at 704, ¶ 37 (2001).

[119] *See* Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CA LAW REV. 451, 478 (noting that the Inter-American Commission "has repeatedly called for investigation of the facts and punishment of those responsible for torture and disappearance") (citing Case 6586 Inter-Am. Ct. H.R. 91, OEA/ser.L./VII/61, doc.22 rev.1 (1983) at 93 (torture and arbitrary arrest); Case 7821, Inter-Am. Ct. H.R. 86,87, OED/ser.L./V/II.57, doc. 6 rev. 1 (1982) (disappearance)). *See generally*, Fernando Felipe Bash, *The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers*, 23 AMER. UNIV. INT'L L REV. 196 (2007).

[120] COMMITTEE AGAINST TORTURE, GENERAL COMMENT NO. 2, *supra* note 58 ¶ 5.

[121] *See* Roht-Arriaza, *supra* note 119 at 477 (citing U.N. Comm'n on Human Rights. (195th mtg.) at 25, U.N. Doc. E/CN.4/SR.195 (1950); Irene Bleier Lewenhoff& Rosa Valino de Bleier v. Uruguay, U.N. Human Rights. Comm. No.30/1978, 13.3, U.N. Doc. CCPR/C/OP/I (1985)).

[122] G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 8 (Dec. 10, 1948).

[123] *See, e.g.*, HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES 1 (2005), https://www.hrw.org/reports/2005/us0405/us0405.pdf.

[124] *See generally*, Human Rights Watch, supra note 123; OPEN SOCIETY JUSTICE INITIATIVE, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 5, 11 (2013), http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf. While this report focuses on failure to prosecute acts of torture, several petitions that have been filed before the IACHR (and additional documentation filed in support of those claims) allege that the criminal torture program also violated

programs were designed to escape accountability under both national and international law for use of interrogation techniques that would likely amount to torture and CIDT.[125] Therefore, failure to prosecute torture not only denies justice to survivors, but also rewards practices explicitly designed to circumvent the responsibilities of the United States under international law. The United States' failure to prosecute officials responsible for its criminal torture program leaves a dangerous precedent. The shielding of officials responsible for the criminal torture program generates a culture of impunity in the face of widespread violations of human rights.

other *jus cogens* norms, including the right to liberty and security of persons and norms against arbitrary detention and forced disappearance. S*ee generally*, AMERICAN CIVIL LIBERTIES UNION, *Petition Alleging Violations of the Human Rights of Khaled El-Masri by the United States of America, with a Request for an Investigation and Hearing on the Merits, submitted to the IACHR* (April 9, 2008); AMERICAN CIVIL LIBERTIES UNION, *Petition Alleging Violations of the Human Rights of Jose Padilla and Estela Lebron, with a Request for an Investigation and Hearing on the Merits, submitted to the IACHR* (December 11, 2012); AMERICAN CIVIL LIBERTIES UNION, *Petition Alleging Violations of the Human Rights of Thahe Mohammad Sabar, Sherzad Kamal Khalid, Ali Hussein, Mehboob Ahmad, Said Nabi Siddiqi, and Haji Abdul Rahman, with a Request for an Investigation and Hearing on the Merits, submitted to the IACHR* (March 19, 2012); REDRESS, *Amicus Curiae Presented to the Inter-American Commission on Human Rights by the REDRESS Trust (REDRESS) in the Case of Khaled El Masri v. United States* at 5 (March 2009).

[125] Open Society Justice Initiative, *supra* note 124 at 5, 11.

APPENDIX A

Advocates for U.S. Torture Prosecutions

Authors

The **International Human Rights Clinic at Harvard Law School** is a center for active engagement in human rights within a context of critical reflection. Under the supervision of clinical faculty, law students work on a range of international and humanitarian law projects in countries throughout the world. Since 2006, the Clinic has been involved in efforts to address human rights violations by the United States in the counterterrorism context. It has developed particular expertise on the pivotal role played by U.S. military and intelligence health professionals in the torture of people held in national security detention centers.

The Clinic's team of researchers and authors for the original 2014 report, which took the form of a submission to the Committee Against Torture, included: **Deborah Alejandra Popowski**, Lecturer on Law and Clinical Instructor; **Peter Barnett**, LL.M. '15; **Lauren Blodgett**, J.D. (expected) '16; **Morgan Davis**, J.D. '15; and **Kristopher Yue**, J.D. (expected) '16. This 2015 adaptation for the IACHR was researched and authored by **Michelle Ha**, J.D. (expected) '16; **Kelsey Jost-Creegan**, J.D. (expected) '17; and **Marin Tollefson**, J.D. (expected) '17, under the supervision of **Deborah Popowski**. **Fernando Ribeiro Delgado**, Lecturer on Law and Clinical Instructor, contributed vital strategic, research, and editing support to the original report as well as to the adapted submission.

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APPENDIX B

Military Personnel Alleged to Have Engaged in Wrongful Conduct in Connection with Detainee Mistreatment

Source: The Constitution Project, *Disposition of Abuse Allegations*, available at http://detaineetaskforce.org/resources/alleged-wrongful-conduct-charges/#sdfootnote1sym

"The following is a list of military personnel – by rank and age where available[126] – alleged to have engaged in wrongful conduct in connection with detainee mistreatment after September 11. Some have been charged with and convicted of crimes in the military justice system, others have been acquitted of military criminal charges or had those charges against them dropped, still others have had allegations against them handled administratively by the military. The list also includes one CIA contractor who was subject to federal court criminal proceedings. The list was compiled from press accounts of court martial proceedings and in some instances from transcripts of those proceedings. While the list does not purport to be exhaustive, the Task Force believes that it is illustrative of who has borne responsibility to date for mistreating detainees, and who, particularly by omission, has not."

1. Specialist, age 25, convicted of assault and two counts of making a false official statement while serving in Afghanistan in 2002. Sentenced to 90 days in prison, a reduction to the rank of Private, a fine of $3,288.00, and a bad conduct discharge.
2. Private First Class, age 22, convicted of assault, prisoner maltreatment, maiming a prisoner, and providing a false statement to investigators while serving in Afghanistan in 2002. Sentenced to a reduction in rank to Private.
3. Specialist, age 21, convicted of assault and prisoner maltreatment while serving in Afghanistan in 2002. Sentenced to five months in prison and a bad conduct discharge.
4. Specialist, age 21, convicted of conspiracy to maltreat detainees, prisoner maltreatment, and committing an indecent act while serving in Iraq in 2003. Sentenced to three years in prison and a dishonorable discharge.
5. Sergeant, age 24, convicted of dereliction of duty for failing to protect prisoners from abuse, prisoner maltreatment, and assault while serving in Afghanistan in 2002. Sentenced to a reduction in rank, a $1,000 fine, and a letter of reprimand.
6. Specialist, age 21, convicted of dereliction of duty for failure to protect prisoners from abuse and assault while serving in Afghanistan in 2002. Sentenced to two months in prison, a reduction in rank to Private, and a bad conduct discharge.
7. Specialist, convicted of assault, prisoner maltreatment, and dereliction of duty for failing to protect prisoners from abuse while serving in Afghanistan in 2002. Sentenced to 75 days in prison, a reduction in rank to Private, and a bad conduct discharge.

[126] The age listed is at the time of the alleged conduct. For those cases where age calculations were based on press accounts that specified the individual's age at the time of reporting and the approximate date of the alleged conduct, the age listed here should be accurate within one year.

8. Specialist, age 34, convicted of assault, battery, indecency, conspiracy to maltreat detainees, maltreatment of detainees, committing an indecent act, and dereliction of duty for failure to protect prisoners from abuse while serving in Iraq in 2003. Sentenced to ten years in prison, a reduction in rank to Private, forfeiture of pay and benefits, and a bad conduct discharge.
9. Staff Sergeant, age 38, convicted of conspiracy to maltreat detainees, dereliction of duty for failure to protect detainees from abuse, maltreatment of detainees, assault, and committing an indecent act while serving in Iraq in 2003. Sentenced to eight years in prison, a reduction in rank to Private, a forfeiture of pay, and a bad conduct discharge.
10. Sergeant, age 26, convicted of dereliction of duty for failure to protect detainees from abuse, providing false statements to investigators, and battery while serving in Iraq in 2003. Sentenced to six months in prison, a reduction in rank to Private, and a bad conduct discharge.
11. Specialist, age 24, convicted of dereliction of duty for failing to protect prisoners from abuse, prisoner maltreatment while serving in Iraq in 2003. Sentenced to one year in prison, a reduction in rank to Private, and a bad conduct discharge.
12. Specialist, age 24, convicted of conspiracy to maltreat detainees and maltreatment of detainees while serving in Iraq in 2003. Sentenced to eight months in prison, a reduction in rank to Private, and a bad conduct discharge.
13. Specialist, age 25, convicted of conspiracy to maltreat detainees, maltreatment of detainees, and dereliction of duty for failing to protect prisoners from abuse while serving in Iraq in 2003. Sentenced to six months in prison, a reduction in rank to Private, and a bad conduct discharge.
14. Specialist, age 28, convicted of dereliction of duty for failing to protect prisoners from abuse while serving in Iraq in 2003. Sentenced to a reduction in rank to Private, fine of a half-month's pay, and a bad conduct discharge.
15. Sergeant, age 29, convicted of dereliction of duty for failing to protect prisoners from abuse and aggravated assault while serving in Iraq in 2003. Sentenced to 90 days' hard labor, a fine, and a reduction in rank to Private.
16. Specialist, age 22, convicted of conspiracy to maltreat detainees and maltreatment of detainees while serving in Iraq in 2003. Sentenced to ten months in prison, reduction in rank to Private, and a bad conduct discharge.
17. Specialist, age 22, convicted of conspiracy to maltreat detainees, maltreatment of detainees, assault, dereliction of duty for failing to protect prisoners from abuse and an indecent act while serving in Iraq in 2003. Sentenced to 179 days in prison, a fine of $2,250, a demotion to the rank of Private, and a bad conduct discharge.
18. Private First Class, age 19, convicted of murder, attempted murder, conspiracy to commit murder and conspiracy to obstruct justice while serving in Iraq in 2006. Sentenced to 18 years in prison, a demotion to the rank of Private, and a dishonorable discharge.
19. Specialist, age 21, convicted of murder, attempted murder and conspiracy to obstruct justice while serving in Iraq in 2006. Sentenced to 18 years in prison, a demotion to the rank of Private, and a dishonorable discharge.
20. Specialist, age 18, convicted of aggravated assault for shooting a detainee while serving in Iraq in 2006. Sentenced to nine months in prison.

21. Private, age 19, convicted of aggravated assault on a detainee while serving in Iraq in 2006. Sentenced to ten months confinement, a fine of $8,000, and a bad conduct discharge.
22. Petty Officer 2nd Class, age 24, convicted of assault and conspiracy to mistreat detainees while serving in Iraq in 2007. Sentenced to 79 days in jail, a reduction of rank by two grades, and a loss of pay.
23. Petty Officer 2nd Class, age 26, convicted of conspiracy to maltreat detainees, cruelty and maltreatment of detainees, lying and assault. Sentenced to 45 days confinement and a reduction in rank.
24. Seaman, age 22, convicted of conspiracy to maltreat detainees, cruelty and maltreatment of detainees, lying and assault. Sentenced to 3 months in prison and a fine of $3,600.
25. Chief Petty Officer, age 42, convicted of conspiracy and assault while serving in Iraq in 2007. Sentenced to 89 days in the brig, $1,500 forfeiture, and a reduction in rank by one grade.
26. Master Sergeant, age 40, convicted of premeditated murder and conspiracy to commit murder while serving in Iraq in 2007. Sentenced to 40 years in prison, a reduction in rank to Private, dishonorably discharged, and forfeited all pay and allowances.
27. Sergeant First Class, age 25, convicted of premeditated murder and conspiracy to commit murder while serving in Iraq in 2007. Sentenced to 35 years in prison.
28. Sergeant, age 25, convicted of murder and conspiracy to commit murder while serving in Iraq in 2007. Sentenced to life in prison, a reduction in rank to Private, dishonorably discharged and forfeited all pay and allowances.
29. 1st Lieutenant, age 25, convicted of unpremeditated murder of a detainee while serving in Iraq in 2007. Sentenced to 25 years in prison.
30. Staff Sergeant, age 34, convicted of assault, maltreatment of a subordinate and making a false statement in a case involving the premeditated murder of a detainee in Iraq in 2007. Sentenced to 17 months in prison, a reduction in rank to Private, and a bad conduct discharge.
31. Specialist, age 24, convicted of conspiracy to commit murder while serving in Iraq in 2007. Sentenced to 8 months in prison.
32. Specialist, age 22, convicted of conspiracy to commit murder while serving in Iraq in 2007. Sentenced to 7 months in prison.
33. Petty Officer First Class, age 26, convicted of dereliction of duty for inhumane treatment of an Iraqi detainee while serving in Iraq in 2009. Sentenced to no punishment.
34. Sergeant, age 39, convicted of dereliction of duty and the abuse of prisoners while serving in Iraq in 2003. Sentenced to 60 days' hard labor and confinement to barracks, and demoted to the rank of Private.
35. First Lieutenant, age 24, convicted of assault and dereliction of duty for failing to protect detainees while serving in Iraq in 2004. Sentenced to 45 days in prison and fined $12,000.
36. Sergeant 1st Class, age 33, convicted of aggravated assault and obstruction of justice while serving in Iraq in 2004. Sentenced to six months in jail and a reduction in rank to Staff Sergeant.
37. Captain, age 33, convicted of two counts of aggravated assault against detainees while serving in Iraq in 2003. Sentenced to 45 days prison time and a fine of $1,000 per month for twelve months.

38. Lance Corporal, convicted of dereliction of duty for failing to protect prisoners from abuse, maltreatment of a prisoner, and assault for holding a pistol to the head of a detainee while serving in Iraq in 2003. Sentenced to 90 days in prison, a fine of $1500, and a reduction to the rank of Private.
39. Sergeant, age 27, convicted of conspiracy to commit prisoner maltreatment, prisoner maltreatment, dereliction of duty for failing to protect prisoners from abuse, and giving a false statement to investigators while serving in Iraq in 2003. Sentenced to 12 months in prison, a reduction to the rank of Private and bad conduct discharge.
40. Sergeant, convicted of dereliction of duty for failing to protect prisoners from abuse, maltreatment of prisoners, and assault while serving in Iraq in 2003. Sentenced to a reduction in rank to Lance Corporal and 30 days' hard labor.
41. Staff Sergeant, convicted of assault and maltreatment of prisoners while serving in Iraq in 2003. Sentenced to be discharged from the Army.
42. Corporal, convicted of assault, conspiracy to maltreat a prisoner, and maltreatment of prisoners while serving in Iraq in 2003. Sentenced to one month hard labor, a fine, and reduction in rank to Lance Corporal.
43. Major, age 35, convicted of dereliction of duty for failing to protect prisoners from abuse and maltreatment of prisoners while serving in Iraq in 2003. Sentenced to be discharged from the military.
44. Chief Warrant Officer, age 40, convicted of negligent homicide and negligent dereliction of duty for failing to protect prisoners from abuse while serving in Iraq in 2003. Sentenced to a reprimand, forfeiture of $6,000, and a restriction to barracks for two months.
45. Sergeant First Class, age 36, convicted of assault on a prisoner and making false statements to investigators while serving in Iraq in 2003. Sentenced to receive a reprimand.
46. Sergeant, age 25, convicted of dereliction of duty for failure to protect detainees and maltreatment of detainees while serving in Iraq in 2005. Sentenced to a reduction in rank and forfeiture of pay and confinement for five months.
47. Sergeant, age 28, convicted of dereliction of duty for failure to protect detainees and maltreatment of detainees while serving in Iraq in 2005. Sentenced to a reduction in rank and forfeiture of pay, confinement for six months, and a bad conduct discharge.
48. Sergeant, age 26, convicted of maltreatment of detainees, conspiracy to commit maltreatment of detainees, dereliction of duty for failing to protect detainees and obstruction of justice while serving in Iraq in 2005. Sentenced to 12 months of confinement, loss of one year's pay, demotion to Private and a bad-conduct discharge.
49. Private First Class, age 20, convicted of manslaughter of a prisoner while serving in Iraq in 2004. Sentenced to three years in prison, a reduction in rank, forfeiture of pay, and a dishonorable discharge.
50. Lance Corporal, age 23, convicted of assault, prisoner maltreatment while serving in Iraq in 2003. Sentenced to 120 days in prison, a reduction to the rank of Private, and discharged from the Marines.
51. Private First Class, age 19, convicted of assault, prisoner maltreatment, dereliction of duty for failing to protect a prisoner, and conspiracy to commit assault while serving in Iraq in 2004. Sentenced to one year in confinement, demotion to the rank of Private, forfeiture of pay, and a bad conduct discharge.

52. Private First Class, age 19, convicted of assault, prisoner maltreatment, dereliction of duty for failing to protect a prisoner, making a false statement to investigators, violating a lawful order, and conspiracy to commit assault while serving in Iraq in 2004. Sentenced to eight months in confinement, demotion to the rank of Private, forfeiture of pay, and a bad conduct discharge.
53. Private First Class, age 19, convicted of dereliction of duty for failure to protect a prisoner while serving in Iraq in 2004. Sentenced to 60 days in prison, 30 days of hard labor without confinement, reduction in rank to Private and forfeiture of pay and benefits.
54. CIA Contractor, age 37, convicted of felony assault and misdemeanor assault while working as a CIA civilian contractor in Afghanistan in 2003. Sentenced to eight years and four months in prison.

Acquitted/Charges Dropped or Matter Handled Administratively

- Lieutenant Colonel, age 46, disobeying an order. Criminal charges dismissed, issued an administrative reprimand.
- Lieutenant, age 30, negligence and conduct unbecoming an officer. Acquitted.
- Sergeant, maltreatment, dereliction of duty and assault. Charges dropped, received a letter of reprimand.
- Sergeant, assault, maltreatment of a prisoner and providing a false statement to investigators. Acquitted.
- Captain, age 36, dereliction of duty and making a false official statement. Charges dropped.
- Sergeant, assault, maltreatment of a prisoner and providing a false statement to investigators. Acquitted.
- Sergeant, age 32, assault and maltreatment. Acquitted.
- Specialist, assault, maltreatment and providing a false statement to investigators. Charges dropped.
- Private First Class, age 23, dereliction of duty, maltreatment, wrongful use of hashish, assault, and performing an indecent act with another person. Acquitted.
- Petty Officer 2nd Class, dereliction of duty, false official statement, and assault. Acquitted.
- Petty Officer, dereliction of duty and false official statement. Acquitted.
- Petty Officer, age 23, impediment of an investigation, dereliction of duty and false official statement. Acquitted.
- Machinist's Mate 2nd Class, age 28, conspiracy, false statement, and assault. Acquitted.
- Master Sergeant, age 35, punished for assaulting a detainee, received other than honorable discharge and forfeited 2 months' pay as nonjudicial punishment. Her other than honorable discharge status was later reversed.
- Staff Sergeant, age 38, punished for assaulting a detainee and providing false statements to investigators, received a demotion to Sergeant as nonjudicial punishment and a general discharge.
- Specialist, age 21, punished for assaulting a detainee and providing false statements to investigators, received a demotion to Private as nonjudicial punishment and a general discharge.

- Brigadier General, age 50, punished for dereliction of duty and shoplifting following her command of the 800th Military Police Brigade in Iraq, received a letter of reprimand and a demotion in rank to Colonel.
- First Lieutenant, age 30, convicted of conduct unbecoming an officer for striking a detainee in the stomach while serving in Iraq in 2003. Sentenced to receive a letter of reprimand, and a fine of $1003.00 for 12 months. Clemency granted.
- Staff Sergeant, acquitted of dereliction of duty and maltreatment.
- Sergeant, acquitted of charges of assault, maltreatment and making a false official statement.
- Staff Sergeant, age 23, convicted of obstruction of justice, conspiracy to obstruct justice and violation of a general order while hiding the murder of a detainee while serving in Iraq in 2006.
- Sentenced to 180 days of confinement, a reduction in rank, and a letter of reprimand. Conviction later overturned

APPENDIX C

Civil Cases Alleging Detainee Torture Brought Against U.S. Officials

Below is a non-exhaustive list as of September 11, 2014 of cases brought by people who were held in U.S. custody abroad, asserting that U.S. officials subjected them to torture or cruel, inhuman, or degrading treatment.

1. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007)
    a. Facts: A German citizen brought suit against then Director of the Central Intelligence Agency (CIA) and other U.S. Government officials, alleging that he was tortured and subject to cruel, inhuman, and degrading treatment as part of the CIA's "extraordinary rendition" program.
    b. Disposition: Dismissal affirmed. State secrets privilege barred disclosure of information necessary to the plaintiff's claim.
2. *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (D.C. Cir. 2006)
    a. Facts: Four former Guantánamo Bay detainees brought suit against then Secretary of Defense Donald Rumsfeld alleging violations of the Alien Tort Statute (ATS), the Fifth and Eighth Amendments, the Geneva Conventions, and the Religious Freedom Restoration Act (RFRA).
    b. Disposition: Dismissed claims under Alien Tort Statute and the Geneva Conventions, stating that torture was "a foreseeable consequence of the military's detention of suspected enemy combatants," and dismissed on "qualified immunity" ground. The court also stated that RFRA did not apply to detainees at Guantánamo.
3. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009)
    a. Facts: Dual Canadian–Syrian citizen brought suit against the United States Government and several government officials, alleging that the defendants violated the Torture Victim Protection Act and the Fifth Amendment of the United States Constitution by mistreating him and then removing him to Syria pursuant to an intergovernmental agreement that Syrian officials would interrogate him under torture.
    b. Disposition: Dismissal affirmed. No standing. Plaintiff failed to state a claim under the Torture Victim Protection Act and the Fifth Amendment because he did not "specify any culpable action taken by any single defendant," nor did he allege the "'meeting of the minds'" required to support his claim that U.S. government officials conspired with the Syrian government to torture him. Further, plaintiff was not eligible to sue government officials for harms arising from his extraordinary rendition due to the suit's potential impact on national security, diplomacy, and foreign policy.
4. *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011)
    a. Facts: Nine citizens of Iraq and Afghanistan filed suit against then Secretary of Defense Donald Rumsfeld, Colonel Thomas Pappas, Lieutenant General Ricardo Sanchez, and Colonel Janis Karpinski, alleging that they were subjected to torture by U.S. military personnel while in U.S. custody in Iraq and Afghanistan. The

plaintiffs sought monetary damages as well as a declaratory judgment that alleged that torture by military personnel was unlawful and violated the Fifth and Eighth Amendments of the U.S. Constitution, U.S. military rules and guidelines, and the law of nations.

b. Disposition: Dismissed. As noncitizens detained abroad, plaintiffs did not enjoy the right to freedom from torture under the U.S. Constitution. As government employees acting within the scope of their employment, defendants were entitled to qualified immunity from claims brought under the Alien Tort Statute and the Fourth Geneva Convention. No standing to request declaratory relief.

5. *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012)
    a. Facts: An American citizen detained as an enemy combatant by the United States Government in Afghanistan brought suit against a John Yoo, a Department of Justice attorney, alleging that he was held incommunicado and subjected to torture, in violation of his constitutional and statutory rights.
    b. Disposition: Dismissed. Yoo was entitled to qualified immunity because, at the time of Padilla's detention and interrogation, it was not clearly established under the law that the treatment to which Padilla was subjected amounted to torture.
6. *Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012)
    a. Facts: Survivors of detainees who died at Guantánamo Bay Naval Base sued the United States and various government officials under the Alien Tort Claims Act, the Federal Tort Claims Act, and the U.S. Constitution, asserting that the detainees had been subjected to torture and other forms of abuse.
    b. Disposition: Dismissed. No jurisdiction. Military Commissions Act stripped civilian courts of jurisdiction to hear plaintiffs' claims relating to any aspect of their detention, treatment, transfer, trial, or conditions of confinement.
7. *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) *cert. denied*, 133 S. Ct. 2796, 186 L. Ed. 2d 877 (U.S. 2013)
    a. Facts: Two American citizens who were working in Iraq as private security contractors brought suit against high-level military officials and the federal government, alleging that military personnel subjected them to abusive interrogation and mistreatment, including "hooding," "walling," and sleep deprivation, while in military detention in Iraq.
    b. Disposition: Dismissed. American citizens had no private right of action against individual military officials, as creating such a right "would intrude inappropriately into the military command structure." There was no jurisdiction to consider claims against the federal government arising from military authority exercised in the field in the time of war or in occupied territory.
8. *Hamad v. Gates*, 732 F.3d 990 (9th Cir. 2013) *cert. denied*, 134 S. Ct. 2866 (U.S. 2014)
    a. Facts: Adel Hassan Hamad, a former detainee at Guantánamo Bay, brought suit against the United States Government, challenging his detention and treatment in U.S. custody.
    b. Disposition: Dismissed. No jurisdiction. Military Commissions Act stripped civilian courts of jurisdiction to hear Hamad's claims relating to any aspect of his detention, treatment, transfer, trial, or conditions of confinement.
9. *Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014)

a. Facts: Abdul Rahim Abdul Razak Al Janko, who had mistakenly been captured and detained in Afghanistan and at Guantánamo Bay, brought suit against the United States Government, alleging violations of the Alien Tort Statute, the Federal Tort Claims Act, and the United States Constitution arising from his torture by U.S. officials in detention.
b. Disposition: Dismissal affirmed. No jurisdiction. The court lacked jurisdiction over plaintiff's action pursuant to a provision of the Military Commissions Act stripping civilian courts of jurisdiction to hear plaintiff's claims relating to any aspect of his detention, treatment, transfer, trial, or conditions of confinement.

10. *Allaithi v. Rumsfeld*, 753 F.3d 1327 (D.C. Cir. 2014)
    a. Facts: Former Guantánamo detainees brought actions under the Alien Tort Statute, alleging that U.S. officials authorized their torture while in detention.
    b. Disposition: Dismissal affirmed. Plaintiffs were required to bring suit against the United States Government pursuant to the Foreign Tort Claims Act, rather than against individual officials pursuant to the Alien Tort Statute.
11. *Ameur v. Gates*, 13-2011, 2014 WL 3455741 (4th Cir. July 16, 2014)
    a. Facts: An Algerian citizen brought suit against several former U.S. Government officials, alleging that he was subjected to torture and cruel, inhuman, or degrading treatment during his detention in U.S. military facilities in Afghanistan and Guantánamo Bay.
    b. Disposition: Dismissal affirmed. No jurisdiction. The court lacked jurisdiction over plaintiff's action pursuant to a provision of the Military Commissions Act stripping civilian courts of jurisdiction to hear Ameur's claims relating to any aspect of his detention, treatment, transfer, trial, or conditions of confinement.

APPENDIX D

Professional Misconduct Complaints Against Psychologists

The complaints below were filed against psychologists affiliated with U.S. military or intelligence forces in relation to the alleged mistreatment of prisoners in the course of U.S. counterterrorism operations since 2002.[127]

Complaints Against Captain John Francis Leso: New York

Captain John Francis Leso allegedly led the first Behavioral Science Consultation Team (BSCT) at the U.S. Naval Station in Guantánamo Bay from June 2002 to January 2003. Dr. Leso devised, recommended, and implemented psychologically and physically harmful and abusive detention and interrogation tactics.

Dr. Trudy Bond v. Dr. John Francis Leso (2007)

1. Forum: New York Office of Professional Discipline (NYOPD)
   Disposition: No written decision issued.

Dr. Steven Reisner v. Dr. John Francis Leso (2010)

1. Forum: New York Office of Professional Discipline (NYOPD)
   Disposition: Dismissed for lack of jurisdiction. The NYOPD concluded that the alleged conduct did not constitute the practice of psychology. The licensing board considered that no therapist-patient relationship existed, and that behavior modification at the behest of a third party "as a weapon [and] not to help the mental health" of the subject did not fall within the definition of psychology. The NYOPD claimed that it was "not within [their] purview to express an opinion" on the "appropriateness" of the interrogation techniques used in Guantánamo, and that short of a conviction of Dr. Leso for committing a crime, there would be "no basis" for the board to open an investigation.
2. Forum: Supreme Court of New York (lower state court)
   Disposition: Dismissed for lack of standing Dr. Reisner's request that the court compel the NYOPD to initiate an investigation into his complaint.

[127] This list is adapted from the appendix of another report co-written by one of the authors of this Shadow Report. *See* COLUMBIA UNIVERSITY INSTITUTE ON MEDICINE AS A PROFESSION & THE OPEN SOCIETY FOUNDATION, ETHICS ABANDONED: MEDICAL PROFESSIONALISM AND DETAINEE ABUSE IN THE WAR ON TERROR (2013) 201-213, http://www.imapny.org/wp-content/themes/imapny/File%20Library/Documents/IMAP-EthicsTextFinal2.pdf.

Complaints Against Retired Colonel Larry C. James: Louisiana and Ohio

Colonel Larry James was the senior intelligence psychologist for the Joint Intelligence Group and alleged commander of the Behavioral Science Consultation Team (BSCT) at the detention center at Guantánamo Bay from January 2003 to May 2003 and June 2007 to May or June 2008. He was also director of the Behavioral Science Unit in the Joint Interrogation and Debriefing Center at the Abu Ghraib prison in Iraq from June to October 2004. At least four professional misconduct complaints have been filed against Dr. James with psychology boards in two states, Louisiana and Ohio. Neither Board investigated or brought charges.

Dr. Trudy Bond v. Dr. Larry James (2008-2009)

1. Forum: Louisiana State Board of Examiners of Psychologists (LSBEP)
   Disposition: Dismissed on statute of limitations grounds.
2. Forum: 19th Judicial District Court of the State of Louisiana
   Disposition: Dismissed request for remand or discovery on the basis that the licensing board's dismissal was not an appealable decision, regardless of whether it was based in fact or law.
3. Forum: Louisiana First Circuit Court of Appeal
   Disposition: Dismissed for lack of standing and for lack of a right of action to seek judicial review of the dismissal.

Dr. Trudy Bond v. Dr. Larry James (2008)

1. Forum: Ohio State Board of Psychologists
   Disposition: Dismissed, finding "no foundation … to support the initiation of formal proceedings" and providing no further justification.

Dr. Trudy Bond, Mr. Michael Reese, Rev. Colin Bossen, and Dr. Josephine Setzler v. Dr. Larry James (2010-2013)

1. Forum: Ohio State Board of Psychologists
   Disposition: Dismissed, concluding that it was "unable to proceed to formal action in this matter" and providing no further justification.
2. Jurisdiction: Franklin County Court of Common Pleas (lower state court)
   Disposition: Dismissed for lack of standing and failure to establish entitlement to a legal remedy.

Complaint Against Dr. James Mitchell: Texas

Dr. Jim Cox v. Dr. James Mitchell (2010-2011)

Dr. James Elmer Mitchell, a former military psychologist, allegedly served as a contract psychologist for the CIA in 2002.

1. Forum: Texas State Board of Examiners of Psychologists
   Disposition: Dismissed, citing insufficient evidence of a violation, following an informal settlement conference in which a panel heard from both parties in *ex parte* confidential proceedings.
2. Forum: 353rd Judicial District
   Disposition: Dismissed for lack of standing (failure to show a "concrete and particularized" injury) and lack of jurisdiction based on Federal Military Commissions Act of 2006.

Complaint Against Retired Lt. Colonel Diane Zierhoffer: Alabama

Dr. Diane Michelle Zierhoffer was a lieutenant colonel in the U.S. Army who allegedly served as a Behavioral Science Consultation Team (BSCT) psychologist at Guantánamo.

Dr. Trudy Bond v. Dr. Diane Zierhoffer (2008-2009)

1. Forum: Alabama Board of Examiners in Psychology (2008-2009)
   Disposition: Dismissed for lack of jurisdiction, citing extensive research into the "feasibility of the Board's investigation of the issues raised in the complaint." No response to supplemental evidence and follow-up letters from counsel.